A Traveler's Guide for the Road to Reform

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A TRAVELER'S GUIDE FOR THE ROAD TO REFORM

F. Scott Boyd*

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I. THE ADMINISTRATIVE CONSTITUTION

A question confronts Florida. It is not a new question; it has been around as long as administration itself. This quintessential question of administrative law involves two competing goals. How are we to maintain the control over the administrative process compelled by our constitutional democracy, while at the same time allowing agencies sufficient authority and freedom to carry out the duties they were created to perform? Many states, including Florida, have enacted legislation in hopes of striking this elusive balance.

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* Senior Staff Attorney of the Joint Administrative Procedures Committee. The author would like to thank Professor Johnny C. Burris for his review of an earlier draft of this article. The views expressed here are solely those of the author and are not intended to reflect the views of the Joint Administrative Procedures Committee or the Florida Legislature.


2. Florida’s Administrative Procedure Act is found in chapter 120, Florida Statutes.
Florida’s Administrative Procedure Act (APA or the Act), as its name suggests, does not contain substantive law on any particular subject. Rather it addresses the procedures by which agencies carry out the responsibilities granted to them in various substantive statutes. Because a defining characteristic of administrative agencies is that they perform quasi-legislative and quasi-judicial functions, as well as quasi-executive ones, the Act is necessarily wide in scope. The APA not only governs the processes by which administrative agencies do such things as adopt rules, issue orders, and grant licenses; it also contains provisions for other entities to oversee, influence, and control these agency actions under certain circumstances. Independent hearing officers, for example, are granted authority to issue recommended and final orders. The Administrative Procedures Committee is given responsibility to oversee agency actions. The District Courts of Appeal are assigned powers of judicial review. The Act thus establishes structures, processes, and limitations which govern the exercise of an agency’s statutory powers.

This complex system is designed to ensure that administrative agency decisions are wise and rational, that they are arrived at in a fair and open fashion, and that the agency has full legal authority to make them. In this sense, the APA might be compared to a constitution, which itself contains little substantive law, but rather establishes the governmental structures, processes, and limitations which define how the government will work. Just as Florida’s Constitution declares the limitations within which the legislative, executive, and judicial branches of our government operate, so too the APA may be seen as

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5. Id. § 120.57.

6. Id. § 120.60.

7. Id. §§ 120.54(4)(d), 120.56(5), 120.57(1)(b).

8. Id. § 120.545.

9. Id. § 120.68.

10. Not all agency actions are subject to the Act. Numerous actions are excluded from the definitions of both a rule and an order by sections 120.52(11), (16). There are also countless "free form" activities which have not yet matured into an action covered by the APA. See Capeletti Brothers, Inc. v. Department of Transp., 362 So. 2d 346, 348 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1374 (1979).

11. On the general purposes sought to be achieved through the enactment of administrative procedure acts, see Arthur Bonfield, State Administrative Rule Making, 16-22 (1986).
providing similar direction to what has been termed "the fourth branch" of government,\textsuperscript{12} the administrative agency.

Given the "constitutional" nature of the APA, major amendments can have significant effects on the structure of Florida's government. Scholars and judges alike have long recognized that elements of political theory lie deeply embedded in administrative law issues.\textsuperscript{13} Political theory, however, can be a boring subject; it is of no concern to the average citizen, and of only slightly more interest to the legal practitioner. Thus, philosophical debates on such questions are unlikely to surface in either legal briefs or legislative hearings. Yet the ever-growing importance of administrative law in our society suggests the wisdom of occasionally considering our administrative law system from this more philosophical perspective. Part II of this Article outlines three models of administration which have infused administrative law: the classical model; the procedural model; and the evaluative model.\textsuperscript{14} An understanding of these three basic models in their historical context provides a good background from which to examine the provisions of Florida's Act, and to consider proposals for reform.

Florida administrative law has drawn from at least the first two models, but has not completely endorsed either of them.\textsuperscript{15} In Part III, this Article suggests that the intention of the drafters of the APA to balance the classical and procedural models has not been completely successful. The courts have failed to give this balance full effect be-

\textsuperscript{12} The characterization of administrative agencies as the "fourth branch" of government is a common one. It is occasionally used pejoratively, "Commissions . . . constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers . . . ." Kenneth C. Davis & Richard J. Pierce, \textit{Administrative Law Treatise} 12 (1994) (quoting the \textit{Report of the President's Committee on Administrative Management} (1937)). It is intended here simply in a descriptive sense, in recognition of the large role administrative agencies play in our government.


\textsuperscript{14} While this particular terminology is original, several scholars have suggested similar classifications in explaining the historical evolution of federal administrative law. \textit{See generally, Kenneth Davis, Administrative Law Text}, 2 (3d ed. 1972) (describing four stages as constitutionalism, judicial review, proceduralism, and informal discretion); Richard Stewart, \textit{The Reformation of American Administrative Law}, 88 Harv. L. Rev. 1669 (1975) (describing transmission belt theory, traditional theory, and interest group theory); Shapiro & Levy, \textit{supra} note 1 (describing three stages as structuralism, proceduralism, and rationalism). There was quite a bit of commentary written in the 70's and 80's discussing the first two of these models. \textit{See Ronald Cass, Models of Administrative Action}, 72 Va. L. Rev. 363, 364 (1986).

\textsuperscript{15} When the Florida APA was enacted in 1975, the evaluative model was not yet accepted at the federal level. While it is difficult to assign specific dates to the rise of a theoretical model, the evaluative model might be dated from the early 1980's.
cause they have relied upon federal cases reflecting the procedural model, and have seldom been guided by the provisions of the Act on judicial review.

It is clear from the 1994 Regular Session that many legislators are deeply concerned about agency rules in Florida and are committed to greater control over agency rulemaking. While there was general agreement on this goal, the bills introduced sought to achieve it in starkly different ways. In some cases, bills seeking general control were in fact based upon different philosophical approaches. This Article concludes that in some instances the proposed bills had the potential to change the philosophical approach underlying Florida's APA. If enacted, one bill would have moved Florida down the road taken by the federal administrative law system, while another would have moved Florida in the opposite direction.

II. THREE MODELS OF ADMINISTRATION

Federal administrative law has successively embraced three different models of administration. The first, the classical model, lasted from the beginnings of American administrative law until the 1930's. The second, the procedural model, then prevailed for nearly fifty years. It, in turn, was overtaken by the third, the evaluative model, which now prevails. The assignment of these three models to specific periods does not imply that they existed to the exclusion of other models, but only that they were ascendant.

A. The Classical Model

The classical model focuses on power. Legal analysis centers on who exercises what substantive powers, and on the source of those...
powers. The model is expressed in the doctrines of separation of powers, checks and balances, void-for-vagueness, dual federalism, and standards attached to grants of power. The unifying concept underlying each of these doctrines is the concept that governmental power is a dangerous commodity, to be carefully distributed and controlled.22 This is the essence of the classical model. This concept has its roots in the political philosophies of Locke, Blackstone and Montesquieu, who wrote in the 18th century before the founding of the Republic, and it is reflected in the United States Constitution itself.23

The classical model was predominant from the founding of the Republic until the New Deal. The first century of the Republic was a time of Congressional government with self-executing laws and minimal administration.24 The regulation which existed then was largely based on common law tort and property principles.25 In general, Congress could pass the laws and see to their execution, because of the limited involvement of government.26 The passage of the Interstate Commerce Act in 1887 heralded the end of this congressional century.27 For the first time, there was a delegation of executive, legislative, and judicial powers into a single entity.28 While this was a substantial break from tradition and a particular blow to the development29 of the non-delegation doctrine, the classical model of administrative law still predominated.30 The Interstate Commerce Act contained fairly clear standards regarding the jurisdiction of the com-

25. Rabin, supra note 20, at 1192.
26. Lowi, supra note 24, at 93.
27. Smythe, supra note 13, at 454 (remarking that the full political motivation for this regulation is still not clear).
29. Several commentators have argued that there has never really been a nondelegation doctrine at the federal level. Compare Johnny C. Burris, Administrative Law, 1986 Eleventh Circuit Survey, 38 MERCER L. REV. 991, 993-97 (1987) with Farina, supra note 1, at 479-89 (arguing that many commentators have underestimated the effect of the doctrine).
30. Farina succinctly characterizes the evolution of nondelegation theory as a shift in tactics from "power divided to power restrained." Farina supra, note 1, at 478; see also Thomas McGarity, Regulatory Reform and the Positive State: An Historical Overview, 38 ADMIN L. REV. 399, 401 (1986).
mission and the type of conduct to be regulated, 31 and there was a substantial history of common law and state regulatory efforts to give the terms in the statute specific meaning. 32 Similarly, Congress discussed and came to agreement on all significant policy issues before enacting the Federal Railway Safety Appliances Act in 1893. 33 The legislation itself contained the applicable safety rules. 34

The Supreme Court did not strike down this new type of legislation, but nevertheless continued its concern with standards and limitation of power through strict interpretations of statutory language 35 and by striking down certain actions of the new agencies. 36 The role of the judiciary in the classical model is narrowly active, in that the courts ensure that agency action is strictly within the scope of the agency's authority. Apart from this function, review is deferential. The classical model asserted that an agency may act only within the substantive boundaries set forth in its statutory grant from Congress, and that it is the courts which determine the scope of this authority through interpretation of the statute. 37 Narrow interpretation of statutory delegations, and the concept of substantive limitations on administrative power, may be the most important contributions of the classical model.

B. The Procedural Model

The procedural model 38 focuses on process. Legal analysis centers on the way in which administrative decisions are reached. The model promotes application of expertise 39 and procedural safeguards 40 in de-

31. Lowi notes that later grants of power in the Transportation Act of 1920 were significantly more open ended. In his typology of regulatory forms, he also comments that this second Act preceded other grants of what he terms "control over markets" by nearly 15 years. Lowi, supra note 24, at 97.
32. Id. at 96.
34. Id. at 449.
35. Farina, supra note 1, at 483-86.
36. See, e.g., Federal Trade Comm'n v. Gratz, 253 U.S. 421 (1920). This approach was to be followed in many other areas. The courts would declare agency actions illegal as either ultra vires or inconsistent with statutory purpose, and did not declare the statutes delegating the power to be unconstitutional. See Johnny C. Burris, Administrative Law, 12 Nova L. Rev. 299, 303 (1988).
38. A generally similar classification is made by Davis, supra note 14, at 2; Shapiro & Levy, supra note 1, at 397. The procedural model has also been termed "traditional," Stewart, supra note 14, at 1671.
39. For a discussion of the New Deal conception of the expert agency, see Sargentich, supra note 3, at 411-12.
40. See generally James Landis, The Administrative Process (1938); Davis, supra note 14.
cision making, rather than external substantive limitations. The procedural model finds expression in concepts of adequate notice, impartiality, fair hearing, due process, and standards established by the agency exercising the authority. There are two premises underlying these concepts. The first is that the questions confronting government are susceptible to scientific rationality, that is, there are “correct” answers. The second premise is that the way administrative decisions are reached can determine the accuracy of those decisions. These premises of the procedural model had their basis in “legal process” scholarship, which compared the relative institutional competence of legislatures, courts, and agencies. This model concludes that courts are well equipped to review the procedures which agencies follow, but do not possess the necessary expertise to review the substance of administrative decisions.

The procedural model predominated at the federal level from the 1930’s until the early 1980’s. Beginning with the Great Depression, there was a fundamental change in the perception of the proper role of government. Public acceptance of market autonomy was replaced with a commitment to extensive government control of economic and social activity. The result was the rise of an entirely different administrative law model in what Richard Stewart has termed “the New Deal constitutional revolution.” Stewart sums up the political response concisely, “Congress created the regulatory and social welfare programs of the New Deal and Great Society, and established vast administrative bureaucracies to implement these programs.” Statutory delegations no longer specifically identified what an agency was to do and how it was to do it, but with ever greater frequency merely identified a general problem. In stark contrast with the Railway Safety Act discussed above, Peter Strauss noted that in the enactment of the National Traffic and Motor Vehicle Safety Act of 1966, Congress did not debate any of the major issues, but instead simply instructed the agency to further motor vehicle safety.

During this era, the courts abandoned much of the classical model's jurisprudence. Not only was substantive due process repudiated, but

41. See McGarity, supra note 30, at 403 (discussion of the influence of the concept of “administrative science” and procedural reform reaction).
42. Cass, supra note 14, at 364.
43. Shapiro & Levy, supra note 1, at 407 n.89; see also Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).
44. Rabin, supra note 20, at 1193.
45. Stewart, supra note 28, at 338.
46. Id. at 338.
47. Strauss, supra note 33, at 430.
48. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), was one of the last major eco-
the courts also stopped virtually all discussion of nondelegation,49 gave ever broader interpretations to agency enabling legislation,50 and rejected earlier law on dual federalism.51 As an alternative, the courts began to emphasize the importance of hearings and other procedures conducted by an agency before decisions were made.52 Congress, too, began to focus on process. The federal Administrative Procedure Act was passed in 1946, creating a host of procedural safeguards for the exercise of agency discretion.53 The federal APA was created, in part, as a counterbalance to the broad delegation of discretion no longer prohibited by classical jurisprudence.54 The courts, seen as well-qualified to oversee legal process, began to remand cases to agencies for them to conduct additional procedures not specifically required by statute or due process.55 At the same time, review of the substance of agency decisions was rejected as an improper function for the court. Not only was this restriction applicable when courts addressed questions of statutory authority and jurisdiction,56 but also with respect to economic substantive due process cases. For a review of the doctrine's decline and rejection, see Robert McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34.


50. Farina, supra note 1, at 485.

51. Stewart, supra note 28, at 338.

52. Shapiro & Levy note that one of the first cases suggesting the use of procedural safeguards was, ironically, Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), one of the very few cases ever invalidating a statute on nondelegation grounds. Shapiro & Levy, supra note 1, at 397.

53. McGarity, supra note 30, at 403.

54. For a review of the history leading up to the adoption of the federal APA, see Paul Verkuil, The Emerging Concept of Administrative Procedure, 78 COLUM. L. REV. 258, 264-79 (1978) and McGarity, supra note 30, at 403-07.

55. In later years, the District of Columbia Circuit was particularly inclined to interpret language of section 553 (the informal rulemaking section) of the APA in an expansive way. See Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Automotive Parts and Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). In other cases, the court would even require adjudicatory rulemaking procedures not statutorily required. Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 67 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1253 (D.C. Cir. 1973); see also Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1987 SUP. CT. REV. 345, 348.

56. While the general approach of the procedural model is to give great deference to agencies on questions of law because of their superior knowledge and involvement, there were other cases during this time concluding that a less deferential role was required. Compare National Labor Relations Bd. v. Hearst Publications, Inc., 322 U.S. 111 (1944) (noting that the agency's experience gave it familiarity with the statute) with Packard Motor Car Co. v. National Labor Relations Bd., 330 U.S. 483 (1947) (in which no apparent deference was given); see generally Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363 (1986),
review of facts and policy. The role of the judiciary in the procedural model is thus quite narrow. While providing close scrutiny over the procedures used in arriving at administrative decisions, it is otherwise extremely deferential to the agency.

C. The Evaluative Model

The evaluative model focuses on product. Legal analysis centers on the quality of the agency decision. The model takes form in regulatory analysis requirements and in strong rationality review. The underlying objective of this approach is to compel agencies to engage in careful and documented deliberation before reaching decisions to ensure that improper influences and erroneous information are excluded from the process while all relevant factors are considered. The evaluative model posits that agencies alone cannot accomplish this objective, so forces external to the agency, and particularly judicial review, must therefore be used to prompt them. The evaluative model thus shares with the classical model reliance upon external controls, but differs from it in that while the classical model is concerned primarily with the legality of agency decisions, the evaluative model is concerned essentially with their quality. The evaluative model has its roots in scholarship which began to recognize the political nature of agency decisionmaking, and to suggest the application of formal policy analysis to public policy questions.

The evaluative model became predominant at the end of the 1970's and the early 1980's. Vast amounts of social and environmental legislation had been enacted which were even more far reaching and less

(in which he concludes that more decisions have followed the Hearst approach). The question was ostensibly settled—if not entirely as Breyer might have liked—in Chevron, U.S.A. Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778 (1984) (describing the famous two-step analysis which results in high deference in most cases.)

57. In Pacific States Box and Basket Co. v. White, 296 U.S. 176 (1935), the Court applied a presumption that some state of facts justifying the agency decision existed, just as it would have applied a similar presumption in reviewing a statute. This highly deferential standard of review of matters within an agency's delegated discretion would change under the evaluative model. See infra note 66 and accompanying text.

58. McGarity, supra note 30, at 415 refers to "cognitive", while Shapiro & Levy, supra note 1, at 399 refer to the "rationalist" model. Richard Stewart explains both regulatory analysis requirements and "hard look" judicial review of agency action as reactions to capture of regulatory agencies. Stewart, supra note 28, at 348. He concludes these developments, although relatively new, have already proven that they are incapable of solving the problem of interest groups.

59. Shapiro & Levy, supra note 1, at 401. Critiques of the procedural model have come from all parts of the political spectrum, from public choice to civic republicanism.

60. McGarity, supra note 30, at 416, particularly notes the influence of concepts of "comprehensive analytical rationality" and "cost-benefit" analysis.
specific than the economic regulation of the New Deal. As a result, new concerns with administrative decision making arose. Though additional procedural rulemaking requirements by the courts were deterred by the U.S. Supreme Court, Congress continued to create “hybrid” rulemaking in several statutes, which required an agency to compile additional records of proceedings, receive public testimony, and prepare justification statements. In the executive branch, there was a rise in regulatory analysis statements, which require agencies to apply cost-benefit and other forms of formal analysis. In the judicial branch, the United States Supreme Court adopted the concept of “hard look” review, which had been percolating in the district courts. All of these developments were designed to serve as external checks on the quality of agency decision making. The role of the judiciary in the evaluative model is deferential with respect to questions of statutory authority and jurisdiction, but more active with respect to questions involving factual issues and policy.

62. The landmark decision of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), held that reviewing courts were not to require additional rulemaking procedures if not required by the federal APA or the Constitution. Statutory rulemaking requirements, such as those contained in section 553 of the federal APA, are of course still subject to judicial interpretation. Thus, the pre-Vermont Yankee case of Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973)(requiring public notice of any studies agency relied upon, based on statutory notice requirement), cert. denied, 417 U.S. 921 (1974), has survived. See also Motor Vehicle Mfr. Ass'n v. State Farm Mutual Ins. Co., 436 U.S. 29 (1983) (must use the APA process to create a record to support agency decision).
63. Pierce, et. al. supra note 37, at 312.
64. Id. at 315-16.
66. Judicial review of the factual basis and policy choices represented in an agency rule adopted under informal rulemaking proceedings is conducted pursuant to the “arbitrary and capricious” standard under the federal APA, 5 U.S.C. § 706(2)(A). Traditionally, and consistent with the procedural model outlined here, the courts had construed this to require only “minimum rationality” similar to that required in a statute by the Due Process Clause. Pacific States Box and Basket Co. v. White, 296 U.S. 176 (1935). “Hard look” review, in contrast, has been summarized as having two components. First, it requires the court to ensure the agency itself has documented that it has taken a “hard look” at the rule, i.e., seriously considered all of the proper factors. Second, the court takes its own “hard look” at the substance of the decision to detect bias, inconsistency, lack of logic, absence of factual basis, or anything else to suggest that it was based on an unacceptable policy judgment. See Arthur E. Bonfield & Michael Asimow, State and Federal Administrative Law, 621-22 (1989).
68. One often quoted administrative law scholar, presumably now even more influential,
III. THE FLORIDA EXPERIENCE

Although Florida's experience has not followed the federal pattern directly, the models still provide a very useful framework for analysis. The classical and procedural models provide insight into many of the provisions of the 1974 Act, particularly when comparing the House and Senate versions which were ultimately put together by the conference committee to become the new APA. The models are also useful in examining administrative law decisions by Florida's courts, because the courts have been influenced by the procedural model much more than the classical model. Finally, the major House and Senate bills affecting rulemaking during the 1994 Regular Session can be seen as partly arising from dissatisfaction with the prevailing procedural model constructed by the courts. Some of the solutions proposed in 1994 may be viewed as attempts to revitalize the classical component of Florida's APA, while others seem best explained as attempts either to strengthen procedural safeguards or to move Florida toward an evaluative model.

A. The 1974 Innovations

Florida was considering wholesale revision of its Administrative Procedure Act in the early 1970's, while the federal government was well settled into the procedural model. Although the U.S. Supreme Court had by this time rather completely abandoned the nondelegation doctrine and the classical model, Florida was not yet willing to do so. The Supreme Court of Florida had in fact strongly reiterated its commitment to the principles of the classical model not long before. In the Legislature, there existed a much publicized concern with "phantom government," which translates into a perception that

has suggested that the present federal system is unstable and that change is likely. He notes that it would make more sense to have federal courts conduct a stricter review in matters of law, and a more lenient one in matters of policy. See Breyer, supra note 56, at 397. Interestingly, this is the allocation of deference chosen by the Florida Legislature in 1974. See infra notes 86-97 and accompanying text.

69. See supra text accompanying notes 38-57.
70. See Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974); Conner v. Joe Hatton, Inc., 216 So. 2d 209 (Fla. 1968); Dickinson v. State, 227 So. 2d 36 (Fla. 1969); Delta Truck Brokers, Inc. v. King, 142 So. 2d 273 (Fla. 1962).
71. See, e.g., Raymond Mariotti, Senator Lewis Shadowing Phantoms, PALM BEACH POST- TIMES, Nov. 24, 1974, at D24; John Van Gieson, Bill Tightening State Rules Clears, TALLAHASSEE DEMOCRAT, Apr. 19, 1974. This last article also offers interesting anecdotal evidence of the source of one of the Act's provisions. Part of the article read:

Rep. Curtis Kiser, R-Dunedin, said state bureaucrats have invented unauthorized powers to justify their rules. Kiser said a subcommittee that drafted the bill, HB 2672, was talking about constitutional and statutory authority for rules when an unidenti-
agencies were acting outside their delegated power. Many of the legislative concerns, in short, were viewed from the perspective of the classical model. At the same time, the approach ultimately favored by Florida’s APA could hardly be explained as a refusal to depart from the past. The Florida Act also drew heavily upon the procedural model, and implemented both of these models with several elements that were truly innovative. As a result, chapter 74-310 was unique legislation, blending elements from both the classical model and the procedural model in its approach.

The drafting of this new Act really began in 1973 with a bill redefining “rule” and “agency” in the 1961 Administrative Procedure Act. House Bill 2145 passed the House and Senate, but was vetoed by the Governor. Before the next session, a House subcommittee continued its hearings and its staff began working with the Florida Law Revision Council, which had adopted the complete revision of chapter 120 as its major goal for 1974 and had selected Arthur England, Jr. as reporter for the project. At England’s request, an ad hoc task force was put together by the Center for Administrative Justice of the American Bar Association to prepare an initial draft. The Task Force focused on fairness and expanded process, in harmony with the prevailing procedural model of federal administrative law. The draft contained

The APA bill which subsequently passed the House contained the simple declaration: “No agency has inherent rulemaking authority.” Representative Kiser was a member of the conference committee, and this language was included in the final version of the bill which became subsection 120.54(13), Florida Statutes (Supp. 1974).

72. The Chairman of the Rulemaking and Public Information Committee of the Administrative Conference of the United States wrote in 1975: “In enacting this comprehensive reform in the administrative procedures of state agencies, the Florida legislature has drawn upon the legal thinking and experience of the 1970’s, rather than the 1940’s when the last major administrative procedure acts were conceived.” Cornelius B. Kennedy, A National Perspective of Administrative Law and the Florida Administrative Procedure Act, 3 FLA. ST. U. L. REV. 65 (1975).

73. Three of these innovations, a legislative review committee, administrative rule challenges, and compartmentalized judicial review, are briefly discussed here. For more discussion of judicial review and two other innovations of the Act see Stephen T. Maher, We’re No Angels: Rulemaking and Judicial Review in Florida, 18 FLA. ST. U. L. REV. 767-84 (1991), arguing that the Act’s effort to create an opportunity to present evidence and argument in rulemaking succeeded, but that the draw-out proceeding and limitations on the scope of review have been largely ignored by the courts.

74. Brief History of Administrative Procedure Reform, July 1, 1974 (legislative staff document) (available at Fla. Dep’t of State, Div. of Archives, ser. 333, carton 18, Tallahassee Fla.) [hereinafter Brief History].

75. Id.

76. The ad hoc committee draft concentrated on “expanding the procedures by which decisions of adjudication and rulemaking could be made” to give agencies “greater flexibility” and the public a greater “ability to be heard.” Kennedy, supra note 72, at 66.
several innovations: mandating full availability of all agency decisions; enhancing public participation; minimizing distinctions between quasi-legislative and quasi-judicial actions; and compartmentalizing judicial review. 77 After several cycles of public hearings before the Council and the subcommittee followed by revisions, the Council adopted a fifth draft with few changes and it became the starting point for both House Bill 2672 and Senate Bill 892.78

This basic Law Revision Council draft still had to make it through the Legislature, however. First there was the committee process in each house, and then the conference committee. The Senate, in particular, was the source of many provisions79 which reflected the classical model of administrative law. When the bill finally passed, several additions had been made to the Law Revision Council’s draft. Subsection 120.54(12), Florida Statutes provided, “[n]o agency has authority to establish penalties for violation of a rule unless the Legislature when establishing a penalty specifically provides that the penalty shall apply to rules.”80 Subsection 120.54(13) provided, “[n]o agency has inherent rule making authority.”81 Paragraph 120.54(10)(a) directed the newly created Administrative Procedures Committee to examine each proposed rule to determine “whether the proposed rule is within the statutory authority on which it is based, as a legislative check on legislatively created authority.”82 Subsection 120.54(3) permitted a hearing officer of the Division of Administrative Hearings to determine if a proposed rule was “an invalid exercise of validly delegated legislative authority”83 or “an exercise of invalidly delegated authority.”84 Sub-

77. Some of these procedural innovations are discussed in Maher, supra note 73.
78. Brief History, supra note 74. Committee Substitute for Senate Bill 892, as amended by the conference committee, was to become chapter 74-310, the Administrative Procedure Act. Ch. 74-310, 1974 Fla. Laws 952.
81. Fla. Stat. § 120.54(13) (Supp. 1974). See supra note 71 for the likely source of this declaration.
82. Fla. Stat. § 120.54(10)(a) (Supp. 1974). As the APA was originally enacted, this was the only criterion for committee review of rules. Compare sections 120.545(1)(a) through (m) in the current Act.
83. Fla. Stat. § 120.54(3) (Supp. 1974). Originally this basis of invalidity was solely that the rule was beyond the agency’s power under its enabling statute. See Patricia Dore, Rulemaking Innovations Under the New Administrative Procedure Act, 3 Fla. St. U. L. Rev. 97, 98 (1975); Arthur England & Harold Levinson, Florida Administrative Practice Manual, Ch. 10, p. 15, note 55. (Supplemented by Johnny C. Burris, 1993) The phrase “invalid exercise of delegated legislative authority” was later defined in the Act more broadly to codify court decisions, ch. 87-385, 1987 Fla. Laws.
84. Fla. Stat. § 120.54(3) (Supp. 1974). This second ground was later declared unconstitutional because it would allow a hearing officer to declare a statute to be invalid, Department of Admin. (Div. of Personnel) v. Department of Admin. (Div. of Admin. Hearings), 326 So. 2d
section 120.56(2) allowed a hearing officer to invalidate an existing rule on the same two grounds. These additions to the original bills were attempts to establish substantive limitations on the authority of agencies and to create innovative external controls on the exercise of administrative power. If the procedural model was the mother of the Florida Administrative Procedure Act, the classical model was its father.

B. Deference and Standards of Review

Standard of review can best be described as the amount of deference that a reviewing court will give the agency decision or action under review. Standards of review used by courts in reviewing administrative action are important because in our tripartite system of government the courts bear ultimate responsibility for validating agency action. The provisions on judicial review of agency action are thus central to the operation of any administrative law system. Only with the cooperation of Florida's judicial branch could the compromises of the 1974 Act be effective. The APA's compartmentalization of judicial review sought to increase the clarity and comprehensiveness of standards of review. It required that judges deal separately with issues of procedure, law, fact, and policy, and provided a different standard of review for each.

The 1974 Act requires no deference to agency actions with respect to procedure. The court must review the procedures itself, and if the court finds that a material error may have impaired either the fairness of the proceedings or the correctness of the action, the court is to remand the case. It does not matter if the agency found no material error. It does not matter if the agency determined there was an error which did not impair the fairness of the proceeding. The court is to make its own independent finding, and the statute contains no sugges-

85. FLA. STAT. § 120.56(2) (Supp. 1974).
86. Complete deference would be the equivalent of no review at all, that is, whatever the agency determined would be automatically upheld. The opposite extreme would be no deference, that is, completely independent review of the matter, with no regard for what the agency decided. For a discussion of deference which demonstrates how confusing "degrees" of deference can become, see John C. Blizor et al., Project: State Judicial Review of Administrative Action, 43 ADMIN. L. REV. 571, 721-30 (1991).
87. Id. at 719.
88. Schwartz, supra note 49, at 160, wrote, "In the end, perhaps, it all comes down to judicial review."
90. FLA. STAT. §§ 120.68(7)-(12) (Supp. 1974). See also Maher, supra note 73, at 792-98.
91. FLA. STAT. § 120.68(8) (Supp. 1974).
tion that any deference should be shown to the agency's conclusions.

Questions of law are treated in a similarly direct fashion under the 1974 Act. The court must consider the provision of law itself. Then, if the court finds that the agency erroneously interpreted the provision and that a correct interpretation would compel a particular action, it is to set aside, modify, or remand the case. The court must again make its own independent finding. The statute does not require that the agency's interpretation be clearly erroneous to be rejected, nor does the statute contain any other indication that any deference should be given to the agency's interpretation.

Agency actions which depend on findings of fact, in contrast, require some deference. The Act provides that "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." If there has been no hearing which meets the requirements of section 120.57, Florida Statutes, and the validity of the action depends on disputed facts, the court must order the agency to conduct a hearing. The court must examine the record, but is to set aside the action or remand the case only if the action depends on a finding of fact not supported by competent substantial evidence.

Finally, the Act compels virtually complete deference on matters of discretion. The Act first restates that the exercise of discretion must

92. *Id.* § 120.68(9).
93. Other than the statement in the reporter's comments (contained in Appendix C of England & Levinson, *supra* note 83, at 27) that Florida's new provisions on judicial review were intended to provide more precise guidelines than the 1961 Model Administrative Procedure Act, there is little legislative history which specifically sheds light on the intended nature of judicial review. When the 1981 Model State Administrative Procedure Act was drafted, it changed the general approach of the 1961 Model State Act and instead followed the lead of Florida by attempting to require the courts to make separate and distinct rulings on each issue. The Florida language on questions of law is similar to that of section 5-116(4) of the 1981 Model State Act, "agency has erroneously interpreted or applied the law." A Reporter of the 1981 Model Act notes: "Section 5-116 clearly authorizes courts determining the validity of agency rules to substitute their judgment for those of the agencies with respect to questions of law." *Arthur Bonfield, State Administrative Rule Making 580* (1986).
94. The "clearly erroneous" standard requires substantial deference to be given to the decision being reviewed. See *Bilzor*, *supra* note 86, at 725.
96. *Id.* § 120.68(10). In *Bilzor*, *supra* note 86, at 727, substantial evidence is described in the following manner:

If an agency decision or action is supported by substantial evidence, it must be upheld even though the reviewing court would have reached a different result had it been considering the matter de novo. The possibility of drawing two inconsistent conclusions or inferences from the evidence does not prevent an administrative agency's decision from being supported by substantial evidence.

*See also* Adam Smith Enters. Inc. v. Department of Envtl. Reg., 553 So. 2d 1260, 1270 n.15 (Fla. 1st DCA 1989).
be within lawful authority, and also allows for remand for inconsist-
tency, but otherwise clearly states that the court is not to substitute its
judgment for that of the agency on an issue of discretion.

It can be difficult to separate questions of procedure, law, fact, and
policy. Florida's Act does not attempt to control this determination,
but once such a determination is made, the legislation prescribes the
appropriate standard of review. In overly simplistic terms, Florida's
Administrative Procedure Act requires strict review of the way an
agency makes a decision, strict review over whether it is lawful, less
strict review over whether it is right, and virtually no review over
whether it is smart.

Another innovation of the Act important to judicial decisions is the
common treatment of quasi-executive, quasi-legislative, and quasi-jud-
dicial actions. The APA provides that all agency action is to be re-
viewed pursuant to the same statutory section. This section
compartmentalizes review of procedure, law, fact, and policy, as
noted above, but does not distinguish standards of review based upon
the form of the agency action. Even though the record to be reviewed
varies depending on the form of the action, the standards of review
are identical.

But although the Act goes to great lengths to specify judicial stan-
dards of review, it says nothing about what standards hearing officers
should use when they review rules. As discussed above, the provisions
allowing for rule challenges by hearing officers were not part of the
Law Revision Council draft, and no new language has been added to
the Act to cover such challenges. As a result, hearing officers are
left without any statutory standards of review whatsoever. A more
specific definition of "invalid exercise of delegated legislative author-
ity" was later added as section 120.52(8), but no attempt was made
to add standards of review at that time. Instead, the attempt was only
to codify judicial grounds for invalidation of statutes.

98. Sargenti ch, supra note 3, at 414.
99. The intent was to cover all agency actions, no matter how the courts had characterized
them before the Act, and to have the same procedures apply whenever substantial interests were
affected. There was a specific intent to legislatively change the result of such cases as Bay Nat’l
Bank and Trust Co. v. Dickinson, 229 So. 2d 302 (Fla. 1st DCA 1969) which had limited judicial
review because of the nature of the agency action. See Levinson, supra note 89, at 73.
100. FLA. STAT. § 120.68(1) (Supp. 1974)
101. Id. § 120.68(5).
102. Compare the text of the Reporters’s Final Draft, March 1, 1974, contained in Appendix
C of England & Levinson, supra note 83, with the text of FLA. STAT. § 120.68 (Supp. 1974).
103. Ch. 87-385, 1987 Fla. Laws 2316.
104. See Maher, supra note 73, at 816 n.225. Also as a result of the addition of DOAH rule
challenges, subsection 120.68(5), Florida Statutes, contained no indication of what the record
C. Decisions of the Courts

The unusual integration of the procedural and classical models envisioned by the Act was never given the chance to fully develop. Instead, courts have generally decided cases based upon the federal administrative law system. The first result of this approach was that the provisions of the Act which attempt to limit agency powers were gradually undermined in accordance with the then prevailing federal procedural model. If this pattern continues, the next result may be that the provisions of the Act which attempt to ensure that the courts do not substitute their judgment on issues of agency discretion will be undermined, in accordance with the now prevailing federal evaluative model.

A comprehensive review of the adoption of federal administrative law by the Florida courts is beyond the scope of this Article. However, the critical role played by standards of review makes it possible for a brief examination of this one area to demonstrate how federalization has occurred, and to illustrate the connection to models of administrative law. The Act’s innovative provisions on compartmentalization of judicial review and common treatment of quasi-legislative and quasi-judicial actions have not been followed by the courts.

As might be expected, in the early years following passage of the APA there was some adjustment to this new approach to administrative law. But while some decisions seemed to be oblivious of the new Act, many cases closely followed the provisions on judicial review. There were decisions by the Supreme Court of Florida involving procedure, law, fact, and policy which closely adhered to the APA’s provisions.105

would be on appeal from a hearing officer’s order. Incredibly, the question of whether the rule or the hearing officer’s order was under review persisted until Adam Smith Enters. Inc. v. Department of Envtl. Reg., 553 So. 2d 1260, 1274 (Fla. 1st DCA 1989), when it was declared that it was the hearing officer’s order, and not the rule, which was under review.

105. In Keystone Water Co. Inc. v. Bevis, 313 So. 2d 724 (Fla. 1975), a question of law arose as to the interpretation of section 367.12(2)(b), Florida Statutes, with respect to the computation of a utility’s rate base. The court reviewed the statute in light of prior case law, disagreed with the Commission’s interpretation and remanded the case. Although rate making is acknowledged to require technical expertise, the court did not mention this or give any deference to the Commission’s interpretation. The court specifically cited section 120.68(9), Florida Statutes.

The following year, a question involving factual determinations and procedure arose in Florida v. Mayo, 333 So. 2d 1 (Fla. 1976). The specific issues were whether sufficient data had been presented to support an interim rate increase, and whether such an increase could be awarded after only a preliminary presentation by the utility before the opportunity for cross-examination had been exercised. The court concluded that it was unable to determine whether the award was supported by competent and substantial evidence pursuant to 120.68(10), Florida Statutes, be-
After this hopeful beginning, things began to go awry. *Agrico Chemical Co. v. Department of Environmental Reg.*,\(^{106}\) was a consolidation of three rule challenge cases. It is of concern here because of its pronouncements on standards of review. The hearing officer's order stated that "under a claim that a proposed rule is arbitrary, unreasonable, or factually unsound, the Petitioners must demonstrate that the rule is so totally unfounded as to be completely beyond reason."\(^{107}\)

This language is so foreign to the *APA* that the only thing that is clear is that the rule was being challenged because it lacked an adequate factual predicate. Rather than refer to section 120.68(10), *Florida Statutes*, the district court complicated matters by turning to a 1937 United States Supreme Court decision, *Thompson v. Consolidated Gas Corp.*\(^{108}\) The Florida court cited *Thompson* for the proposition that the proper test for validity was whether the regulations had a reasonable relationship to the purposes of the statute. The only Florida authority the court cited was *Florida Beverage Corp. v. Wynne*,\(^{109}\) a rule challenge case brought in the circuit court before the enactment of the 1974 Act. The court borrowed a quote from *Wynne*:

> Where the empowering provision of a statute states simply that an agency may make such rules and regulations as may be necessary to carry out the provisions of this Act, the validity of regulations promulgated thereunder will be sustained so long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary and capricious.\(^{110}\)

*Wynne* had taken this standard directly from another federal case,\(^{111}\) adding only the final words, "and are not arbitrary and capri-

\(^{106}\) 365 So. 2d 759 (Fla. 1st DCA 1978).
\(^{107}\)  Id. at 762.
\(^{108}\) 300 U.S. 55 (1937).
\(^{109}\) 306 So. 2d 200 (Fla. 1st DCA 1975).
\(^{110}\) Id. at 202.
As if this reliance upon cases that had nothing to do with Florida's APA was not confusing enough, the quoted test was clearly explained in the federal case as one used to determine whether a rule exceeded statutory authority; it did not apply to review of factual issues in a rule.

All of this might have died quietly, except the Supreme Court of Florida so liked the test that it adopted it as the standard of review for rulemaking in General Telephone Co. of Florida v. Florida Public Service Commission. In adopting the test, the Florida Supreme Court explained:

As a quasi-legislative proceeding, our review of the rulemaking is more limited than would be review of a quasi-judicial proceeding. The standard of review for a quasi-legislative proceeding must differ from that for a quasi-judicial proceeding, as a qualitative, quantitative standard such as competent and substantial evidence is conceptually inapplicable to a proceeding where the record was not compiled in an adjudicatory setting and no factual issues were determined.

There was no reference to the provisions of chapter 120, nor could there be, for as noted above, the Act provides the same standard of review for both quasi-legislative and quasi-judicial proceedings. Because the first portion of the test adopted by the court actually relates to statutory authority and the last portion to factual issues, Agrico and General Telephone affected not only the independent review standard of § 120.68(9) on issues of statutory authority for rules, but also the competent substantial evidence test of § 120.68(10) on issues involving a rule's factual basis.

112. Under the federal APA, "arbitrary and capricious" is the standard courts use when reviewing agency factual determinations in proceedings such as informal rulemaking. 5 U.S.C. § 706(2)(A). See Bonfield, supra note 11, at 576.
113. Mourning, at 369. "The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth in Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may 'make such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'"
114. See supra text accompanying note 66. Admittedly, the development of federal law has tended to merge and blur these standards. As discussed in the text accompanying notes 89 and 90, one of the main purposes of the Florida Act was to clarify review by more strictly separating reviewable issues.
115. 446 So. 2d 1063 (Fla. 1984).
116. Id. at 1067.
117. See supra text accompanying notes 99-100.
Meanwhile, the First District Court of Appeal again had an opportunity to consider judicial review of rulemaking in *State Department of Health and Rehabilitative Services v. Framat Realty, Inc.* Framat involved an appeal of an administrative challenge to an existing rule and a question of legal interpretation. The statute involved provided that certain residential subdivisions could use individual sewage disposal facilities, if they contained no more than four lots per acre. The Department’s rule provided that “an acre, as defined elsewhere in this Chapter [it was defined as 43,560 square feet of land], shall not include the following: paved areas, paved and unpaved rights of ways, paved roadways, consolidated buildings, foundation drainage, underground water drainage, streams, lakes, ditches, coastal, (sic) waters and marshes.” The hearing officer determined that the statute used the word “acre” in its usual sense, and that the Department’s interpretation of that word was therefore erroneous. The district court of appeal reversed the hearing officer. The court discussed in detail the agency rulemaking procedures: the rule notices the agency published; the workshops it conducted; its involvement of interest groups; the public hearing it held. The court discussed the public policy reasons for encouraging rulemaking. It did not discuss the standard of review set out in § 120.68(9), but instead offered its own test, stating:

> 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 interpretive rule emerging from this process should be accorded a most weighty presumption of validity

Permissible interpretations of a statute must and will be sustained, though other interpretations are possible and may even seem preferable according to some views. The *Framat* case is an unmistakable application of the premises of the procedural model of administrative law. The decision is based upon the conception that sufficient process ensures accurate and politically acceptable agency decisions. To further this conception, *Framat* applied a deferential review standard, allowing any “permissible interpretation.” This decision does not support the classical model, with its concerns about strict limitations on authority; nor does it support

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118. 407 So. 2d 238 (Fla. 1st DCA 1981).
119. Id. at 240.
120. Id. at 241-2.
121. See supra text accompanying notes 38-57.
122. See supra text accompanying notes 21-37.
the language of section 120.68(9), which does not provide a deferential standard of review on questions of law.

Like Agrico, Framat distinguishes review of rulemaking from review of other agency action, though no provision of chapter 120 provide for this. Also like Agrico, Framat has been cited numerous times—though not yet by the Supreme Court of Florida—and it has had a marked effect on Florida administrative law.

The differing standards for judicial review of rules enunciated in Agrico and Framat have multiplied. They have been crossed with each other and with statutorily based standards to create still more standards. Finally, in 1989, the First District Court of Appeal acknowledged that there was a problem with the standard of review for “informal” rulemaking in its decision in Adam Smith Enter., Inc. v. Department of Environmental Reg. But the court misstated the problem when it wrote in its opinion that a standard had “never been clearly stated” and that this had been the “source of much confusion.” The source of the considerable confusion was not that the standard had never been articulated; but to the contrary that it had been articulated far too many times, seldom in the same way twice, and almost never with reference to the governing statute. Unfortunately, Adam Smith did little to resolve the confusion, and even added a few complications of its own.

Given the dismal state of affairs before the Adam Smith opinion, it is perhaps unfair to be too critical of this decision. It did conduct a detailed and largely accurate review of the provisions of the APA, and it did impose some order on the chaos. It imposed this order, however, at some cost. Just as the Agrico and Framat cases declined to follow chapter 120 and looked instead to federal law to create a distinction between rulemaking and adjudication, Adam Smith declined to follow chapter 120 and looked to federal law to create a distinction between formal and informal rulemaking.

The federal APA sets up two kinds of rulemaking, formal and informal. In general, rules adopted by the informal process may be

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123. In late 1994, Shepard's Citations lists 20 cases citing headnote two, relating to “permissible interpretations.”
124. 553 So. 2d 1260, 1270 (Fla. 1st DCA 1989).
125. For a time, the courts appeared to accept competent substantial evidence as the proper standard of review in reviewing a DOAH order, as decreed by Adam Smith Enters. Inc. v. Department of Envl. Reg., 553 So. 2d 1260 (Fla. 1st DCA 1989). However, cracks have already appeared in this facade of order. See Department of Labor and Emplo. Sec. v. Bradley, 636 So. 2d 802 (Fla. 1st DCA 1994); Stuart Yacht Club & Marina v. Department of Natural Resources, 625 So. 2d 1263 (Fla. 4th DCA 1993); Department of Correct. v. Hargrove, 615 So. 2d 199 (Fla. 1st DCA 1993).
126. 5 U.S.C. §§ 553, 556, 557. Ironically, while Adam Smith sought to create informal and
invalidated if they are "arbitrary and capricious," while rules adopted by the formal process are held to the higher "substantial evidence" standard. In Florida, the First District Court of Appeal adopted this distinction to justify review of some rulemaking under the first of these standards, and review of other rulemaking under the second.\textsuperscript{127} Upon first consideration, the opinion seems logical. It makes the argument that rules undergoing a section 120.54(3) proceeding do not have a sufficient evidentiary record to allow application of the "competent substantial evidence" standard, while appeals from DOAH hearing officers do. The court cited \textit{General Telephone} and \textit{Agrico} as authority. But as shown earlier, \textit{General Telephone} has been interpreted to distinguish all rulemaking from adjudications regardless of how the cases arrive for review, and \textit{Agrico} itself involved a DOAH appeal. In fact, several jurisdictions do apply substantial evidence review without a record generated by formal procedures,\textsuperscript{128} and there is very little practical difference in the standards.\textsuperscript{129}

But more basically, the problem with the \textit{Adam Smith} solution is that according to the APA, Florida has only one type of rule. Rules going to the court on direct appeal following their adoption, which \textit{Adam Smith} terms "informal rulemaking" are adopted in exactly the same way as rules going to the court following an administrative rule challenge proceeding. Unlike the federal system, the difference is not in the adoption process of the rules, but in the review process. More to the point, the APA provides the same standard of review for all agency action, regardless of its form. If petition for direct review following adoption of a rule is filed, and the challenge concerns factual

\textsuperscript{127} This distinction was not historically accurate simply because there were too many examples to the contrary. For instance, there were numerous appeals from DOAH rule challenges that were reviewed using the arbitrary and capricious standard. See, e.g., \textit{Fairfield Communities v. Florida Land and Water Adjudicatory Comm'N}, 522 So. 2d 1012 (Fla. 1st DCA 1988). Of course, this is not to criticize \textit{Adam Smith's} attempt to provide consistent guidance for the future.

\textsuperscript{128} \textit{See Maher, supra} note 73, at 817-18 n.228.

\textsuperscript{129} It is ironic that \textit{Adam Smith Enters. v. Department of Envtl. Reg.}, 553 So. 2d 1260 (Fla. 1st DCA 1989) went to such lengths to justify the application of "arbitrary and capricious" review in some cases and "substantial evidence" in others, when many commentators agree that it is almost impossible to distinguish the two types of review in practice. In fact, the United States Court of Appeals for the District of Columbia Circuit held, years before the \textit{Adam Smith} opinion, that the "substantial evidence" test and the "arbitrary and capricious" test applied to findings of fact were identical. Association of Data Processing Serv. Org., Inc. v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984). \textit{See also} Pierce, et al. \textit{supra} note 37, at 341-42 (predicting and advocating that soon only one test would be applied, to eliminate the "unnecessary confusion" now affecting the law).
issues, the courts need only follow the direction of sections 120.68(6) and 120.68(11) to create and review a factual record. These provisions have been in the Act since 1974, and there was no need for the Adam Smith court to create the fiction of "informal" and "formal" rules in Florida.

Further, the Adam Smith solution does not help resolve the conflicting standards of review used when interpretations of law are involved. This is because it is difficult to explain why the law should be interpreted differently depending on the form of the proceeding. In fact, Adam Smith continued to link the "reasonably related to the purpose of the enabling statute" test for statutory authority with the "arbitrary and capricious" test for factual issues. In so doing, it endorsed this federal standard, but apparently only for direct appeals. In its valiant attempt to resolve the confusion surrounding standards of review for questions of fact, Adam Smith thus arrived at an illogical conclusion which increases the confusion surrounding standards of review for questions of law.

Yet the most significant result of the Adam Smith case ultimately may stem from its attempt to define "arbitrary and capricious" by reference to federal law. The Overton Park case, quoted in Adam Smith, brings with it a host of issues. Overton Park is generally seen as the first federal case presaging the "hard look" doctrine, later strengthened and developed in Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co. As discussed earlier, the "hard look" doctrine is strongly associated with the evaluative model of administrative law. It was not simply the quotations from Overton Park which suggest movement towards the evaluative model. Adam Smith also sought to enhance the records required in rulemaking, and repeatedly referred to the critical role of "reason" in the rulemaking process. But regardless of whether or not the Florida courts are consciously attempting to move toward the

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130. Section 120.68(15) was added by ch. 92-166, § 10, 1992 Fla. Laws 1679, to eliminate direct appeal of rule adoptions unless the sole issue is the constitutionality of a rule and there are no disputed issues of fact, so this situation could not arise today.

131. See supra text accompanying note 126.

132. Adam Smith, 553 So. 2d at 1271.


134. See, e.g., Breyer, supra note 56, at 384.


136. See supra text accompanying notes 58-68.

137. Adam Smith, 553 So. 2d at 1270.

138. Id. at 1273. For a discussion of Adam Smith and the "hard look" doctrine, see Maher, supra note 73, 815-28.
evaluative model, continued references to federal administrative law will only enhance the confusion.

The widely lauded innovations of Florida's APA earned praise partly because they offered hope that the chaos of the federal administrative law system could be avoided. The Florida courts, however, have repeatedly turned to federal cases and adopted portions of that very different administrative law system. This adoption has been particularly destructive to the operation of Florida's Administrative Procedure Act with respect to standards of review. The federal standards of review have upset the delicate balance between the classical and procedural models that the Act tried to achieve. It is, of course, not obvious that the Act's attempt to balance the two models would have succeeded, but it is clear to many that the rejection of that balance by the courts in favor of the prevailing procedural model of federal law has failed.

D. The 1994 Proposals

The Florida Legislature has long been concerned with the exercise of authority delegated to administrative agencies. In the last several years in particular, legislators have received an increasing number of complaints that agencies are "out of control." Although the term "phantom government" was not often heard, the concerns expressed during the 1994 Regular Session were quite similar to those of twenty years ago. Each house of the Legislature sent at least one major APA bill concerning rulemaking to the other house. These bills show that both houses agree that Florida's current administrative law system needs greater control over agency rules, and that amendment to the APA is the road to that reform. There was no agreement as to exactly what changes should be made, however, and no major reform bill passed. Analysis of some of the major bills affecting rulemaking suggests that they reflect different administrative law models.

140. See supra text accompanying note 16.
142. See Mann, supra note 16, at 57.
143. See supra text accompanying note 71.
145. This Article has focused on rulemaking, and no review of Fla. HB 833 or Fla. HB 2429 (1994), relating to substantial interest hearings, has been attempted.
The first major rulemaking bill to pass the House was House Bill 835.\(^{146}\) The approach of House Bill 835 almost exclusively reflected the procedural model\(^{147}\) of administrative law. The main change to the Act was a revision of the rulemaking time frames, intended to improve public involvement in the rulemaking process. The bill also would have expanded the initial rule notice to include more information about the economic impact statement, and would have increased public access to the economic impact statement once it is prepared. These changes were in the tradition of the procedural model. House Bill 835 also would have created a final notice which included publication of changes and would have moved the opportunity to file an administrative rule challenge to this later point in the rulemaking process. This move might have slightly enhanced opportunities to challenge rules in furtherance of the classical model, but its primary purpose appears to have been to enhance cooperation between the public and the agency in the early stages of rulemaking. The restrictions on changing a rule after the final notice would have improved public participation and fairness to the public, also in keeping with the procedural model. The bill would have improved Administrative Procedures Committee access to rulemaking information, which may have marginally improved its review in furtherance of the classical\(^{148}\) and evaluative\(^{149}\) models. Basically, however, the bill would not have affected the power of an agency to adopt rules or attempt to change the deliberative process of the agency.\(^{150}\)

The main rulemaking bill originating in the Senate was Committee Substitute for Senate Bill 1440.\(^{151}\) The approach of this bill was in accord with the classical model,\(^{152}\) though it did contain a few provisions reflecting both the procedural and evaluative models. First, the bill would have required that the legislature consider additional rulemaking requirements at the time an enabling act was passed. As an overall concept, this is a classical model requirement because it exercises legislative control over the power delegated to an agency. But the various options available reflected all of the models: lowest cost alternatives and economic impact statements are evaluative in nature; additional


\(^{147}\) See supra text accompanying notes 38-57.

\(^{148}\) See Fla. Stat. § 120.545(1) (a), (b), (g) (1993).

\(^{149}\) Id. § 120.545(1)(f), (h), (i), (k).

\(^{150}\) Fla. HB 835 (1994).

\(^{151}\) Fla. Legis., Final Legislative Bill Information, 1994 Regular Session, History of Senate Bills at 125, SB 1440.

\(^{152}\) See supra text accompanying notes 21-37.
workshops follow the procedural model; monthly reports to the legislature and, of course, legislative ratification of rules, are classical. Other classical model features of the bill included the grant of authority to the Administrative Procedures Committee to file section 120.535 mandatory rulemaking proceedings, a requirement that the Committee certify that inquiries had been answered before a rule was filed, the switching of the burden of proof following objection to a rule, and the suspension of rules. On the other hand, the modifications to the rule development statement were typically evaluative. Committee Substitute for Senate Bill 1440 would have required this statement to include the evidence that the agency relied upon, rejected, and failed to consider in adopting the rule. As a whole, however, the provisions of the bill that would have furthered the evaluative and procedural models were minor in comparison to the many strongly classical features.153

A third bill,154 House Bill 237, was predominately evaluative in approach. As originally filed, it contained a few procedural and classical model elements, but its main provisions were based upon the evaluative model.155 It would have required an agency to prepare a written report in response to evidence submitted in a section 120.53 hearing, and it would have provided that only a rationale for the rule made a part of the rulemaking record and actually relied upon by the agency could be offered in support of the rule during a rule challenge. These are typical evaluative provisions. There were also extensive amendments that would have further defined and clarified the rulemaking record, as including agency responses, rationale, and reasons for rejecting alternatives. The requirements for final filing of a rule with the Department of State were amended to require a rationale for the rule and a copy of the report responding to evidence submitted in public hearings. Each of these provisions was clearly designed to ensure that agencies carefully consider all relevant factors and justify their rules on the basis of those factors. The bill as originally filed also provided that the Legislature could impose additional rulemaking requirements or legislative oversight on particular rules. In concept, this is a classical model requirement. The authorized provisions for additional oversight were typical classical provisions, but most of the additional rulemaking requirements were evaluative, mandating a detailed description of the agency's consideration of law, facts, and policy in rule

155. See supra notes 58-68.
development notices and requiring adoption of rules which impose the lowest net cost. The bill did contain a classical provision which would have switched the burden of proof following Committee objection to a rule. It also contained a procedural provision which would have required the economic impact statement to be available at the time of initial notice. Nevertheless, the bill was primarily based on the evaluative model.  

House Bill 237, however, was replaced with a substitute to address concerns of the Governor’s Office and to incorporate provisions from several other bills. As amended, Committee Substitute for House Bill 237 contained provisions that reflected the classical, procedural, and evaluative models of administrative law. One classical element was the creation of section 11.0755, which would have declared that each legislative chamber shall consider and identify, as each bill is passed, the appropriate degree of delegated legislative authority. Other classical provisions would have directed the Joint Administrative Procedures Committee to review statutes authorizing agencies to adopt rules and make recommendations to appropriate standing committees; amended the definition of “invalid exercise of delegated authority”; required agencies to review their existing rules and to identify those needing legislative clarification of authority; and provided that rules objected to by the Committee, which the agency did not act in good faith to change, would carry no presumption of validity in subsequent rule challenge proceedings. Procedural elements included the following: new requirements for rule development notices; requirements for improved agency participation at rule workshops; new rule adoption time frames; new public notice provisions for changes in a proposed rule; the promulgation of new model rules by the Administration Commission; and agency review of rules to be clarified, combined, and deleted. Evaluative elements included a rewritten small business and small county impact requirement; a new

156. Fla. HB 237 (1994).
158. Mann, supra note 16, at 58.
159. Curiously, some of the language in Committee Substitute for House Bill 237 had the effect of decreasing deference to an agency interpretation of the law while other language in the same bill advocated increased deference. Compare the bill’s language providing “a rule does not acquire a presumption of validity because it has been through the rulemaking process or because it is within the range of permissible interpretations of the implemented statutes,” (rejecting deferential review) with the language invalidating a rule which “is not reasonably related to the purpose of the implemented statutes,” (codifying deferential review). See supra text accompanying notes 106-22.
statement of estimated regulatory costs; written response to public concerns when requested; consideration of alternatives offered by the Small Business Ombudsman; a definition of rulemaking record; and a strengthened, though more narrowly focused, lowest net cost requirement.

IV. CONCLUSIONS

The Florida Legislature is apparently committed to greater control over agency rulemaking. Legislators' dissatisfaction with agency exercise of delegated authority suggests that in their judgment Florida's attempt over the last twenty years to answer the quintessential question of how best to balance control with agency freedom and efficiency has failed. The failure of the procedural model as elaborated by the Florida courts has prompted the Legislature to seek ways of improving control over agency rulemaking. During the 1994 Legislative session, various bills attempting to increase control invoked different conceptual models. Some bills attempted to strengthen existing components which are based on the procedural model, some sought to create new elements implementing the classical model, and still others tried to add provisions grounded in the evaluative model.

While there was an apparent consensus that agencies were not exercising their delegated authority properly, agreement did not seem to extend much beyond this general statement of the problem. The Legislature may need to further clarify the exact problem or combination of problems it is trying to correct. Once this is done, the models discussed here should be of some help in choosing possible solutions, because different models address different problems.

If agency decisions are scientifically unsupportable, or the agency is weighing improper factors or ignoring proper ones, the deliberative process of the agency may need strengthening with provisions drawing on the evaluative model. If agency decisions are being made without adequate public notice and participation, or if there is an unacceptable appearance that this is the case, provisions based upon the procedural model may be the best solution. If agency decisions do not reflect the political consensus of the Legislature, or if these decisions are going beyond the powers delegated, provisions in the classical model may be most appropriate.

160. It is not clear if this was an increase or decrease in regulatory analysis, because the new statement replaced the old economic impact statement. While the new statement seemed more narrowly focused, it also required more detail.
162. See supra text accompanying note 1.
163. See supra discussion in notes 147-62.
Whatever amendments are made, legislative choices must be carefully buttressed with careful attention to the standards of review. Compartmentalization of distinct standards of review for different issues is still a good idea. It is obvious that classification of an issue as one of procedure, law, fact, or policy is far from an exact taxonomy. The words of any particular standard are also flexible. Compartmentalization would therefore not inappropriately straight-jacket judges. What it would do, and should be allowed to do, is provide a consistent framework for analysis. Agencies, petitioners, hearing officers and courts should all know the review standards which will be used before the agency decision is made, so that evidence and argument in support of the decision, and in opposition to it, can be directed to that standard. Uniformity is the most important value. Given the plethora of existing standards of review, the only hope of clarification is for someone simply to choose one and write it down somewhere, so everyone can know what the standard is. The Legislature must be the one to choose, and the Florida Statutes must be the place to record that choice.

Because history demonstrates that the courts are unlikely to be guided by statutory standards, it might be more effective to clarify the standards of review used by hearing officers. The various bases of invalidity could be coupled with a clear legislative indication of the amount of deference to accompany each agency determination. Once a clear set of standards was in place, the Act could be narrowly adjusted in future years to address specific concerns with agency exercise of delegated authority in a given category, without affecting other areas that might not need adjustment.

The question confronting Florida endures. The successes and failures of federal administrative law as well as Florida's own experience must affect our answer. The administrative law models outlined in this Article offer new perspectives on the difficult choices to be made. The philosophical model which underlies our "administrative constitution" is important because it affects not only the authority of administrative agencies, but also the very balance of power among the three branches of Florida's government. While the decision of whether and how to amend the APA is a legislative one, all parts of Florida's government and its citizens should contribute to the debate. Surely, all will be common travelers down the chosen road to reform.