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WHEN ADMINISTRATIVE LAW JUDGES RULE THE WORLD:

***Wooley v. State Farm* – Does A Denial Of Agency-Initiated Judicial Review Of ALJ Final Orders Violate The Constitutional Doctrine Of Separation Of Powers?**

April Rolen-Ogden

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As one scholar wisely noted, "at the very minimum, the availability of agency-initiated judicial review seems implicit to a constitutional scheme of ALJ finality."¹ Louisiana is the only state in the nation with an Administrative Procedure Act (hereinafter APA) specifically precluding agency-initiated judicial review of ALJ final orders. In *Wooley v. State Farm*,² the Louisiana Supreme Court faced the issue of whether or not such an administrative scheme comports with the constitutional doctrine of separation of powers. Depending on the court's ultimate conclusion, the Louisiana Legislature would either be praised for its ingenuity or chastised for substituting efficiency for inherent principles. This case will be analyzed and followed very closely by administrative and constitutional scholars, lawyers, and legislators around the country because Louisiana's unique APA places it on the brink of the modern administrative state.

The Louisiana Supreme Court ultimately held that both amendments to Louisiana's APA are constitutional.³ It is the contention of this comment that a proper analysis in *Wooley* required

1. Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 Admin. L. Rev. 53, 66 (2004) [hereinafter Rossi, *Final, But Often Fallible*].

2. This matter was directly appealed from the District Court to the Louisiana Supreme Court, so there is no appellate court citation. See District Court Opinion in the *Wooley v. State Farm* Case, No. 502-311, available at http://biotech.law.lsu.edu/la/briefs/state_farm_dc.htm (last visited Sept. 15, 2005) (hereinafter *Wooley* District Court Opinion).

3. *Wooley v. State Farm*, 04-0882 (La. 1/19/2005), 893 So.2d 746, 772 (hereinafter *Wooley* State Supreme Court Decision).

a ruling that the denial of agency-initiated judicial review in a central panel system with ALJ finality is unconstitutional because it impermissibly infringes on both the judicial and executive branches. Yet, the court correctly determined that there is nothing unconstitutional about the creation of Louisiana's central panel, which grants ALJs final order authority.

Agencies must be afforded some mechanism to perform their delegated duty to make and enforce law and policy, while respecting the fairness concerns of regulated entities and individuals. This comment illustrates the detrimental effect of focusing too much power in the ALJs with no opportunity for judicial review when the ALJs rule against the agencies involved. Also, this comment offers a critique on the court's rationales and ultimate decision, while simultaneously analyzing issues that were either not brought to the attention of the court, missed, or ignored by the court in *Wooley*. In an attempt to correct the damage wreaked by this decision, this comment explores two other states' APAs and their solutions to the issues presented. A constitutional scheme would respect both sides of this debate by allowing ALJ finality, while also providing for agency-initiated judicial review, which encompasses differing standards of review for issues of fact, issues of law, and issues of policy.

Section I provides the necessary background information on the administrative law aspects of this debate, while Section II examines Louisiana's current APA prior to discussing the *Wooley* matter in all its phases. Section III analyzes the constitutionality of Louisiana's denial of agency-initiated judicial review in a system of ALJ finality. Section IV engages in a comparative analysis between Louisiana and the Carolinas to fully comprehend the gravity of the constitutional concerns at stake. Finally, Section V offers two proposals for a constitutionally sound APA. Both proposals are equally capable of success in achieving the worthy goals attempted by the Louisiana legislature.

I. THE ORIGINS AND TRENDS OF MODERN ADMINISTRATIVE LAW

A. The Origins and Development of the Traditional Administrative Procedure Act

Congress and state legislatures alike delegate to administrative agencies the authority to promulgate, enforce, and interpret regulations for recently passed statutes. One of the primary vehicles for exercising this delegated duty includes administrative adjudications, where agencies often make and enforce law and policy. Since their inception, administrative agencies have been an anomaly because of their vast blending of various roles in one entity. These roles include that of investigator, prosecutor, regulator, and adjudicator.⁴

Most states modeled their APAs on the federal APA.⁵ Prior to the enactment of the federal APA, the political debate focused on the degree of division between the agency's traditional regulatory and adjudicatory functions.⁶ As a result, many people advocate reform of the traditional agency system.⁷ This reform is usually centered on separating the adjudicatory function from other agency functions so the system will be fairer.

Unlike many recent state APA amendments, the federal APA does not remove administrative adjudications from the agency itself, despite many unsuccessful attempts at reform. Instead, federal hearing officers are placed outside of the control of agency officials

4. Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 La. L. Rev. 431, 443 (1999) [hereinafter Bybee, *Agency Expertise*]. at 443.

5. *Id.* at 434.

6. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 Admin. L. Rev. 1355, 1363 (2002) [hereinafter Flanagan, *Redefining the Role*].

7. See generally Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 Notre Dame L. Rev. 965 (1991) (hereinafter Gifford, *Adjudication*); See generally F. Scott McCown and Monica Leo, *When Can an Agency Change the Findings or Conclusions of an ALJ? Part Two*, 51 Baylor L. Rev. 63 (1999).

engaged in prosecuting or investigating claims.⁸ The responsibility of the federal hearing officers is to make an initial decision, which later becomes part of the record. It is this record that is submitted for final review by the agency head or commission.⁹ With this structure, the agency is left with the discretion to follow the hearing officers' recommendation or to make different findings of fact, conclusions of law, and thus reach a different result than the hearing officer did.¹⁰ As a result, under the federal APA, the ultimate decision remains with the agency.

In 1961, the National Conference of Commissioners on Uniform State Laws enacted the Model State Administrative Procedure Act.¹¹ The 1961 Model State APA did not address the primary concern of its federal counterpart regarding the seemingly coercive and inefficient relationship between agencies and hearing officers. However, in 1981, a revised APA was issued.¹² This 1981 Model State APA adopted the prior federal APA standard of allowing the hearing officer or administrative law judge's (ALJ) decision to be an initial conclusion for the agency head to consider during his or her review of the matter.¹³

B. Three Different Models of Administrative Adjudication

Despite differing terminology used by scholars, there are three generalized models of administrative adjudication in the several states.¹⁴ First, the agency staff approach, which is also known as the

8. Flanagan, *Redefining the Role*, *supra* note 6.

9. *Id.* at 1364; See also Daniel J. Gifford, *Adjudication*, *supra* note 7, at 970.

10. See Flanagan, *Redefining the Role*, *supra* note 6, at 1364.

11. See Bybee, *Agency Expertise*, *supra* note 4, at 444.

12. See Flanagan, *Redefining the Role*, *supra* note 6, at 1364.

13. *Id.* at 1363-64.

14. William B. Swent, *South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both?*, 48 S. C. L. Rev. 1, 2 (1996) (citing Malcolm C. Rich & Wayne E. Brucar, *The Central Panel System for Administrative Law Judges: A Survey of Seven States* 10-11 (1983))(hereinafter Swent, *South Carolina's ALJ*). See also Rossi, *Final, But Often Fallible*, *supra* note 1, at 56-58 (citing William R. Andersen, *Judicial Review of State Administrative Action – Designing the Statutory Framework*, 44 Admin. L. Rev. 523, 555 (1992)).

internal model, renders the ALJs the least amount of decisional independence.¹⁵ This is because the ALJs are operating entirely within the agency. The ALJ decision is merely a suggestion, which is subject to acceptance or rejection by the agency head or commission.¹⁶

Second, the central panel approach provides for full separation between agencies and ALJs. Traditional agency adjudications are not conducted by the agency involved in the matter; instead, the adjudications are managed and controlled completely outside of the agency involved.¹⁷ Central panel systems vary from state to state. As a generalized notion, a central panel is a non-political, merit-protected agency that is independent of the various state agencies.¹⁸ This independence allows the central panel to perform agency adjudications so that the ALJs will not feel compelled to render favorable decisions to the agencies involved.

Finally, the "administrative court" model, which is also known as the external model, is the most controversial approach. ALJs have the greatest amount of autonomy under this approach because they have the authority to issue final and immediately appealable decisions.¹⁹ Review of such decisions is not open to the traditional agencies. Instead, these decisions go directly to a reviewing court in case of conflict.²⁰ An APA system that grants such ALJ authority is a system of "ALJ finality" or "ALJ final order authority." In comparing these three models, Professor Rossi noted that in contrast to the first two models, "the agency effectively submits to binding arbitration before the ALJ" with this external approach.²¹ There are only four states which utilize this model: Louisiana, Florida, South Carolina, and Missouri.²²

15. *Id.*

16. See Rossi, *Final, But Often Fallible*, *supra* note 1, at 56-57.

17. *Id.* at 57. See also Swent, *South Carolina's ALJ*, *supra* note 14.

18. See Rossi, *Final, But Often Fallible*, *supra* note 1, at 57.

19. *Id.* at 58.

20. *Id.*

21. *Id.*

22. *Id.*

C. The Trend Towards Central Panels

The concept of central panels in administrative agencies is not as new and revolutionary as one might think. In 1945, California was the first state to adopt a central panel for its administrative agencies.²³ Nearly forty years later, six other states joined California in adopting central panels, including Colorado, Florida, Massachusetts, Minnesota, New Jersey and Tennessee.²⁴ By 2002, the total number of states employing central panels was twenty-five,²⁵ including Louisiana.²⁶

There are two major policy reasons for using central panels, both of which are inherently based upon the structure and nature of traditional agency adjudications. The first reason is the lack of public confidence in the administrative adjudication process.²⁷ This was certainly an important impetus for the amendments to Louisiana's APA as noted by LSU Law Professor Paul R. Baier in his amicus curiae brief to the Louisiana Supreme Court in the *Wooley* matter.²⁸ Professor Baier argues that the vast blending of the roles of regulator, investigator, and adjudicator in the agency as one entity leaves the public with "an impression of bias and unfairness."²⁹

Concern over this public sentiment of agency bias is strengthened by Professor Daye's empirical analysis of ALJ decisions and judicial review in North Carolina prior to the 2000 amendments to its APA.³⁰ One of his conclusions is that generally individuals do not succeed in

23. *Id.* at 57.

24. *Id.*

25. *Id.*; See also Flanagan, *Redefining the Role*, *supra* note 6, at 1357 (In addition to those listed in the text above, the other states with central panels include Arizona, Georgia, Iowa, Kansas, Michigan, Missouri, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington, Wisconsin and Wyoming).

26. *Id.*

27. See Swent, *South Carolina's ALJ*, *supra* note 14, at 7-8.

28. Brief of Amicus Curiae Paul R. Baier at 13-14, *Wooley v. State Farm* (hereinafter Amicus Baier).

29. *Id.*

30. Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. Rev. 1571, 1577 (2001) [hereinafter Daye, *Powers of Administrative Law Judges*].

administrative adjudications.³¹ This conclusion is based upon the fact that seventy-six percent of the 3,470 administrative hearings conducted by the Office of Administrative Hearings in North Carolina from 1985 through 1999 favored the agencies involved.³² Thus, the implication is that when the public participates in the administrative adjudication process and only succeeds against the agencies involved twenty-four percent of the time, such a result discourages the public's confidence to the point of their frustration rendering them unwilling to even try pressing their case.

Even though this empirical study illustrates an important policy concern that must be addressed by a fair APA system, there are two limitations to Professor Daye's study. First, the merits of the individual cases on which this data is based are not taken into account.³³ As a result, there is no indication as to the number of cases in which the result against the regulated entity or individual was correct according to the facts and applicable law. Second, settled cases are not accounted for in this study.³⁴ Thus, there is no indication of how such cases would affect the findings of this study. Despite these minor limitations, however, it is quite clear that the trend towards central panels is growing because of the public's perception of the inherent unfairness in traditional agencies' blended roles, as well as in the agencies having complete control over ALJs.

The second major policy reason for the trend towards central panels is the need for increased ALJ independence. These two calls for reform are closely related in that increased ALJ independence is intended to remedy the lack of public confidence. If ALJs are completely separated from the individual agencies' control, then the public's perception of fairness improves, while agency bias is lessened contemporaneously.³⁵

As a result of the interconnected nature of these two policy concerns, the Louisiana legislature intended to increase ALJ independence as well. As Professor Baier noted, "it is quite plain that

31. *Id.* at 1615. See also Flanagan, *Redefining the Role of the State Administrative Law Judge*, *supra* note 6, at 1391.

32. *Id.*

33. See Daye, *Powers of Administrative Law Judges*, *supra* note 30, at 1614.

34. *Id.*

35. See Flanagan, *Redefining the Role*, *supra* note 6, at 1383.

the Louisiana Legislature focused exclusively on creating the Division of Administrative Law so as to make its administrative law judges independent of agency control and influence.”³⁶ Thus, many states, including Louisiana, take these important policy concerns seriously by incorporating central panels. However, as crucial as these policy concerns may be, states must be mindful that their state constitutions are supreme to policy. This may be accomplished by carefully weighing these policy interests against inherent constitutional principles.

II. LOUISIANA’S APA AND THE *WOOLEY V. STATE FARM* CONUNDRUM

A. Louisiana’s APA

In order to understand the constitutional concerns presented in *Wooley*, one must first be familiar with Louisiana’s APA. This section analyzes the two amendments to Louisiana’s APA, which caused such a stir in the *Wooley* matter. This section continues by analyzing the facts of the *Brown* and *Wooley* matters, and by examining the trial court’s oral reasons for judgment in *Wooley*. Finally, the Louisiana Supreme Court’s decision and rationales are examined.

1. Creation of Louisiana’s Central Panel

In 1967, Louisiana, along with many other states, adopted much of the 1961 Model State APA.³⁷ As a result, prior to 1995, the relationship between agencies and ALJs was not addressed.³⁸ As Professor Bybee points out, “[u]ntil the recent amendments, the Louisiana APA contained but a single reference to ‘administrative hearing officer’.”³⁹ However, all of this changed in 1995 when the Louisiana legislature enacted Acts No. 739 (hereinafter DAL amendment), which created a new Division of Administrative Law

36. See Amicus Baier, *supra* note 28, at 12.

37. See Bybee, *Agency Expertise*, *supra* note 4, at 445.

38. See text accompanying Section IA.

39. See Bybee, *Agency Expertise*, *supra* note 4, at 451.

within the Louisiana Department of Civil Service.⁴⁰

Even though a full examination of the changes effected by this amendment is beyond the scope of this article,⁴¹ one change in particular merits special attention here. Louisiana Revised Statutes 49:992(B)(2) states, “in an adjudication commenced by the division, the administrative law judge shall issue the *final decision* or order, whether or not on rehearing, and the *agency shall have no authority to override such decision or order.*”⁴² With these provisions, the legislature effectively revoked the agency’s right to review. On June 29, 2005 following the Supreme Court’s decision in *Wooley*, the Louisiana legislature amended Revised Statutes 49:992(B)(2) to add the following sentence: “Upon the issuance of such a final decision or order, the agency or any official thereof shall comply fully with the final order or decision of the administrative law judge.”⁴³ final agency decisions. As Professor Bybee observed, “no longer do agency heads have the ability to reverse – under any circumstances, with or without explanation – an ALJ’s decision.”⁴⁴

As a result, even though agencies are delegated the authority by the legislature to make law and policy through administrative adjudications, Louisiana agencies must accept the ALJs’ decisions on law and policy. However, as argued by Professor Baier, “there is nothing per se unconstitutional about creating the Administrative Law Division and separating the quasi-judicative from the administrative within the Executive Branch.”⁴⁵ This is because merely transferring adjudicatory power from one executive branch agency to another does not run afoul of the constitutional doctrine of separation of powers. Since it is constitutional for traditional agencies to exercise adjudicatory power due to the demise of the non-delegation doctrine in modern administrative law analysis,⁴⁶ it is also

40. 1995 La. Acts No. 739, § 2 (codified at La. R.S. 49:991-99 (Supp. 1998)).
See also *Id.*

41. See generally Bybee, *Agency Expertise*, *supra* note 4, at 451-54, for a more in-depth look at the other changes effected by this amendment.

42. La. R.S. 49:992(B)(2) (2004) (emphasis added).

43. La. R.S. 49:992(B)(2) (2005).

44. See Bybee, *Agency Expertise*, *supra* note 4, at 455.

45. See Amicus Baier, *supra* note 28, at 14.

46. McGrath, et al., *Project: State Judicial Review of Administrative Action*, 43 Admin. L. Rev. 571, 571-72 (1991) [hereinafter, McGrath, *Project*].

constitutional for a newly created central agency to perform the same power.

2. Legislative Preclusion of Agency-Initiated Judicial Review

Constitutional concerns may not arise with the DAL amendment; however, the same cannot be said of the second amendment. In 1999, the Louisiana Legislature amended Louisiana Revised Statutes 49:992(B)(3) by enacting Acts No. 1332 (hereinafter Judicial Review amendment), which states: “however, no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this Chapter.”⁴⁷ The Judicial Review amendment also changed Louisiana Revised Statutes 49:964(A), by adding subsection (A)(2), which provides: “no agency or official thereof, or other person acting on behalf of an agency or official thereof shall be entitled to judicial review under this Chapter.”⁴⁸

Finally, Louisiana also excludes agencies from the definition of “person” to whom the provisions regarding the right to seek judicial review of ALJ final decisions apply.⁴⁹ The major policy reason for imposing these rules against agency-initiated judicial review in an APA system with ALJ finality focused on protecting regulated entities and individuals from being placed “in the position of having to compete in the judicial system against the power and unlimited financial backing of the state.”⁵⁰ Thus, agencies were thought to be in a better position to use the judicial system than regulated entities and individuals would be. As a result, the legislature thought the only

47. See 1999 La. Acts No. 1332.

48. *Id.*

49. See La. R.S. 49:951(5) (“‘Person’ means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency, except that an agency is a ‘person’ for the purpose of appealing an administrative ruling in a disciplinary action brought pursuant to Title 37 of the Louisiana Revised Statutes of 1950 prior to the final adjudication of such disciplinary action.”).

50. Original Amici Curiae Brief on Behalf of the Louisiana Legislature, p. 4 (citing Minutes and audiotape of the *House and Governmental Affairs Committee*, May 6, 1999)(hereinafter *Amici Legislature*). See also Original Brief on Behalf of Director of DAL, p. 19 (citing Minutes of the May 6, 1999 meetings of the House Committee on House Governmental Affairs, p. 12)(hereinafter *Director’s Brief*).

way to sufficiently “level the playing field” was to deny agency-initiated judicial review.⁵¹

It is important to note that agencies have not generally had the right to judicial review because agencies managed their own adjudications, and even with ALJs involved, the agencies had the final say.⁵² As a result, there was “no need to appeal a self-imposed adverse decision.”⁵³ However, agency-initiated judicial review becomes important when an administrative court style of central panel, which provides for ALJ finality, is established because the agency needs some mechanism to fulfill its delegated duty, especially when it believes the ALJ has made legal error or poor policy.

With Louisiana’s preclusion of agency-initiated judicial review, the legislature rendered Louisiana agencies powerless to make and enforce law and policy through administrative adjudications. Without a chance to review the ALJ’s decision, the agency does not have a say in the final agency decision. In a central panel system, which has final order authority, the only way to contest a decision with which the agency disagrees is through the courts in judicial review. However, even this avenue is closed off to Louisiana agencies. It is this last step closing off agency-initiated judicial review in a system with ALJ finality that raises constitutional concerns regarding the inherent power of both the judicial and executive branches, which will be discussed in more detail *infra* in Section III.

B. The Wooley Conundrum

1. The Facts and Procedural History in *Brown* and in *Wooley*

The dispute in both *Brown* and *Wooley* arose over an insurance policy form for rental condominium unit owners for which State Farm Fire and Casualty Insurance Company (hereinafter State Farm) wanted approval.⁵⁴ Louisiana Revised Statutes 22:620 requires that such an insurance policy form must be “filed with and approved by

51. *Id.*

52. See Bybee, *Agency Expertise*, *supra* note 4, at 457.

53. *Id.*

54. Appellant’s Original Brief, *Wooley v. State Farm, et al.*, p. 1, (La. 2004) (No. 04-882) (hereinafter Appellant’s Original Brief).

the commissioner of insurance” before it may be “issued, delivered, or used”.⁵⁵ Pursuant to this statute, State Farm filed their policy form for review and approval.⁵⁶ The Department of Insurance (hereinafter Department) rejected the submitted policy form because the Department believed the representations and warranties provision did not comply with applicable insurance law.⁵⁷

During the time that State Farm’s policy form was under review, the DAL amendment was enacted transferring all adjudicatory power to the Division of Administrative Law (hereinafter DAL) from the administrative agencies.⁵⁸ As a result, an ALJ of the Louisiana DAL presided at the hearing regarding State Farm’s policy form. This ALJ ruled in favor of State Farm and against the commissioner of insurance (hereinafter COI) and the Department. The ALJ ordered the Department to approve the contested policy form as submitted.⁵⁹

In response, the COI filed a petition for judicial review of the ALJ’s decision in the matter of *Brown v. State Farm*,⁶⁰ notwithstanding the fact that the definition of “person” explicitly excluded administrative agencies.⁶¹ While this case was pending before the Nineteenth Judicial District Court, the Louisiana legislature passed the Judicial Review amendment in 1999 specifically precluding agency-initiated judicial review of adverse ALJ decisions.⁶² The *Brown* matter culminated before Louisiana’s First Circuit Court of Appeal, where the issue presented was whether the trial court correctly dismissed State Farm’s exception of no right of action based upon the COI not having a right to seek judicial review of an ALJ decision.⁶³

The First Circuit affirmed the trial court’s decision because of the

55. La. R.S. 22:620.

56. See Appellant’s Original Brief, *supra* note 54; See also Appellee’s Original Brief, *Wooley v. State Farm, et al.*, p. 1, (La. 2004) (No. 04-882) (hereinafter Appellee’s Original Brief).

57. *Id.* See also *Wooley* District Court Opinion, *supra* note 2.

58. *Id.*

59. See Appellant’s Original Brief, *supra* note 54.

60. *Brown v. State Farm*, 2000-0539 (La.App. 1 Cir. 6/22/2001), 804 So.2d 41.

61. See Appellant’s Original Brief and Appellee’s Original Brief, *supra* note 56. See also La. R.S. 49:951(5).

62. See La. R.S. 49:964(A) and 992(B)(3).

63. *Brown*, 804 So.2d 41.

legislature's strong intention to limit agency-initiated judicial review.⁶⁴ More importantly for the *Wooley* matter, the First Circuit affirmed the trial court's denial of the COI's request to amend his petition to allege a constitutional infringement on the judiciary. The court did so because "the proposed amendment apparently would not merely add a cause of action or a party, but would substitute one lawsuit for another, changing the parties, the form of procedure, and the relief sought."⁶⁵ The court would be required to modify a petition for judicial review into a declaratory judgment matter, which would not be appropriate.⁶⁶

As a result, any *res judicata* or issue preclusion claims in the *Wooley* matter ultimately did not succeed because *Wooley* alleges the substance of the refused amendment in an action for declaratory judgment, not a petition for judicial review.⁶⁷ In *Wooley*, the COI asked the court to declare both the DAL amendment and the Judicial Review amendment unconstitutional.⁶⁸ The COI also sought to enjoin the operations of the DAL.⁶⁹ The trial court conducted a hearing on the permanent injunction.⁷⁰ Upon the trial court's determination that both statutes were unconstitutional, State Farm filed an appeal with the Louisiana State Supreme Court.⁷¹

2. The Trial Court's Oral Reasons for Judgment

The trial court ultimately held both the DAL amendment and the Judicial Review amendment unconstitutional. As fact, the trial court found that similar policy forms submitted by other foreign insurers operating in Louisiana were rejected, and those insurers accepted the

64. *Id.* at 45-46. See also Amicus Baier, *supra* note 28, at 6.

65. *Brown*, 804 So.2d at 47.

66. *Id.*

67. See *Wooley* State Supreme Court Decision, *supra* note 3, at 771-72 ("...although the judgment of the [First Circuit] court of appeal in the previous litigation was final, State Farm's exception of *res judicata* was properly denied as the instant cause of action [*Wooley*] did not arise out of the transaction or occurrence that was the subject matter of the litigation.").

68. See Appellant's Original Brief, *supra* note 54, at 2.

69. *Id.*

70. See Appellant's Original Brief, *supra* note 54, at 3; See also Appellee's Original Brief, *supra* note 56, at 2.

71. See Appellant's Original Brief, *supra* note 54, at 4.

agency's interpretation, unlike *State Farm*.⁷² Even though the trial court found several constitutional infringements, only the relevant findings are briefly discussed here.

First, the trial court held that both amendments violated the separation of powers doctrine by vesting judicial power in the executive branch, and by obliterating a judicial check on the executive branch.⁷³ Second, the court urged that the Judicial Review amendment violated the separation of powers doctrine by diminishing the judiciary's power to hear matters involving questions of law.⁷⁴

Third, the DAL amendment was held violative of Article V, which is Louisiana's judiciary article, by divesting the district courts of original jurisdiction.⁷⁵ The trial court viewed the DAL as an independent judiciary within the executive branch, which is only limited by the executive branch and not by the judicial branch.⁷⁶ Finally, the trial court concluded that the Judicial Review amendment was unconstitutional because it denied the representative of the citizens of Louisiana, the COI, the opportunity to protect their interests against an illegal policy form through judicial review.⁷⁷

3. The Louisiana Supreme Court Speaks

As a result of Louisiana's unique APA, which combines a central panel system of ALJ finality with a preclusion of agency-initiated judicial review, the Louisiana Supreme Court's decision in *Wooley* will be examined in depth by administrative and constitutional scholars, lawyers, and legislators around the country. This is because if the rationale supporting either the constitutionality or the unconstitutionality of such a system is convincing, other states might be encouraged to either follow Louisiana's lead or to view *Wooley* as persuasive authority to not go as far as Louisiana did. With such an important and possibly trend-setting decision, it is quite unfortunate

72. See *Wooley District Court Opinion*, *supra* note 2.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

that the Louisiana Supreme Court was only half right in their decision. The court correctly held the DAL amendment to be constitutionally sound; however, it spent entirely too much time on irrelevant arguments supporting the constitutionality of this amendment.⁷⁸

The major constitutional concern in this case was not the DAL amendment alone, but rather the Judicial Review amendment in combination with the DAL amendment. It is the contention of this comment that had the Louisiana Legislature stopped with the DAL amendment, no constitutional concerns would have surfaced. Yet, Louisiana went a step too far in combining a denial of agency-initiated judicial review with a system of ALJ finality. Apparently, the Louisiana Supreme Court disagrees, at least as far as can be seen from a thirty-nine page opinion of which only about four pages are dedicated to discussing the major issue in this case, the constitutionality of the Judicial Review amendment.

In quite a cavalier fashion, the court quickly dismissed any claims that the Judicial Review amendment was unconstitutional by holding "that under the particular factual circumstances presented in this matter, the Commissioner has not shown Act 1332 [Judicial Review amendment] to be unconstitutional."⁷⁹ Thus, the court applied a heavy burden on the COI to prove this amendment was unconstitutional because of the general presumption that statutes are constitutional.⁸⁰ The court followed this by opining about the possibility of the COI bringing a declaratory judgment when he believed the ALJ made legal error, even though the court itself admitted that "it is questionable whether [the COI] could change the result of the underlying adjudication."⁸¹ Instead of deciding the matter itself, the court remanded to the First Circuit Court of Appeal the narrow issue of whether the COI is entitled to seek declaratory judgment regarding whether the RCU policy form complies with the

78. See *Wooley State Supreme Court Decision*, *supra* note 3, at 761-67 (an in-depth examination of the bases on which the court upheld the constitutionality of the DAL amendment is beyond the scope of this article, which focuses on a thorough critique of the bases on which the court upheld the constitutionality of the Judicial Review amendment).

79. *Id.* at 768.

80. *Id.* at 761.

81. *Id.* at 770.

law and whether the district court correctly determined that it does not.⁸² This was done even though the First Circuit never had this case as a result of the direct appeal from the district court to the Louisiana Supreme Court.

There are four rationales upon which the court based this decision regarding the Judicial Review amendment. First, the principle that state agencies cannot appeal decisions made by other state agencies precludes the COI from seeking judicial review of this new executive branch agency's decisions.⁸³ Second, since the COI has no constitutionally-defined powers and duties, he only has the constitutional right to exist, and only the legislature "has the right to define his powers and duties."⁸⁴ The implication being that since the legislature specifically disallowed the COI the right to seek judicial review, he has no constitutional claim to such a right. Third, since an agency or the COI representing the agency is not a "person" intended to be protected by Article I of the Louisiana Constitution, neither the agency itself nor the COI has a constitutional right to access the courts.⁸⁵ Finally, the court concluded that because "ALJs make administrative law rulings that are not subject to enforcement and do not have the force of law," there was no constitutional problem of the executive overstepping the judiciary.⁸⁶ Upon examination of the court's decision as a whole, this last rationale appears to underlie the court's ultimate decision to uphold the constitutionality of Louisiana's current APA. All of these arguments and rationales advanced by the court will be analyzed and critiqued in the next section, *infra*.

4. The Louisiana Legislature Reacts

On June 29, 2005 following the supreme court's decision in *Wooley*, the Louisiana legislature amended Revised Statutes 49:992(B)(2) to add the following sentence: "Upon the issuance of such a final decision or order, the agency or any official thereof shall

82. *Id.* at 772.

83. *Id.* at 768-69.

84. *Id.* at 770.

85. *Id.* at 768.

86. *Id.* at 764.

comply fully with the final order or decision of the administrative law judge.”⁸⁷ The problem with this amendment is that it negates the underlying rationale advanced by the *Wooley* court in favor of the constitutionality of Louisiana’s current APA. If the agency against whom the ALJ ruled is now statutorily compelled to fully comply with the ALJ’s final order, then it cannot be logically argued that ALJs make “rulings that are not subject to enforcement and do not have the force of law.”⁸⁸

If the agency is compelled to follow the ALJ’s final decision, then that decision is subject to enforcement against the agency, and thus it does have the force of law as pertains to all parties involved in the matter. This is because the agency must comply with the ALJ’s decision, which is in favor of the regulated entity or individual, and this regulated party is free to act in a manner consistent with the ALJ’s final decision. Given this new amendment, the Louisiana Supreme Court must revisit this issue again in light of the legislature’s obliteration of the court’s underlying rationale for upholding the constitutionality of Louisiana’s current APA.

III. ANALYSIS OF LOUISIANA’S APA AND THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS

“It is emphatically the province and duty of the judicial department to say what the law is.”⁸⁹ With these simple, eloquent words, Chief Justice Marshall mobilized the antiquated legal system in the United States towards the judicial review enjoyed today. Despite the vast number of times historians and scholars alike have quoted this important language, students of the law, as well as citizens of this great country, often take for granted exactly what Chief Justice Marshall accomplished with this statement.

With the landmark case of *Marbury v. Madison*,⁹⁰ the United States Supreme Court laid to rest any lingering doubt regarding whose right and duty it was to say what the law is. It clearly lies with

87. La. R.S. 49:992(B)(2) (2005); *See also* note 42 *supra*.

88. *Id.*

89. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

90. *Id.*

the courts through judicial review. This is a tremendous power and responsibility that is not to be taken lightly. As a result, anytime Congress or a state legislature denies judicial review, courts should strictly scrutinize that denial lest these foundational principles upon which our entire legal system is based be placed in jeopardy.

This section analyzes the constitutional arguments against the Judicial Review amendment and critiques the arguments and rationales advanced by the Louisiana Supreme Court in *Wooley*. As this section details, the ultimate conclusion the court should have reached is that the Judicial Review amendment is unconstitutional because it impermissibly infringes on both the judicial and executive branches. Nevertheless, the Louisiana Supreme Court correctly determined that the trial court was incorrect in striking the DAL amendment down as unconstitutional because a central panel with final order authority does not necessarily run afoul of the separation of powers doctrine.

Additionally, this section details how the lack of a right to seek judicial review “changes the nature of the power exercised by the ALJ,” which the court specifically found the COI had not shown in *Wooley*.⁹¹ Finally, this section illustrates how Louisiana went a step too far in combining a system of final order authority with a denial of agency-initiated judicial review. The remedy to this problem is not the striking of both amendments, but instead lies in striking the unconstitutional denial of agency-initiated judicial review, while maintaining Louisiana’s administrative court style of central panel.

A. Infringement on the Judicial Branch

1. Crucial Check on Executive Branch Obliterated

Louisiana’s current APA raises several separation of powers concerns. First, the denial of agency-initiated judicial review in combination with a central panel of ALJ finality is problematic because such a prohibition obliterates a crucial check on executive branch activities. Many scholars advocate that “judicial review of administrative actions provides a crucial check on the delegation of

91. See *Wooley* State Supreme Court Decision, *supra* note 3, at 769.

executive powers.”⁹² When the legislature passes a law and delegates the authority to promulgate, enforce, and interpret corresponding regulations to an agency, the courts through judicial review are the only guardians against excesses by executive branch agencies. As a result, all agency and all ALJ decisions must be open for judicial review to protect against executive branch excesses.

However, Louisiana’s system, as a central panel with ALJ finality, transfers the adjudicatory powers of traditional agencies to the ALJs in its central panel, which is also a part of the executive branch.⁹³ In effect, the Louisiana system currently allows decisional finality where it has never been allowed before. Even under the old Louisiana system modeled after the 1961 Model Act,⁹⁴ final agency decisions were subject to judicial review by Louisiana courts. Since traditional agency decisions were always subject to judicial review, final ALJ decisions substituting for agency decisions in Louisiana’s new central panel must be as well.

Louisiana’s Judicial Review amendment denies agency-initiated judicial review of adverse ALJ decisions. Thus, if an ALJ rules against the agency in favor of the regulated entity or individual, the agency cannot seek judicial review of that decision. Consequently, a particular kind of executive branch activity, that of the ALJ ruling against the agency, escapes judicial scrutiny under this scheme precluding agency-initiated judicial review. Therefore, a crucial check on a particular kind of executive branch activity is eviscerated, which leaves room for executive branch excesses.

For example, suppose there is a renegade ALJ who is truly a “man of the people” and who wants to be active in acquiring as many favorable decisions for aggrieved persons as possible. Suppose further, as in a situation similar to *Wooley*, there is an ALJ who is truly in favor of regulated entities, and as a result, he or she consistently rules in favor of regulated entities, such as State Farm. Regulated entities engage in a wide spectrum of activities that must be regulated not just to protect citizens from financial ruin, but also

92. See McGrath, *Project*, *supra* note 46, at 571.

93. See La. R.S. 49:995 (2003). This statute states the Director of the DAL is to be appointed by the Governor. Thus, both the Director of the DAL and the DAL itself operate within the Executive Branch.

94. See text accompanying Section I(A), *supra*.

to provide for the citizens' safety and well-being. One example includes nuclear power plants. If an ALJ consistently rules in favor of the nuclear power plant industry, there will be less regulation. Since regulated entities are normally in favor of less regulation to keep their costs down, such a renegade ALJ would seriously undermine the agency's delegated duty to enforce the statute's regulations. Such a scenario endangers the persons intended to be protected by the applicable regulations.

Even worse, under Louisiana's current APA, such culpable activity is not subject to any judicial scrutiny because as long as the ALJ rules against the agency, whatever the ALJ says goes with no opportunity for judicial review. As a result, the ALJs rule the world of administrative law in Louisiana. One scholar aptly recognized, "judicial review ... provides protection against improper or illegal administrative action."⁹⁵ As illustrated here, in the absence of judicial review, impropriety reigns.

As stated by Judge James L. Dennis of the United States Court of Appeals for the Fifth Circuit, "the underlying constitutional conception [of separation of powers concerns] is that those with governmental power must be subject to the limits of law, and that the limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary."⁹⁶ Louisiana's Judicial Review amendment ignores this important constitutional conception because when ALJs rule against the agencies involved, those decisions are not subject to review "by an impartial judiciary."⁹⁷ Since ALJs now have the power to conduct administrative adjudications, *all* of their decisions must be open for judicial review, not just some, so that the judiciary may be able to set the limits of the ALJs' power instead of the limits being set by the executive branch central panel itself.

Since Louisiana's denial of judicial review destroys a check on executive branch power by not only allowing decisional finality where it has never been allowed before, but also by denying judicial review of a particular kind of executive branch activity, the

95. See McGrath, *Project*, *supra* note 46.

96. Judge James L. Dennis, *Judicial Power and the Administrative State*, 62 La. L. Rev. 59, 74 (hereinafter Judge Dennis, *Judicial Power*).

97. *Id.*

judiciary's power to say what the law is by overseeing the executive branch has been invaded. Thus, the equilibrium between the judicial branch and the executive branch is necessarily compromised in contravention to Louisiana's separation of powers doctrine as constitutionally provided by Article II, Sections 1 and 2.⁹⁸

2. Divestiture of the Jurisdiction of Article V Courts and Agency Appeals

A second concern raised by Louisiana's current APA is whether or not the legislature has deprived Article V courts of jurisdiction by creating an administrative court, the DAL, and coupling that with a denial of agency-initiated judicial review.⁹⁹ Consideration of this question is important for Louisiana, and also for proponents in favor of installing a central panel in the federal APA because, as urged by Judge Dennis, "Article V and Article III [of the United States Constitution] appear designed to promote the same basic values and objects." In order to fully appreciate the merits of this concern regarding the deprivation of Article V jurisdiction, it must be placed in the proper context.

Article V vests "original jurisdiction" of civil matters in a "supreme court, courts of appeal, district courts, and other courts authorized by this Article", and it also provides for appellate jurisdiction.¹⁰⁰ However, classification of administrative adjudications as "civil matters" creates confusion with regard to the whole concept of administrative agencies. Any argument that the legislature has divested Article V courts of jurisdiction, which is made on a strict, non-delegation, separation of powers theory, calls into question the quasi-judicial functions of agencies. As has been clear for some time, such a strict interpretation of the separation of powers doctrine is stunted by an "inexorable growth of the administrative state."¹⁰¹

In the correct context, however, this concern of stripping Article V courts of their "appellate" rather than "original" jurisdiction has

98. La. Const. art. II, §§ 1-2.

99. See Bybee, *Agency Expertise*, *supra* note 4, at 462.

100. La. Const. art. V, §§ 1 and 16(A).

101. McGrath, *Project*, *supra* note 46, at 579.

merit. When Article V courts are divested of their appellate jurisdiction, the end result is a destruction of a crucial check on the executive branch, as discussed *supra*. Therefore, these two constitutional infringements are very closely related. The major “transfer of power” argument urged in brief and at oral arguments in favor of the Director of the DAL in *Wooley* is the perfect illustration of this point. As stated in brief by Daniel Webb, attorney for the director,

Simply put, one of the purposes of Act 739 (creation of the DAL) was *to transfer* the final decision making authority from the Executive Branch departments to the DAL. The Legislature in making that determination *did not “strip” the Judicial Branch of its jurisdiction*. Rather it *simply transferred* an Executive Branch function *from one Executive Branch agency to another Executive Branch agency*. It also made the Administrative Law System of Louisiana much fairer to its citizens.¹⁰²

The gist of this argument is that the powers exercised by traditional agencies were merely transferred to the insulated DAL, which is just another agency within the executive branch. As a result of this transfer, the judicial branch is not stripped of any jurisdiction because matters formerly adjudicated by traditional agencies are currently adjudicated by the central panel agency, the DAL.

While the transfer of authority part of this argument is certainly true, the rest of the argument ignores one important fact. Historically, *all* executive branch agencies have been subject to judicial review. In his law review article published in 2001 after the passage of Louisiana’s Judicial Review amendment, Judge Dennis outlined the following factors on which administrative agencies were subject to review by the courts: (1) violations of the constitution or statutory provisions; (2) exceeding the statutory authority of the agency; (3) unlawful procedure; (4) errors of law; (5) arbitrary or capricious exercise of discretion; and (6) manifest error in view of reliable, probative, and substantial evidence on the whole record.¹⁰³ From this,

102. See Director’s Brief, *supra* note 50, at 7.

103. See Judge Dennis, *Judicial Power*, *supra* note 96, at 94 (citing *Save Ourselves, Inc. v. The Louisiana Environmental Control Commission*, 452 So.2d 1152, 1158 (La. 1984), which was well before the 1995 amendment creating the DAL and the 1999 amendment precluding agency-initiated judicial review).

it is quite clear that agency decisions have been and continue to be subject to judicial review, and a rather searching review at that. This is especially true of decisions of law and of policy.

Judge Dennis urges that “the 1974 [the current] Louisiana Constitution plainly vests in courts established and authorized by Article V the judicial power to declare laws unconstitutional and to review the actions of the executive branch of government.”¹⁰⁴ Since the DAL is merely another executive branch agency, and as a result of agency decisions being subject to rather searching judicial scrutiny, ALJ decisions adverse to the agencies involved must also be subject to the same judicial review. If not, then Louisiana Article V courts have been divested of their appellate jurisdiction to oversee particular executive branch actions for the factors noted by Judge Dennis.

It seems the Louisiana Supreme Court either overlooked or ignored Judge Dennis’ article even though it was put before them by Amicus Baier. Perhaps the result in *Wooley* would have been different had adequate attention been given to these important considerations. One of the bases for the court’s decision was the principle that state agencies cannot appeal decisions made by other state agencies, thus precluding the COI from seeking judicial review of this new executive branch agency’s decisions.¹⁰⁵

Yet therein lies the problem – *all* decisions by traditional agencies were always subject to judicial review. Now, this new DAL agency is not subject to judicial review as long as the ALJ rules against the agency. This subset of executive branch decisions escapes judicial scrutiny, which has never before occurred with traditional agencies. The principle that state agencies cannot appeal decisions of other state agencies was formulated in an era where agency heads made the final agency decisions.¹⁰⁶ Since the agencies had a

104. See Judge Dennis, *Judicial Power*, *supra* note 96, at 78-79 (citing La. Const. Art. V, § 5(D); *Progressive Sec. Ins. Co. v. Foster*, 711 So.2d 675 (La. 1998); *Bruneau v. Edwards*, 517 So.2d 818 (La.App. 1st Cir. 1987); *Carso v. Bd. Of Liquidation of State Debt*, 205 La. 368, 17 So.2d 358 (1944); *Graham v. Jones*, 198 La. 507, 3 So.2d 761 (1941)).

105. See *Wooley State Supreme Court Decision*, *supra* note 3, at 768-70.

106. *Id.* (citing *State through Dept. Of Pub. Safety and Corrections, Office of State Police, Riverboat Gaming Div. v. Louisiana Riverboat Gaming Com’n*, 94-1872, (La. 5/22/95), 655 So.2d 292. It is important to note that even though this

mechanism that allowed them to perform their delegated duty to make law and policy through administrative adjudications, other non-interested agencies had no right to contradict decisions made by other agencies.

Now that all agency adjudications have been transplanted to one central executive agency, the agencies themselves have been cut out of the process leaving them no other alternative but to seek judicial review when they disagree with the central panel's determination. The agencies must have a mechanism that allows them to perform their delegated duty. Therefore, the "established principle" that agencies cannot seek judicial review of other agency decisions, which was liberally applied by the court in *Wooley*, is inapplicable to Louisiana's current APA where final agency decisions are made by one centralized agency that escapes judicial scrutiny as long as the ALJ rules against the agency involved. If the right to handle all agency adjudications transferred to the DAL, surely the traditional obligation to have all agency decisions subject to judicial review likewise transferred to the DAL.

With this denial of judicial review of certain ALJ decisions, which are now the final agency decisions, this new central panel agency has greater rights than any other agency has ever had. Namely, this new agency is not subject to judicial review when the ALJs rule against the traditional agencies. Just as Louisiana's Judicial Review amendment obliterates a crucial check on the executive branch,¹⁰⁷ it also divests the judiciary's inherent power and jurisdiction to oversee certain executive branch ALJ decisions. Such a scheme is not constitutionally acceptable.

3. Divestiture of the Judiciary's Inherent Authority to Decide Questions of Law

The final concern raised by Louisiana's current APA is that the

case recognizes the common law principle that agencies cannot seek judicial review of other agency decisions, this recognition was based on the previous APA prior to the DAL amendment, which according to Act No. 739 took effect on and after October 1, 1996. Therefore, this principle remains inapplicable to the current LAPA).

107. See Section III(A)(1), *supra*.

judiciary has been divested of its inherent authority to hear and decide questions of law. Many ALJ decisions adverse to agencies involve questions of law. Thus, a denial of judicial review of those decisions is in effect a denial of judicial review of questions of law. The more likely scenario is that many ALJ decisions adverse to agencies will be mixed questions of law, fact, and policy. However, it is this denial of review of questions of law that raises the biggest concern among constitutional scholars. In *Wooley*, the ALJ made a determination regarding the application of the Insurance Code to State Farm's submitted policy form. Since the ALJ decided to approve State Farm's policy form, this decision of law was contrary to the agency's interpretation of regulations promulgated by the agency itself.

According to Louisiana's Judicial Review amendment, this determination of law is un-reviewable by Louisiana courts because it is adverse to the agency. This is a more serious constitutional infraction than the destruction of a judicial check on the executive branch, which results in the divestiture of the jurisdiction of Article V courts. This is because the judiciary is being denied the right to review questions of law, which is the judiciary's premier province. As a result, the Judicial Review amendment divests the judiciary of its inherent authority to say what the law is, which unconstitutionally alters the equilibrium between the judicial and executive branches.

B. Infringement on the Executive Branch

1. The COI's Core Function and Delegated Duty

As posed by Professor Rossi in his recent nationwide analysis of the increasing trend towards ALJ finality, "if - as in Louisiana - a state agency is prohibited from appealing a final ALJ order (only private parties are afforded appellate remedies) would this undermine the legislature's delegation of policy decisions to the agency or otherwise interfere with powers at the core of politically accountable executive branch agencies?"¹⁰⁸ This question encapsulates the issues the Judicial Review amendment raises with respect to its infringement on the executive branch. At oral arguments in *Wooley*,

108. See Rossi, *Final, But Often Fallible*, *supra* note 1, at 65.

many of the questions posed by both Justice Kimball and Justice Weimer focused on whether there is any core function in the COI,¹⁰⁹ as well as whether the COI has any inherent authority that might be endangered by the denial of agency-initiated judicial review.¹¹⁰

Before one can fully appreciate these two inquiries, as well as the court's response, it is necessary to understand the actual dynamics of the situation posed in the *Wooley* case. In the dispute between State Farm and the COI, the only representative of the people is the COI who was duly elected, as constitutionally and statutorily provided. This fact was highlighted during oral arguments before the Louisiana Supreme Court when the attorney for State Farm argued that "the COI should not be allowed to prevent the marketing of the State Farm policy forms."¹¹¹ The main reason the COI has stood in such staunch opposition to the marketing of this policy form is because he does not believe that it complies with the law. The COI has a statutory duty to ensure that all approved policy forms comply with applicable Insurance Code regulations promulgated by the Department of Insurance of which the COI is the agency head.¹¹²

Louisiana Revised Statutes 22:2(A)(1) specifically states that "insurance is an industry affected with the public interest and it is the purpose of this Code to regulate that industry in all its phases...it shall be the duty of the commissioner of insurance to administer the provisions of this Code."¹¹³ Thus, a logical inference is that the COI, as the duly elected officer in charge of the Department of Insurance, is charged with the duty of protecting the public interest regarding insurance. This duty is adjunct to the COI's responsibility to "administer the provisions" of the Insurance Code. A denial of agency-initiated judicial review in a system with ALJ finality necessarily infringes upon the Executive COI's ability to fully discharge his duty to protect the public interest regarding insurance. Absent a right in the COI to challenge the ALJ's approval of the

109. Commissioner of Insurance.

110. The writer was present at oral arguments before the Louisiana Supreme Court, 9/7/2004.

111. *Id.*

112. La. R.S. 22:620(A)(1).

113. La. R.S. 22:2(A)(1).

policy form, no one else will be able to protect the public from what the COI considers to be an illegal policy form.

Therefore, it could be reasonably argued that one of the functions, powers or duties inherent in the COI's position, as a politically accountable entity, is that of protecting the public interest. If the field of insurance is truly "affected with the public interest,"¹¹⁴ then surely the core function of the COI, as the guardian charged with the duty of administering the Insurance Code, is to administer the Code in such a way as to protect the public interest.

Yet the Louisiana Supreme Court disagrees. The court in *Wooley* took great pains to establish the history surrounding the indoctrination of the COI as a constitutional entity. The court ultimately concluded that since the delegates refused to enumerate any rights and duties of the COI in the constitution, the rights and duties of the COI were only to be created by the legislature by statute.¹¹⁵ The court used this to support its conclusion that since the legislature specifically denied agency-initiated judicial review, the COI has no such constitutional right.¹¹⁶

The court's major flaw here is that of form over substance. The inquiry into a constitutional violation is not foreclosed simply because the right to seek judicial review is not enumerated in the constitution as one of the COI's rights and duties. The court's own excerpts cited in its opinion illustrate the major point of contention at the constitutional convention was specifying the COI's rate-making function,¹¹⁷ which is totally irrelevant to the constitutionality of the Judicial Review amendment. Whether the COI is a constitutional entity or not, the COI has a core function, as well as other rights and duties delegated to it by the legislature. Thus, a constitutional infraction is possible regardless of the enumeration of the COI's rights and duties in the constitution itself.

To adequately perform his administrative duties, the COI must protect the public interest. With no opportunity to petition a court of law for judicial review of decisions with which the executive COI believes is in derogation of the public's interest, the COI is stripped

114. *Id.*

115. See *Wooley* State Supreme Court Decision, *supra* note 3, at 758-62, 770.

116. *Id.* at 768, 770.

117. *Id.* at 759-60.

of his core function and is undermined in performing his delegated duty. As a result, such an infringement is an impermissible extension of legislative power into the executive's realm in contravention of Louisiana's doctrine of separation of powers, despite the COI having no constitutionally enumerated rights and duties.

2. Agencies as "Persons" Entitled to Judicial Review

The final basis for the court's decision to uphold the constitutionality of the Judicial Review amendment was that since the agency was not a "person" intended to be protected by Article I of the Louisiana Constitution, an agency has no constitutional right to seek judicial review.¹¹⁸ The court's own cited quote describing Article I illustrates the irony of this decision, i.e. "[Article I] protects the rights of individuals against unwarrantable government action and does not shield state agencies from law passed by the people's duly elected representatives."¹¹⁹

First, the new central panel agency, the DAL, is being shielded from review by the courts when the ALJs rule against the agency. Yet there is no protection of the rights of individuals as mandated by Article I because absent a right in the COI to seek judicial review, no one can protect the public's rights. Second, the only representative of the people in a situation similar to *Wooley* is the COI himself who is charged with protecting the public interest as regards insurance. The COI is trying to vindicate the public's interest. Finally, the COI is politically accountable for his decisions; whereas, the ALJs in the DAL are not because they are appointed. Thus, if the public disagrees with an agency decision, the public has no recourse against the insulated DAL central panel as they would have against the COI by political control.

As a result, new situations call for new remedies to protect the intended beneficiaries of law. It is quite clear that Article I of the Louisiana Constitution was intended to protect the rights of individuals. In a situation where the only protector of these rights is denied the right to seek judicial review of government action, clearly

118. *Id.* at 768.

119. *Id.* (citing *Board of Comm'rs of Orleans Levee Dist. v. Department of Natural Resources*, 496 So.2d 281, 287 (La. 1986) (on rehearing)).

the true intent and spirit of Article I has been invaded. With such drastic changes to Louisiana's APA, the court incorrectly applied law that made sense under the traditional agency regime, but which currently lacks both logic and consistency with the constitution given this new agency context.

It is as if the current APA has reduced the agency to the position of an interested party who has no control over the outcome of the case. In such a situation, both parties should be entitled to seek judicial review of adverse decisions. Whether such a result was intended by the legislature, this is the only constitutionally acceptable scenario in a system with ALJ finality. This scenario is similar to a situation in which an individual or a corporation brings suit against the state, and following an adverse decision against the state, the state appeals to a higher court.

IV. COMPARATIVE ANALYSIS BETWEEN LOUISIANA AND THE CAROLINAS

In order to fully comprehend the gravity of the constitutional ramifications of Louisiana's APA, this section analyzes the APAs in two other central panel states. Although South Carolina's APA is an example of an extreme "administrative court" style of central panel, it is not as extreme as Louisiana's APA. North Carolina is a model of compromise for other states because it has struck the appropriate balance between competing interests, and unlike Louisiana's APA, is constitutionally sound.

A. South Carolina's APA - Extreme, But Not as Extreme as Louisiana

South Carolina's APA is similar to Louisiana's APA in that both are administrative court style central panels. Scholar William B. Swent argues that South Carolina blends the central panel model with the "administrative court" model.¹²⁰ The South Carolina Administrative Law Judge Division (hereinafter ALJD) is fully within the executive branch, thus it has a quasi-judicial nature as

120. See Swent, *South Carolina's ALJ*, *supra* note 14, at 2.

opposed to a purely judicial nature.¹²¹ This is similar to Louisiana's DAL, which is fully within the executive branch as well.¹²² ALJs in South Carolina render final and immediately appealable decisions on a variety of issues,¹²³ just like Louisiana ALJs. One major difference from Louisiana's APA, however, is that South Carolina differentiates which issues can be finally adjudged by ALJs based upon the nature of the agency involved.

First, when an agency is headed by a commission or a board, the ALJ's decision is subject to a limited review by the agency involved prior to issuance of the final agency decision.¹²⁴ As a result of these agencies being afforded the final say, there is no need for agency-initiated judicial review. The same is not true of central panels with final order authority, such as the DAL in Louisiana. South Carolina provides the needed mechanism to allow agencies headed by commissions or boards to fulfill their delegated duty, while respecting the fairness concerns of regulated entities and individuals.

Second, for agencies headed by a single director, the ALJ's decision becomes the final agency decision, thus denying the agency any final say on the final agency decision.¹²⁵ Even though this scheme is similar to Louisiana's system of ALJ finality, the major difference is that South Carolina's ALJ final order authority applies only to a small subset of agencies. Louisiana's ALJ finality applies across the board to all Louisiana agencies except for very few, specified agencies. If *Wooley* occurred in South Carolina, the ALJ's decision would have been final there as it was in Louisiana because the COI is a single director agency head. Yet, even this scheme of ALJ finality poses no serious constitutional problems, unless it is coupled with a legislative denial of agency-initiated judicial review, as Louisiana's APA is. As long as the agency head is allowed a right to seek judicial review, there is nothing per se unconstitutional about a scheme of ALJ final order authority.¹²⁶

Finally, occupational and licensing agency boards render final

121. *Id.* at 5.

122. *See supra* note 93.

123. *See Rossi, Final, But Often Fallible, supra* note 1, at 61.

124. *See Swent, South Carolina's ALJ, supra* note 14, at 12.

125. *Id.* at 13.

126. *See Amicus Baier, supra* note 28, at 14.

agency decisions; however, South Carolina's ALJD acts as an appellate court for these agency decisions.¹²⁷ Judicial review of the ALJ appeal is a matter of right, and the courts review the record developed by the agency.¹²⁸ Here, these agencies make the initial decision, which is subject to review first by the ALJD, and then by the courts as a matter of right. Since the agency is not completely cut out of the decision-making process, there are no overwhelming constitutional concerns with this scheme.

Even though South Carolina is one of the few extreme states employing ALJ finality in some form, Louisiana's APA is even more extreme in that it completely denies agency-initiated judicial review without providing any mechanism for agencies to perform their delegated duty. Had Louisiana stopped short of completely cutting off agency-initiated judicial review, its scheme of ALJ finality would not run afoul of the constitutional doctrine of separation of powers. Unfortunately, the Louisiana legislature went a step too far.

B. North Carolina's APA - The Model of Compromise for Other States

In 2000, North Carolina amended its APA in several significant ways. Actually passing these amendments proved to be quite a long, hard-fought battle, which began in the State House of Representatives. The bill, as introduced, provided for ALJ finality of decisions, as well as for agency-initiated judicial review.¹²⁹ Obviously, the North Carolina General Assembly was sensitive to the constitutional doctrine of separation of powers. Even though the final bill changed substantially due to the ensuing debate and compromise regarding ALJ finality, it is quite remarkable that even in its most extreme form, this North Carolina bill never contemplated denying agency-initiated judicial review in an APA system with ALJ finality. Instead, this debate centered on the logistics of instituting ALJ finality.

127. *Id.*

128. *Id.*

129. Brad Miller, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. Rev. 1657, 1658 (2001) (hereinafter Miller, *What Were We Thinking?*).

The North Carolina Senate received an onslaught of arguments from both sides of this debate over instituting ALJ finality. The supporters of the amendments argued that the procedural unfairness inherent in allowing one of the parties to a dispute to be the judge was unacceptable. They also urged that agencies continuously reject ALJ decisions that are not favorable to the agencies, and enter final decisions upholding the agencies' stance.¹³⁰ Finally, the supporters also contended that the ALJ has the benefit of experiencing the witnesses' demeanor under cross-examination; whereas, the agencies's decisions are usually based only on the "cold record", which would be equally available to a judge on judicial review.¹³¹ In other words, the agency should not be allowed to change the ALJ's decision because the agency is in no better position to do so than either the ALJ or a judge on judicial review.

On the other side of the debate, the opponents of the bill argued that the ALJ's duties should not exceed those of a hearing officer who compiles the record for a final decision to be made by the agency.¹³² Any recommended ALJ decision was simply something to be considered by the agency.¹³³ The opponents also contended that many decisions turn on issues of expertise fully within the ambit of the agencies' specialized knowledge, and, as such, agencies "should not be bound by a lay ALJ fact finding that was contrary to the agency's expert knowledge."¹³⁴ Finally, opponents urged that the Executive Branch's power to govern by consistently applying the law would be seriously undermined by giving ALJs the authority to render final decisions with no opportunity for agency review.¹³⁵

As Professor Daye said, "[t]he [North Carolina] General Assembly crafted an approach that represents a middle ground."¹³⁶ He believes this new legislation changed three areas of North Carolina's administrative law: first, it constituted ALJs as "quasi-judicial officials in the executive branch."¹³⁷ Second, ALJ decisions

130. *Id.* at 1660.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1661

135. *Id.*

136. See Daye, *Powers of Administrative Law Judges*, *supra* note 30, at 1579.

137. *Id.* at 1577-78.

are given more effect “without giving ALJs so much power that they effectively oust agencies of their proper decisional role.”¹³⁸ Finally, judicial review is more extensive when agencies reject the ALJ’s decisions, “while stopping short of transforming courts into ‘super agencies’ that usurp statutory powers of agencies.”¹³⁹ In the end, agencies have the authority to make the final decision, but when the agency rejects the ALJ’s decision, the standard for judicial review will be *de novo*.¹⁴⁰ The ALJ is required to give deference to the agency’s expertise, so long as the agency adequately demonstrates its expertise.¹⁴¹

Obviously, the North Carolina General Assembly engaged in a thorough analysis of arguments on both sides of the debate. Not once, however, did they consider instituting ALJ finality with a denial of agency-initiated judicial review. Unlike North Carolina’s APA, Louisiana has given its ALJs “so much power that they effectively oust agencies of their proper decisional role”¹⁴² because Louisiana agencies have no mechanism to fulfill their delegated duty.

Additionally, the court’s statement in *Wooley* that “ALJs make administrative law rulings that are not subject to enforcement and do not have the force of law” is quite remarkable.¹⁴³ If this is true, it is hard to believe that the Louisiana legislature intended to have an unenforceable system of ALJ finality. Where questions of law, in particular, are decided with no opportunity for judicial review, those decisions of law are final and have the effect of law because no alternative exists to question those decisions. It was this very issue that prompted the vigorous debate in North Carolina, and to their credit, the North Carolina APA serves as a model compromise

138. *Id.*

139. *Id.*

140. See Miller, *What Were We Thinking?*, *supra* note 129, at 1661.

141. *Id.* Regarding how an agency might adequately demonstrate its expertise, Senator Brad Miller, Chairman of the Senate Judiciary II Committee, said, “in the end, we decided not to decide. Again, the procedures by which the ALJ decides how agency expertise can be demonstrated should never be an issue on judicial review. When the decision of the ALJ differs from the final agency decision, the question on judicial review is not the procedural correctness of the decision below, but rather a *de novo* review of the record.” *Id.* at 1662-63.

142. See Daye, *Powers of Administrative Law Judges*, *supra* note 30, at 1577-78.

143. See *Wooley* State Supreme Court Decision, *supra* note 3, at 764.

representing all sides.

V. PROPOSALS FOR A CONSTITUTIONALLY SOUND LAPA

A. Allow Agencies the Right to Judicial Review

The first proposal for a constitutionally sound LAPA is to keep the current DAL system, but simply allow agencies the right to seek judicial review. This proposal is consistent with a system of ALJ finality, but it is unnecessary in a system that already allows the agency some say, whether initial or final, in the decision making process. Louisiana's current denial of judicial review coupled with ALJ finality completely cuts agencies off from making law and policy. Instead, both are currently made by the ALJs in the DAL with no opportunity for agency review. This proposal provides Louisiana's system of ALJ final order authority with the necessary mechanism for agencies to fulfill their delegated duties.

In a central panel with final order authority, such as Louisiana's DAL, the agency is reduced from an adjudicator to merely an interested party to the adjudication. Such a reduction is appropriate given the strong policy arguments in favor of central panels and ALJ finality. However, as in any other adjudication, all parties to the litigation must be granted the right to seek judicial review. A fair and constitutionally sound system requires some give and take. If the ALJs are to have final order authority, then in order for the agencies to be able to perform their delegated duty of enforcing the regulations they promulgate, agencies must be granted the right to seek judicial review of adverse ALJ final orders. By allowing agencies the right to judicial review, at least the judiciary's power is not infringed because ALJ questions of law adverse to the agency may be appealed to Article V courts. Also, the executive's power is not infringed because the agencies are still allowed some mechanism to make and enforce law and policy.

One important criticism of this proposal is that such a system is invariably biased toward the agencies that have the unlimited financial backing of the state.¹⁴⁴ In fact, the Judicial Review

144. See Amici Legislature and Director's Brief, *supra* note 50.

amendment was enacted, in part, to remedy this concern.¹⁴⁵ If such a system were allowed, the argument is that agencies can tie up regulated entities and individuals in court until they lose the financial and emotional will to continue to press their case. This is certainly a crucial concern; however, it is not necessary to deny agency-initiated judicial review of final ALJ orders in order to sufficiently meet it. This concern may be adequately addressed by providing procedural safeguards monitoring the standards of review to be used by the courts on judicial review.

With this in mind, this proposal advocates differing standards of review for questions of fact, questions of law, and questions of policy. A strict form of deference should be accorded to ALJ factual decisions, as the ALJ is the ultimate trier of fact and has the advantage of viewing the witnesses' demeanor during cross-examination. Thus, agencies should not be able to easily or successfully contest ALJ factual decisions, unless the ALJ has committed manifest error. On the other hand, less deference should be accorded to ALJ decisions of law as the ALJ has no advantage over the court regarding such decisions. As wisely noted by Judge Dennis, "Article V courts must review all questions of law decided by non-Article V tribunals."¹⁴⁶

Finally, on issues of policy, political accountability must be taken into account. Since the ALJs in the DAL are appointed by the Director of the DAL, who is appointed by the Governor of Louisiana,¹⁴⁷ neither the ALJs themselves, nor the DAL as an entity, is politically accountable to the citizens of Louisiana. However, since the agency head of the Department of Insurance is duly elected by the citizens of Louisiana,¹⁴⁸ the COI is politically accountable for his or her policy decisions.

As urged by Professor Rossi, "the political accountability of agency heads is important to ensuring the public legitimacy of

145. See text accompanying Section II(A)(2), *supra*.

146. See Judge Dennis, *Judicial Power*, *supra* note 96, at 93. The term "Non-Article V" tribunals typically refers to administrative agencies. However, since adjudications in Louisiana have been transferred to the central panel, the DAL, this term also applies to ALJs in the DAL.

147. See La. R.S. 49:995 (2003).

148. La. Const. art. IV, § 3.

agency action.”¹⁴⁹ Therefore, when courts review issues of policy decided by an ALJ, “the agency’s reasoning framework should trump the ALJ’s reasoning, or that of any competing expert witness.”¹⁵⁰ Just as strong deference should be accorded to ALJ findings of fact, strong deference also should be accorded to the reasoning of politically accountable agencies on issues of policy. The public has the power to hold agencies politically accountable for their policy decisions. The same is not true of politically insulated ALJs.

In practice, application of these principles is more daunting than theory may suggest. More often than not, the usual administrative adjudication handled by an ALJ involves mixed questions of law, fact and policy. Sometimes it is very difficult to separate these three. In such a case, the court must engage in a *de novo* review of the matter while balancing the ALJ’s advantage of viewing the witnesses’ demeanor under cross-examination with the agency’s advantages of expertise and political accountability. After all, “agencies are often immersed in administering a particular statute. Such specialization gives those agencies an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations.”¹⁵¹

One major criticism of this proposal could be that such a system is inefficient for administrative adjudications, as well as for Article V courts. However, a little inefficiency is a small price to pay to preserve our constitutional doctrine of separation of powers. This proposal requires more work than the current system, but it will be well worth it for Louisiana to have a constitutionally sound, cutting edge APA to which other states, and even the federal APA, might look for direction in amending their APAs. Louisiana should no longer substitute efficiency for fundamental constitutional principles.

B. Follow North Carolina’s Lead in Striking an Appropriate Balance

In case the legislature is wary of allowing agency-initiated

149. See Rossi, *Final, But Often Fallible*, *supra* note 1, at 71.

150. *Id.*

151. Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1196 (1995).

judicial review, the second proposal is to follow North Carolina's lead in striking an appropriate balance between the competing interests at stake. This proposal is consistent with the traditional system of ALJs recommending decisions to the agencies, who make the final decision. This proposal will not work properly in a system of ALJ finality. Even though North Carolina had the opportunity to institute ALJ finality in its APA, the General Assembly chose another course. Agencies retain the right to make the final decision on administrative adjudications; however, if the agency overturns the ALJ's decision, the agency's decision will be subject to de novo review by the courts on judicial review.

This approach respects both sides of the debate in that neither the agencies, nor the ALJs are completely cut out of the process. An important advantage of this approach is that it is familiar because the first part of this process is similar to the traditional federal APA, which allows hearing officers or ALJs to make a recommended decision prior to the agency's final decision.¹⁵² At the same time, this approach utilizes the courts to resolve disagreements between agencies and ALJs, which properly protects the judiciary's check on the executive branch.

One undeniable criticism of this approach is that in situations where the agency disagrees with the ALJ's decision, the courts are merely substituting their judgment while completely ignoring the ALJ's advantage of viewing the witnesses' demeanor under cross-examination and the agencies' advantages of expertise and political accountability. These advantages are ignored because no deference is due in a de novo review, which occurs when the agency disagrees with the ALJ in North Carolina's APA.

Yet this criticism is easily overcome by applying the same standards of review for issues of fact, law and policy as suggested in the first proposal. The ALJ's recommended decision should be given strong deference on issues of fact; whereas less deference should be accorded ALJ decisions of law. Where there is an issue of law or of policy, the agency's final decision should be given strong deference. Finally, in cases where there are mixed issues, the court should review the matter de novo, as already provided in North Carolina's APA, while being mindful of the respective advantages of both the

152. See text accompanying Section I(A), *supra*.

ALJ and the agency. Either proposal will render a sophisticated and constitutionally sound APA for Louisiana.

VI. CONCLUSION

In *Wooley*, the Louisiana Supreme Court faced the issue of whether an explicit denial of agency-initiated judicial review in a system of ALJ finality comports with the constitutional doctrine of separation of powers. Even though the court answered this issue in the affirmative, the correct finding would conclude that such a denial is an unconstitutional infringement on the judicial branch in that a crucial check on the executive is obliterated, which leads to an impermissible divestiture of the appellate jurisdiction of Article V courts and a deprivation of the judiciary's inherent authority to decide questions of law. This denial is also an unconstitutional infringement on the executive branch in that the executive COI is stripped of his core function of protecting the public interest.

It is quite remarkable that this debate was foreshadowed merely one year prior to Louisiana's passage of the Judicial Review amendment by two authors with their "not yet thoroughly baked idea," as they described it.¹⁵³ Judge McCowan and Ms. Leo opined "why not give the agency the same right as other parties in a contested case: the right of appeal of the decision to court?"¹⁵⁴ They wisely reasoned "now that agency authority is limited, perhaps the agency should have a right to appeal."¹⁵⁵ This idea came about in response to a more limited APA system that focused on balancing the needs of both the agencies and ALJs, much like North Carolina's APA.¹⁵⁶ This argument in favor of agency-initiated judicial review is only strengthened when analyzing Louisiana's system, which completely cuts agencies out of the decision and policy making process.

Despite the outcome in *Wooley*, the legislature must revisit this

153. F. Scott McCowan and Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?*, 50 Baylor L. Rev. 65, 90 (1998). See also Amicus Baier, *supra* note 28, at 14.

154. *Id.*

155. *Id.*

156. See *Id.* generally.

issue with more sensitivity to the constitutional doctrine of separation of powers. It is the contention of this comment that the best avenue for Louisiana lies in retaining ALJ finality, allowing agency-initiated judicial review of adverse ALJ decisions, and requiring the courts to apply the differing standards of review with respect to issues of fact, law, and policy. If the Legislature decides against retaining the current system of ALJ finality, the best alternative is to strike an appropriate balance between the agencies and the ALJs much like North Carolina has done. Only then will Louisiana truly be on the cutting edge of the modern administrative state, and ALJs will no longer rule the world of administrative law in Louisiana.

Inherent constitutional principles must no longer be surrendered for the sake of efficiency. As Chief Justice Burger so eloquently stated when analyzing the separation of powers between Congress and federal agencies, “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government.”¹⁵⁷

157. *INS v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 2781 (1983).