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WE'RE NO ANGELS: RULEMAKING AND JUDICIAL REVIEW IN FLORIDA*

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If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹

THESE words were written to emphasize the importance of "maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution . . ."² Those partitions have become more difficult to maintain in the modern administrative state, where the sight of an administrative agency acting in executive, legislative, and judicial roles has become commonplace. Our view of what separation of powers requires may have changed, but the observation concerning the necessity for "auxiliary precautions" remains true. Today, we look to administrative procedure acts to provide those precautions and to prescribe the nature of the interaction between agencies, the courts, and the Legislature.

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1. THE FEDERALIST NO. 51, at 354-55 (A. Hamilton or J. Madison) (M.W. Dunne ed. 1901).

2. *Id.* at 353.

The Florida Administrative Procedure Act (Florida APA or "the act")³ offers a new approach to the control of administrative government, with innovative answers to traditional problems of administrative procedure. However, its message is likely to be lost. The act is misunderstood in its own jurisdiction, its innovations have not been adopted elsewhere, and its approach is clearly out of step with the prevailing wisdom in state administrative law, the 1981 Model State Administrative Procedure Act (1981 MSAPA).⁴ This occasion, the fifteenth anniversary of the Florida APA, is a suitable one for a more careful look at the promise of the act and the problems that beset it.

Both the language and the legislative history of the act clearly indicate that, in the areas of rulemaking and judicial review, the drafters and the Legislature intended the Florida APA to depart considerably from existing law and other models. The principal departures important to the discussion here⁵ are the Florida act's provisions that 1) guarantee persons affected by rules "an opportunity to present evidence and argument" to the agency as part of the rulemaking proceedings,⁶ 2) establish a "draw out" procedure under which rulemaking can be suspended and more formal adjudicative procedures held,⁷ and 3) establish limits on the scope of judicial review in light of the extensive procedural protection afforded to participants in the rulemaking process.⁸

Two of the three departures analyzed in this Article are largely ignored by the courts. The courts follow the legislative judgment that the fairness of the procedure and the quality of the product are enhanced if agencies hear evidence and argument during rulemaking. However, the courts reject two other legislative judgments. First, they refuse to fol-

3. FLA. STAT. § 120.50 (1989). The Florida APA was originally enacted by Ch. 74-310, 1974 Fla. Laws 952. It became effective on January 1, 1975. The act has been amended in every session since it was enacted. I discuss the present form of the act, unless otherwise indicated. For a good summary of the amendments that have been made to the act, year by year, see Dore, *Overview of the Administrative Procedure Act*, in FLORIDA ADMINISTRATIVE PRACTICE § 2.1, at 2-5-2-7 (3d ed. 1990). Amendments to the APA are also summarized in the Joint Administrative Procedure Committee's annual reports.

4. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981, 15 U.L.A. 1 (1990) [hereinafter 1981 MODEL ACT].

5. Other innovations included in the act have had a significant effect on how rulemaking is conducted, but they are outside the scope of this Article, which focuses on innovations that provide opportunities for public input concerning the substance of proposed rules. Other procedural requirements, like the economic impact statement requirement, FLA. STAT. § 120.54(2) (1989), formal requirements, FLA. STAT. § 120.54(1) (1989), and legislative checks on the process such as the involvement of the Joint Administrative Procedures Committee (JAPC), FLA. STAT. §§ 120.54(11), 11.60 (1989), also play an important role in the rulemaking process, but are also outside the scope of this Article.

6. FLA. STAT. § 120.54(3)(a) (1989).

7. *Id.* § 120.54(17).

8. *Id.* § 120.68. Judicial review is discussed here only as it relates to rulemaking.

low the Florida APA's approach to adjudicatory process during rule-making. The act guarantees the availability of adjudicatory process during rulemaking through the draw out mechanism. However, the courts, however, have marginalized the draw out. Second, the courts have ignored the limitations in the act on judicial intervention in rule-making, and they have instead borrowed federal standards, such as the "arbitrary and capricious" standard of review. The courts have also continued to use characterizations such as "quasi-legislative" and "quasi-judicial," in order to retain their discretion and power, even though the drafters had specifically repudiated the use of such terms.⁹

In this Article, I argue that the Florida Legislature struck a balance between contending interests when it adopted the act and that the balance struck, although unusual, is potentially quite beneficial.¹⁰ After fifteen years of experience with the act, we are no closer to being able to actually evaluate the utility of that balance because it has not been honored in the courts. I suggest that the time has come for the Legislature to reassert its authority in this area and undertake a reexamination of the act in light of the concerns I address.

Part I of this Article analyzes and discusses the history, the intended effects, and the value choices underlying two central rulemaking provisions of the Florida APA: sections 120.54(3) and 120.54(17), Florida Statutes. These provisions establish the right to present evidence and argument in rulemaking proceedings and, in some circumstances, the right to have a more formal adjudicative hearing under the draw out provision.¹¹ Part II discusses the statutory provisions intended to govern and restrict the role of the courts in reviewing the results of administrative rulemaking. Part III analyzes the balance struck between citizen participation, agency action, and judicial review. Part IV discusses the principal judicial decisions dealing with rulemaking and judicial review under the provisions analyzed in Parts I and II. In Part IV, I seek to demonstrate how the Florida courts have failed to perceive and implement the new and different approach to rulemaking and judicial review adopted by the Legislature, and have instead "borrowed" federal law in a way that has fundamentally altered the Legislature's intended effect of the Florida APA. Part V discusses the advantages of the Legis-

9. *Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida March 9, 1974*, in A. ENGLAND & L. LEVINSON, *FLORIDA ADMINISTRATIVE PRACTICE MANUAL* 5, at app. C (1990) [hereinafter *Reporter's Comments*].

10. Because the balance struck is so unusual and may at first appear to be a throwback to some discredited past, it is important to withhold judgment on the viability of the balance until the longer explanation that follows is concluded.

11. For a short overview of the rulemaking process in Florida, see Maher, *Rulemaking in Florida: An Opportunity For Reflection*, 62 FLA. B.J. 48 (Jan. 1990).

lature's original approach, with special attention to the seldomly-used draw out mechanism. Part VI concludes that changes should be made in the conduct of rulemaking and judicial review. I suggest that if the courts do not correct the problems that have developed, the Florida Legislature must step in and do so.

I. THE FLORIDA APA'S OPPORTUNITIES FOR CITIZEN INPUT CONCERNING THE SUBSTANCE OF PROPOSED RULES: A BRIEF REVIEW OF THE HISTORY, INTENDED EFFECTS, AND VALUE CHOICES

The Legislature enacted Florida's first comprehensive administrative procedure act in 1961 (the "1961 act").¹² A partial revision was attempted in 1973, but Governor Askew vetoed it, believing that the Law Revision Council¹³ should conduct a comprehensive review of the act.¹⁴ The Director of the Center for Administrative Justice, created in 1972 by the American Bar Association,¹⁵ agreed to organize an ad hoc task force to assist in preparing a draft of a new act.¹⁶ The task force met in September 1973,¹⁷ and

prepared extensive drafts incorporating recent judicial and proposed statutory concepts dealing with administrative fairness, many of which had never before been given such specific legislative drafting attention. These drafts also devoted attention to expanding the procedures by which decisions of adjudication and rulemaking could be made in order to provide agencies with greater flexibility to conduct their affairs and the public with a greater ability to be heard effectively in such proceedings.¹⁸

Reporter Arthur England drew upon these early drafts in preparing a comprehensive initial draft, followed by four more drafts which he pre-

12. FLA. STAT. §§ 120.031-.051 (1961). A. ENGLAND & L. LEVINSON, *supra* note 9, § 1.02(a), at 2. This act was similar but not identical to the 1961 Revised Model Act (RMA). REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1961, 15 U.L.A. 137 (1990) [hereinafter 1961 MODEL ACT].

13. The Law Revision Council was created to examine State law, discover defects and anachronisms, and recommend needed reforms. FLA. STAT. § 13.96 (1989).

14. A. ENGLAND & L. LEVINSON, *supra* note 9, § 1.02(b), at 3. The Council established a committee chaired by Professor Harold Levinson and contracted with Arthur England to be the Reporter. England subsequently served as Chief Justice of the Supreme Court of Florida. *Id.*

15. For a discussion about the Center, see Carrow, *Administrative Justice Comes of Age*, 60 A.B.A. J. 1396 (1974).

16. Kennedy, *A National Perspective of Administrative Law and the Florida Administrative Procedure Act*, 3 FLA. ST. U.L. REV. 65, 66 (1975).

17. The weekend conference in Washington was a "brainstorming" session attended by Arthur England, Professor Levinson, and "a number of distinguished administrative law scholars and practitioners from various parts of the country." Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 621 (1975).

18. Kennedy, *supra* note 16, at 66.

pared and annotated with the assistance of Professor Harold Levinson.¹⁹ The Council presented the Reporter's Final Draft to the Legislature as a new administrative procedure act, accompanied by extensive annotations commonly known as the *Reporter's Comments*.²⁰

The Law Revision Council held public hearings on the draft proposals at various locations throughout Florida.²¹ At the same time, parallel efforts were undertaken by the Government Operations Committee of the Florida House of Representatives.²² A bill reflecting the work of both the Law Revision Council and the House Government Operations Committee quickly passed the House.²³ Meanwhile, the Senate passed a completely different bill designed to subject agency rulemaking to more stringent legislative control.²⁴ The conference committee bill incorporated most features of both the House and Senate versions.²⁵

To expand the effectiveness of the public's voice in rulemaking, the new act provided three different proceedings that persons with an appropriate level of interest could request during rulemaking.²⁶ Section 120.54, the section of the Florida APA governing rulemaking, authorizes each proceeding under separate subsections: section 120.54(3) grants persons an opportunity to present evidence and argument on all issues appropriate to inform the agency of that person's contentions; section 120.54(17) permits that evidentiary opportunity to be drawn out into a more formal proceeding, which will resolve factual and policy disputes pursuant to established procedures, and develop a record for judicial review of those disputes; section 120.54(4) provides persons whose substantial interests are affected with an administrative remedy for invalidating a proposed rule that is an invalid exercise of delegated legislative authority,²⁷ before the rule becomes effective. These provi-

19. See Levinson, *supra* note 17.

20. "The Reporter's Comments, submitted to the Florida Law Revision Council by its reporter in March 1974 to accompany the Council's final draft of the APA, have been recognized in a number of court decisions as a primary source of legislative intent." A. ENGLAND & L. LEVINSON, *supra* note 9, § 1.05(a), at 12-13.

21. *Id.* § 1.02(b), at 4.

22. *Id.* Its efforts included circulating a questionnaire to all administrative agencies of the State. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. An opportunity to present evidence and argument on all issues appropriate to inform the agency of the contentions of "affected persons" is authorized by section 120.54(3), Florida Statutes. A "draw out" of that rulemaking hearing by those who timely assert that their "substantial interests" will be affected in the proceeding is authorized by section 120.54(17). Finally, "[a]ny substantially affected person" may seek an administrative determination of a proposed rule pursuant to section 120.54(4).

27. See FLA. STAT. § 120.52(8) (1989). Proposed rule challenges are discussed here only to the extent such discussion is necessary to fully address sections 120.54(3), (17), and 120.68.

sions reflect the drafters' conviction that procedural flexibility is essential to protecting the interests of the public. The *Reporter's Comments* state:

[A]gency proceedings frequently affect individual rights and create general policy at the same time, so that they partake of adjudication and rule-making at the same time. A failure of agencies to recognize this fact, and the reluctance of Florida courts to depart from analysis in terms of "judicial" and "legislative" decision-making, has created rigidity in the [1961 APA], unwarranted exemptions, and unreviewable agency discretion which defeats due process.²⁸

A. *The Intended Effect of Rejecting "Quasi-Legislative" Rulemaking*

Before the Legislature adopted the present APA, rulemaking was generally a matter of agency prerogative, and agencies frequently promulgated rules without the participation of the public or the persons affected.²⁹ Under the 1961 act, circuit courts reviewed rules by declaratory proceedings, while district courts of appeal reviewed by certiorari the final orders from adjudicative proceedings.³⁰

The 1961 act characterized rulemaking as "quasi-legislative," a characterization used to restrict public input into the process. In *Daniel v. Florida State Turnpike Authority*,³¹ for example, the Supreme Court of Florida stated:

[I]t cannot be doubted that the power to promulgate rules and regulations to effectuate the general public purpose of the statute is an administrative function that is quasi-legislative in nature, rather than quasi-judicial. This being so, a hearing before the administrative body is not necessarily a *sine qua non* to the validity of rules and regulations adopted by it pursuant to legislative authority.³²

Similarly, in *Bay National Bank & Trust Co. v. Dickinson*,³³ the court used the quasi-legislative characterization as a basis for concluding that the State banking commissioner did not violate due process by issuing without a public hearing a certificate of authorization to engage

28. *Reporter's Comments*, *supra* note 9, at 6.

29. Note, *Rulemaking and Adjudication Under the Florida Administrative Procedure Act*, 27 U. FLA. L. REV. 755, 759 (1975).

30. A. ENGLAND & L. LEVINSON, *supra* note 9, §1.02(a).

31. 213 So. 2d 585 (Fla. 1968).

32. *Id.* at 586.

33. 229 So. 2d 302 (Fla. 1st DCA 1969).

in the banking business.³⁴ Thus, the court employed the characterization of rulemaking proceedings as "quasi-legislative" in order to limit the opportunity to present evidence and argument afforded those whose substantial interests were affected by the agency action.

The *Reporter's Comments* indicate that the Law Revision Council sought "to rid existing law of the anachronisms" the "quasi-judicial," "quasi-legislative," and "quasi-executive" characterizations had produced.³⁵ The *Reporter's Comments* note:

A major feature of the proposed act is to eliminate these anachronisms (i) by focusing attention on the rights affected rather than the labels given a particular process, (ii) by allowing total flexibility for fact-finding in rule-making proceedings and policy-making in individual cases, and (ii) [sic] by authorizing informality whenever it is possible to exercise it without affecting rights unfairly.³⁶

The Law Revision Council sought to reduce the power of characterizations such as "quasi-legislative" in determining the type of procedures required. The *Reporter's Comments* expressly caution against the continued use of such characterizations, explaining the damage they caused under the old act and explicitly indicating the Legislature's intent to "overrule cases making the distinction, such as *Bay National Bank* and *Dickinson v. Judges of the District Court of Appeal . . .*"³⁷

B. The Significance of the Rejection of Quasi-Legislative Rulemaking

The Florida APA's rejection of the "quasi-legislative" concept is significant. As Professor Martin Shapiro has noted, "[i]f rulemaking is quasi-legislative, it is quasi-arbitrary . . ."³⁸ A legislator's "factual assumptions, whether correct or absurd, need be based on no evidence of record; his policy choices, whether statesmanlike or deplorable, are not limited to any pleadings or points raised in argument."³⁹ There was a

34. The court found, "[i]n passing upon such an application the Commissioner performs a purely quasi-legislative or quasi-executive function. His consideration of the application does not constitute an adjudication of rights vested in any person or corporation, but is an administrative determination as to whether a requested right shall be granted." *Id.* at 304.

35. *Reporter's Comments*, *supra* note 9, at 5.

36. *Id.* at 6-7.

37. *Id.* at 18 (citation omitted). They also explain that "the discretionary determinations of many governmental agencies and officers which have been characterized as 'quasi-judicial,' 'quasi-legislative' or 'quasi-executive,' or have otherwise been exempted from the operation of administrative procedure laws, are now brought under the minimum fairness provisions of the proposed act." *Id.*

38. Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 463 (1986).

39. Linde, Book Review, 66 YALE L.J. 973, 975 (1957) (reviewing C. NEWMAN & S. SURREY, *LEGISLATION, CASES AND MATERIALS* (1955)).

time when agency rules were treated as presumptively correct⁴⁰ and were upheld if not "arbitrary and capricious."⁴¹ This traditional standard of judicial review of rules in the federal courts was "extremely deferential, perhaps close to the 'minimum rationality' test for the validity of *statutes* under substantive due process."⁴²

The Florida APA rejects this approach, recognizing instead a new standard for minimum fairness exceeding the degree of fairness guaranteed by the Federal Constitution. The *Reporter's Comments* state that in Florida, "[t]he notions of basic fairness which should surround *all* governmental activity, [includes rulemaking and] the right to present viewpoints and to challenge the view of others, the right to develop a record which is capable of court review, . . . and the right to know the factual bases and policy reasons for agency action"⁴³ The drafters and Legislature intended the Florida APA to check *all* arbitrary agency action through its procedural requirements. By guaranteeing certain persons the opportunity to participate in agency decisionmaking, even in rulemaking, the Legislature sought to ensure agency responsiveness to fact and reason, thereby enhancing the accuracy and legitimacy of agency decisions, and rendering those decisions more acceptable to the public. The *Reporter's Comments* note there are three due process checks to prevent arbitrary agency action: "the requirements that reasons be stated for all action taken or omitted, that reasons be supported by 'the record,' and that specific judicial review procedures allow the courts to remedy defects of substance."⁴⁴

In short, the approach to rulemaking incorporated in the Florida APA is very different from the deference characterizing the early federal cases, such as *Pacific States Box & Basket Co. v. White*.⁴⁵ The act also breaks with the traditional Florida understanding of procedural protection by focusing attention "away from labels and toward the ef-

40. "[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches" *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935).

41. "With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious." *Id.* at 182.

42. A. BONFIELD & M. ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* 621 (1989) (emphasis in original). It has also been suggested that this arbitrary and capricious standard "bore a strong family resemblance to the test employed by appellate review of jury verdicts." Shapiro, *Administrative Discretion: The Next Stage*, 92 *YALE L.J.* 1487, 1492 (1983).

43. *Reporter's Comments*, *supra* note 9, at 5 (emphasis added).

44. *Id.* at 20. This passage was quoted with approval in *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

45. 296 U.S. 176 (1935). The more recent federal cases have also moved away from this early federal approach. For a more detailed discussion of those developments, see *infra* notes 256-63 and accompanying text.

fects of agency decision-making,"⁴⁶ and makes clear that "rule-making can involve substantial individual interests, and that procedures suitable for adjudication may be needed in the course of rule-making in order to protect these interests."⁴⁷

This shift, from the traditional deference shown agency rules to a requirement that agencies explain the rules and support the explanations in a record, may be thought to threaten the efficiency of the decisionmaking process.⁴⁸ The Florida APA seeks to address efficiency concerns through its emphasis on flexibility. The agency's duty to provide well supported reasons is limited to those cases in which substantially affected persons actually take advantage of opportunities during rulemaking to discover and challenge the fact or policy choices incorporated in the rule. Where affected persons do not take prompt action to protect their substantial interests, the agency need not defend its choices.

This approach permits opportunities for significant participation by affected persons while not unduly compromising efficiency. The decision to make significant procedural protections available, but only as needed, encourages prompt and vigorous participation by substantially affected persons, while freeing decisionmakers from the unnecessary formality of explaining and supporting every decision.

C. *Value Choices Included in Citizen Participation Opportunities*

Against this general background, it is worth examining more specifically the innovations the Florida APA brings to the rulemaking process. Other state administrative procedure acts commonly make some provision through which interested persons may submit their views on proposed rules.⁴⁹ Federal law also requires that agencies "give interested persons an opportunity to participate in the rule-making through the submission of written data, views, or arguments with or

46. *Reporter's Comments, supra* note 9, at 18.

47. *Id.*

48. Efficiency is one of three normative requirements usually identified in administrative procedure. The other two are accuracy and acceptability. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-80 (1978) (using slightly different terminology).

49. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 967, 998 (1986). Professor Dore notes that a majority of states have adopted requirements based upon the RMA, which requires agencies to afford interested parties "reasonable opportunity to submit data, views, or arguments, orally or in writing." *Id.* at 998-99.

without opportunity for oral presentation" in most circumstances.⁵⁰ The federal provision has generally been construed to require "notice and comment" rulemaking and to permit agencies to limit participation in rulemaking to written submissions, although the courts have regulated the comment process in an attempt to improve its effectiveness.⁵¹ The language of the rulemaking provisions of the Revised Model Act is similar to the language in the federal provision.⁵² The extent and intended effect of the Florida APA's departures from the federal and state models is clearly apparent in the procedures mandated by sections 120.54(3) and 120.54(17).

1. Section 120.54(3)—The Public Hearing

Section 120.54(3)(a) provides in relevant part:

If the intended action concerns any rule other than one relating exclusively to organization, procedure, or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice, give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of their contentions.⁵³

50. 5 U.S.C. § 553(c) (1988) (informal rulemaking). Informal rulemaking is the dominant rulemaking approach in the federal system. Professor Davis concludes that "rulemaking on the record is in process of disappearing except for fixing the rates of one or a few companies." K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:8, at 481 (2d ed. 1978). However, in a recent trend, Congress has been adding procedures to basic section 553 requirements in various substantive enactments. *Id.* § 6:9, at 482. For further discussion of federal informal rulemaking, see *infra* notes 280-88 and accompanying text.

51. For a more detailed explanation of federal law in this area, see *infra* notes 280-97 and accompanying text.

52. Section 3 of the RMA also requires a notice and comment procedure for the adoption of rules. 1961 MODEL ACT, *supra* note 12, § 3(a), at 167. It provides that the agency shall "afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing." *Id.* § 3(a)(2), at 168. Section 3-104 of the 1981 MSAPA, which Professor Bonfield suggests "modifies and extends" the RMA provision in a number of respects and goes beyond the federal act, provides for an opportunity for written submissions concerning the proposed rule. A. BONFIELD, *STATE ADMINISTRATIVE RULEMAKING* 187 (1986). However, even the expanded citizen participation opportunities of the 1981 MSAPA provide significantly less opportunities for citizen participation than does the Florida APA. 1981 MODEL ACT, *supra* note 4, § 3-104(a), at 36. The RMA and the 1981 MSAPA both provide that in the case of substantive rules, an oral hearing must be granted only when requested by 25 persons, a governmental subdivision or agency, or an association having not less than 25 members. 1961 MODEL ACT, *supra* note 12, § 3(a)(2), at 167-68; 1981 MODEL ACT, *supra* note 4, § 3-104(a)(2), at 36-37. Section 3-104 "does not create a right to a trial-type or evidentiary hearing in rule making 'only an argument-style oral proceeding'" without confrontation or cross-examination. A. BONFIELD, *supra*, at 198. For a comparison of the RMA, the 1981 MSAPA and the federal act on these points, see A. BONFIELD, *supra*, at 187-207.

53. FLA. STAT. § 120.54(3)(a) (1989).

The language of section 120.54(3) differs significantly from the language commonly used in such provisions. For example, section 120.54(3)(a) of the Florida APA guarantees each affected person⁵⁴ an opportunity to present evidence and argument on all issues under consideration appropriate to inform the agency of the participants' contentions, except in the case of rules that relate exclusively to organization, procedure, or practice.⁵⁵ Neither the federal act nor the model state acts guarantees individuals the opportunity to present "evidence and argument."

The decision to allow evidence and argument rather than to require only notice and an opportunity to comment was a considered judgment. The language "present evidence and argument on all issues" appears in the Reporter's First Draft, although not in the rulemaking section.⁵⁶ Only when the House Government Operations Committee prepared a bill based on the Reporter's Final Draft were the words "opportunity to present evidence and argument" added to the rulemaking section of the Florida APA.⁵⁷ The Legislature deliberately chose language traditionally associated with adjudication to describe the rulemaking hearing guaranteed by the new APA. This decision to incorporate adjudicatory language in the rulemaking section comports

54. The public hearing authorized by this section can be invoked by "affected" persons. The remedies authorized by sections 120.54(4) and 120.54(17) can be invoked only by "substantially affected" persons. Although the act defines neither category, the logical conclusion that the "affected person" standard is less difficult to satisfy than the "substantially affected" standard, has been confirmed. For a detailed discussion of the level of interest necessary to invoke this and other administrative proceedings authorized by the act, *see generally* Dore, *supra* note 49.

55. FLA. STAT. § 120.54(3) (1989). As defined in section 944.02(5), Florida Statutes, prisoners "may be limited by the Department of Corrections to an opportunity to submit written statements"

56. Reporter's Draft No. 1 (on file with the author). This language appeared in section 0120.6, titled "Adjudication; in general" and it listed the "source" of this language as "F.S. 120.22; RMA 9(a)." *Id.* at 14. Section 120.22, Florida Statutes, was titled "Administrative Adjudication Procedure," in Part II of chapter 120. Section 9 of the RMA provided the procedure applicable in "contested cases." 1961 MODEL ACT, *supra* note 12, § 9, at 207-08. The term "contested case" was defined in section 1 of the RMA to mean "a proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . ." *Id.* § 1(2), at 148. Thus, both of the source sections pertained to adjudication. Section 9 of the RMA provided that parties may "present evidence and argument on all issues involved." *Id.* § 9(c), at 207. The *Reporter's Final Draft* retained that language in section 0120.6, but did not include that language in the section 0120.4, the section that governed rulemaking. Section 0120.4 provided only for "an opportunity for such public hearing as may be appropriate to inform it of the contentions of interested persons." *Reporter's Final Draft* (Mar. 1, 1974), in A. ENGLAND & L. LEVINSON, *supra* note 9, 4 at app. B [hereinafter *Reporter's Final Draft*]. This language was the same as the language in the first draft of that section. Reporter's Draft No. 1, *supra*, at 8.

57. Fla. CS for SB 892 at 956 (1974). This language was also retained in section 120.57.

with the decision to focus "attention on the rights affected rather than the labels given a particular process," but differs from the language suggested by the Law Revision Council.⁵⁸ Section 120.54(3) does not require a hearing every time a rule is proposed. Rather, pursuant to the principle of "total flexibility" and "informality whenever it is possible to exercise it without affecting rights unfairly,"⁵⁹ it varies the actual process, case by case, depending upon the degree to which affected persons participate in the rulemaking process. If no one requests a hearing, none is required. If an individual wants merely to comment in writing, that comment is to be made a part of the record. However, if even a single affected person requests a public hearing one must be held. Whether an affected person wants to use that opportunity to appear and comment orally or to present evidence and argument is a matter to be decided by that participant, not the agency.⁶⁰

58. *Reporter's Comments, supra* note 9, at 6. I recognize that the view I express here conflicts with the view expressed by one of the principal drafters of the APA shortly after it was enacted. Professor Levinson stated: "The new Florida Act establishes, by this provision, the type of rulemaking which is generally known in the literature of administrative law as 'notice-and-comment,' or 'informal' rulemaking. . . . This type of proceeding is also found in the federal APA" Levinson, *supra* note 17, at 639 (footnotes omitted). Levinson's description failed to take into account the changes that had been made to the rulemaking provisions of the act in the House Government Operations Committee. His description corresponded with his erroneous suggestion that the Florida APA does not require an oral proceeding in rulemaking. *Id.* at 634. That suggestion has not been followed. I do not believe that the Florida provision can fairly be construed as either "informal" rulemaking or "notice and comment" rulemaking, in light of its language and legislative history. Professor Levinson supported his analysis with extensive citation to federal materials:

Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51; Fitzgerald, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 AD. L. REV. 287 (1974); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 ADMIN. L. REV. 199 (1974).

Id. at 639 n.122. For reasons discussed later, I suggest that such reliance on federal authority in interpreting the Florida APA is inappropriate.

59. *Reporter's Comments, supra* note 9, at 6-7.

60. In Florida, an agency is required to hold a public hearing on a proposed rule at the timely request of only one affected person. Professor Dore notes that "no state other than Florida permits a single 'affected person' to require the convening of a public hearing on a proposed rule at which 'affected persons' may submit their views to the agency." Dore, *supra* note 49, at 1000. This requirement should have been clear from the fact that affected persons have the right to make evidentiary presentations. However, the requirement was clarified by a 1978 amendment to section 120.54(3) which added: "The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule." Ch. 78-425, Fla. Laws 1411 (emphasis added). Legislative history suggests that the amendment was designed to clarify, rather than to create, such a requirement. A JAPC memorandum dated April 28, 1978, described the purpose of that language when the amendment was attached to House Bill 1751:

Thus, section 120.54(3) was adopted to guarantee affected persons an opportunity to make an evidentiary presentation at a public hearing. This opportunity differs from the participation opportunities guaranteed in other jurisdictions: by requiring an opportunity for an evidentiary presentation that is *appropriate* to inform the agency of the participant's contentions,⁶¹ section 120.54(3) allows the agency some discretion to control—but not to eliminate—the presentation. Whether an opportunity is “appropriate” depends upon its reasonableness under the circumstances. In determining what is appropriate, the agency may consider limitations on an evidentiary presentation only to avoid duplication, irrelevant matters, unnecessary delay, and disruption of the proceedings. This is precisely the construction given to the provision by the Model Rules.⁶² Under the popular labels of the old act, a hearing permitting such a presentation might be characterized as adjudicatory or “quasi-judicial” in nature. The new act, however, does not focus on the labels given a particular process but on the rights affected.

In sum, section 120.54(3) reflects a legislative decision to favor citizen input during rulemaking and to discount concerns about the loss of efficiency these additional opportunities threaten to create. The Legislature recognized the value of input of affected persons. By providing information that supports their views on the proposed rule and explaining their understanding of how it will apply to them, affected persons help the agency understand its proposal.⁶³ The Legislature also recognized the value of permitting affected persons to participate in the process by organizing and delivering an evidentiary presenta-

“An agency’s obligation to conduct a public hearing on a proposed rule upon the request of an affected person is clarified” The fact that this amendment was a clarification is also clear from contemporary commentary. Johnson, *1978 Revision of the Administrative Procedure Act*, 52 FLA. B.J. 549, 550 (1978) (“Section 120.54(3) was amended to clarify that the ‘opportunity to present evidence and argument’ in rulemaking proceedings means a public hearing.”). Model Rule 28-3.031(1) now provides that an “agency shall provide, upon request, a public hearing for presentation of evidence, argument and oral statements, within the reasonable conditions and limitations imposed by the agency” FLA. ADMIN. CODE R. 28-3.031(1) (1990). The Model Rules were promulgated pursuant to section 120.54(10), to provide uniform procedures on such questions. See Whisenand, *Model Rules of Florida Administrative Practice—Chaos or Uniformity*, 49 FLA. B.J. 361 (1975).

61. FLA. STAT. § 120.54(3) (1989) (emphasis added).

62. FLA. ADMIN. CODE R. 28-3.031(1) (1990). Some commentators have read into this language more agency discretion than is appropriate. See Dore, *supra* note 49, at 1007-08. For further discussion of this point, see *infra* notes 149-75 and accompanying text.

63. Who better than the affected person can provide this information? By permitting evidentiary presentations, the APA not only obtains the views of such persons, it also solicits the raw material from which those persons have drawn their views, thereby providing the agency with a depth of information sufficient to allow exploration beyond the conclusions a participant might draw from that raw material.

tion.⁶⁴ The Florida APA empowers affected persons to protect their own interests in rulemaking where it appears to them that an agency is acting without full knowledge of the facts or a proper understanding of policy. The Legislature chose the evidentiary presentation as the proper vehicle for educating agencies and affected persons alike.⁶⁵

2. Section 120.54(17)—The “Draw Out”

Section 120.54(17) of the Florida APA provides for what is popularly known as a “draw out.” It states:

Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect his interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of s. 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

This proceeding is not just unusual, it is unique to the Florida APA.⁶⁶ Under sections 120.54(17) and 120.57, the nature of the draw

64. Individuals who prepare an evidentiary presentation are likely to be more familiar with the broad spectrum of concerns that the proposed rule is designed to address than individuals who are only prepared to comment. Preparation of an effective evidentiary presentation requires that the participants develop a theory of the case being presented, analyze and sift through the available evidence, and take account of contrary evidence and argument. Participants concerned about the effectiveness of their presentation will commonly modify their case theory during investigation and preparation in order to take account of contrary evidence and argument that has been discovered. In this way, a provision permitting evidentiary presentations during rulemaking can sensitize affected persons to contrary evidence, value judgments, and compromises that may be incorporated in the proposed rule, even before such affected persons appear to participate in the rulemaking proceeding.

65. Like section 120.54(3) proceedings, notice and comment rulemaking procedures were intended “for the education of the administrator, especially on questions of policy . . .” Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 755 (1975). Section 120.54(3) proceedings, however, provide an even better education.

66. Dore, *supra* note 49, at 1006. The Legislature originally adopted the draw out provision as part of the introductory paragraph to section 120.57, Florida Statutes (1975). It was subsequently moved to section 120.54 by Ch. 76-131, 1976 Fla. Laws 221. Originally numbered section 120.54(15), it was renumbered (16), Ch. 76-276, 1976 Fla. Laws 750, and then renumbered (17) as a result of Ch. 84-203, 1984 Fla. Laws 612. Apparently, the Legislature intended no substantive change when the provision was moved from section 120.57 to section 120.54, although there were changes in language. A JAPC staff memorandum entitled “Amendment

out proceeding, as well as who will preside at the draw out hearing, varies depending upon the nature of the matters in dispute.⁶⁷ If a material fact is in dispute, section 120.57(1) governs the draw out and the full formal proceedings of that section, including discovery and an evidentiary hearing, are available to resolve the factual dispute.⁶⁸ The statute specifies that, in most instances, an independent hearing officer from the Division of Administrative Hearings (DOAH) will preside.⁶⁹ The hearing officer hears the evidence, rules on proposed

Number 10' explains the rationale for the move to section 120.54:

PROBLEM

The language in the introductory paragraph to §120.57 relating to adversary hearings to protect a person's interests at a rulemaking proceeding, properly belongs with the other rulemaking provisions of the Act.

SUGGESTED SOLUTION

Amendment #10 moves these provisions from §120.57 to a new subsection (15) of 120.54 without substantive change except to make it clearer that the regular §120.54 hearing is suspended pending completion of the §120.57 hearing.

67. A. ENGLAND & L. LEVINSON, *supra* note 9, § 9.22(i), at 78. "If the affected person demonstrates to the agency that his substantial interests will not be adequately protected by informal rulemaking proceedings, the agency must convene a separate, trial-type hearing, which shall be formal if a disputed issue of material fact is involved; otherwise the procedure is informal." Levinson, *supra* note 17, at 639 (footnote omitted). For a general discussion of the nature of the proceedings conducted pursuant to section 120.57, see A. ENGLAND & L. LEVINSON, *supra* note 9, chapters 11-13.

Whether formal or informal procedures under section 120.57 are required is a determination most frequently made in the context of the type of hearing appropriate when rules or policy are being *applied*, and when the person to whom they are being applied demands a hearing; however, one case has confirmed that a similar determination should be made to decide appropriate hearing procedure outside that traditional context. *Garrido v. Department of Health and Rehab. Servs.*, 386 So. 2d 811 (Fla. 1st DCA 1980) (holding that the determination of proper hearing procedure in connection with a petition to initiate rulemaking turned on the existence of a material factual issue; if a material issue of fact existed, then section 120.57(1) proceedings are required); *but cf.* *Bayonet Point Hosp., Inc. v. Department of Health & Rehab. Servs.*, 490 So. 2d 1318 (Fla. 1st DCA 1986) (holding that findings of fact and conclusions of law are not required in an order denying a petition to initiate rulemaking pursuant to section 120.54(5), because those proceedings are governed by section 120.54).

68. For example, section 120.57(1)(b)(4) guarantees that "[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel." FLA. STAT. § 120.57(1)(b)(4) (1989). Section 120.58(1)(e) also guarantees the right to cross-examine, whether the proceeding results in a rule or order. Levinson, *Elements of the Administrative Process: Formal, Semi-Formal, and Free-form Models*, 26 AM. U.L. REV. 872, 902 (1977). Also, parties may prepare for the draw out hearing with the assistance of discovery, Model Rule 28-5.208, and employ subpoenas to compel the attendance of witnesses. FLA. STAT. § 120.58 (1989); FLA. ADMIN. CODE R. 28-5.301 (1990). These guarantees are most familiar in the context of adjudication. See generally Benton & Pfeiffer, *Administrative Adjudication*, in FLORIDA ADMINISTRATIVE PRACTICE 4-1 (3d ed. 1990). Through the draw out, the same procedural protections available in adjudication are available in rulemaking.

69. Section 120.57(1) provides that the Division of Administrative Hearings shall conduct hearings unless they are conducted by the agency head or a member thereof, or unless the hear-

findings submitted by the parties, and makes findings of fact and conclusions of law on policy issues in a recommended order which is sent to the agency. The agency then enters a final order that accepts or rejects the hearing officer's findings and recommendations. When this procedure is complete, rulemaking may continue. Where no material facts are in dispute—for example, where only policy matters are disputed⁷⁰—section 120.57(2) specifies applicable procedures. In a 120.57(2) proceeding, an independent hearing officer is not required and the procedure is less formal. Still, the affected person's right to choose how to present evidence and argument, either oral or written, is preserved,⁷¹ as is a ban on ex parte communications.⁷² If the objections of the persons or parties are overruled, the agency is required to provide a written explanation within seven days.⁷³

The decision to provide similar forms of protection for persons whose substantial interests are affected by proceedings previously thought of as either "adjudication" or "rulemaking" is one of the most significant innovations of the Florida APA.⁷⁴ This innovation, the *Reporter's Comments* note, "broaden[s] considerably the scope of administrative fairness."⁷⁵ The *Reporter's Final Draft* intentionally

ing is of a type exempted from that requirement in section 120.57(1)(a)(1)-(8). These subsections exempt certain agencies from the DOAH hearing requirement in cases where the agency's own hearing officers may preside. The exemptions may be construed not to extend to rulemaking. For example, section 120.57(1)(a)(2) exempts from the DOAH requirement "[h]earings before the Unemployment Appeals Commission in *unemployment compensation appeals*, unemployment compensation appeals referees, and special deputies pursuant to s. 443.141" FLA. STAT. § 120.57 (1)(a)(2) (1989) (emphasis added). This language suggests that, if the Unemployment Appeals Commission engages in rulemaking, it will be subject to the DOAH hearing requirement during a draw out. Whether—and to what extent—these exemption provisions apply to rulemaking are currently open questions.

70. Some policy questions will involve factual disputes and others will not. If the question is whether the policy choice incorporated in the proposed rule will perform in practice as the proposed rule suggests, then a material factual issue may exist which should be resolved pursuant to section 120.57(1). If the issue is whether the policy choice follows logically from the agency's resolution of the underlying policy considerations, then a section 120.57(2) proceeding may be adequate.

71. Section 120.57(2)(a)(2) guarantees the right "to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or of its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction." FLA. STAT. § 120.57(2)(a)(2) (1989).

72. Section 120.66(1) provides that the ban on ex parte communications is applicable "[i]n any proceeding under s. 120.57 . . ." *Id.* § 120.66(1).

73. *Id.* § 120.57(2)(a)(3).

74. *Reporter's Comments*, *supra* note 9, at 6-7. The authorization of adjudicatory methods in rulemaking is consistent with the APA's emphasis on rational decisionmaking: "Adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs." Fuller, *The Forms and Limits of Adjudications*, 92 HARV. L. REV. 353, 366 (1978).

75. *Reporter's Comments*, *supra* note 9, at 18. The draw out provision as enacted was de-

avoids terms such as "adjudication" when providing protection for substantial interests in order to "focus attention away from labels and toward the effects of agency decision-making."⁷⁶

The legislative history of the act further suggests how the decision to depart from "unthinking adherence to 'rule-making' and 'adjudication' procedures, as if the two were wholly distinct and distinguishable,"⁷⁷ was one important way the drafters sought to rid the act of anachronisms creating unfair procedures. The drafters intended that rulemaking under the act be flexible enough to provide for adjudicatory process during rulemaking, and that the need for such procedures, rather than the label given the proceedings, should determine the process to be used. As the drafters stated: "This provision . . . makes clear that rule-making can involve substantial individual interests, and that the procedures suitable for adjudication may be needed in the course of rule-making in order to protect these interests."⁷⁸

While the Florida APA differed from other administrative procedure acts when it was adopted, its approach gained support among some commentators. Most APAs require agencies to follow rulemaking procedure when they adopt rules, and adjudicatory process when they issue an order.⁷⁹ Yet,

rived from a similar provision included in the section of the Reporter's Final Draft governing decisions affecting substantial interests, which, with some significant changes, the Legislature adopted as section 120.57. Section 0120.6 provides in relevant part: "Rule-making proceedings shall be governed solely by section 0120.4 unless and to the extent that a party timely asserts that its substantial interests will be affected in the proceeding and affirmatively demonstrates that the proceeding does not provide adequate opportunity to protect those interests." *Reporter's Final Draft*, *supra* note 56, at 8. The Senate version of the proposed APA that was sent to the conference committee did not provide for a draw out. Fla. CS for SB 892 (1974). However, the bill passed by the House included the draw out, but differed from the Reporter's Final Draft in that it added "to the agency" after "affirmatively demonstrates." It also added the following after the provision quoted above: "If the agency determines that rule-making proceedings are not adequate to protect a party's interests, it shall convene an additional proceeding, which shall conform to the provisions of this section. The agency may request similarly situated parties to join and participate in such a proceeding." Fla. CS for HB's 2672, 2434, 2583, § 120.57 at 15, lines 1-7 (1974). As adopted, the law changed "an additional proceeding, which shall conform to the provisions of this section" to "a separate proceeding and proceed under the provisions of this section." FLA. STAT. § 120.57 (Supp. 1974). Note also that the protections proposed in section 0120.6 of the *Reporter's Final Draft* were limited in applicability before adoption in section 120.57(1). *Reporter's Final Draft*, *supra* note 56, at 8-10. In the *Reporter's Final Draft*, the protections later adopted in section 120.57(1) applied not only when a material fact was in dispute, but also in the case of a dispute over policy or the interpretation of a provision having the effect of law. *Reporter's Final Draft*, *supra* note 56, at 8. As adopted, the act limited the availability of section 120.57(1) proceedings to situations where a material fact was in dispute.

76. *Reporter's Comments*, *supra* note 9, at 17-18.

77. *Id.* at 6.

78. *Id.* at 18.

79. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 308 (1986). Bonfield notes that this is the approach followed by the federal APA and the two model state acts.

[c]ritics argue that the classification of all formal agency action as either a rule subject to rulemaking procedures or an order subject to adjudication procedures is unduly rigid and, therefore, fundamentally unsound. Such a dichotomous classification may not always yield the most appropriate procedures. For instance, in the adoption of certain statements of general applicability—rules—some types of relevant factual issues may properly be the subject of oral testimony and cross examination, procedures granted of right only in formal adjudications.⁸⁰

The Florida approach recognizes the difficulties this critique describes⁸¹ and adopts a unitary decision making process.

3. *Broader Theoretical Framework for the Florida Approach*

The Florida APA breaks with tradition by taking a functional approach to the determination of appropriate procedure. In their cover letter to the first draft of the act, the drafters stated:

For purposes of the draft statute, the traditional terms "adjudication" and "rule-making" have been retained. The draft has been developed, however, on the assumption that these terms are operationally too narrow and confining. . . . Thus, authority is provided in rule-making proceedings to determine disputed facts in a hearing, and in adjudicatory proceedings to establish policy with the mechanics of rule-making. In other words, the traditionally narrow paths to administrative determinations have been varied to allow function-oriented goals, rather than continuing a pattern of procedures pre-conditioned by the first denomination of the proceeding.⁸²

This critique—that the distinction between adjudication and rule-making is an overly rigid one—may be misinterpreted; this criticism is not essentialist in nature.⁸³ The problem is not that some rules are essentially orders or that some rulemaking will include some facts better found through the use of adjudicatory methods. The problem is that the determination of facts and policy by the adoption of legislative rules precludes the right to challenge those determinations when the

80. *Id.* at 309 (footnotes omitted). Bonfield does not subscribe to this critique. *Id.* at 311.

81. Bonfield states, "[t]his line of criticism further suggests that the states should have substituted for the rule-order dichotomy a unitary decision-making process that used different procedures for different classes of factual and legal issues that might arise in the course of an agency proceeding." *Id.* at 309.

82. Cover letter to Reporter's Draft No. 1, at 2 (on file with the author).

83. See R. UNGER, KNOWLEDGE AND POLITICS 46-49 (1975).

rule is applied. Agencies, therefore, often enact legislative rules in order to benefit from their preclusive effect.⁸⁴ In Florida, as in other jurisdictions, a rule properly enacted pursuant to legislative rulemaking authority displaces proof as to the facts upon which it was predicated and forecloses debate concerning the policy judgments it embodies.⁸⁵ Thus, substantial interests are affected in rulemaking, even rulemaking that occurs long before the rules are actually applied to those interests.

The importance of this recharacterization of the problem can best be seen by reviewing some suggestions made by Professors Bonfield and Davis. Professor Bonfield suggests a four-part test for identifying those situations where an agency statement of general applicability should be treated as an "order" subject to adjudicatory procedures rather than a "rule" subject to rulemaking procedures despite its form.⁸⁶ According to his test, a "rule" is an "order" only when it can be demonstrated that:

- (1) in effect, the impact of the statement falls exclusively on one identifiable individual or entity; *and* (2) it can be demonstrated that, on the basis of current information, no other individual or entity could ever join the described class; *and* (3) the statement is based wholly on specific facts pertaining to the circumstances or conduct of that particular individual; *and* (4) as a matter of subjective agency intention, the statement is directed only at the particular individual or entity in question.⁸⁷

Thus, Bonfield suggests that where a rulemaking proceeding is essentially an adjudication, a reliance on the distinction between rules and orders would be placing form over substance.

Professor Davis proposes a distinction between "legislative" and "adjudicative" facts.⁸⁸ Adjudicative facts are rare in rulemaking, ar-

84. See, e.g., *Heckler v. Campbell*, 461 U.S. 458 (1983) (holding that social security grid regulations relieved the Secretary of Health and Human Services of the need to rely on vocational experts in individual cases, because the types and numbers of jobs existing in the national economy was established in the regulations); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973); *Federal Power Comm'n v. Texaco Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). "*Storer* marked a shift in judicial notions about administrative procedure. Before the APA, the notion of fair procedure had been equated primarily with trial-type hearings." Verkuil, *supra* note 48, at 189 (footnote omitted). After *Storer*, the courts were willing to preclude trial-type hearings on issues resolved through rulemaking, even if only notice and comment rulemaking was conducted.

85. *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 583 (Fla. 1st DCA 1977).

86. A. BONFIELD, *supra* note 52, at 85.

87. *Id.* (emphasis in original).

88. See Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55

gues Davis; therefore, where adjudicatory methods may increase the accuracy of the adjudicatory facts found in rulemaking, the efficiency of rulemaking will not be unduly compromised by using adjudicatory methods in order to find those facts. Professor Davis concludes that it is inappropriate to determine the degree of procedural protection based upon the rule/order dichotomy in those circumstances.⁸⁹

Professors Bonfield and Davis respond to the concern about the preclusive effect of rules only in a very minimal way. Bonfield's analysis of the circumstances in which adjudicatory procedures should be used in rulemaking is limited to cases in which the preclusive effect of rulemaking is immediate and apparent. Davis' analysis rejects the rigidity of the distinction in circumstances where the preclusive effect applies specifically to individuals. Yet, all facts forming the predicate of rules have a preclusive effect on individuals because rules are not subject to proof when they are later applied.⁹⁰ This preclusive effect is true for both legislative and adjudicative facts, and raises the question of whether those facts should be subject to challenge.⁹¹

The courts have generally been unwilling to find that this preclusive effect raises due process concerns.⁹² An early example of this trend,

HARV. L. REV. 364, 402 (1942). While Professor Davis' distinction between legislative and adjudicative facts has had great influence, it has also found critics:

Apart from the rather circular nature of this distinction—since it takes us back to the ultimate question of law or policy to be decided—in actual application it is as elusive as all the other magic keys which have been offered for the solution of the right to hearing problem.

Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961) (reviewing K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958)); Cramton, *supra* note 48, at 591 ("While the idea that trials are appropriate only for 'adjudicative facts' is suggestive, it begs the hard question because the identification of 'adjudicative facts' is so subjective and flexible." (footnotes omitted)). It has also been recognized that "[g]eneral or legislative facts consist of a host of particulars . . ." Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U.L. REV. 781, 800 (1964).

89. K. DAVIS, *supra* note 50, § 14.4, at 20 ("If the agency's task is to find disputed adjudicative facts, that is, facts about a particular party, the proper basic procedure is almost always trial procedure . . ."). Bonfield disagrees because of the costs he believes such an approach would create. Bonfield, *supra* note 79, at 311.

90. "[A] factual predicate is, of course, the 'factual' underpinning of the rule. It is the set of facts under which the rule becomes a means of furthering the statutory goal." Gifford, *Rule-making and Rulemaking Review: Struggling Toward a New Paradigm*, 32 ADMIN. L. REV. 577, 595 (1980) (footnote omitted).

91. Professor Davis has recognized:

The ingredients of all lawmaking have to be policy ideas and facts, but the policy ideas are necessarily dependent, immediately or remotely, on facts. Two interrelated questions . . . are: (1) Should law require lawmakers to develop the facts that are relevant to their lawmaking? (2) Should law require lawmakers, before using facts in lawmaking, to allow interested persons to challenge the assumed facts?

Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980).

92. Rulemaking does not raise due process concerns, except where an agency is making a

cited by more recent cases as a leading authority, is the *Bi-Metallic Investment Company v. State Board of Equalization of Colorado*⁹³ case. In *Bi-Metallic*, Justice Holmes considered the degree of the participation opportunity guaranteed by the United States Constitution and found that "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."⁹⁴

This assumption—that a hearing is impracticable in such circumstances—is subject to challenge and has been called "inadequate on its face."⁹⁵ However, when Judge Williams of the D.C. Circuit made that observation some years before he went on the bench, he suggested that a "second dimension" of Justice Holmes' concern is "more plausible: the possibly greater utility of the political process as a check upon administrative error."⁹⁶ Nevertheless, he acknowledged weaknesses in this reasoning as well.⁹⁷ He sought to justify Holmes' result as based upon the different nature of the inquiry in adjudication and rulemaking:

The *Bi-Metallic* preference for the political remedy makes sense in comparative terms. Holmes may have meant not that the political remedy is ideal, but merely that when the ultimate issues require value judgments that are not susceptible to "proof," the check afforded by the procedural protections of a hearing may be even less worthwhile—especially when one considers the costs in time and energy involved in such procedural checks.⁹⁸

"quasi-judicial" determination, exceptionally affecting in each case a very small number of persons upon individual grounds, or perhaps where a totally unjustified departure from long standing procedure is involved. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* 435 U.S. 519, 542 (1978); *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 242, 245 (1973).

93. 239 U.S. 441 (1915). In *Bi-Metallic*, "Justice Holmes articulated the basic procedural distinction between rulemaking and adjudication that prevails to this day." Verkuil, *supra* note 48, at 264 n.22. *Bi-Metallic* is often read together with *Londoner v. Denver*, 210 U.S. 373 (1908), another case involving a Denver property dispute. "Upon this unlikely foundation much of the structure of procedural due process has been erected." A. BONFIELD & M. ASIMOW, *supra* note 42, at 94.

94. *Bi-Metallic*, 239 U.S. at 445.

95. Williams, "Hybrid Rulemaking" *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 404 (1975) (suggesting practical solutions to the problem).

96. *Id.*

97. *Id.* at 405. He suggests that these reasons include the lack of clear-cut supporting examples and the fact that the political process might respond only to large numbers of affected persons.

98. *Id.* at 407 (footnote omitted).

Williams had to qualify this justification further because, as he conceded, “[w]henver the perception of raw data is at stake, or doubts are raised about the analytical underpinnings of competing inferences, those requirements may play more or less the role that they do when a rule is being applied to a historical episode.”⁹⁹ He ultimately discounted the utility of additional procedures, on the assumption that agencies can avoid the correction of factual errors made during rule-making by recasting their fact-finding as value judgments.¹⁰⁰ Thus, when reduced to its core, the challenge raised by *Bi-Metallic* is to find a way to prevent agencies from accomplishing this maneuver.

To the extent that a system can be designed to operate with reasonable efficiency and to increase assurance that faulty factual premises will be identified and corrected, such a system holds promise as a method of improving agency accountability during rulemaking. Putting aside efficiency concerns, an adjudicatory system holds promise because it seems more likely to discover errors in legislative as well as adjudicative facts. Professor Glen Robinson notes:

Challenges to the suitability of adjudicative methods (particularly the reliance on testimonial evidence and cross-examination) where the issues involve policy planning, appear to rest in large part on the notion that “policy,” or, to use Professor Davis’ phrase, “legislative fact,” is something pure, uncontaminated by particular data and questions, assumptions, opinions and biases which have been regarded as properly the subject of such methods in other contexts.¹⁰¹

This premise is debatable. As Professor Robinson states, “a judgment on policy or ‘legislative fact’ invariably involves an admixture of particular facts, opinions, and biases, some of which may and some of which may not be appropriate for exploration by testimony and cross-examination.”¹⁰²

Professor Robinson also challenges the theory that “predictive judgments or forecasts are a class apart from ‘historical facts’, and techniques of testimonial proof and cross-examination are inappropriate” in the case of predicative judgment.¹⁰³ He suggests that, in both cases, “the determination must almost invariably rest on general con-

99. *Id.* (footnote omitted).

100. *Id.* at 407-08.

101. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 521 (1970).

102. *Id.* Accord Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 911 (1980) (“[A]djudicatory procedures may be helpful in illuminating even decisions turning on legislative facts.” (footnote omitted)).

103. Robinson, *supra* note 101, at 522.

clusions that are inferred from particular factual data and an evaluation of probabilities that may be as appropriate for testimonial proof and cross-examination"¹⁰⁴ as questions of historical fact. He also suggests that, even absent dispute about specific identifiable "facts," it may still be desirable to force the agency, through cross-examination of its experts, to disclose the particular premises, including facts, opinions, and reasoning, which underlie its "policy" conclusions.¹⁰⁵

There are, of course, efficiency costs in adopting a system based upon an adjudicatory model;¹⁰⁶ however, those costs do not clearly outweigh any possible benefits from the use of adjudicatory methods. The challenge is one of design: Can we structure a participatory regime that will efficiently capture the accuracy benefits of the adjudicatory methods in a way that will provide net benefits to the rulemaking process?

Allowing input from affected interests has been a standard solution to the problem of rulemaking's preclusive effects.¹⁰⁷ Beyond efficiency costs, this solution has two basic limitations: first, uniform rules have benefits,¹⁰⁸ even though uniformity limits the agency's sensitivity to individual concerns during rulemaking; second, rules shaped by citizen participation may reflect the unequal resources of the rulemaking participants.¹⁰⁹ The first problem poses the question of how responsive to affected interests we want to make the rulemaking process. The answer represents a choice of political values.¹¹⁰ The second problem

104. *Id.*

105. *Id.* (footnote omitted).

106. Professor Richard Pierce identifies three ways rulemaking enhances efficiency:

[Rulemaking] avoids the needless cost and delay of finding legislative facts through trial-type procedures; it eliminates the need to relitigate policy issues in the context of disputes with no material differences in adjudicative facts; and, it yields much clearer 'rules' than can be extracted from a decision resolving a specific dispute.

Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308. The draw out adversely effects only the first of these efficiencies.

107. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (describing the interest participation model).

108. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1696 (1976).

109. Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1196 (1981) ("Since interest groups primarily represent business groups and the well-to-do, many citizens go unrepresented." (footnotes omitted)).

110. Professor Shapiro suggests that:

From the founding of the republic, Americans have embraced two opposing modes of public administration, the democratic and the technocratic. The former, which we might term the Jacksonian tradition, calls for government by the common people themselves, or at least by administrators directly representative of and responsive to the people. . . . The opposing, Federalist tradition, first advocated by Hamilton,

poses a question of whether a participatory system can be designed that does not increase the advantages of those with wealth and power.

Florida's innovative draw out procedure attempts to meet this challenge by making those whose substantial interests are affected responsible for objecting to agency decisions and by making the agency responsible for meeting their objections, when timely and competently made.¹¹¹ The draw out is thus a response to the challenge of institutional design: it provides individuals a time-limited opportunity during the rulemaking process to protect their substantial interests¹¹² from the choices agencies incorporate in valid rules.¹¹³ This opportunity is par-

stresses the need for efficient government and thus the need for an administration staffed not by an ever-changing stream of Know-Nothings, but by experts.

Shapiro, *supra* note 42, at 1495-96 (footnote omitted).

111. In this way, the draw out can be viewed as an attempt to merge our democratic and technocratic traditions. The draw out responds to the technocratic tradition by recognizing various kinds of expertise and empowering all involved, rather than assuming agency expertise in all aspects of decisionmaking. The draw out provision treats affected persons as experts on how proposed policy will affect their substantial interests. It treats the DOAH hearing officer as the expert fact finder, and limits the autonomy of the agency to the area of its special expertise. This approach is responsive to the democratic tradition because it empowers affected persons in the process of policy creation and because it forces agencies to take account of opposition to the factual and policy content of its rules.

112. The Florida APA was designed to guarantee greater adjudicatory process than does the United States Constitution in connection with rulemaking. For this reason, it is "revolutionary":

Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted. . . . To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.

Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 284 (1984).

113. Two other administrative remedies provided by the act are available to challenge rules: section 120.54(4), which authorizes proposed rule challenges, and section 120.56, which authorizes existing rule challenges. Section 120.54(4) authorizes persons who are substantially affected by a proposed rule to file a proposed rule challenge with the Division of Administrative Hearings. Section 120.56 authorizes similar challenges to existing rules. These proceedings are available to raise the issue of whether proposed or existing rules are an "invalid exercise of delegated legislative authority," as that phrase is defined in section 120.52(8). They are heard and decided by a DOAH hearing officer. The proposed rule challenge is decided while the rulemaking proceeding is pending before the agency. If the challengers can demonstrate that the proposed or existing rule is an invalid exercise of delegated legislative authority, the hearing officer is authorized to invalidate the proposed or existing rule. Only one other state, Missouri, has provided for an administrative challenge to adopted rules. Dore, *supra* note 49, at 1034 (noting that some other states provide for court challenges). The availability of these remedies may appear to threaten one of the premises of the argument—that rules have a preclusive effect—because they allow the invalidation of rules, even after they are adopted, since substantially affected persons can wait until the rule is applied to them, demand a section 120.57 hearing on the matter, and then simultaneously file a section 120.56 challenge to the rule's validity.

While the availability of rule challenge remedies may appear to mitigate the preclusive effect of rules, it does so only in cases where the rule is an invalid exercise of delegated legislative authority. There are many cases involving important disputes in rulemaking that do not rise to

ticularly important in Florida because agencies are not permitted to deviate from their own rules.¹¹⁴

The draw out should clearly be available in the situations discussed by Professors Bonfield and Davis.¹¹⁵ However, the draw out is intended to be available in other situations as well, such as cases where the disputed facts are described as "legislative." The draw out is available because without it, the individual whose substantial interests are affected in the rulemaking is forever denied the protection provided by section 120.57 in connection with the agency's decision. The draw out is intended to be available where disputes arise concerning policy choices because section 120.57 provides minimum standards for determining disputed policy choices that affect substantial interests. The Legislature recognized that the adoption of policy by rule frees an agency from substantiating the policy when applied, thereby precluding those whose substantial interests are affected from invoking procedures mandated by section 120.57 to examine the policy judgments embodied in the rule.¹¹⁶

The draw out provides more protection against preclusive rules than do the procedures guaranteed by section 120.54(3).¹¹⁷ In section 120.54(3) proceedings, affected persons may speak, but the agency is

the level of invalidity. In those cases, the factual and policy choices made in rulemaking have a preclusive effect and are not subject to challenge either in a section 120.57 proceeding, available when the rule is enforced, or by rule challenge. Since in those situations the agency is making decisions of a final nature about substantial interests without the procedural protections guaranteed by section 120.57, a draw out should be available.

114. Section 120.68(12)(b) was amended in 1984 to require an agency to follow its own rules. Ch. 84-173, 1984 Fla. Laws 523-24. This amendment was intended to overrule *Best Western Tivoli Inn v. Department of Transportation*, 435 So. 2d 321 (Fla. 1st DCA 1983), which found that an agency may deviate from its rules if it provides an explanation. See Staff of Fla. H.R. Comm. on Govtl. Ops. HB 173 (1984) Staff Analysis 6, 7 (Apr. 16, 1984) (on file with the author).

115. See *supra* notes 86-91 and accompanying text. State involvement in local zoning decisions in the Florida Keys exemplifies these situations. The draw out has been used in rulemaking concerning land use in the Florida Keys. See, e.g., *In re* Petitions for Draw-Out Proceedings Pursuant to Section 120.54(17), F.S., Concerning the Dep't of Community Affairs' Proposed Rules 9J-14.006 and 9J-15.006, Case No. 88-1067 RGM *et. al.* (1989) (25 consolidated cases) (Recommended Order and Acceptance and Adoption of Hearing Officer's Recommended Order on file with the author). The proposed rules at issue in that case disapproved of the petitioners' map amendment requests that the Monroe County Board of County Commissioners had approved. The adoption of those proposed rules would have resulted in the denial of each of the petitioners' individual rezoning requests. See FLA. STAT. Ch. 380 (1985). Therefore, the Department determined that normal rulemaking proceedings under section 120.54 were not adequate to protect the petitioners' substantial interests. Such rulemaking may also raise due process concerns. See *Allen v. Martinez*, 573 So. 2d 987 (1991).

116. For further discussion of nonrule policy in Florida, see *infra* notes 328-33 and accompanying text.

117. The draw out provides more procedural protection and improves the dynamics of interaction with the agency.

not required to respond.¹¹⁸ Section 120.54(3) may be sufficient when the agency is acting without full knowledge of the facts or understanding of the policy. However, it is inadequate to protect substantial interests where the problem is not that the agency is uninformed, but rather that it is unconvinced. The opportunity to hear the agency's response to the input it receives when deciding the factual and policy choices is essential to an "adequate opportunity to protect" substantial interests. Without some response, it may be impossible to discern the nature of the decisionmaker's concerns and, thus, to tailor the presentation to address those concerns. Also, where an agency is not required to express its reasons for discounting or rejecting input, neither the affected persons nor the courts will have a firm basis for understanding the agency's decision. Instead, the agency's reasons may remain obscured, even during judicial review.

The dynamics of the draw out thus facilitate information exchange. By making the agency a party, the draw out places the agency in a position where it cannot stand mute and only receive input. Instead, the agency must meet the evidence and argument presented by the participant in the draw out with evidence and argument of its own. Otherwise, the agency could not reject adverse fact findings made by the hearing officer since there would not be competent and substantial evidence in the record to justify the agency's substituted findings of fact.¹¹⁹

Those who participated in drafting the Florida APA and in designing the innovative draw out procedure were aware of traditional justifications for the absence of formal procedures in rulemaking—concerns that efficiency must be maintained and beliefs that procedural opportunities would simply magnify the effect of resource disparity among those affected by agency action. The Florida Legislature responded to these concerns, but how it did so cannot be fully understood without an examination of the act's approach to judicial review.

II. OPPORTUNITIES FOR JUDICIAL INPUT IN RULEMAKING

Section 120.68, Florida Statutes, represents a clear departure from the models of judicial review reflected in the federal APA and the

118. *Whitehall Boca v. Department of Health & Rehab. Servs.*, 456 So. 2d 928, 930 (Fla. 1st DCA 1984) (in a section 120.54(3) proceeding, "the administrative hearing officer advised the parties that . . . he and his staff would not conduct a 'question and answer session,' as it was the department's primary duty . . . 'to listen rather than to speak.'"). All agencies do not necessarily follow this procedure, but the act seems to have been construed to permit this approach.

119. The draw out thereby solves "a recurring problem of the administrative process: the apparent insensitivity of agencies to communications addressed to them." Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1314 (1972).

1961 Revised Model Act (RMA). By providing detailed guidelines for judicial review of agency action, designed to limit the exercise of judicial discretion in ways that affect the substance of agency rules.¹²⁰ The reviewing court must "deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion."¹²¹ If the agency fails to follow required procedures or has made a material error in procedure that may have impaired the fairness of the proceedings or the correctness of the action, the court must remand the case for further agency action.¹²² If the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, the court must either set aside or modify the agency action, or remand the case to the agency for further action under a correct interpretation of the provision.¹²³ If the agency's action depended upon any fact found by the agency in a proceeding meeting the requirements of section 120.57, the court may not substitute its judgment for that of the agency regarding the weight of the evidence on any disputed finding of fact; it may only set aside the agency action or remand the case to the agency if it has found that the agency's action depended on a finding of fact unsupported by competent and substantial evidence.¹²⁴

Where discretionary policy choices are involved, the court is not permitted to substitute its own judgment for that of the agency. Remand to the agency is required when the court finds that the agency's exercise of discretion is outside the range of discretion delegated to the

120. Section 120.68 does not distinguish between the review of rules and the review of orders when it specifies the parameters of judicial review. FLA. STAT. § 120.68 (1989).

121. *Id.* § 120.68(7).

122. Section 120.68(8) provides:

The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. Failure of any agency to comply with s. 120.53 shall be presumed to be a material error in procedure.

123. Section 120.68(9) provides:

If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

- (a) Set aside or modify the agency action, or
- (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

124. Section 120.68(10) provides:

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

agency by law, is inconsistent with agency rule, is inconsistent with an officially stated agency policy or prior agency practice (if the deviation is not explained), or otherwise violates constitutional or statutory provisions.¹²⁵ The court's decision may be mandatory, prohibitory, or declaratory in form.¹²⁶ Section 120.68 is designed to eliminate review of agency action based upon nebulous standards, such as the "arbitrary and capricious" standard of review. Section 120.68(14) mandates that "[u]nless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action."¹²⁷ Thus, the drafters of section 120.68 established clear parameters for judicial review of agency action and limited both the matters that may be reviewed and the manner in which that review may be accomplished. The Florida APA provides significantly more detail in this area than do most other administrative procedure acts.¹²⁸

The *Reporter's Comments* note the innovative nature of the Florida APA's judicial review provisions and describe the "more detailed analysis of how courts should review agency action" as one of the key

125. Section 120.68(12) provides:

The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:

- (a) Outside the range of discretion delegated to the agency by law;
 - (b) Inconsistent with an agency rule;
 - (c) Inconsistent with an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or
 - (d) Otherwise in violation of a constitutional or statutory provision;
- but the court shall not substitute its judgment for that of the agency on an issue of discretion.

126. Section 120.68(13) provides:

(a) The decision of the reviewing court may be mandatory, prohibitory, or declaratory in form; and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings, or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and
2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

127. *Id.* § 120.68(14).

128. The 1961 Model Act "contains no express standards to guide courts when they determine the validity of a rule." A. BONFIELD, *supra* note 52, at 574. Section 5-116 of the 1981 Model Act, on the other hand, provides for a number of specific grounds for invalidating agency rules. Section 120.68, the Florida Statute governing judicial review, is arguably even more specific.

provisions which distinguishes the proposed act from existing practice.¹²⁹ Section 120.68 also notably differs from the federal APA, in that it does not use the words "arbitrary" or "capricious" when describing judicial review. The omission was not an oversight—it was part of a considered decision to limit the scope of judicial review of administrative action.¹³⁰

This decision reflects a recognition of the problems involved in allowing courts to make post hoc evaluations of decisions agencies make during rulemaking.¹³¹ Section 120.68 directs the courts to consider whether the agency has committed a material error in procedure,¹³² whether the agency has correctly interpreted the statute it was implementing,¹³³ whether its rule is supported by competent, substantial evidence,¹³⁴ and whether the agency's exercise of discretion has exceeded the discretion delegated to it by the Legislature.¹³⁵

129. *Reporter's Comments, supra* note 9, at 27-28. Florida has been a model for other states in this regard. The Florida APA incorporated detailed standards for judicial review years before that innovation was included in the 1981 MSAPA. A. BONFIELD, *supra* note 52, at 555 ("the provisions of the new Model Act governing judicial review of agency rules are much more detailed than those found in existing APAs . . ."). Florida's standards are at least as detailed, if not more detailed, than those adopted in the 1981 MSAPA. *Compare* FLA. STAT. §§ 120.68(7)-(14) (1989) with 1981 MODEL ACT, *supra* note 4, § 5-116, at 127.

130. The *Reporter's Comments* note: "This more detailed analysis of how courts should review agency action is designed to provide more precise guidelines in Florida than ambiguous provisions such as RMA 15(g)." *Reporter's Comments, supra* note 9, at 27. Section 15(g) of the RMA provides:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

1961 MODEL ACT, *supra* note 12, § 15(g), at 301-02.

131. Section 120.68 tried to answer the difficult question of what degree of deference courts should give to agency decisions. "Over-deferential judicial review can leave agencies free to ignore legislative policy. At the same time, review can become so nondeferential that judges substitute their policy preferences for the agencies'." Shapiro & Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 865 (footnote omitted).

132. FLA. STAT. § 120.68(8) (1989).

133. *Id.* § 120.68(9).

134. *Id.* § 120.68(10).

135. *Id.* § 120.68(12).

However, the Florida APA does not put its faith only in these legal apothegms. Experience with judicial review of agency action has shown that even stern reminders that judges should not substitute their judgment for that of the agency on matters of discretion do not alone effectively curtail such activity. This has caused some commentators to become cynical concerning review standards.¹³⁶ The Florida APA attempts an innovative solution to this problem.

The Legislature restructured judicial review to rely on a system that compartmentalizes the decisionmaking process and separates power by assigning discrete responsibilities to the various actors in the process, rather than placing its faith in words alone.¹³⁷ The APA relies on individuals whose substantial interests will be affected by proposed rules to assure that controversial issues are presented and decided before rules are adopted. The draw out enables them to use adjudicatory methods to develop detailed agency explanations concerning fact and policy choices that the final rule reflects, and also to develop an evidentiary context that will permit those conclusions to be carefully examined. Thus, the value of the record produced depends on the vigor and skill of the participants.

The hearing officer plays the role of neutral decisionmaker in that process, hearing and evaluating the evidence, ruling on proposed findings, and submitting a recommended order to the agency consisting of both findings of fact and conclusions of law. The agency must play two roles: the role of litigant in the draw out, responding to the participant's evidence and argument, and the role of ultimate decisionmaker, reviewing the proceedings as a whole before entering the final order and proceeding to adopt a rule. The disputed choices reflected in the final order must be supported by competent evidence in the record and explained to the extent they vary from the order recommended by the hearing officer.

136. "Some observers of the administrative scene purport to believe that rules concerning judicial review 'have no more substance at the core than a seedless grape' and that in essence 'legal formulae governing the scope of review . . . tend to be little more than convenient labels attached to results reached without their aid.'" Byse, *Scope of Judicial Review in Informal Rule-making*, 33 ADMIN. L. REV. 183, 193 (1981) (quoting Gellhorn & Robinson, *Perspectives in Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975)).

137. The power of courts conducting judicial review is directly related to the power of words. "The principal control mechanisms in our system of government are words in law books. This elementary truth makes courts the primary institutions for agency control, because courts are the official interpreters of the sacred constitutional and statutory texts." DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 411 (1986) (footnote omitted). Because it makes outcomes less dependent upon the interpretation of words, and more reliant on compartmentalized decisionmaking, the act makes it possible to limit the power of courts in the administrative process.

The draw out thus sets the basis for a disciplined judicial review. The system not only allows courts to focus on particular disputes, but also provides them with a detailed, yet manageable, record on each disputed point. When a party argues that a particular finding should be adopted, it directs the hearing officer to the evidence in the record it believes supports that point. If the hearing officer refuses to accept a proposed finding, he or she must explain the decision. If the agency rejects a finding in a recommended order, it too must explain why. Thus, on contested points, the record will contain arguments that identify evidence and rejections of findings that include reasons so that the factual and policy reasons for each choice are clear. By the time a court is called upon to review the final order, the nature of the dispute, the evidence involved, the positions of all involved, and their reasons for arguing or deciding in the ways they did, should all be before the court. The court must then review these proceedings under the specific dictates of section 120.68.¹³⁸ In such a review, it is neither helpful nor appropriate to argue generally that a rule emerging from the process is "arbitrary" or "capricious." Section 120.68 separates issues involving procedure, evidentiary support, legal authority, interpretations of law, and discretionary choice so that such matters do not come together and blur the court's focus.¹³⁹

The nature and intended effect of the innovation were recognized shortly after the Florida APA was adopted. Professor Donald Brodie and Professor (now Justice) Hans Linde praised the judicial review provisions of the act: "An important innovation [of the Florida APA] is the deliberate omission of the accordion-like terms 'arbitrary,' 'capricious,' and 'abuse.' In place of these familiar epithets, the statute requires the reviewing court to analyze the component elements of agency actions which involve discretion."¹⁴⁰ The Brodie and Linde article argues in favor of a new generation of statutory procedures and holds up the Florida and Wisconsin Administrative Procedure Acts as specific models.¹⁴¹ Their article is particularly complimentary of section 120.68: "The Florida scope of review section sets new standards for judicial surveillance of agency fairness, rationality, and compliance with assigned goals. Not only is reversal by epithet excluded, but court and counsel are directed to identify and dispose of one issue at a

138. For a more detailed discussion of those requirements, see *supra* notes 120-35 and accompanying text.

139. FLA. STAT. § 120.68 (1989).

140. Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 559-60. Linde participated in the Washington drafting session that produced the initial draft of the Florida APA. Levinson, *supra* note 17, at 621 n.9.

141. Brodie & Linde, *supra* note 140, at 558.

time."¹⁴² Brodie and Linde contrast the more explicit and detailed standards of review in Florida with the federal approach, which they note is generally traced back to the Supreme Court's opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*.¹⁴³ *Overton Park* was based on the federal APA's judicial review section, which specifically provided for an "arbitrary and capricious" standard of review.¹⁴⁴

III. EFFICIENCY CONCERNS AND THE BALANCE STRUCK BETWEEN CITIZEN PARTICIPATION, AGENCY ACTION, AND JUDICIAL REVIEW

As already noted, the Legislature was fully sensitive to the traditional fear that introducing evidentiary proceedings into the rulemaking process could so encumber the process as to effectively destroy an agency's regulatory power. The Legislature responded to this concern in two ways. First, it structured the draw out to effectively process the information received while minimizing possibilities for its abuse. Second, as we have seen, it sought to enhance the efficiency of judicial review by limiting its scope and increasing its precision.

The draw out procedure minimizes efficiency costs by limiting the opportunity to invoke it as a remedy. It is available only where a substantially affected person appears at a section 120.54(3) hearing (which cannot be requested any later than twenty-one days after publication of notice of the agency's intent to adopt a proposed rule) and makes the showing required to obtain a draw out before the conclusion of that hearing.¹⁴⁵ This limited window of opportunity assures that only the most vigilant interests will seek to take advantage of the draw out in ordinary cases and that only the most controversial rules will mobilize less vigilant interests within that time period.

The draw out also preserves efficiency by placing the burden on citizens to invoke the draw out by coming forward with their objections, provide evidentiary support for those objections, and propose findings if they desire specific rulings. The agency is not required to include in the record detailed justifications of its choices independent of the matters raised in the draw out proceeding. Thus, the draw out does not mandate rulemaking "on the record"—the Florida APA contains no requirement that the content of rules rest only on what is

142. *Id.* at 563.

143. *Id.* at 555. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). *Overton Park* was for many years "the leading federal case on review of discretion." A. BONFIELD & M. ASIMOW, *supra* note 42, at 618.

144. 5 U.S.C. § 706(2)(A) (1988).

145. FLA. STAT. § 120.54(17) (1989); FLA. ADMIN. CODE R. 28-5.604 (1990).

in the record of the agency hearing.¹⁴⁶ The draw out does provide persons whose substantial interests are affected by a proposed rule with an opportunity to demonstrate that the rule's factual premises are not supported by substantial evidence or that the policy choices do not follow logically from the agency's premises. However, aspects of the rule which are not challenged need not be supported.

Concerns about the problem of differential access are valid; only those who can mobilize quickly can participate. Nevertheless, the draw out procedure creates meaningful opportunities for those with less political power.¹⁴⁷ Politically powerful interests generally have resources to influence agency choices in rulemaking without a draw out. The draw out provides the less politically powerful with a mechanism to bring the power of facts and logic to bear on the rulemaking process.¹⁴⁸

The limitations on judicial review also enhance the efficiency of the process. The draw out's compartmentalization of functions assures that all participants will use their particular expertise to develop a complete, yet focused, record. The review limitations in section 120.68 make reversal based upon vague concerns or upon disagreement with the agency's exercise of discretion quite difficult. Compartmentalization, together with the limitation on the courts' role and court intervention, lessen the likelihood that rulemaking proceedings will need to continue after the conclusion of judicial review. Unfortunately, the Florida courts have disregarded this statutory scheme, so the act's innovations have never had an opportunity to operate effectively.

146. In federal law, formal rulemaking is on the record. Davis has suggested, "[r]ules are made on the record when their factual content rests only on the record plus what is officially noticed, even though ideas about law and policy come from outside the record." K. DAVIS, *supra* note 50, § 6:3, at 454. In contrast, where formal rulemaking is required in the federal system, "the record of the administrative hearing preceding formal rule making is exclusive, in that 'upon it, and no other evidence, the further administrative proceedings must be had, the final administrative decision made, and judicial review be confined.'" Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 Nw. U.L. REV. 15, 16 (1977) (footnote omitted) (quoting SENATE COMM. ON THE JUDICIARY, 79th Cong., 1st Sess., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1946, S. Doc. No. 248, 79th Cong., 2d Sess. 32 (1946)).

147. For further discussion of this point, see *infra* notes 355-63 and accompanying text.

148. Nevertheless, standing problems may make it difficult for some affected interests to have an effective voice in this process. For example, where an agency proposes a rule changing eligibility standards in a benefit program such as unemployment compensation, identifying any person whose substantial interests will be affected by that rule may be impossible; the rule would not be applied to current applicants, and those to whom it will later be applied probably have not yet become unemployed. However, even with these concerns, differential access problems seem manageable, provided that the courts do not take a restrictive view of access requirements.

IV. THE FLORIDA APA AND THE FLORIDA COURTS: FROM *BALINO* (1977) TO *ADAM SMITH* (1989), AND BEYOND

Florida courts have largely misconstrued the provisions of the Florida APA reviewed in the previous parts. I have provided an account of the Legislature's intent when it enacted sections 120.54(3), 120.54(17), and 120.68 of the Florida APA. A different vision, however, has guided practice in Florida, one clouded by a return to the labels and characterizations that the Florida APA was designed to reject. The courts seem to have forgotten that the act represented a conscious legislative decision to create different procedures than those adopted in other jurisdictions. Instead, federal law has strongly influenced the court's construction of the Florida APA. In sum, the courts have prevented effective implementation of the innovative procedures specifically fashioned by the Florida Legislature. I develop these points in the part that follows.

A. *Section 120.54(3)—The Public Hearing*

The first major case considering section 120.54(3) is the First District Court of Appeal's decision in *Balino v. Department of Health & Rehabilitative Services*.¹⁴⁹ In *Balino*, nursing home patients requested a hearing during rulemaking pursuant to section 120.54(3) on a proposed rule defining eligibility for the highest level of nursing care funded by the medicaid program.¹⁵⁰ The patients sought to present evidence and argument concerning what they believed were weaknesses in the proposed rule. They attempted to demonstrate that the proposed definitions were "(1) incomplete because they fail[ed] to define all the criteria required to be defined in the order [entered in earlier proceedings that had required the rulemaking by] HRS Secretary Page and (2) unworkable."¹⁵¹ The patients attempted to do this by calling

149. 362 So. 2d 21 (Fla. 1st DCA 1978), cert. denied, 370 So. 2d 458 (Fla. 1979). I was lead counsel for America Balino and the other nursing home patients who sought to participate in the rulemaking involved in that case. One of my opposing counsel has also written about the case. Waas, *The Limits Upon the Administrative Procedure Act's Drawout Remedy*, 52 FLA. B.J. 815 (1978). The *Balino* decision is also one of the leading decisions construing section 120.54(17), an aspect of the decision that will be discussed in the next section.

150. The dispute centered on additions to the rule which were being used to determine whether medicaid nursing home patients were entitled to receive the highest level of care. In a prior administrative proceeding, the patients had secured an order requiring the Department of Health and Rehabilitative Services to add definitions to key terms in the rule in order to remove ambiguities that had created enforcement difficulties. *Balino v. Department of Health & Rehab. Servs.*, 348 So. 2d 349 (Fla. 1st DCA 1977).

151. *Balino*, 362 So. 2d at 25. The department was conducting a rulemaking procedure in an attempt to comply with the earlier order that provided: "[the rule] . . . will be amended to in-

as witnesses those who worked with and applied the proposed rule.¹⁵² They also attempted to invoke the rule excluding potential witnesses from the hearing while other witnesses were being examined. The hearing officer denied the patients the right to present any evidence, and instead invited their counsel to "comment" on the proposed rule.¹⁵³ The rule was subsequently adopted and the patients appealed.

The court's ruling is unremarkable in its effect. The court recognized that section 120.54(3) required the patients, as persons whose interests were affected by the rule, to be permitted to present evidence as well as argument. The court therefore remanded the case, directing the department to reconvene a rulemaking hearing within thirty days and to consider the patients' claim that their interests could not be adequately protected by a hearing conducted pursuant to section 120.54(3).¹⁵⁴

The reasoning the court used to reach its result *is* remarkable. It looked to federal decisions construing the procedures required under informal notice and comment rulemaking, as it decided the proper construction of the Florida APA. It cited federal law when it weighed the contentions of individuals denied an opportunity to present evidence and argument. It quoted section 553(c) of the federal APA,¹⁵⁵ and it quoted from law review commentary on the purposes of infor-

clude definitions and examples of key words and phrases, such as, 'nurse'; 'professional person'; 'technical person'; 'available on a twenty-four hour basis'; 'which as a practical matter can only be provided in a skilled nursing care facility on an inpatient basis.'" Brief for Petitioner at 3 n.2, *Balino*, 362 So. 2d at 21 (No. HH-177) (on file with the author). The proposed rule was largely unresponsive to that order:

Of the five key words and phrases which were ordered defined and illustrated with examples by the Secretary, two are still undefined, and three still contain no examples. Three terms have been defined which do not appear in the text of the Rule. The Department was successful in defining three of the terms which were ordered defined. However, only one of those terms, "Professional Person," was both defined and illustrated by examples as required by the Order which mandated the rulemaking proceeding.

Id. at 9-10 (footnotes omitted).

152. *Balino*, 362 So. 2d at 25.

153. *Id.* at 24. At that point, the patients sought to draw out the proceedings pursuant to section 120.54(17). That request was also denied. See *infra* notes 183-86 and accompanying text for a discussion of this aspect of the case.

154. *Balino*, 362 So. 2d at 27. If the agency determined on remand that the patients' interests could not be adequately protected in section 120.54(3) proceedings, then it would be required to grant the draw out request. The most controversial aspect of the relief was the court's refusal to vacate the rule that it found had been adopted through seriously defective procedures. For further discussion of this point, see *infra* notes 197-99 and accompanying text.

155. 5 U.S.C. § 553(c) (1988) provides: "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . ."

mal rulemaking in the federal system.¹⁵⁶ Nowhere did the court recognize the Florida APA's intended departures from federal rulemaking procedure.¹⁵⁷

Instead, the court rested its decision on the same characterizations the Florida Legislature explicitly repudiated¹⁵⁸ and characterized the rulemaking proceeding as "a quasi-legislative, information-gathering type [of proceeding], which in theory at least, does not adjudicate the rights of any particular individual."¹⁵⁹ The court's analysis is also inconsistent with the preclusive effect rules have on substantial interests. Rules employed to decide questions of fact and policy before they are applied in the context of adjudication and which are not open for discussion in subsequent adjudication, clearly determine the rights of particular individuals on those questions.¹⁶⁰

Having reverted to the "quasi-legislative" characterization, the *Balino* court used it very differently than it had been used in the past. Under the old act, the characterization was used to limit hearing opportunities. In *Balino*, however, the court used it to justify its ongoing hostility towards the use of adjudicative procedures in rulemaking, on the curious ground that such procedures might enable the agency to limit citizen input. The court argued that, since section 120.54(3) could not be viewed as an adversary proceeding,

[t]he agency has no right, as a litigant in an adversary proceeding might have, to protect itself from evidence or argument that may be unfavorable. The officer conducting the hearing must make every effort to assure those present have fair opportunity to present evidence and argument which is material to the rules in question and appropriate under the circumstances.¹⁶¹

156. *Balino v. Department of Health & Rehab. Servs.*, 362 So. 2d 21, 25 n.3 (Fla. 1st DCA 1978), cert. denied, 370 So. 2d 458 (Fla. 1979).

157. Despite its citation to federal law, the court did not find that section 120.54(3) proceedings should be conducted like federal informal rulemaking proceedings, and it did not limit participation in rulemaking proceedings to "notice and comment." *Id.*

158. See *supra* notes 29-37 and accompanying text.

159. *Balino*, 362 So. 2d at 24.

160. Section 120.54(3) provides only one type of opportunity to participate in the rulemaking process. The draw out may be a better forum for protecting substantial interests from the preclusive effects of rules. See *infra* notes 308-14 and accompanying text for further discussion of this point.

161. *Balino v. Department of Health & Rehab. Servs.*, 362 So. 2d 21, 24 (Fla. 1st DCA 1978), cert. denied, 370 So. 2d 458 (Fla. 1979). This injunction requiring the agencies to listen to input has been used by some agencies as an excuse for refusing to participate in dialogue during section 120.54(3) proceedings. See, e.g., *Whitehall Boca v. Department of Health and Rehab. Servs.*, 456 So. 2d 928, 930 (Fla. 1st DCA 1984) (Department's duty during section 120.54(3) proceeding is "'to listen rather than to speak.'" (quoting the HRS official who conducted the hearing)).

Thus, the courts have used the act's concern for citizen input to implement their hostility towards adjudicatory process during rulemaking.¹⁶²

The characterization of rulemaking as quasi-legislative appears in various commentaries as well. Professor Levinson describes the section 120.54(3) proceeding as "an informal, quasi-legislative proceeding."¹⁶³ *Balino* cites that article when it describes rulemaking as quasi-legislative.¹⁶⁴ Professor Patricia Dore indicated in an article that formed part of a Symposium issue on the newly enacted APA, that "[i]n my opinion, the opportunity contemplated by section 120.54(2) [now section 120.54(3)] is a public hearing of the legislative fact gathering type."¹⁶⁵ This view was confirmed in *Balino* and further developed by Professor Dore in a later writing.¹⁶⁶

The "quasi-legislative" characterization of rulemaking has led courts and commentators to suggest that the public hearing held in connection with rulemaking should be conducted like a "legislative" hearing.¹⁶⁷ While it is true that "[n]otice and comment rulemaking proceedings are modeled on the representative political process of the legislative branch of government,"¹⁶⁸ it does not necessarily follow that section 120.54(3) hearings should be conducted as legislative hearings. If agencies follow the legislative hearing model, significant limitations may be placed on the type of presentation an affected person will be permitted to make. The legislative hearing model suggests a

162. The court's approach also suggests a shift in judicial beliefs. It suggests that the judiciary may no longer be convinced of the value of adjudication as an engine for discovering truth. This is all the more surprising in light of the assumption, shared by the judicial decisions under the old APA and by the Legislature in the enactment of the present APA, that adjudicatory methods are the greatest engine for the discovery of truth.

163. Levinson, *supra* note 17, at 634.

164. *Balino*, 362 So. 2d at 24 n.2.

165. Dore, *Rulemaking Innovations Under the New Administrative Procedure Act*, 3 FLA. ST. U.L. REV. 97, 98 (1975).

166. Dore, *supra* note 49, at 1000-03.

167. This suggests a much different kind of hearing than the one that has been described here.

At first blush, the procedural trappings of a [legislative] hearing might give the uninitiated the impression that its primary purpose is to dig objectively into the facts which prompted the introduction of a bill, to check the claims concerning the means-end hypotheses, and to explore the efficacy of the value judgments which are involved. . . . But once the hearing is under way, it soon becomes evident that the procedure is not geared for a critical study of the three component elements of a bill. Witness after witness makes an appearance, states his name and connections, and usually proceeds to read from a prepared statement [M]aterials . . . are inserted into the record without critical analysis and discussion. . . . [T]he evidentiary materials presented by the witness are often apt to go unchallenged.

Cohen, *Hearing on a Bill: Legislative Folklore?* 37 MINN. L. REV. 34, 39-40 (1952).

168. A. BONFIELD, *supra* note 52, at 185.

presentation controlled by the agency, which might allow an affected person to testify, and may involve questions asked by the agency about the testimony. This is no different from permitting oral comment, and is not the same as permitting the affected person to make an evidentiary presentation.

Section 120.54(3) proceedings are not legislative hearings, and the agency is not a Legislature. The appropriate manner in which to conduct those hearings is clear from the text of section 120.54(3), which provides that the agency "*shall*" give "*affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform [the agency] of their contentions.*"¹⁶⁹ This guarantees affected persons the right to make an evidentiary presentation. The term "appropriate" limits the presentation to what is reasonable, assuming an evidentiary presentation is permitted. The courts seem to read "appropriate" as meaning appropriate, given the fact that the proceeding is a legislative hearing. This is technically incorrect not only because the drafters explicitly rejected such characterizations, but also because it appears that the language of this provision was borrowed from a section of the RMA governing contested cases. It is also incorrect because it undermines the balance struck by the Legislature.

Recognizing the advantages of flexibility and informality, the test in Florida for determining whether evidence can be restricted should be a functional one: simply, what is the effect on affected interests? By such an analysis, the section 120.54(3) hearing is not, as *Balino* suggests and as the Supreme Court of Florida has now agreed, "designed only to allow an agency to inform itself"¹⁷⁰ That view has been shaped by the courts' vision of what a legislative hearing should look like, at the expense of fidelity to the Legislature's vision of what an administrative hearing should involve: an evidentiary presentation appropriate not for the agency to inform itself, but rather for affected persons to inform the agency of their contentions.¹⁷¹ The conclusion that section 120.54(3) is designed solely for the benefit of the agency is a significant flaw in the reasoning of the cases interpreting section

169. FLA. STAT. § 120.54(3) (1989) (emphasis added).

170. *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984).

171. This may well permit what the courts might characterize as "adjudication" procedures in the rulemaking hearing. Although such procedure is inconsistent with the courts' vision of a section 120.54(3) hearing, it is consistent with the Florida APA, which was designed to remedy the problems that were created by "unthinking adherence to 'rule-making' and 'adjudication' procedures, as if the two were wholly distinct and distinguishable," under the 1961 Act. *Reporter's Comments*, *supra* note 9, at 6.

120.54(3), because it misconceives the proper dynamics of those proceedings.

Despite the courts' "quasi-legislative" rhetoric, agencies permit more than just comment or testimony by affected persons in section 120.54(3) public hearings. This is not surprising since the alternative, as *Balino* makes clear, is for the agency to grant a request for a draw out. Agencies can be expected to permit almost anything to be presented in the public hearing, even a presentation such as the one attempted in *Balino*,¹⁷² if the alternative is a draw out.¹⁷³ Thus, despite the characterization of public rulemaking hearings as legislative, the hearings themselves, when pressed into service by those whose substantial interests are affected by a proposed rule, can be expected to maintain only a loose resemblance to that model.¹⁷⁴ This has sometimes created a sense of incongruity between the courts' vision of those proceedings and the actual administrative practice.¹⁷⁵

B. Section 120.54(17)—The Draw Out

While the draw out also has been the victim of the courts' failure to follow the language of the statute, the problems with the draw out

172. In *Balino*, the affected persons sought to call and examine agency employees as witnesses, and to invoke the rule excluding witnesses during the presentation of testimony at the section 120.54(3) hearing. *Balino v. Department of Health & Rehab. Servs.*, 362 So. 2d 21, 25 (Fla. 1st DCA 1978), cert. denied, 370 So. 2d 458 (Fla. 1979).

173. See *Dore*, supra note 49, at 1008 ("As a practical matter, an agency will be more inclined to transform the information gathering hearing to accommodate specifically requested and adequately supported procedural protections than it will be to grant a request for an adjudicatory hearing."). Agency reluctance to grant a draw out is traceable to its reluctance to share control over factfinding with DOAH and its reluctance to provide the detailed explanations the draw out may require.

174. For example, in *In re Wheeling of Cogenerated Energy*, 70 P.U.R. 143, 147 (Fla. Pub. Serv. Comm. 1985), the following occurred:

A public hearing on the rules was held in Tallahassee on May 17, June 5, and 6, 1985. A request for a "draw-out" to a § 120.57(1) proceeding, pursuant to Section 120.54(17), was denied. However, the commission conducted the public hearing in a manner similar to a Section 120.57(1) hearing. Witnesses were sworn and subject to cross-examination.

175. This sense of incongruity is clear in *City of Key West v. Askew*, 324 So. 2d 655, 658 (Fla. 1st DCA 1975):

It would seem to be most illogical to permit "Citizen Petitioners", who testify before sundry House and Senate committees against the enactment of a proposed bill, to subsequently litigate in the courts the wisdom of the legislature in enacting the same. Although the proceedings now sought to be reviewed [section 120.54(3) proceedings] are analogous to the legislative process, apparently, logic has been supplanted by the Administrative Procedure Act.

It is also evident in *General Tel. Co. v. Florida Public Service Commission*, 446 So. 2d 1063, 1067 (Fla. 1984), where the court notes: "Despite the section 120.54(3) hearing where interested parties made statements under oath and were subjected to limited cross-examination, we find that the rulemaking in this case retained its quasi-legislative nature." This sense of incongruity would disappear if the courts ceased to permit the quasi-legislative label to have any power over the question of which procedural protections are appropriate.

have been more directly related to the influence of federal law. The threshold questions are: who should have standing to invoke this remedy, and how should it be invoked? Professor Dore states:

The use of the adjective "substantial" suggests that the interests affected must be important or significant personal interests. The use of the noun "interests" rather than "rights," "privileges," or "immunities" suggests that the draw out petitioner's "substantial interests" do not have to rise to the level of legally recognized and protected rights, privileges, or immunities. Rather, any important or significant concern personal to the petitioner is sufficient.¹⁷⁶

The Model Rules provide that a person seeking to draw out section 120.54(3) proceedings into more formal proceedings must request the draw out before the conclusion of the 120.54(3) public hearing.¹⁷⁷ Unless the agency rejects the request at the time it is made, the party making the request must, within forty-eight hours, file a petition with the person conducting the rulemaking proceeding, substantiating the matters asserted in support of the request.¹⁷⁸

The type of showing the person requesting draw out must demonstrate has been the subject of discussion in some cases. In *Bert Rogers Schools of Real Estate v. Florida Real Estate Commission*,¹⁷⁹ the court did more to obscure the nature of the remedy than to clarify it. The court did not discuss the nature of the interests asserted by the party seeking the draw out other than to note that "petitioner (in effect) asserted that the Section 120.54(2)¹⁸⁰ input hearing would not be sufficient to protect its substantial interests, [and therefore] petitioner was entitled to have the Commission exercise its discretion and make an express determination as to whether the input hearing was adequate to protect the interests asserted."¹⁸¹ The court found nothing in the record to support a denial, and remanded the case with directions that the Commission "grant petitioner a hearing as authorized by Section 120.57."¹⁸²

176. Dore, *supra* note 49, at 1004.

177. FLA. ADMIN. CODE R. 28-5.604 (1990); *Private Care Ass'n of Fla. v. Department of Health & Rehab. Servs.*, 10 Fla. Admin. L. Rep. 4388 (1988).

178. FLA. ADMIN. CODE R. 28-5.604(2) (1990). The rule requires the petition to set forth "specific facts supportive of the claim that the rulemaking proceedings will not provide an adequate opportunity to protect substantial interests." It also provides that the agency may hold a hearing to determine the merits of the petition. *Id.* at 28-5.604(3).

179. 339 So. 2d 226 (Fla. 4th DCA 1976).

180. This was the previous site of material now contained in section 120.54(3).

181. *Bert Rogers*, 339 So. 2d . at 228.

182. *Id.* While *Bert Rogers* suggests that agencies summarily reject draw out requests at their peril if adequate allegations of the need for such proceedings are made, a more recent supreme court decision rejects the contention that allegations alone are sufficient to require an agency to grant the request. See *Corn v. Department of Legal Affairs*, 368 So. 2d 591 (Fla. 1979).

The *Balino* case includes the most complete discussion of the draw out remedy. There, the court found that the agency had indeed denied the patients an opportunity to present evidence permitted during the rulemaking proceeding; however, the court found it could not determine whether or not a draw out should have been permitted, and directed the issue to be revisited on remand:

The principal question to be resolved is whether [the patients' substantial] interests are adequately protected in the § 120.54 rule-making proceeding. The answer to that question depends, in part at least, on the extent to which petitioners are able, and are permitted, to make an effective presentation at the Section 120.54 hearing.¹⁸³

A person seeking a draw out must affirmatively demonstrate to the agency that the proceeding does not provide "adequate opportunity to protect substantial interests." The important question is "What does that phrase mean?" The court in *Balino* looked to federal law for guidance concerning the nature of the showing this phrase requires and found that the patients had not demonstrated any "unique circumstances that might justify a trial-type presentation in the informal rule-making proceeding,"¹⁸⁴ suggesting that such a showing is necessary before a draw out will be permitted. The court seemed to rely on federal law for this requirement, because it included the following footnote to support that statement:

American Airlines Inc. v. CAB, 123 U.S.App. D.C. 310, 319, 359 F.2d 624, 633, cert. den. 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966): "Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kinds of facts they proposed to adduce and by what witnesses, etc. Nor was there any specific proffer as to [the] particular lines of cross-examination which required exploration at an oral hearing."; Clagett, *Informal Action-Adjudication Rule Making*, Vol. 1971, Duke L.Rev. 51, 72: "[T]he opinions are not devoid of hints that a petitioner would be wise, rather than demanding a full statutory adjudication as a matter of right, to specify what procedures, not normally required in a rule-making proceeding, he considers appropriate in the particular circumstances of the case."¹⁸⁵

183. *Balino v. Department of Health & Rehab. Servs.*, 362 So. 2d 21, 26 (Fla. 1st DCA 1978), cert. denied, 370 So. 2d 458 (Fla. 1979).

184. *Id.* at 25. The court continued this theme later in the opinion. It suggested that the patients should have submitted "a verbal or written statement of their contentions, of the evidence sought to be elicited and the particular reasons why examination and cross-examination" were essential. *Id.* at 26.

185. *Id.* at 25 n.6.

The court then announced what it believed was required: "Petitioners, for their part, should have submitted either a verbal or written statement of their contentions, of the evidence sought to be elicited and the particular reasons why examination and cross-examination was essential to that presentation of a § 120.57 proceeding necessary [sic]."¹⁸⁶

The federal materials quoted in *Balino* reflect a federal experience with rulemaking procedures that differs in important ways from the Florida experience. The federal statute governing both the rulemaking procedure in *American Airlines, Inc. v. Civil Aeronautics Board*¹⁸⁷ and the informal rulemaking discussed in the *Duke Law Review* Article requires only an opportunity for notice and comment. The proffer discussed in that context was required by the federal courts so that they could determine whether to impose rulemaking procedures *not authorized by statute*.¹⁸⁸ In Florida, neither the court nor agency is free to determine which additional procedures are required. If the agency decides to grant the draw out request, the statute specifies the additional procedures that "shall" be used.¹⁸⁹ Since a person making a successful draw out request is entitled to the protection set out in section 120.57, it makes no sense to require individuals to specify with particularity the additional procedures needed and the reasons they are necessary. Whether or not a need for cross-examination is demonstrated, the statute guarantees the right to cross-examine, provided a question of material fact exists. The type of showing required in *Bal-*

186. *Id.* at 26. Because of the error in the text there is some ambiguity in the requirement, but it appears that persons seeking to draw out must proffer their contentions, their evidence, and why the particular procedural protections of section 120.57, such as cross-examination, are necessary.

187. 359 F.2d 624, 632, *cert. denied*, 385 U.S. 843 (1966) (this case is commonly known as the "Blocked Space" case).

188. There was a time when federal courts required additional procedural protections, like cross-examination, based upon such requests. This trend, known as "hybrid rulemaking," is described in one of the articles cited by the court in *Balino* as follows:

[S]everal recent judicial decisions . . . have ordered an agency—despite the inapplicability of sections 556 and 557 [the provisions of federal law that govern formal rulemaking]—to afford opponents of a rule substantially greater procedural opportunities than are prescribed by section 553 [the provision of federal law that governs informal rulemaking]. None of these cases relied on the APA's procedural requirements concerning formal rulemaking; indeed, several of the opinions showed no inclination to rule that the particular decision-making process in contention fell anywhere within APA classifications. Thus, with only a little help from Congress, the courts seem to have created a procedural category that might be termed "hybrid rulemaking" or "notice-and-comment-plus."

Williams, *supra* note 95, at 402 (footnote omitted).

189. Section 120.54(17) provides that the agency "shall . . . convene a separate proceeding under the provisions of s. 120.57" (emphasis added). If there is a question of material fact, section 120.57(1) procedures are to be used. If no such question exists, then section 120.57(2) governs.

ino makes sense only where the court needs to decide the particular procedures necessary, a situation that does not occur in Florida. Therefore, the federal law cited in *Balino* is inapposite.

In order to affirmatively demonstrate that a proceeding does not provide adequate opportunity to protect substantial interests (the showing required by section 120.54(17)), all one need demonstrate is that the proposed rule will preclusively determine factual premises and policy choices. Once such a showing is made, the act requires section 120.57 proceedings during rulemaking, because the preclusive effect of the rule will render section 120.57 proceedings useless at any later time. Thus, what is "adequate" to protect persons whose substantial interests are affected by an agency rule is no different from what is adequate in any other proceeding where substantial interests are affected: the procedural protections guaranteed by section 120.57. Adequacy is not a matter of abstraction; it is a matter of statutory right.

It has been suggested that the decision to permit a draw out is a matter within the agency's discretion.¹⁹⁰ While it is true that section 120.54(17) states the showing must be made "to the agency" and shall be granted "[i]f the agency determines" the rulemaking proceeding is inadequate, this language does not mean the drafters intended to leave this decision to the agency's discretion. The requirement that the persons affected make the showing to the agency and that the agency make a determination on the question assures that the showing will be made at a meaningful time and in a meaningful manner: in full to the agency, rather than for the first time on judicial review after the adoption of the rule. It does not mean that the agency is free to determine when it believes such a proceeding is necessary. If it did, the draw out would rarely if ever be granted.

The draw out is designed to limit agency power. Therefore, it is unreasonable to assume that the act intended to give the agency the discretion to determine when it will allow the remedy. A reading that guarantees a draw out as a matter of right, acknowledging it as the only opportunity for a section 120.57 hearing on the matters decided by the rule adoption, is a more reasonable construction because it is more consistent with the act's overall approach, from citizen participation to judicial review. A construction vesting the agency with discretion to decide when adjudicatory procedures are appropriate deprives citizens of an effective means of participation, and also deprives courts of an adequate record for conducting judicial review.

Professor Dore agrees with the limiting construction the courts have given the draw out language in the APA. She agrees that the partici-

190. See Dore, *supra* note 49, at 1007-08 and cases cited therein.

pants must demonstrate the procedural protections they need.¹⁹¹ The agency then has discretion to determine "which, if any, of the requested procedures are necessary to protect petitioner's substantial interests. The agency may then either extend the necessary procedural protections to the petitioner in the information gathering hearing, or if that response is inconvenient or inappropriate, suspend the proceeding and convene an adjudicatory proceeding."¹⁹² These requirements facilitate agency denial of draw out requests in several ways. For example, the agency can reject the showing as not sufficiently particular, or it can deny proposed presentation because, in its judgment, such a presentation is unnecessary. Clearly, if Professor Dore is correct, the agency can use these two grounds together to deny most draw out requests. To do so, the agency need only require that all draw out requests be accompanied by detailed proffers. It could then deny most requests either because the proffers are not detailed enough or, if detailed proffers are made, deny the request because the agency understands the nature of the participants' objections or suggestions from the detailed proffer, and a draw out is therefore unnecessary.

In cases in which the agency has no choice but to recognize both the sufficiency of the showing and the need for a presentation using adjudicatory process, the courts still may allow the agency to deny the request. A denial of the draw out is presently permissible when the particular protection requested, such as the cross-examination of specific witnesses, is provided in the section 120.54(3) hearing. Thus, Professor Dore's construction of the draw out provision should be rejected because it recognizes agency prerogative to effectively prevent the remedy from being invoked in almost every case.¹⁹³

The courts have given the draw out a self-defeating construction because they disfavor adjudicatory process in rulemaking. The existence of such a process in rulemaking conflicts with their vision of those proceedings as "quasi-legislative." The showing the courts have created helps agencies avoid this disfavored remedy in almost every case.

The draw out has rarely been tried,¹⁹⁴ and when tried, has usually been denied.¹⁹⁵ Professor Dore has recognized the realities in operation here:

191. "Whatever the nature of the asserted need, it must be accompanied by a specific proffer of the facts to be adduced through each witness and an explanation of why the evidence sought to be elicited through examination or cross-examination of these witnesses is necessary to protect the interests." *Id.*

192. *Id.*

193. It is, of course, a well-established rule of statutory construction that courts should avoid a construction of a statute that would render a section of it meaningless. *Cilento v. State*, 377 So. 2d 663 (Fla. 1979).

194. The discussion at the Conference indicated that the draw out provision has rarely been

As a practical matter, an agency will be more inclined to transform the information gathering hearing to accommodate specifically requested and adequately supported procedural protections than it will be to grant a request for an adjudicatory hearing. . . . By responding to a petition in this fashion, the agency maintains the relative informality of the rulemaking process, retains control over the development of its policy, and saves time.¹⁹⁶

This analysis ignores the fact that the draw out was specifically designed to formalize the relative informality of the rulemaking process and wrest from the agency a certain amount of control over the development of policy.

C. Judicial Review

Judicial review under the new act is governed by section 120.68, an innovative provision that "sets new standards for judicial surveillance of agency fairness, rationality, and compliance with assigned goals."¹⁹⁷ However, the courts' view of rulemaking proceedings as "quasi-legislative," and their reliance on federal law for guidance in interpreting the Florida APA have had a greater effect on the courts' approach to judicial review than section 120.68. This trend began soon after the act took effect. In *Balino*, the court advanced the quasi-legislative characterization of the rulemaking process as a basis

used and is not well understood. See Transcript of Seventh Admin. L. Conf. proceedings 51-62 (Mar. 17, 1990) (remarks of various speakers). Although a few speakers recognized the provision would be useful to resolve disputes concerning the factual premises of the rule, some reported that their groups did not understand the provision, and others saw no difference between the draw out and the rule challenge.

195. All the reported appellate decisions discussing the draw out concern the agency's refusal to convene draw out proceedings in the first instance. See, e.g., *Bert Rogers Schools of Real Estate v. Florida Real Estate Comm'n*, 339 So. 2d 226 (Fla. 4th DCA 1976) (reversing denial of draw out as unsupported by the record, and remanding for one); *Mitchell v. School Bd. of Leon County*, 347 So. 2d 805, 807 (Fla. 1st DCA 1977) (essentially affirming rejection of request as untimely); *Cross Keys Waterways v. Askew*, 351 So. 2d 1062, 1071 (Fla. 1st DCA 1977) (denial of draw out affirmed without explanation), *aff'd sub nom. Askew v. Cross Keys Waterway*, 372 So. 2d 913 (Fla. 1978); *Balino v. Department of Health & Rehab. Servs.*, 362 So. 2d 21 (Fla. 1st DCA 1978) (remanding for further proceedings that could perhaps include a draw out), *cert. denied*, 370 So. 2d 458 (Fla. 1979); *Corn v. Department of Legal Affairs*, 368 So. 2d 591 (Fla. 1979) (no conflict with *Bert Rogers* where the court dismissed the appeal from denial of draw out); *Whitehall Boca v. Department of Health & Rehab. Servs.*, 456 So. 2d 928, 932 (Fla. 1st DCA 1984) (stating that although the agency reacted "perhaps too abruptly" in denying a draw out, appellants failed to show "manifest error amounting to an abuse of discretion"); *Bayonet Point Hosp. v. Department of Health & Rehab. Servs.*, 490 So. 2d 1318, 1320 (Fla. 1st DCA 1986) (denying draw out from section 120.54(5) proceeding, which is not possible because only section 120.54(3) proceedings can be drawn out, on grounds that proper showing was not made).

196. Dore, *supra* note 49, at 1008.

197. Brodie & Linde, *supra* note 140, at 563.

for relaxed review, and refused to invalidate rule amendments, even though it found that during their adoption, the agency had wrongfully denied participants an opportunity to present evidence. The court stated, "[t]here is no authority cited, and we have found none, which requires that this court hold invalid rules or rule modifications adopted following a legislative type hearing," citing two federal decisions.¹⁹⁸ The court's resort to federal law is inapposite here as well. While the cited authorities did not require invalidation, they did recognize that courts have the power to suspend rules adopted with inadequate procedural safeguards and that it is unusual for courts to leave rules in effect while they remand for further rulemaking proceedings. If this is the law where procedural protections not required by statute are at issue, it would seem more appropriate to invalidate a rule the agency adopted without granting the opportunity to present evidence required by the statute.¹⁹⁹

198. *Balino*, 362 So. 2d at 27 (citing Williams, *supra* note 95, at 443; Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973); Virginia Petroleum Jobbers' Assoc. v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958)). The cited cases suggest that courts may entertain motions to suspend rules adopted through inadequate procedures if the showing normally required for an injunction is made to the court. The cited portion of the Williams article describes the situation "when a court remands for a hearing involving cross-examination but leaves the rules in effect pending the hearing" as a "probably rare case." Williams, *supra* note 95, at 443.

199. Subsequent Florida decisions cast doubt on the court's suggestion that procedural error will be judged differently when it occurs in rulemaking than if it occurs in adjudication. See, e.g., Association of Condominiums, Inc. v. Department of Revenue, 431 So. 2d 748 (Fla. 5th DCA 1983) (material error of procedure justified quashing rule where opportunity for section 120.54(3) hearing was denied). The court perhaps could have refused to invalidate the rule on the grounds that section 120.68(8) does not provide for reversal, only "remand," in cases of material procedural error. It is unclear whether this was intended to shield from reversal even agency action taken with willful disregard for proper procedure. See Alley, *Agency Accountability: Judicial Remedies for Wrongful Agency Action Under the Florida APA*, 54 FLA. B.J. 445 (1980).

In discussing *Balino*, Professor John-Edward Alley notes that cases have split on the question of whether reversal is proper in the case of procedural error. *Id.* at 446-47. He suggests also that section 120.68(13), which provides that the court may award "whatever relief is appropriate," and which he sees as a "virtually untapped source of judicial remedial power," may be available to provide authority for reversal where only procedural error has occurred. *Id.* at 447. I suggest that an expansive construction of section 120.68(13) is inconsistent with the significant limitations on judicial review included in section 120.68. However, the petitioners in *Balino* did seek to have the rule at issue there declared invalid pursuant to section 120.68(13)(a). Brief for Petitioner at 22, *Balino v. Department of Health & Rehab. Servs.*, 362 So. 2d 21 (1st DCA 1978), *cert. denied*, 370 So. 2d 458 (Fla. 1979) (No. HH-177) (on file with the author). There has also been some suggestion that "substantial compliance" with rule adoption procedures will be found sufficient, and that a showing of "prejudice" is required to challenge procedural error. See Brewster Phosphates v. Department of Env'tl. Reg., 444 So. 2d 483, 486 n.6 (Fla. 1st DCA 1984). Requiring a showing of actual prejudice seems inconsistent with the language of 120.68(8), which provides for remand where the fairness or correctness of agency action "may have been impaired" by material procedural error. In addition, the concept of substantial compliance with rulemaking procedure threatens the linchpin of the statutory scheme: the ability of affected persons to hold the agency fully accountable through the use of procedural safeguards.

The quasi-legislative characterization of rulemaking has also affected the way the courts have defined their review of agency rules. The most striking example is *General Telephone Co. of Florida v. Florida Public Service Commission*,²⁰⁰ in which the Florida Supreme Court reviewed a rule adopted by the Public Service Commission. It cited one of the cases intended to be overruled by the new APA, *Daniel v. Florida State Turnpike Authority*,²⁰¹ in support of its determination that "agency rulemaking pursuant to statutory authorization . . . is a quasi-legislative function."²⁰² The court found that "[a]s a quasi-legislative proceeding, our review of the rulemaking is more limited than would be review of a quasi-judicial proceeding."²⁰³ The court announced a standard of review of rules not found in section 120.68:

Where the empowering provision of a statute states simply that an agency may "make such rules and regulations as may be necessary to carry out the provisions of this Act," the validity of the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious.²⁰⁴

The supreme court borrowed the standard announced in *General Telephone* from earlier decisions of the First District Court of Appeal, such as *Agrico Chemical Co. v. Department of Environmental Regulation*,²⁰⁵ despite the fact that the First District created the *Agrico Chemical* standard to review decisions of DOAH hearing officers in rule challenge proceedings, not to conduct direct judicial review of

200. 446 So. 2d 1063 (Fla. 1984).

201. 213 So. 2d 585 (Fla. 1968). The *Daniel* decision was not mentioned by name in the *Reporter's Comments*; however, *Daniel*, like *Bay National Bank & Trust Co. v. Dickinson*, 229 So. 2d 302 (1st DCA 1969), which was explicitly disapproved, relied on the characterizations. It was thus one of the group of cases to which the *Reporter's Comments* referred when they stated that "the act is intended to overrule cases making the distinction, such as *Bay National Bank . . .*" *Reporter's Comments, supra* note 9, at 18.

202. *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1066 (Fla. 1984).

203. *Id.* at 1067.

204. *Id.* (citations omitted). The requirement that rules be reasonably related to the purposes of the enabling legislation has been described as a "purely instrumental rationality standard which generally provides a wide margin for the agency's policy choices . . ." Gifford, *supra* note 90, at 595. The requirement that rules themselves not be arbitrary and capricious suggests that "the agency's inferences from, and evaluations of, raw data to ultimate factual conclusions are also governed by a rationality standard which here is less [of] a criterion of instrumental rationality and more of a general standard of reasonableness as measured by commonly shared experience." *Id.* (footnote omitted).

205. 365 So. 2d 759, 762 (Fla. 1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979).

agency rules.²⁰⁶ In fact, shortly before *General Telephone*, the First District had developed a different standard for direct review of agency rules that was even more deferential than the supreme court's standard in *General Telephone*. Citing *Polk v. School Board of Polk County*²⁰⁷, a Second District case, the First District Court of Appeal held in *Brewster Phosphates v. Department of Environmental Regulation*,²⁰⁸ that on direct review, "a rule will not be reversed absent a flagrant abuse of discretion."²⁰⁹ However, at the time of the *Brewster Phosphates* decision, the First District was unsure whether it had used the correct review standard, since the supreme court had earlier affirmed a different Second District decision, which upheld an agency rule on direct review on the basis that the evidence in the record was sufficient to support the rule, where the rule had been attacked on appeal as not supported by competent and substantial evidence.²¹⁰ This uncertainty apparently led the court in *Brewster Phosphates* to note, in a footnote, that even if it were to apply the substantial evidence standard urged by the appellant, the result would not change.²¹¹

206. The court's choice of review standards was thus not only unrelated to section 120.68, it was also inconsistent with the internal logic of the opinion. The opinion found that "the standard of review for a quasi-legislative proceeding must differ from that for a quasi-judicial proceeding, as a qualitative, quantitative standard such as competent substantial evidence is conceptually inapplicable to a proceeding where the record was not compiled in an adjudicatory setting and no factual issues were determined." *General Telephone*, 446 So. 2d at 1067. At the same time, the court adopted for the direct review of rules a review standard that had been developed to review final orders in rule challenges, a "quasi-judicial" action.

207. 373 So. 2d 960 (Fla. 2d DCA 1979). In that case, a rule was challenged on direct review, on the grounds that there was no substantial evidence to support it. The court agreed that "there was no evidence at all in a judicial sense" because "those who presented their views at the public hearing did so in the context of a town meeting." *Id.* at 962. The court then turned to *Broward County v. Administration Commission*, 321 So. 2d 605 (Fla. 1st DCA 1975), a case that had relied heavily on *Bay National Bank* despite the admonition in the *Reporter's Comments* that the new act was intended to specifically overrule that case. The court in *Polk County* failed to recognize that the new act rejected *Bay National Bank*, and proceeded to rely on *Broward County* to find that judicial review of quasi-legislative action was more limited than review of quasi-judicial action. The court concluded, "[t]he agency rule-making function involves the exercise of discretion, and absent a flagrant abuse of that discretion a court may not substitute its judgment for that of the agency. Section 120.68(12), Florida Statutes (Supp. 1978); Citizens of Florida v. Mayo, 357 So. 2d 731 (Fla.1978)." *Polk County*, 373 So. 2d at 962. The reference to *Mayo* is clearly inapposite as that case involved a denial of a petition to initiate rulemaking, and neither that case nor section 120.68(12) supports the conclusion that the "flagrant abuse" standard is an appropriate one in the direct judicial review of rulemaking.

208. 444 So. 2d 483 (Fla. 1st DCA 1984).

209. *Id.* at 486 (footnote omitted). In *Brewster*, the court confirmed that its *Agrico Chemical* standard was applicable in the review of section 120.56 rule challenges, not in the direct review of rules. *Id.*

210. *Florida Canners Ass'n v. Department of Citrus*, 371 So. 2d 503, 519 (Fla. 2d DCA 1979), *aff'd sub nom. Coca-Cola Co. v. Department of Citrus*, 406 So. 2d 1079, 1088 (Fla. 1982). The supreme court later rejected the substantial evidence test in *General Telephone*.

211. 444 So. 2d at 486 n.11.

The courts have tended to ignore the inconsistency between *Polk County* and *Brewster Phosphates*, on the one hand, and the supreme court's position in *General Telephone* on the other.²¹²

Recently, in *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*,²¹³ the First District attempted to clarify the law in this area.²¹⁴ Here, Concerned Citizens of Citrus County, Inc. (Concerned Citizens) filed a petition to initiate rulemaking in an attempt "to have existent potable waters in Pinellas, Hillsborough, Pasco, Hernando and Citrus counties classified Class G-I groundwater, and to thereby impose the most stringent water quality protection accorded groundwaters of the state."²¹⁵ The Environmental Regulation Commission (ERC) deferred action on the petition and directed the Department of Environmental Regulation (DER) to review the existing G-I rule and to propose revisions. After the agency held public hearings and prepared the revisions,²¹⁶ they were challenged under section 120.54(4) before the Division of Administrative Hearings (DOAH) as an invalid exercise of delegated legislative authority. The hearing officer sustained some of the proposed revisions and found others invalid. Numerous appeals and cross appeals were filed.

The First District decided that the proper standard for judicial review of a DOAH order in a section 120.54(4) rule challenge was whether the order, rather than the proposed rule, was supported by substantial evidence.²¹⁷ The court also rejected the use of the substantial competent evidence standard as appropriate in the direct review of

212. See, e.g., *Booker Creek Preservation, Inc. v. Southwest Fla. Water Management Dist.*, 534 So. 2d 419 (Fla. 5th DCA 1988). The court in *Booker Creek* stated:

The route by which these issues reach us necessarily limits our scope of review, and our ability to determine them. *Gen. Teleph. Co. of Fla. v. Fla. Pub. Serv. Comm.*, 446 So.2d 1063 (Fla.1984); *Brewster Phosphates v. State Dep't of Environmental Regulation*, 444 So.2d 483 (Fla. 1st DCA), *rev. den.*, 450 So.2d 485 (Fla. 1984). . . . The validity of the exemptions from this rule must be sustained as long as we can find they are reasonably related to the purposes of the Isolated Wetlands Act, and are not arbitrary or capricious. *Gen. Teleph. Co.*, 446 So. 2d at 1067; *Polk v. School Board of Polk County*, 373 So.2d 960 (Fla. 2d DCA 1979).

Id. at 422-23.

213. 553 So. 2d 1260 (Fla. 1st DCA 1989).

214. "The standard of judicial review to be applied by the appellate court . . . has never been clearly articulated in the case law and has been the source of much confusion." *Id.* at 1270.

215. *Id.* at 1262.

216. The Florida APA does not require this type of hearing, but it is available where the agency seeks broader input as it shapes its proposed rule. "The APA establishes no particular procedure to be followed by an agency during the original drafting of the proposed rule. The drafting sessions of a collegial agency head or committee appear to be 'workshops' or 'meetings' subject to the requirements of Section 120.53(1)(d)." *Id.* at 1265 n.4.

217. *Id.* at 1274.

rules and announced that on direct review, agency rules would be reviewed under an arbitrary and capricious standard.²¹⁸

Adam Smith was an appeal from an order of DOAH in a rule challenge. The decision's extensive discussion of the standard supposed to be used on direct review, therefore, was dicta. However, that discussion is important because the *Adam Smith* standard has already been applied in a subsequent case²¹⁹ to invalidate an agency rule, and it appears likely that *Adam Smith* will continue to be used as an authority for invalidating agency rules on direct review.

The court in *Adam Smith* derived its arbitrary and capricious standard for judicial review of agency rules²²⁰ from federal law, not from section 120.68.²²¹ Its decision to borrow the federal standard from *Citizens to Preserve Overton Park, Inc. v. Volpe*²²² ignores two important facts: first, the Florida APA explicitly forbids Florida courts to develop their own approach to judicial review of agency action;²²³ second, the APA deliberately omits the words "arbitrary and capricious," which are the words in the federal APA upon which the decision in *Overton Park* clearly rests. The drafters' decision to omit the words "arbitrary and capricious," and thus reject review by epithet, was hailed at the time as an "important innovation."²²⁴ Thus, the statute and its legislative make the court's decision to rely on *Overton Park* rather than section 120.68 difficult to reconcile with the legislative mandate.²²⁵

218. *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1271 (Fla. 1st DCA 1989).

219. *Manasota-88, Inc. v. Department of Env'tl. Reg.*, 567 So. 2d 895 (Fla. 1st DCA 1990).

220. 553 So. 2d at 1271.

221. *Id.* at 1272.

222. 401 U.S. 402 (1971).

223. "Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief *under a specified provision of this section*, it shall affirm the agency's action." FLA. STAT. § 120.68(14) (1989) (emphasis added).

224. "In place of these familiar epithets, the statute requires the reviewing court to analyze the component elements of agency actions which involve discretion." Brodie & Linde, *supra* note 140, at 559-60.

225. However, the matter is not completely clear. In 1987, the Legislature added section 120.52(8), containing a definition for the previously undefined phrase, "invalid exercise of delegated legislative authority." The phrase is important in the context of rule challenges because only existing rules and proposed rules constituting an invalid exercise of delegated legislative authority may be invalidated by DOAH. Section 120.52 provides a number of specific grounds for such a determination. One is that "[t]he rule is arbitrary and capricious." FLA. STAT. § 120.52(8) (1989).

A review of the legislative history suggests that the drafters of section 120.52(8) were attempting to codify the existing decisional law, which by that time had already adopted the phrase "arbitrary and capricious," despite indications in the APA that this was inappropriate. See Staff of Fla. H.R. Comm. on Gov'tl. Ops., HB 710 (1987) Staff Analysis (Apr. 9, 1987) (on file with

Section 120.68(10) provides for a competent substantial evidence standard of review when there is a challenge to the factual basis of agency action.²²⁶ Section 120.68 does not distinguish between the standard of review for rules and orders. The *Adam Smith* and *General Telephone* cases both rejected the substantial evidence test required by section 120.68(10) on the grounds that the nature of the record produced in rulemaking does not permit such a review.²²⁷ This has not been the experience in other jurisdictions.²²⁸ This suggests that Florida

the author). "The Joint Administrative Procedures Committee (JAPC) has reviewed DOAH and court decisions for the past ten years to determine the grounds stated for declaring rules invalid. The bill would codify those grounds." *Id.* at 2. The Staff Analysis of Proposed Amendments to Chapter 120 provides even more detail:

Paragraph (e) codifies the long established principle that administrative rules cannot be arbitrary or capricious, i.e., unsupported by logic, despotic or irrational. *E.g.*, *Agrico Chem. Co. v. State D.E.R.*, 365 So.2d 759, 763 (Fla. 1 DCA 1978); *cert. den.* 376 So.2d 74 (Fla. 1979); *General Telephone Company of Florida v. Florida P.S.C.*, 446 So.2d 1063 (Fla. 1984).

Staff of Fla. H.R. and S. Comm. on Govtl. Ops. HB 710 and SB 608 (1987) Staff Analysis of Proposed Amendments 2 (1987) (on file with the author). There is no indication that the drafters of this amendment were aware of the scrupulous avoidance of the term "arbitrary and capricious" characterizing earlier drafting efforts. It does not appear that this amendment was an attempt to depart from that path.

226. Rulemaking commonly involves the resolution of fact questions. Sometimes policy choices involve fact questions, and sometimes facts are resolved when the factual predicate of a rule is determined. Where individuals seek to participate in the resolution of fact and policy choices during rulemaking, the Florida APA provides that they may do so through the draw out. If they are unsatisfied with the resolution reached by the agency, judicial review is available. Section 120.68(10) provides:

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

FLA. STAT. § 120.68(10) (1989).

The draw out meets "the requirements of s.120.57." The above language also suggests that where substantially affected persons have not first participated in a draw out, they may not obtain judicial review of the agency's resolution of factual issues. Similarly, the substantially affected person has the burden of assembling, through the draw out, a record sufficient to permit judicial review based upon a competent, substantial evidence standard.

227. *Adam Smith* rejected competent substantial evidence review because of a belief that using this evidence standard in rulemaking "would force rulemakers to adopt more formal, rigid, trial-like procedures in an attempt to make an adequate record capable of judicial review." *Adam Smith Enters., Inc. v. Department of Env'tl. Regulation*, 553 So. 2d 1260, 1272 n.16 (Fla. 1st DCA 1989). In *General Telephone*, the court found that "competent and substantial evidence is conceptually inapplicable to a proceeding where the record was not compiled in an adjudicatory setting. . . ." *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984).

228. Both the federal courts and the 1981 MSAPA have adhered to the substantial evidence standard of review even in the absence of a record generated by trial-type procedures. The federal courts have had to adjust to the idea of substantial evidence review of informal rulemaking

courts could conduct substantial evidence review on what they have considered to be inadequate records. While that solution would be consistent with federal law, it would not be consistent with the Florida APA. In Florida, it is possible to create a record capable of competent substantial evidence review through the use of the draw out. Rulemaking records now available are inadequate for judicial review of rules using the competent substantial evidence standard mandated by section 120.68(10) because the draw out has been made virtually unavailable as a result of judicial interpretations.

The proper solution to the confusion in this area would have required the First District to certify the matter to the supreme court and suggest that it revisit *General Telephone* and *Balino* and reinterpret the draw out, to make the draw out more available to facilitate competent substantial evidence review. Instead, *Adam Smith* looked to federal law. There it discovered "hard look" review.²²⁹ Federal courts created the doctrine of hard look review to review administrative action in the federal system. Although there are many definitions of hard look review, Professor Sunstein has described hard look review as the requirement that agencies "consider all statutorily relevant factors, to justify departures from past practices, to furnish detailed explanations of their decisions, to explain the rejection of alternatives and to show connections between statutory purposes and regulatory policies" ²³⁰ To facilitate hard look review in Florida, the court

because a number of federal statutes require the courts to conduct such review. Comment, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, 542 n.5 (1986). Section 5-116(c)(7) of the 1981 MSAPA mandates substantial evidence review of rules made through notice and comment rulemaking through a process that involves supplementing the record on appeal with evidence. For further discussion of this provision, see *infra* notes 315-19 and accompanying text.

229. "Every noteworthy phenomenon can use a label; the hard look doctrine is as important to the judicial review of technological decisionmaking by administrators as the slam dunk is to professional basketball." Rogers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699, 704-05 (1979). As Professor Rogers notes, "[a]ctually, courts take a hard look to make sure the agency has taken a hard look." *Id.* at 704-05 n.43.

230. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 470 (1987). Professor Bonfield has described hard look review as composed of two distinct elements. First, the court insures that the agency has taken a hard look at the problem. This requires "the agency to furnish a sufficient explanation of its factual findings and conclusions, to establish that it has sought out the necessary information, and to show that it actually took into account the appropriate factors and seriously considered the available data and alternate solutions." A. BONFIELD & M. ASMOW, *supra* note 42, at 621-22.

Second, as is the current practice in federal law, the court takes a hard look at the substance of the decision under review. Professor Bonfield notes that the grounds for reversal under this portion of the standard of review were restated by the ABA Section on Administrative Law as follows:

- i. The action rests upon a policy judgment that is so unacceptable as to render the

created additional record requirements during rulemaking. In *Adam Smith*, the court stated:

The administrative record that comes before the appellate court on a direct appeal from an adopted rule will generally consist of the following: (1) the agency's initial proposal, its tentative empirical findings, important advice received from experts, and the description of the critical experimental and methodological techniques on which the agency intends to rely; (2) the written or oral replies of interested parties to the agency's proposals and to all the materials considered by the agency; and (3) the final rule accompanied by a statement both justifying the rule and explaining its normative and empirical predicates.²³¹

The court did not cite any statutory authority for the requirement that an agency write down and include in the record such things as "tentative empirical findings,"²³² advice received from experts,²³³ and descriptions of experimental and methodological techniques.²³⁴ The court determined that a proper record for judicial review of informal rulemaking "will reflect *all of the relevant views and facts considered*

action arbitrary.

ii. The action rests upon reasoning that is so illogical as to render the action arbitrary.

iii. The asserted or necessary factual premises of the action do not withstand scrutiny

iv. The action is, without good reason, inconsistent with prior agency policies or precedents.

v. The agency arbitrarily failed to adopt an alternative solution to the problem addressed in the action.

vi. The action fails in other respects to rest upon reasoned decisionmaking.

Id. at 622.

231. *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1270 (Fla. 1st DCA 1989).

232. It is important to keep this requirement in context. While the court will require these things in the record, it claims its role in reviewing these materials is quite limited:

The reviewing court is not authorized to examine whether a rulemaker's empirical conclusions have support in substantial evidence. Rather, the arbitrary and capricious standard requires an inquiry into the basic orderliness of the rulemaking process, and authorizes the courts to scrutinize the actual making of a rule for signs of blind prejudice or inattention to crucial facts.

Id. at 1273. The workability of the court's distinction between conducting a substantial evidence review (which it forbids), and scrutinizing the record for inattention to crucial facts (which it requires) is questionable.

233. The court only requires "important" advice. Important in whose judgment? What standards should rulemakers use in deciding whether to provide the explanations the court requires of important advice? To avoid the consequences of failing to provide full explanations, rulemakers will probably learn to err on the side of including full explanations whenever they are in doubt about the importance of the advice received, a development that threatens to further bureaucratize rulemaking.

234. Here, the requirement is qualified by the term "critical." The same questions arise.

by the rulemaker, from whatever source, and will reveal *if and how the rulemaker considered each factor throughout the process of policy formation.*"²³⁵ The court also suggested that to "demonstrate his seriousness and good faith" a rulemaker can through a "justification" statement,²³⁶ for example, detail for the court the actual attention he gave to the factors, and explain his final disposition with respect to each of them.²³⁷

It is not hard to find a federal parallel for using the justification statement in the manner that *Adam Smith* suggests. The federal courts similarly transformed the basis and purpose statement required by statute in informal rulemaking from its original purpose to that of providing the additional information necessary to conduct a more searching judicial review. Section 553, governing federal informal rulemaking, began its career modestly. According to one commentator, "section 553 requires that when a rule is issued, it must be accompanied by a concise statement of its basis and purpose. The authors of the statute apparently had in mind something like a headnote."²³⁸ Justice Scalia of the United States Supreme Court, when he was a law professor, stated that "[t]here is no doubt that the burden meant to be imposed by this provision was minimal."²³⁹ Nevertheless, the courts used this provision to require agencies to explain the major issues of policy ventilated in rulemaking and why the agencies reacted to them as they did.²⁴⁰

The circumstances that led the federal courts to improvise new record requirements are demonstrated by cases like *United States v. Nova Scotia Food Products Corp.*,²⁴¹ an enforcement proceeding by the Federal Drug Administration (FDA) against a company that refused to conform to an FDA rule prescribing the process for preparing hot smoked whitefish. The FDA's rule was designed to prevent

235. *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989) (footnote omitted) (emphasis added).

236. This refers to section 120.54(11)(a), which provides in relevant part that "[t]he adopting agency shall file with the committee . . . a detailed written statement of the facts and circumstances justifying the proposed rule."

237. *Adam Smith*, 553 So. 2d at 1273 n.19.

238. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 248 (1986) (footnote omitted).

239. Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 378.

240. *Id.* at 379. See, e.g., *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (stating that adjectives "concise" and "general" "must be accommodated to realities of judicial scrutiny").

241. 568 F.2d 240 (2d Cir. 1977). This case is included in many law school administrative law casebooks and is discussed in detail in Davis' *Treatise*. K. DAVIS, *supra* note 50, § 6:12, at 499-501.

botulism. The defendant contended that compliance with the rule would render its product commercially unsalable. The record reflected that the defendant had processed whitefish for fifty-six years without a single case of botulism. In addition, the record reflected that the industry had processed over seventeen million pounds of whitefish without a single case of botulism. Industry representatives, including the defendant, had participated in the rulemaking, explained the problems the prescribed process would create, and suggested alternative approaches. It was unclear whether the agency failed to understand that the process would make the whitefish unsalable, or simply decided the danger of botulism required the process "even if that meant commercial death for the whitefish industry."²⁴² The court was frustrated by the rulemaking procedure's failure to provide enough information so that it could determine whether a reasonable or an arbitrary decision had been made.²⁴³ To address this problem, the court read the basis and purpose statement requirement to mean that the agency must provide additional information, such as the reasons the Secretary chose to follow one course rather than another and the facts upon which those choices were based.²⁴⁴

Just as the basis and purpose statement was rewritten in federal law, the *Adam Smith* court has rewritten the justification statement requirement of section 120.54(11)(a).²⁴⁵ Under that section, the agency is required to file certain documents with the Joint Administrative Procedures Committee (JAPC) in connection with each rule it proposes to adopt, including "a detailed written statement of the facts and circumstances justifying the proposed rule"²⁴⁶ Thus, *Adam Smith* has adapted a section designed to facilitate JAPC review into one which facilitates a more searching judicial review.

242. *Nova Scotia*, 568 F.2d at 250.

243. Davis finds five reasons in the opinion for the court's decision to invalidate the FDA regulations:

- (1) inadequate facts in the rulemaking record to support the rule; (2) the agency's reliance on facts that were not in the rulemaking record and that the company had no chance to rebut; (3) lack of an articulate effort . . . to connect the scientific requirements to the available technology that would make commercial survival possible; (4) failure of the agency to sustain the burden of proof, which 'required it to bear a burden of adducing a reasoned presentation supporting the reliability of its methodology'; and (5) failure of the agency to respond to a vital comment.

K. DAVIS, *supra* note 50, § 6:12, at 499-500.

244. *Nova Scotia*, 568 F.2d at 253. The court stated, "[w]e think that to sanction silence in the face of such vital questions would be to make the statutory requirement of a 'concise general statement' less than an adequate safeguard against arbitrary decision-making." *Id.*

245. *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1268 (Fla. 1st DCA 1989).

246. FLA. STAT. § 120.54(11)(a) (1989).

In addition to changing the purpose of the justification statement, *Adam Smith* has changed its scope. The *Guide to Rules Promulgation Under the Florida Administrative Procedure Act*²⁴⁷ explains that the "Statement of Justification" is part of the "Initial Rule Review File" and the "Final Review File." Each of these files must include "[a] detailed written statement of the facts and circumstances justifying the adoption of the proposed rule"²⁴⁸ The fact that these requirements are less stringent than *Adam Smith* is clear from a sample statement of justification included in the Appendices to the *Guide*. It speaks only in general terms about the need for the proposed rule and does not address any of the factors that *Adam Smith* suggests the justification statement must address.

The *Adam Smith* approach is now being used to review agency rules. In *Manasota-88, Inc. v. Department of Env'tl. Regulation*,²⁴⁹ the First District used *Adam Smith* as authority to remand a rulemaking proceeding "with directions to fully comply with the requirements of [section 120.54(11)(b)] . . . and to develop a more detailed record in accordance with the opinion in *Adam Smith*"²⁵⁰ In the *Manasota-88* case, the court noted that a one-page statement titled "Facts and Circumstances" had been filed that briefly set out the history of the rule amendment and a summary of the proposed rule. The court found the agency's failure to detail the relevant factors it considered, its failure to explain if and how it considered each factor throughout the process of policy formation, and its failure to describe the actual attention it gave to the factors—including an explanation of the final disposition with respect to each one—required remand in *Manasota-88*.²⁵¹

The exact nature of the review required by the arbitrary and capricious standard announced in *Adam Smith* is not clear. At one point, the opinion states that the standard it announced requires only "the most rudimentary command of rationality."²⁵² Elsewhere in the opinion, the court explains:

247. *Guide to Rules Promulgation Under the Florida Administrative Procedure Act* (Nov. 1986 ed.), in A. ENGLAND & L. LEVINSON, *supra* note 9, at app. E.

248. *Id.* at 3. The statement is also required by Model Rule 28-3.027, entitled "Rulemaking Materials." The Model Rule requires that, after publication of notice initiating rulemaking, the agency make available "[a] detailed written statement justifying the proposed rule" FLA. ADMIN. CODE R. 28-3.027(2) (1990).

249. 567 So. 2d 895 (Fla. 1st DCA 1990).

250. *Id.* at 898.

251. *Id.*

252. *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

[I]n applying the arbitrary and capricious standard to an agency's informal rulemaking proceedings, the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision.²⁵³

Thus, the court's description of the standard is somewhat confusing because it alternately describes the standard in both deferential and more searching terms.²⁵⁴ The standard is also unclear because *Overton Park* is no longer the definitive case on the hard look doctrine in federal law.

Present day federal law on this point suggests that a considerably more searching review may be required when this standard is applied than *Adam Smith* indicates. *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Auto Insurance Co.*,²⁵⁵ not cited in *Adam Smith*, is now the leading example of the hard look doctrine.²⁵⁶ *State Farm* demonstrates how much the arbitrary and capricious standard has changed since the *Pacific States Box* decision in 1935.²⁵⁷ The court found that the arbitrary and capricious standard of review is narrow and, therefore, a court should not substitute its judgment for that of the agency.

Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

253. *Id.*

254. Throughout the opinion, the court alternates between descriptions of the arbitrary and capricious standard that suggested first the old federal approach (minimum rationality) and then the new federal approach (hard look) for review of administrative rules. In the end, it is unclear how hard a look *Adam Smith* will require.

255. 463 U.S. 29 (1983).

256. A. BONFIELD & M. ASIMOW, *supra* note 42, at 618.

257. "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." *State Farm*, 463 U.S. at 43 n.9. "State Farm left unclear the basis for heightened scrutiny of administrative decisions." Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 427 (1987).

that it could not be ascribed to a difference in view or the product of agency expertise.²⁵⁸

In *Adam Smith*, the court appears not only to have ignored the more recent developments in the hard look doctrine, but also to have been unaware of the weaknesses in that approach. The merits of the hard look doctrine have been the subject of debate among administrative law scholars. Professor Peter Strauss recently summarized the positions of some academics on the question of hard look review,²⁵⁹ noting that while Professor Richard Stewart supports the approach, many other academics have expressed reservations:²⁶⁰

Those who are against hard look review believe with Steven Breyer that it calls on judges to perform a function for which they are not well suited; or with Martin Shapiro, that review's inevitable tendency to focus on only a limited number of issues in a complex proceeding invites a distortion of agency effort and a quite imperfect view of agency process; or with Shep Melnick, that the programmatic impact on the agency of hard look review is at best mixed and probably productive of misallocated resources—too much time spent on too few rules, excessive effort in a few instances producing under-regulation (that is, the absence of funds to make any effort) in others.²⁶¹

Even Professor Sunstein, a strong proponent of the hard look review, has candidly recognized the concerns raised by the hard look approach:

An active judicial posture may be inconsistent with the rationale that underlay the original creation of administrative agencies, substituting a politically unaccountable, decentralized, and generalist decision maker for the relatively specialized, centralized and accountable administrator. There is, moreover, a danger that an active judicial stance may result in usurpation of political prerogatives.²⁶²

There is also a danger that hard look review may not be uniformly searching and that the courts may use agency failure to conform with

258. *State Farm*, 463 U.S. at 43 (citation omitted).

259. Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 DUKE L.J. 538 (1989).

260. *Id.* at 539-40.

261. *Id.* at 540 (footnotes omitted).

262. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 58 (1984).

procedural requirements to force reconsideration of agency decisions with which the courts disagree:

[A]t times one is convinced that, whatever the articulated reason, there lies at the heart of the [court's] decision a dissatisfaction with the agency's judgment on the merits, a sense of frustration at being unable to reverse that judgment directly, and a resulting desire to compel the agency to observe the highest standards of fair procedure²⁶³

The hard look doctrine has not only been criticized, it may be unwelcome in some jurisdictions.²⁶⁴ Professor Bonfield has explained that the 1981 MSAPA "reflects serious misgivings on the part of its drafters toward hard look review of discretionary action."²⁶⁵ The judicial review provisions of the 1981 MSAPA are drafted in a way that gives state legislatures the option of adopting or rejecting hard look review. The phrase "otherwise unreasonable, arbitrary or capricious" is bracketed to indicate that it can be omitted by those states wishing to avoid hard look review.²⁶⁶ If the 1981 MSAPA drafters' approach to statutory construction is used to construe the Florida APA, review of agency rules based upon a hard look or arbitrary and capricious standard is clearly inappropriate in Florida.

It is unclear where the courts' rebalancing of legislative choices will lead; there are many possible alternatives. For example, the courts could return to the intended APA balance by reviving the draw out and limiting judicial review, as section 120.68 provides. Or, the courts could reject the hard look doctrine and the additional record requirements adopted in *Adam Smith* and return to the confusion it sought to resolve. Without additional record requirements or better opportunities to make a record during rulemaking, however, judicial review of agency rules would necessarily be quite deferential. Finally, the courts could continue along the course charted in *Adam Smith*. If that course is followed, the federal experience suggests that more difficulties lie ahead.

263. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 722-23 (1968).

264. It may be unwelcome because "[t]his standard of review has been improperly used by some courts to substitute their judgment for that of the agency as to the wisdom or the desirability of the latter's action." A. BONFIELD, *supra* note 52, at 574.

265. A. BONFIELD & M. ASIMOW, *supra* note 42, at 623.

266. A. BONFIELD, *supra* note 52, at 574-75. The National Conference of Commissioners on Uniform State Laws (NCCUSL) equivocated with respect to the use of this language in the 1981 MSAPA. *Id.*

An empirical study of the federal system for the Administrative Conference of the United States²⁶⁷ compared reversal rates under deferential judicial review and hard look review in the federal system.²⁶⁸ The study found that, contrary to conventional wisdom, judicial review was not more stringent in the mid-1970's, if by "stringent" one means the propensity of the courts to reverse or remand rather than affirm.²⁶⁹ The study suggests that it is not the absolute stringency of judicial review which translates into reversals and remands, but rather increasing marginal stringency, and that difficulties arise when courts change the law when agencies have not yet changed their practices.²⁷⁰ The study also noted that "[a]lthough the rules are indeed more stringent today, they are also relatively clear and predictable, and agencies routinely comply with them. The courts have practically gone out of the business of imposing new procedural requirements on agencies. Thus, there are fewer occasions today for courts to reverse or remand."²⁷¹ The federal experience suggests that the change begun by the *Adam Smith* decision threatens to create a period of higher reversal rates while agencies adjust to the new regime.

Adjusting to *Adam Smith* is made more difficult by the many uncertainties surrounding that approach. It is unclear, for example, exactly what *Adam Smith* will require²⁷² and to what degree *Adam Smith* will be accepted in Florida, since the other district courts and the supreme court have not yet spoken on the issue.²⁷³ Also, the First District Court of Appeal has not clearly stated that it has imposed substantial new rulemaking requirements not found anywhere else in

267. Schuck & Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law* (1990). This study will be published in a forthcoming issue of the *Duke Law Journal*.

268. Professors Schuck and Elliott found:

In the 1960's, courts routinely upheld agency actions that were accompanied by short, vague notices in the *Federal Register*, although these notices were clearly inadequate to provide meaningful disclosure of the factual basis for the agency's action. No court in the 1980's would permit an agency to proceed without much more detailed disclosure of the underlying factual support for the agency's action.

Id. at 13.

269. *Id.* at 12.

270. *Id.* at 13.

271. *Id.*

272. The many developments that followed cases like *Overton Park* in federal law suggest that other innovations, not suggested in *Adam Smith*, may soon follow. For ideas on that subject, see *infra* notes 280-99 and accompanying text.

273. In the mean time, it is no secret where dissatisfied individuals will file for judicial review of agency rules. Under the terms of the APA, the losing party at the administrative level usually has a choice of appellate districts on judicial review: either the district court of appeal where the appellant resides or the court of appeal where the agency is headquartered. FLA. STAT. § 120.68(2) (1989). Access to the First District is often available because most state agencies are headquartered in Tallahassee, which is in the First District.

Florida law. In fact, in *Manasota-88*,²⁷⁴ which first applied the new *Adam Smith* regime, the court gave the misleading impression that the *Adam Smith* standard does not differ from the standard of review in *General Telephone*, a much more deferential standard of review that *Adam Smith* had clearly modified.²⁷⁵ As things stand today, a painful transition appears likely because it will take time for the courts to recognize that significant change is underway and to decide what new standards they will require. Agencies will then take additional time to understand and adapt to those new standards.²⁷⁶

Another probable result of the *Adam Smith* decision must be considered. *Adam Smith* threatens not only the viability of newly adopted rules, but also the viability of all previously adopted agency rules. This threat is significant. Even the model justification statement included in the *Guide to Rules Promulgation* would not withstand the scrutiny now conducted in the name of arbitrary and capricious review.²⁷⁷ Therefore, it seems likely that almost every administrative rule now in force is vulnerable to attack on the basis that it fails to conform with the record requirements *Adam Smith* imposed.²⁷⁸ As section 120.52(8)(e) makes clear, section 120.56 provides an administrative remedy for invalidating agency rules that are "arbitrary and capri-

274. *Manasota-88, Inc. v. Department of Env'tl. Reg.*, 567 So. 2d 895 (Fla. 1st DCA 1990).

275. *Id.* at 897. In *Manasota-88*, the court quoted *General Telephone's* statement that the appellate court must sustain the validity of rules adopted by an agency "as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious . . ." *Id.* (quoting *General Tel. Co. of Fla. v. Public Serv. Comm'n.*, 446 So. 2d 1063, 1067 (Fla. 1984)). The court then proceeded to explain the requirements of *Adam Smith*. This interpretation gives the false impression that the deferential review standard of *General Telephone* is no different from the much more stringent review sanctioned by *Adam Smith*.

276. Florida courts should try to avoid a period of increased reversals of agency rules. One way to do this is to return to the APA's intended approach to making and reviewing rules. But, even if the courts are unwilling to do that, the Supreme Court of Florida should at least clarify existing law. It must decide whether it is willing to embrace hard look review, and if so, what it will require of the agencies. The new record requirements imposed by *Adam Smith* should similarly be abandoned or confirmed. If accepted, those requirements should be clarified and codified in the Model Rules. Florida case law provides precedent for convening model rulemaking proceedings to codify procedural changes suggested by the courts. In *Capelletti Bros. v. Department of Transportation*, 362 So. 2d 346 (Fla. 1st DCA 1978), *cert. denied*, 368 So. 2d 1374, the court required a "clear point of entry" to section 120.57 proceedings. Rulemaking was then convened to add a model rule governing point of entry. See FLA. ADMIN. CODE R. 28-5.111 (1990) ("Point of Entry into Proceedings"). Codifying any additional record requirements imposed by the courts would ensure changes are clearly articulated and routinely incorporated in the rule adoption process.

277. See discussion *supra* notes 245-51 and accompanying text.

278. This resembles the federal experience, where the adoption of additional record requirements resulted in the invalidation of existing rules not promulgated in compliance with those requirements during enforcement proceedings. See, e.g., *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (holding that the regulation was promulgated in an arbitrary manner and was, therefore, invalid).

cious." The *Adam Smith* and *Manasota-88* decisions establish that rules not complying with the courts' vision of proper record requirements are invalid under the "arbitrary and capricious" standard. If DOAH hearing officers apply those cases to existing rules in section 120.56 rule challenge proceedings, they will find that most existing rules do not conform. Thus, these decisions threaten the viability of the Florida Administrative Code. It will be particularly difficult to argue the unfairness of applying the *Adam Smith* standard retroactively because the First District seems unwilling to admit a difference exists between the standards in *Adam Smith* and *General Telephone*.

As a result, the *Adam Smith* approach threatens to create widespread instability, and litigants will undoubtedly take full advantage of this weakness. The most likely scenario is that every time a rule is applied, its validity will be simultaneously challenged on this basis. Mechanically, this will occur through the filing of two administrative actions: a request for a section 120.57 hearing to challenge the merits of the agency's action, and a section 120.56 rule challenge to strip the agency of its rules during the consideration of the merits. The rule challenge probably will be tried and decided first because section 120.56 provides expedited proceedings in rule challenges, including final decisions within seventy days. If the challenged rules have a standard justification statement, and if the hearing officer follows the emerging First District case law, it is reasonable to expect the invalidation of most challenged rules. The agency will then be without the benefit of its rules when it needs them the most: at the time it seeks to enforce its policies in section 120.57 proceedings. If this occurs, the agency is at a serious disadvantage, because its rule policy has suddenly become nonrule policy. If the agency decides to proceed, it must carry a heavier burden and prove up the policies that were formerly incorporated in its rules during the section 120.57 proceedings.²⁷⁹ The party opposing the agency in the section 120.57 proceeding gains a significant advantage because that party will be able to challenge the factual premises and policy choices of the now nonrule policy.

279. Nonrule policy may be used in section 120.57(1) proceedings, but only under the following conditions:

[It] must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action. . . . In other words, an agency may apply incipient or developing policy in a Section 120.57 administrative hearing *provided the agency explicates, supports and defends such policy with competent, substantial evidence on the record in such proceedings.*

Health Care Retirement Corp. of Am., Inc. v. Department of Health and Rehab. Servs., 559 So. 2d 665, 667-68 (Fla. 1st DCA 1990) (citation omitted) (emphasis in original).

V. THE DRAW OUT RECONSIDERED

The *Adam Smith* case has attempted to balance the desire for efficiency and the need for accountability in the rulemaking process. The desire to balance these conflicting norms is not unusual because accountability and efficiency form a basic tension that underlies decisions about how the rulemaking process should be conducted. With too much procedural protection, efficiency suffers; with too little procedural protection, procedure ceases to be an effective method of guaranteeing accountability.

It is not at all surprising, therefore, that concerns about accountability and efficiency are central to decisions about rulemaking procedure and the nature and scope of judicial review; however, it is quite surprising, given the detailed provisions of the Florida APA and its historical background, that courts are resolving issues of rulemaking procedure and judicial review on an ad hoc basis. The Florida APA strikes a balance between accountability and efficiency. The courts' job is not to reweigh that balance based upon their own preferences or concerns, but to adhere to the balance established in the statute. The danger in ignoring that balance is that premises supporting rules will not be sufficiently examined and preferences of courts will not be sufficiently restrained.

The Florida APA's balance clearly favors adjudicatory methods in rulemaking. This preference becomes even clearer when one compares the Florida act to any other administrative procedure act. The courts may not like that preference, given their view of rulemaking as quasi-legislative; nevertheless, they are not permitted to change the balance. The reasons are obvious: first, it is not their decision to make; the APA has given the courts a limited role in the administrative process and courts are not permitted to create new standards of review. Second, courts are not as well suited as the Legislature to make such choices, since the courts cannot provide the clarity and consistency in this area that a legislative enactment can. The Florida experience demonstrates this problem. In *Balino*, for example, the court opted for less formality in the rulemaking process than the statute demanded. In *Adam Smith*, it opted for more. The requirements imposed by *Adam Smith* are unclear and in some respects problematic.

Why did the courts reject the adjudicatory methods in the APA and rely instead on court-created requirements that are less efficient and effective than those required by the APA? There was both motive and opportunity: the motive was the courts' view of rulemaking as quasi-legislative; federal law created the opportunity, because it provided a body of precedent that initially confirmed the courts' intuitive distrust of adjudicatory methods in rulemaking. Later, after it became clear

that its approach was too deferential and more accountability in rule-making was necessary, federal law provided the courts with a ready-made solution: hard look review. While the parallels between the State and federal experiences have been noted throughout this Article, they are worth exploring further.

A. *History Repeats*

The problems in federal law that the hard look doctrine was created to solve can be traced to the United States Supreme Court's decisions in *United States v. Allegheny-Ludlum Steel Corp.*²⁸⁰ and *United States v. Florida East Coast Railway Co.*²⁸¹ Prior to those decisions, formal proceedings were more readily available in federal law.²⁸² These decisions limited the language in statutes, such as the agency's organic act, that the courts would thereafter view as requiring formal proceedings in rulemaking.²⁸³ Since Congress had used various formulations to describe the necessary rulemaking procedure, after *Florida East Coast* very few statutes contained the precise language the court required to trigger formal rulemaking.²⁸⁴ This left most rulemaking to the hardly rigorous statutory requirements of informal rulemaking.²⁸⁵ Absent new legislation,²⁸⁶ and in light of increased informal rulemaking and

280. 406 U.S. 742 (1972).

281. 410 U.S. 224 (1973).

282. Indeed, Judge Friendly has suggested that *Florida East Coast* "signals a large expansion of what can be done by notice and comment rulemaking and a corresponding retraction of the area where a trial-type hearing is required in the regulatory field." Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1308 (1975).

283. After these cases, the fact that a statute required rules be made "after hearing" was insufficient to require formal rulemaking pursuant to sections 556 and 557.

284. After *Florida East Coast*, the words "on the record" became the "touchstone test." *Mobil Oil Corp. v. Federal Power Comm'n*, 483 F.2d 1238, 1250 (D.C. Cir. 1973).

285. "The central loss in discarding the adjudicatory model in favor of notice and comment rulemaking was not cross-examination or oral testimony in particular; rather it was the focused and defined record which all the procedures used in adjudication were intended to produce." Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 61 (1975).

286. No government-wide legislation emerged from efforts to reform rulemaking. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 342, 347-48 (1986); K. DAVIS, *supra* note 50, § 6:9, at 481 ("No statutory change has been made in the APA or in any other law that cuts across all or most agencies."). However, changes in procedure have been made in individual statutes. *Id.* Professor Shapiro has suggested:

The basic reason there is little attention anywhere to amending the [federal] APA is that most of the administrative law we are interested in preserving or changing is not in the APA but in subsequent law made by the courts, by Congress in recent statutes establishing and modifying new agencies and programs, by the agencies themselves, and by the presidency.

Shapiro, *supra* note 38, at 480-81.

adjudication by federal agencies,²⁸⁷ the courts' concerns about fairness and accountability during rulemaking drew them into a procedural void. They responded with a burst of creativity:

They invented a host of procedural requirements that turned rulemaking into a multiparty paper trial. They also imposed a rulemaking record requirement that allowed courts to review minutely every aspect of that trial. They invented a "dialogue" requirement and a "hard look" requirement that turned the agency from a legislative rulemaker into a party at its own proceedings. They converted the "arbitrary and capricious" test specified by the APA as the standard of judicial review of rulemaking from a lunacy test into a "clear error" standard that empowers a court to quash a rule not only when it is crazy but also when the judges simply believe it is wrong.²⁸⁸

Hybrid rulemaking in the federal system arose as a compromise between two sets of concerns: *Florida East Coast* expressed the concern that adjudicatory methods in rulemaking were inefficient; the opposing concern was that rules would fail to reflect wisdom and truth without adjudicatory methods, such as cross-examination.²⁸⁹ The preclusive effect given rules adopted through notice and comment procedures heightened these concerns. There is real irony in *Balino's* use of the "Blocked Space"²⁹⁰ case as authority for marginalizing the

287. See Scalia, *supra* note 239, at 377; Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974) (noting that administrative law has entered an age of rulemaking).

288. Shapiro, *supra* note 38, at 462. Davis notes that "the nature of informal rulemaking procedure under Section 553 has undergone fundamental and extensive changes, brought about by a combination of congressional legislation and judicial legislation." K. DAVIS, *supra* note 50, § 6:9, at 481. While a law professor, Justice Scalia suggested:

[T]he "notice and comment" provision of § 553 has been converted, contrary to its original intent, into a requirement that the agency disclose in advance the factual data to be relied upon in rulemaking; and the "statement of basis and purpose" provision into a requirement that major arguments against a proposed rule be answered.

Scalia, *supra* note 239, at 394.

289. Professors Pierce, Shapiro, and Verkuil note:

Many lawyers and judges believed, however, that informal notice and comment rulemaking was an unsatisfactory procedure for formulating rules whose wisdom or necessity was premised on contested facts. To many observers and participants in the administrative process who were accustomed to the judicial approach to fact-finding, it was heresy to allow agencies to resolve contested issues of fact without providing opponents an opportunity to cross-examine the proponents of those facts.

R. PIERCE, S. SHAPIRO, & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 6.4.9, at 330 (1985).

290. *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, *cert. denied*, 385 U.S. 843 (1966).

draw out.²⁹¹ The "Blocked Space" case exemplifies how agencies can use rulemaking to limit participation by affected persons in decisions of great importance to them. In addition, dicta in the "Blocked Space" case foreshadowed the courts' eventual response to that gambit: the development of hybrid rulemaking.²⁹²

The hybrid rulemaking solution that arose as a balance between these competing concerns ultimately failed to survive Supreme Court review. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,²⁹³ the Court rejected the view that the section governing informal rulemaking "merely establishes lower procedural bounds" and that a court may routinely require more when a proposed rule addresses "complex or technical factual issues or 'Issues of Great Public Import.'"²⁹⁴ The Court found that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed.²⁹⁵ The decision created uncertainty concerning the degree to which it undermined judicial interpretations of informal rulemaking requirements;²⁹⁶ however, it was clear that not all of the courts' creative solutions had been rejected.²⁹⁷

Florida courts have not learned the lesson taught by history and are in the process of repeating it. The *Balino* case had the same effect in Florida as the *Allegheny-Ludlum* and *Florida East Coast* cases did upon federal law. *Balino*, like those federal cases, limited the use of adjudicatory methods in rulemaking. As a result, rulemaking has be-

291. In the "Blocked Space" case, the Civil Aeronautics Board used rulemaking to amend existing cargo carriage certificates. This allowed it to dispense with the adjudicatory hearings that were required by statute whenever existing certificates were being amended.

292. The "Blocked Space" case marked the beginning of the move toward hybrid rulemaking. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 262 (1979). Dicta in that case, which indicated the court's willingness to create procedural requirements not established by Congress, is cited in later rulemaking cases. See Scalia, *supra* note 239, at 348-49.

293. 435 U.S. 519 (1978).

294. *Id.* at 545.

295. *Id.* at 546 (emphasis in original).

296. A. BONFIELD & M. ASIMOW, *supra* note 42, at 318-19 (noting questions raised by decision).

297. The judicially created requirement of a record for judicial review of informal rulemaking—rulemaking that is by definition not "on the record"—survived *Vermont Yankee*, because the Court remanded for a determination of whether the rule was sustainable on the existing record. *Vermont Yankee*, 435 U.S. at 549. Also, *Vermont Yankee* "retained the requirement that an agency must sufficiently justify its decisions." Shapiro & Levy, *supra* note 257, at 421. "The Court apparently believes that judicial review of informal rulemaking best takes place exclusively on an administrative record that has been prepared in proceedings over which the agency concerned has sole control." Gifford, *Administrative Rulemaking and Judicial Review: Some Conceptual Models*, 65 MINN. L. REV. 63, 68 (1980).

come quite informal, and it has therefore become more difficult to assure accountability during the rulemaking process. Nevertheless, agencies continue to decide important questions of law and fact in rulemaking and to give those decisions preclusive effect. This has given rise to concerns, implicit in *Adam Smith*, that the *Balino* approach fails to adequately guarantee accountability. *Adam Smith* is an attempt to strike a different balance between efficiency and accountability in the rulemaking process, a balance that assures greater accountability.

Thus, the Florida courts' response to judicial marginalization of the formal process prescribed by statute has resembled the federal courts' response. Both systems have fashioned additional record requirements and hard look review. The courts in Florida, however, have not gone so far as to impose hybrid rulemaking procedures, probably because of the Florida courts' longstanding aversion to adjudicatory process in rulemaking.

This judicial imperialism has been tempered to some degree in the federal courts,²⁹⁸ but the Supreme Court of Florida has yet to speak on the latest innovations created by the First District. Even when it addresses this issue, the cycle may continue. The reduction of procedural protections raises accountability concerns, and judicially imposed accountability mechanisms are always subject to attack as being the judgments of judges. This cycle will continue until either "judicial legislation" like that imposed by *Adam Smith* becomes accepted or the courts return to the balance between accountability and efficiency established by the Legislature in the Florida APA.

A return to that balance would not be as difficult in Florida as in the federal system. The federal act has been treated more like a constitution than a statute because it has been so unresponsive to the changing conditions of administrative law since the 1940's.²⁹⁹ The Florida APA, on the other hand, surveyed the landscape in the 1970's, included certain innovations, and refused to incorporate others. Therefore, it is fair to conclude that the statutory innovations it adopted, and not others that the courts now find useful, should be used in Florida.

298. See *Vermont Yankee*, 435 U.S. at 519.

299. One way to encourage the acceptability of an active judicial role is to argue that the statute was never meant to provide specifics. See, e.g., Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253 (1986) (noting that the APA is more like a constitution than a statute); Scalia, *supra* note 239, at 375 ("[t]he APA as Magna Carta of Administrative Procedure"). This argument is more difficult to make in Florida because of the obvious and precise language of the Florida APA.

B. *The Advantages of the Draw Out*

The unavailability of the draw out has made protection of substantial interests difficult during rulemaking. The informality of the rule-making process, together with the relaxed standards of review common before *Adam Smith*, have made it impossible to develop a record and obtain the precise judicial review required by the act.³⁰⁰ Even after *Adam Smith* signaled a shift toward a more searching form of judicial review, the affected person's ability to make a record is questionable: requiring the agency to incorporate explanations in its rulemaking materials does not give the same level of protection as allowing participants to secure agency explanations through adjudicatory process. Whether the explanations stated in the rulemaking materials are any more reliable than post hoc rationalizations will depend on the agency. While the quality of the explanations provided by adjudicatory process will also vary, the source of the variance will be the participants' vigor, rather than the agency's good faith. The Florida courts' solution thus distinctly disadvantages³⁰¹ participants whose objections to proposed rules are significant, but insufficient for challenging the rule's validity.³⁰²

Additionally, the *Adam Smith* requirements have undesirable side effects not shared by the draw out. The record requirements demand additional explanations and, therefore, additional paperwork in every case.³⁰³ The draw out, however, is not invoked in every case, and detailed explanations are not necessary where the draw out is not requested.³⁰⁴ Also, the additional paperwork required by *Adam Smith* is

300. These were rights the drafters sought to secure. *Reporter's Comments, supra* note 9, at 5, 27.

301. Those who can file rule challenges need not accept the agency's explanation about the choices made and the reasons for those choices. For example, an agency may say in the justification statement required by *Adam Smith* that it gave full consideration to certain facts or policy considerations. The court may be inclined to accept that statement. Agency discussion of the issue suggests the agency is aware of the matters involved. In the rule challenge proceedings authorized by section 120.54(4), challengers need not accept the agency's assurances; they can demonstrate the agency's lack of familiarity with fact or policy, or its lack of consideration of either, by examining witnesses and presenting evidence. Evidence speaks louder than assurances. Thus, if accountability is the concern, as in the Florida APA, an administrative adjudicatory process is clearly superior to the record requirements imposed by the court.

302. Those grounds are set out in section 120.52(8), Florida Statutes.

303. Some fear that "the administrative costs of recordkeeping or reason-giving may severely deplete available resources." Shapiro, *supra* note 42, at 1502.

304. Of course, the agency must continue to comply with other requirements in the APA, such as filing a justification statement; however, the justification statement required before *Adam Smith* was not particularly demanding. How much explanation will be required in a draw out depends on the degree to which explanation is required by the participants, and will probably vary with the vigor of the participants, the skill of their counsel, and the strength of their displeasure with the proposed rule.

in some ways more difficult to prepare than a response to a draw out. In a draw out the participants explain their concerns, and the agency must respond, not to all possible concerns, but only to the concerns raised by the participants. The new record requirements created by *Adam Smith* demand that the agency not only respond to concerns raised during rulemaking, but also anticipate the yet unformulated concerns of reviewing courts. When those concerns, which apparently include such things as the agency's tentative empirical findings and experimental and methodological techniques,³⁰⁵ are first questioned on judicial review, the agency has long since lost its opportunity to address them in a manner acceptable to the courts. This will encourage agencies to paper the record with explanations to queries that may never be raised, in order to protect the rule during judicial review.³⁰⁶ I have suggested a proper construction of the Florida APA would preclude direct judicial review of the rule's substance where an adequate record for review has not been made through the draw out.

The draw out also has the advantage of not undermining the finality of agency rules. The failure to comply with the *Adam Smith* requirements leaves agency rules vulnerable to an arbitrary and capricious challenge years after they have become final. The draw out does not have this effect. If no one requests a draw out, rule adoption without detailed explanations does not render the rule arbitrary and capricious. Thus, the act balances protection of substantial interests with the need for flexibility.

The *Adam Smith* decision suggests that the courts are losing confidence in deferential review and are struggling to restore accountability to the rulemaking process. Their concerns about accountability are valid, but are those concerns more serious where objections to the proposed rule do not go to its validity and section 120.54(4) challenges are not available.³⁰⁷ In such cases, a problem of accountability arises

305. *Adam Smith Enterprises, Inc.*, 308 So. 2d at 1273.

306. The additional record requirements in *Adam Smith* not only produce unnecessary paperwork when proposed rules are of no interest to affected persons, they also produce unnecessary paperwork when substantially affected persons oppose proposed rules on the grounds they are an invalid exercise of delegated legislative authority. In cases where the proposed rule is subject to challenge as an invalid exercise of delegated legislative authority, pursuant to section 120.54(4), the rule challenge remedy provides substantially affected persons with a tool more powerful than the justification statement: Challengers can require agencies to respond either through discovery or through the agency's response to the challenger's evidentiary presentation. A challenger is likely to unearth the factual and policy choices incorporated in a proposed rule and the reasons supporting those choices during the course of the rule challenge proceeding. Thus, in cases where rule validity is at issue, the problem of accountability which troubles the court in *Adam Smith* is not a matter of great concern.

307. It is important to recognize that cases not involving validity challenges may nevertheless

because, where the draw out is not permitted, no formal process is available to challenge the rule and only section 120.54(3) proceedings are available. Even with a newly invigorated justification statement, section 120.54(3) proceedings are a poor substitute for formal proceedings if the goal is to determine the issue of fact and policy the agency has considered, because the act does not require the agency to respond to questions during those proceedings.

Although it is too early to determine the effectiveness of hard look review in protecting substantial interests in Florida, a comparison of approaches suggests that the draw out can provide significantly more protection. Take, for example, a case that involves a factual dispute. The *Adam Smith* approach tends to submerge factual issues because there are no required findings of fact and the agency rule is reviewed under an arbitrary and capricious standard. Thus, the record hampers the court's ability to understand the underlying factual issues. The justification statement presents only the agency's untested assertions concerning the facts, the policy choices, and the reasons for those choices. The court must then compare those assertions to the evidence and argument presented in the section 120.54(3) hearing—evidence not processed in the same way that a draw out would prepare the evidence for judicial review. No findings of fact have been made and, while the agency may respond to evidence and argument presented in its justification statement, it need not submit a point-by-point response, as required by the draw out. The court is thus disadvantaged; it must compare untested assertions of the agency with the unprocessed evidence of the appellant.

The draw out permits a more careful examination of factual premises. Both the participant and the agency may present evidence and test the others' evidence through cross-examination. They may also present proposed findings of fact and conclusions of law that articulate the conclusions they believe are warranted by their presentations. Usually, an independent hearing officer enters a recommended order that includes findings of fact and conclusions of law.³⁰⁸ If the hearing

need close scrutiny. For example, where objections to a proposed rule point out that the rule threatens to devastate a regulated person or industry, and the agency does not explain why it has decided to adopt such a rule, the reviewing court wants to know: Does the agency comprehend the consequences of its proposed rule? Is such a draconian step really necessary? Without some assurance in the record that the agency does indeed understand and have good reasons for its course of action, the reviewing court is understandably hesitant to simply affirm. See, e.g., *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977).

308. A rulemaking participant can submit proposed findings of fact in a draw out, an opportunity not available in section 120.54(3) proceedings. *Florida Cannery Ass'n v. Department of Citrus*, 371 So. 2d 503, 520 (Fla. 2d DCA 1979) (agency correct in refusing to rule on findings of

officer's findings favor the individual, and the agency subsequently rejects the hearing officer's findings, the court can easily determine whether the record contains competent substantial evidence to support the agency's choices, since the court will have before it the evidence in the draw out, the parties' proposed findings, the hearing officer's findings, and the agency's substituted findings. The approach to judicial review that should be followed in such cases has been clarified:

In determining whether substantial evidence supports the agency's substituted findings of fact, a reviewing court will naturally accord greater probative force to the hearing officer's contrary findings when the question is simply the weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight. . . . At the other end of the scale, where the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.³⁰⁹

The susceptibility of factual issues to ordinary methods of proof constrains the agency's fact finding, since the court may require the agency to base its rules on the facts found by the hearing officer.³¹⁰ The agency has more prerogatives, however, where factual issues are infused with policy within the agency's special expertise and the draw out imposes less of a constraint. As the court noted in *McDonald*:

fact submitted in section 120.54(3) proceedings), *aff'd sub nom. Coca-Cola Co. v. Department of Citrus*, 406 So. 2d 1079 (Fla. 1981). The broad statement in *Florida Cannery* that "[s]ection 120.59 does not apply to rulemaking" is incorrect to the extent that it suggests that proposed findings are not permissible during a draw out. *Island Harbor Beach Club, Ltd. v. Department of Natural Resources*, 476 So. 2d 1350, 1351 (Fla. 1st DCA 1985) ("we do not agree with DNR that section 120.59 is inapplicable to proposed rule challenge proceedings"). Like the proposed rule challenge, the draw out is conducted pursuant to section 120.57. The hearing officer's order must include a ruling on each proposed finding. FLA. STAT. § 120.59(2) (1989). The ruling must specify which proposed findings are rejected and the basis for the rejection. *Island Harbor*, 476 So. 2d at 1353.

309. *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 579 (Fla. 1st DCA 1977). This is applicable to the draw out, as well. Although a draw out occurs during rulemaking, it is also a section 120.57 proceeding, so both a recommended and final order are entered when a material issue of fact exists. The recommended order is entered by the hearing officer, and the final order is entered by the agency before rulemaking resumes. Whether the agency's final order is reviewable independent of the final rule review is an open question.

310. See, e.g., *Tampa Wholesale Liquors, Inc. v. Division of Alcoholic Beverages & Tobacco*, 376 So. 2d 1195, 1196 (Fla. 2d DCA 1979) (requiring a remand for entry of order consistent with fact findings of hearing officer).

[D]isplaced findings of [the] hearing officer . . . lessen in probative force as the "facts" blur into opinions and opinions into policies, and the Department's power to substitute findings based on record evidence correspondingly increases. But the Department's duty of exposition also increases. The final order must display the agency's rationale. It must address countervailing arguments developed in the record and urged by a hearing officer's recommended findings and conclusions or by a party's written challenge of agency rationale in informal proceedings, or by proposed findings submitted to the agency by a party.³¹¹

The draw out thus checks agency overreaching by using independent hearing officers to resolve factual disputes.³¹² The limitation on the power of agencies to find facts during rulemaking also answers a major concern raised by Judge Williams in his reinterpretation of *Bi-Metallic*,³¹³ that the agency might avoid correction of its factual errors by recasting them as value judgments. If an agency engages in such conduct under the Florida APA, the draw out makes its gambit clear. During the draw out, an agency cannot play its cards close to the vest. Because the agency is a litigant, it must provide its best evidence and real reasons or risk adverse findings of fact and conclusions of law in the hearing officer's recommended order. The process thus permits the participants to require the agency to articulate the precise factual and policy bases for the proposed rule so each can be examined or challenged. If any premise is flawed or unsupported, and the agency refuses to acknowledge and address the problem, the reviewing court can be enlisted to force the agency to address the problem.³¹⁴ Any attempt to recast facts as policy choices will be hard to disguise in this type of regime. Thus, the system permits the participant to harness the power of fact and logic to protect substantial interests.

Section 120.68 serves as a check on overreaching by the courts; it limits judicial control over agency policy choice by requiring precise

311. *McDonald*, 346 So. 2d at 583. Although the quoted material described the agency's duty to explain nonrule policy in the context of its application to an individual who challenges it, I suggest that the same requirements should apply with even greater force when the agency's policy judgments are challenged during the process of making its nonrule policy into a rule.

312. The creation of a group of hearing officers was designed to "improve the fairness of administrative practice . . ." *Reporter's Comments*, *supra* note 9, at 22.

313. See discussion *supra* notes 92-100 and accompanying text. Williams discounted the value of procedural checks on factual errors during rulemaking because "[t]o the extent that the agency, simply by recasting its value judgment, may achieve its original result despite being forced to correct its factual errors, the benefits that are supposed to be derived from precision are vitiated." Williams, *supra* note 95, at 408.

314. Thus, participants may prevent the agency from supporting the rule on judicial review with facts and reasons not first subjected to careful examination during rulemaking.

review of discrete questions. The clear record provided by the draw out facilitates closer adherence to section 120.68(7), one of the act's most important checks on judicial overreaching and perhaps the most neglected provision in the act. Section 120.68(7) commands that each time a court reviews agency action, it must deal separately with disputed issues of agency procedure, interpretations of law, and determinations of fact or policy within the agency's exercise of delegated discretion. Judicial review that separately addresses each issue, using the focused record produced by the draw out, is unlikely to result in judicial overreaching or a decision based upon the courts' own policy preferences. In contrast, the "review by epithet" conducted with the record characteristic in hard look review provides ample cover for the imposition of judicial preferences during judicial review.

The Florida APA introduced the draw out mechanism to produce an adequate record for competent substantial evidence review. It has several advantages over other approaches, such as the review of rules made through notice and comment rulemaking outlined in the 1981 MSAPA. The 1981 MSAPA provides that a rule or order may be held invalid when it is:

based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.³¹⁵

Thus, the 1981 MSAPA's substantial evidence standard of review for factual determinations "applies to judicial review of legislative facts on which a rule rests."³¹⁶ Logistically, this may be accomplished by permitting the record to be supplemented on judicial review of the rule;³¹⁷ however, where a bona fide dispute exists over the facts upon which the rule expressly or impliedly rests, the 1981 MSAPA requires either the official agency rulemaking record or supplemental submissions to be supported by "substantial evidence."³¹⁸

315. 1981 MODEL ACT, *supra* note 4, § 5-116(c)(7), at 127.

316. A. BONFIELD, *supra* note 52, at 576.

317. 1981 MODEL ACT, *supra* note 4, § 5-116 (c)(7), at 127. Unless required by other law, "the agency rule-making record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof." *Id.* § 3-112 (c), at 50.

318. A. BONFIELD, *supra* note 52, at 579. However, the burden of demonstrating rule invalidity is on the appellant, and "an agency need not, as a technical matter, submit to the reviewing court evidence on the reasonableness of its fact-findings in rule making until those challenging the rule have made a prima facie case that those fact-findings are unreasonable." *Id.* Ultimately, Bonfield finds little difference between the substantial evidence and the arbitrary and capricious standards since both standards require review for rationality. *Id.* at 576-77.

The Florida APA provides, through the draw out, a record that allows the court to conduct a review that is more efficient and precise than is possible when evidence is initially provided on appeal. The draw out permits the evidence to be processed and analyzed in specific ways during the rulemaking proceeding, benefitting both the reviewing court and the rulemaking agency. As stated in *Anheuser Busch, Inc. v Department of Business Regulations*,³¹⁹ "the accuracy of every factual premise and the rationality of every policy choice which is identifiable and reasonably debatable must be shown by some kind of evidence undergirding the order which makes that policy choice on that factual premise."³²⁰ The agency's factual premises and policy choices are illuminated by the parties' proposed findings, the rulings on these findings, the agency's final decision, and its reasons for rejecting the hearing officer's findings. Whether or not evidence sufficiently supports the rulings will be clear from a review of the draw out record. The court need not rely on information that was not first presented and analyzed by the agency or which is presented to the court out of context. This process thus compares favorably with the 1981 MSAPA's approach.

C. *Is the Draw Out Worth Trying?*

The Legislature and drafters of the Florida APA have tried a novel approach to standard rulemaking concerns, one that blends formality with uncommon flexibility: the rule adoption process can either involve no participation where no affected person chooses to participate, making detailed supporting explanations unnecessary, or it can involve significant formality where facts are in dispute. Whether or not the draw out approach to rulemaking works, it is clearly a bold experiment. Unfortunately, after fifteen years of experience under the APA, we do not know how it is working because it has never really been tried.

From the beginning, the Florida courts have shown great reluctance to permit adjudicatory process in rulemaking. Such reluctance has no basis in the Florida experience because the courts have never permit-

319. 393 So. 2d 1177 (Fla. 1st DCA 1981).

320. *Id.* at 1182. At first, these standards may seem inapplicable to the draw out, because they were announced in connection with nonrule policy in section 120.57 proceedings. However, they are in fact applicable. A draw out is a section 120.57 proceeding, and the factual and policy choices the agency is attempting to adopt will bind substantially affected persons in all future cases. These choices should be subject to no less scrutiny than would be appropriate if they were being applied to an individual. Any other construction of the draw out remedy does not provide the participant an "adequate opportunity to protect" his or her substantial interests. FLA. STAT. § 120.54(17) (1989).

ted the draw out to become a regular part of rulemaking procedure. These fears most likely come from the federal experience,³²¹ however, it is not clear how much weight courts should give the federal experience with formal rulemaking in determining whether adjudicatory process will work in Florida. There are major differences between the federal and the Florida experiences. For example, state rulemaking affects fewer people than federal rulemaking, so fewer people may be interested in participating in rulemaking on the state level than on the federal level. Also, the flexibility of formal procedure in Florida may permit agencies to avoid some of the difficulties, such as delay and confusion, that have occurred in the federal system.³²²

The concerns fueling the Florida courts' reluctance to permit adjudicatory process in rulemaking are most clearly expressed in the *Adam Smith* case. In *Adam Smith* the court recognized that additional measures are necessary to improve accountability in rulemaking, the court chose to create additional record requirements and implement hard look review rather than use the draw out.³²³ The court's reluctance to resort to adjudicatory methods was two-part: first, the court was not convinced that adjudicatory methods were necessary, and second, it feared that such methods would be counterproductive. Its suggestion that "[f]ormalized adjudicatory methods are clearly nonessential for purposes of rational rulemaking"³²⁴ indicates that the court did not believe hard look review and additional record requirements would cause great difficulties or prove inferior to adjudicatory methods. For

321. "The trial procedures of §§ 556 and 557 are not good for making rules of general applicability. Such is the consensus of judges, legislators, administrators, and practitioners." K. DAVIS, *supra* note 50, § 6:8, at 475. Davis called the FDA's peanut butter proceeding, which questioned whether peanut butter should have 87% or 90% peanuts and which lasted from 1959 until a final rule was issued in 1968, "a great educator of the American legal profession." *Id.*

322. The FDA's peanut butter rule is always used as an example of formal rulemaking failure. Yet, the agency itself might have been responsible for much of the delay and confusion it attributes to formal rulemaking. "Perhaps much of the problem with formal rulemaking is the result of the failure of the agencies to take advantage of the flexibility permitted by the formal hearing sections of the [federal] APA." D. ROTHSCHILD & C. KOCH, *FUNDAMENTALS OF ADMINISTRATIVE PRACTICE AND PROCEDURE* 540 (1981). *Accord* Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 *SAN DIEGO L. REV.* 183, 195 (1979) ("To some courts and commentators the application of sections 556 and 557 to general rulemaking is anathema. To others, including the present writer, this is a very exaggerated view." (footnote omitted)).

323. While the court did not expressly consider reviving the draw out, it did give some thought to the use of adjudicatory methods in the rulemaking process. It rejected the competent, substantial evidence standard of review because it believed that such a standard on agency rulemaking "would force rulemakers to adopt more formal, rigid, trial-like procedures in an attempt to make an adequate record capable of judicial review." *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1272 n.16 (Fla. 1st DCA 1989).

324. *Id.* at 1273 n.19

the reasons discussed in the previous section, experience with the *Adam Smith* approach should provide ample evidence to refute this view.

The second part of the court's concern questioned the benefits that adjudicatory methods can offer to improve accountability during rule-making. The court predicted dire consequences if trial-like procedures were adopted in rulemaking:

A general paralysis of administration would result, and rulemaking would lose most of its peculiar advantages as a tool of administrative policymaking. Trial-like adjudication would be extremely costly in time, staff, and money. Orderly innovation would be difficult. To discern basic agency policy, the public would often have to wade through volumes of scarcely relevant testimony and findings. Especially in the rapidly expanding realms of economic, environmental, and energy regulation, the policy disputes are too sharp, the technological considerations too complex, and the interests affected too numerous to require agencies to rely on the ponderous workings of adjudication.³²⁵

Will the draw out create these problems if it is permitted to become a regular part of the rulemaking process? It seems unlikely that the draw out will obscure agency policy, since that policy will be discernable from the agency's reasons for rejecting the input it receives. Where in the record will these reasons be found? When the draw out is governed by section 120.57(1), they will be found in the agency's proposed findings and in its final order rejecting some or all of the hearing officer's findings of fact and conclusions of law. When the draw out is governed by section 120.57(2), they will be found in that section's required statement of reasons for overruling objections to the proposed rule. Thus, it will be no more difficult to find agency policy after a draw out than it will be to find policy in the regime created by *Adam Smith*.

325. *Id.* at 1272 n.16. From the first full sentence to the end, the quoted material is verbatim, without citation, from Wright, *supra* note 287, at 376. The beginning partially quoted sentence has been assembled from material on page 378 of that article. The influence of this article on the court's decision in *Adam Smith* should not be underestimated. In it, Judge Skelly Wright criticized the D.C. Circuit's trend of requiring hybrid rulemaking procedures, but endorsed "a properly expansive reading" of section 553. *Id.* at 380-84. The *Adam Smith* opinion takes a similar tack, but fails to recognize the differences between federal and Florida law. It is not true in Florida, as it is in federal law, that the claim "that regulated parties have some 'right' to an adjudicatory promulgation of general policies merely because these policies affect important interests . . . has been decisively rejected." *Id.* at 377. The draw out was designed to preserve this right.

Will routine use of the draw out create costly chaos? Two other experiences under the act suggest that chaos is not a likely result. The first is the Florida experience with the proposed rule challenge. For the past fifteen years, section 120.54(4) has made adjudicatory process available in rulemaking in the limited situation where a challenge to the validity of a proposed rule is involved. Although this provision has injected into rulemaking the trial-like proceedings feared in *Adam Smith*, the courts do not seem particularly critical of section 120.54(4) proceedings. Also, little complaint about such proceedings has appeared elsewhere to suggest that the adjudicatory process injected into rulemaking by rule challenge remedy has created problems.

At the Seventh Administrative Law Conference celebrated by this issue of the *Law Review*, we asked those attending to focus on this issue in their group sessions. We specifically asked their position on the following question: "Should a single person who [would] be substantially affected by a proposed rule if [it] is adopted be able to challenge the validity of the proposed rule before it is adopted and becomes effective? Or would it be better to give prefilings review authority to the Attorney General?"³²⁶ While some expressed concern over the possibility that individuals could use such proceedings to delay the adoption of rules and thus gain leverage in negotiations with the agency over the substance of the proposed rule, very little opposition to the remedy was expressed, even among agency lawyers. Furthermore, most of the small groups reported satisfaction with section 120.54(4) as it is presently operating.³²⁷ Of course, opportunities to file rule challenges are limited, and the draw out would be more available, if permitted. However, both proceedings involve a similar form of adjudicatory process.

Also instructive is Florida's experience with nonrule policy,³²⁸ which suggests that permitting more adjudicatory process during rulemaking will not significantly reduce the efficiency of the process. It is no secret that Florida courts have experienced problems in securing agency compliance with the requirement that agencies adopt as rules policy

326. Transcript of Seventh Admin. L. Conf. proceedings 45 (Mar. 17, 1990) (remarks of Stephen Maher).

327. See generally *id.* at 45-51. In one group, "the agency people thought it was a very good provision to keep." *Id.* at 49 (remarks of Arthur England). It was also reported that "an agency dominated group reached a conclusion that this procedure was important enough or too important from the private perspective to be replaced." *Id.* at 47 (remarks of Prof. Dore).

328. In Florida, agencies may develop policy through adjudication on a case-by-case basis, but must explicate and defend such policy repeatedly in section 120.57 proceedings when they choose that mode of policy development. Florida Pub. Serv. Comm'n v. Indiantown Tel. Sys., Inc., 435 So. 2d 892 (Fla. 1st DCA 1983); Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177 (Fla. 1st DCA 1981).

statements of general applicability.³²⁹ The courts began to enforce this rulemaking requirement by invalidating established policy not properly adopted as a rule,³³⁰ but abandoned this approach because invalidating rules on this basis permitted the skill of the litigants, rather than the merits of the case, to decide the claim.³³¹ The courts then decided that the burden of having to prove up the factual and policy predicates for its nonrule policy in every case where it was applied would force agencies to promulgate those policies as rules.³³²

The consensus is that this approach has failed to encourage rulemaking;³³³ thus, the underlying assumption that agencies will act to avoid the burden of repeatedly proving up their nonrule policy has proven false. This suggests that requiring formal proof of policy and its factual predicates may not be as burdensome as generally believed. If requiring agencies to repeatedly prove up their policy, in formal proceedings through the introduction of evidence and to test that policy through cross-examination and rebuttal evidence, has not proven burdensome enough to stop agencies from continuing to use nonrule policy, then the courts' fears that similar requirements in rulemaking will make it too burdensome are similarly unfounded.

The court in *Adam Smith* also raises economic regulation, environmental regulation, and energy regulation as special situations where policy disputes are too sharp, technological issues too complex, and interests too numerous for a "ponderous" adjudicatory process. The sharpness of policy disputes should not prevent the use of the draw out. The draw out will permit the development of an equally sharp record for judicial review of issues that divide the agency and substantially affected persons. Sharp disputes are specially benefited by this

329. See Waas, *The Nightmare of Nonrule Policy*, 56 FLA. B. J. 193 (1982).

330. See *Price Wise Buying Group v. Nuzum*, 343 So. 2d 115 (Fla. 1st DCA 1977); *Department of Admin. v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977).

331. The similarity between the side effects of this strategy (now abandoned) and the *Adam Smith* attempt to enforce accountability during rulemaking by adding record requirements, is clear. In both cases, the strategy is open to exploitation by skilled practitioners who may use it to obtain results that reflect their skill as litigators rather than the merits of their client's claim.

332. For judicial accounts of this transition of approach, see *Barker v. Board of Medical Examiners*, 428 So. 2d 720, 722-23 (Fla. 1st DCA 1983); *White Advertising Int'l v. Department of Transp.*, 368 So. 2d 411, 413-15 (Fla. 1st DCA 1979) (Ervin, J., concurring and dissenting).

333. This was the consensus at the Seventh Administrative Law Conference. In her remarks, Professor Dore noted, that "[o]ver the years participants at the administrative law conference, but particularly last year's participants, have complained about the fact that in Florida they think we have a real problem with incipient non-rule policy." Transcript of Seventh Admin. L. Conference proceedings 126 (Mar. 16, 1990) (remarks of Prof. Dore). Legislation was introduced during the 1990 legislative session to respond to the problem of agencies not promulgating their policy as rules. Professor Dore discussed these proposals at the Conference, *id.* at 126-133, and they were also one subject discussed in the small group sessions.

process, because all involved—even those who do not prevail—can take comfort in the fairness of the process that produced the proposed rule.³³⁴

Complex issues and numerous interests will not make the process too ponderous. If the agency cannot explain complex issues, perhaps it does not really understand them. Furthermore, if a large number of substantially affected persons are so unhappy with a proposed rule that they are willing to hire lawyers to request and conduct a draw out, they should be heard. Reasonable limitations can assure that the presentations are not duplicative and do not go too far afield. A Model Rule can be adopted on this point if the problem appears serious. Also, the availability of the DOAH, a group of professional hearing officers, lessens concern about the logistics of multiple-party participation.

The more serious problem with the complex multiparty proceedings feared by the *Adam Smith* court is that the courts may make the leap from requiring the agency to respond to each of the parties, to “making synoptic demands quite apart from requiring the agencies to respond to all comments.”³³⁵ The irony is that *Adam Smith's* additional requirements are synoptic, and the draw out is not. The court in *Adam Smith* moved towards synoptic demands when it required all agencies, in connection with every proposed rule, to compile a record that reflects all of the views and facts considered, and to provide information, such as the agency's tentative empirical findings, important expert advice, and the description of the critical experimental and methodological techniques on which the agency intends to rely,

334. Acceptability is the third consideration, together with accountability and efficiency, that should be balanced to achieve fairness in an administrative system. Cramton, *supra* note 48, at 593. “Acceptability emphasizes the indispensable virtues of procedures that are considered fair by those whom they affect, as well as by the general public. Usually this translates into meaningful participation in the decisional process.” *Id.* Professor Barry Boyer has noted:

[There is a] pervasive American belief that individuals and organizations have a fundamental right to participate in the decision of issues that affect their well-being. Adjudication guarantees this right to participate at all important stages of the decisional process; moreover, because adjudicative decision-making takes place on the public record and employs a reasoning process of applying principles to facts, the parties have assurance that their participation will be meaningful. Finally, there seem to be other intangible values inherent in trial procedures: private litigants may gain satisfaction from having the right to force agencies to come forward and formally justify their positions

Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 148 (1972) (footnote omitted).

335. Professor Shapiro defines synoptic decisionmaking as a “process that requires all facts to be known, all alternative policies to be considered, all values to be identified and placed in an order of priorities and that then selects the alternative that best achieves the values given the facts.” Shapiro, *supra* note 38, at 466 n.21.

whether or not anyone inquired about them.³³⁶ Had the court instead implemented the draw out, it would have required only that the agency respond to the participants.

Another problem with rulemaking proceedings is that the agency's rulemaking task may be "polycentric."³³⁷ Professor Lon Fuller describes polycentrism as follows:

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions.³³⁸

When dealing with a polycentric task, adjudication may not be well suited to the task because "forms of adjudication cannot encompass and take into account the complex repercussions that may result" from individual changes.³³⁹ There is a danger that the decisionmaker will respond by reformulating the problem to make it amenable to adjudicative procedures.³⁴⁰

Concerns over the polycentric nature of rulemaking must, however, be kept in perspective, since, Fuller adds, "[t]here are polycentric elements in almost all problems submitted to adjudication"³⁴¹ and the distinction is "often a matter of degree."³⁴² Also, in some circumstances adjudicative methods may improve accuracy in a polycentric controversy,³⁴³ where in others they may not.³⁴⁴

Other concerns suggested in *Adam Smith* are more troubling. The court notes that "[a] rulemaker must typically make and coordinate many empirical conclusions dependant on raw material outside the conventional evidentiary categories of 'testimony' and 'exhibits.' For example, the rulemaker must often draw upon prior experience, expert advice, the developing technical literature, ongoing experiments,

336. *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1270 (Fla. 1st DCA 1989).

337. Fuller, *supra* note 74, at 394.

338. *Id.* at 395.

339. *Id.* at 394. Managerial direction has been suggested as a method to solve polycentric problems. *Id.* at 398.

340. *Id.* at 401.

341. *Id.* at 397.

342. *Id.*

343. Boyer notes that adjudicative procedures may protect accuracy against undue political influence in polycentric controversies. Boyer, *supra* note 334, at 142.

344. Boyer also notes that adjudicative procedures may decrease accuracy when the agency decision should approach the optimizing model. *Id.* at 140.

or seasoned predictions."³⁴⁵ In other words, the court questions whether the picture the rulemaker sees can be captured on the film of adjudicatory process.³⁴⁶ Proponents of the use of adjudicatory process in rulemaking assume that it is beneficial because it is truth-finding, and thus can assure that rules find a firm footing in objective reality. Is the assumption that adjudicatory methods are able to find truth correct in this context?³⁴⁷ Will the draw out that uses a DOAH hearing officer to find facts do a better job of finding "the truth" than the agency itself?

The Florida APA's approach to fact finding evidences a strong concern that the agency cannot be trusted to find discernable facts without the presence of an intermediary, such as the DOAH hearing officer,³⁴⁸ because the agency may use its fact finding power to submerge policy judgments and thus defeat the act's repeated theme—the requirement that the agency must explain its exercises of discretion.³⁴⁹ In the Legislature's judgment, this paramount concern outweighs the costs involved, including the agency's loss of independence in fact finding and the administrative burdens associated with constantly explaining its decisions.

It may be impossible to reduce the world to a transcript, or to findings of fact, and still preserve the bigger picture. The 1981 MSAPA approach seems to recognize this, and the MSAPA is willing to sacrifice close scrutiny of agency fact finding in rulemaking to preserve the

345. *Adam Smith Enters., Inc. v. Department of Env'tl. Reg.*, 553 So. 2d 1260, 1273 n.19 (Fla. 1st DCA 1989).

346. Professor Davis uses still another metaphor to describe the facts used in this process: "Facts that are useful in lawmaking, like chemical elements, often come as a part of a compound or mixture; the facts are often a part of thinking processes or judgment." Davis, *supra* note 91, at 935. He also cautions that there are some facts "that cannot be proved or disproved." *Id.* at 938.

347. Professor Cramton notes that in trial-type hearings, there is a danger that the issues must be "severely compressed and put in a bipolar form."

Since trial procedure is intricate and specialized, lawyers come to dominate the decision-making process even though many issues may be non-legal. Moreover, trial procedures are enormously expensive and often dilatory. Finally, . . . [t]he focus on "justice in the individual case" does not lend itself to intelligent forward planning, to rational consideration of major options and alternatives, and to a concern for the aggregate effects of individualized decisions.

Cramton, *supra* note 48, at 590.

348. The 1981 MSAPA has taken a different approach: "[R]eviewing courts may not substitute their judgments de novo for those of the agencies with respect to the existence of the facts necessary to legitimate particular rules. Agencies are normally delegated authority to find those facts based on an exercise of discretion." A. BONFIELD, *supra* note 52, at 582-83. Thus, the 1981 MSAPA does not restrict agency determination of the facts upon which the proposed rule is based, and it limits the ability of courts to review those factual determinations.

349. See *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977).

agencies' freedom to see the world their own way without "assistance" from independent fact finders or reviewing judges. The MSAPA may be less fair to persons whose substantial interests are affected by the proposed rule, but better suited to protect the "hunch."

Can agency hunches survive a draw out? Will the process wring out the agency knowledge and expertise that intuition may represent? Certainly, the draw out is not designed to remove the hunch from rule-making,³⁵⁰ but rather, to investigate the hunch, to find out about the experience and understanding it may represent, and to discover if the agency is within the proper domain of hunches. It exposes weaknesses in the hunch that the policy maker may not even have realized existed until the investigation was made. Thus, while it is not the ideal environment for intuition, the draw out may not destroy it. We will not know for sure until we give the draw out a real chance.

D. Should the Draw Out Be Modified?

The weakness in the draw out approach may be that the premise upon which the mechanism itself is based—that adjudicatory process should be equally available whether the proceeding is denominated a rulemaking or an adjudication—is flawed. Requiring the agency to explain and defend its factual premises and policy choices during rule-making may not produce better decisions. The rulemaker may not be able to work effectively without the power to find its own facts. But the draw out is a legislative choice that must either be accepted or changed. It is hard to understand the cavalier disregard for legislative judgment that has thus far been shown. Nevertheless, opposition to the draw out has been strong. Should the statute be changed? I suggest that the draw out should be tried in its present form because potential modifications do not look promising.

Of course, the draw out could be modified in ways that would make it more acceptable to the courts, and in fact, the courts have already begun that process. Taking the court's lead, the Legislature could change the provision from its current absolute form, which guarantees a participation opportunity for all whose substantial interests are af-

350. Safeguards in the draw out process may help prevent loss of the hunch's essence. Agencies still retain their power over policy choice. They are required to explain their choice, but even *Adam Smith* acknowledges that there is a need for explanation. Adjudicatory administrative process does not have all the distorting characteristics of a trial where the rules of evidence are strictly enforced. Evidence inadmissible in civil courts but "of a type commonly relied upon by reasonably prudent persons," is admissible in administrative hearings. Benton & Pfeiffer, *supra* note 68, at 4-19 (quoting FLA. STAT. § 120.58(1)(a) (1989)).

fect, to a form guaranteeing such an opportunity only in certain circumstances. The nature of the opportunity provided could also be made more flexible. For example, the statute might reject the concept of one draw out procedure for all agencies, and instead require procedural protections on either an agency-by-agency or case-by-case basis. The Legislature could limit the required protections to those that the participant can demonstrate are necessary, rather than the full 120.57 protections now guaranteed. This approach would benefit from a guiding principle, which could be used by participants, agencies, and courts to determine when adjudicatory methods will be required and which protections will be required. Such a principle might state: "An agency should engage in formal factfinding when, regardless of the role it is playing, the need for factual accuracy outweighs other considerations and trial-type procedures will effectively decrease uncertainty."³⁵¹

While these modifications will alleviate concerns about the rigidity of the draw out approach,³⁵² problems do exist with these modifications. Opinions will strongly differ, for example, on various questions, such as when adjudicatory procedures can increase accuracy, how much they will decrease efficiency, and how necessary they are to preserving the acceptability of agency decisions. The courts' views on these questions will prove dispositive, and given the courts' longstanding hostility to adjudicatory process in rulemaking, a more flexible statutory substitute for the draw out provision would probably rarely result in adjudicatory process.³⁵³ Some of the same concerns discussed

351. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 775 (1979). Professor McGarity calls this a "newly developing 'functional approach.'" *Id.* Judge Leventhal also favored a functional inquiry which asked what procedures are necessary for reasoned decisionmaking and effective participation. Estreicher, *supra* note 102, at 909-10.

352. "Rigidity" describes the fact that the draw out is now (theoretically, at least) available to resolve factual and policy disputes, whether or not the rigorous procedures would bring "net" benefits to the process. In other words, the inefficiencies that the draw out may bring to the process through delay and resource expenditure may not be outweighed, in the agency's or the court's mind, by the contributions it makes to the accuracy of decisions incorporated in the rule. I suggest that the draw out is not concerned with net benefits because it exists to protect the rights of the participant. Similarly, the public interest is protected, not by agency denial of process, but by agency participation in the process.

353. For example, if it were ultimately decided under such general guidelines that adjudicatory procedures were only required where adjudicatory facts were involved, the process would add little to rulemaking procedure. Similarly, if showings were required to obtain additional procedures that were difficult to meet, the remedy might rarely be used. For example, if those who sought adjudicatory process were required to demonstrate 1) the benefit to accuracy the procedure would provide; 2) the cost to efficiency; 3) the increase in the decision's acceptability; and 4) the particular procedures needed and how each would be used (perhaps, as the Florida courts now require, the particulars of a proposed examination) it is unlikely many who sought additional procedures would ever survive the preliminary inquiry.

in hard look review are also troubling in this context, since courts may use the failure to provide additional protections as grounds for reversing decisions with which they disagree.

Much of the benefit of the draw out will be lost under a flexible approach. One strength of the present procedure is that one can determine, with certainty, when the draw out will be available: It is available any time a rule will preclusively determine fact and policy questions. The statute also provides certainty in the available procedures if the request is granted. It not only guarantees important protections that might not be specifically demanded, such as an independent hearing officer and a ban on ex parte contacts, but also develops an adequate record for substantial evidence review. A more flexible system for providing adjudicatory process may not provide an ideal record for such judicial review. Since a shift to a more flexible approach will sacrifice benefits that the strict procedure of the draw out makes possible, the draw out should not be tried in modified form.

VI. THE NEED FOR LEGISLATIVE ACTION IN THE 1990'S

The rulemaking and judicial review provisions of the Florida APA were a bold experiment, never before attempted in Florida or in any other jurisdiction. Professor Dore asked at the Seventh Administrative Law Conference whether the draw out is "an innovation whose time has not yet come?"³⁵⁴ Unfortunately, its time may have already come and gone, without its having ever been tried. Florida law in this area has gone so far afield the courts may now be unable to change direction. If the courts do not act, then the Legislature should intervene.

Rulemaking under the Florida APA has been reshaped by judicial usurpation of the prerogatives of others. The Legislature authorized those whose substantial interests would be affected by proposed rules to bring the power of facts and logic to bear on agency choices made during rulemaking. The courts have essentially withdrawn this prerogative from rulemaking participants by marginalizing the draw out. The First District, through its decision in *Adam Smith*, has now placed the responsibility for documenting those choices on the agency, and the power for reviewing those choices in the courts. Similarly, the courts have expropriated the Legislature's required justification statement that facilitates JAPC legislative review of proposed rules and

354. Transcript of Seventh Admin. L. Conf. proceedings 136 (Mar. 16, 1990) (remarks of Prof. Dore).

have revised it to facilitate closer judicial review of rules. The courts have ignored the Legislature's explicit limitations on the nature and scope of judicial review, and instead have adopted a standard of review which makes it easier for courts to substitute their judgment for the agency's on matters of discretion. In short, judges are substituting their own judgments for the statutory mechanisms designed to assure accountability in administrative rulemaking.

Flaws in the legislative scheme did not necessitate this shift. The courts have not been forced to step in because the public has been shut out. Concerns about differential access to agency proceedings are logical in any system which relies heavily on participation by affected persons to shape agency policy. However, the APA experience of the last fifteen years would surprise those who expected exclusion of individuals from the process due to inadequate resources, lack of organization, or too little political power. For example, prisoners have been perhaps too successful in using the APA's rulemaking provisions to shape corrections policy.³⁵⁵ The poor have also used the rulemaking provisions of the APA to shape welfare policy,³⁵⁶ medicaid policy,³⁵⁷ and policy in the area of unemployment insurance.³⁵⁸

The problem of differential access remains serious despite these efforts, not because these groups failed to take advantage of the opportunity provided, but because the courts have taken affirmative steps to limit the ability of politically less powerful groups to participate in the process. *Department of Offender Rehabilitation v. Jerry*³⁵⁹ marked an early turning point in the law in this area, by establishing access requirements that pose a significant obstacle to participation in formal proceedings, such as the rule challenge and the draw out. Although

355. The strongest testament to this success was the decision to amend the APA to limit the participation of prisoners in some of the remedies provided by the act. Ch. 83-78, 1983 Fla. Laws 257.

356. See, e.g., *Amos v. Department of Health & Rehab. Servs.*, 444 So. 2d 43 (Fla. 1st DCA 1983) ("policy clearance" was invalid rule); *Woodley v. Department of Health & Rehab. Servs.*, 505 So. 2d 676 (Fla. 1st DCA 1987) (agency rule read to require reversal and remand).

357. See, e.g., *Balino v. Department of Health & Rehab. Servs.*, 348 So. 2d 349 (Fla. 1st DCA 1977) (requiring department to amend its rules); *Farmworker Rights Organization, Inc. v. Department of Health & Rehab. Servs.*, 430 So. 2d 1 (Fla. 1st DCA 1983) (rules establishing certificate of need criteria held invalid as they did not explicitly contain any criterion dealing with access of low-income and minority groups services); *Kearse v. Department of Health & Rehab. Servs.*, 474 So. 2d 819 (Fla. 1st DCA 1985) (portions of proposed administrative rule requiring prior authorization for reimbursement of medically necessary services held invalid).

358. See, e.g., *Guerra v. Department of Labor & Employ. Sec.*, 427 So. 2d 1098 (Fla. 3d DCA 1983) (requiring department to amend its rules); *Cotilla v. Department of Labor & Employ. Security*, 1 Fla. Admin. L. Rep. 1026 (1979) (invalidating Department's subpoena rule).

359. 353 So. 2d 1230 (Fla. 1st DCA 1978).

the supreme court has modified *Jerry* to some extent,³⁶⁰ the fact remains that courts have construed the APA provisions governing access to formal process in a way which makes it more difficult for affected persons to protect their substantial interests.³⁶¹ Not surprisingly, this barrier has also been grounded in inapposite federal case law.³⁶²

Thus, concerns about differential access have proven significant, not because the politically powerless lack the interest or resources, but because their participation has been thwarted by a concerted effort to make the system less responsive to those interests. This trend is unacceptable because the statute relies on such participation to guarantee fairness. When participation is prevented, the system fails.³⁶³

The APA as now interpreted by the courts fails to guarantee equal access to its procedural protections, fails to permit those who have access to its procedural protections to make a record capable of judicial review, fails to allow those with access to protect their substantial interests during rulemaking, fails to prevent judges from substituting their judgment for that of the Legislature concerning procedures agencies should use during rulemaking, and fails to prevent judges from substituting their judgment for that of the agency on the discretionary agency decisions incorporated in the rules emerging from rulemaking. Thus, as it is presently construed, the APA has failed to accomplish its basic mission in this area. If these problems cannot be remedied by the courts—and it appears unlikely at this point that they can—then the Legislature must intervene.

The Legislature can decide to continue this experiment, which I believe still holds promise. But if it does, it must amend the act to sweep aside much existing case law. In addition, it must take measures to protect against future encroachments on its prerogatives. It must define with greater clarity the attributes of those who can participate in administrative proceedings, and it must more clearly define how those proceedings will operate. The Legislature, of course, has other op-

360. *Florida Home Builders Ass'n v. Department of Labor & Employ. Sec.*, 412 So. 2d 351 (Fla. 1982). For an extended discussion of *Jerry* and *Florida Home Builders*, see Dore, *supra* note 49, at 968-974.

361. See Dore, *supra* note 49.

362. Professor Dore notes that the Florida courts' reliance on federal case law to develop standing requirements in the administrative context is inappropriate because federal law is dissimilar. *Id.* at 969.

363. When politically less powerful groups are excluded from the protections of the act or denied standing, the discretionary judgments made by the agency are permitted to go unchallenged: "Proponents of restrictive standing respond that [these individuals] can always take their complaints to the political system, but that system often ignores such complaints." Shapiro & Glicksman, *supra* note 131, at 886 (footnotes omitted).

tions. It may choose to give up on the present innovative scheme and enact a completely new statute. Professor Bonfield proposes such an approach in this Symposium issue.

