

1991

The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking

Johnny C. Burris

Nova Southeastern University - Shepard Broad Law Center, burrisj@nsu.law.nova.edu

Follow this and additional works at: http://nsuworks.nova.edu/law_facarticles

Recommended Citation

Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 Fla. St. U. L. Rev. 661 (1991), available at <http://>

This Article is brought to you for free and open access by the Shepard Broad College of Law at NSUWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of NSUWorks. For more information, please contact nsuworks@nova.edu.

THE FAILURE OF THE FLORIDA JUDICIAL REVIEW
PROCESS TO PROVIDE EFFECTIVE INCENTIVES FOR
AGENCY RULEMAKING

JOHNNY C. BURRIS

Table of Contents

I.	INTRODUCTION.....	662
II.	THE THEORY OF A PREFERENCE FOR RULEMAKING.....	665
III.	THE LOSS OF THE RULEMAKING PREFERENCE IN PRACTICE	667
IV.	THE <i>McDONALD</i> RESOLUTION OF THE PROBLEMS POSED BY THE RULE/ORDER DICHOTOMY.....	673
V.	THE FAILURE OF THE <i>McDONALD</i> VISION FOR RESOLU- TION OF THE PROBLEMS POSED BY THE RULE/ORDER DICHOTOMY	677
VI.	THE RESOLUTION OF THE PROBLEMS POSED BY THE RULE/ORDER DICHOTOMY SUGGESTED BY <i>ADAM SMITH</i> ..	685
VII.	SOME POLICY REASONS FOR WHY ADMINISTRATIVE AGENCIES SHOULD NOT GENERALLY BE PERMITTED TO DEVELOP PUBLIC POLICY THROUGH ADJUDICATION	690
VIII.	WHY HAVE THE COURTS FAILED TO ADEQUATELY CON- STRAIN ADMINISTRATIVE AGENCY DISCRETION IN THE RULE/ORDER DICHOTOMY CONTEXT?	697
IX.	A POSSIBLE JUDICIAL SOLUTION TO THE RULE/ORDER DICHOTOMY PROBLEM.....	699
X.	CONCLUSION.....	701

THE FAILURE OF THE FLORIDA JUDICIAL REVIEW PROCESS TO PROVIDE EFFECTIVE INCENTIVES FOR AGENCY RULEMAKING*

JOHNNY C. BURRIS**

[T]he powers that are committed to . . . regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong.¹

I. INTRODUCTION

THE propagation of administrative agencies on both the federal and state levels in the post-New Deal era decisively shifted the public policy decision making process from the elected public policy makers in the legislature and executive branches of government to administrative agencies,² composed of appointed officials which are generally not directly accountable to the electorate.³ With the shift of

* Copyright 1990 Johnny C. Burris

** Professor of Law, Nova University Shepard Broad Law Center. This Article is a substantially expanded and revised version of my speech before the Seventh Administrative Law Conference which was held on March 16-17, 1990, in Tallahassee, Florida. I gratefully acknowledge the research assistance I received from Ellen Fell Baig, a 1990 graduate of Nova University Shepard Broad Law Center, and Laurie Moss, a student at Nova University Shepard Broad Law Center, in the preparation of my speech and this Article.

1. E. ROOT, *Public Service by the Bar*, in ADDRESSES ON GOVERNMENT AND CITIZENSHIP 535 (1916).

2. See, e.g., J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978); R. HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1987); J. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77 (1975). Several academic and political commentators have suggested that the Federal Reserve Board is the most powerful entity in our society. See, e.g., M. NEWTON, *THE FED: INSIDE THE FEDERAL RESERVE, THE SECRET POWER CENTER THAT CONTROLS THE AMERICAN ECONOMY* (1983).

3. Not all administrative agencies have escaped the burden of electoral accountability. For example, the members of the State Board of Education are elected and at one time members of the Public Service Commission were also elected. See FLA. CONST. art. IX, § 2; FLA. STAT § 350.01 (1977). In theory, administrative agencies are indirectly accountable to the people through the controls over administrative agencies exercised by the elected representatives of the people.

most public policy making to modern administrative agencies,⁴ administrative agencies emerged as an omnipotent institutional tool capable of shaping the fundamental nature of our society.⁵ As Justice Jackson noted, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."⁶ Fortunately or unfortunately, depending on one's point of view, the influence of administrative agencies shows no sign of being diminished anytime soon.⁷ Given

4. Of course, not all public policy choices are made by administrative agencies. Such a process would clearly be unconstitutional in Florida. *E.g.*, *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978); *accord* *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). While the legislature and the executive jointly create a general public policy position embodied in legislation, the all important details are almost always left to administrative agencies. It is the details for the implementation of the general public policy choice that brings it to life in our society. *See, e.g.*, *Brewster Phosphates v. State Dep't of Env'tl. Regulation*, 444 So. 2d 483, 485 (Fla. 1st DCA), *review denied*, 450 So. 2d 485 (Fla. 1984). Given the degree of discretion usually granted administrative agencies in implementing a policy, the details promulgated by the administrative agency can radically alter the impact of the legislation on our society. *See, e.g., id.* at 486-87.

5. By limiting my comments to the role of administrative agencies, I do not intend to suggest that other institutions, both public and private, do not play important roles in shaping the nature of our society. These other institutions are also important, but usually only in limited fields. What sets the category of administrative agencies apart from these other institutions is their persuasive impact on society. The discretionary powers wielded by administrative agencies on the national, state, and local levels directly or indirectly impact on the day to day lives of every person in our society. *See generally* B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) (arguing that the rise of the administrative state transformed the nature of our legal culture and requires a new type of "activist lawyering"); A. BERLE, *POWER* (1969) (examines the nature of the power exercised by various private and public institutions); C. SUSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

6. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

7. As early as the 1930's, commentators were noting the seemingly inevitable growing reliance on administrative agencies in our society.

Despite . . . [the] chorus of abuse and tirade, the growth of the administrative process shows little sign of being halted. . . . [I]ts extraordinary growth in recent years, the increasing frequency with which government has come to resort to it, the extent to which it is creating new relationships between the individual, the body economic, and the state, already have given it great stature.

J. LANDIS, *THE ADMINISTRATIVE PROCESS* 4-5 (1938). Both Presidents Reagan and Carter presided over major deregulation efforts which had little impact on our dependence on administrative agencies. As Professor Bonfield noted, deregulation, even if a success, has done little to alter our continued and expanding reliance on administrative agencies. "[D]espite recent efforts to deregulate certain sectors of our economy, the long-term upward curve of legislative delegation to administrative agencies of law-making authority has not been disturbed." A. BONFIELD, *STATE ADMINISTRATIVE RULEMAKING* 4 (1986); *see* C. SUSTEIN, *supra* note 5; McGarity, *Regulatory Reform and the Positive State: An Historical Overview*, 38 *ADMIN. L. REV.* 399 (1986). The failure, or at the very least problematic success, of the so-called deregulation movement actually may ultimately further enhance the powers of administrative agencies as our society adjusts to

the preeminent role of administrative agencies in our society, it is not surprising that the imposition of an effective set of limits or controls on the discretion exercised by administrative agencies, without unduly damaging their ability to perform their assigned duties, has been a constant concern of the elected branches of government⁸ and a topic of much discussion in the academic community.⁹

In Florida, one of the principal tools used to assure that administrative agencies act in a manner consistent with the will of the legislative and executive branches of government is the Administrative Procedure Act (APA).¹⁰ The general nature of the limitations imposed on the discretion of administrative agencies by the APA was noted by the court in *McDonald v. Department of Banking & Finance*:¹¹

In three important respects . . . the APA affects the scope and manner of exercise of agency discretion: (1) the APA prescribes the process by which disputed facts are found; (2) it requires that the agency adopt as rules its policy statements of general applicability, requires agency proof of incipient policy not expressed in rules and permits countervailing evidence and argument; and (3) it requires an agency to explain the exercise of its discretion and subjects that explanation to judicial review.¹²

the collapse or serious malfunctioning of such institutions as banks and savings and loans after deregulation. See generally S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* (1983); TRANSPORTATION SAFETY IN AN AGE OF DEREGULATION (L. MOSES & I. SAVAGE ed. 1989); Berger, Wiley, Patrick, Tisch & Blake, *Broadcast Deregulation: The Reagan Years and Beyond*, 40 ADMIN. L. REV. 345 (1988); Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987).

8. See, e.g., *Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida*, reprinted in 3 A. ENGLAND & L. LEVINSON, *FLORIDA ADMINISTRATIVE PRACTICE MANUAL 3-7* (1979) (appendix C) [hereinafter *Reporter's Comments*]; Senate Comm. on Gov't Affairs, Congressional Oversight of Regulatory Agencies, S. Doc. No. 95-26, 95th Cong., 1st Sess. (1977) (volume II); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1246-49 (1982); Report of the Committee with Studies of Administrative Management in the Federal Government (1937).

9. See S. BREYER, *REGULATION AND ITS REFORM* (1982) (thoughtful discussions on the problems associated with attempting to control administrative discretion); K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); T. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1979).

10. FLA. STAT. §§ 120.50-.73 (1989). The current Administrative Procedure Act was adopted in 1974 and went into effect in 1975. See *id.* § 120.72(1)(a). While it has been amended on numerous occasions the basic design and provisions of the 1974 APA have remained in place to date. See Burris, *Administrative Law, The 1987 Survey of Florida Law*, 12 NOVA L. REV. 299, 357-60 & n.404 (1988).

11. 346 So. 2d 569 (Fla 1st DCA 1977).

12. *Id.* at 577. This is not an exhaustive list of the checks on the discretion of administrative agencies. See, e.g., *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978). Even in the APA there are other important potential institutional checks on the discretion of administrative agencies such as the Joint Administrative Procedures Committee. FLA. STAT. §§ 120.52 (4), .545 (1989). See also *id.* § 11.60.

These constraints on administrative agency discretion were designed to statutorily mandate that administrative agencies provide adequate opportunities in the administrative process for governmental institutions, interested parties, and the general public to participate in the processes by which administrative agencies develop public policy. The theory underlying the APA was that a process assuring the possibility of broad participation in administrative agency decision making would offer the public and interested parties the best opportunity to check possible abuses of discretion.¹³ In the scheme established in the APA, the courts play a critical role in assuring that administrative agencies comply with the processes set forth in the APA and thus indirectly insure that adequate access to the public policy making process carried on by administrative agencies is maintained.

This Article offers a critical review and evaluation of how the Florida courts have performed one of the institutional roles assigned to them in the APA - appropriately limiting the discretion of administrative agencies in selecting the process used to promulgate public policy. This Article is prepared on the assumption that the legislature, in adopting the APA, imposed a requirement that administrative agencies generally develop public policy through rules in the rulemaking process¹⁴ rather than in final orders rendered at the conclusion of the adjudicatory process.¹⁵ This position on the intent of the legislature in adopting the APA is relatively controversial and is criticized by those who have reached the conclusion that the APA expresses no such strong preference for the rulemaking process.

II. THE THEORY OF A PREFERENCE FOR RULEMAKING

There are primarily two processes which administrative agencies can use in developing legally binding public policy - rulemaking and adjudication.¹⁶ In theory, administrative agencies should use the rulemaking process to establish legally binding public policy of general

13. See *Reporter's Comments*, *supra* note 8, at 3.

14. FLA. STAT. § 120.54 (1989).

15. *Id.* § 120.57 (1989).

16. "Every policy statement an agency relies upon in reaching a decision must be either codified as a rule or expressly stated in an order." *Florida Cities Water Co. v. Florida Pub. Serv. Comm'n*, 384 So. 2d 1280, 1282 (Fla. 1980) (Boyd, J., concurring in part and dissenting in part); see *McDonald*, 346 So. 2d at 580-81. This statement is generally true, but there are other methods by which administrative agencies can establish legally binding public policy. See *Department of Health and Rehabilitative Servs. v. Barr*, 359 So. 2d 503 (Fla. 1st DCA 1978) (the court noted that a declaratory statement can validly establish an administrative agency's policy position without going through the rulemaking process); FLA. STAT. § 120.565 (1989); *Cf. Palm Springs Gen. Hosp., Inc. v. Health Care Cost Contain. Bd.*, 560 So. 2d 1348, 1349 (Fla. 3d DCA 1990) (the court validated the use of settlement agreements to resolve pending disputes).

applicability.¹⁷ The adjudication process should be used to determine the substantial interests of parties¹⁸ under the relevant statutes and administrative rules and only incidentally to develop legally binding public policy. Generally, the results of the rulemaking process are ultimately embodied in administrative rules and the results of the adjudicatory process are ultimately embodied in administrative agency orders. The distinction between these two means for exercising administrative agency authority to develop public policy was diminished in the APA by providing in some cases for additional procedural protection during the rulemaking process.¹⁹ In cases where these procedural protections are invoked during the rulemaking process, it would closely resemble adjudication. Despite the procedural convergence of rulemaking and adjudication there still was a general consensus that administrative agencies, at least in theory, should prefer the rulemaking process over adjudication as the means for developing public policy,²⁰ because the rulemaking process was designed to maximize public participation and fairness through its notice, hearing, and publication

17. See FLA. STAT. § 120.52(16) (1989).

18. See *id.* § 120.57.

19. This was done in order to avoid some of the evils associated with the formalistic approaches courts had used in evaluating the significance of the dichotomy between rules and orders. *Reporter's Comments*, *supra* note 8, at 6-7, 10, 17-18. Prior to the adoption of the 1974 version of the APA, the courts encouraged parties to engage in arguments over whether the wrong method for seeking judicial review was used in light of the type of administrative agency action taken. See, e.g., *De Groot v. Sheffield*, 95 So. 2d 912, 914-15 (Fla. 1957); *Bryan v. Landis*, 106 Fla. 19, 142 So. 650 (1932); *Board of Pub. Instruction v. Sack*, 212 So. 2d 819, 821-22 (Fla. 1st DCA), *cert. denied*, 219 So.2d 698 (Fla. 1968); *Harris v. Goff*, 151 So. 2d 642, 643-44 (Fla. 1st DCA 1963). A variation on this argument, which was understandably a favorite of the administrative agencies, was that the subject matter did not concern an administrative agency's quasi-legislative powers covered by the APA rulemaking process or an administrative agency's quasi-judicial powers covered by the APA adjudicatory processes. In such cases, the power exercised by the agency was quasi-executive, and the administrative agency was not subject to any of the constraints imposed by the APA—including the judicial review process created by the APA. See, e.g., *Dickinson v. Judges of the Dist. Ct. App.*, First Dist., 282 So. 2d 168, 168-69 (Fla. 1973); *Bay Nat'l Bank & Trust Co. v. Dickinson*, 229 So. 2d 302, 306-08 (Fla. 1st DCA 1969); *Carbo, Inc. v. Meiklejohn*, 212 So. 2d 328, 330 (Fla. 1st DCA 1968). The courts have rejected attempts to resurrect this particular argument under the 1974 version of the APA. See, e.g., *Groves-Watkins Constructors v. Department of Transp.*, 511 So. 2d 323 (Fla. 1st DCA 1987), *rev. on other grounds*, 530 So. 2d 912 (Fla. 1988).

20. "The model of responsible agency action under the APA is action faithful to statutory purposes and limitations, foretold to the public as fully as practicable by substantive rules, and refined and adapted to particular situations through orders in individual cases." *Anheuser-Busch, Inc. v. Department of Bus. Reg.*, 393 So. 2d 1177, 1181 (Fla. 1st DCA 1981); see also *Florida Pub. Serv. Comm'n v. Indiantown Tel. Sys.*, 435 So. 2d 892, 895 (Fla. 1st DCA 1983); *Cf. A. BONFIELD*, *supra* note 7, at 114-18; *K. DAVIS*, *supra* note 9, at 102-03, 221-22; *Berg, Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986) (discussing the preference for rulemaking); *Mayton, The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103.

requirements.²¹ "We must remember . . . one prime goal of the 1974 Administrative Procedure Act . . . [was] to encourage agencies of the executive branch to interpret statutes in their regulatory care deliberately, decisively, prospectively, and after consideration of comments from the general public and affected parties . . . [through] rulemaking."²² This preference for rulemaking was justified by relying on the assumption that rulemaking, as compared to adjudication, was a functionally superior means of developing public policy in a logical fashion. The procedural advantages of the rulemaking process were thought to enhance the probability that administrative agencies would select the most rational policy choice in light of the information available, competing policy arguments, and appropriate political considerations.²³

III. THE LOSS OF THE RULEMAKING PREFERENCE IN PRACTICE

As is often the case, there is a substantial discrepancy between the theory and the practice of administrative agencies. Many administrative agencies are antagonistic toward extensive public participation in the rulemaking process. Extensive public participation in the rulemaking process is viewed as a substantial impediment to the proper exercise of their rulemaking powers. In fact, such participation is seen as an expensive process that generally generates few, if any, benefits and does not enhance the quality of an administrative agency's decision making. Many agencies believe that the process merely serves as a method for delaying an administrative agency's efforts to promulgate appropriate rules by permitting parties to the rulemaking process to request that an administrative agency: (1) hold an information gathering hearing concerning the substantive merits of the proposed rule;²⁴

21. See Hyde, *Rulemaking Redux*, 12 ADMIN. L. SEC. NEWSL. 1 (Sept. 1990); Kennedy, *A National Perspective of Administrative Law and the Florida Administrative Procedure Act*, 3 FLA. ST. U.L. REV. 65 (1975); Note, *Rulemaking and Adjudication Under the Florida Administrative Procedure Act*, 27 U. FLA. L. REV. 755, 759-63 (1975).

22. *Department of Health and Rehabilitative Servs. v. Framat Realty, Inc.*, 407 So. 2d 238, 241 (Fla. 1st DCA 1981).

23. See *Anheuser-Busch*, 393 So. 2d at 1182; A. BONFIELD, *supra* note 7, at 4-11; Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U.L. REV. text accompanying notes 1-9 (1990); Diver, *Policy-making Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981). Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

24. FLA. STAT. § 120.54(3)(a) (1989) states:

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

(2) hold the so called "drawout" information gathering hearing;²⁵ or (3) participate in a section 120.54(4) hearing before a hearing officer on the issue of whether the "proposed rule is an invalid exercise of delegated legislative authority."²⁶ Each of these hearings cause delays in the rulemaking processes. Perhaps the most commonly used—and the most deadly to a speedy rulemaking process—is a section 120.54(4) hearing. It can create a considerable delay in the rulemaking process, because the administrative agency is prohibited from issuing the rule "until the hearing officer has rendered his decision . . ."²⁷ In such hearings, the hearing officer's order is considered final agency action²⁸ and is subject to judicial review, a process that may significantly further delay the rulemaking process.²⁹ Similar delays can occur in a "drawout" information gathering hearing.

If the agency determines that the rulemaking proceeding is not adequate to protect . . . [a person whose substantial interests will be affected], it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of s. 120.57. . . . *Upon*

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. . . . The agency . . . if requested by any affected person, shall schedule a public hearing on the [proposed] rule.

See Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 965, 995-1003 (1986).

25. FLA. STAT. § 120.54(17) (1989). In a "drawout" information-gathering proceeding, a party is entitled to the procedural protection of a section 120.57 hearing. If there is no disputed issue of material fact, then the drawout hearing can take the form of an informal hearing. *Id.* § 120.57(2). In most cases where the "drawout" hearing request is successful there will be issues concerning material facts in dispute and a formal hearing will need to be held. *See id.* § 120.57(1). Professor Dore has suggested the "drawout" formal hearing may be avoided if administrative agencies make procedural accommodations to parties with interests at stake which the "drawout" hearing is designed to protect. Dore, *supra* note 24, at 1003-09; see *General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1065-66 (Fla. 1984); *Balino v. Department of Health and Rehabilitative Servs.*, 362 So. 2d 21, 25-26 (Fla. 1st DCA 1978) (rejection of request for "drawout" hearing must explain how the party's interests will be adequately protected by the procedures being used) *cert. denied*, 370 So. 2d 458 (Fla.), *appeal dismissed*, 370 So. 2d 462 (Fla. 1979).

The legislature, by providing for the "drawout" procedure, preserved many of the procedural protections which the federal courts attempted to impose on the informal rulemaking process at the federal level before *Vermont Yankee* brought these innovations to a halt. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

26. FLA. STAT. § 120.54(4)(a) (1989) (only a substantially affected person can request such a hearing). *See generally Agrico Chem. Co. v. Department of Env'tl. Reg.*, 365 So. 2d 759 (Fla. 1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979); *see Dore, supra* note 24, at 1009-18.

27. FLA. STAT. § 120.54(4)(c) (1989).

28. *Id.* § 120.54(4)(d).

29. *See id.* § 120.68.

*conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.*³⁰

Administrative agencies also are opposed to using the rulemaking process because of other requirements imposed by the APA, such as the preparation of an economic impact statement³¹ and review by the Joint Administrative Procedures Committee.³² All of these factors potentially drive up an administrative agency's transaction costs when it engages in the rulemaking process. Thus, from an administrative agency's point of view, the APA-imposed constraints on the rulemaking process are substantial disincentives which dictate that it avoid the rulemaking process in developing public policy whenever possible.³³

Professor Levinson prophetically commented shortly after the APA was passed on the potential of administrative agencies adopting this attitude toward the rulemaking process.

I do hope we have not imposed excessive burdens on the rulemaking power of the agencies. If in fact we have done so, we are simply tempting the agencies to abandon rulemaking as a means of establishing policy; we are tempting them to develop their policy on an ad hoc basis through adjudication of one case after another. This would be a regrettable development at a time when the leading scholars emphasize the need to encourage agencies to develop policy by rulemaking rather than adjudication whenever feasible.³⁴

As he predicted, administrative agencies responded to the disincentives associated with the rulemaking process by seeking alternative methods for developing public policy which circumvented some or all

30. *Id.* § 120.54(17) (emphasis added).

31. *Id.* § 120.54(2). See *Department of Health and Rehabilitative Servs. v. Framat Realty, Inc.*, 407 So. 2d 238, 242 (Fla. 1st DCA 1981) (declaring a rule invalid because it was not supported by an adequate economic impact statement).

32. FLA. STAT. §§ 120.52(4), .545 (1989).

33. See Hyde, *supra* note 21, at 2. My comments are not intended to indicate that public participation in the rulemaking process is an evil to be avoided. Rather, they are descriptive of why administrative agencies have avoided the process.

Sometimes private parties are as hostile to the rulemaking process as administrative agencies. For example, a party may argue that administrative agencies must use adjudication as the method for determining their interests without benefit of an administrative rule concerning the subject matter. See, e.g., *General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1069-70 (Fla. 1984).

34. Levinson, *A Comparison of Florida Administrative Practice Under the Old and the New Administrative Procedure Acts*, 3 FLA. ST. U.L. REV. 72, 74 (1975).

of the disincentives associated with the rulemaking process.³⁵ In the APA adjudicatory processes, administrative agencies found a method for developing public policy which avoids many of the disincentives associated with the rulemaking process. From the perspective of administrative agencies, there are several advantages to developing public policy through adjudicatory policy making³⁶ embodied in final orders rather than in the rulemaking process. First, adjudication under the APA is generally concerned only with the parties to the proceeding.³⁷ It is clear that not all persons or entities who may arguably be affected by a public policy position established by an administrative agency final order are entitled to participate in the adjudicatory hearing as a party.³⁸ Further, when an administrative agency is engaged in adjudication, there is only a very limited opportunity for other interested persons or entities to intervene in the proceeding.³⁹ Thus, the number of persons or entities potentially eligible to participate in an adjudicatory hearing is substantially fewer as compared to those who are potentially eligible to participate in the rulemaking

35. Of course, not all the disincentives attached to the rulemaking process are necessarily found in the APA. At least one author has noted how the abandonment of the rulemaking process in the federal system often has nothing to do with the structure imposed on that process by the federal Administrative Procedure Act.

The failure to use rulemaking is far less a product of conscious departmental choice than a result of impediments to the making of rules created by the Department's internal procedures. The channels which lead to rulemaking, and to a lesser extent other forms of legislative policy statement . . . are so clogged with obstacles, and the flow through them so sluggish, that staff members hesitate to use them.

Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245 (1974).

36. The courts have often referred to public policy developed in the context of adjudication as incipient rulemaking or nonrule policy. I have rejected the incipient rulemaking characterization of the decision process because it suggests that at some point administrative agencies will actually engage in rulemaking activity in the area when in fact that is a very rare occurrence. Once administrative agencies have established public policy through adjudication they rarely reestablish it by promulgating it through the rulemaking process. Accordingly, I will refer to the decision process as adjudicatory policy making and the end results as nonrule policy.

37. In order to qualify as a party in a 120.57(1) hearing, a person's or entity's substantial interests must be at stake before the administrative agency. See FLA. STAT. 120.52(12)(b), .57 (1989).

38. See generally Dore, *supra* note 24.

39. Unless the legislature has granted non-parties a right to participate in a section 120.57(1) hearing, an administrative agency generally has the discretion to exclude non-parties from participating in the adjudicatory hearing process. See FLA. STAT. § 120.52(12)(b) (1989); FLA. STAT. § 120.57(1)(b)4 (1989); Suwannee River Area Council Boy Scouts of Am. v. Department of Community Affairs, 384 So. 2d 1369, 1373 (Fla. 1st DCA 1980); Peterson v. Florida Dep't of Comm'y Affairs, 386 So. 2d 879, 881 (Fla. 1st DCA 1980). But see Bio-Medical Applications of Clearwater, Inc. v. Department of Health & Rehabilitative Serv., 370 So. 2d 19 (Fla. 2d DCA 1979); Bio-Medical Applications of Ocala, Inc. v. Office of Community Medical Facilities, 374 So. 2d 88 (Fla. 1st DCA 1979) (comparative hearing situation).

process.⁴⁰ Second, when an administrative agency is engaged in adjudicatory policy-making, it does not have to file a small business economic impact statement which is required when the rulemaking process is used.⁴¹ Third, when an administrative agency is engaged in adjudicatory policy-making it does not have to subject its policy choice to review by the Joint Administrative Procedures Committee.⁴² Fourth, administrative agencies also believe that it is much cheaper to develop public policy through adjudication rather than rulemaking.⁴³ Fifth, when an administrative agency chooses to develop public policy through adjudication, it often is able to avoid thinking about the problems associated with a substantive decision in a universal way. Its primary concern in such cases is only with the development of public policy to the extent of its immediate consequences to the parties. From an administrative agency's perspective, it is often much easier to deal with a small piece of a more general problem in the context of adjudication rather than to develop a general public policy position to deal with the problem as a whole.⁴⁴

Of course, there are disadvantages associated with developing public policy through adjudication. First, the procedural protection avail-

40. See *Florida Soc'y of Ophthalmology v. State Bd. of Optometry*, 532 So. 2d 1279 (Fla. 1st DCA 1988), *rev. denied*, 542 So. 2d 1333 (Fla. 1989). Compare FLA. STAT. § 120.54(3)(a) (1989) with FLA. STAT. § 120.57 (1989).

41. See FLA. STAT. § 120.54(2)(a) (1989).

42. See FLA. STAT. § 120.545 (1989); *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So. 2d 1177, 1182 (Fla. 1st DCA 1981). Avoiding the possibility of being called to account by the legislature for a policy choice it made is a powerful incentive for an administrative agency not to offer such clear statements of its policy positions as are found in an administrative rule or proposed rule. See Bernstein, *The NLRB's Adjudication - Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970) (noting that avoiding political accountability was one of the primary reasons why the NLRB has not used its rule making power). It is much easier to avoid this type of potential confrontation with the legislature if the public policy position of the administrative agency remains only vaguely defined in a series of often difficult to locate final orders. See *infra* text accompanying notes 145-151; cf. Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 995-96 (1980) (commenting on why federal administrative agencies prefer adjudication for developing public policy positions).

43. This conclusion is based on my discussions with several heads of administrative agencies during the Seventh Administrative Law Conference. I am not sure their impressions of the relative cost of rulemaking compared to adjudicatory policy making is empirically correct, but it clearly was a strongly held belief. Cf. Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381 (commenting on the cost ineffectiveness of public participation in some types of rulemaking). But see Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1 (1979) (commenting on the excessive costs associated with developing public policy through adjudication).

44. By avoiding the large public policy issues at stake in dealing with a problem as a whole and by using the piecemeal approach of the adjudicatory policy making process, an administrative agency can often avert confronting conflicts within the administrative agency over policy choices. See Strauss, *supra* note 35.

able in section 120.57 almost always applies to adjudicatory policy making. The procedural protection offered by section 120.57(1) is only available in very limited circumstances during the rulemaking process.⁴⁵ Second, the hearing process which leads to a recommended order is generally controlled by a hearing officer from the Division of Administrative Hearings, not the administrative agency.⁴⁶ This allows a person outside the administrative agency to play a potentially decisive role in shaping the nature of the record and the factual inferences and conclusions to be drawn from the record. This may be fatal to an administrative agency's policy preference, because in rendering its final order an administrative agency has limited discretion to reject the hearing officer's factual findings in the recommended order.⁴⁷ Third, during the judicial review process, the degree of judicial deference accorded to administrative agency policy-making rendered in nonrule orders is in theory substantially less than that granted to administrative agency rulemaking.⁴⁸ But these disadvantages generally are not

45. See FLA. STAT. §§ 120.54(4)(a), (17) (1989); see *supra* note 25.

46. See FLA. STAT. § 120.65 (1989).

47. FLA. STAT. § 120.565(b)(10) (1989). The factual disputes concerning adjudicative facts which are subject to normal methods of proof before the hearing officer "are generally binding upon the [administrative] agency . . . and may not be disregarded unless the agency finds them unsupported by competent substantial evidence." *Manasota 88, Inc. v. Tremor*, 545 So. 2d 439, 441 (Fla. 2d DCA 1989) (per curiam). This approach to the sufficiency of the factual record may prevent an administrative agency from properly finding facts essential to establishing the validity of its nonrule policy because the hearing officer rejected the administrative agency's position on these factual questions. *Barker v. Board of Medical Examiners*, 428 So. 2d 720, 722-23 (Fla. 1st DCA 1983). This limitation on the administrative agency's discretion can be fatal to its attempt to establish a valid nonrule policy, for "when an agency elects to adopt incipient policy in a non-rule proceeding, there must be an adequate support for its decision in the record of the proceeding." *Florida Cities Water Co. v. Florida Pub. Serv. Comm'n*, 384 So. 2d 1280, 1281 (Fla. 1980). Courts reviewing adjudicatory policy-making in this context may overturn an administrative agency's decision because it improperly rejected the hearing officer's factual findings on such issues. The courts have not hesitated to rigorously enforce this limitation on administrative discretion. But this has not deterred administrative agencies from continuing to try to circumvent this limitation on their discretion by labeling such factual disagreements between it and the hearing officer as one not subject to normal methods of proof. *E.g.*, *Freeze v. Department of Business Regulation*, 556 So. 2d 1204, 1205-06 (Fla. 5th DCA 1990) (Judge Goshorn also discussed this limitation on administrative agency discretion in his dissenting opinion.); *Bajrangi v. Department of Business Regulation*, 561 So. 2d 410, 413-16 (Fla. 5th DCA 1990) (nature of penalty imposed). The administrative agencies argue that factual disputes concern legislative facts that are not subject to normal proof because they involve political-type judgments to which there are no clear, correct answers. Administrative agencies, because of their special expertise, have the authority to make the final judgment on legislative-type factual issues. The courts are much more reluctant to accept this argument when the administrative agency is engaged in adjudicatory policy-making as compared to rulemaking. See *Bowling v. Department of Ins.*, 394 So. 2d 165, 172-74 (Fla. 1st DCA 1981); *Burris*, *supra* note 10, at 388-95.

48. Courts generally are more deferential in reviewing the validity of an administrative agency's rule as compared to its final order. See *General Tel. Co. v. Florida Pub. Serv.*

perceived by administrative agencies as sufficient cause for them to abandon their practice of using adjudicatory proceedings as a means of establishing nonrule policy. The result is that in practice administrative agencies have engaged in a plethora of public policy development through adjudication.⁴⁹ The net effect of this practice is that administrative agencies have functionally forsaken the rulemaking process in many important areas.⁵⁰ And because so many of the nonrule orders are not readily available to the public, it has caused many parties subject to regulation by administrative agencies to characterize the process as one of administration by ambush.

IV. THE *McDONALD* RESOLUTION OF THE PROBLEMS POSED BY THE RULE/ORDER DICHOTOMY

The net result is that the burden of enforcing the rule/order dichotomy has fallen to the courts. The leading case addressing the role of the courts in enforcing the rule/order dichotomy is *McDonald v. Department of Banking & Finance*.⁵¹ *McDonald* is one of the most important administrative law cases ever decided by the Florida courts,

Comm'n, 446 So. 2d 1063, 1067 (Fla. 1984); *Booker Creek Preservation, Inc. v. Southwest Fla. Water Management Dist.*, 534 So. 2d 419, 422 (Fla. 5th DCA 1988), *rev. denied*, 542 So. 2d 1334 (Fla. 1989); *Agrico Chem. Co. v. State Dep't of Env'tl. Regulation*, 365 So. 2d 759, 762-63 (Fla. 1st DCA 1978), *cert. denied sub nom. Askew v. Agrico Chem. Co.*, 376 So. 2d (Fla. 1979).

49. It is currently impossible to state a precise figure concerning the number of administrative agency orders in which adjudicatory policy-making has occurred. It is estimated that administrative agencies in Florida render between 100,000 and 450,000 final orders each year. See Fla. S. Comm. on Gov'tl. Ops., *A Review of Indexing of Agency Orders Issued Pursuant to Chapter 120, F.S., The Administrative Procedure Act Report (1989 & Supp. 1990)*. Although no precise number is available, based upon my conversations with government administrators and attorneys in private practice, it is safe to assume that many of these final orders, perhaps as high as one-half, can be viewed as establishing or relying on nonrule policy. See Waas, *The Nightmare of Nonrule Policy*, 56 FLA. B.J. 193, 194 (1982) (noting the danger that "this judicially spawned creature [will] devour the [rulemaking provisions of the] APA.").

50. I am not suggesting that administrative agencies have totally abandoned the rulemaking process. Administrative agencies have constantly been engaged in rulemaking activity as figures compiled by the Joint Administrative Procedures Committee indicate.

Year	Number of Rules Promulgated
1985	4447
1986	4121
1987	3610
1988	3706
1989	4865
1990	2636

Memo from Joint Administrative Procedures Committee to Johnny C. Burriss (on file with the Florida State Law Review) (The figure for 1990 is through July 27, 1990); see Joint Administrative Procedures Committee Annual Report January 1, 1989 - December 31, 1989.

51. 346 So. 2d 569 (Fla. 1st DCA 1977).

because it established the basic fundamentals of how the new APA would be viewed by the judiciary.⁵² A key aspect of the decision was the legitimization of the use of adjudicatory policy-making through administrative orders.⁵³ Since *McDonald*, the courts have as a practical matter treated the *McDonald* decision as authorizing administrative agencies virtually complete discretion in choosing whether to develop public policy through adjudication or rulemaking.⁵⁴

The court in *McDonald* was reviewing the validity of the Department of Banking and Finance's order⁵⁵ denying McDonald and others a charter to organize and operate a bank in Port Richey.⁵⁶ The Department's order was an interpretation or implementation of criteria for the chartering of a bank, but the criteria had not been adopted through the rulemaking process. As a result, the court was required to explain when it was appropriate for a court to require an administrative agency to adopt its public policy position through rulemaking and when the administrative agency was free to continue developing its public policy positions in the context of adjudication.

52. Pfeiffer, *When is an Agency Required to Explicate Its Policies in Rules Adopted in Accordance with Section 120.54, Florida Statutes?*, 11 ADMIN. L. SEC. NEWSL. 3 (March 1990).

53. *McDonald*, 346 So. 2d at 580-83. The case also raised some other very interesting questions concerning the impact of the 1974 APA. See *id.* at 577 (constitutionality of the APA as applied in this case), 578-79 (authority of an administrative agency to substitute its judgment for those of the hearing officer concerning findings of fact).

54. See *infra* text accompanying notes 71-113.

55. The head of the Department of Banking and Finance is the Comptroller. While the order was entered by the Department of Banking and Finance, the final decisions were made by the Comptroller. Where appropriate, I have identified those substantive decisions which the Comptroller made, but I have continued to refer to the order as one rendered by the Department of Banking and Finance, the institution responsible for administering the banking laws. See FLA. STAT. § 659.03 (1975); FLA. ADMIN. CODE ANN. r. 3C-20.05(5), 20.12 (1975).

56. The process by which the case reached the First District Court of Appeal is interesting because the case arose during the transition period from the 1961 APA to the 1974 APA. They had originally received conditional approval of their application, but when shortly thereafter the new Comptroller took office, he promulgated an emergency rule authorizing revocation of all conditionally approved applications. Cf. *Lewis v. Judges of the Dist. Ct. of App., First Dist.*, 322 So. 2d 16, 20-21 (Fla. 1975) (no emergency rule was required in order for the Comptroller to void the conditionally approved applications). Using his authority under the emergency rules, the Comptroller reviewed their application and ultimately denied it. After this decision was rendered, the applicants for the bank charter requested and were ultimately granted a formal hearing under section 120.57 of the 1974 APA which was conducted by a hearing officer from the Division of Administrative Hearings. *McDonald*, 346 So. 2d at 575 & n.4. In the recommended order, the hearing officer made extensive findings of fact supporting her conclusion that the applicants had satisfied the criteria for the granting of a charter to operate a bank. The Comptroller rejected four of these findings of fact and the conclusion that the applicants had satisfied the criteria for the granting of a charter to operate a bank. *Id.* at 576-77. The court ultimately reversed the order and remanded the case to the Department of Banking and Finance for further proceedings consistent with the court's opinion. *Id.* at 586.

The court acknowledged that the interpretations of the statutory criteria found in the order could be viewed technically as a rule under the APA.⁵⁷ However, the court rejected a rigid, formalistic approach to the problem and elected to read the APA as not requiring the adoption of all rule-type policy statements through the rulemaking process. "The APA does not chill the open development of policy by forbidding all utterance of it except within the strict rulemaking process"⁵⁸ The court offered four compelling reasons for seeking a middle ground on this issue. First, the court thought such a holding would cause agency orders "to become arid, unreasoning edicts because explanation and interpretation, without rulemaking, would be held fatal to the intended [administrative agency] action."⁵⁹ Such a result would obviously be disastrous for the adjudicatory process of the APA by robbing it of the flexibility needed to explain why a particularly factual circumstance was or was not governed by a particular administrative rule or statutory provision.⁶⁰ Second, it would deprive the public of an important source of information concerning an administrative agency's views on matters not yet dealt with in promulgated administrative rules and on administrative agency's views on the purpose and scope of the administrative rules which have been promulgated.⁶¹ Third, the court believed a rigid approach to this issue would defeat the incremental development of public policy by an administrative agency when it was unsure of what approach should be used. This would undercut the logical development of public policy in the administrative process.⁶² Finally, the court assumed that the public would not be disadvantaged by the development of public policy in adjudication, because all public policy choices developed through adjudication must be, just as rules are, "catalogued by a subject-matter index [and] must be made available for inspection and copying by the

57. *Id.* at 580-81. The APA defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." FLA. STAT. § 120.52(16) (1989).

58. *McDonald*, 346 So. 2d at 580.

59. *Id.* at 581.

60. *See id.* at 582; FLA. STAT. § 120.68(12)(b)-(c) (1989) (requiring explanation of deviations from established rules, policies, or practices); Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 650 (1975).

61. *See McDonald*, 346 So. 2d at 581.

62. "Agencies will hardly be encouraged to structure their discretion progressively by vague standards, then definite standards, then broad principles, then rules if they cannot record and communicate emerging policy . . . without offending [the requirements found in] Section 120.54." *Id.* at 580. "[E]ven the agency that *knows* its policy may wisely sharpen its purposes through adjudication before casting rules." *Id.* at 581 (emphasis in original).

public in an ever-expanding library of precedents to which the agency must adhere or explain its deviation.”⁶³

While the court recognized there were legitimate reasons for not imposing a rigid approach to the issue of when an administrative agency must use the rulemaking process, it also appreciated that there had to be some limitation on the discretion of an administrative agency to develop public policy through adjudication rather than rulemaking.⁶⁴ In *McDonald*, the court read the APA as having resolved these competing interests by generally leaving administrative agencies free to develop valid and enforceable public policy outside of the rulemaking process in the context of administrative adjudication.⁶⁵ But the court also noted that administrative agencies should be deprived of this discretion when the administrative decision concerned public “policy statements of *general applicability*”, i.e., those statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law“ and which can no longer be characterized as part of the incipient policy development process.⁶⁶ In such cases, the administrative agency must promulgate its public policy choice through the rulemaking process. The court apparently believed that this requirement would be essentially self-enforcing, because administrative agencies would have significant incentives for opting for the rulemaking process whenever possible. First, administrative agencies would have to justify their public policy positions by persuasively developing the factual and legal arguments favoring their positions in the adjudicatory process in order to adequately support a nonrule policy.⁶⁷ This could, in some cases, be as substantial a burden as developing policy through rule-

63. *Id.* at 582.

64. “Thus, the APA does not . . . require agencies to make rules of their policy statements of general applicability, nor does it explicitly invalidate action taken to effectuate policy statements of that character which have not been legitimated by the rulemaking process. But that is the necessary effect of the APA if the prescribed rulemaking procedures are not to be atrophied by nonuse.” *Id.* at 580.

65. *Id.* at 580-81.

66. *Id.* at 581. Even in this context the court found that the APA permitted an administrative agency to pursue both rulemaking and adjudicatory activity simultaneously. The court assumed that if adjudicatory activity disclosed a need for rulemaking action, then it could be undertaken without terminating the current adjudicatory process. *Id.* at 581-82; see *Reporter's Comments, supra* note 8, at 6.

67. *McDonald*, 346 So. 2d at 582. The court viewed this process as functionally equivalent to or a substitute for the rulemaking processes mandated by section 120.54, because it provides “a forum to expose, inform and challenge agency policy and discretion” just as section 120.54 was designed to do. *Id.* at 583 (quoting *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 591 (Fla. 1st DCA 1977)).

making.⁶⁸ Second, and more significantly, even after the administrative agency had established a public policy position through adjudication, it could not consistently rely upon it as binding precedent. Adjudicatory policy positions were always vulnerable to attack in a subsequent adjudicatory proceeding.⁶⁹ In such cases, the administrative agency would have to vindicate its public policy choice again.

The scheme developed in *McDonald* authorized adjudicatory policy-making, but the court also believed that important institutional incentives existed to check the improper exploitation of this process. It is also important to note that the court asserted that if these institutional constraints did not adequately protect the balance established in the APA between rulemaking and adjudication in the development of public policy, then the courts must intervene to require administrative agencies to engage in rulemaking activity to legitimate public policy choices made by administrative agencies of general applicability.

V. THE FAILURE OF THE *McDONALD* VISION FOR RESOLUTION OF THE PROBLEMS POSED BY THE RULE/ORDER DICHOTOMY

As Justice Holmes observed long ago "[t]he life of the law has not been logic: it has been experience."⁷⁰ The beautiful logical design envisioned by Judge Smith in his *McDonald* opinion interpreting the APA has not come to pass.⁷¹ Our experiences post-*McDonald* have not fol-

68. Administrative agencies will be required to defend adjudicatory policy-making positions by conventional proof methods:

[This requirement,] in appropriate cases, subjects agency policymakers to the sobering realization their policies lack convincing wisdom, and requires them to cope with the hearing officer's adverse commentary [and factual findings].

....

... 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.

McDonald, 346 So. 2d at 583.

69. When an administrative agency relies on a public policy position established in adjudication, then it "is fair game for a party's challenge both in the public and in his private interest . . ." *Id.*

70. O. HOLMES, *THE COMMON LAW* 1 (1881).

71. See *supra* text accompanying notes 51-69. The federal courts have experienced similar difficulties in trying to enforce the preference for the rulemaking process. Compare *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) and *Morton v. Ruiz*, 415 U.S. 199 (1974) with *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); see also Mayton, *supra* note 20. "[Federal] courts rarely strike down an adjudicative rule on the ground that it should have been created legislatively [through the rulemaking process]." Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161, 163 (1988).

lowed the logic of the decision.⁷² In fact, the post-*McDonald* cases have demonstrated that the institutional checks identified in *McDonald* have been ineffective. Furthermore, the courts have not intervened to require administrative agencies to engage in rulemaking rather than adjudication in developing legally binding public policy, or absent such intervention, developed other incentives or disincentives sufficient to encourage administrative agencies to engage in rulemaking. This has resulted in the development, by many administrative agencies, of a large body of virtually unknown law.⁷³ This state of affairs may be accounted for by the fact that the courts have failed to understand the fundamental nature of the collapse of the *McDonald* vision and the need for a renewed effort by the judiciary to resort the balance established by the APA between developing public policy through the rulemaking process and in adjudicatory proceedings.

It is important to note that in offering this criticism of the decisions rendered by the courts in attempting to enforce the rule/order dichotomy I am not suggesting that the courts have abjured *all* application of the restraints on administrative agency choice between rulemaking and adjudication envisioned by *McDonald*.⁷⁴ There are three catego-

72. Some early cases, decided for the most part contemporaneously with *McDonald*, indicated that the courts were willing to impose restrictions on administrative agency discretion when the institutional checks failed. For example in *State Dep't of Administration v. Stevens*, the court held, in part, that the Department of Administration's directive and the Department of Health and Rehabilitative Services' guidelines both were "clearly . . . agency policy statements of general applicability . . . [and] not having been legally adopted and promulgated as rules [were] therefore void and of no effect." 344 So. 2d 290, 296 (Fla. 1st DCA 1977). In *Department of Revenue v. U.S. Sugar Corp.*, the court held that a policy statement interpreting the scope of statutory language originally found in a tax audit statement was a rule not adopted through the rulemaking process. The court rejected the argument by the Department of Revenue that it had validly adopted the tax audit policy position through adjudicatory policy-making in the context of U.S. Sugar Corporation's section 120.56 challenge to the tax audit statement. 388 So. 2d 596, 598 (Fla. 1st DCA 1980). See also *Mental Health Dist. Bd., II-B v. Department of Health & Rehabilitative Servs.*, 425 So. 2d 160, 162 (Fla. 1st DCA 1983) (disapproving of the use of a declaratory statement rather than rulemaking to state policy); *State v. Harvey*, 356 So. 2d 323 (Fla. 1st DCA 1978); *North Miami Gen. Hosp. v. Office of Community Medical Facilities*, 355 So. 2d 1272, 1277 (Fla. 1st DCA 1978); *Price Wise Buying Group v. Nuzum*, 343 So. 2d 115, 116 (Fla. 1st DCA 1977) (disapproving of the use of a declaratory statement rather than rulemaking to state policy); *Florida Dep't of Offender Rehabilitation v. Walsh*, 352 So. 2d 575 (Fla. 1st DCA 1977) (*per curiam*).

73. See *Waas*, *supra* note 49; *Hyde*, *supra* note 21, at 2-3.

74. Clearly the language in some opinions does suggest such a conclusion. See, e.g., *City of Tallahassee v. Florida Pub. Serv. Comm'n*, 433 So. 2d 505, 508 (Fla. 1983) ("[A]lthough codification is ultimately desirable, this Court will not compel the PSC to adopt formal rules . . ."); *Barker v. Board of Medical Examiners*, 428 So. 2d 720, 722, 723 (Fla. 1st DCA 1983) ("It obviously would have been preferable for the Board to have expressed its policy by the adoption of a new rule."). There are virtually no post-*McDonald* decisions which have required an administrative agency to engage in rulemaking activity in order to enforce its policy choices. See *Floria*

ries of cases where it is fairly clear the courts are willing to enforce the rule/order dichotomy in public policy decision-making. These are practically the only examples of when the *McDonald* paradigm was effectively used by courts as a real, rather than illusory, check on administrative agency discretion. Regrettably, the utility of these cases is severely constrained by the unusual circumstances which probably limited their usefulness to their unique facts.

First, the courts have not permitted an administrative agency to use the adjudicatory policy making process to directly contravene an administrative rule which was promulgated through the rulemaking process.⁷⁵ In *Gar-Con Development, Inc. v. State*,⁷⁶ the court was reviewing an order by the Department of Environmental Regulation which expanded its rule concerning dredging to include pile driving.⁷⁷ The court held that the Department of Environmental Regulation could not accomplish the functional modification of an existing administrative rule using this method. The court found that the Department of Environmental Regulation was prohibited from using orders rendered in the adjudicatory process to develop a policy position directly contrary to its own properly promulgated rule defining dredging. A policy shift in this circumstance must be carried out through the rulemaking process.⁷⁸ The court used the *McDonald* paradigm in reaching this result.

One of the principal objectives of the Administrative Procedure Act is to prevent state [administrative] agencies from adopting unpromulgated and often unwritten policies that are to be generally applied and that affect persons regulated by the agency or having a

Pub. Serv. Comm'n v. Indiantown Tel. Sys., Inc., 435 So. 2d 892, 895 (Fla. 1st DCA 1983). Rather, courts have found the record did not adequately support the adjudicatory policy-making activity in the order. See, e.g., *Florida Cities Water Co. v. Florida Pub. Serv. Comm'n*, 384 So. 2d 1280, 1281 (Fla. 1980); *Anheuser-Busch, Inc.*, 393 So. 2d at 1183.

75. If the action of the administrative agency is merely a permissible interpretation of an existing rule, then it is perfectly valid. See *C.H. Barco Contracting Co. v. State*, 483 So. 2d 796, 799-801 (Fla. 1st DCA 1986) (per curiam). But if such an interpretation does not renounce the prior rule, but is nonetheless a rather radical departure from prior understandings of the meaning of a rule, then it may still run afoul of retroactivity concerns. See *id.* at 801-04 (Booth, C.J., dissenting).

76. 468 So. 2d 413 (Fla. 1st DCA), *review denied sub nom.* Department of Env'tl Regulation v. *Gar-Con Dev. Inc.*, 479 So. 2d 117 (Fla. 1985).

77. Pile driving was clearly an action not covered under the administrative rule for dredging.

78. 468 So.2d at 415. Cf. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). A potential problem with the *Gar-Con Development* decision is that it may be inconsistent with the provisions of the APA which implicitly authorize an administrative agency to act inconsistent with a prior established policy as long as it adequately explained its shift. FLA. STAT. § 120.68(12)(c) (1989).

substantial interest in the policy. Another objective is to prevent agencies from changing such policies at will without notice or without following formal rulemaking procedures.⁷⁹

The court explicitly rejected the claim that this administrative order was a form of mere interpretation of the scope of the administrative rule.⁸⁰ The court correctly recognized that if this argument was permitted to succeed it would as Justice Boyd state in *Florida Cities Water Co.*, "allow every agency total discretion in deciding whether to use rulemaking procedures in implementing changes in policy . . . [by claiming] it is reinterpreting the law."⁸¹

Second, the courts have indicated they will not permit administrative agencies to exercise their discretion to select adjudication as a mode of policy development when the legislature has clearly expressed its intention that an administrative agency develop its public policy positions in an area only through the rulemaking process. In *Evans Packing Co. v. Department of Agriculture and Consumer Services*,⁸² the court reviewed the validity of the Department of Agriculture and Consumer Services' attempt to enforce restrictions on the presence of pulp wash solid in orange juice without adopting standards concerning this matter through the rulemaking process as directed by the legislature. In 1949, the legislature passed legislation directing the Department of Agriculture and Consumer Services to promulgate rules concerning methods for testing citrus products for the presence of pulp wash solids.⁸³ Rather than adopt an administrative rule concerning this matter the Department of Agriculture and Consumer Services chose to impose a testing procedure standard developed in an adjudicatory proceeding. The court held that when an agency has been directed by statute to establish public policy by administrative rules, such as the testing procedure at issue in this case, then the administrative agency cannot escape this statutory requirement by developing policy in adjudicatory proceedings. Any attempt to do so is an ultra vires act, clearly beyond the scope of authority delegated to the

79. 468 So. 2d at 414.

80. "By no stretch of the imagination can pile driving mean dredging or excavating nor is that a reasonable and permissible interpretation of the word dredging." *Id.* at 415. *But see id.* (Wentworth, J., dissenting). *Cf. Gulf Oil Corp. v. Hickel*, 435 F.2d 440, 444-45 (D.C. Cir. 1970) (discussion of the problem of limiting the scope of interpretation).

81. *Florida Cities Water Co. v. Public Serv. Comm'n*, 384 So. 2d 1280, 1283 (Fla. 1980) (Boyd, J., dissenting).

82. 550 So. 2d 112 (Fla. 1st DCA 1989).

83. *See* FLA. STAT. §§ 601.24, 601.25 (1989).

administrative agency by the legislature.⁸⁴ The cases where the courts have authorized case by case development of scientific testing standards were distinguishable because in those cases there was no statutory requirement that the agency adopt a test by administrative rule.⁸⁵ The court went on to note in *dicta* that the method used to detect the presence of pulp wash solids was not even a valid form of adjudicatory policy making.⁸⁶ This approach obviously checks administrative agency discretion in the area of adjudicatory policy making, but it is limited to when the legislature has done so, a rare circumstance.⁸⁷

Third, the courts will not permit an administrative agency to announce a policy choice with legal effect when it has not used either the rulemaking or adjudicatory process.⁸⁸ Obviously these cases raise a different fundamental question. Can agencies develop legally binding policies outside the context of rulemaking and adjudication? The courts seem to have answered that question with a resounding no. *Public Service Commission v. Central Corporation*⁸⁹ is typical of the decisions which have addressed this problem. In that case the Public Service Commission sua sponte issued an administrative order⁹⁰ which required alternative operator service providers to "hold subject to refund all revenues collected by those providers which exceeded the most comparable local exchange rate."⁹¹ The Public Service Commission was concerned that the rates being charged by alternative operator service providers were excessive and not in the public interest.

84. "[W]e know of no authority for allowing an agency to use a disputed testing method as the basis for imposition of severe disciplinary penalties when that test has not been adopted in a rulemaking proceeding as explicitly required by statute." *Evans*, 550 So. 2d at 120-21; *Cf. Burris, 1988 Survey of Florida Law, Administrative Law* 13 NOVA L. REV. 727, 734-36 (1989); *Burris*, *supra* note 10, at 316-22 (discussion of ultra vires doctrine).

85. *Evans*, 550 So. 2d at 120-21.

86. The court found the test used was not sufficiently reliable to satisfy the clear and convincing burden of persuasion for establishing adjudicatory policy making in a licensing case. The test used would detect even de minimis amounts of pulp wash solids and had not been accepted in the scientific community as reliable. The testimony at the hearing established that the pulp wash solids detected by the test used could have a variety of sources and need not be the result of adulteration of the orange juice. *Id.* at 120.

87. *See Hyde, supra* note 21, at 4.

88. *See Department of Corrections v. Piccirillo*, 474 So. 2d 1199, 1201-02 (Fla. 1st DCA 1985) (per curiam); *Department of Corrections v. Adams*, 458 So. 2d 354, 356 (Fla. 1st DCA 1984); *Enterprise Bldg. Corp. v. School Bd. of Pinellas County*, 445 So. 2d 686, 687 (Fla. 2d DCA 1984) (per curiam); *Gulfstream Park Racing Ass'n v. Division of Pari-mutuel Wagering*, 407 So. 2d 263, 265 (Fla. 3d DCA 1981).

89. 551 So. 2d 568 (Fla. 1st DCA 1989).

90. The Public Service Commission characterized its order as an interim rate order issued in response to numerous complaints that alternative operator service providers were charging excessive rates. Prior to the issuance of this order, the rates charged by alternative operator service providers had not been regulated by the Public Service Commission. *Id.* at 569.

91. *Id.*

Central Corporation, an alternative operator service provider, in an administrative proceeding claimed the order was an invalid rule because it was not promulgated through the rulemaking process.⁹² The court held, in part, that the Public Service Commission's order was an invalid rule. Under the APA a rule is any agency "statement of general applicability that implements, interprets, or prescribes law or policy"⁹³ The Public Service Commission's order met these requirements. The general applicability requirement was satisfied, because the order was applicable to all alternative operator service providers in Florida. The order also implemented, interpreted and proscribed policy by imposing a new obligation, one which did not exist prior to the issuance of the order. The court found the fact the order was intended to remain in effect for only a brief period of time did not alter the result. "However, a temporally limited agency action is properly denominated a rule if it has the consistent effect of law, that is, is consistently applicable throughout its existence to an entire group rather than to one member of that group."⁹⁴ The court rejected the claim that this order was a valid nonrule policy, because the Public Service Commission had not offered the alternative operator service providers a point of entry in its decision process before it announced its order. The Public Service Commission did not hold a formal or informal hearing necessary to the development of the record to support a nonrule policy. It just announced its order. By failing to provide a hearing the Public Service Commission acted beyond the scope of the adjudicatory policy making doctrine. The Public Service Commission must follow one of the two courses available for developing policy, either rulemaking or adjudication. There is no other valid means for the development of legally enforceable policy.⁹⁵

These three categories of decisions only concern a small fraction of the nonrule orders rendered by administrative agencies. There is no reason to question the results in these types of cases, but because of their unusual factual and legal setting they do not help us with the problem of when courts should require rather than merely encourage administrative agencies to use rulemaking rather than adjudication in developing public policy positions in more typical settings.

92. *Id.* at 569-70; see FLA. STAT. § 364.14(1) (1987).

93. FLA. STAT. § 120.52(16) (1989).

94. *Central Corp.*, 551 So. 2d at 570 (citing *Balsam v. Department of Health and Rehabilitative Serv.*, 452 So. 2d 976 (Fla. 1st DCA 1984)).

95. See *Central Corp.*, 551 So. 2d at 571; *Amos v. Department of Health & Rehabilitative Servs.*, 444 So. 2d 43 (Fla. 1st DCA 1984). See generally, *Health Care and Retirement Corp. v. Department of Health and Rehabilitative Servs.*, 559 So. 2d 665, 667 (Fla. 1st DCA 1990) (point of entry requirement).

It remains true that in the vast majority of cases the courts continue to ritualistically adhere to the distinctions drawn in the *McDonald* decision as if they will become self-enforcing if they are repeated often enough.⁹⁶ In the process of doing so, the courts have continually reminded agencies that it is generally preferable to develop policy through the rulemaking rather than the adjudication process.⁹⁷ In fact, outside of the factually unique settings of the three categories of cases discussed above, the courts have not attempted to enforce the rule/order dichotomy or create new incentives for agencies to develop public policy through rules in the rulemaking process or disincentives for using the adjudicatory process to create nonrule orders. The courts have continued, with but a very few exceptions, to approve virtually all of the policy developments which have occurred in the adjudication process. The result is that agencies functionally have unlimited discretion in determining how to proceed in developing public policy because the courts have failed to effectively use the judicial review process to channel the public policy development of administrative agencies into the rulemaking process.⁹⁸ One committee in the legislature has concluded that the courts have "effectively established adjudication as an alternative to rulemaking."⁹⁹

Illustrative of the cases adhering to the form of *McDonald* with no substantive bite are *City of Tallahassee v. Public Service Commission*¹⁰⁰ and *Rolling Oaks Utilities v. Public Service Commission*.¹⁰¹ In *City of Tallahassee*, the Florida Supreme Court noted that in formulating policy an "administrative agenc[y] may develop policies by adjudication and that formal rulemaking is not initially neces-

96. See *Hill v. School Bd. of Leon County*, 351 So. 2d 732, 733 (Fla. 1st DCA 1977), cert. denied 359 So. 2d 1215 (Fla. 1978). At least one court has suggested that the APA preference for rulemaking should be treated as only a self-enforcing limitation on administrative agency discretion, because of the deference courts should extend to the executive branch in choosing how it should develop public policy positions. *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So. 2d 1177, 1182 (Fla. 1st DCA 1981).

97. "Administrative agencies are not required to institute rulemaking procedures each time a new policy is developed . . . although that form of proceeding is preferable where established industry-wide policy is being altered." *Florida Cities Water Co. v. Public Serv. Comm'n*, 384 So. 2d 1280, 1281 (Fla. 1980) (citations omitted). *But see Id.* at 1281-3 (Boyd, J., concurring and dissenting).

98. See, e.g., *Anheuser-Bush*, 393 So. 2d at 1181-82.

99. House Committee on Governmental Operations, Staff Analysis and Economic Impact Statement Report on House Bill 2539 5 (1990); see also House Committee on Governmental Operations, Staff Analysis and Economic Impact Statement Report on House Bill 91-1879 (1991).

100. 433 So. 2d 505 (Fla. 1983).

101. 533 So. 2d 770 *modified on reh'g*, 533 So. 2d 775 (Fla. 1st DCA 1988) (facts of the case clarified).

sary in *all* cases.”¹⁰² An agency can choose “to exercise its authority on a case-by-case basis until it has focused on a common scheme of inquiry derived through experience gained from adversary proceedings.”¹⁰³ But once a policy position has been established, then it “should be codified . . . [as a] rule.”¹⁰⁴ As with most cases of this type the Florida Supreme Court saw no reason for requiring the Public Service Commission to engage in rulemaking activity at this time.¹⁰⁵ Similarly, in *Rolling Oaks Utilities* the First District Court of Appeal reaffirmed that agencies may create legally enforceable public policy through the case by case adjudicatory process in a series of nonrule orders.¹⁰⁶ The court noted that in Florida, adjudicatory public policy making is limited to circumstances where an agency has not yet settled on an approach to a problem and wants to preserve its freedom to experiment with possible solutions.¹⁰⁷ In both these cases the reviewing court simply unquestioningly accepted the administrative agency’s assertion that it had not yet settled on a policy concerning how to judge the validity of a rate surcharge.¹⁰⁸

The common theme in all the cases like *City of Tallahassee* and *Rolling Oaks Utilities* is that after noting the *McDonald*-based limitation on the scope of administrative agency discretion to chose adjudicatory policy making over rulemaking, the courts then went on to hold that the adjudicatory public policy developed in an administrative agency’s nonrule order was valid and functionally enforceable as if it had been adopted as a rule.¹⁰⁹ These decisions are typical of the overwhelming majority of decisions discussing this issue. They all follow the standard form of noting that there are limits on the discretion of administrative agencies in this area, but they were not transgressed

102. *City of Tallahassee*, 433 So. 2d at 508 (emphasis added). The court noted once again that it preferred for administrative agencies to use the rulemaking process when the public policies will have an industry wide impact. *Id.*

103. *Id.* at 507.

104. *Id.*

105. The court has indicated in other cases that it applies the abuse of discretion standard of judicial review in determining whether an administrative agency improperly developed public policy in an adjudicatory proceeding. *City of Tallahassee v. Public Serv. Comm’n*, 441 So. 2d 620, 623 (Fla. 1983).

106. *Rolling Oaks Utilities*, 533 So. 2d at 773-74.

107. *Id.* at 774.

108. *Id.*; *City of Tallahassee*, 433 So. 2d at 507-08.

109. *City of Tallahassee*, 433 So. 2d at 507-08; *Rolling Oaks Utilities*, 533 So. 2d at 774. This is not always the case. While the courts almost uniformly legitimate an administrative agency’s decision to develop public policy in a nonrule order, on some occasions courts have held a nonrule order invalid because the administrative agency failed to provide sufficient factual support or legal justification in support of the order. See, e.g., *St. Francis Hosp., Inc. v. Department of Health and Rehabilitative Servs.*, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989); *General Development Corp. v. Division of State Planning*, 353 So. 2d 1199 (Fla. 1st DCA 1978).

in this particular case. Sometimes the courts even make these statements in a rather ominous tone. "If an agency neglects its rulemaking power and attempts to promulgate policy of general applicability on an ad hoc basis by orders in particular cases, we must order rulemaking as a predicate for further action and, if necessary, invalidate agency action taken without rulemaking."¹¹⁰ Despite the tone, the decisions addressing the rule/order dichotomy issue remain classic examples of form being mistaken for substance.

For example, even when the courts appear to be critically evaluating the validity of an administrative agency choosing to develop public policy through adjudication, the decisions still lacks any substantive bite. In a few cases the courts have mentioned, but thus far not actually used, two circumstances where they would intervene to require an administrative agency to exercise its discretion in developing public policy only in the context of the rulemaking process. First, when an administrative agency is imposing a new policy which has an industry-wide impact in an area which under its anterior policy was unregulated, the courts have indicated that an administrative agency may be required to use the rulemaking process.¹¹¹ Second, when an administrative agency will be imposing "severe and judicially unreviewable penalties for violation of a statutory norm [not commonly understood and] made explicit only by the disciplinary order," a form of retrospective policy making, the administrative agency may be required to use the rulemaking process to impose the new public policy position.¹¹² In these two circumstances the courts have suggested that if an administrative agency failed to use the rulemaking process, then it may well constitute a material error affecting the fairness of the proceedings.¹¹³ But these constraints on administrative discretion in the rule/order dichotomy remain merely empty threats, because the courts have yet to find a circumstance where an administrative agency has violated them.

VI. THE RESOLUTION OF THE PROBLEMS POSED BY THE RULE/ORDER DICHOTOMY SUGGESTED BY ADAM SMITH

In *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*¹¹⁴ the court indicated that the standard of judicial review

110. *General Development*, 353 So. 2d at 1209.

111. *Florida Cities Water Co. v. Public Serv. Comm'n*, 384 So. 2d 1280, 1281 (Fla. 1980); *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So. 2d 1277, 1281 (Fla. 1st DCA 1981).

112. *Anheuser-Busch, Inc.*, 393 So. 2d at 1181.

113. *Id.* at 1182.

114. 553 So. 2d 1260 (Fla. 1st DCA 1989).

applied in evaluating the validity of a rule depends on how the issue reached the courts. If judicial review is conducted pursuant to an appeal from an agency rule adopted using the informal rulemaking procedures,¹¹⁵ then the standard of judicial review is arbitrary and capricious.¹¹⁶ This is a less stringent standard of judicial review for the factual record than the competent substantial evidence standard which is applied in the review of adjudicatory decisions.¹¹⁷

The court noted that the nature of the judicial review process is fundamentally altered by the standard of judicial review applied.

We believe that under th[e] arbitrary and capricious standard . . . an agency is . . . subjected only to the . . . command of rationality. 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. [This requires] the reviewing court [to] 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.¹¹⁸

However, if judicial review of an administrative agency rule arises out of the context of adjudicatory proceedings held during the rulemaking process,¹¹⁹ then the agency's quasi-legislative rulemaking process is converted into an adjudicatory process and the standard of judicial review for factual conclusions supporting the rule is the competent substantial evidence standard.¹²⁰ This shift in the standard of judicial review occurs because the hearing officer's factual conclusions become the basic record for the court to review.¹²¹

Applying this paradigm to the procedures used by the Department of Environmental Regulation in *Adam Smith*, the court concluded that the appropriate standard of judicial review in this case was the competent substantial evidence standard because this case reached the court on appeal from an adjudicatory proceeding held during the rule-

115. FLA. STAT. § 120.54(3) (1989).

116. *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*, 553 So. 2d 1260, 1271 (Fla. 1st DCA 1989).

117. *Id.* at 1271-72.

118. *Id.* at 1273.

119. FLA. STAT. §§ 120.54(4), 120.56 (1989).

120. *Adam Smith*, 553 So. 2d at 1273-74; see FLA. STAT. § 120.68(10) (1989).

121. *Adam Smith*, 553 So. 2d at 1274.

making process.¹²² The court in a bare conclusion stated that after reviewing the record it found that the substantial competent evidence standard of judicial review was satisfied in this case.¹²³

If the court is correct about the variable standard of judicial review in the rulemaking context,¹²⁴ then the potential for a two tier judicial review process creates a new incentive for administrative agencies to develop public policy through the rulemaking process rather than adjudication. The type of record created in a formal adjudicatory proceeding¹²⁵ is similar to that created by in adjudicatory hearing held during the rulemaking process. Clearly the substantial competent evidence standard of judicial review applies to factual determinations made during the adjudicatory process which resulted in a nonrule order. Thus, under *Adam Smith*, an administrative agency may be induced to use the rulemaking process because as long as the rulemaking process does not involve an adjudicatory hearing, then any rule promulgated will be reviewed by a court under the less stringent "arbitrary and capricious" standard. Though the variable standard of judicial review creates a substantial incentive for an agency to use the rulemaking process for policy development, there are three problems with the *Adam Smith* approach which will prevent it from effectively encouraging administrative agencies to use the rulemaking process.

First, an agency can be dragged into the adjudicatory mode of judicial review by a party successfully invoking its right to a hearing under several provisions of the APA.¹²⁶ Thus, an administrative agency can be deprived of the incentive for using the rulemaking process because of circumstances beyond its control. The uncertainty over the standard of judicial review that may ultimately be applied will offset any chance that the *Adam Smith* decision will encourage administrative agencies to self-select the rulemaking process rather than adjudicatory process for developing public policy positions.

Second, the two tier approach to the judicial review of factual issues may apply to nonrule orders. When an administrative agency has held an adjudicatory type hearing during the rulemaking process it does not change the nature of its decision. The actions of the administrative agency remain quasi-legislative in nature.¹²⁷ In such cases the standard of judicial review applied by the courts should retain its very

122. *Id.* at 1262, 1275; see FLA. STAT. § 120.54(4) (1989).

123. *Adam Smith*, 553 So. 2d at 1275.

124. See *infra* text accompanying notes 126-39.

125. FLA. STAT. § 120.57(1) (1989).

126. See *supra* text accompanying notes 25-33.

127. See *General Tel. Co. of Fla. v. Public Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984).

deferential nature¹²⁸ because the administrative agency was still engaged in making legislative type factual judgments during the adjudicatory type hearing.¹²⁹ An adjudicatory type hearing held during the rulemaking process is purely information gathering in nature and designed to assist the administrative agency in making legislative-type factual judgments. It is not designed to adjudicate factual issues or the rights of parties.¹³⁰ If an administrative agency is engaged in a rulemaking "drawout" hearing, the nature of the hearing more closely resembles the adversary process associated with quasi-judicial decision making in the adjudicatory process. In a "drawout" hearing, the characteristics of process have changed because there is an adjudicatory record designed to assist a party in preserving rights which would not have been adequately protected during the normal rulemaking process. Arguably, it may be appropriate in such cases for a reviewing court to apply the competent substantial evidence test to administrative agency factual judgments because the court has an adversarial type factual record concerning some factual issues. But the nature of the rulemaking process has not changed; it still concerns legislative-type factual judgments. Such factual judgments are a matter within the policy discretion of the administrative agency.¹³¹ All that has changed is the nature of the process used in gathering the facts necessary for making such an informed choice concerning legislative type factual issues. This should not convert a rulemaking proceeding into an adjudicatory process and change the standard of judicial review.¹³² This point of view is supported by the decision in *Agrico Chemical Company v. Department of Environmental Regulation*.¹³³ In *Agrico Chemical*, the court found that the holding of a section 120.54(4) rule challenge hearing did not convert the basic nature of the administrative agency's activity, which was promulgating an administrative rule.¹³⁴ In such cases the perspective for judicial review remains the

128. See *Brewster Phosphates v. Department of Envtl. Regulation*, 444 So. 2d 483, 486 (Fla. 1st DCA 1984) (reverse administrative agency judgments only for "flagrant abuse of discretion").

129. See generally 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 12:3-12:8 (2d ed. 1979) (legislative and adjudicatory facts distinguished).

130. *General Tel. Co. of Fla.*, 446 So. 2d at 1067; *Balino v. Department of Health & Rehabilitative Servs.*, 362 So. 2d 21, 24-25 (Fla. 1st DCA 1978).

131. See *Groves-Watkins Constructors v. Department of Transp.*, 511 So. 2d 323, 328 (Fla. 1st DCA 1987), *rev'd on other grounds*, 530 So. 2d 912 (Fla. 1988); *Burris*, *supra* note 10, at 388-95.

132. *Cf. Balino v. Department of Health & Rehabilitative Servs.*, 362 So. 2d 21, 25-6 (Fla. 1st DCA 1978).

133. 365 So. 2d 759, 762-66 (Fla. 1st DCA 1979), *cert. denied*, 376 So. 2d 74 (Fla. 1979).

134. *Id.* at 762-63.

same: very deferential to the judgments of the administrative agency. Courts should affirm the validity of the administrative rule as long as the discretion exercised by the administrative agency was a reasoned one, not arbitrary or capricious, and "based upon competent substantial evidence. Competent substantial evidence . . . [is] such evidence as a reasonable person would accept as adequate to support a conclusion."¹³⁵ In the evaluation of the record to determine whether sufficient substantial competent evidence exists, the courts have consistently maintained that an administrative agency can resolve conflicts in the evidence independent of the hearing officer as long as it concerns matters which were "infused by policy considerations for which the agency has special responsibility"¹³⁶ This diminishes the significance of the factual findings by hearing officers concerning policy matters or legislative facts.¹³⁷ If the factual findings by the hearing officer concern adjudicatory facts, not legislative facts, then the administrative agencies must defer to these factual judgments and can not reject them.¹³⁸ To the extent the factual judgments made by a hearing officer in either a rule making hearing or a nonrule policy adjudicatory hearing involve legislative facts the same standard of judicial review should apply in both circumstances, because the administrative agency is still exercising its quasi-legislative type authority.

Third and most importantly, the deferential standard of judicial review used in the rulemaking context has been in place for a number of years.¹³⁹ During that time administrative agencies have continued to

135. *Id.* at 763.

136. *McDonald v. Department of Banking and Fin.*, 346 So. 2d 569, 579 (1st DCA 1977).

137. *See Bowling v. Department of Ins.*, 394 So. 2d 165, 171 & n.9 (Fla. 1st DCA 1981).

138. *See id.* at 174-75; *Koltaty v. Division of Gen. Regulation*, 374 So. 2d 1386, 1391 (Fla. 2d DCA 1979).

139. Although several courts including the Florida Supreme Court have approved of a two tier system of judicial review similar to that discussed in *Adam Smith*, it is not at all clear that the APA authorizes a two tier standard of judicial review. *See, e.g., General Tel. Co. v. Public Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984); *Booker Creek Preservation, Inc. v. Southwest Fla. Water Management Dist.*, 534 So. 2d 419, 422 (Fla. 5th DCA 1988); *Agrico Chemical Co. v. Department of Env'tl. Regulation*, 365 So. 2d 759, 762-63 (Fla. 1st DCA 1978). The competent substantial evidence standard of judicial review for factual issues found in section 120.68(10) clearly applies to formal and *informal* hearings under section 120.57. The process used in the informal proceeding under section 120.57(2) creates a record which is remarkably similar to the type of record generated in an informal rulemaking process when no adjudicatory type hearing was held. The facts are found in a proceeding which functionally meets the requirements of section 120.57. If this is true, then the courts should apply the competent substantial evidence standard to informal rulemaking. Arguably, this judicial attempt to create a rulemaking incentive is invalid because the court has imposed a judicial review scheme (similar to that found in the federal Administrative Procedure Act) which the structure of the APA does not support. In doing so, the court in *Adam Smith* functionally amended the nature of the judicial review process set forth in section 120.68. This is more properly a matter for the legislature, rather than the courts, to consider and adopt.

use the adjudicatory policy making process rather than the rulemaking process. The significant advantage enjoyed by administrative agencies under the more deferential standard of judicial review has not induced them to use it more often.

VII. SOME POLICY REASONS FOR WHY ADMINISTRATIVE AGENCIES SHOULD NOT GENERALLY BE PERMITTED TO DEVELOP PUBLIC POLICY THROUGH ADJUDICATION

Even if there has been a general failure on the part of the courts to enforce the rule/order dichotomy, the question remains whether this is a significant problem in the administrative process. Why should the courts and the other branches of the government care whether administrative agencies develop public policy through rulemaking or adjudicatory processes? If administrative agencies prefer one process to another for developing public policy there is no harm as long as administrative agencies are still performing their functions. A short response to this attitude is that there are significant problems associated with administrative agencies coming to rely on nonrule orders to establish public policy. There are at least five significant problems with permitting administrative agencies to have virtual *carte blanche* authority to choose the adjudicatory policy making process over the rulemaking process.¹⁴⁰ Both as a group and individually, these problems provide a justification for the courts requiring administrative agencies to use the rulemaking process rather than the adjudicatory policy making process.

First, the use of adjudicatory policy making significantly limits who can participate in the policy making process. One of the purposes of the APA was to open up the relatively hidden and inaccessible decision processes of administrative agencies to more public participation.¹⁴¹ When an administrative agency engages in rulemaking, any

140. There are other arguments against adjudicatory policy making process; the general approval of adjudicatory policy making by the courts has diluted the nature of the check on administrative agency discretion offered by the section 120.56 hearing. "Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." FLA. STAT. § 120.56(1) (1989). By using the adjudicatory policy making process administrative agencies have functionally nullified the purpose of the section 120.56 which only restricts the administrative rulemaking process. Waas, *supra* note 49.

141. *Reporter's Comments, supra* note 8, at 5; see also *Gar-Con Development, Inc. v. Department of Environmental Regulation*, 468 So. 2d 413, 414 (Fla. 1st DCA 1985) ("One of the principal objectives of the Administrative Procedure Act is to prevent state agencies from adopting unpromulgated and often unwritten policies that are to be generally applied and that affect persons regulated by the agency or having a substantial interest in the policy. Another objective is to prevent agencies from changing such policies at will without notice or without following formal rulemaking procedures."); *State ex rel. Dep't of Gen. Serv. v. Willis*, 344 So. 2d 580, 591-92 (Fla. 1st DCA 1977); see also *Hyde, supra* note 21.

“affected” person can request that the administrative agency hold an information gathering hearing. An “affected” person may also participate in such an information gathering hearing being held at the request of another “affected” person. The relative openness of the administrative process in rulemaking is lost when an administrative agency elects to develop its public policy positions through adjudication.¹⁴² It is much more difficult to qualify as an intervenor in a formal adjudicatory hearing and thereby gain the right to participate in an adjudicatory proceeding where a nonrule policy may be established.¹⁴³ It also unduly burdens the private party involved in the adjudicatory proceeding with the duty of calling into question the legitimacy of administrative agency’s policy choice found in a nonrule order.

Requiring a single party to present evidence and argue against a fundamental change in policy places that particular party at a severe disadvantage Additionally, that party may not have the financial resources necessary for gathering evidence and hiring legal representation . . . [to] argu[e] against the broader policy changes. By limiting the quantity and quality of evidence presented, an agency’s decision to change its policy through adjudicating a single case also has the effect of curtailing the effectiveness of judicial review.¹⁴⁴

Thus, the courts should act to prohibit the use of nonrule orders in many cases, because nonrule orders are not consistent with the participatory approach mandated by the APA when an administrative agency exercises its discretion in establishing public policy.

Second, the letter and spirit of the APA is violated by nonrule orders because administrative agencies have failed to make their orders generally available through publication or subject matter indexing system.¹⁴⁵ The APA requires that the rules and orders of administrative agencies be made available for “inspection and copying” and that a subject-matter index be maintained for each.¹⁴⁶ Generally, administra-

142. *Florida Cities Water Co. v. Florida Pub. Serv. Comm’n*, 384 So. 2d 1280, 1282 (Fla. 1980) (Boyd, J., dissenting).

143. *Cf. Dore supra* note 24; *Florida Medical Ass’n v. Department of Professional Regulation*, 426 So. 2d 1112 (Fla. 1st DCA 1983); *Coalition of Mental Health Professionals v. Department of Professional Regulation*, 546 So. 2d 27 (Fla. 1st DCA 1989) (intervention in rule validity challenge).

144. *Florida Cities Water Co.*, 384 So. 2d at 1282 (Boyd, J., dissenting); *see also* Hyde, *supra* note 21, at 2. *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 681-82 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

145. Waas, *supra* note 49, at 194.

146. FLA. STAT. § 120.53(2) (1989).

tive agencies have adequately implemented the legislative mandate in this area for administrative rules. They are published with an adequate subject-matter index in the *Florida Administrative Code* which is readily available throughout the state and nation. This is not the case with administrative agency orders. The vast majority of administrative agency orders remain unavailable and are not recorded in adequate subject-matter indexes. Only selected administrative agency orders are published in the *Florida Administrative Law Reporter*.¹⁴⁷ Many administrative agency orders, if they are available at all, can only be found at the Department of State or at the administrative agency office in Tallahassee. Even if one resides in Tallahassee or is willing to travel to Tallahassee to investigate these administrative agency orders, access to them is effectively denied because there is usually no subject-matter index available. Without the subject-matter index it is virtually impossible to find the administrative orders relevant to a particular problem.¹⁴⁸ Often a whole body of nonrule orders exists which remain accessible only to administrative agency attorneys or private attorneys located in Tallahassee who regularly practice before the particular administrative agency and can keep track of the wide variety of nonrule orders.¹⁴⁹ It is virtually impossible for others to have meaningful access.¹⁵⁰ Thus, one of the primary purposes of the APA, of "broadening public access to the precedents" of administrative agencies is frustrated by administrative agencies using the adjudicatory policy making process.¹⁵¹ The courts should act to enforce the legislature's clear mandate in this area and prohibit the use of

147. See Senate Committee on Governmental Operations, A Review of Indexing of Agency Orders Issued Pursuant to Chapter 120, F.S., the Administrative Procedure Act Report (1989 & Supp. 1990).

148. *Id.*

149. See Hyde, *supra* note 21, at 2-3.

150. The fact [is] that an agency believes it is within its power to reveal, at an appropriate time, its unpromulgated policy to a surprised and unsuspecting person or entity subject to the policy . . . Nonrule policy, by its nature, is invisible; it does not appear in an agency's index of rules or any other fixed location. A person impacted by such policy has no knowledge of conduct required or proscribed by the agency.

Waas, *supra* note 49, at 194. A similar condition was noted prior to the adoption of the APA. It was hoped that the APA "w[ould] cut down on the private knowledge of the policies which shape agency decisions which is now possessed only by small groups of specialists and the agencies' staffs." *Reporter's Comments, supra* note 8, at 6. Unfortunately, this aspect of administrative law practice has changed little since 1975.

151. *Reporter's Comments, supra* note 8, at 3, 5-6. The use of the term precedents by the Reporter clearly suggests that the public should have access not only to formally promulgated administrative rules, but also to administrative orders. See FLA. STAT. § 120.53(2)-(4) (1989); *Gar-Con Development v. Department of Environmental Regulation*, 468 So. 2d 413, 414 (Fla. 1st DCA 1985); Waas, *supra* note 49.

nonrule orders until administrative agencies make such orders available as mandated by the APA.

Third, the failure of administrative agencies to make their orders readily available to the public undermines the ability of the courts to assure that administrative agencies have acted rationally toward similarly situated individuals.¹⁵² This argument rests on the assumption that administrative agency orders, particularly nonrule orders, should be subject to a limited rule of precedent. Generally, the value of administrative agency orders as precedent is not coextensive with the precedential value attached to judicial opinions.¹⁵³ Even treating administrative agency orders as subject to a limited rule of binding precedent is a somewhat controversial assumption in Florida, because some courts have suggested that administrative agency orders should have no precedential value similar to that associated with judicial opinions.¹⁵⁴ From this point of view, administrative orders are merely the resolution of a particular dispute involving only the parties to the orders. Advocates of this point of view argue that if an administrative agency wants to rely upon a nonrule policy in a subsequent adjudicatory proceeding, then it must establish in the subsequent order "the accuracy of every factual premise and the rationality of every policy choice which is identifiable and reasonably debatable must be . . . [supported] by some kind of evidence undergirding the order which makes that policy choice on that factual premise."¹⁵⁵

Two reasons are offered for why administrative orders should not be given precedential authority. First, administrative agencies need flexibility to respond to changing conditions, and the application of even a limited rule of precedent to administrative orders would effectively prevent this from occurring.¹⁵⁶ Second, the application of a rule of precedent could deprive a party in a subsequent adjudicatory proceeding of an opportunity to challenge the administrative agency's po-

152. See Hyde, *supra* note 21, at 3; FLA. STAT. § 120.68(12) (c) (1989).

153. "Although the doctrine of *stare decisis* does not apply to decisions of administrative bodies, consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily." *R-C Motor Lines, Inc. v. United States*, 350 F. Supp. 1169, 1172 (M.D. Fla. 1972); see *Department of Health & Rehabilitative Servs. v. Barr*, 359 So. 2d 503, 505 (Fla. 1st DCA 1978).

154. "The doctrine of *stare decisis* is primarily applicable only to judicial decisions and is not generally applicable to decisions of administrative bodies." *Mercedes Lighting and Elec. Supply v. Department of Gen. Servs.*, 560 So. 2d 272, 278 (Fla. 1st DCA 1990).

155. *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So. 2d 1177, 1182 (Fla. 1st DCA 1981); see also *Public Serv. Comm'n v. Indiantown Tel. Sys., Inc.*, 435 So. 2d 892, 896 (Fla. 1st DCA 1983).

156. See *Anheuser-Busch*, 393 So. 2d at 1181. Cf. *Maxwell Co. v. NLRB*, 414 F.2d 477, 479 (6th Cir. 1969); *Jets Serv., Inc. v. Hoffman*, 420 F. Supp. 1300, 1308 (M.D. Fla. 1976) (federal cases discussing this problem).

sition as stated in the earlier order because it would functionally foreclose the possibility of a successful argument for a change in the administrative agency's earlier position. This is a very important right guaranteed by the APA to parties appearing before administrative agencies in adjudicatory proceedings.¹⁵⁷

These arguments fundamentally misconceive the impact a limited rule of precedent would have in the context of administrative orders.¹⁵⁸ It is an important and fundamentally sound policy that a limited rule of precedent apply to administrative orders for four reasons. First, it would relieve administrative agencies of the burden of constantly reestablishing the validity of their nonrule policy in every case.¹⁵⁹ Administrative agencies should be required to do this only when the validity of an appropriately adopted nonrule policy estab-

157. *Mercedes Lighting*, 560 So. 2d at 278.

158. Of course even a rule of limited precedent for administrative nonrule orders has its costs. The primary practical pressure, the requirement that the administrative agency will have to repeatedly defend its adjudicatory policy making decision, has been undercut to the extent that agencies have been encouraged by subsequent courts to rely upon their early orders as providing a sufficient justification for nonrule policy. *Anheuser-Busch*, 393 So. 2d at 1182; *Hill v. School Bd. of Leon County*, 351 So. 2d 732, 733 (Fla. 1st DCA 1977); *Albrecht v. Department of Envtl. Regulation*, 353 So. 2d 883, 886-87 (Fla. 1st DCA 1977), *cert. denied*, 359 So. 2d 1210 (Fla. 1978). *But see* *Bowling v. Department of Ins.*, 394 So. 2d 165, 174 (Fla. 1st DCA 1981) (rejecting the applicability of an adjudicatory policy established in a prior order to a subsequent case). As was noted in *McDonald*, "[t]o the extent the agency may intend in its final order to rely on or refer to emerging policy not recorded in rules or discoverable precedents . . . [which includes prior agency orders] that policy must be established and may be challenged by proof" and countervailing policy and legal arguments. *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 582 (Fla. 1st DCA 1977). Thus, if a prior order established an agency nonrule policy and it is discoverable, then the agency avoids the primary practical consideration which encourages an agency to convert nonrule policies to rules through the rulemaking process, because it no longer must repeatedly extensively justify its incipient policy in each case. In effect the prior order can be treated as a rule. First, the court decisions indicate it might be sufficient for an agency just to place the prior nonrule orders in the record, particularly if that order was found sufficient in the judicial review process, and then prove by competent substantial evidence that the circumstances of this case are sufficiently parallel to the prior order so that it should control. Or, second, if an agency cannot rely upon the prior nonrule order by itself, then all it need do is offer the same proof and legal arguments developed in the prior order and the nonrule policy is established for purposes of the subsequent proceeding. Thus, the nonrule policy is proven by a court process and the only new issues in these cases is whether substantial competent evidence demonstrates that the current matter is sufficiently similar to that in the early agency order. While the cost to the agency in the latter process is greater, it still has not been sufficient to encourage agencies to move to the rulemaking process. In part, this consequence results because under this scheme of things, there is no greater degree of certainty that the policy adopted will be valid if it is created by using the rulemaking process as opposed to the adjudication process once the policy has been held valid in one adjudicatory process.

159. To take this position is not to concede the larger point concerning when it is appropriate for an administrative agency to have engaged in adjudicatory policy making. An administrative nonrule policy has precedential value only if it arose in a context where it was appropriate for an administrative agency to have engaged in this process.

lished in the earlier administrative agency order is challenged by a party in a subsequent proceeding,¹⁶⁰ or if the earlier administrative order is not available in advance to a party in the subsequent administrative agency hearing.¹⁶¹ Second, by applying a limited rule of precedent to administrative agency orders, the courts would not require administrative agencies to abandon their flexibility or foreclose their ability to respond to changing circumstances.¹⁶² Administrative agencies would merely be put to the test of demonstrating what new or other significant circumstance exists which was not noted or present in the earlier nonrule order, or what facts concerning this case are sufficiently distinct from those involved in its earlier nonrule order to justify abandoning it.¹⁶³ As the court noted in *Department of Health and Rehabilitative Services v. Barr*,¹⁶⁴

Agency orders rendered in Section 120.57 proceedings may in the same way indirectly determine controversies and affect persons yet unborn. But the rule is *stare decisis*, not *res judicata*. If such a person's substantial interests are to be determined in the light of a

160. *HCA Gulf Coast Hosp. v. Department of Health and Rehabilitative Servs.*, 10 FLA. ADMIN. L. REP. 2807, 2808-09 (1988).

161. [W]hen an agency seeks to validate its action based upon a policy that is not recorded in rules or *discoverable* precedents, that policy 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.

Health Care and Retirement Corp. of Am., Inc. v. Department of Health and Rehabilitative Servs., 559 So. 2d 665, 667-68 (Fla. 1st DCA 1990) (emphasis added) (quoting *St. Francis Hosp. v. Department of Health and Rehabilitative Servs.*, 55 So. 2d 1351, 1354 (Fla. 1st DCA 1989)); see also *Amos v. Department of Health and Rehabilitative Servs.*, 444 So. 2d 43, 47 (Fla. 1st DCA 1983). Of course, if the administrative agency has not established its public policy preference in a prior order, then it must develop both the factual and legal basis for its public policy position during the adjudicatory hearing. *Ganson v. Department of Admin.*, 554 So. 2d 516, 520-21 (Fla. 1st DCA 1989).

162. It is a myth that without broad discretion to use adjudicatory policy making powers administrative agencies would be deprived of the flexibility needed to deal with changing circumstances. Administrative agencies retain a substantial amount of flexibility even when they have used the rulemaking process to establish public policy. First, administrative agencies can interpret the scope of the administrative rule in a reasonable fashion to deal with unforeseen circumstances. Second administrative agencies can also repeal or amend the administrative rule in subsequent rulemaking activity as long as it is consistent with the statutory language and purpose and is supported adequately in the rulemaking record. Nothing in the APA requires that administrative agencies view the administrative rules they adopt as forever binding. They remain free to shift their policy at anytime. See *Department of Admin., Div. of Retirement v. Albanese*, 445 So. 2d 639, 642 (Fla. 1st DCA 1984). In case of an emergency, an administrative agency can promulgate administrative rules very quickly using the emergency rulemaking provisions of the APA. FLA. STAT. § 120.54(9)(a) (1989).

163. *Amos*, 444 So. 2d at 47.

164. 359 So. 2d 503 (Fla. 1st DCA 1978).

prior agency order or declaratory statement, Section 120.57 proceedings will afford him the opportunity to attack the agency's position . . . and section 120.68 will provide judicial review in due course.¹⁶⁵

A limited rule of binding precedent as suggested by the district court in *Barr* does not prevent a party, including the administrative agency, from arguing successfully that the nonrule policy established in the prior administrative agency order should not apply to the current case.¹⁶⁶ Third, an administrative agency should not be free to arbitrarily choose whether it will or will not rely upon a preexisting nonrule policy. If administrative agencies have this degree of freedom, then it is an invitation to engage in arbitrary decision-making or favoritism.¹⁶⁷ Treating policy established in a nonrule order as a binding precedent helps guard against favoritism and arbitrary agency action by offering a party the opportunity to require the administrative agency to demonstrate it is acting in a rational fashion in light of its past administrative orders.¹⁶⁸ A limited rule of precedent is also more consistent with the letter and spirit of the APA which directs that reviewing courts remand a case to an administrative agency because the agency's decision was "[i]nconsistent with an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency."¹⁶⁹ Thus, courts should prohibit or restrict the use of nonrule orders until administrative agencies make such orders available to assure that administrative agencies are not acting arbitrarily and infringing on the limited rule of precedent which should apply to nonrule policy orders.

Fourth, the adjudicatory policy making process can result in a substantial waste of limited resources available to the courts. It has always been assumed that the threat of being required to reestablish the validity of nonrule policy was a practical incentive for an administrative agency to use the rulemaking process once it has clearly deter-

165. *Id.* at 505.

166. *Department of Corrections v. Holland*, 469 So. 2d 166, 167 (Fla. 1st DCA 1985). Of course, parties may argue that an administrative agency must adhere to the policy it adopted in its prior administrative orders. *International Medical Centers, H.M.O. v. Department of Health and Rehabilitative Servs.*, 417 So. 2d 734, 736-37 (Fla. 1st DCA 1982).

167. *See Hyde, supra* note 21, at 3.

168. If administrative agency orders are not binding precedent, then they are of little value except as a non-binding guide to future action by administrative agencies. Such a position would trivialize the nature of the process through which administrative agencies develop nonrule policy.

169. FLA. STAT. § 120.68(12)(c) (1989); *see International Medical Centers*, 417 So. 2d at 736-37.

mined what policy it wants to adopt.¹⁷⁰ If no limited rule of precedent applies to administrative agency orders, then this process of reestablishing the validity of a nonrule policy in every case would practically dictate that the administrative agency adopt the nonrule order as a rule. Regardless of a court's view on the issue of the precedential value of an administrative agency's order, it is clear that the establishment of the validity of a nonrule policy is a substantial burden on both administrative agencies and courts if it must be constantly repeated. The courts have assumed that this process is a substantial burden in terms of both expense and efficiency for administrative agencies, but it is a burden the courts cannot require administrative agencies to forego.¹⁷¹

What this analysis has left perhaps unperceived and certainly unstated is the cost such a process ultimately imposes on the courts. Imposing this burden on the judicial resources of the state by administrative agencies is intolerable. The courts should force administrative agencies to use the rulemaking process as a means of substantially diminishing this constant drain on judicial resources.

VIII. WHY HAVE THE COURTS FAILED TO ADEQUATELY CONSTRAIN ADMINISTRATIVE AGENCY DISCRETION IN THE RULE/ORDER DICHOTOMY CONTEXT?

In light of these problems, the question remains as to why the courts have employed the *McDonald* limitations on adjudicatory policy making in an illusory fashion, rather than as a substantive check on the scope of agency discretion. Perhaps an explanation for these opinions is that the courts have not viewed the rule/order dichotomy

170. The incentive for agency rulemaking is to avoid the burden of having to "repeatedly . . . defend its nonrule policy decisions in each case." *Barker v. Board of Medical Examiners*, 428 So. 2d 720, 722 (Fla. 1st DCA 1983). As the court noted in the recent case of *Ganson v. Department of Admin.*, "[w]hen . . . an agency does not choose to document its policy by rule, there must be adequate support for its decision in the *record* of the proceeding." 554 So. 2d 516, 520 (Fla. 1st DCA 1989) (emphasis added). The administrative agency in such a case must support in the record with competent substantial evidence every factual conclusion which is necessary to justify the agency's policy choice as well as detailing the legal rationale for such policy choices. *Id.* at 520-21 (citing *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So. 2d 1177, 1182-83 (Fla. 1st DCA 1981)). This is a much greater burden than that imposed on administrative agencies in a rulemaking context, where this justification process must be undertaken only once. See *Mitchell v. School Bd. of Leon County*, 347 So. 2d 805, 807 (Fla. 1st DCA 1977).

171. This approach erroneously assumes that practical considerations will push agencies toward the rulemaking process. See *infra* text accompanying notes 70-113.

as a critical distinction in the judicial review process.¹⁷² Several recent opinions have indicated that the standard of judicial review remains fundamentally the same whether an administrative agency used the rulemaking process or the adjudicatory process in developing and justifying its policy choices.¹⁷³ According to these opinions, the only possible significant difference between these two methods for developing public policy is the type of record the court has to review. If the rulemaking process involves a "draw out" hearing, this distinction may not even be a significant distinction. As Judge Ervin, the primary proponent of this point of view, has explained, a reviewing court should not be concerned with classifying agency action as either a rule or an order as it accomplishes nothing.¹⁷⁴ From this perspective the important issues are "whether the agency . . . adequately explained its action [in the record], and, if it has, whether its action is within the discretion delegated to it."¹⁷⁵ If an agency has satisfied the reviewing court on these two points, "then the [reviewing] court should sustain the action even though the agency's statement 'may have all the characteristics of . . . [a] rule.'"¹⁷⁶ Under this approach courts cannot reject an administrative agency policy merely because it was adopted through the adjudicatory process rather than through the rulemaking process. As the court noted in *Public Service Commission v. Indiantown Telephone Systems, Inc.*,¹⁷⁷ "there is no authority to compel the agency to choose rulemaking over adjudication."¹⁷⁸

172. *Public Serv. Comm'n v. Indiantown Tel. Sys., Inc.*, 435 So. 2d 892, 895-96 (Fla. 1st DCA 1983). Not all court have even been disturbed by administrative agencies failing to follow the procedural requirements for rulemaking. In some cases they enforced administrative policy even though it was not properly adopted as a rule. See *Enterprise Bldg. Corp. v. School Bd. of Pinellas County*, 445 So. 2d 686, 687 (Fla. 2d DCA 1984) (per curiam); *Hill v. School Bd. of Leon County*, 351 So. 2d 732, 733-34 (Fla. 1st DCA 1977) (Mills, J., dissenting).

173. *Pan Am. World Airways v. Public Serv. Comm'n*, 427 So. 2d 716, 719 (Fla. 1983) (The standard of judicial review is the same whether the Public Service Commission interpreted the statutes it administers through rulemaking or adjudication.). Cf. *Gulf Court Nursing Center v. Department of Health and Rehabilitative Servs.*, 483 So. 2d 700, 704 (Fla. 1st DCA 1986) (The court read the substantive statutes governing the awarding of certificates of need as functionally applying the same standard of judicial review to both orders and rules.) The standard of judicial review used in reviewing the validity of administrative rules "are in our judgment equally applicable to review of orders" issued in a challenge to a proposed rule under section 120.54(4), Florida Statutes. *Florida Waterworks v. Public Serv. Comm'n*, 473 So. 2d 237, 239 (Fla. 1st DCA 1985) (per curiam).

174. *Department of Revenue v. United States Sugar Corp.*, 388 So. 2d 596, 598 (Fla. 1st DCA 1980) (Ervin, J., concurring) (rejecting the policy position adopted by the Department of Revenue because it had not adequately explained or factually justified its policy position).

175. *Public Serv. Comm'n v. Central Corp.*, 551 So. 2d 568, 573 (Fla. 1st DCA 1989) (Ervin, J., dissenting).

176. *Id.* at 573 (quoting *United States Sugar Corp.*, 388 So. 2d at 598).

177. 435 So. 2d 892 (Fla. 1st DCA 1983).

178. *Id.* at 895-96.

This point of view obviously trivializes the nature of what is at stake in the argument over the rule/order dichotomy, particularly the dangers of abuse and frustration of the APA participatory administrative process model. According to these opinions, such concerns should not overshadow the substantive question of the validity of the administrative agency's actions. Another important problem with this approach is that it ignores the fact that the courts' approach to judicial review of nonrule orders has removed many of the practical pressures for agencies to move from the adjudicatory process to the rulemaking process.

IX. A POSSIBLE JUDICIAL SOLUTION TO THE RULE/ORDER DICHOTOMY PROBLEM

Any judicial solution to the rule/order dichotomy problem will involve a major shift in the attitude of the members of the judicial branch.¹⁷⁹ First, the courts must recognize that it is their duty to enforce the rule/order dichotomy. Second, the courts must realize that the enforcement of the rule/order dichotomy involves more than merely uttering stern warnings to administrative agencies that they should consider using the rulemaking process in the future. When the issue is raised, the courts must require administrative agencies to offer evidence to support their claim that the subject matter of the nonrule order is an area in which it is still inappropriate for them to have engaged in rulemaking.¹⁸⁰ Furthermore, the courts must, in appropriate circumstances, invalidate administrative orders based upon nonrule

179. Other participants at the Seventh Administrative Law Conference have suggested legislative solutions to the problem of nonrule orders. See Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U.L. REV. text accompanying notes — (1990). A suggestion made by Professor Dore which would in part cure the problem also could be implemented by the judiciary. Impose a requirement that administrative agencies file and index their orders before they will be considered rendered. This would at least make nonrule orders more generally available. Further, its implementation need not necessarily await legislative action. The provisions of § 120.53(2)-(3) could be used by the judiciary to impose such a requirement.

180. The courts may soon no longer be burdened with the task of identifying the relevant criteria to be used in making these judgments. House Bill 1879 will be considered early in the 1991 legislative session. In addition to restating the legislative preference for rule making, as long as it is feasible and practicable to adopt a rule concerning the subject matter, the bill provides specific criteria for the Department of Administrative Hearings and courts to use in determining whether an administrative agency has properly used the nonrule policy making process rather than the rule making process in establishing public policy. If this bill becomes law, then the courts no longer can choose to remain in the dark as to what standards they should apply in judging whether rule making is required. H.B. 1879, § 1 (1991). Even if House Bill 1879 should not become law the criteria listed in the bill is a good starting point for the courts in developing their own meaningful criteria for enforcing the rule/order dichotomy. A process the courts should have begun fifteen years ago, if not sooner.

policy which should have been promulgated as a rule through the rule-making process.¹⁸¹ This should be done even though the public interest may suffer in the short run. Third, and the key to any judicial solution to this problem, the courts must use the judicial review process in a manner that creates incentives for administrative agencies to self-select the rulemaking process over adjudication to develop public policy.¹⁸² This involves a return to a basic premise of the APA—a preference for rulemaking. When an administrative agency has engaged in “[r]ulemaking . . . [it] is quasi-legislative action” and a reviewing court must consider the validity of the administrative rule with the appropriate degree of deference to an administrative agency’s exercising that power.¹⁸³ The judicial deference accorded an administrative agency rule is of the same degree as that accorded a statute enacted by the legislature.¹⁸⁴ Applying this deferential approach to the judicial review process, courts should invalidate an administrative rule only if it is not “‘reasonably related to the purposes of the enabling legislation, and . . . [is] arbitrary or capricious.’”¹⁸⁵ The arbitrary or capricious standard of judicial review is one designed to maximize administrative agency discretion in the rulemaking context. As the court noted in *Department of Health and Rehabilitative Services v. Framat Realty, Inc.*:¹⁸⁶

When . . . an agency has responded to rulemaking incentives and has allowed affected parties to help shape the rules they know will regulate them in the future, the judiciary must not . . . overly restrict the range of an agency’s interpretative powers. Permissible interpretations of a statute must and will be sustained, though other interpretations are possible and may even seem preferable according to some views.¹⁸⁷

181. When an administrative agency has failed to adopt a public policy position which clearly should be a rule through the rulemaking process, then the classic remedy is to not apply the policy to the party in this particular case and to direct the administrative agency to comply with the requirements of the rulemaking process if it wants to enforce the policy in future cases. *Gulfstream Park Racing Assoc. v. Division of Pari-mutuel Wagering*, 407 So. 2d 263, 265 (Fla. 3d DCA 1981).

182. This suggestion encourages the courts to continue on the path of rewriting the APA judicial review provisions. See *infra* text accompanying notes 114-139. If the courts are reluctant to do so, the legislature should consider amending the APA to clearly establish a two-tiered approach to judicial review.

183. *Agrico Chem. Co. v. Department of Env'tl. Regulation*, 365 So. 2d 759, 762 (Fla. 1st DCA 1979) *cert. denied*, 376 So. 2d 74 (Fla. 1979).

184. *Id.*

185. *Id.* (quoting *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st DCA 1975)); see also *General Tel. Co. of Fla. v. Public Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984).

186. 407 So. 2d 238 (Fla. 1st DCA 1981).

187. *Id.* at 242.

This degree of judicial deference accorded to administrative agency decision making in the rulemaking context is justified by the APA preference for rulemaking.

[T]he APA plainly regards rules as the valuable endpoint in the agency's development of policy. Rules represent an agency's considered decision on issues left to the agency's decision by a substantive act of the legislature. If we are to regard seriously the incentives for rulemaking under the APA scheme, and if we are to credit the deliberative process that the legislature has prescribed for the development of agency policy, then surely an interpretative [or substantive] rule emerging from this process should be accorded a most weighty presumption of validity. Otherwise the elaborate statutory scheme, pressing for rulemaking and prescribing how it shall be accomplished with maximum public participation, has no productive purpose, and it has become only a snare for agency action, a device for evasion, avoidance, or postponement of effective agency action in its authorized field of responsibility.¹⁸⁸

The courts must interpret the APA in such a manner that this degree of judicial deference is sacrificed by administrative agencies when they develop public policy in the context of adjudication.¹⁸⁹ In reviewing the validity of administrative nonrule orders, the court must not grant administrative agencies any deference in the judicial review process.¹⁹⁰ Without the same degree of freedom to shape the factual record in support of its policy choices during the adjudicatory policy making process as compared with the rulemaking process, administrative agencies will have a powerful incentive to limit the use of nonrule policy to appropriate circumstances.¹⁹¹

If these three changes in the judiciary's approach to the rule/order dichotomy problem occur, then the scope of the problem posed by nonrule orders should be significantly diminished.

X. CONCLUSION

The conclusion, it seems, is obvious. Despite a legislative design predicated in part on the judicial enforcement of the rule/order di-

188. *Id.* at 241-42.

189. *See supra* text accompanying notes 127-36.

190. *See City of Tallahassee v. Public Serv. Comm'n.*, 441 So. 2d 620, 623 (Fla. 1983). In adopting this approach the courts may find it necessary to overrule some decisions where they indicated that legislative factual findings made by a hearing officer concerning legislative facts can be rejected by the administrative agency even though they were supported by competent substantial evidence.

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

chotomy, the courts have refused to effectively enforce this distinction in the judicial review process. Or at the very least the courts have not successfully used the judicial review process to set up effective incentives for rulemaking and disincentives for adjudicatory policy making. The result is the judicial sanctioning of agencies abandoning the rulemaking process as the preferred mode for developing policy. Absent legislative action, the courts and the administrative agencies are the only forums where a solution to this problem can be developed.¹⁹² There is no indication that administrative agencies plan to change or are even considering changing their practice of relying on nonrule policy rendered in administrative orders. Thus, the burden is on the courts to recapture the lost spirit of the *McDonald* decision and enforce the legislative preference for rulemaking activity found in the structure and purpose of the APA.

192. If a legislative remedy is going to be imposed, then in addition to establishing a two tier standard of judicial review, I would favor a modification of section 120.54(5) to provide that if a properly filed petition requests an administrative agency to adopt as a rule a nonrule policy rendered in an administrative order, then the agency must initiate the rulemaking process or refer the matter to the division director for a hearing to determine whether the denial of the request for rulemaking was proper. At the hearing, the burden of proof shall be on the administrative agency to show that the denial of the rulemaking request was lawful. Such a scheme should limit any adverse impact on administrative agencies by not striking at all nonrule policies. It leaves the decision of what nonrule policies need to be promulgated as rules to those who are regulated by the administrative agency or who have a substantial interest in the administrative agency's regulations. Because the petition process is not cost free, only those nonrule policies which truly need to be promulgated as rules probably would be subject to the petition process.