

Administrative Practice under the 1974 Constitution: A "Silver Anniversary" Review

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David A. Marcello*

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Most of what we commonly identify as “administrative law” is elaborated through statutes and regulations, not as a direct expression of constitutional authority. Accordingly, this analysis of administrative practice under the 1974 Constitution necessarily addresses not only constitutional language but also includes statutory and regulatory references.

The article begins with a look at two of the most significant administrative reforms accomplished by the 1974 Constitution—increased openness in administrative practice and reorganization of the executive branch of state government. It then examines rulemaking under the Administrative Procedure Act¹ (with particular focus on the legislative veto in Louisiana) and briefly considers four new developments in the adjudication process since 1974. The article next suggests several innovations in administrative practice that might comfortably be accommodated within the current constitutional framework and concludes with an assessment of the road traveled by administrative practice since adoption of the 1974 Constitution.

I. CONSTITUTIONAL REFORMS IN ADMINISTRATIVE PRACTICE

A. *Openness in Administrative Practice*

A new provision in the 1974 Constitution established a presumption of openness in government and laid a solid foundation

1. La. R.S. 49:950-970 (1987) [hereinafter “APA”].

for vigorous open meetings² and public records³ laws by providing that: “[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.”⁴ This new provision guaranteed citizens a right not found in the U.S. Constitution.⁵ In effect, it established a “default” provision of openness, a constitutional “presumption that public meetings . . . are open to the public unless a specific law denies access.”⁶ This constitutional guarantee “opens up” the Open Meetings Act in at least two respects. First, a “convening” that may not be within the defined term “meetings” but that does fall into the undefined broader realm of “deliberations”⁷ must be opened to the public. Second, entities expressly covered by the definition of “public body” are required by statutory mandate of the Open Meetings Act to open their meetings to the public, but other entities neither encompassed in nor excluded by statute from the definition⁸

2. La. R.S. 42:4.1 (1990) (the “Sunshine Act”).

3. La. R.S. 44:1 (1982).

4. La. Const. art. XII, § 3 (“Right to Direct Participation”).

5. Bruce V. Schewe, Comment, *Entering the Door Opened: An Evolution of Rights of Public Access to Governmental Deliberations in Louisiana and a Plea for Realistic Remedies*, 41 La. L. Rev. 192, 195 (1980).

6. IX Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 3073 (Jan. 3, 1974). Delegate Jenkins further observed that “in cases where there is no law on the subject” or “if there has not been a specific denial of the right to public access, then access would be allowed.” *Id.* See also Lee Hargrave, *The Louisiana State Constitution: A Reference Guide* 187 (1990).

7. Schewe, *supra* note 5, at 199 n.34 (quoting Professor Lee Hargrave: “Notice the word is ‘deliberations’—not ‘meetings.’ It is broader than simply ‘watching the meetings.’ No matter how a statute might classify meetings, . . . the constitutional reference is to ‘deliberations.’ . . . The right is with respect to deliberations, and the presumption is in favor of openness.” Hargrave, speech before 1978 PAR Annual Conference, *Know vs. NO, A Case for Open Meetings and Public Records* in PAR Analysis 21, 22 (March, 1978)).

8. “Unlike the statutory open meetings regime, the constitutional language is unqualified in its applicability to public bodies.” *Id.* at 201 n.45. Consider, as an example, a federal lawsuit filed by All Congregations Together (ACT) against the Corps of Engineers, et al., challenging the practice of a Community Based Mitigation Committee (CBMC) in meeting privately to consider how \$37,000,000 in federal mitigation funds should be expended to ameliorate the adverse effects of an Inner Harbor Navigational Lock Replacement and Expansion Project. *Holy Cross Neighborhood Assoc., et al. v. Colonel Thomas F. Julich, et al.*, 106 F. Supp. 2d 876 (E.D. La. 2000). The Court rejected plaintiffs’ theory that the CBMC was required to hold open meetings by the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-15 (1996 and Supp. 2001). Nor did the CBMC meet the statutory definition of a “public body” as defined in Louisiana’s Open Meetings Act, La. R.S. 42:4.1-11 (Supp. 2001), since it was not a “state, parish, municipal or special district” entity. La. R.S. 42:4.2(A)(2) (1990). Despite these lacunae in federal and state laws, the CBMC might be constitutionally compelled by Art. XII, § 3 of the La. Const. of 1974 to open its meetings, because: “[n]o person shall be denied the

could be required by constitutional mandate to open their deliberations to the public.

The new constitution mandated for the first time⁹ that agency law should be codified and accessible to the public, requiring that: “[r]ules, regulations, and procedures adopted by all state administrative and quasi-judicial agencies, boards, and commissions shall be published in one or more codes and made available to the public.”¹⁰ This provision supported various public information requirements already found in the Administrative Procedure Act.¹¹ The Louisiana Administrative Code arose out of this mandate¹² and has been continuously revised and supplemented by the Office of State Register¹³ to encompass most of the state’s regulations.

Even more significant than the changes in text are the changes in context since 1974. Technology and the Internet have probably done more than any statutory revision to enhance the public’s access to administrative regulations. The Louisiana Register and the Louisiana Administrative Code are both available online at the website for the Office of the State Register.¹⁴ Federal regulations published in the Federal Register and the Code of Federal Regulations can now be found online as well.¹⁵ The regulations of numerous states are also available electronically.¹⁶

right to observe the deliberations of public bodies and examine public documents, except in cases established by law.”

9. Hargrave, *supra* note 6, at 194 (characterizing Art. XII, § 14 as “an innovation in the 1974 Constitution”).

10. La. Const. art. XII, § 14. A word about semantics: this article uses “rules” and “regulations” interchangeably and regards “procedures” as a type of rule or regulation. The most recent edition of *Black’s Law Dictionary* also uses the terms interchangeably, defining “regulation” as: “[a] rule or order, having legal force, issued by an administrative agency . . .” and “rule” as: “[a] regulation governing a court’s or an agency’s internal procedures.” *Black’s Law Dictionary* 1289, 1330 (7th ed. 1994) (emphasis added).

11. See, e.g., APA §§ 49:952, 954.1 (1987 and Supp. 2001).

12. La. R.S. 49:981-987 (Supp. 2001).

13. In an unfortunate choice of terminology, the APA repeatedly refers to the “Department of the State Register.” As we shall see, *infra* at 6-8, the Constitution authorizes a total of no more than 20 departments in state government. The State Register is part of the Division of Administration and should properly be referred to not as a “Department” but rather as the “Office of the State Register.”

14. Office of the State Register, Louisiana Register, <<http://www.state.la.us/osr/reg/register.htm>> (last modified Aug. 8, 2001); Office of the State Register, Louisiana Administrative Code, <<http://www.state.la.us/osr/lac/lac.htm>> (last modified Aug. 8, 2001).

15. United States Government Printing Office, Database List, <http://www.access.gpo.gov/su_docs/db2.html> (last modified Oct. 24, 2001). See also FirstGov, The Official Cite for U.S. Government Information, Services, Transactions, and Forms, at <<http://www.firstgov.gov>> (last modified Nov. 5, 2001) (providing numerous links to federal law databases).

16. A wealth of online citations to administrative law sources can be found in

Access to agency regulations is still a problem in Louisiana, because parts of the Louisiana Administrative Code are either incomplete or not regularly updated. The Associate Director of the Law Library of Louisiana recently highlighted some shortcomings:

The hardest material to find concerns Public Health because the compilation on the web is not completed and the paper version has not been republished since 1984. It is also difficult to find Bulletins from the Department of Education. In these cases, a researcher should check an agency website or call the agency to find the current regulations.¹⁷

When I began teaching agency rulemaking in 1989, I routinely advised students who were seeking out-of-state regulations to call law librarians in that state and ask them to copy and fax the regulations, which at that time were available only in hard copy. In the Age of the Internet and at the dawn of the proverbial New Millennium, however, such machinations should no longer be necessary. Requiring the public to check an agency's website or to phone the agency for a copy of current regulations seems both unduly burdensome and flatly inconsistent with the APA's statutory mandate that "[t]he Louisiana Administrative Code shall be supplemented or revised as often as necessary and at least once every two years."¹⁸

Constitutional principles of openness also extend to the openness of courts for judicial review of administrative agency actions. Delegates to the 1973 Constitutional Convention ("CC 73") preserved the 1921 Constitution's assurance of "Access to Courts"¹⁹

William H. Manz, *Guide to State Legislative and Administrative Materials* (2000). The book's Appendix at 551-53 lists several useful search engines for state administrative law, including regulation tracking services for all 50 states. See, e.g., Realer, *Proposed Rules and Regulations*, at <<http://www.regalert.com>> (last visited Nov. 5, 2001); Statement, at <<http://www.statenet.com>> (last visited Nov. 5, 2001). For website linked to state-related databases, see Findlay, at <<http://www.findlaw.com>> (last visited Nov. 5, 2001); Washburn University School of Law, at <http://washlaw.edu> (last visited Nov. 5, 2001); <[http://www.state.\[postal-abbreviation\].us](http://www.state.[postal-abbreviation].us)> (providing a "template" for state web sites). See also OMB Watch, *Plugged In, Tuning Up: An Assessment of State Legislative Website* (March 2001), available at <<http://www.ombwatch.org/npadv/2001/stlg/index.html>> (highlighting the progress and continuing work of state legislatures to deliver on the promises of "e-government" through "one-stop" online legislative resource portals).

17. Catherine Lemann, *@%\$#% or How to Find Administrative Regulations*, New Orleans Bar Association Briefly Speaking, Aug. 2000, at 23.

18. APA § 49:954.1(A) (1987 and Supp. 2001).

19. "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." La. Const. art. I, § 22.

and went further with a new "Right to Judicial Review" guaranteeing the following protections:

No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.²⁰

This provision, which had no predecessor in the 1921 Constitution, originated in the debate regarding "Rights of the Accused."²¹ Although most subsequent jurisprudence has arisen in the context of criminal proceedings, the language can also be invoked to support the right of judicial review from adverse administrative decisions.²² The comments of one CC 73 delegate, who spoke in opposition to the proposed amendment before it was approved, expressly recognized its applicability to judicial review of agency decisions:

As I read this amendment, this amendment will provide for judicial review of all administrative agency determinations where anybody loses any rights for which he may be an applicant, or any rights that he may possess. . . . And by adopting this amendment, you will be providing for judicial review of, in my opinion, all administrative agency determinations.²³

These constitutional guarantees of "Access to Courts" and the "Right to Judicial Review" provide parties who have been disappointed in the administrative process an opportunity to air their grievances further in the courts.

B. Executive Branch Reorganization

Reorganization of the executive branch of state government constituted one of the most significant developments in administrative practice arising out of the 1974 Constitution. An important development, it certainly was, but "interesting" may not be the first word that comes to mind for most readers. A drone's sense of duty impels me to burden this article with an account of reorganization, but the reader

20. La. Const. art. I, § 19.

21. La. Const. art. I, § 13.

22. See, e.g., *Something Irish Co. v. Rack*, 333 So. 2d 773, 775 (La. App. 1st Cir. 1976) (acknowledging in an eviction proceeding "the rights of judicial review and free access to the courts granted by" Art. I, Sections 19 and 22); *Harris v. Dupree*, 322 So. 2d 380, 383 (La. App. 2d Cir. 1975) (recognizing in a medical malpractice case that the "right to appellate review is a constitutional right (Article I, Section 19).").

23. VI Records of the Louisianan Constitutional Convention of 1973: Convention Transcripts, at 1135 (Sept. 6, 1973).

who is not in love with bureaucracy should feel free to trip lightly past this section.

The 1921 Constitution and its numerous amendments overloaded the state's organic law with far too many details about administrative entities such as port and highway commissions²⁴ or levee boards.²⁵ The 1921 Constitution also imposed few limitations on the number of agencies, boards, and commissions; as a consequence, they proliferated at some cost to the state's taxpayers.²⁶ By the late 1960s it had become clear to the state's pre-eminent governmental research organization that "Louisiana is far out of line with other states in the number of state agencies. No state has as many, and the national average was only about one-fourth the number in Louisiana. Of the 45 states for which information was available, only eight, including Louisiana, had more than 100 agencies."²⁷ The need for reorganization of state government played a major role in the 1971 gubernatorial campaign²⁸ and constituted one of the new administration's clearest commitments²⁹ when delegates convened in 1973.

CC 73 delegates recognized the need to dramatically redesign an executive branch of government that had mushroomed into a profusion of relatively independent agencies and that lacked any overriding structure by which the governor could control or direct those agencies' operations.³⁰ A contemporaneous analysis by the

24. See, e.g., La Const. of 1921, art. VI ("Administrative Officers and Boards").

25. See, e.g., La. Const. of 1921, art. XVI ("Levees").

26. See 1969 Louisiana State Agencies Handbook at v (1979), which documented "the trend toward a massive, top-heavy executive branch" by tracking the growth of executive branch agencies during the 1950s and 1960s. A report by the Public Affairs Research Council of Louisiana, Inc., *The Executive Branch of State Government*, identified 151 agencies in 1951—a number that increased to 217 in 1960, 231 in 1964, and 256 by 1968.

27. 1969 Louisiana State Agencies Handbook at vii-viii (1969) (citing 1 Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the American Federal System* (1967)).

28. Public Affairs Research Council, *State Government Reorganization: The End of the Beginning*, PAR Analysis 231, Oct. 1978, at 3.

29. "Governor Edwards had suggested a cabinet-style reorganization during his campaign, and CC 73 adopted his idea by mandating reorganization of all existing agencies . . ." Mark T. Carleton, *Fundamental Special Interests: The Constitution of 1974*, in *In Search of Fundamental Law: Louisiana's Constitutions 1812-1974* (Warren M. Billings and Edward F. Haas eds., 1993).

30. Louisiana House of Representatives, *State and Local Government in Louisiana: An Overview* 11 (December 1987) [hereinafter *House Overview*]. This introduction to state and local government in Louisiana is revised quadrennially to serve as background information for newly elected members of the Louisiana House of Representatives. Copies are available from House Legislative Services, P.O. Box 44486, Baton Rouge, LA 70804.

Public Affairs Research Council of Louisiana, Inc. reached the following conclusion:

One of the most significant defects in Louisiana's state government is its administrative structure. This structure is weakened by the multiplicity of separate agencies and by the fragmentation of authority among numerous elected officials and commissions which enjoy special constitutional protection. A modern and efficient administrative structure would require a major reorganization consolidating the existing executive agencies into a manageable number of major departments under the direction of the governor.³¹

The 1974 Constitution directed the legislature to reorganize the executive branch within three years after its effective date³² into not more than twenty departments.³³ The first reorganization measure³⁴ created the Joint Committee on Reorganization of the Executive Branch, which led legislative reorganization of state government until its termination on June 30, 1978.³⁵

1. Statutory Implementation of Reorganization

The Executive Reorganization Act³⁶ consolidated approximately three hundred independent agencies into twenty departments and the offices of the governor and lieutenant governor, eliminating eighty-eight agencies in the process.³⁷ The degree of each agency's independence and control under the new reorganization plan was determined by its assignment to one of several transfer mechanisms, or "transfer types,"³⁸ consisting of four major categories: maximum independence, where the agency retained its policymaking, rulemaking, licensing, regulatory, enforcement, adjudicatory and advisory powers as well as control over most personnel matters;³⁹ independence with regard to policymaking matters, but where the

31. Public Affairs Research Council, Constitution '74: PAR Voters Guide to the Proposed Constitution 13 (1974).

32. La. Const. art. XIV, § 6. The legislature's constitutionally mandated initial allocation of functions, powers, duties, and responsibilities within the executive branch was not subject to veto by the governor.

33. La. Const. art. IV, § 1(B).

34. 1975 La. Acts No. 720. *See also* 1976 La. Acts No. 513.

35. Public Affairs Research Council, State Government Reorganization: The End of the Beginning, PAR Analysis 231, Oct. 1978, at 3.

36. 1977 La. Acts No. 83 (codified at La. R.S. 36:1-960 (1985 and Supp. 2001)) [hereinafter Transfer Act].

37. Public Affairs Research Council, The Rise and Fall of Reorganization, PAR Analysis 248, Jan. 1981, at i.

38. House Overview, *supra* note 30, at 13.

39. *See generally* La. R.S. 36:801, 801.1, 801.2-801.5, and 809 (1985).

department controlled personnel and fiscal matters;⁴⁰ advisory powers only;⁴¹ complete departmental control of the entity (usually an institution or facility).⁴² A fifth category provided for variations specifically tailored to the functions of licensing boards, retirement systems, and agricultural promotion agencies.⁴³ In addition, the Transfer Act abolished outright a number of agencies and transferred their functions to a department.⁴⁴

The 1974 Constitution perpetuated two constitutional agencies—the Public Service Commission (“PSC”)⁴⁵ and the Civil Service Commission (“CSC”).⁴⁶ Relying on its direct constitutional authority to “adopt and enforce reasonable rules, regulations, and procedures,”⁴⁷ the PSC successfully argued to the Louisiana Supreme Court that its rulemaking powers are not subject to the procedural constraints imposed on state agencies by the Administrative Procedure Act.⁴⁸ Even though it is not bound by the rulemaking requirements of Louisiana’s APA, the courts’ interpretation of “reasonable” rules must be informed by APA procedures.⁴⁹ The 1974 Constitution also vested the CSC with direct rulemaking authority.⁵⁰ Subsequent court decisions have held that CSC rules have the effect of law⁵¹ and that they prevail over conflicting statutes.⁵² The constitution provides for appeals from PSC decisions to the district courts with a right of direct appeal thereafter to the Louisiana Supreme Court.⁵³ CSC appeals go by constitutional directive to the courts of appeal.⁵⁴

In addition to the PSC and CSC, the 1974 Constitution also makes reference to several other entities, such as the Pardon Board,⁵⁵

40. See generally La. R.S. 36:802, 802.1-802.11, and 804-807 (1985).

41. See generally La. R.S. 36:901-919.6 (1985 and Supp. 2001) (Part III of Chapter 22 of Title 36).

42. See generally La. R.S. 36:851-857 (1985) (Part II of Chapter 22 of Title 36).

43. See, e.g., La. R.S. 36:803 (1985).

44. See La. R.S. 36:921-927 (1985) (Part IV of Chapter 22 of Title 36).

45. La. Const. art. IV, § 21.

46. La. Const. art. X.

47. La. Const. art. IV, § 21(B).

48. *Louisiana Consumers’ League, Inc. v. Louisiana Public Serv. Comm’n.*, 351 So. 2d 128 (La. 1977).

49. *Id.* at 131-32 & 132 n.4.

50. La. Const. art. X, §§ 10(A)(1), 10(A)(4).

51. See, e.g., *Bannister v. Dep’t of Streets*, 666 So. 2d 641 (La. 1996).

52. See, e.g., *Frazier v. Dep’t of State Civil Serv.*, 449 So. 2d 95 (La. App. 1st Cir. 1984).

53. La. Const. art. IV, § 21(E).

54. La. Const. art. X, § 12.

55. La. Const. art. IV, § 5(E).

the State Bond Commission,⁵⁶ the Interim Emergency Board,⁵⁷ and various state educational boards, parish school boards, special districts, and historic district commissions.⁵⁸ The State Board of Ethics, which now regulates both elected officials and public employees, arose out of the constitutional mandate for a Code of Ethics⁵⁹ that was derived from an earlier provision in the 1921 Constitution.⁶⁰

2. *Developments Subsequent to Initial Reorganization*

In the three-year period after adopting the new constitution, reorganization of the executive branch reduced state agencies from about 300 to 281.⁶¹ Within a year or two after this initial reorganization, however, the number had climbed to 325.⁶² And by the early 1980s, the improvements brought about by the new constitution had already been seriously eroded, according to one study: "[t]he Legislature and governor have failed to continue reorganization of state government with the result that agencies continue to multiply, and overlapping and duplication continue unabated. The result is inefficient and ineffective operations of state government."⁶³ Various governors and legislatures have continued ever since to tinker with the structure of the executive branch.

Some changes required that existing departments be eliminated or consolidated in order to make way for new executive branch agencies. This "zero sum" game was an outgrowth of the constitutional limit on "not more than twenty departments"⁶⁴ in the executive branch of state government. Legislation establishing the Department of Environmental Quality⁶⁵ made room for a new

56. La. Const. art. VII, § 8.

57. La. Const. art. VII, § 7.

58. See the citations to 15 public entities referenced in Richard D. Moreno, Comment, *Louisiana's Constitutional Agencies: Plenary Powers or "Constitutional Illusions of Being a Fourth Branch of Government?"*, 51 La. L. Rev. 875, 903 n.128 (1991).

59. La. Const. art. X, § 21 directs the legislature to enact a code of ethics. The statutory implementation of that directive is found at La. R.S. 42:1101-1170 (1990).

60. La. Const. of 1921, art. XIX, § 27(4) established a Board of Ethics for Elected Officials.

61. Public Affairs Research Council, *The Rise and Fall of Reorganization*, PAR Analysis 248, Jan. 1981, at 5.

62. *Id.*

63. *Id.* at 11.

64. La. Const. art. IV, § 1(B).

65. 1979 La. Acts No. 449 established the Environmental Control Commission within the Department of Natural Resources at La. R.S. 30:2001-2380 (2000 and Supp. 2001) (originally enacted as La. R.S. 30:1051-1055), which was amended

department by merging the formerly separate Departments of Public Safety and Corrections into a single unit. The First Extraordinary Session of 1988 split the Department of Health and Human Resources into the Department of Health and Hospitals and the Department of Social Services,⁶⁶ eliminating the Department of Urban and Community Affairs in order to accommodate the split. Some departments underwent a name change or reassignment within the structure of the executive branch. In 1986, the Department of Culture, Recreation, and Tourism (CRT)⁶⁷ was placed in the office of the lieutenant governor, who appoints the secretary and supervises its operations. CRT is unique in this regard, because all other departmental secretaries are appointed by the governor with consent of the Senate and serve at the governor's pleasure.⁶⁸ In 1988 the Department of Commerce became the Department of Economic Development (DED),⁶⁹ which houses many of the professional licensing boards and commissions in state government.⁷⁰ On November 7, 2000, Louisiana voters emphatically rejected a proposed constitutional amendment⁷¹ to "privatize" the functions of DED in "Louisiana, Inc.," a quasi-private, state-funded corporation that would have been exempt from civil service and most public bid laws.⁷² In 1989, during the administration of Republican Governor Charles E. "Buddy" Roemer, III, the Department of Labor became the Department of Employment and Training.⁷³ Three years later in the administration of Democratic Governor Edwin W. Edwards, the legislature reversed itself, and the name reverted to Department of Labor.⁷⁴

in 1983 to create the Department of Environmental Quality.

66. 1988 La. Acts, 1st Ex. Sess., No. 1

67. See S.B. 281, 12th Legis. Sess. (La. 1986).

68. House Overview, *supra* note 30, at 12.

69. 1988 La. Acts No. 563.

70. See Title 46 of the Louisiana Administrative Code, listing more than 40 entities with the authority to promulgate "Professional and Occupational Standards." Office of the State Register, Online Publications of the Administrative Code, available at <<http://www.state.la.us/osr/lac/title.htm>> (last modified Aug. 28, 2001).

71. 2000 La. Acts, 1st Ex. Sess., No. 153 placed Amendment No. 1 on the ballot; the voters rejected it by a greater than 2-1 margin. Stewart Yerton, *Agency to Pursue Louisiana Inc. Vision; Voters Reject Plan, But Goals Still Beckon*, The Times Picayune, Nov. 12, 2000, at A1. In its 2001 Regular Session, the legislature approved La. H.B. 1666, effecting a less ambitious reorganization of the department that did not require voter approval. Governor Foster signed the measure into law as Act 9 of the 2001 Regular Session.

72. Jack Wardlaw and Ed Anderson, *Foster's Tax Revision Package Fails*, The Times Picayune, Nov. 8, 2000, at E12.

73. 1989 La. Acts No. 512.

74. 1992 La. Acts No. 447.

The legislature has constitutional authority to convert certain statewide elective offices to appointive positions by a two-thirds vote.⁷⁵ Until recently, only one such position, Superintendent of Education, had in fact been converted,⁷⁶ though bills are routinely introduced in most legislative sessions proposing such changes.⁷⁷ The legislature used its conversion and consolidation powers for the first time in over 15 years when it approved legislation in the 2001 regular session to eliminate the Department of Elections and Registration by merging its functions with those of the Department of State.⁷⁸ The elective post of Commissioner of Elections had its origins in a 1950s political squabble between then-Governor Earl K. Long and Secretary of State Wade O. Martin, from whose grasp certain election functions were wrested.⁷⁹ The current Commissioner of Elections, Suzanne Haik Terrell, campaigned successfully against her predecessor on a platform of reform that included possible elimination of the office.⁸⁰ Newspaper accounts of impropriety and indictments arising out of her predecessor's tenure⁸¹ laid a foundation of public and legislative support for elimination of the office. The position enjoyed even less support after the prior officeholder's recent conviction on federal and state felony charges.⁸² The current Commissioner's willingness to see her elective office made appointive clearly enhanced the prospects for passage of legislation in the 2001 regular session.⁸³

In at least one instance, a significant new entity in state government emerged independently of the legislature. The 1974

75. La. Const. art. IV, § 20 authorizes the legislature by two-thirds vote to convert from elective to appointive positions the commissioner of agriculture, commissioner of insurance, superintendent of education, or commissioner of elections. The legislature may also merge or consolidate their departments and may reestablish any of them as elective positions by the same two-thirds vote.

76. 1985 La. Acts No. 444.

77. See, e.g., S.B. 13, 27th Legis. Sess. (La. 2001), proposing to convert the elected office of the Commissioner of Insurance to a position appointed by the governor.

78. See H.B. 18, 27th Reg. Sess. (La. 2001).

79. See Jack Wardlaw, *Fowler in Race of His Career*, *The Times-Picayune*, Oct. 6, 1999, at A1.

80. *Id.* See also Jack Wardlaw, *Let's Fix a 44-Year-Old Mistake; Days are Numbered for Election Post*, *The Times-Picayune*, Aug. 27, 2000, at A4; Editorial, *Move Growing for Appointees*, *Baton Rouge Advocate*, Nov. 30, 1999, at 8B.

81. See Ed Anderson, *Elections Chief Hopefuls Rip Fowler Again*, *The Times-Picayune*, Oct. 22, 1999, at A2; Scott Dyer, *Field Fighting Hard for Elections Job*, *Baton Rouge Advocate*, Oct. 10, 1999, at A1.

82. Former Commissioner of Elections Jerry Fowler entered guilty pleas to state felony charges on November 27, 2000. Michelle Millnollon & Christopher Baughman, *Fowler Pleads Guilty; Former Elections Official Faces More Than 4 Years*, *Baton Rouge Advocate*, Nov. 28, 2000, at A1.

83. Ed Anderson, *Elections Chief OKs Revamping Office*, *The Times-Picayune*, Feb. 13, 2001, at A3.

Constitution never contemplated the Office of Inspector General (OIG), which Governor Roemer created in 1988 by executive orders.⁸⁴ In 1989, proposed legislation⁸⁵ sought to establish the office statutorily in an effort to prevent a new governor from eliminating it through the simple expedient of allowing previous executive orders to expire by operation of law.⁸⁶ The bill was defeated, but the OIG has nonetheless survived through the administrations of three different governors; each allowed Bill Lynch, the sole Inspector General to date, to maintain his position. Governor Edwards renewed the office by executive order in 1992, but removed from its jurisdiction colleges and universities as well as statewide elected officials.⁸⁷ When Governor Murphy J. "Mike" Foster, Jr. took office in 1996, he declined to issue a new executive order, but the Inspector General continued to operate with his acquiescence.

In litigation initiated by the Inspector General, courts have found independent constitutional and statutory support for the office. *Roemer v. Guillot*⁸⁸ located the origins of the OIG in the governor's authority "to take an unclassified aide position in his office and place that aide in charge of the Division of Administration Internal Audit Section, thereby creating the Inspector General."⁸⁹ The court upheld creation of the OIG by reference to the governor's oversight authority over all budget units⁹⁰ and express statutory⁹¹ and constitutional⁹² authority to delegate these powers. *Edwards v. Board of Trustees of State Employees Group Benefits Program*⁹³ relied on the same sources of authority to find "both constitutional and statutory authority, apart from any Executive Order, for the Inspector General to do his delegated duties."⁹⁴

84. Exec. Order B.R. 88-10, 14 La. Reg. 211 (1988), created the Office of Inspector General and defined its authority. Exec. Order B.R. 88-26, 14 La. Reg. 592 (1988), established the "Inspector General's Office/Internal Audit" within the Division of Administration.

85. S.B. 749 (La. 1989) by Senator William Jefferson.

86. Unless otherwise provided, an executive order terminates "sixty days following adjournment sine die of the regular session of the legislature after the issuing governor leaves office." La. R.S. 49:215(C) (1987).

87. Exec. Order EWE 92-59, 18 La. Reg. 1042 (1992).

88. 616 So. 2d 711 (La. App. 1st Cir. 1992).

89. *Id.* at 712.

90. La. R.S. 39:7 (1989).

91. La. R.S. 39:8 (1989).

92. La. Const. art. IV, § 5.

93. 644 So. 2d 776 (La. App. 1st Cir. 1994).

94. *Id.* at 778.

II. RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

Since its enactment in 1966,⁹⁵ Louisiana's APA has undergone numerous changes.⁹⁶ Many of the changes enacted since the adoption of Louisiana's new Constitution in 1974 have lengthened the rulemaking process and placed various obstacles in the path of agency policymakers—particularly environmental policymakers. We begin with a look at conventional and emergency rulemaking under the APA, then review special procedures applicable to fees. Next, we examine special-interest provisions applicable to environmental and family issues and conclude with an extended analysis of Louisiana's "legislative veto" in its multiple incarnations.

A. Conventional Rulemaking

The timetable for promulgating agency regulations has grown steadily longer over the years since CC 73. In 1974, the APA required that an agency give "at least twenty days notice of its intended action" before adopting, amending, or repealing any rule.⁹⁷ By the following decade, the APA required that an agency give "notice of its intended action at least fifty days prior to taking action on the rule."⁹⁸ And by the beginning of the next decade, the APA required both notice of intended action and "a copy of the proposed rules at least ninety days prior to taking action."⁹⁹

In 1993, a significant new source of uncertainty and potential delay entered the APA rulemaking process.¹⁰⁰ Earlier versions of Section 968 established a definite timetable for the legislative oversight subcommittee hearing.¹⁰¹ By contrast, the 1993 amendments created a "gap" in the middle of the rulemaking process so that the countdown to a legislative hearing begins only after an agency delivers its report¹⁰² on the agency hearing to the appropriate

95. 1966 La. Acts No. 382. See Karen M. Karre, *Louisiana's "New" Administrative Procedure Act*, 35 La. L. Rev. 629 (1975).

96. For a good analysis of the APA and its amendments through the first fifteen years, see Robert Force and Lawrence Griffith, *The Louisiana Administrative Procedure Act*, 42 La. L. Rev. 1227 (1982) and sources cited therein.

97. APA § 953(A)(1) (1975) in 1974 La. Acts No. 284.

98. APA § 953(A)(1) (1987) in 1983 La. Acts No. 713.

99. APA § 953(A)(1) (2001) in 1990 La. Acts No. 1063.

100. 1993 La. Acts No 119.

101. "Any such [legislative] hearing shall be conducted after any hearing on the same rule is conducted by the agency pursuant to R.S. 49:953(A)(2) and not later than forty days after the publication of notice of intended action on the rule in the State Register." APA § 968(D)(1) (1987), as enacted by 1983 La. Acts No. 713 (emphasis added).

102. Note that the agency actually must deliver two separate reports to the

legislative subcommittees: “any [legislative] subcommittee hearing on a proposed rule shall be held no earlier than five days and no later than thirty days following the day the [agency] report . . . is received by the subcommittee.”¹⁰³ The agency’s delivery of its report activates the second half of the rulemaking process.

Not until the agency delivers its report does the clock again begin ticking toward a legislative oversight subcommittee meeting, which can be held from five to thirty days later. The statutory language is somewhat misleading, requiring the agency to furnish its report to the subcommittees “at least five days prior to the day the legislative oversight subcommittee hearing is to be held on the proposed rule.”¹⁰⁴ It is not when the legislative oversight subcommittee meets that determines when the agency’s report must be delivered, but rather the other way around. When the legislative oversight subcommittee may meet is determined by when the agency delivers its report. The agency is the action-forcing party in this process.

The 1993 legislation was an “administration” bill, proposed by DEQ at the start of newly inaugurated Governor Edwards’ fourth term in office. According to DEQ legislative staff,¹⁰⁵ the statutory time limit of forty days afforded inadequate time for the agency to process public comments on DEQ’s long, complex proposed rules. As a consequence, the summary report might not be delivered until the day of the committee hearing, when distrustful committee members, industry representatives, or environmentalists would sometimes oppose the rule simply because they were uncertain what it contained. Changes in the proposed rule might be styled “substantive” (even though they were not) in order to take advantage of additional time in the rulemaking process.¹⁰⁶ DEQ therefore proposed legislation to do away with the statutory time limit so that its staff would have more time in preparing and disseminating reports to the public.

Whatever the rationale may have been, the net effect of these and other changes has been to extend significantly the amount of time

appropriate legislative oversight committees. The first is submitted at the beginning of the promulgation process “on the same day the notice of the intended action is submitted to the Louisiana Register for publication.” APA § 968(B) (1987 and Supp. 2001). The second comes later in the promulgation process and summarizes the agency’s public hearing and comment process. APA § 968(D)(1)(b) (1987 and Supp. 2001). The delivery of this latter report initiates the countdown to a legislative oversight committee hearing.

103. APA § 968(D)(2)(a) (1987 and Supp. 2001).

104. APA § 953(A)(2)(b)(ii) (1987 and Supp. 2001).

105. I am indebted to Wade Adams, whose explanation regarding the background of this legislative change and whose other observations about APA practice in Louisiana were very helpful to me.

106. APA § 968(H)(2) (1987 and Supp. 2001).

required for conventional rulemaking.¹⁰⁷ This additional delay by the agency in preparing and delivering its report extends the rulemaking process toward the APA's one-year deadline on final action, which has remained unchanged since its adoption in 1981,¹⁰⁸ when the timetable for rulemaking required only 15 days' prior notice for adoption, amendment, or repeal of a rule.¹⁰⁹

B. Emergency Rulemaking

In 1974, the sole basis for "emergency" rulemaking was "an imminent peril to the public health, safety, or welfare."¹¹⁰ During the next decade, the emergency rulemaking provisions were broadened to include compliance with new federal regulations¹¹¹ or "to avoid sanctions or penalties from the United States."¹¹² Emergency rulemaking took on its current form in 1990, when amendments added three additional criteria to the original "public health, safety, or welfare" formulation: "to avoid sanctions or penalties from the United States, or to avoid a budget deficit in the case of medical assistance programs or to secure new or enhanced federal funding in medical assistance programs."¹¹³

This new terminology resulted from Congress' practice of passing at the end of each calendar year an Omnibus Budget Reconciliation Act¹¹⁴ loaded with new federal requirements that were invariably set to become effective on the first day of the new year. The Department of Health and Human Resources (DHHR) routinely confronted an implementation problem: how to promulgate regulations that would bring the state's Medicaid program into compliance with federal law with only a few days' (or at best a few weeks') prior notice. Each year, DHHR's lawyers responded to this threat by issuing an opinion to authorize the adoption of new regulations via emergency rulemaking. They justified these opinions by characterizing the threatened loss of

107. Most states only require a minimum of approximately twenty to thirty days between the published notice of a proposed rule and its adoption by the agency. Louisiana's minimum of 100 days stands in stark contrast. See Arthur E. Bonfield, *State Administrative Rule Making* 170 n.5 (1986) [hereinafter Bonfield]; Arthur E. Bonfield, *State Administrative Rule Making 1993 Supplement* 96 (1993) [hereinafter 1993 Supplement]. Professor Bonfield's publications on state agency rulemaking have established him as a leading scholar in this area, and I have drawn extensively in this article upon his writings and research.

108. 1981 La. Acts No. 877.

109. See APA § 953(A)(1) (1981) in 1980 La. Acts No. 392.

110. APA § 953(B) (1966).

111. APA § 953(B)(1) (1987), as amended by 1983 La. Acts No. 713.

112. APA § 953(B)(1) (1987), as amended by 1984 La. Acts No. 953.

113. APA § 953(B)(1) (Supp. 2001), as amended by 1990 La. Acts No. 1085.

114. See, e.g., the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330.

hundreds of millions of federal Medicaid dollars as “an imminent peril to the public health, safety, or welfare.” The rationale was surely plausible enough, but the need for repeated reliance on this device ultimately led DHHR’s General Counsel, Charles Castille, to propose legislation that explicitly authorized the use of emergency rulemaking to meet federal Medicaid requirements.¹¹⁵

C. Fees

Between 1987 and 1995, the treatment of “fees” under the APA traveled nearly full circle. The APA’s definition of “rule” had been interpreted as including fees since its adoption in 1966,¹¹⁶ but fees were expressly removed from that definition in 1987.¹¹⁷ Governor Roemer used the legislative change to address a fiscal crisis, generating additional revenues by increasing numerous fees¹¹⁸ that would previously have required a lengthy (and politically challenging) promulgation process under the APA. The politics of fee increases by administrative fiat proved too troubling, however, and the clear trend since then has been to restrict ever more severely the power of agencies to increase fees.

In 1995, the legislature functionally reversed itself by amending the “rulemaking” definition to provide as follows: “the procedures for adoption of rules and of emergency rules as provided in R.S. 49:953 shall also apply to adoption of fees.”¹¹⁹ The APA still explicitly excludes fees from the definition of a “rule,” but incongruously, the APA’s “rulemaking” definition effectively reaches the opposite result by subjecting fees to the same adoption procedure that applies to rules. In fact, fees now undergo even stricter legislative review and control than rules. A governor can unilaterally override the legislative veto of a proposed rule change.¹²⁰ But if two legislative subcommittees vote a proposed fee change “unacceptable,” their veto is definitive; the agency may not implement the change.¹²¹ The most daunting challenge facing proposed fee increases, however, derives from Act No. 1324 of 1995—a constitutional amendment that requires a two-thirds vote of the legislature to enact most new fees or

115. My thanks to Charles Castille for helping to reconstruct the origins of this legislative change.

116. 1966 La. Acts No. 382. The Federal APA treats fees as included in the definition of “rule.” 5 U.S.C. § 551(4) (1994).

117. 1987 La. Acts No. 240.

118. *Louisiana OKs Fiscal Powers for Governor*, Los Angeles Times, Mar. 27, 1988, at A4.

119. APA § 951(7) (Supp. 2001), added by 1995 La. Acts No. 1057.

120. APA § 968(G), 968(H)(1) (1987 and Supp. 2001).

121. APA § 971(A) (Supp. 2001).

increases in an existing fee.¹²² This constitutional change is likely to fall with particular force on environmental regulators because in “the last two decades, Louisiana has relied on fees rather than general revenues to fund the Department of Environmental Quality.”¹²³ Effectively, it grants “veto authority over future fee increases” to “entities subject to environmental regulation [which] have always had more legislative influence than would be necessary to assemble that [one-third] minority.”¹²⁴

D. Obstacles to Environmental Rulemaking

Numerous “environmental” provisions that have found their way into the APA are apparently intended to afford procedural safeguards for industry against regulation by state agencies.¹²⁵ Recent statutory changes in the APA rulemaking process reflect a significant environmental bias.¹²⁶

For example, the APA imposes special restrictions on the Department of Environmental Quality (DEQ) when it “proposes a rule that is not identical to a federal law or regulation or is not required for compliance with a federal law or regulation.”¹²⁷ The APA also requires various regulatory agencies to file with the Department of Natural Resources (DNR) an index and summary of regulations pertinent to oil and gas development, which are then critiqued and consolidated into a Unified Oil and Gas Regulatory Index.¹²⁸ DEQ must codify its rules and regulations in an Environmental Regulatory Code and update it on a quarterly basis.¹²⁹ Certain permit applicants¹³⁰ are afforded an expedited hearing (“out

122. La. Const. art. VII, §2.1(A) reads as follows:

Any new fee or civil fine or increase in an existing fee or civil fine imposed or assessed by the state or any board, department, or agency of the state shall require the enactment of a law by a two-thirds vote of the elected members of each house of the legislature.

The constitutional restriction on fee and fine increases does not apply to “any department which is constitutionally created and headed by an officer who is elected by majority vote of the electorate of the state.” *Id.* at § 2.1(B).

123. Kenneth M. Murchison, *Recent Changes in Procedures of the Department of Environmental Quality*, 57 La. L. Rev. 855, 869-70 (1997).

124. *Id.* at 868.

125. See the discussion of “rulemaking” in Murchison, *supra* note 123, at 857-61.

126. “Even though they amend the Administrative Procedure Act rather than the Environmental Quality Act, some of the most onerous of the new requirements apply only to rules issued by the Department of Environmental Quality.” *Id.* at 882.

127. APA § 953(F) (Supp. 2001).

128. APA § 954.2 (Supp. 2001).

129. APA § 954.3 (Supp. 2001).

130. See La. R.S. 30:26 (Supp. 2001) and 30:2022(C) (2000), 49:214.30(C)(2)

of term and in chambers”) on a rule to show cause why a permit should not be granted when the secretary¹³¹ has failed to act within applicable time periods. The rule to show cause “shall be denied by the court only if the secretary provides clear and convincing evidence of an unavoidable cause for the delay” and the permit “shall be granted without further action of the secretary or the court” if the secretary fails to grant or deny the permit within an additional time period set by the court.¹³²

These and other procedural changes affecting DEQ have been characterized as “an example on the state level of a recent phenomenon that has recently been documented on the federal level: using the mantle of administrative reform to disguise a substantive goal of reduced protection for the environment.”¹³³ They are responsive to the regulated community’s desire “to avoid both regulations and enforcement whenever possible” and “to reduce public input and to delay regulation and enforcement when permanent avoidance is impossible.”¹³⁴ Therefore, as viewed “from the perspective of the regulated community,” they were “highly desirable” changes.¹³⁵

E. Family Impact

In another apparent concession to special interests, a 1999 amendment¹³⁶ to the APA now requires the preparation of a “family impact statement” on every rule proposed by any agency.¹³⁷ Although the section heading refers to a “penalty,” the provision is silent as to the consequences of failing to prepare and keep on file in the agency a copy of the mandated statement. Some states that require a special analysis of proposed rules focus upon the impact on small businesses.¹³⁸ The rationale for such specialized studies is “to ensure that the interests of groups with limited resources to defend themselves receive special consideration in the rulemaking process.”¹³⁹

(Supp. 2001), and 56:6(26) (Supp. 2001).

131. The “secretary” in question may be from the DEQ [La R.S. 30:2022 (2000)], from DNR [La. R.S. 30:26 (Supp. 2001) and La. R.S. 49:214.30(C)(2) (Supp. 2001)], or from the Department of Wildlife and Fisheries [La. R.S. 56:6(26) (Supp. 2001)].

132. APA § 962.1 (Supp. 2001).

133. Murchison, *supra* note 123, at 884.

134. *Id.* at 880.

135. *Id.*

136. 1999 La. Acts No. 1183.

137. APA § 972 (Supp. 2001).

138. See 1993 Supplement, *supra* note 107, at 109-13 for a discussion of “Special Analysis Requirements.”

139. *Id.* at 112.

F. Legislative Veto

A decade after *CC 73*, the United States Supreme Court decided *Immigration and Naturalization Service v. Chadha*,¹⁴⁰ which was the "legislative veto" case invalidating Congress' attempt to statutorily reserve a right of review and rejection over executive branch decision making.¹⁴¹ The Court held that Congress could not use a one-house veto to circumvent the constitutional requirements of "presentment"¹⁴² and "bicameralism."¹⁴³ *Chadha* concerned legislative intervention to overturn an adjudicative or "quasi-judicial" administrative decision, but the Supreme Court shortly thereafter confirmed its intention to apply the same principles to legislative review of an agency's rulemaking or "quasi-legislative" functions as well.¹⁴⁴ To date, *Chadha* appears to have had no impact on the legislative veto in Louisiana.¹⁴⁵ If the courts someday entertain a

140. 462 U.S. 919, 103 S. Ct. 2764 (1983).

141. The legislative veto was originally designed "to enhance administrative leadership in the system by making it easier for members of Congress to delegate new powers to the executive," but beginning in the late 1960s, "it began to serve a growing congressional demand for procedural weapons to restrain executive power." Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto* 4-5 (1996).

142. Presentment requirements (presidential review and approval or veto of proposed legislation) are found in U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . .") and art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

143. Bicameralism requirements (passage of proposed legislation by both houses of Congress) are found in U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.") and art. I, § 7, cl. 2 (preceding footnote).

144. *Consumers Union of United States, Inc. v. Federal Trade Comm'n*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom*, *United States Senate v. Federal Trade Comm'n*, 463 U.S. 1216, 103 S. Ct. 3556 (1983).

145. "The Louisiana courts have yet to directly address the legislative veto." David A. Peterson, *Louisiana's Legislative Suspension Power: Valid Method for Override of Environmental Laws and Agency Regulations?*, 53 La. L. Rev. 247, 260 (1992). The Louisiana Supreme Court addressed issues related to the legislative veto in *State v. Broom*, 439 So. 2d 357 (La. 1983), when it applied the "delegation doctrine" to first uphold, and then on rehearing, 439 So.2d at 365, to invalidate, rules promulgated by the Secretary of Public Safety. *Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), which the United States Supreme Court decided in the interim between the original and rehearing decisions in *Broom*, was mentioned in the rehearing opinion, but only in support of the "bicameralism" requirement and

Chadha-type argument attacking the legislative veto in Louisiana, various of the factors discussed below should enter into their evaluation of the issue.

We do well at the outset to define what we mean by the term “legislative veto.” This article classifies as a “legislative veto” any mechanism by which the legislative branch of government can block, reject, or invalidate regulations issued by an executive branch agency. Thus, although Section 970 of the APA is styled “Gubernatorial suspension or veto of rules and regulations,”¹⁴⁶ it does not qualify as a legislative veto because it concerns “blocking” action by the head of the executive branch of state government, not by a legislative entity.¹⁴⁷ The legislative veto presents a constitutional problem because of Louisiana’s “separation of powers” principles, which restrict one branch of government from exercising powers committed by the constitution to any other branch.¹⁴⁸

Louisiana’s Constitution and statutes expressly establish five separate mechanisms that might each be characterized as a legislative veto. In addition, the approval process for fiscal and economic impact statements under the APA potentially creates a sixth such mechanism. We will first examine the conventional legislative oversight procedures for rules, then the separate process by which proposed fee changes can be reviewed and vetoed by the legislative branch. We next consider the process by which both rules and fees are evaluated by the legislature following their emergency adoption, then review two mechanisms—one constitutional, the other

as an example of “lip service” to separation of powers principles, shedding no light on how its principles might apply to Louisiana’s legislative veto provisions. *Id.* at 368, 369 n.21.

146. “The governor, by executive order, may suspend or veto any rule or regulation or body of rules or regulations adopted by a state department, agency, board or commission, except as provided in R.S. 49:967, within thirty days of their adoption. Upon the execution of such an order, the governor shall transmit copies thereof to the speaker of the House of Representatives and president of the Senate.” La. R.S. 49:970 (1987).

147. The 1981 version of the Model State Administrative Procedure Act (MSAPA) in Uniform Laws Annotated expressly approves gubernatorial review and rescission or suspension of agency rules, stating: “the governor may rescind or suspend all or a severable portion of a rule of an agency.” Model State Admin. Procedure Act § 3-202(a), 15 U.L.A. 58 (1990). For a discussion of the legal and policy considerations that distinguish gubernatorial review from the legislative veto, see Bonfield, *supra* note 107, at 470.

148. La. Const. art. II, § 1 distributes the powers of government among “three separate branches: legislative, executive, and judicial” and provides in Section 2 that “no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.” Louisiana’s constitutional separation of powers is explicit; the U.S. Constitution has no comparable provision, but implicitly requires such a separation of powers among the three branches of the federal government.

statutory—by which laws and regulations can be suspended by the legislature. We conclude with observations about the approval process for fiscal and economic impact statements—a process that empowers the Legislative Fiscal Office to stymie rules proposed by an executive branch agency.

1. Legislative Oversight

The legislative oversight procedures in APA Section 968 are the “legislative veto” as it is conventionally understood by most courts and commentators. The 1981 version of the Model State Administrative Procedures Act (MSAPA) adopted by the National Conference of Commissioners on Uniform State Laws addresses veto provisions in Sections 3-202 through 3-204.

Legislative oversight procedures came into Louisiana’s APA for the first time in 1976,¹⁴⁹ and legislative veto authority followed two years later.¹⁵⁰ Each agency must submit a report on any proposed rule or rule change to designated House and Senate standing committees or to the presiding officers in each chamber.¹⁵¹ The chair of each standing committee must appoint an oversight subcommittee, which may consist of the entire membership of the standing committee but must consist of at least a majority of the entire membership.¹⁵² By a simple majority of

149. 1976 La. Acts No. 279 added a new § 968 entitled “Review of agency rules” and provided in subparagraph F(3) for a standing committee report finding the rule “acceptable or unacceptable.” The committee report had no effect, however, on the rule’s legal efficacy.

150. 1978 La. Acts No. 252 added a new provision at § 968 (F)(4) that established for the first time a legislative veto that was subject to override by the governor:

(4) If a committee having jurisdiction as provided in this Section determines that a proposed rule change is unacceptable, the committee shall provide a written report which contains the reasons therefore. Such report shall be delivered to the governor. The governor shall have five days in which to disapprove the action taken by the committee. If the action of the committee is not disapproved by the governor within five calendar days, from the day the committee report is delivered to him, such proposed rule change shall not be adopted by the agency until such proposed rule has been changed or modified and has been found acceptable by the committee, or has been approved by the legislature by concurrent resolution. If, however, the committee makes no determination with respect to a proposed rule change prior to the time when the agency may adopt such proposed rule change as provided in R.S. 49:953, or if the governor disapproves the action by the committee as provided herein, the proposed rule change may be adopted.

151. APA § 968(B) (1987 and Supp. 2001) lists the appropriate House and Senate standing committees or presiding officers for all executive branch agencies.

152. APA § 968(D) (1987 and Supp. 2001).

the subcommittee members present and voting,¹⁵³ a subcommittee may vote the proposed rule unacceptable.¹⁵⁴ Unless the governor disapproves the subcommittee's report within ten days after receiving it, the agency may not adopt the rule.¹⁵⁵

Louisiana's legislative oversight process suffers from the same "bicameralism" problem that undermined Congress' action in *Chadha*, since a mere handful of legislators meeting as the oversight subcommittee of a single chamber can veto a proposed rule simply by finding it "unacceptable."¹⁵⁶ The "presentment" challenge is weaker, however, because Louisiana's APA allows the governor to review and reject a legislative veto.¹⁵⁷ Gubernatorial override leaves the executive branch ultimately in control of the rulemaking process. Gubernatorial power to override a legislative veto of rules is even stronger than gubernatorial power to veto legislation, because the governor's rejection of the legislative veto is definitive¹⁵⁸ while the governor's veto of proposed legislation may be overridden by a two-thirds vote of each house.¹⁵⁹

2. Veto of Fees

Legislative oversight of proposed agency fee increases differs critically from legislative oversight of rules. If both oversight subcommittees determine "that the proposed fee adoption, increase, or decrease is unacceptable, the fee action shall not be adopted by the agency."¹⁶⁰ This flat prohibition, not tempered by any opportunity for

153. APA § 968(E) (1987 and Supp. 2001).

154. APA § 968(F) (1987 and Supp. 2001).

155. APA § 968(G) (1987 and Supp. 2001).

156. The APA specifies four bases on which an oversight subcommittee may evaluate proposed rules. The first two appear to impose an "ultra vires" standard: "(a) Determine whether the rule change or action on fees is in conformity with the intent and scope of the enabling legislation purporting to authorize the adoption thereof" and "(b) Determine whether the rule change or action on fees is in conformity and not contrary to all applicable provisions of law and of the constitution." Two subsequent provisions, however, make it plain that the oversight subcommittee's discretion in reviewing proposed rules is essentially unfettered: "(c) Determine the advisability or relative merit of the rule change or action on fees" and "(d) Determine whether the rule change or action on fees is acceptable or unacceptable to the oversight subcommittee." APA § 968(G) (1987 and Supp. 2001).

157. "[T]he governor shall have ten calendar days in which to disapprove the action taken by the subcommittee." APA § 968(G) (1987 and supp. 2001).

158. "[I]f the governor disapproves the action of an oversight subcommittee within the time provided in R.S. 49:968(G), the proposed rule change may be adopted by the agency . . ." APA § 968(H)(1) (1987 and Supp. 2001).

159. La. Const. art. III, § 18(C)(1).

160. APA § 971(A) (Supp. 2001).

gubernatorial override, renders the legislative veto of fees highly suspect in a *Chadha* type of analysis based on "formalist" principles.¹⁶¹

On the other hand, a "functionalist" mode of analysis might regard the veto of fees more favorably. The functionalist approach evaluates an exercise of legislative power in terms of its impact on functions traditionally reserved for the executive branch.¹⁶² Shared legislative and executive responsibility for certain matters¹⁶³ can lead to different outcomes even before the same court.¹⁶⁴ Where fees are concerned, the courts might afford the legislature broader latitude because the constitution distributes responsibility for fees between the legislative and executive branches.¹⁶⁵

It has been suggested that the recent constitutional amendment barring a fee increase without a two-thirds vote of the legislature

161. A "formalist" approach to the separation of powers draws strict lines between the tasks assigned to different branches of government and strikes down as unconstitutional any task given by statute to an inappropriate branch. Chief Justice Burger's opinion in *Chadha* reflects a formalist perspective on these issues. For a discussion of the formalist-functional dichotomy, see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987).

162. "It is a relatively flexible approach that asks whether a given structural arrangement intrudes *too far* on the functions of any branch of government, or concentrates *too much* power in any branch." Michael Asimow et al., *State and Federal Administrative Law* 455 (1998) (emphasis in original). The Louisiana Supreme Court exhibited both "formalist" and "functionalist" modes of analysis with respect to the institution of a civil enforcement action, traditionally an executive branch function, in *State Bd. of Elected Officials v. Green*, 545 So. 2d 1031 (La. 1989), *on rehearing*, 566 So. 2d 623 (1990). The Court first favored a strict separation of executive and legislative branch powers by denying civil enforcement authority to the legislatively appointed entity, then on rehearing reversed itself by another 4-3 vote that focused less on the strict separation of powers between the branches than on the legislature's "degree of control over the appointees" and whether the statutory scheme would "significantly unbalance the equilibrium sought to be established by the constitutional allocation of powers among the various branches of government." *Id.* at 625-26.

163. See Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 Duke L.J. 789 (1983) (defending the legitimacy of a legislative veto when used to control action in an area of shared executive-legislative responsibility).

164. See, for example, the contrasting New Jersey Supreme Court cases of *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982) (striking down one legislative disapproval of agency actions), and *Enourata v. New Jersey Building Authority*, 448 A.2d 449 (N.J. 1982) (upholding the legislature's disapproval in another instance).

165. La. Const. art. VII, § 2.1(A) treats a new fee or civil fine or any increase in an existing fee or fine in the same manner as a tax, requiring "enactment of a law by a two-thirds vote of the elected members of each house of the legislature," a shared legislative-executive branch responsibility because each such measure must be presented to the governor for veto or approval.

“effectively moots this provision because it requires affirmative legislative action before a new or increased fee is imposed.”¹⁶⁶ Reports of the fee veto’s demise are somewhat exaggerated, however, because the constitutional restriction on fee increases does not apply to “any department which is constitutionally created and headed by an officer who is elected by majority vote of the electorate of the state.”¹⁶⁷ Such a department can propose new or increased fees without a two-thirds vote of the legislature, but it still must subject those proposed fees to legislative oversight (and possible veto) under the APA’s rulemaking procedures.¹⁶⁸ Another example of the fee veto’s continuing viability arises when an agency has statutory authority to fix fees that do “not exceed”¹⁶⁹ a certain amount. That agency would use rulemaking procedures to increase fees from some lesser amount (e.g., \$50) up to the maximum (e.g., \$100), and those rulemaking procedures would give the legislative oversight subcommittees an opportunity to veto the proposed fee increase.

3. Veto of Emergency Rules and Fees

The two preceding sections discuss separate legislative oversight procedures for *rules* and for *fees* adopted through conventional rulemaking. A third veto provision combines legislative oversight of both rules *and* fees that were adopted via emergency rather than conventional rulemaking procedures.

An oversight committee of either house may unilaterally veto an emergency rule or fee within sixty days after its adoption.¹⁷⁰ The committee can evaluate whether the measure meets criteria for emergency rulemaking, which consist of “imminent peril to the public health, safety, or welfare” or various threats of diminished federal funding.¹⁷¹ Or it can reject an emergency rule or fee for any of the four reasons enumerated under conventional oversight, which essentially amounts to an exercise of unfettered discretion by the committee.¹⁷² If the emergency adoption is unacceptable, the committee prepares and transmits a report in the same manner

166. Murchison, *supra* note 123, at 857.

167. La. Const. art. VII, § 2.1(B).

168. APA § 951(7) (1987 and Supp. 2001) defines “rulemaking” and provides that “procedures for adoption of rules and of emergency rules as provided for in R.S. 49:953 shall also apply to adoption of fees.”

169. See, e.g., 2001 La. Acts, Reg. Sess., No. 296 authorizing the Louisiana Board of Physical Therapy Examiners to adopt “in accordance with the Administrative Procedure Act . . . a schedule of fees which shall not exceed” specified amounts.

170. APA § 953(B)(4)(a) (Supp. 2001).

171. APA § 953(B)(1) (1987 and Supp. 2001).

172. APA § 968(D)(3) (1987 and Supp. 2001).

as under conventional oversight procedures.¹⁷³ Upon receipt of such a report by the agency, "the rule or fee shall be nullified and shall be without effect."¹⁷⁴

Nullification by a single oversight committee of either house seems clearly offensive to *Chadha* principles. And unlike conventional rulemaking, the governor enjoys no right of subsequent review or opportunity to wrest ultimate control back to the executive branch.¹⁷⁵ What rationale might justify legislative intervention into the realm of executive branch decision making when an agency adopts rules or fees by emergency procedures?

Since emergency adoption affords no opportunity for either the public or public officials to review the rule or fee in its pre-adoption phase, this extraordinary and non-participatory "emergency" adoption process might create a need for extraordinary post-adoption remedies. In fact, we see evidence of such remedies in the APA. Affected members of the public, for example, are given a special declaratory judgment action to test the validity of an emergency rule or fee.¹⁷⁶ The governor also gets a review opportunity that is specific to emergency rule or fee adoptions.¹⁷⁷ Defenders of the legislative veto might agree that these circumstances also entitle the legislature to an extraordinary right of review as a means of maintaining "balance" among separate branches of government.

In response, consider how criteria either govern or fail to govern these various post-adoption review processes. The governor's review of an emergency measure is essentially unconstrained by criteria, but this causes no constitutional concern under *Chadha* because it invokes no separation of powers problem. In the realm of judicial power, an adversely affected party can pursue the special declaratory judgment remedy "only on the grounds that the rule or fee does not meet the criteria for adoption of an emergency rule;"¹⁷⁸ in addition, the rule or fee remains in effect while being tested in the courts.¹⁷⁹ These restrictions, coupled with the usual constraints of judicial

173. APA § 968(F)(2) (1987 and Supp. 2001).

174. APA § 953(B)(4)(c) (Supp. 2001).

175. APA § 953(B)(4)(b) (Supp. 2001) gives the governor the same 60-day review period as the legislative oversight committee but no power to override the committee's unfavorable decision on an emergency rule or fee.

176. "The provisions of this Paragraph are in addition to R.S. 49:963 and shall not limit any action pursuant to R.S. 49:963." APA § 953(B)(3) (Supp. 2001).

177. APA § 953(B)(4)(b) (Supp. 2001).

178. APA § 953(B)(3) (Supp. 2001).

179. "Notwithstanding any other provision of law to the contrary, the emergency rule or fee shall remain in effect until such declaratory judgment is rendered." *Id.*

procedures and the adversarial process, render post-adoption review by the judiciary an appropriate and reasonable assertion of review power by one branch over the decisions of another. By contrast, the legislature's veto power can be exercised without regard to any limiting criteria, and legislative disapproval of an emergency rule or fee takes effect immediately. This unfettered discretion renders legislative oversight suspect, even in a context of emergency adoption and possible "balancing" of powers between two co-equal branches of government.

4. *Constitutional Suspension*

The Louisiana Constitution specifically authorizes the legislature to suspend laws by concurrent resolution:

Only the legislature may suspend a law, and then only by the same vote and, except for gubernatorial veto and time limitations for introduction, according to the same procedures and formalities required for enactment of that law. After the effective date of this constitution, every resolution suspending a law shall fix the period of suspension, which shall not extend beyond the sixtieth day after final adjournment of the next regular session.¹⁸⁰

The legislature can apparently renew its concurrent resolutions repeatedly, thereby extending the suspension indefinitely.¹⁸¹ A 1991 analysis by the Public Affairs Research Council characterized Louisiana's constitutional suspension procedure as "unique" among the fifty states.¹⁸²

The provision treats a concurrent resolution like a bill, requiring it to pass "by the same vote"¹⁸³ (majority or supermajority) and through "the same procedures and formalities"

180. La. Const. art. III, § 20.

181. In CC 73 debate on this provision, Delegate Asseff asked "Under your amendment, would it not be possible for the legislature at the expiration of the time, by following the same procedure to continue the suspension?" Delegate Perez replied, "Yes, sir, that could be done, there is no question about it." V Records of the Louisiana Constitutional Convention of 1973, Convention Transcripts, at 455 (July 28, 1973).

182. Mark C. Drennan, *Unique Power of Louisiana Legislature to Suspend Laws*, PAR Commentary, Oct. 1991, identified only three states that authorized laws to be suspended by resolution—Iowa, Louisiana, and South Carolina—but the resolutions in Iowa and South Carolina were subject to veto. Accordingly, the monograph's author concluded, "Louisiana is the only state that authorizes suspension of laws by resolution which is not subject to gubernatorial veto." *Id.* at 2.

183. La. Const. art. III, § 15(G).

(e.g., three readings and committee hearings in each house)¹⁸⁴ as the bill originally enacting the law. A concurrent resolution approved by the House and Senate thus satisfies the "bicameralism" requirement, since it follows the same two-chamber approval process that applies to a bill.

A resolution typically differs from a bill, however, in two respects: it can be introduced at any time during a legislative session,¹⁸⁵ and it does not go to the governor for review and approval or rejection.¹⁸⁶ Because a resolution never crosses the governor's desk, the procedure clearly does not comply with the "presentment" requirement. But this is of no constitutional consequence, because the use of a concurrent resolution to suspend a statute enjoys express constitutional authorization and therefore does not conflict with the "separation of powers" doctrine.¹⁸⁷

Should Louisiana's constitutional suspension procedure even properly be characterized as a "legislative veto"? If the legislature uses its power to suspend only statutes, that falls outside of our earlier suggested definition: a legislative veto occurs when the legislature rejects *regulations* promulgated by an executive branch agency. But the constitutional suspension provision refers to "law," and that term might be read broadly to include both regulations and statutes. Can the legislature use a concurrent resolution to suspend agency regulations, as it unquestionably can to suspend a statute?

The legislature has apparently proceeded on that assumption.¹⁸⁸ But the legislature's power to suspend agency regulations must be scrutinized independently of its unquestioned constitutional power

184. La. Const. art. III, § 15(D).

185. Constitutional restrictions govern when bills may be introduced:

Any bill to be introduced in either house shall be prefiled no later than five o'clock in the evening of the Friday before the first day of a regular session; thereafter no member of the legislature may introduce more than five bills, except as provided in the joint rules of the legislature.

La. Const. art. III, § 2(A)(1).

186. La. Const. art. III, § 17(B) regarding "resolutions" provides that "[n]o joint, concurrent, or other resolution shall require the signature or other action of the governor to become effective."

187. This provision overcomes *Chadha*-type problems only so long as the legislature confines itself to actions expressly authorized by the constitutional suspension provision. See the discussion of "law" *infra* at notes 188-198.

188. See, for example, proposed concurrent resolutions purporting to suspend or nullify numerous environmental regulations during the 1991 regular session, listed in Appendix A of Peterson, *supra* note 145, at 280-81. See also H.C.R. 211, 18th Legis. Sess. (La. 1992) (nullifying Wildlife and Fisheries regulations); H.C.R. 284, 19th Legis. Sess. (La. 1993) (suspending regulations of the Department of Economic Development); H.C.R. 108, 23d Legis. Sess. (La. 1997) (repealing regulations of the Department of Health and Hospitals).

to suspend statutes. If the constitutional reference to “law” in Article III, Section 20 is read narrowly to include only “statutes” and not “regulations,” then attempting to suspend agency regulations by a mere resolution exceeds the legislature’s constitutional suspension authority and is constitutionally suspect as a violation of the separation of powers.

Post-1974 jurisprudence suggests that this narrow interpretation of “law” is the correct one and accordingly that the legislature’s suspension of agency regulations is not well founded. In *Board of Elementary and Secondary Education v. Nix*,¹⁸⁹ the supreme court applied a narrow reading: “[w]hen used in this context, as it was in 103 other instances in the 1974 constitution, the term ‘provided by law’ means ‘provided by legislation.’”¹⁹⁰ In support of its interpretation, the opinion cited the Civil Code: “[l]aw is the solemn expression of legislative will.”¹⁹¹ The Court was also guided by interpretive principles embodied in the Style and Drafting Committee reports of CC 73, which routinely substituted “the term ‘by law’ for deemed-equivalent expressions of ‘by the legislature’ or ‘by statute.’”¹⁹²

Linguistic context also suggests that “law” should be narrowly interpreted to include only “statutes” and not “regulations.” When the constitutional suspension provision states that a suspension must be accomplished “according to the same procedures and formalities required for *enactment of that law*,”¹⁹³ it clearly contemplates procedural conformity to the *statutory* enactment process for legislation, not to APA rulemaking procedures for regulations. The choice of language is also highly suggestive because we typically refer to the *enactment*¹⁹⁴ of statutes exclusively (as opposed to the term *promulgation*,¹⁹⁵ which is more inclusively applied to both statutes and regulations).

Finally, the CC 73 debates yield no support for using this procedure to suspend regulations. The delegates’ comments focused

189. 347 So. 2d 147 (La. 1977).

190. *Id.* at 151 (emphasis omitted). See also *State ex rel. Bd. of Ethics for Elected Officials v. Green*, 566 So. 2d 623, 624-25 (La. 1990).

191. *Nix*, 347 So. 2d at 151 (citing La. Civ. Code art. 1 (1870)).

192. *Nix*, 347 So. 2d at 151-52 (citing numerous entries in State of Louisiana Constitutional Convention of 1973, Verbatim Transcripts (1973-74)). Professor Lee Hargrave, the honoree of this symposium issue, authored numerous Style and Drafting Committee reports.

193. La. Const. art. III, § 20 (emphasis added).

194. Black’s Law Dictionary 546 (7th ed. 1999) defines “enactment” as “The action or process of making into law <enactment of a legislative bill>” and “A statute ‘a recent enactment.’”

195. Black’s Law Dictionary defines “promulgation” as “The official publication of a new law or regulation, by which it is put into effect.” *Id.* at 1231.

exclusively on the suspension of an “act” or a “statute” and on the suspension of “legislation” or a “bill” by the same procedure through which it was “enacted.”¹⁹⁶ Specific references in debate to laws that had been or might be suspended were all references to statutes.¹⁹⁷ One delegate even questioned the origins of the constitutional suspension procedure, suggesting that the only purpose of its predecessor provision in the 1921 Constitution might have been to prohibit the governor from suspending laws by “executory edict,”¹⁹⁸ and that it was never meant to confer on the legislature extraordinary suspension powers. Nothing in the CC 73 transcripts implies that the constitutional suspension procedure was ever intended to suspend anything other than statutes.

The legislature’s constitutional power to “suspend a law” should be narrowly construed, applied exclusively to statutes and not expansively to include suspension of agency regulations. If the supreme court ultimately accepts the wisdom of *Chadha* and applies its principles in Louisiana, it should restrict the legislature’s constitutional suspension authority to statutes and prohibit its extension into the unsanctioned realm of regulations.

5. Statutory Suspension

The APA gives the legislature express statutory authority to block agency regulations by concurrent resolution: “the legislature, by Concurrent Resolution, may suspend, amend, or repeal any rule or regulation or body of rules or regulations, or any fee or any increase, decrease, or repeal of any fee, adopted by a state department, agency,

196. V Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 452-62 (July 28, 1973).

197. See e.g., *id.* at 452 (discussing the Lead Paint Law); *id.* at 454 (commenting that a measure subject to suspension “may be in the Civil Code, any law, it could be the drivers license law, it could be the financial responsibility law”); and *id.* at 460 (referencing to an act establishing requirements to take the examination for real estate broker). The word “regulation” appeared only once and that was regarding a *bill* introduced by Senator O’Keefe to regulate the safety of glass doors. *Id.* at 456.

198. La. Const. of 1921, art. XIX, § 5 provided that “no power of suspending laws in this state shall be exercised except by the legislature.” See comments of Delegate Triche:

[T]he original intent of that Article was not to grant the legislature any specific authority to suspend laws . . . I think that what the people in the convention of 1921 were trying to tell us was that laws should not be suspended, and they were trying to guarantee, I believe, the people of this state against rule by executory edict, to prevent the governor from declaring emergency or martial law, to prevent the executive from suspending laws by executive order and rule by edict, and I think that’s all it meant.

V Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, at 459 (July 28, 1973).

board, or commission.”¹⁹⁹ What are we to make of this grant of statutory authority? No question about it, this provision clearly qualifies as a “legislative veto” of agency regulations. Statutory suspension explicitly goes even further than the constitutional suspension provision, allowing the legislature to “suspend, amend, or repeal any rule.”²⁰⁰ This statutory suspension procedure enjoys no apparent constitutional authorization that might immunize it from a *Chadha*-style challenge.

Statutory suspension has been characterized as “a legislative assertion of the constitutional suspension power,”²⁰¹ but that assertion does not seem correct. If it were, then it should logically follow that “the limits on the statutory suspension power are the same as the limits on the constitutional provision,”²⁰² and accordingly, no such suspension could extend beyond the sixtieth day after final adjournment of the next regular session. Section 969 nowhere suggests any such limit on the exercise of statutory suspension powers, and the legislature has not used its statutory suspension powers in that restricted manner.

Statutory suspension procedures have caused concern in other states.²⁰³ Because they do not require “presentment” to the governor, these procedures undermine equal access to the rulemaking process by providing powerful interest groups with an opportunity to influence agency policymaking processes, unchecked by the balancing effect of an alternate branch of government.²⁰⁴ Louisiana’s recent legislative history confirms that the statutory suspension process is susceptible to political manipulation.²⁰⁵

When it was originally enacted in 1980,²⁰⁶ Section 969 allowed the legislature to “nullify or suspend” any rule or regulation by concurrent resolution.²⁰⁷ Just one year later, the 1981 version of the

199. APA § 969 (1987 and Supp. 2001).

200. *Id.*

201. Peterson, *supra* note 145, at 259.

202. *Id.* at 275-76.

203. See *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622 (Kan. 1984) (holding unconstitutional a statute authorizing the legislature to adopt, modify, or revoke administrative rules by concurrent resolution); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980) (holding unconstitutional a statute authorizing the legislature to annul agency regulations by concurrent resolution).

204. Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977); Marcus E. Etheridge, *Consequences of Legislative Review of Agency Regulations in Three U.S. States*, 9 Legis. Stud. Q. 161 (1984).

205. See David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 Tul. L. Rev. 2437, 2444-46 (1996).

206. 1990 La. Acts No. 660.

207. Peterson, *supra* note 145, at 260 (observing that the legislature’s incorporation of statutory suspension power in the APA coincides “historically

Model State Administrative Procedure Act repudiated that approach and asserted a countervailing "principle that the legislature may permanently nullify or suspend an agency rule *only* by statute."²⁰⁸ Persuasive constitutional²⁰⁹ and policy²¹⁰ considerations militate against legislative nullification or suspension of agency regulations by less than statutory means.

Even more troubling than the original version of Section 969 is its current language, empowering the legislature to "suspend, amend, or repeal" any rule or regulation.²¹¹ How far does the power to "amend" extend? Is the legislature simply limited to excising offending language, or may it go further and actually rewrite a regulation by adding new language of its own?²¹² The power to "amend" agency regulations by

with the passage of the Louisiana Environmental Procedure Act in the previous legislative session. . . . and could indicate a desire on the legislature's part to use Louisiana Revised Statutes 49:969 as a limit upon the expansion of the newly created environmental agencies.").

208. See the commentary on the Model State Admin. Procedure Act § 3-204(c) (1981) in Bonfield, *supra* note 107, at 495 (emphasis in original), characterizing the "consensus" view of the National Conference of Commissioners on Uniform State Laws (NCCUSL) as follows:

[T]he legislature should not be authorized to nullify or suspend an agency rule by means other than the enactment of a statute. Therefore, according to the 1981 MSAPA, legislative repeal or suspension of an agency rule may be accomplished only by joint legislative action, subject to the veto of the governor or to the overriding of such a veto. Because the legislature initially authorized agency rule making by the enactment of a statute, the legislature must use a statute to nullify or suspend a particular product of that process.

209. Bonfield discusses constitutional reasons for rejecting the legislative veto in Section 8.3.2(c) of his treatise, concluding that "in the absence of a constitutional provision expressly authorizing such action, nonstatutory legislative vetoes or suspensions of particular agency rules are probably impermissible under most state constitutions." Bonfield, *supra* note 107, at 498. La. Const. art. III, § 20 is, of course, just such an express constitutional authorization for the legislature to suspend "law" by concurrent resolution—though for reasons set forth above, the authorization should be read to encompass only "law" made by statutory enactment and not to include regulations promulgated by an agency.

210. See Bonfield, *supra* note 107, at 507-14 (discussing policy reasons for rejecting the legislative veto in Section 8.3.2(d)).

211. For examples of suspension and repeal, see H.C.R. 284, 19th Legis. Sess. (La. 1993) (suspending provisions of the Louisiana Administrative Code that were promulgated by the Office of Financial Institutions within DED to permit the sale of annuities by banks) and H.C.R. 108, 23d Legis. Sess. (La. 1997) (repealing rules promulgated by DHH with regard to the Medically Needy Program).

212. Since APA § 969 was amended by 1995 La. Acts No. 1109, the legislature has repeatedly used it to rewrite agency regulations. See, for example, H.C.R. 31, 23d Legis. Sess. (La. 1994) (amending a Family Independence Project rule of the Office of Family Support in DSS); H.C.R. 94, 23d Legis. Sess. (La. 1994) (amending rules of the Charitable Gaming Control Division in the Office of State Police); H.C.R. 124, 23d Legis. Sess. (La. 1994) (amending DOTD rules to

concurrent resolution—to rewrite them, in effect—pushes the legislative branch well into the realm of executive branch decision making and invites the courts to strike down this example of legislative overreaching.

6. *Legislative Fiscal Office Approval*

Every proposed rule published in the Louisiana Register must be accompanied by a fiscal and economic impact statement that has been approved by the Legislative Fiscal Office.²¹³ The Louisiana Register will not publish a Notice of Intent unless it is accompanied by an approved fiscal and economic impact statement bearing the signatures of personnel from both the agency and the fiscal office.²¹⁴ No rule can be adopted in substantial compliance with APA procedures unless such an approved statement has been published prior to its adoption.²¹⁵

redesignate transit lanes on the Crescent City Connection Bridge); H.C.R. 2, 26th Legis. Sess. (La. 1998) (amending a rule of the Board of Registration for Professional Engineers and Land Surveyors in DOTD); H.C.R. 6, 25th Legis. Sess. (La. 1999) (amending rules of the Charitable Gaming Control Division in the Office of State Police).

213. The Legislative Fiscal Office was created by 1973 La. Acts No. 169 to provide “service, research, and technical staff assistance concerning fiscal matters of any kind to the members of the legislature and to the committees thereof.” La. R.S. 24:601 (1989). The office is wholly a creature of the legislature: “a service agency of the legislature and in every aspect of its functions, duties and operations shall be responsible solely to the legislature and to no other branch of the state government.” La. R.S. 24:608 (1989).

214. APA § 953(A)(1)(a)(ii) and (iii) (1987 and Supp. 2001) requires that the agency’s notice of intended action must include “[a] statement, approved by the legislative fiscal office,” of any anticipated fiscal or economic impact of the intended action.

215. APA § 954(A) (1987 and Supp. 2001) requires that rules be adopted “in substantial compliance” with the Act’s procedural requirements. What constitutes substantial compliance is a matter to be determined on the facts of each particular case. *Dorignac v. Louisiana State Racing Comm.*, 436 So. 2d 667, 669 (La. App. 4th Cir. 1983). Nonetheless, the APA identifies at least three specific requirements that each agency must meet in order to achieve “substantial compliance” with its rulemaking procedures: (1) “file a certified copy of its rules with the Department of the State Register”; (2) “prior to its adoption a report relative to the proposed rule change is submitted to the appropriate standing committee of the legislature or to the presiding officers of the respective houses”; and (3) “the approved economic and fiscal impact statements . . . [must] have been filed with the Department of State Register and published in the Louisiana Register.” APA § 954 (1987 and Supp. 2001). The last of these three requirements cannot be met if the fiscal and economic impact statement is not “approved” by the Legislative Fiscal Office. Note also that Section 954(A) establishes a two-year prescriptive period to challenge a rule based on procedural noncompliance: “A proceeding under R.S. 49:963 to contest any rule on the grounds of noncompliance with the procedures for adoption, as given in this Chapter, must be commenced within two years from the date upon which the rule became effective.” *Id.*

When the legislature adopted new language²¹⁶ requiring fiscal and economic impact statements, it gave only superficial guidance about the respective roles of the agency and the fiscal office in their preparation and approval.²¹⁷ In 1987, the Attorney General issued an opinion²¹⁸ attempting to clarify the relationship by assigning responsibilities in the following manner. The agency is responsible for preparing statements and has ultimate control over their contents. The fiscal office can identify deficiencies and suggest revisions, but the agency ultimately decides whether to accept or reject these suggestions. The fiscal office has the last word on the matter, however, because it can either give or withhold approval of an agency's proposed statement; withholding approval blocks publication of the agency's Notice of Intent.

This situation obviously creates considerable potential for stalemate. If the agency and the fiscal office cannot resolve a deadlock over the content of a fiscal or economic impact statement, the fiscal office can effectively "veto" proposed agency regulations by withholding its approval, thereby denying the agency an essential step in the promulgation process—publication in the Louisiana Register. The exercise of this functional "veto" by the fiscal office is definitive and cannot be overturned by further gubernatorial review (unlike the "conventional" legislative oversight process conducted pursuant to Section 968, which authorizes the governor to rescue the regulations by gubernatorial override).

7. *Conclusions Regarding Legislative Veto*

If the supreme court ultimately elects to apply *Chadha* principles in Louisiana, how might the various forms of legislative veto fare? Legislative oversight under Section 968 may well survive the test, because the governor's authority to override the legislative veto²¹⁹ preserves executive branch control of agency rulemaking. If the governor can act to suspend or veto rules by executive order,²²⁰ is it not equally permissible for the governor to accomplish the same result by acquiescing in the actions of a legislative oversight committee?

Every other legislative veto mechanism reposes definitive control in the legislative branch, and accordingly, all (save one) are

216. 1980 La. Acts No. 392.

217. APA § 953(A)(3)(a) and (b) (1987 and Supp. 2001) provides that the statements of fiscal and economic impact "shall be prepared by the proposing agency and submitted to the Legislative Fiscal Office for its approval," but does not explain how to resolve conflicts between the agency and the fiscal office.

218. 87 Op. Att'y Gen. No. 87-752 (Nov. 9, 1987).

219. APA § 968(G) (1987 and Supp. 2001).

220. APA § 970 (1987).

constitutionally suspect under *Chadha*. The one exception is, of course, the constitutional suspension of statutes, which survives unequivocally but should not be extended to the suspension of resolutions. And its illegitimate offspring, the statutory suspension of regulations pursuant to Section 969, should be struck down without equivocation as an unconstitutional intrusion into the powers of the executive branch.

The definitive veto of fees under Section 971 might survive if the Court applies a “functionalist” rather than “formalist” mode of analysis and finds sufficient intermingling of legislative and executive branch powers to support legislative intervention on revenue-related measures. The equally definitive veto of emergency rules and fees might be justified, if at all, only as an extraordinary remedy to the extraordinary lack of public and legislative participation in the emergency adoption process.

Since the legislative fiscal office is so wholly a creature of the legislature, its ability to block the publication (and therefore the adoption) of agency regulations should be evaluated as if the legislature itself were acting.²²¹ The legislature’s legitimate interest in publicizing the fiscal and economic impact of proposed regulations could be served by something less than an absolute bar to the publication of the agency’s Notice of Intent in the Louisiana Register. For example, the fiscal office might publish its independent and dissenting analysis of the proposed rule’s impact alongside the agency’s own evaluation. This device would promote public and legislative scrutiny of the rule, instead of stifling it as is presently the case. It would also eliminate the constitutional questions raised by current procedures for the approval of fiscal and economic impact statements. The legislature should address this subject in a further amendment, delineating how the fiscal office and the agency should reconcile differences over the content of statements and how they should proceed in the event of an impasse.

III. ADJUDICATION UNDER THE APA

Another article waits to be written—this is not it—evaluating significant changes in adjudication practice since 1974. Here, with no pretense of comprehensiveness, are some observations about just a few of the topics that might be addressed in such an article.

221. Fiscal staff may enjoy even less justification than the legislature to block agency action, because, unlike legislators, they hold no elective office and are unaccountable to the public.

A. *Division of Administrative Law*

In 1996, the APA consolidated responsibility for adjudication hearings in a new Division of Administrative Law ("DAL")²²² located within the Department of Civil Service. Administrative law judges ("ALJ's") hear cases involving the Departments of Public Safety (driver's license revocation or suspension for traffic violations, constituting approximately two-thirds of the Division's total caseload), Wildlife and Fisheries (hunting and fishing license violations), Health and Hospitals (sanitation code violations), Environmental Quality, and Insurance.²²³ During the year ending on June 30, 2000, the Division docketed 11,322 new matters; conducted 8,623 hearings; settled 1,316 cases; and rendered 8,601 decisions or orders.²²⁴ DAL also offers mediation services.²²⁵

Strong arguments can be advanced either to celebrate or to condemn the consolidation of administrative appeals before a single body of ALJ's.²²⁶ To its proponents, DAL provides an independent, impartial, professionally trained corps of ALJ's, ending the appearance of conflict that occurs when hearings are held before ALJ's employed by the very agency whose interests are at stake.²²⁷ Proponents also maintain that the Division puts an end to ex parte communication between agency personnel and ALJ's, thereby increasing public respect for the process and perhaps even increasing compliance with administrative orders and decisions.

To opponents of such a system, the disadvantages outweigh its benefits. A wide-ranging caseload challenges the ability of ALJ's to acquire the depth of expertise needed to manage, for example,

222. APA §§ 991-999.1 (Supp. 2001) (enacted by 1995 La. Acts Nos. 739 and 947) and supplemented by APA §§ 999.21-999.25 (Supp. 2001) (enacted by 1997 La. Acts No. 1162). The 1981 version of the Model State Administrative Procedure Act acknowledged a role for ALJ's at Section 4-202(a) and included a provision establishing the central panel of ALJ's at Section 4-301.

223. Except as provided in APA § 992(D)(2)-(8), the DAL provisions "apply to any board, commission, department, or agency of the executive branch of state government" and to "all adjudications as defined in the Administrative Procedure Act pursuant to the Procurement Code." APA §§ 992(D) and 992(E) (Supp. 2001).

224. My thanks to the Director of the DAL, Ann Wise, for supplying data and other information about the division.

225. See State of Louisiana, Division of Administrative Law, at <http://www.adminlaw.state.la.us> (last modified Oct. 22, 2001).

226. See Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 La. L. Rev. 431 (1999) and sources cited therein, particularly footnote 5.

227. Malcolm C. Rich & Wayne E. Brucar, *The Central Panel System for Administrative Law Judges: A Survey of Seven States* 9 (1983).

complex environmental enforcement proceedings. Of even more consequence, decisions rendered by ALJ's are binding on the agency, which has no right of appeal from an adverse decision.²²⁸ The concept of "judicial deference to agency expertise" becomes somewhat suspect when the critical decisions are made not by agency experts but by ALJ's who are wholly unaffiliated with the agency.

B. *Judicial Review of Agency Decision Making*

Two concepts compete for dominance in Louisiana jurisprudence regarding judicial review of agency decisions. Some cases describe the transition from the administrative process to the courts as a first instance of "judicial review" invoking the original jurisdiction of courts, while others label it an "appeal." The conflict is not simply one of terminology but one with significant conceptual ramifications as well.

1. *"Appeal" of Agency Decisions Under the 1921 Constitution*

Just a few years before CC 73 convened, two Louisiana Supreme Court cases decided under the 1921 Constitution generated some confusion about district courts' jurisdiction over "appeals" of administrative action. In *Trosclair v. Houma Municipal Fire & Police Civil Service Board*²²⁹ and *Albert v. Parish of Rapides*,²³⁰ the Louisiana Supreme Court held that district courts were relying upon "appellate" rather than "original" jurisdiction in their review of decisions by local fire and police civil service boards. Since the 1921 Constitution did not include "appeals" within the original jurisdiction of district courts, the Court reasoned that a district court must have express constitutional authority to hear such proceedings,²³¹

228. Bybee, *supra* note 226, at 432. APA § 992(B)(2) (Supp. 2001) provides that "[i]n 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." Bybee styles this "a remarkable" and "an astonishing provision" noting that he "cannot find any other state that has a provision identical" to it. Bybee, *supra* note 226, at 455-57. Murchison, characterizes it as the "most pernicious" of the changes affecting adjudication under the APA and discusses its incompatibility with conventional concepts of the political accountability of agencies. Murchison, *supra* note 123, at 873.

229. 252 La. 1, 209 So. 2d 1 (1968).

230. 256 La. 566, 237 So. 2d 380 (1970).

231. *Trosclair* found "limited jurisdiction" in La. Const. of 1921, art. 14, § 15.1 and La. R.S. 33:2501 for the district court to hear "appeals" from the civil service board. *Trosclair*, 252 La. at 5-6, 209 So. 2d at 2 (emphasis in original). Because the district court's review was limited and not an expression of its "exclusive original jurisdiction," the Louisiana Supreme Court denied the Houma civil service

otherwise, the "appeal" to a district court would be denied as exceeding the jurisdictional power of district courts.²³²

Justice Hamiter's dissent in *Trosclair* rejected the view that judicial review invoked the appellate powers of a district court because "the [civil service] board is no court" and "proceedings before the district court to determine the correctness of its ruling is [sic] not an 'appeal.'"²³³ Instead, the dissent maintained, "the procedure commenced in the district court was 'simply the institution of a civil matter (not an appeal)' in that court which had exclusive original jurisdiction over the subject."²³⁴

2. Rejection of "Appeal" Theory Under the 1921 Constitution

Just a few years later (and still prior to CC 73), Justice Hamiter's dissenting view prevailed when *Trosclair* and *Albert* were overruled in *Bowen v. Doyal*.²³⁵ *Bowen*, relying on the 1921 Constitution²³⁶ to overrule earlier decisions, held that due process entitles a losing party in the administrative adjudication process to judicial review by the courts.²³⁷ Justice Barham drew an appropriate distinction between "appeal" (appellate courts reviewing the decisions of a lower trial court) and "judicial review" of administrative action (courts reviewing for the first time an agency decision) in the following forceful language: "[j]udicial review of administrative determinations should not be confused with judicial appeals. A district court's review of an administrative determination is not an appeal; it is in fact an original judicial action."²³⁸ After *Bowen*, participants in the

board a right of appeal from the district court's adverse decision to the court of appeal. *Id.* at 2-3 (emphasis in original).

232. *Albert* reached a different result from *Trosclair*, holding that La. Const. of 1921, art. 14, § 15.1 contained no express provision for district courts to review decisions rendered by civil service boards in smaller municipalities. *Albert*, 256 La. at 571-72, 237 So. 2d at 381-82. Finding that the statutory attempt to confer such authority exceeded the scope of the jurisdiction granted to district courts by La. Const. of 1921, art. 7, § 36, the Court dismissed the "appeal" to the district court that *Albert* and other plaintiffs had filed in response to an adverse ruling by the Rapides civil service board. *Id.*

233. *Trosclair*, 252 La. at 8, 209 So. 2d at 3.

234. *Id.*

235. 259 La. 839, 253 So. 2d 200 (1971).

236. La. Const. of 1921, art. 1, § 6 ("Open courts; legal remedies"), which the 1974 Constitution preserved as "Access to Courts" in La. Const. art. I, § 22. The 1974 Constitution went further in protecting access to the courts by providing for a "Right to Judicial Review" in La. Const. art. I, § 19: "No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based."

237. *Bowen*, 259 La. at 847-48, 253 So. 2d at 203-04.

238. *Id.* at 852, 253 So. 2d at 205.

administrative process could rely on a simple semantic device to maintain clarity in this area. "Appeal" could be used exclusively to refer to appellate court review of lower court decisions, while the transition from agency process to the courts was best described as "judicial review" of agency action (not "appeal" from the agency's decision).

The supreme court shed further light on these semantic and conceptual distinctions in a decision rendered after adoption of the 1974 Constitution. *Buras v. Board of Trustees of Police Pension Fund of the City of New Orleans* held that statutory references to the Board's decision as "final and conclusive" (from which there could be "no appeal") simply signified "the point of administrative finality, leaving to the courts the ultimate decision as to the validity of the final administrative decision."²³⁹ Administrative finality meant that no further appeal was possible within the administrative process, but the agency's final and conclusive decision could still be challenged by judicial review in the courts.

3. Restoration of "Appeal" Under the 1974 Constitution

Despite the clarity of *Bowen* and the Court's post-1974 adherence to its principles, old notions die hard. *Touchette v. City of Rayne, Municipal Fire & Police Civil Service Board*,²⁴⁰ decided a year after the new Constitution took effect, first accepted the wisdom of *Bowen* by asserting that "judicial review of an administrative decision is essentially a different process than the appellate review of a district court's judgment."²⁴¹ *Touchette* also appeared open to the countervailing view, however—that a district court's review of an agency decision might be an "appeal" rather than the exercise of its original jurisdiction. The opinion mused that "even if the district court review is an appeal,"²⁴² the court of appeal had jurisdiction pursuant to expansive new language in the 1974 Constitution.²⁴³ This early perpetuation of the "appeal" concept in the post-1974 era acquired significant jurisprudential weight in subsequent years.

The original majority opinion in *LOOP, Inc. v. Collector of Revenue*²⁴⁴ took these musings to a higher level, citing *Touchette* in

239. *Buras v. Bd. of Trs. of Police Pension Fund of City of New Orleans*, 367 So. 2d 849, 851 n.4 (La. 1979).

240. 321 So. 2d 62 (La. App. 3rd Cir. 1975).

241. *Touchette*, 321 So. 2d at 64.

242. *Id.*

243. "Appellate jurisdiction is no longer based on the nature of the jurisdiction exercised by the district court. This court now has jurisdiction over all civil matters decided within its circuit subject to exceptions specified in the Constitution." *Id.*

244. 523 So. 2d 201 (La. 1987).

support of the proposition that judicial review invokes appellate rather than original jurisdiction. The court in *LOOP* held that "a legislative act establishing procedures for judicial review of an administrative tribunal decision by a district court, should properly be considered to be a law providing for that court's appellate jurisdiction."²⁴⁵ The supreme court reversed itself on rehearing but approvingly mentioned both the pre-1974 reasoning of *Bowen v. Doyal* and the post-1974 expanded "appellate jurisdiction" of the district courts, thereby perpetuating confusion about which principle applies to the courts' consideration of agency decisions—"judicial review" or "appeal."²⁴⁶

The supreme court emphatically resolved matters in *American Waste & Pollution Control Co. v. State Department of Environmental Quality*,²⁴⁷ holding that a court's first instance of judicial review over agency decision making "is an exercise of a court's appellate, rather than original, jurisdiction."²⁴⁸ The Court dismissed competing jurisprudence with a retrospective characterization that "the *Bowen* court chose to construe what was actually appellate review of agency determinations as 'original jurisdiction,'"²⁴⁹ despite the *Bowen* court's unambiguous assertion that "a district court's review of an administrative determination is not an appeal; it is in fact an original judicial action."²⁵⁰

In reaching these conclusions, the court in *American Waste* relied on new language in the 1974 Constitution regarding the appellate jurisdiction of district courts. Precisely how did the 1974 Constitution change the appellate jurisdiction of district courts?

4. Analysis of Changes in the 1974 Constitution

The 1921 Constitution enumerated four specific categories in which district courts could exercise appellate jurisdiction.²⁵¹ The 1974

245. *Id.* at 203 n.1.

246. *Id.* at 202-03.

247. 588 So. 2d 367 (La. 1991).

248. *Id.* at 370.

249. *Id.*

250. *Bowen v. Doyal*, 259 La. 839, 851, 253 So. 2d 200, 205 (1971).

251. La. Const. of 1921, art. 7, § 36 conferred on the district courts appellate jurisdiction of the following cases:

All appeals in civil cases tried by justices of the peace within their respective districts; all appeals in civil cases tried in city or municipal courts within their respective districts where the amount in dispute, or the value of the movable property involved does not exceed one hundred dollars, exclusive of interest; all appeals from orders of justices of the peace requiring a peace bond; and all appeals from sentences imposing a fine or imprisonment by a mayor's court or by a city or municipal court.

Notably, all of the categories refer exclusively to lower courts; none contemplate

Constitution eliminated this list of categories and shifted authority from the constitution to the legislature to designate by statute those matters over which the district courts might exercise appellate jurisdiction: "A district court shall have appellate jurisdiction as provided by law."²⁵² These changes made the allocation of appellate authority for district courts a matter of statutory law, not constitutional directive.

Nowhere, however, do the constitutional convention transcripts suggest an intent to characterize a district court's review of non-judicial, agency proceedings as an exercise of the district court's "appellate" jurisdiction. When giving examples of the appellate jurisdiction of district courts, CC 73 debates referred exclusively to appeals from "limited jurisdiction courts" or "courts below" or "courts of record" or "inferior courts" (principally mentioning parish courts, city courts, and mayors' courts).²⁵³ This usage was consistent with the 1921 Constitution, which also referred exclusively to lower courts in its provision regarding appellate jurisdiction of district courts.²⁵⁴

Nor do the CC 73 debates suggest any intent to remove judicial review of agency decision making from the original jurisdiction of district courts. Under the 1974 Constitution, district courts have "original jurisdiction of all civil and criminal matters."²⁵⁵ In 1990, the Supreme Court interpreted this jurisdictional grant as all-inclusive, signifying:

an intent by the [CC 73] drafters to include all matters not criminal in nature as "civil matters" under the district court's original jurisdiction. Nothing in the constitution suggests any intent that a separate category of innominate matters should be excluded from these all-inclusive terms.²⁵⁶

The only proceedings expressly excluded from the grant of original jurisdiction are "administrative agency determinations" in worker's compensation matters,²⁵⁷ which suggests by implication that all other administrative agency determinations ought properly to be included within the original jurisdiction of district courts. DEQ permitting decisions would seem to be such an administrative agency determination.

"appeals" of agency decisions.

252. La. Const. art. V, § 16(B).

253. VI Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts at 795-800 (Aug. 17, 1973).

254. La. Const. of 1921, art. 7, § 36.

255. La. Const. art. V, § 16(A).

256. *Moore v. Roemer*, 567 So. 2d 75, 79 (La. 1990).

257. La. Const. art. V, § 16(A).

Just one year after its "all-inclusive" interpretation rendered in *Moore v. Roemer*, the Court held in *American Waste & Pollution Control Co. v. State Department of Environmental Quality* that DEQ permitting decisions are "not civil matters within the meaning of" the constitutional grant of original jurisdiction to district courts.²⁵⁸ The Court acknowledged that the constitutional "grant of original jurisdiction in all civil matters to the district courts contemplates first instance *judicial* adjudications," but effectively held that this constitutional grant of original jurisdiction could be diminished by statute where "the first instance adjudication has been delegated by the Legislature to the DEQ."²⁵⁹ In so holding, the Court apparently equated a first instance *administrative* adjudication by DEQ with a first instance *judicial* adjudication by a court. Even if rendered in a quasi-judicial agency proceeding, however, a DEQ decision still seems in fact to be only *quasi-judicial*, issued by an agency of the executive branch and not by an Article V court.²⁶⁰ The dissents by Justices Marcus and Hall raised some of these same questions,²⁶¹ but the majority unambiguously embraced the proposition that judicial "review of DEQ's permitting decisions clearly represents an exercise of appellate review of quasi-judicial determinations,"²⁶² not an exercise of a district court's original jurisdiction.

5. Current State of Judicial Review

Jurisdiction to review the decisions of administrative agencies can generally be given to either district or appellate courts.²⁶³ The matter is one to be determined by statute or by constitution. Recognizing this reality, the 1981 MSAPA offers alternative provisions: one lodges jurisdiction in trial courts, the other in courts of appeal.²⁶⁴ Under both the 1921 and 1974 Constitutions, Louisiana has recognized a right to judicial review of administrative

258. 588 So. 2d 367 (La. 1991). See also *MEDX, Inc. v. Templet*, 633 So. 2d 311, 314 (La. App. 1st Cir. 1993).

259. *American Waste*, 588 So. 2d at 372 (emphasis added).

260. An administrative hearing officer is not a "judge" within the meaning of Article V, and the decisions rendered in a quasi-judicial capacity by an administrative body do not qualify as the "judgment" of a court. *Walker v. Conagra Food Servs.*, 671 So. 2d 1218 (La. App. 2d Cir. 1996). See also *Hogan v. G & J Pettit*, 687 So. 2d 680, 680 n.1 (La. App. 2d Cir. 1997) and *Spencer v. Gaylord Container Corp.*, 693 So. 2d 818, 822 n.2 (La. App. 1st Cir. 1997).

261. *American Waste*, 588 So. 2d at 374, 375.

262. *Id.* at 370.

263. 2 Am. Jur. 2d *Administrative Law* § 422 (1994).

264. Model State Admin. Procedure Act § 5-104(a) (1981).

proceedings.²⁶⁵ Cases decided under both constitutions have varied, however, on whether that right involves an exercise of original jurisdiction by the district courts or whether it constitutes an “appeal” to the district courts or courts of appeal. *American Waste* appears to have resolved the matter by stating that “[j]udicial review of a decision of an administrative agency is an exercise of a court’s appellate jurisdiction, and the Legislature may constitutionally repose such appellate review in the court of its choice.”²⁶⁶ The twists and turns of prior jurisprudence in this area suggest, however, that the matter may be revisited at some point.²⁶⁷ If so, the courts might consider which judicial forum (district or appellate) does more to build public confidence in the administrative process.

Initiating judicial review of administrative decisions in the courts of original jurisdiction would give litigants an assurance of “two bites at the apple” in the courts, instead of a single “appeal” to the intermediate courts and an uncertain application to the Louisiana Supreme Court for writs thereafter. Affording litigants their fullest possible “day in court” would respond to the complaint that agencies constitute an unresponsive, anti-democratic “fourth branch” of government. Testing agency outcomes in the courts not once but twice might encourage greater care and deliberation by agencies and seems likely to increase public confidence in the judicial system’s oversight of agency proceedings. Courts of original jurisdiction may also be better equipped than appellate courts to devote the time and attention required for reviewing detailed administrative records. Even if the courts decide not to revisit the matter in the future, these policy considerations should discourage the legislature from passing new laws that direct judicial review of agency decisions to the appellate courts.

265. *Bowen v. Doyal*, 259 La. 839, 854, 253 So. 2d 200, 205-06 (1971); *Brock v. Schwegmann Giant Supermarkets, Inc.*, 520 So. 2d 711 (La. 1988).

266. *American Waste*, 588 So. 2d at 373.

267. A recent decision, *Duplantis v. Louisiana Bd. of Ethics*, 782 So. 2d 583 (La. 2001), found constitutional authority for “direct appeal to the court of appeal of a decision by the Board.” *Id.* at 590. The supreme court stated that “[i]n the absence of this provision, jurisdiction for judicial review would be vested in the district court.” *Id.* at 590-91. This statement apparently affirms the view that first-instance judicial review of administrative agency decisions resides in the original jurisdiction of district courts. But compare an even more recent case, *Metro Riverboat Associates, Inc. v. The Louisiana Gaming Control Board*, No. 01-C-0185, 2001 La. LEXIS 2852 (Oct. 16, 2001), where the Louisiana Supreme Court cited approvingly the holding of *American Waste* that “judicial review of the decision of an administrative agency . . . is an exercise of a court’s appellate jurisdiction pursuant to La. Const. art. V, § 16(B).” *Id.* at *9. In *Metro Riverboat*, the 19th Judicial District Court enjoyed both original and appellate jurisdiction over decisions of the Gaming Control Board, giving rise to considerable confusion among the litigants and the courts below about the jurisdictional basis on which the suit was proceeding.

C. *The Choice Between Rulemaking and Adjudication*

A recent Attorney General's opinion requires the Board of Ethics (acting as the Supervisory Committee on Campaign Finance Disclosure) to make new law by promulgation of a rule rather than the release of an advisory opinion.²⁶⁸ This opinion raises substantial questions about the law-making powers of administrative agencies in Louisiana and, if inappropriately applied in the future, could do much to undermine the effectiveness of agencies. Let's look at what the advisory opinion said and why the Attorney General's Office concluded that the Supervisory Committee had engaged in substantive rulemaking.

The Supervisory Committee sought "to provide general guidelines as to the use of campaign funds"²⁶⁹ and to identify criteria for distinguishing between personal and campaign related expenditures under the Campaign Finance Disclosure Act.²⁷⁰ Its advisory opinion first listed and briefly summarized fifteen previous opinions on the subject, then "reaffirmed" and "incorporated" those opinions, but "with the following modification: campaign related activities or matters relating to the holding of public office must be the primary purpose" of the expenditure.²⁷¹ The Supervisory Committee also adopted the following interpretive principle:

In order to further assist candidates and officeholders in determining whether a particular use of campaign funds is acceptable, the Board adopts the standard used by the Federal Election Commission which defines as personal use of campaign funds any use of funds to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or responsibilities as a public officeholder.²⁷²

The Attorney General concluded that the policies announced by the Supervisory Committee in its advisory opinion "constitutes rules. . . which require adoption and promulgation in accordance with the Administrative Procedure Act."²⁷³ The Attorney General's opinion attached special importance to the Supervisory Committee's use of a

268. 99 Op. Att'y Gen. No. 99-130 (Apr. 15, 1999).

269. Louisiana Board of Ethics acting as the Supervisory Committee on Campaign Finance Disclosure, Op. No. 98-232 (Sept. 17, 1998) [hereinafter Louisiana Board of Ethics].

270. La. R.S. 18:1505.2(I) (Supp. 2001).

271. Louisiana Board of Ethics, *supra* note 269.

272. *Id.*

273. 99 Op. Att'y Gen. No. 99-130 (Apr. 15, 1999).

“primary purpose” test and its adoption of “standards of the Federal Election Committee [sic].” In assessing whether the Supervisory Committee overstepped its authority, a brief overview of how agencies make or interpret law may be helpful.

1. How Agencies Make and Interpret Law—An Overview

Agencies can make new law in two ways—by promulgating regulations (rulemaking) or by rendering decisions in contested cases (adjudication). When they rely on rulemaking, agencies engage in a quasi-legislative function, articulating new law through what has been characterized as a process of “comprehensive rationality.”²⁷⁴ When making new law by adjudication, on the other hand, agencies function in a quasi-judicial capacity, adopting a case-by-case or “incrementalist” approach.²⁷⁵ Rulemaking and adjudication procedures differ significantly with regard to public notice and public participation in their respective law-making processes, and significant policy implications flow from the choice of one technique over the other.²⁷⁶

Federal law leaves the choice between rulemaking and adjudication within the discretion of the agency.²⁷⁷ Several states, on the other hand, have held that rulemaking is the preferred method of

274. Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv. L. Rev. 393, 395 (1981) (observing that “comprehensive rationality and incrementalism represent two competing models of the policymaking process. Each has its own internal logic: comprehensive rationality is structural, static, prophylactic; incrementalism is organic, dynamic, remedial.”). See also Ronald A. Cass, *Models of Administrative Action*, 72 Va. L. Rev. 363 (1986); Bonfield, *supra* note 107, at 5-7.

275. Bonfield, *supra* note 107, at 4-5.

276. See, e.g., 1 Frank E. Cooper, *State Administrative Law* 177-80 (1965). Rulemaking and adjudication differ significantly with regard to the type of notice, form of hearing, mechanics of decision, scope of judicial review, trial-type procedures, introduction of testimony, cross-examination of witnesses, oral argument, substantial evidence supporting the agency’s findings, and prospective versus retrospective operation of new principles of law. Cooper illustrates with a hypothetical the specific policy and procedural differences arising out of an insurance commission’s choice between rulemaking and adjudication to review the reasonableness of a standard clause found in numerous insurance agreements. He concludes that if “a large number of persons will be affected in substantially the same manner by the administrative decision, there is much to be said in favor of the utilization of rulemaking techniques.” *Id.* at 179. On the other hand, if “a single party (or a small, well-defined group) will bear the brunt of the administrative order, the adoption of rulemaking techniques may cause hardship to the individuals affected.” *Id.* at 180.

277. *Securities Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 675 S. Ct. 1575 (1947).

making new administrative law.²⁷⁸ The 1981 MSAPA states a strong preference for rulemaking over adjudication,²⁷⁹ but it also permits agencies to announce new law through declaratory orders, which can be issued by an agency without the need for a formal adjudicative hearing.²⁸⁰ Louisiana's APA also clearly contemplates the use of declaratory orders and rulings, because it requires each agency to "provide by rule for the filing and prompt disposition of petitions for declaratory orders and rulings" that are accorded "the same status as agency decisions or orders in adjudicated cases."²⁸¹ Despite this statutory recognition of a proper role for declaratory orders, the Attorney General's opinion required the Supervisory Committee to act by rule, prohibiting the use of an advisory opinion to announce its interpretation of the law.

How does the prohibited "advisory opinion" differ from an APA-approved "declaratory order or ruling?" The difference is not simply in who takes the initiative—whether the legal interpretation was externally requested by some party or internally generated at the initiative of an agency. The Campaign Finance Disclosure Act (as quoted in the Attorney General's opinion) clearly draws no such distinction:

The supervisory committee may render an opinion in response to a request by any public official, any candidate for public office, any political committee, *or the committee may render an advisory opinion on its own initiative.* Such an opinion shall not constitute a rule under the provisions of the Administrative Procedures Act and the supervisory committee shall not be subject to that Act in carrying out the provisions of this subsection.²⁸²

278. *Anheuser-Busch, Inc. v. Dep't of Bus. Regulation*, 393 So. 2d 1177 (Fla. Dist. Ct. App. 1981); *Boller Beverages v. Davis*, 183 A.2d 64 (N.J. 1962); *Elizondo v. Dep't of Revenue*, 570 P.2d 518 (Colo. 1977); *Megdal v. Oregon State Bd. of Dental Examiners*, 605 P.2d 273 (Or. 1980).

279. See Model State Admin. Procedure Act § 2-104(3), 15 U.L.A. 29 (2000) and the discussion in Bonfield, *supra* note 107, at 118-31.

280. See Model State Admin. Procedure Act § 2-103, 15 U.L.A. 26-27; § 4-201(4), 15 U.L.A. 76 (2000). In *Transit Mgmt. of Southeast Louisiana, Inc. v. Comm'n on Ethics for Public Employees*, 703 So. 2d 576, 577 n.1 (La. 1997), *modified on rehearing*, 710 So. 2d 792 (1998), the Louisiana Supreme Court observed that the ethics code "does not require notice or a hearing for the rendition of any advisory opinion."

281. APA § 962 (1987). The definition of a "rule" in APA § 951(6) (Supp. 2001) expressly "does not include declaratory rulings or orders or any fees," so it is hard to see how an agency's exercise of its power to render a declaratory ruling could be viewed as thrusting the agency into the realm of rulemaking.

282. La. R.S. 18:1511.2(B) (Supp. 2001) (emphasis added) (citations omitted).

Thus, regardless of how it is initiated, an advisory opinion issued by the Supervisory Committee expressly does “not constitute a rule” under the APA, and the committee is not bound to follow rulemaking procedures in rendering such an opinion.

An advisory opinion bears some resemblance to an interpretive rule.²⁸³ Conceptually, interpretive rules reside within the rulemaking province of agencies. We are currently assessing adjudication (not rulemaking) in administrative practice, but let us as a working proposition style the advisory opinion an “interpretive *ruling*” and borrow such wisdom as we can from the realm of interpretive rules.

2. “Interpretive” and “Legislative” Pronouncements by Agencies

What is an “interpretive” ruling and how does it differ from an agency’s “legislative” or “policy” statements? Compare the definitions of “interpretive”²⁸⁴ and “legislative” rules given in *Black’s Law Dictionary*:

interpretive rule. *Administrative Law.* 1. The requirement that an administrative agency explain the statutes under which it operates. 2. An administrative rule explaining an agency’s interpretation of a statute. — Also termed *interpretive rule*. Cf. LEGISLATIVE RULE.²⁸⁵

legislative rule. An administrative rule created by an agency’s exercise of delegated quasi-legislative authority. A legislative rule has the force of law. — Also termed *substantive rule*. Cf. INTERPRETATIVE RULE.²⁸⁶

The essential difference is between non-binding agency pronouncements interpreting or explaining the meaning of statutory law on the one hand (an interpretive rule) and, on the other hand, an agency’s promulgation of administrative law in the form of agency regulations with binding legal effect (a legislative rule). An interpretive ruling is more in the nature of a quasi-judicial advisory

283. See Bonfield, *supra* note 107, at 279-85. An interpretive rule “only defines the meaning of a statute or other provision of law or precedent [where] the agency does not possess delegated authority to bind the courts to any extent with its definition.” Model State Admin. Procedure Act § 3-109(a), 15 U.L.A. 45, cmt. (2000).

284. The Federal Administrative Procedure Act uses the term “interpretive,” but this article follows modern practice in referring to “interpretive” rules.

285. Black’s Law Dictionary 824 (7th ed. 1999).

286. *Id.* at 911.

opinion—an opinion rendered in advance of an actual controversy²⁸⁷ that explains the meaning of a law—rather than a quasi-legislative promulgation of law itself. In fact, it has been observed that “[i]nterpretive rules are comparable to opinions issued by state attorneys general. Indeed, they are often prepared by counsel for the agency issuing them.”²⁸⁸

The courts deal very differently with “interpretive” and “legislative” pronouncements by agencies. When an agency engages in “legislative” law-making, it exercises authority (delegated to it by the legislature) to issue law with binding force.²⁸⁹ Courts defer to the agency’s statement of the law since it derives from delegated legislative power.²⁹⁰ When it issues an “interpretive” ruling, however, an agency has no power to make binding statements of law,²⁹¹ and the courts need not defer to the agency’s explanation of the

287. In *Transit Mgmt. of Southeast Louisiana, Inc. v. Comm’n on Ethics for Public Employees*, 703 So. 2d 576, 577 (La. 1997), modified on rehearing, 710 So. 2d 792 (1998), the supreme court captured the non-binding, “interpretive” nature of an advisory opinion in the following passage: “The advisory opinion is simply that—advice. It is not a ruling or action by the Commission that will affect the person whose conduct or status is questioned, and it cannot be enforced by any person. . . . Indeed, there is no justiciable controversy for the courts to decide.” 1999 La. Acts No. 252 attempted legislatively to overrule the Court’s holding of “no justiciable controversy” by adding to La. R.S. 42:1142(A) (Supp. 2001) the following language: “Any advisory opinion issued to any person or governmental entity by the board . . . is subject to the supervisory jurisdiction of the appellate court” The Ethics Administration successfully challenged this language, arguing that the legislature cannot by statute simply deem that a “case or controversy” exists and thereby remove from the courts this critical jurisdictional decision. See *Duplantis v. Louisiana Bd. of Ethics*, 782 So. 2d 583 (La. 2001).

288. *Bonfield*, *supra* note 107, at 282. Interestingly, Attorney General opinions are themselves exempt from APA rulemaking requirements. See also Model State Admin. Procedure Act § 3-116(9), 15 U.L.A. 57 (1981). They are “conceptually similar to interpretive rules,” but enjoy a broader exemption under the APA and additional rationales. *Bonfield*, *supra* note 107, at 419.

289. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1322 (1992), identifies six requirements that must be met in order for a rule to qualify as “legislative,” summarized as follows: an agency possessing delegated statutory authority over the subject matter and the power to make rules with the force of law intentionally exercises that power to promulgate such rules in accordance with procedural requirements. See also 1993 Supplement, *supra* note 107, at 213 n.60a (providing useful analysis of “legislative” and “interpretive” law-making).

290. Anthony, *supra* note 289, at 1327 n.80 (noting that legislative “rules are binding and have the force of law” and that “a court may not review them freely, but must accept them unless they are contrary to statute or unreasonable.”).

291. The Model State Admin. Procedure Act § 3-109, 15 U.L.A. 45 (2000) requires an agency with the authority to issue a binding rule to follow notice and comment rulemaking procedures; it may not rely on the abbreviated procedures applicable to issuance of an interpretive rule. 1993 Supplement, *supra* note 107,

statutory law. In the interpretive context, law is given to the agency in statutory form; the agency is not making law but rather restating or explaining it.²⁹² If a court disagrees with an agency's interpretation, it may substitute its own view of the matter.

When courts do not need to defer to an agency's interpretive statements of law, the agency's position is a weak one, vulnerable to review and reversal by the courts.²⁹³ Where an agency applies the law to a specific set of facts found by the agency, however, the agency's position is stronger because courts defer to an agency's application of the law within its area of primary jurisdiction.²⁹⁴ Thus, ironically, 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 prior warning to the affected party.

The 1981 MSAPA does not require interpretive rules to be promulgated in compliance with notice and comment rulemaking procedures²⁹⁵ for at least two good reasons. First, subjecting interpretive rules to such procedural constraints simply does not work, as has been amply demonstrated by the extraordinary level of noncompliance in states that make the effort to constrain interpretive rulemaking:

[T]here appears to be no means to enforce effectively a requirement that notice and comment procedures be followed in interpretive rule making. That is why agencies in virtually all states requiring notice and comment rule making for interpretive rules have completely ignored that requirement in practice, and have done so with impunity.²⁹⁶

at 134. Federal law takes a different view, allowing an agency with delegated authority to elect either legislative or interpretive rulemaking at its option. *Id.* at 135. In Louisiana, the APA makes no provision for interpretive rules—but the Campaign Finance Disclosure Act does specifically provide for the issuance of advisory opinions by the Supervisory Committee at its initiative and in its discretion. Might this provision be construed in a manner similar to federal law, allowing the Supervisory Committee to issue non-binding interpretive rulings or binding regulatory promulgations at its option? If so, then the Supervisory Committee's use of an advisory opinion would constitute a non-binding statement of the agency's interpretation of the law—an advance insight into how the committee might interpret the law in the future.

292. Anthony, *supra* note 289, at 1324 and cases cited in note 59.

293. 1993 Supplement, *supra* note 107, at 213 n.60a (observing that "a court reviewing the legality of procedurally proper interpretive law-making need not give any deference to such agency action" and "a reviewing court may overturn such law making that is wholly interpretive solely on the ground that the court disagrees with the agency construction of the statute (or other law) involved.").

294. Bonfield, *supra* note 107, at 584-85.

295. Model State Admin. Procedure Act § 3-109(a), 15 U.L.A. 45 (2000). See Bonfield, *supra* note 107, at 283-85.

296. Bonfield, *supra* note 107, at 285.

In California, for example, a supreme court ruling required prior notice and comment before adopting nonlegislative rules. In response, “[m]ost agencies largely ignored the decision.”²⁹⁷ The state legislature fared little better when it tried several years later to mandate prior notice and comment because “[m]any agencies . . . ignored the requirements” while “[o]thers complied with the requirements but issued fewer nonlegislative rules.”²⁹⁸

The supply of interpretive rules is highly “elastic,”²⁹⁹ so imposing additional burdens on agency personnel like “notice and comment will shift the supply curve for nonlegislative rules to the left” and “fewer will be produced.”³⁰⁰ Any reduction in interpretive rules adversely affects the public more than the agency because:

the purpose of nonlegislative rules is to diminish uncertainty. For the most part, the costs of uncertainty are borne by members of the public, not by the agency. For that reason, uncertainty is an externality that agency utility-maximizers need not take into account. Thus an agency may well choose to muddle through without producing any guidance documents, or it may choose to transmit any necessary guidance to its staff through informal intra-agency memoranda, hallway conversations, or other subformal communications. It may feel little or no compulsion to issue a steady flow of publicly available nonlegislative rules.³⁰¹

Far from “protecting” the public, requiring notice and comment rulemaking actually deprives the public and affected parties of important agency guidance on unclear policies.

Thus, the second rationale supporting the MSAPA provision on interpretive rules is an underlying policy assumption that the public benefits when agencies use interpretive rules, which Bonfield states as follows: “The issuance of such rules . . . should be encouraged in the public interest rather than discouraged by subjecting their issuance to unnecessary procedural requirements.”³⁰² Encouraging

297. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 407 (1985) [hereinafter Asimow].

298. *Id.* at 408.

299. “Interpretive rules and policy statements are different from other bureaucratic outputs in one critical respect: a regulatory program can function without them.” *Id.* at 405 (emphasis in original).

300. *Id.* at 406. Imposing procedural burdens on the issuance of interpretive rules carries other negative consequences as well, including reliance on “underground regulations.” Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 55-61 (1992).

301. *Id.* at 405.

302. Bonfield, *supra* note 107, at 289 n.5 (citing *Administrative Procedure Act*:

agencies to issue as many interpretive rules as possible protects the public by giving notice—in advance—of how the agency interprets the laws that it administers. “In the absence of interpretive rules,” by contrast, “agency interpretations would be made on an ad hoc basis in adjudicatory proceedings and applied retroactively. As a result, members of the public would not enjoy the advantage of being forewarned”³⁰³

The Attorney General’s opinion does some disservice³⁰⁴ to the parties who would be most affected by the Supervisory Committee’s advisory opinion, depriving them of advance insight into the agency’s interpretation of the campaign finance laws. In addition, the Attorney General’s sweeping prohibition on advisory opinions may actually accomplish very little—just as the procedural constraints on interpretive rulemaking often accomplish very little because agencies have other avenues by which to achieve the same result. The Supervisory Committee could still apply its interpretation of the “personal” and “political” use of funds in ad hoc decision making and enforcement of the Campaign Finance Disclosure Act. It would do so, however, to the detriment of an individual who is thereby retrospectively regulated, rather than having put everyone on notice in advance (without penalty) of the Board’s view of these matters.

Another reason for encouraging rather than prohibiting interpretive rulings by agencies is the ready availability of effective post-hoc remedies. As already noted, an agency’s inappropriate interpretation of the law can be corrected by a court’s *de novo* review of the matter.³⁰⁵ And even before resorting to litigation, anyone dissatisfied with an agency’s interpretive ruling can petition the agency to change it through a conventional rulemaking process with full notice and comment protections.³⁰⁶

Hearings Before the United States Senate Subcomm. on Administrative Practice and Procedure on S. 1663, 88th Cong. 145, 2d Sess. (1964)). See also Hearings Before the United States Senate Subcomm. on Administrative Practice and Procedure on S. 1160, S. 1336, S. 1758 and S. 1879, 89th Cong. 384, 1st Sess. (1965).

303. Bonfield, *supra* note 107, at 289 (citations omitted).

304. Michael Asimow contends that requiring “agencies to employ notice and comment procedures before adopting many nonlegislative rules . . . would discourage agencies from adopting nonlegislative rules and thus would dramatically disserve the public interest.” Asimow, *supra* note 297, at 381. Asimow also contends that “the costs of mandatory advance public participation in the making of nonlegislative rules outweighs the benefits.” *Id.* at 382.

305. Bonfield, *supra* note 107, at 581 (“[C]ourts may normally substitute their judgment *de novo* for that of the agencies on issues of law” because “legislatures usually do not delegate authority to agencies to bind the courts, to any extent, with agency interpretations of law.”).

306. APA § 953(C) (1987 and Supp. 2001).

3. Distinguishing "Interpretive Rules" and "Policy Statements"

The Supervisory Committee wanted to explain the meaning of the statutory phrase "personal use unrelated to a political campaign or the holding of a public office or party position."³⁰⁷ The Attorney General found that the Supervisory Committee had gone beyond merely "explaining" the statutory language when it articulated a "primary purpose" test and adopted "the standard used by the Federal Election Commission." The pertinent question is whether these pronouncements constituted substantive changes in the law governing campaign finance violations (therefore requiring promulgation under "legislative" rulemaking procedures) or whether they are best regarded as non-binding "interpretive" language. To answer this question we must first articulate a distinction between "interpretive rules" and "policy statements:"

An interpretive rule clarifies or explains the meaning of words used in a statute, a previous agency rule, or a judicial or agency adjudicative decision. A policy statement, on the other hand, indicates how an agency hopes or intends to exercise discretionary power in the course of performing some other administrative function. For example, a policy statement might indicate what factors will be considered and what goals will be pursued when an agency conducts investigation, prosecution, legislative rulemaking, or formal or informal adjudication.³⁰⁸

Applying the distinction in practice remains an elusive enterprise: "[t]rying to distinguish interpretive rules from policy statements is as difficult as trying to separate legal issues from discretionary issues (or perhaps those are two facets of the very same enigma)."³⁰⁹

The degree of specificity in statutory language that an advisory opinion seeks to explain is critical. If the legislative terminology is sufficiently specific, then the agency can fairly be said to "extract" meaning from the statute. But if the statutory language is too general to supply much intrinsic meaning, then the agency effectively "creates" new law that must be promulgated through legislative rulemaking procedures.

For example, the Federal Trade Commission successfully relies on the statutory phrase "unfair or deceptive acts or practices" when it articulates specific examples of misrepresentation or deception. These

307. La. R.S. 18:1505.21(I)(1) (Supp. 2001).

308. Asimow, *supra* note 297, at 383 (citations omitted).

309. Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 Duke L.J. 1497, 1505 (1992).

“statutory words are broad but nevertheless have some tangible meaning when applied in a ‘negative’ way, that is, to condemn acts which by common usage or general acceptance are ‘unfair or fraudulent or tricky.’”³¹⁰ By contrast,

A rule that purported to interpret a vacuous statutory term like “just and reasonable” or “public interest, convenience and necessity” would not be interpretive; if it were issued by legislative rulemaking, it would be a legislative rule, but if not, such a rule would be a policy statement.³¹¹

Whether the advisory opinion at issue in this discussion should be viewed as interpretive or legislative depends upon the degree of tangible meaning we attribute to the “personal use” terminology. The reference to “personal use unrelated to a political campaign or the holding of a public office or party position” seems more “tangible” rather than “vacuous” terminology, and accordingly, it should support explanatory interpretive pronouncements by the Supervisory Committee. Whether the terminology supports the committee’s adoption of a “primary purpose” test and of the Federal Election Commission standard remains a close question. Because it is such a close question in this instance, the Attorney General’s opinion should not be regarded in the future as a blanket prohibition on agencies’ use of advisory opinions to clarify the meaning of statutes they enforce.

4. Conclusion

Denying an agency the use of an advisory opinion to tell the public how it will interpret laws within the agency’s area of expertise seems needlessly restrictive, particularly since an advisory opinion has only prospective effect. By announcing to the public the agency’s interpretation of the law on such matters in the future (and not applying any punitive measures against previous conduct), the advisory opinion is “fairer” than adjudication in a contested case (where someone pays the price of not having anticipated the new agency law). The advisory opinion is also more efficient than rulemaking, enabling an agency (such as the Board of Ethics) to address an area of need both quickly and comprehensively. If, as

310. Anthony, *supra* note 289, at 1339 n.161 (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553, 55 S. Ct. 837, 853 (1935) (Cardozo, J., concurring)).

311. Anthony, *supra* note 289, 1325 n.62. *But see* *Friedrich v. Sec’y of Health & Human Servs.*, 894 F.2d 829, 837 (6th Cir. 1990), where an agency’s explanation of the relatively vacuous phrase “reasonable and necessary” was nonetheless held to be interpretive in nature.

suggested, advisory opinions are indeed fairer than adjudication and more efficient than rulemaking, then denying an agency that capability seems an inappropriate and unwise restriction of administrative discretion.

D. Separation of Prosecution and Adjudication Functions in Agency Counsel

The Louisiana Supreme Court significantly altered administrative practice with its decisions in *Allen v. State Board of Dentistry*³¹² and *Georgia Gulf Corp. v. Board of Ethics for Public Employees*.³¹³ Administrative practice in Louisiana now requires a separation of functions between the prosecution and adjudication tasks performed by agency counsel, but the precise dimensions of the separation remain in a state of jurisprudential development.³¹⁴

Louisiana's APA deals most directly with the separation of prosecutorial and adjudicatory functions in its prohibition of ex parte communications with agency decision makers:

[M]embers or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a case of adjudication . . . shall not communicate . . . in connection with an issue of fact or law . . . with any officer, employee, or agent engaged in the performance of investigative, prosecuting, or advocating functions, except upon notice and opportunity for all parties to participate.³¹⁵

Both the Federal and Model State Administrative Procedure Acts prohibit such communication by a presiding officer or employee charged with decision making responsibility, except upon "notice and an opportunity for all parties to participate."³¹⁶ The federal and model state acts also prohibit agency personnel who have performed investigative or prosecutorial functions from advising the agency decision maker.³¹⁷ This would prohibit agency counsel who have been engaged in these functions from counseling the agency's adjudicators, but would apparently still allow other agency lawyers

312. 543 So. 2d 908 (La. 1989).

313. 694 So. 2d 173 (La. 1997).

314. Compare *Georgia Gulf Corp. v. Bd. of Ethics*, 694 So. 2d 173 (La. 1997), with *In re Ronald Bankston and Lounges*, 761 So. 2d 716 (La. App. 1st Cir. 2000).

315. APA § 960(A) (1987).

316. Administrative Procedure Act § 554(d), 5 U.S.C. § 554 (1994); Model State Admin. Procedure Act § 4-213(a), 15 U.L.A. 92 (2000). See generally Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759 (1981).

317. Administrative Procedure Act § 554(d), 5 U.S.C. § 554 (1994); Model State Admin. Procedure Act § 4-214(a), 15 U.L.A. 94 (2000).

to play an advisory role. But the MSAPA prohibits a "person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in an adjudicative proceeding" from assisting or advising "a presiding officer in the same proceeding."³¹⁸ This last prohibitory language apparently would prevent subordinate lawyers in an agency's legal division from counseling a presiding officer where the chief legal counsel of the agency has served as investigator, prosecutor, or advocate.

IV. WHAT LIES AHEAD

What more might be done to improve administrative practice in Louisiana? Several statutory reforms could be made (all of them compatible with Louisiana's current constitutional regime) to significantly enhance the fairness, openness, and ease of state administrative practice.

A. Advance Notice of Rulemaking

Agencies should alert the public to possible rulemaking initiatives at the earliest stages of agency consideration, even before publication of a Notice of Intent in the Louisiana Register. Advance notice of proposed rulemaking involves publishing a staff report or advisory group recommendation and inviting public comment while the draft is still in development.³¹⁹ The 1981 MSAPA provides for notice of possible rules and the solicitation of public comments by state agencies,³²⁰ including provision for a rulemaking docket that lists "each possible rule currently under active consideration within the agency" and "the name and address of agency personnel with whom persons may communicate with respect to the matter."³²¹ For two decades the federal government has required agencies to give public

318. Model State Admin. Procedure Act § 4-214(b), 15 U.L.A. 94 (2000).

319. See discussion in James T. O'Reilly, *Administrative Rulemaking: Structuring, Opposing, and Defending Federal Agency Regulations* 72-75 (1983) [hereinafter O'Reilly].

320. Model State Admin. Procedure Act § 3-101(a), 15 U.L.A. 34 (2000): "In addition to seeking information by other methods, an agency . . . may solicit comments from the public on a subject matter of possible rule making under active consideration within the agency by causing notice to be published . . ." Several states (Indiana, Maryland, New Jersey, New York, Tennessee, Virginia, Washington) have incorporated similar provisions into their APA as a voluntary component of the rulemaking process. See 1993 Supplement, *supra* note 107, at 94.

321. Model State Admin. Procedure Act § 3-102(b), 15 U.L.A. 35 (2000). For state laws incorporating similar requirements, see Ariz. Rev. Stat. Ann. § 41-1021 (West 1999); N.Y. A.P.A. Law § 202-d (McKinney 1995 and Supp. 2001); Wash. Rev. Code Ann. § 34.05.315 (West 1990).

notice of rules that are under development or being considered for withdrawal during the next twelve months by publishing a regulatory agenda and a central calendar.³²² The concept is embodied in federal legislation requiring the Consumer Product Safety Commission to commence its rulemaking proceedings with the publication of an advance notice of proposed rulemaking.³²³

Advance notice would do much to "level the playing field" in state administrative practice. Agency personnel are often predisposed to consult industry representatives in advance of rulemaking because of a measure's obvious relevance to the industry's economic interests.³²⁴ But the same agency staff may be less sensitive to the need for advance consultation with representatives of a broader public, whose more "diffuse" interests are less obviously affected. Well-financed interests can afford to employ a corps of in-house and contract personnel who maintain relationships with agency staff and monitor their actions. These monied interests enjoy corresponding advantages over their less well-funded opponents in the administrative process.

And what an advantage it is to gain access to agency personnel when a rule is still in its earliest formative stages! Before pen is set to paper, before policy is even preliminarily determined by a draft, before staff become invested in a particular approach to the problem—that is when the most meaningful influence can be had.³²⁵ Advance notice of rulemaking promotes equal access to agency process—for everyone, not just for the privileged few who can afford to maintain a year-round presence with agency staff.

B. Negotiated Rulemaking

Advance notice of rulemaking leads naturally into another worthwhile innovation—negotiated rulemaking. By publicizing in advance the rulemaking initiatives it is considering, an agency invites

322. Exec. Order No. 12291, 3 C.F.R. 127 (1981). See discussion of agendas and calendars in O'Reilly, *supra* note 319, at 70-72.

323. Consumer Prod. Safety Act, 15 U.S.C. § 2058(a) (1994).

324. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1775 (1975) ("[T]he content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence").

325. Bonfield discusses ("Prerule-making Notice and Comment") how public input at the earliest stage of policy formulation is "more likely to influence an agency than public input in later stages of the rule-making process." Bonfield, *supra* note 107, at 157-61. Particularly after the agency publishes notice of its proposed rule in the state register, "agency personnel may have psychologically committed themselves to the specific text of the proposed rule. Under those circumstances, it is unlikely that an agency will significantly revise a rule as a result of subsequent public comments." *Id.* at 157-58 (citing Stewart, *supra* note 324, at 1775).

the affected interests to sit down with agency personnel and with other stakeholders for a pre-publication discussion of the proposed rule.³²⁶ In the conventional notice and comment rulemaking, critical commentary and the clash of interests frequently follow publication of a Notice of Intent, when parties are confronted with the text of a proposed new rule that has already been drafted with no public input.³²⁷ Negotiated rulemaking, on the other hand, involves interested parties in a pre-text policymaking dialogue, working toward consensus on a proposed new rule.

Congress enacted the Negotiated Rulemaking Act of 1990³²⁸ to encourage federal agencies to use negotiated rulemaking (sometimes called "regulatory negotiation" or "reg-neg").³²⁹ This approach to rulemaking had already surfaced in environmental agency proceedings. Based on earlier experiences, the Administrative Conference of the United States recommended various criteria for agencies to consider in evaluating whether to engage in negotiated rulemaking.³³⁰ The Negotiated Rulemaking Act uses permissive language that allows parties to the proceeding to vary their approaches. A willing state agency might engage in negotiated rulemaking even without the benefit of a statutory framework.³³¹

326. The Center for Public Policy Dispute Resolution at the University of Texas School of Law has published a "Texas Negotiated Rulemaking Deskbook" that discusses what negotiated rulemaking is (and is not), its benefits and drawbacks, criteria for identifying good candidates for negotiated rulemaking, and a step-by-step guide to the process. Information about obtaining copies can be found on the Center's website, at <<http://www.utexas.edu/law/acadprogs/cppdr/pubs>> (visited Oct. 23, 2001).

327. Regarding the conventional consequences of notice-and-comment rulemaking, see Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *Geo. L.J.* 1 (1982).

328. Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. § 561-570 (1994)).

329. Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* 185 (Congressional Quarterly, 1999) (tracing the origins of reg-neg "back nearly sixty years to the Fair Labor Standards Act . . .").

330. Administrative Conference of the United States Recommendations 82-4 and 85-5, 1 C.F.R. 305.82-4 (1983), 305.85-5 (1986). The criteria are embodied in the Act at 5 U.S.C. § 563 (1994).

331. The Public Law Center (TPLC) participated in just such a negotiated rulemaking process in 1989. 1989 La. Acts No. 719, codified at La. R.S. 40:2009.23 (2001) (originally enacted as La. R.S. 40:2009.51), directed DHH to promulgate a system of intermediate sanctions for enforcement of nursing home regulations in order to bring Louisiana into compliance with directives of the Omnibus Budget Reconciliation Act of 1987. The legislative battle preceding passage of Act 719 was hard fought and highly controversial; the promulgation of regulations promised to be equally contentious. DHH elected to draft the regulations by convening interested stakeholders in a task force that consisted of TPLC and its clients, Citizens for Quality Nursing Home Care and the Louisiana Chapter of the American Association of Retired Persons; the Louisiana Nursing

C. Rulemaking at the Local or Municipal Level of Government

Many of the same policy arguments in favor of notice and comment rulemaking at the state level apply with equal force to the promulgation of regulations by local government, but rarely do APA-style protections apply. In most local jurisdictions across the country, for example, the Director of the Department of Finance could retire to the office on a Tuesday afternoon, affix a signature at the bottom of a sheaf of papers, and on Wednesday begin collecting city taxes pursuant to a new body of regulatory law. Why should that continue to be the case at the municipal level of government when we have long since prohibited such opaque and undemocratic practices at the state level?

The City of New Orleans leads the way in Louisiana with recent revisions to its Home Rule Charter requiring a notice and comment procedure comparable to that found in the APA.³³² An ordinance implementing the Home Rule Charter mandate establishes procedures for the publication of proposed and final municipal regulations.³³³ The procedures apply to any "municipal entity," which includes "any city board, commission, department, officer, or other entity of city government, including but not limited to public benefit corporations."³³⁴ A municipal entity proposing regulations must publish notice of its intent at least once in the official journal, hold a public hearing, and consider "all comments and suggestions, written or oral, made at or as a result of the aforesaid public hearing . . . in formulating the version of proposed regulations to be submitted

Home Association, representing for-profit homes; and the Louisiana Association of Homes and Services for the Aged, representing nonprofit homes. A series of ten or more meetings, chaired by a DHH staff member, resulted in a consensus on all but a few items, and the regulations were ultimately promulgated with little opposition. 16 La. Reg. 310, 315, 317, 318 (1990). The success of this procedure led DHH to reconvene the task force participants in a renewed rulemaking negotiation when 1990 La. Acts No. 859, codified La. R.S. 40:2009.11, 2009.15, 2009.17, 2009.20 (2001), directed the agency to promulgate enforcement procedures and a schedule of fines of up to \$5000 per day. Once again, the process yielded regulations that were promulgated with minimal opposition. 18 La. Reg. 189 (1992). These successful negotiations in a potentially difficult subject area were conducted voluntarily by DHH and the interested parties without the benefit of any statutory construct.

332. Home Rule Charter of the City of New Orleans § 4-107(3) (effective Jan. 1, 1996), available at <<http://www.nocitycouncil.com/content/TheCouncil/CharterContent/Sec4101-109.asp>>.

333. M.C.S., Ord. No. 17,611 (June 20, 1996) (codified as New Orleans, La., Code of Ordinances art. XI, § 2-1000 (1996)).

334. New Orleans, La., Code of Ordinances art. XI, § 2-1000(a)(1) (1996).

for consideration by the council."³³⁵ Within thirty days after its public hearing, the entity must "submit to the chief administrative officer and the council the proposed regulations and a report detailing the comments and suggestions made at the municipal entity's public hearing," as well as an assessment of the fiscal impact.³³⁶ Copies of the regulations must be available on the premises and at the New Orleans Public Library for public review.³³⁷ The regulations are then approved or disapproved by the council, becoming effective forty-five days after submission to the council if it takes no action.³³⁸ Final regulations must be published in the official journal or in a city register.³³⁹ Emergency adoption is permissible when "an imminent peril to public health, safety, or welfare requires immediate implementation of new or amended regulations."³⁴⁰

Legislation mandating APA-style procedures for the adoption of rules at the local or municipal level of government would need to be crafted with careful attention to several constitutional provisions. Article VI, Section 6 prohibits new laws affecting the structure or distribution of powers within a home rule jurisdiction.³⁴¹ Article VI, Section 14 prohibits new laws that would increase the "financial burden" on local government.³⁴² These constitutional provisions present challenges, but not necessarily insurmountable obstacles, to the implementation of some statewide mandate for rulemaking by local government entities.

V. CONCLUSION: THE GOOD, THE BAD, AND THE UGLY

CC 73 laid a sound foundation for administrative practice in Louisiana. Some of its constitutional reforms have endured or even flourished, but in many instances the legislature has failed to build on those reforms—or worse, has reversed them.

335. *Id.* at § 2-1000(c).

336. *Id.* at § 2-1000(d).

337. *Id.* at § 2-1000(e).

338. *Id.* at § 2-1000(g).

339. *Id.* at § 2-1000(h).

340. *Id.* at § 2-1000(i).

341. "The legislature shall enact no law the effect of which changes or affects the structure and organization or the particular distribution or redistribution of the powers and functions of any local governmental subdivision which operates under a home rule charter." La. Const. art. VI, § 6.

342. "No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision" unless the legislature appropriates funds or provides a local source of revenue to support the new requirement. La. Const. art. VI, § 14(A).

What is the “good” news in administrative practice? Two of CC 73’s most significant accomplishments were the new constitution’s exemplary principles of openness in agency process and a much-needed executive branch reorganization. Since 1974, technological developments such as the Internet have significantly enhanced the public’s access to agency law, which is more readily available today than ever before. Louisiana’s public records and open meetings laws continue to be strong vehicles for protecting the public’s right of access to public information and deliberations.³⁴³ However, with regard to reorganization of the executive branch—the second great administrative achievement of CC 73—we find a mixed picture.

In the eyes of some beholders, the “bad” news is backsliding on the reorganization and reduction of executive branch agencies, which began to grow in number almost immediately after the initial implementation of CC 73’s mandate. But undeniably, some new agencies now on the scene, such as the Department of Environmental Quality, respond to important new needs that were barely on the radar screen in 1974. A blanket indictment of agency growth is suspect on its face. Proper evaluation of developments in this area should be more discrete, looking at specific entities created since the 1970s and assessing their role in state government on a case-by-case basis. A balanced evaluation would also have to recognize that the legislature continues to eliminate various inactive or dormant boards and commissions from time to time.³⁴⁴

The truly “bad” news in administrative practice has been the infiltration of special interest legislation into the APA under the guise of administrative reform. Special regulations that govern environmental policymaking have undermined uniformity in administrative practice and diminished the efficiency and effectiveness of environmental agencies.³⁴⁵ Another regrettable

343. 2001 La. Acts, Reg. Sess., No. 882 consolidated and enumerated for the first time in the Public Records Act all exceptions, exemptions, and limitations scattered throughout the revised statutes. The legislation lays a predicate for comprehensive review and revision of the many exceptions, exemptions, and limitations, which might lead in a subsequent session to the elimination of some provisions and a further strengthening of the public records doctrine in Louisiana.

344. See, e.g., 2001 La. Acts, Reg. Sess., No. 1137.

345. Bonfield raises the question in his 1993 Supplement whether it is “time now to abandon such generally applicable administrative procedure acts in favor of agency-specific procedural legislation?” 1993 Supplement, *supra* note 107, at 4-5. He notes that “any effort to abandon general APA’s in favor of separate administrative procedure legislation specially tailored for the circumstances of each individual agency would fly in the face of the extensive earlier experience of our federal and state governments.” *Id.* at 5. Those experiences and earlier empirical studies suggest that general and comprehensive APA legislation strikes the right balance “between the need for adequate procedural protection of private rights and the need for efficient and effective government.” *Id.* Bonfield acknowledges “the

development has been the steady growth in time needed to promulgate regulations under the APA, making it more difficult and expensive for agencies to perform their functions.³⁴⁶

One "ugly" aspect of administrative practice is legislative excess in the use of concurrent regulations to suspend and amend agency regulations. Section 969 of the APA represents a perversion of the constitutional suspension power drafted by CC 73 delegates. The legislature should not be in the business of circumventing the separation of powers by rewriting agency regulations. The courts must decide whether *Chadha* principles apply to the legislative oversight of agency rulemaking in Louisiana, and if so, whether statutory suspension and other legislative vetoes pass constitutional muster.

Equally "ugly" in adjudication practice are the final, unappealable decisions rendered by ALJ's. Such determinations remove decision making from the realm of agency expertise and undermine the administrative adjudication process.

The APA's treatment of fees is, if not ugly, at least inelegant. In an ideal world, some effort might be made to clean up the historical anomaly that now has "fees" excluded from the definition of a "rule," but nonetheless subjects them to the same rulemaking procedures that govern the promulgation of a rule. The APA might also be amended to clarify and reaffirm agency authority in issuing advisory opinions—a desirable capability that could be discouraged by the Attorney General's opinion restricting the practice. Finally, the proper separation between prosecutorial and adjudicative functions ought not to be elaborated entirely through jurisprudence. The APA should address these matters affirmatively in new legislation that delineates appropriate procedures in this area of agency practice.

Not every improvement depends upon new state legislation. More could be done to accommodate openness and participation in rulemaking at the local level of government, where most regulatory law still emerges with little public notice or scrutiny of the process. State legislation might help in achieving this objective, but localities need not await such instruction from above in order to begin moving in that direction, as evidenced by the City of New Orleans' process for promulgating municipal regulations. Similarly, in the realm of negotiated rulemaking, agencies at both the state and local levels of government can introduce consensus-building procedures into the

desirability, in appropriate instances, of special procedural legislation concerning a particular agency" but nonetheless concludes "that for most situations general APAs have distinct advantages over agency-specific legislation." *Id.*

346. Compare, for example, Louisiana's minimum of one hundred days to promulgate new regulations with the substantially shorter time periods required in other states. 1993 Supplement, *supra* note 107, at 96.

rulemaking process on their own initiative. They need not await a legislative framework in which to implement this worthy objective. State agencies could also institute advance notice of rulemaking at their own initiative by the simple expedient of periodically publishing in the Louisiana Register a list of matters under consideration and the name of a contact person within the agency.

Agencies could also do more to put their own house in order by taking care of "unfinished business." The Office of State Register should move as quickly as possible to complete the codification of state regulations in the Louisiana Administrative Code and thereafter to supplement and revise it "at least once every two years."³⁴⁷ Every agency in state government should comply with the APA's directive to "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."³⁴⁸ Instead, "most" agencies appear out of compliance.³⁴⁹

This "silver anniversary" review of administrative practice under the 1974 Constitution has revealed a trend (accelerating in recent years) toward weakening and obstructing the policymaking prerogatives of agencies. In practical effect if not by design, numerous aspects of administrative structure and process have been rendered less vigorous today than when the new Constitution was adopted in 1974. And as a subordinate theme, many of the measures undermining the role of agencies appear responsive to interests whose particular focus is on environmental policymaking.

These developments are not the "legacy" of CC 73. The 1974 Constitution provided a good framework for reform and progress in administrative practice. Not all of the legislation enacted since 1974 has served the constitution well, but that is no reflection on the work done by CC 73 delegates and by such major staff contributors as Professor Lee Hargrave, the honoree of this symposium edition. A good constitution simply provides the framework within which voters and state officials subsequently implement their own ad hoc policy judgments. The battle for good policy did not end with CC 73. It just began then, and it is still underway.

347. APA § 954.1(A) (1987 and Supp. 2001).

348. APA § 962 (1987).

349. "Most agencies . . . have not complied with the statutory duty to issue the necessary procedural rules for issuing declaratory orders," despite the apparently mandatory nature of the language. Murchison, *supra* note 123, at 878 n.200.