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## A Rose by Any Other Name: Florida's Return to Consolidated-Tomoka

Jacqueline Van Laningham

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# A ROSE BY ANY OTHER NAME: FLORIDA’S RETURN TO *CONSOLIDATED-TOMOKA*

JACQUELINE VAN LANINGHAM\*

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## I. INTRODUCTION

Florida has historically provided less discretionary power to agencies than the federal system has. Compared to the federal regulatory

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scheme, Florida is downright stingy. The federal system starts from a position of deference to agency decisions and often gives broad discretion to agencies in terms of rulemaking authority. Florida starts from a position of inherent distrust: agency rulemaking authority is limited to specific delegation by the legislature<sup>1</sup> and, in the event of ambiguity in the statutory text, the text is to be interpreted to provide less agency power.

Florida prohibits deference to agencies on paper, but are the courts actually less deferential in practice? In 1996, the legislature tightened the procedures that govern rulemaking authority in section 120.52(8), *Florida Statutes*. The amendments marked a dramatic change that ran counter to the courts' tendency to provide federal-like deference to agencies.<sup>2</sup> In the first case to interpret the new statutory language in section 120.52, *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*,<sup>3</sup> the First District Court of Appeal ("DCA") found the statutory language ambiguous and broadened agency rulemaking authority to situations in which the rule fell within the agency's "class of powers and duties." The legislature disagreed with the opinion's reasoning and amended the statute in 1999 to fix the perceived ambiguity.

Since 1999, the courts have followed the legislative mandate to narrowly construe statutory delegations of authority to agencies. But the First DCA potentially changed all of that in its recent decision, *United Faculty of Florida v. Florida State Board of Education*.<sup>4</sup> In that decision, the First DCA upheld a rule promulgated by the Florida State Board of Education ("Board") concerning continuing contracts, despite the fact that the statutory provisions provided by the Board as the source of its rulemaking authority never once mentioned continuing contracts. The court determined that because the legislature *intended* for the Board to adopt rules about contracting and tenure generally, the rule about continuing contracts fell within the Board's rulemaking authority.

This Note will argue that *United Faculty* returned to the "class of powers and duties" analysis that was expressly invalidated by the legislature in 1999. It will also argue that the reason *United Faculty* returned to a broader rulemaking authority standard was because the courts have a tendency to gravitate toward a federal standard of deference. Because of this tendency, the legislature should not amend section 120.52(8) to clarify the statutory language. Instead, this Note

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1. Unless otherwise indicated, "legislature" refers to the Florida Legislature.

2. This Note focuses primarily on opinions from the Florida District Courts of Appeal ("DCAs"), but it also refers to Department of Administrative Hearings ("DOAH") cases when relevant. Unless otherwise indicated, "the courts" refers to the DCAs and DOAH.

3. 717 So. 2d 72 (Fla. 1st DCA 1998).

4. 157 So. 3d 514 (Fla. 1st DCA 2015).

urges the courts to return to the narrower analysis of section 120.52(8) as set forth in *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n*.<sup>5</sup> Because the approach advocated in *Day Cruise* is still good law, the courts can return to an analysis consistent with the legislature's wishes without drastic change.

Part II of this Note briefly discusses the separation of powers and nondelegation doctrines. Part III explores the history of the Florida Administrative Procedure Act ("APA"), and how that history reflects the legislature's express choice to limit agency discretion. In particular, Part III describes the changes made in the 1996 amendments to the APA and *Consolidated-Tomoka's* interpretation of those amendments. Part IV describes the amendments to section 120.52(8) of the 1999 APA and the legislature's express rejection of *Consolidated-Tomoka's* analysis. Part V explores *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*<sup>6</sup> and *Day Cruise* and their differing analyses of the 1999 amendments. Part VI analyzes the *United Faculty* decision, which returned to the "class of duties and powers" analysis rejected by the legislature in 1999. Part VII discusses whether the *United Faculty* decision actually marks a return to a broader deference standard in rulemaking challenges and, if so, what can be done to limit the impact of the decision.

## II. SEPARATION OF POWERS AND NONDELEGATION

Two doctrines frequently appear in administrative law: separation of powers and nondelegation. The two concepts are inextricably linked. Generally speaking, separation of powers describes a system of government in which the executive, legislative, and judicial branches have independent powers and duties.<sup>7</sup> The nondelegation doctrine expounds the idea that a legislature cannot delegate its lawmaking power to anyone else.<sup>8</sup> The Florida Constitution combines both doctrines and states: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to

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5. 794 So. 2d 696 (Fla. 1st DCA 2001), *aff'd*, 798 So. 2d 847 (Fla. 1st DCA 2001).

6. 773 So. 2d 594 (Fla. 1st DCA 2000).

7. For a detailed discussion of the separation of powers doctrine and its application, see generally Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467 (2011).

8. See Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 926-27 (2006).

either of the other branches unless expressly provided herein.”<sup>9</sup> Thus, separation of powers and nondelegation are alive and well in Florida.<sup>10</sup>

These doctrines are frequently invoked in administrative law because agencies do not fit into the executive, legislative, or judicial branches of government; instead, they combine functions of all three branches.<sup>11</sup> A strict view of separation of powers and nondelegation necessarily dictates that agencies are unconstitutional.<sup>12</sup> The problem, however, is that agencies are necessary as a practical matter.<sup>13</sup> The issue then becomes how much power to delegate to agencies. Florida has traditionally attempted to put strong limitations on delegation of authority to agencies, at least on paper. This Note focuses specifically on the legislature’s intent to limit agency rulemaking authority, which is best exemplified in the history of the Florida Administrative Procedure Act itself.

### III. HISTORY OF THE FLORIDA ADMINISTRATIVE PROCEDURE ACT

The Florida Administrative Procedure Act (“APA”) was first enacted in 1961.<sup>14</sup> The original APA provided few procedures for over-

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9. FLA. CONST. art. II, § 3.

10. This Note simply points out that Florida has expressly incorporated nondelegation into its Constitution. Scholars have hotly contested whether nondelegation is a viable concept in modern jurisprudence and, if it is, whether it should be. Garry, *supra* note 8, at 938-39. Whether nondelegation is a viable, limiting principle on legislative grants of authority to agencies at the federal level is beyond the scope of this Note. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[I]n our . . . complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

11. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) (“[Agencies] have become a veritable fourth branch of the Government . . . . Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) (“The theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches . . .”).

12. See, e.g., *Ruberoid Co.*, 343 U.S. at 487-88 (Jackson, J., dissenting) (“Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial . . . in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying ‘quasi’ is implicit with confession that all recognized classifications have broken down, and ‘quasi’ is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.”).

13. F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida’s New APA*, 24 FLA. ST. U. L. REV. 309, 313 (1997) [hereinafter Boyd, *Legislative Checks on Rulemaking*] (“Legislation cannot be so specific that it anticipates every eventuality and addresses every detail. If government is to work, agencies must have latitude to ‘fill in the details’ of a statutory program. The power to adopt rules is not inherent in the executive branch, however; therefore, the Legislature must delegate this lawmaking power.”) (footnote omitted).

14. See Cathy M. Sellers, *Overview of the Administrative Procedure Act*, in FLORIDA ADMINISTRATIVE PRACTICE § 2.1 (10th ed. 2015), Westlaw ADP FL-CLE 2-1.

sight of agency decisions, which ultimately led to concerns in the legislature about agency abuse of discretion.<sup>15</sup> The 1974 revisions sought to curb “phantom government,” a term used to describe agency actions that exceed their delegated authority.<sup>16</sup> Unfortunately, these amendments failed to live up to expectations.<sup>17</sup>

One of the major failures of the 1974 APA era was the courts’ wholesale importation of federal administrative law standards of review. The standard of review that a court applies in a challenge to an agency rulemaking decision is important because it determines the level of deference that a court will give to the agency.<sup>18</sup> The 1974 APA provided strict compartmentalization of the standard of review depending on whether the court was deciding an issue of procedure, law, fact, or policy.<sup>19</sup> It was up to the judge to figure out into which particular category an issue fell and apply the standard of review accordingly.<sup>20</sup> However, the 1974 APA did not inform hearing officers of what standard of review to apply for rule challenges.<sup>21</sup> Rather than look to the standards of review in the APA for guidance, the courts borrowed from federal decisions.<sup>22</sup> By 1989, the Florida APA standards of review were not only hopelessly confused, but were also completely enveloped by the thorny mess of federal standards of review that the legislature had expressly been attempting to avoid.<sup>23</sup>

So the legislature made substantial changes to the APA again in 1996. Although the legislature has amended the APA every year since 1974 (with the exception of 2014), the 1996 APA is by far the most extensive revision of the Act. “The entire Act was reorganized and renumbered, opportunities to challenge proposed rules were ex-

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15. F. Scott Boyd, *Florida’s ALJs: Maintaining a Different Balance*, 24 J. NAT’L ASS’N ADMIN. L. JUDGES, 175, 205-06 (2004) (positing that increased complaints from citizens and public interest groups about agency abuse, such as “unlawful tax assessments, adoption of rules without statutory authority, and expansion of permitting requirements in direct contravention of . . . legislative intent,” was one of the factors that compelled the legislature to implement the 1974 overhaul of the APA).

16. F. Scott Boyd, *A Traveler’s Guide for the Road to Reform*, 22 FLA. ST. U. L. REV. 247, 257-58 (1994) [hereinafter Boyd, *A Traveler’s Guide*]; Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 311; Martha C. Mann, Note, *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.: Defining Agency Rulemaking Authority Under the 1996 Revisions to the Florida Administrative Procedure Act*, 26 FLA. ST. U. L. REV. 517, 523 (1999).

17. Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 311.

18. Boyd, *A Traveler’s Guide*, *supra* note 16, at 260.

19. *Id.* at 262 (“In overly simplistic terms, Florida’s Administrative Procedure Act require[d] strict review of the way an agency makes a decision [(procedure)], strict review over whether it is lawful [(law)], less strict review over whether it is right [(fact)], and virtually no review over whether it is smart [(policy)].”).

20. *Id.* at 261-62.

21. *Id.* at 262.

22. *Id.* at 263.

23. *Id.* at 263-70.

panded, waiver or variance was permitted, mediation and summary hearing procedures were created, and legislative oversight provisions were strengthened.”<sup>24</sup> The 1996 APA furthered the legislature’s goal to curb phantom government.<sup>25</sup> In particular, the legislature set forth limitations on agency rulemaking authority in section 120.52(8).<sup>26</sup>

Section 120.52(8) defines an invalid exercise of delegated legislative authority as an “action which goes beyond the powers, functions, and duties delegated by the Legislature.”<sup>27</sup> After enumerating a list of conditions that qualify as invalid exercises of delegated legislative authority, the legislature included a “flush-left” paragraph that further limited agency authority:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.<sup>28</sup>

Section 120.52(8) marked a substantial departure from the traditional practice of the courts to provide federal-level deference to agency actions. Unsurprisingly, the statutory provision quickly became the focus of litigation. The DCAs provided differing interpretations of the provision in three 1998 cases: *Department of Business & Professional Regulation v. Calder Race Course, Inc.*,<sup>29</sup> *St. Petersburg Kennel Club v. Department of Business & Professional Regulation*,<sup>30</sup> and *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*<sup>31</sup> Of the three, *Consolidated-Tomoka* is the most well-known because the legislature quickly invalidated the opinion’s reasoning in its 1999 amendments to the APA.<sup>32</sup> Since *Calder Race Course* adopted the rea-

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24. Sellers, *supra* note 14.

25. See Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 311-12.

26. See FLA. STAT. § 120.52(8) (1996).

27. *Id.*

28. *Id.* The term “flush-left” merely indicates that this paragraph is not a numbered provision of the statute; instead, the paragraph is justified “left” without any indentation.

29. 724 So. 2d 100 (Fla. 1st DCA 1998).

30. 719 So. 2d 1210 (Fla. 2d DCA 1998).

31. 717 So. 2d 72 (Fla. 1st DCA 1998).

32. See FLA. STAT. § 120.52(8) (1999).

soning of *Consolidated-Tomoka* in its analysis,<sup>33</sup> only *St. Petersburg Kennel Club* and *Consolidated-Tomoka* are discussed below.

A. *St. Petersburg Kennel Club v. Department of Business & Professional Regulation*

*St. Petersburg Kennel Club* invalidated Florida Administrative Code Rule 61D-11.026, which was promulgated by the Division of Pari-Mutuel Wagering (“Division”) to define what qualified as a game of “poker.”<sup>34</sup> During its rule challenge, *St. Petersburg Kennel Club* had argued that the rule was an invalid exercise of delegated legislative authority.<sup>35</sup> The Division argued that four statutory provisions gave it the authority to implement the rule: sections 849.085(2)(a), 550.0251(12), 849.086(2)(a), and 849.086(4).<sup>36</sup> First, section 849.085(2)(a) authorized a list of “penny-ante games,” including poker, so long as a player did not win more than ten dollars “in a single round, hand, or game.”<sup>37</sup> Second, section 550.0251(12) authorized the Division “to enforce and to carry out the provisions of [section] 849.086.”<sup>38</sup> Third, section 849.086(2)(a) required that the penny-ante games be “played in a non-banking manner.”<sup>39</sup> Finally, section 849.086(4) authorized the Division to adopt rules relating to “the operation of a cardroom.”<sup>40</sup>

The administrative law judge (“ALJ”) agreed with the Division. He found that sections 550.0251(12) and 849.086(4) gave the Division the authority to implement sections 849.085(2)(a) and 849.086(2)(a).<sup>41</sup> The Second DCA, however, invalidated the rule.<sup>42</sup> The court determined that the statutes in dispute did not delegate the specific au-

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33. *Calder Race Course*, 724 So. 2d at 104-05.

34. *St. Petersburg Kennel Club*, 719 So. 2d at 1211.

35. *St. Petersburg Kennel Club v. Dep’t of Bus. & Prof’l Regulation*, Case No. 97-2080RP, 1997 WL 1053339, at \*10 (Fla. Div. Admin. Hearings Aug. 19, 1997), *rev’d*, 719 So. 2d 1210 (Fla. 2d DCA 1998).

36. *St. Petersburg Kennel Club*, 1997 WL 1053339, at \*8-9.

37. FLA. STAT. § 849.085(2)(a) (1995); *see also St. Petersburg Kennel Club*, 1997 WL 1053339, at \*9.

38. FLA. STAT. § 550.0251(12) (1996); *see also St. Petersburg Kennel Club*, 1997 WL 1053339, at \*8.

39. FLA. STAT. § 849.086(2)(a) (1996); *see also St. Petersburg Kennel Club*, 1997 WL 1053339, at \*9.

40. § 849.086(4); *see also St. Petersburg Kennel Club*, 1997 WL 1053339, at \*9.

41. *St. Petersburg Kennel Club*, 1997 WL 1053339, at \*9.

42. *St. Petersburg Kennel Club v. Dep’t of Bus. & Prof’l Regulation*, 719 So. 2d 1210, 1212 (Fla. 2d DCA 1998). Interestingly, *St. Petersburg Kennel Club* never cited *Consolidated-Tomoka*, even though *Consolidated-Tomoka* was first in time. *See infra* Section III.B. *St. Petersburg Kennel Club* is a narrower interpretation of section 120.52(8) and is perhaps more in line with the restrictions on rulemaking authority that the legislature intended in 1996 and reiterated in 1999.



thority “to make rules which set forth the definition of poker.”<sup>43</sup> Instead, the Division’s rulemaking authority included “the issuance of cardroom and employee licenses for cardroom operations; operation of a cardroom; recordkeeping and reporting requirements; and the collection of all fees and taxes imposed by [section 849.086(4)(a)].”<sup>44</sup> The Division was also authorized “to make . . . rules relating to cardroom operations, to enforce and carry out the provisions of [section] 849.086, and to regulate the authorized cardroom activities in the state.”<sup>45</sup> None of these statutes specifically gave the Division the authority to define poker, so the court invalidated the existing rule as an invalid exercise of rulemaking authority.<sup>46</sup>

*B. St. Johns River Water Management District v.  
Consolidated-Tomoka Land Co.*

In *Consolidated-Tomoka*, the First DCA reversed the ALJ’s final order, which had declared a series of proposed rules set forth by St. Johns River Water Management District (the “District”) invalid.<sup>47</sup> The proposed rules allowed the District to regulate two additional hydrologic basins within its borders, the Spruce Creek and Tomoka River Hydrologic Basins, by expanding the breadth of the existing rules.<sup>48</sup> Property owners affected by the rules challenged their validity.<sup>49</sup> On appeal, the court focused on whether the rules were an invalid exercise of legislative authority under either section 120.52(8)(b) or section 120.52(8)(c), *Florida Statutes*.<sup>50</sup> These statutory provisions state that a proposed rule is an invalid exercise of legislative authority if “[t]he agency has exceeded its grant of rulemaking authority” or if “[t]he rule enlarges, modifies, or contravenes the specific provisions of law implemented,” respectively.<sup>51</sup> Section 120.52(8) also includes a list of what does *not* constitute a valid grant of rulemaking authority.

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43. *St. Petersburg Kennel Club*, 719 So. 2d at 1211.

44. *Id.*; see also § 849.086(4)(a).

45. FLA. STAT. § 550.021(12) (1996); see also *St. Petersburg Kennel Club*, 719 So. 2d at 1211.

46. *St. Petersburg Kennel Club*, 719 So. 2d at 1211; cf. *Fla. Elections Comm’n v. Blair*, 52 So. 3d 9, 14-15 (Fla. 1st DCA 2010) (finding that the Commission had authority to define the term “willful” because it was “a necessary component” in the Commission’s fulfillment of its duties).

47. *St. Johns River Water Mgmt. Dist. v. Consol.-Tomoka Land Co.*, 717 So. 2d 72, 75 (Fla. 1st DCA 1998).

48. *Id.* There were four proposed changes: (i) a “recharge standard,” which required that three inches of runoff “be retained within a specified area of the Tomoka River and Spruce Creek Basins”; (ii) “criteria for floodplain storage”; (iii) specifications for the types of storm water systems that could be used and how they could be constructed; and (iv) a “wildlife habitat protection zone.” *Id.*

49. *Id.* at 75-76.

50. *Id.* at 77.

51. FLA. STAT. § 120.52(8)(b)-(c) (1996).

In particular, it states: “An agency may adopt only rules that implement, interpret, or *make specific the particular powers and duties* granted by the enabling statute.”<sup>52</sup> The First DCA found the term “particular” ambiguous.<sup>53</sup> “Particular” could either mean (1) “that the powers and duties conferred on the agency must be identified by some defining characteristic,” or (2) “that they must be described in detail.”<sup>54</sup> The court determined that in section 120.52(8), “particular” had to mean that rulemaking authority was restricted “to subjects that are directly within the class of powers and duties identified in the enabling statute. [Section 120.52(8)] was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.”<sup>55</sup>

At first glance, the court’s interpretation is intuitive. Enabling statutes passed by the legislature will invariably be more general than the rules that an agency is authorized to implement.<sup>56</sup> The legislature granted agencies the ability to “implement, interpret, or *make specific* the particular powers and duties granted by the enabling statute.”<sup>57</sup> If agencies have the power to enact rules that are more specific than the enabling statute, it necessarily follows that “particular,” as it is used in section 120.52(8), cannot be synonymous with “detailed.” It would not be logical for the legislature to authorize agencies to adopt rules that are more specific than the enabling statute on the one hand but forbid them from enacting rules *precisely because* the enabling statute is general on the other. As the court states, “the Legislature could not have meant to condition rulemaking authority on the existence of a statute describing in detail the subject of each potential rule.”<sup>58</sup>

The idea that “particular” could not mean “detailed” also makes sense from a practical standpoint. Regardless of one’s view of agencies and their constitutionality, agencies are meant to do what the legislature does not have time to do<sup>59</sup> (or, more cynically, what the legislature does not want to do for fear of political reprisal).<sup>60</sup> If a

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52. § 120.52(8) (emphasis added). For the full flush-left paragraph, see *supra* pp. 1082.

53. *Consol.-Tomoka*, 717 So. 2d at 79.

54. *Id.*

55. *Id.*

56. *Id.* at 80.

57. *Id.* at 77 (emphasis added).

58. *Id.* at 80.

59. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (finding that at the federal level, Congress needs to delegate power to agencies in order to do its job).

60. See, e.g., Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 347 (listing avoidance of political accountability as a factor that could influence the legislature to draft statutes broadly so that “they can then blame agencies for unacceptable results”); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 370 (1987) (“[D]elegation encourages bad

statute is detailed to the point of “describing . . . the subject of each potential rule,”<sup>61</sup> the need for the agency is substantially diminished.<sup>62</sup> The statute could stand complete on its own.

Given that it makes sense from an intuitive and practical standpoint that agencies need a little wiggle room in their statutory language, the question then becomes whether the First DCA’s interpretation of “particular” was correct. The ALJ concluded that “particular” could mean “detailed,” and by extension, “detailed” had to mean “enumerated.”<sup>63</sup> The court disagreed.<sup>64</sup> Since the legislature could not possibly have meant for its enabling statutes to be so highly detailed, it stood to reason “particular” must have meant a “class of powers and duties identified in the enabling statute.”<sup>65</sup>

There was a third option. “Particular” can mean “of, relating to, or being a single person or thing.”<sup>66</sup> So “particular” has two different connotations: “relating to . . . a single person or thing,” or “being a single person or thing.” The dictionary that the First DCA cited provides this example: “the *particular* person I had in mind.”<sup>67</sup> While the court focused on the “relating to” aspect of “particular” when formulating its class of powers and duties analysis, the dictionary example emphasized the “single person or thing” aspect of the definition. In this sense of the word, the phrase “implement, interpret, or make specific the particular powers and duties granted by the enabling statute” can be interpreted to mean “implement, interpret, or make specific the [individual, identified] powers and duties granted by the enabling statute.”<sup>68</sup> This interpretation does not require the enabling

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laws because members of Congress do not have to take responsibility for the rules of conduct that eventually emerge from the delegation process.”).

61. *Consol.-Tomoka*, 717 So. 2d at 80.

62. See Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 313 (“Legislation cannot be so specific that it anticipates every eventuality and addresses every detail. If government is to work, agencies must have latitude to ‘fill in the details’ of a statutory program.”).

63. *Consol.-Tomoka*, 717 So. 2d at 79.

64. *Id.*

65. *Id.*

66. *Id.* (citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 847 (10th ed. 1996)); see also *Particular*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/particular> (last visited Feb. 9, 2016).

67. *Consol.-Tomoka*, 717 So. 2d at 79 (citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 847 (10th ed. 1996)).

68. One could also read the statute to say, “implement, interpret, or make specific the [specified] powers and duties granted by the enabling statute.” This interpretation also captures the “single person or thing” aspect of the definition of “particular.” This rendition, however, presents the same problem in that “specified” can also be defined to mean “detailed.” The term “specify” means “to name or state explicitly or in detail.” *Specify*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/specify> (last visited Feb. 9, 2016). When using the definition, “to state . . . in detail,” one ends up with an

statute to be highly detailed in listing the agency's authorized duties and powers; rather, it simply requires that the statute actually identify what the agency's duties and powers are.

The difference between the three options just described is in the degree of specificity required to satisfy section 120.52(8). To illustrate, imagine that your friend is trying to find someone in a particular Starbucks, and you are describing that person to your friend. Under the first option (which was rejected by the First DCA), you would have to describe everything about that person with exactitude in order to identify him accurately: hair, eye color, height, clothing, the precise location of the person in the Starbucks, the GPS coordinates for the Starbucks, etc. Under the second option—the “class of powers and duties” analysis that the First DCA chose—you would sufficiently identify the person if you gave a general description of the individual but failed to tell your friend that the person was in a Starbucks. As long as your description matched that of the person your friend found in the Einstein's down the street, you would satisfy the class of powers and duties analysis. Under the third option, you would still be able to give a general description of the person, thus avoiding the exacting requirements of option one, but you would still have to tell your friend that the person was in “X” Starbucks. On a sliding scale, the first option requires the most specificity, the class of powers and duties option requires the least, and the third option is somewhere in the middle.

It is not clear why the court chose the class of powers and duties analysis over the third option. Both definitions are equally reasonable. But the choice between the two options is incredibly important in section 120.52(8) cases because it underlies the central question: Does the language of the enumerating statute provide the agency with the power to promulgate rules in a particular situation? The answer to the question decides the case. By settling on the class of powers and duties analysis, the court gave agencies the broadest possible rulemaking authority. This would seem to suggest that the decision of *Consolidated-Tomoka* was motivated by a desire to take some of the teeth out of the 1996 Amendments and harmonize them with the Florida courts' pre-1996 practice of allowing agencies broad rulemaking authority.<sup>69</sup> Or perhaps the court only considered the “relating to” aspect of the definition of “particular.” Regardless, the legislature disagreed with the First DCA's interpretation of the 1996 Amendments and immediately altered the statutory language in 1999.

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interpretation of the statute that requires the enabling statute to list the powers and duties granted to agencies in detail.

69. Boyd, *A Traveler's Guide*, *supra* note 16, at 264-70 (discussing wholesale importation of federal standards of review into Florida courts after the 1974 amendments).

#### IV. THE 1999 APA

The legislature made three important changes to section 120.52(8) in 1999—at least for the purposes of this Note.<sup>70</sup> Each of these changes addresses—and reverses—the *Consolidated-Tomoka* analysis. Where the 1996 APA stated that “[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute,”<sup>71</sup> the 1999 APA states, “An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.”<sup>72</sup> The 1999 APA specifically added a clause invalidating the reasoning of *Consolidated-Tomoka*:

No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy.<sup>73</sup>

Finally, the legislature replaced the term “particular” with the more restrictive adjective, “specific.” The 1996 APA stated that “[s]tatutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.”<sup>74</sup> In contrast, the 1999 APA states, “Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.”<sup>75</sup>

#### V. RESPONSE OF THE FLORIDA COURTS TO THE 1999 AMENDMENTS

Two First DCA cases interpreted the 1999 amendments to the APA soon after their enactment: *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*<sup>76</sup> and *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n.*<sup>77</sup> The

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70. The 1999 version of section 120.52(8) has remained unchanged in the current version of the statute. Compare FLA. STAT. § 120.52(8) (2015), with FLA. STAT. § 120.52(8) (1999).

71. FLA. STAT. § 120.52(8) (1996) (emphasis added).

72. FLA. STAT. § 120.52(8) (1999) (emphasis added).

73. *Id.* (emphasis added).

74. § 120.52(8) (1996) (emphasis added).

75. § 120.52(8) (1999) (emphasis added).

76. 773 So. 2d 594 (Fla. 1st DCA 2000).

77. 794 So. 2d 696 (Fla. 1st DCA 2001), *aff'd*, 798 So. 2d 847 (Fla. 1st DCA 2001).

cases were decided within a year of each other (2000 and 2001, respectively). *Save the Manatee Club* largely consists of a truncated version of the *Consolidated-Tomoka* analysis, with minor adjustments to conform the opinion to the 1999 amendments. *Day Cruise*, on the other hand, closely analyzes the 1999 version of section 120.52(8). However, it is *Save the Manatee Club* that has come to dominate Florida court opinions on rulemaking challenges and not the more detailed *Day Cruise* analysis.<sup>78</sup> The following Sections will discuss the facts of the two cases, examine the differences between their analyses of section 120.52(8), and finally conclude with an opinion on which analysis is better to apply in section 120.52(8) rulemaking challenges.

A. Southwest Florida Water Management District v.  
Save the Manatee Club, Inc.

After the legislature amended the APA, the First DCA analyzed the statutory language of section 120.52(8) again in *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*<sup>79</sup> *Save the Manatee Club* concerned the Southwest Florida Water Management District's (the "District's") authority to create exemptions to environmental resource permitting requirements.<sup>80</sup> South Shores Partners, Ltd. ("South Shores") applied "for a permit to develop a 720-acre tract of land in Southwest Hillsborough County."<sup>81</sup> As part of the development project, South Shores wanted "to build a connecting waterway between the [existing] canal system [on the property] and the [Tampa] Bay."<sup>82</sup> The Save the Manatee Club believed that the resulting increase in power boat traffic in this new waterway would "endanger the manatee and its habitat."<sup>83</sup>

The District has the authority to grant either a general permit or an environmental resource permit to a development project, depending on the type of project involved.<sup>84</sup> When granting an environmental resource permit, the District must consider "[t]he impact a proposed development will have on wildlife" as a factor; it does not have to do so when it grants a general permit.<sup>85</sup> The District granted South

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78. As of December 14, 2015, a search of the "Citing References" on WestLaw shows that *Save the Manatee Club* has been cited by forty court opinions. *Day Cruise*, by comparison, has been cited by fifteen court opinions. These numbers do not include citations to either case in DOAH decisions.

79. 773 So. 2d 594 (Fla. 1st DCA 2000).

80. *Id.* at 596.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.*

85. *Id.*

Shores a general permit instead of an environmental resource permit.<sup>86</sup> The District claimed that it had the rulemaking authority to exempt South Shores from the environmental resource permitting requirements because of “grandfather provisions” contained in rule 40D-4.051, Florida Administrative Code, sections (3), (5), and (6).<sup>87</sup> The rule allowed the District to exempt development projects from environmental resource permitting requirements if the development had been approved prior to October 1, 1984.<sup>88</sup>

Save the Manatee Club challenged the grandfather provisions of the rule as an invalid exercise of rulemaking authority.<sup>89</sup> It argued that section 373.414(9), which allows the District to “establish exemptions and general permits,”<sup>90</sup> did not authorize the District to exempt developments from “permitting requirements based solely on prior governmental approval.”<sup>91</sup> The First DCA agreed and found that the grandfather provisions were an invalid exercise of legislative authority because they did not “implement or interpret a specific power or duty conferred by statute.”<sup>92</sup>

#### B. Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass’n

*Day Cruise* was decided less than a year after *Save the Manatee Club*.<sup>93</sup> The Board of Trustees of the Internal Improvement Trust Fund (“Trustees”) proposed a rule that would forbid “cruises to nowhere,” in which cruise ships (i) are anchored or moored to sovereignty submerged lands or (ii) simply pass through waters under the jurisdiction of another state or a foreign country without stopping anywhere.<sup>94</sup> The primary purpose of a “cruise to nowhere” is to allow passengers to “gamble (legally) on the high seas.”<sup>95</sup> The Trustees cited sections 253.03(7), 253.001, 253.03, 253.04, and 253.77, *Florida Statutes* (1999), as well as article X, section 11 of the Florida Constitution, “as the ‘statutes’ the proposed rule would implement.”<sup>96</sup> The

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 596-97.

90. FLA. STAT. § 373.414(9) (1999).

91. *Save the Manatee Club*, 773 So. 2d at 597.

92. *Id.* at 600.

93. *State, Bd. of Trs. of the Internal Improvement Tr. Fund v. Day Cruise Ass’n*, 794 So. 2d 696 (Fla. 1st DCA 2001), *aff’d*, 798 So. 2d 847 (Fla. 1st DCA 2001).

94. *Day Cruise*, 794 So. 2d at 697.

95. *Id.*

96. *Id.*

First DCA found the proposed rule to be an invalid exercise of delegated legislative authority that violated sections 120.52(8)(b) and (c) of the 1999 *Florida Statutes*.<sup>97</sup>

Despite the fact that *Day Cruise* was written less than a year after *Save the Manatee Club*, it only mentioned *Save the Manatee Club* once. And it cited the opinion merely to address the legislature's invalidation of *Consolidated-Tomoka*, not to use it as guidance for interpreting section 120.52(8).<sup>98</sup> The *Day Cruise* majority avoided *Save the Manatee Club* when promulgating its own analysis of the 1999 version of section 120.52(8).<sup>99</sup> The noticeable *lack* of citation to a recent—and precedential—First DCA case is unusual. Thus, it is important to discuss *Day Cruise's* interpretation of section 120.52(8) and how that interpretation differs from *Save the Manatee Club*.

### C. Save the Manatee Club and Day Cruise—A Comparison

A quick glance at *Day Cruise* shows that the *Day Cruise* majority underwent a much more thorough analysis of the statutory language of the 1999 amendments to section 120.52(8) than *Save the Manatee Club*. Both cases addressed the impact that the legislature's amendments to section 120.52(8) would have on rulemaking authority challenges. For ease of reference, the following table illustrates the differences between the 1996 and 1999 versions of the section 120.52(8) “flush-left” provision:

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97. *Id.* at 704. Section 120.52(8)(b) invalidates a rule if the agency exceeds its grant of rulemaking authority, and section 120.52(8)(c) invalidates a rule that “enlarges, modifies, or contravenes the specific provisions of law implemented.” FLA. STAT. § 120.52(8)(b)-(c) (1999).

98. *See Day Cruise*, 794 So. 2d at 699.

99. The concurrence and dissent both cited *Save the Manatee Club* in their opinions. *See id.* at 705-06 (Browning, J., concurring; Allen, C.J., dissenting).



FLA. STAT. § 120.52(8) (1996) (emphasis added).	FLA. STAT. § 120.52(8) (1999) (emphasis added).
<p>A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that <b>implement, interpret or make specific the particular powers and duties granted by the enabling statute</b>. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the <b>particular</b> powers and duties conferred by the same statute.</p>	<p>A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that <b>implement or interpret the specific powers and duties granted by the enabling statute</b>. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious <b>or is within the agency's class of powers and duties</b>, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than <b>implementing or interpreting the specific</b> powers and duties conferred by the enabling statute.</p>

### 1. *The Save the Manatee Club Analysis*

*Save the Manatee Club* addressed the differences between the 1996 and 1999 versions of section 120.52(8) collectively. The court started with the simple statement, “[T]he Legislature has rejected the standard we adopted in *Consolidated-Tomoka*.”<sup>100</sup> It then truncated its analysis in two ways. First, it found the language of section 120.52(8) that limits rulemaking authority to “rules that implement or interpret specific powers and duties granted by the enabling statute . . . clear and unambiguous.”<sup>101</sup> Second, it referred the reader back to *Consolidated-Tomoka* for a full analysis of why the term “specific” in the 1999 APA did not mean “detailed,” just as the term “particu-

100. *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

101. *Id.*

lar” in the 1996 APA did not mean “detailed.”<sup>102</sup> Thus, *Save the Manatee Club* should be read in conjunction with *Consolidated-Tomoka*.

The most important portion of the *Save the Manatee Club* decision boils down to a single statement:

[T]he authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*. Either the enabling statute authorizes the rule at issue or it does not.<sup>103</sup>

At first glance, this quotation seems straightforward. But things are not quite so simple, because the statement’s meaning depends on *Consolidated-Tomoka*.

When read in a vacuum, the quote actually becomes nonsensical because it dismisses the very essence of rulemaking authority challenges. *Save the Manatee Club* states that the enabling statute either authorizes the challenged rule or it does not, as if statutory language is always clear enough to provide this binary switch. This is simply not the case.<sup>104</sup> Rulemaking authority challenges arise precisely due to a fight over “whether the grant of authority is specific *enough*.”<sup>105</sup> As one scholar put it:

[I]f it were possible to devise a clear test to determine the point at which an agency exceeds delegated authority, such a test would have been discovered long ago. A new, more restrictive grant of delegated authority is unlikely to be much easier to define. A statutory intent to delegate less may be clear, but the problems inherent in determining exactly where the boundary lies will undoubtedly remain.<sup>106</sup>

So what exactly did the First DCA mean? It was referring to *Consolidated-Tomoka*’s analysis of the term “particular.” Specifically, the First DCA was referring to its dismissal of an interpretation that treated the word “particular” as synonymous with “detailed.”<sup>107</sup> The problem with interpreting “particular” to mean “detailed”<sup>108</sup> is that an enabling statute will inevitably be more general than the rule produced by the agency.<sup>109</sup> *Save the Manatee Club* reiterated this principle: “A rule that is used to implement or carry out a directive will

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102. *Id.*

103. *Id.*

104. See Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 345-47 (listing pressures that the legislature faces that encourage broad drafting rather than specificity).

105. *Save the Manatee Club*, 773 So. 2d at 599.

106. Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 318.

107. *St. Johns River Water Mgmt. Dist. v. Consol.-Tomoka Land Co.*, 717 So. 2d 72, 79 (Fla. 1st DCA 1998).

108. See *supra* Section III.B.

109. See *Consol.-Tomoka*, 717 So. 2d at 80.

necessarily contain language more detailed than that used in the directive itself. . . . There would be no need for interpretation if all of the details were contained in the statute itself.”<sup>110</sup>

Thus, when read in context, *Save the Manatee Club*'s statement seems to be a reiteration of the First DCA's previous admonition to courts not to interpret the word “specific” in section 120.52(8) as the equivalent of the word “detailed.” Perhaps a clearer statement would have been, “The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is [detailed] enough.” If the quote is read without *Consolidated-Tomoka*'s focus, however, the quote invites judges to avoid invalidating vague, overbroad grants of authority, because to do otherwise would be to ask whether the grant of authority is “specific enough.”<sup>111</sup>

## 2. *The Day Cruise Analysis*

After citing the much-discussed “flush left” paragraph, the *Day Cruise* majority stated:

Under the 1996 and 1999 amendments to the APA, it is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.<sup>112</sup>

This passage breaks down into three questions that determine whether the agency has exceeded its rulemaking authority: first, whether the legislature enacted a specific statute; second, whether the legislature authorized the agency to implement the statute; and finally, whether the “(proposed) rule implements . . . specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.”<sup>113</sup>

The court emphasized that the legislature's recent amendments “to clarify significant restrictions on agencies' exercise of rulemaking authority, and to reject the ‘class of powers and duties’ analysis employed in *Consolidated-Tomoka*” were central to its interpretation of section 120.52(8).<sup>114</sup> The court retained this focus when applying the

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110. *Save the Manatee Club*, 773 So. 2d at 599.

111. *Id.*

112. *State, Bd. of Trs. of the Internal Improvement Tr. Fund v. Day Cruise Ass'n*, 794 So. 2d 696, 700 (Fla. 1st DCA 2001) (footnote omitted).

113. *Id.*

114. *Id.* at 700-01 (footnote omitted).

new language of section 120.52(8) to sections 253.03(7), 253.001, 253.03, 253.04, and 253.77, *Florida Statutes* (1999), as well as article X, section 11, Florida Constitution, the “statutes” that the Trustees claimed granted them the necessary authority to promulgate the proposed rule.<sup>115</sup> The proposed rule in this case was “to preclude the use of sovereign submerged lands for mooring gambling vessels or boats transporting passengers to or from gambling vessels.”<sup>116</sup>

The court first looked at sections 253.03(7)(a) and (b) to see if these statutes granted the Trustees the requisite rulemaking authority for the proposed rule. Section 253.03(7)(a) authorized the Trustees to “creat[e] . . . an overall and comprehensive plan of development concerning the acquisition, management, and disposition of state-owned lands so as to ensure maximum benefit and use.”<sup>117</sup> Since this statutory grant of authority said nothing about the Trustees’ authority to promulgate rules concerning submerged lands, the court determined that this statute did not confer the required rulemaking authority to promulgate the proposed rule.<sup>118</sup>

Section 253.03(7)(b) was even less helpful to the Trustees, because this statutory provision limited the Trustees’ rulemaking authority to certain regulations. The Trustees were only able to promulgate rules concerning the use of sovereignty-submerged land by vessels that involved “regulations for anchoring, mooring, or otherwise attaching to the bottom; the establishment of anchorages; and the discharge of sewage, pumpout requirements, and facilities associated with anchorages.”<sup>119</sup> Additionally, the Trustees were prohibited from adopting rules that “interfere[d] with commerce or the transitory operation of vessels through navigable water.”<sup>120</sup> The court determined through standard statutory construction methods that the restrictions of section 253.03(7)(b) limited the broad grant of authority provided in section 253.03(7)(a).<sup>121</sup> It also determined that the proposed rule exceeded the Trustees’ rulemaking authority because the proposed rule had nothing to do with regulating anchoring or mooring; instead, it had everything to do with prohibiting perfectly legal commerce.<sup>122</sup> Thus, the Trustees had exceeded their rulemaking authority in violation of section 120.52(8)(b).

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115. *Id.* at 697.

116. *Id.* at 701.

117. FLA. STAT. § 253.03(7)(a) (1999).

118. *Day Cruise*, 794 So. 2d at 701.

119. § 253.03(7)(b).

120. *Id.*

121. *Day Cruise*, 794 So. 2d at 701-02 (finding that section 253.03(7)(b), the more specific statutory provision, controlled the more general section 253.03(7)(a) provision because both provisions covered the same subject matter).

122. *Id.* at 702.

The court then analyzed sections 253.03 and 253.04, *Florida Statutes* (1999), and article X, section 11 of the Florida Constitution to see if they provided a specific law that the Trustees were authorized to implement, interpret, or make specific.<sup>123</sup> It stressed that, based on the new statutory language of the 1999 APA, “a general grant [of authority] is sufficient to allow an agency to adopt a rule only when relied upon in conjunction with a specific provision of law to be implemented.”<sup>124</sup> Unsurprisingly, the majority in *Day Cruise* found that these statutes did not direct the Trustees to implement rules about the day cruise industry.<sup>125</sup> “No provision listed as being implemented by the proposed rule purports to authorize—much less specifically to direct—the Trustees to prohibit only certain vessels from mooring on the basis of lawful activities on board (possibly other) vessels once they are on the high seas.”<sup>126</sup>

### 3. Are *Save the Manatee Club* and *Day Cruise* Really in Accord?

The Trustees filed a motion for clarification, rehearing, certification, or rehearing en banc, arguing that the *Day Cruise* decision conflicted with *Save the Manatee Club*. The First DCA denied the motion, stating that its decision was “fully consonant” with *Save the Manatee Club*.<sup>127</sup> The court then quoted the well-known statement from *Save the Manatee Club*:

The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. . . . [T]his question is one that must be determined on a case-by-case basis.<sup>128</sup>

And in this particular case, when the effect of the rule would be to outlaw an entire industry, the First DCA reaffirmed its decision that the legislature would have to provide that power to the Trustees specifically.<sup>129</sup>

The First DCA’s support of *Save the Manatee Club* in *Day Cruise* established that the two decisions were not in conflict. In fact, the cases are sometimes cited together as support for the principle that

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123. See FLA. STAT. § 120.52(8)(c) (1999) (invalidating a rule that “enlarges, modifies, or contravenes the specific provisions of law implemented”).

124. *Day Cruise*, 794 So. 2d at 703 (quoting Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 339).

125. *Id.* at 703-04.

126. *Id.* (footnote omitted).

127. *State, Bd. of Trs. of the Internal Improvement Tr. Fund v. Day Cruise Ass’n*, 798 So. 2d 847, 847 (Fla. 1st DCA 2001).

128. *Id.* (alterations in original) (quoting *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000)).

129. *Id.* at 847-48.

the enabling statute must have a specific grant of authority in order for the agency to have rulemaking authority.<sup>130</sup> However, this Note argues that *Day Cruise* did not actually stand for the same proposition that *Save the Manatee Club* did—namely, that a statute did not have to be “detailed” in order to meet the specificity requirement of section 120.52(8).

Although the second *Day Cruise* opinion quoted *Save the Manatee Club*’s “specific enough” language when it denied the Trustees’ motion, its following explanation was actually centered on the sentence, “[e]ither the enabling statute authorizes the rule at issue or it does not.”<sup>131</sup> The majority in the first *Day Cruise* opinion found that there was absolutely no statutory language that would have given the Trustees the authority to effectively outlaw a whole industry.<sup>132</sup> There was no need to delve into the question of whether the authority granted was “specific enough.” Thus, the court’s statement that its *Day Cruise* opinion was “fully consonant” with *Save the Manatee Club* is only true to the extent that both decisions require that there actually be a statutory provision allegedly granting the rulemaking authority in question.

This Note’s argument is “fully consonant” with the language of the original *Day Cruise* opinion. As quoted above, *Day Cruise* essentially set forth three questions to ask when considering a section 120.52(8) rulemaking challenge: first, whether the legislature enacted a specific statute; second, whether the legislature authorized the agency to implement the statute; and finally, whether the “(proposed) rule implements . . . specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.”<sup>133</sup> The first two questions ask generally whether there is rulemaking authority; if there is not, the agency has exceeded its rulemaking authority in violation of section 120.52(8)(b). The third question asks whether the agency has exceeded the rulemaking authority delegated to it in questions one and two, which is prohibited by section 120.52(8)(c) and the flush-left paragraph.

*Day Cruise* never reached question three, because it found that the legislature had not delegated the Trustees the authority to wipe

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130. See, e.g., *United Faculty of Fla. v. Fla. State Bd. of Educ.*, 157 So. 3d 514, 517 (Fla. 1st DCA 2015); *Fla. Elections Comm’n v. Blair*, 52 So. 3d 9, 12 (Fla. 1st DCA 2010); *Lamar Outdoor Advert.–Lakeland v. Fla. Dep’t of Transp.*, 17 So. 3d 799, 801-02 (Fla. 1st DCA 2009); *Florida v. I.B.*, 891 So. 2d 1168, 1173 (Fla. 1st DCA 2005).

131. *Day Cruise Ass’n*, 798 So. 2d at 847 (quoting *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000)).

132. See *State, Bd. of Trs. of the Internal Improvement Tr. Fund v. Day Cruise Ass’n*, 794 So. 2d 696, 697 (Fla. 1st DCA 2001).

133. *Id.* at 700.

out an entire industry.<sup>134</sup> If the authority to implement the rule does not exist in the first place, there is no logical reason to continue the analysis and ask whether the grant of authority was specific. *Save the Manatee Club*, on the other hand, reached the third question because it determined that the agency had tried to implement a power that did not exist within its specific grant of delegated authority.<sup>135</sup> So *Save the Manatee Club* and *Day Cruise* are in accord only to the extent that they both require a statute to grant specific authority to an agency; otherwise, the analysis in the two opinions is entirely different.

#### 4. *There Are Two Different Rulemaking Authority Analyses—Which Is Better?*

As discussed above, the analyses of *Save the Manatee Club* and *Day Cruise* are substantively different, even if facially they appear the same. These two different analytical paths raise the question of which one to take. This Note argues that the courts should follow *Day Cruise's* analysis rather than *Save the Manatee Club's* analysis. *Day Cruise* undergoes a thorough analysis of section 120.52(8) that remains true to the text of the statute and also adheres to the legislature's intent to restrict agency rulemaking authority. *Save the Manatee Club*, on the other hand, is a truncated analysis that relies exclusively on a case whose reasoning was invalidated by the legislature. While there is nothing wrong with the analysis of *Save the Manatee Club*, the very nature of its truncated analysis subjects it to misinterpretation.

In fact, this is exactly what has happened with *Save the Manatee Club's* "specific enough" quote. Courts have taken the quote at its face value, without interpreting it with *Consolidated-Tomoka* in mind. If the quote is read without a consideration of *Consolidated-Tomoka*, the statement gives judges the opportunity to sustain vague, overbroad grants of authority.<sup>136</sup> In short, the focus in *Day Cruise* is on the restrictions on rulemaking authority set out in section 120.52(8); the focus in *Save the Manatee Club* is on the relationship between the alleged grant of statutory authority and the promulgated rule, with the guidelines set out in section 120.52(8) secondary to the analysis. This is best exemplified in *United Faculty of Florida v. Florida State Board of Education*, which arguably returns to

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134. *See id.* at 704.

135. *Save the Manatee Club*, 773 So. 2d at 600 ("[W]e conclude that the disputed sections of [the] rule . . . are an invalid exercise of delegated legislative authority because they do not implement or interpret any specific power or duty granted in the applicable . . . statute. . . . Because section 373.414(9) does not provide specific authority for an exemption based on prior approval, the exemptions in the rule are invalid.")

136. *See supra* Section V.C.1.

the “class of powers and duties” analysis of *Consolidated-Tomoka* by relying first on the *Save the Manatee Club* quote, and section 120.52(8) second.

VI. THE WOLF IN SHEEP’S CLOTHING:  
*UNITED FACULTY OF FLORIDA V. FLORIDA*  
*STATE BOARD OF EDUCATION*

The United Faculty of Florida (“UFF”) challenged a rule amended by the State Board of Education (“Board”), which revised the “standards and criteria for ‘continuing contracts’ with full-time faculty members employed by Florida College System institutions.”<sup>137</sup> “Continuing contract[s]” are “similar to tenure, and [are] viewed by some as a form of tenure.”<sup>138</sup> Although the term is not expressly defined in the rule that was at issue in the case (rule 6A-14.0411 of the *Florida Administrative Code*), an employee that earns a continuing contract is able to keep his or her job without participating in an annual nomination or reappointment process, with three exceptions: (i) for cause termination; (ii) termination for failure to meet the post-award performance criteria set forth in *Florida Administrative Code* 6AA-14.0411; and (iii) termination due to a change in the institution’s program or the required duties of a position.<sup>139</sup>

Continuing contracts have been regulated by the Board since 1979.<sup>140</sup> In 2013, the Board substantially revised its 2004 version of the rule to regulate these contracts in the following ways:

[The Board i]ncrease[d] the period of satisfactory service necessary for an employee to obtain a continuing contract from three years to five years; prescribe[d] specific performance criteria to be used in determining whether to award or terminate a continuing contract; require[d] periodic performance reviews of employees working under continuing contracts; require[d] each college to develop criteria to measure ‘student success’ and require[d] those criteria to be used in the employee’s performance review; and authorize[d] each college to establish positions that are eligible for multiple-year contracts rather than continuing contracts.<sup>141</sup>

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137. *United Faculty of Fla. v. Fla. State Bd. of Educ.*, 157 So. 3d 514, 516 (Fla. 1st DCA 2015).

138. *United Faculty of Fla.*, Case No. 13-2373RX, 2013 WL 6837574, at \*2 (Fla. Div. Admin. Hearings Dec. 23, 2013); *see also United Faculty*, 157 So. 3d at 516 (describing continuing contracts as a “form of tenure”).

139. FLA. ADMIN. CODE ANN. R. 6A-14.0411(5), (7) (2015). As the 2015 version of the rule is identical to the 2013 version, all citations are to the current version of the rule.

140. *United Faculty*, 157 So. 3d at 516.

141. *Id.*



UFF challenged the rule as an invalid exercise of rulemaking authority and as a violation of the nondelegation doctrine.<sup>142</sup> For the purposes of this Note, only the challenge to the Board's rulemaking authority is pertinent.

The Board cited sections 1001.02(1), 1001.02(6), 1012.83(1), and 1012.855(1)(a), *Florida Statutes*, as the sources of its rulemaking authority.<sup>143</sup> Section 1001.02(1) is a general grant of rulemaking authority.<sup>144</sup> Without this, an agency would never be able to adopt a rule.<sup>145</sup> Beyond its ability to fulfill a threshold requirement, however, section 1001.02(1) does not provide separate rulemaking authority.<sup>146</sup>

Section 1001.02(6) states that “[t]he State Board of Education shall prescribe minimum standards, definitions, and guidelines for Florida College System institutions” for personnel and contracting.<sup>147</sup> Section 1012.83(1) entitles employees to “a contract as provided by rules of the State Board of Education.”<sup>148</sup> Finally, section 1012.855(1)(a) states that employment is “subject . . . to the rules of the State Board of Education relative to certification, tenure, leaves of absence of all types . . . and such other conditions of employment as the State Board of Education deems necessary and proper.”<sup>149</sup>

The ALJ found that only section 1001.02(6) provided the necessary rulemaking authority for the rule.<sup>150</sup> UFF appealed this determination.<sup>151</sup> The *United Faculty* majority<sup>152</sup> found that all of the statutes contained a sufficient grant of rulemaking authority.<sup>153</sup> Its analysis consisted of the following:

Although these latter two statutes [sections 1012.83(1) and 1012.855(1)(a)] are not phrased as affirmative directives to the

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142. *Id.*

143. *See id.* at 517. The 2015 versions of these statutes are identical to the 2013 versions. All citations to these statutes are to the current version.

144. *See* FLA. STAT. § 1001.02(1) (2015) (“[The Board] has authority . . . pursuant to [sections] 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it for the improvement of . . . K-20 public education except for the State University System.”).

145. *See* FLA. STAT. § 120.52(8) (“A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required.”).

146. *See id.*

147. § 1001.02(6).

148. FLA. STAT. § 1012.83(1) (2015).

149. § 1012.855(1)(a).

150. *United Faculty of Fla. v. Fla. State Bd. of Educ.*, 157 So. 3d 514, 516 (Fla. 1st DCA 2015).

151. *Id.*

152. Judge Wetherell wrote the opinion for the court; Judge Makar concurred, and Judge Clark dissented. *See id.* at 519.

153. *Id.* at 516-17.

Board, they clearly indicate that the Legislature intended that the Board adopt rules concerning employment contracts for college instructional personnel and that such rules address “tenure” and other terms and conditions of employment. . . . [I]t is not necessary under *Save the Manatee Club* and its progeny for the statutes to delineate every aspect of tenure that the Board is authorized to address by rule; instead, all that is necessary is for the statutes to specifically authorize the Board to adopt rules for college faculty contracts and tenure, which the statutes clearly do.<sup>154</sup>

There are two important points embedded in this paragraph. First, the majority admitted that sections 1012.83(1) and 1012.855(1)(a) are not “affirmative directives to the Board.”<sup>155</sup> Second, the majority relied on *Save the Manatee Club*’s “specific enough” statement for its determination that the statutes did not have to “delineate every aspect of tenure”<sup>156</sup> in order for the Board to pass a rule (i.e., the grant of rulemaking authority did not have to be detailed). Together, these points show that the courts have returned to the *Consolidated-Tomoka* “class of powers and duties” analysis.

*A. Sections 1012.83(1) and 1012.855(1)(a) Are Not Affirmative Directives to the Board—So Why Continue Discussing Them?*

When the majority admitted that sections 1012.83(1) and 1012.855(1)(a) were not “affirmative directives to the Board,”<sup>157</sup> it was, in essence, stating that the rule enacted by the Board was not implementing or interpreting “specific powers and duties granted by the enabling statute.”<sup>158</sup> Instead, the majority found that the statutes should be interpreted as grants of rulemaking authority to regulate continuing contracts because that must have been what the legislature “intended.”<sup>159</sup> This is in direct conflict with two provisions of section 120.52(8): the insufficiency of a general grant of rulemaking authority and the legislature’s express revocation of the “class of powers and duties” analysis.<sup>160</sup>

First, sections 1012.83(1) and 1012.855(1)(a) do not in and of themselves direct the Board to *do* anything. Section 1012.83(1) entitles employees to contracts, and section 1012.855(1)(a) subjects em-

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154. *Id.* (footnote omitted) (citation omitted).

155. *Id.* at 517.

156. *Id.*

157. *Id.*

158. FLA. STAT. § 120.52(8) (2015).

159. *United Faculty*, 157 So. 3d at 517-18.

160. § 120.52(8); *United Faculty*, 157 So. 3d at 520 (Clark, J., dissenting) (“The lack of explicit legislative authorization for the adoption of this comprehensive rule is fatal to its validity.”); *United Faculty of Fla.*, Case No. 13-2373RX, 2013 WL 6837574, at \*10 (Fla. Div. Admin. Hearings Dec. 23, 2013).

ployees to the rules of the Board in certain employment contexts.<sup>161</sup> Section 120.52(8) states that “[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required.”<sup>162</sup> At most, the statutory text of these provisions supports the conclusion that the Board has authority *elsewhere* in the statute to implement rules for contracts and to enforce those rules against its employees. But sections 1012.83(1) and 1012.855(1)(a) do not contain “a specific law to be implemented.”<sup>163</sup>

Second, sections 1012.83(1) and 1012.855(1)(a) simply set out a “general legislative intent or policy;”<sup>164</sup> namely, that employees have contracts and that those contracts may be subject to the rules of the Board in certain contexts. General legislative intent or policy is not enough to justify agency promulgation of a rule that is related to that general policy.<sup>165</sup> The majority admitted that these provisions were not “affirmative directives to the Board,” and that they simply conformed to the legislature’s intent that the agency promulgate rules concerning employment contracts.<sup>166</sup> After finding that sections 1012.83(1) and 1012.855(1)(a) were not affirmative directives to the Board, the First DCA should have invalidated the rules promulgated by the Board under these statutes.

This result—that sections 1012.83(1) and 1012.855(1)(a) do not collectively provide the requisite rulemaking authority—is not changed by adding section 1001.02(6) to the mix. The *United Faculty* majority rejected the ALJ’s determination that section 1001.02(6) established the proper rulemaking authority by itself.<sup>167</sup> Its holding, in essence, stands for the idea that the whole is greater than the sum of

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161. See FLA. STAT. §§ 1012.83(1), .855(1)(a) (2015).

162. § 120.52(8).

163. *Id.*

164. *Id.*

165. *Id.*; see also *United Faculty*, 157 So. 3d at 520 (Clark, J., dissenting).

166. *United Faculty*, 157 So. 3d at 517.

167. *Id.* Although the *United Faculty* opinion is not the model of clarity, its holding suggests that the *only* way to uphold the proposed rule was to find that the statutory provisions collectively provided the requisite rulemaking authority. The opinion suggests this in two ways. First, the majority stated that the statutes “collectively and in conjunction with section 1001.02(1)” provided the proper rulemaking authority for the proposed rule. *Id.* at 518. Second, the First DCA utilized the tipsy coachman doctrine to uphold the ALJ’s determination. *Id.* The tipsy coachman doctrine states that “if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.” *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). The majority would not have utilized the tipsy coachman doctrine unless the ALJ’s reasoning was erroneous in some way. If section 1001.02(6) were sufficient by itself, it would have been unnecessary to even reach the question of whether the statutes collectively provided rulemaking authority. The only reason to bolster the analysis with sections 1012.83 and 1012.855(1)(a) would be if section 1001.02(6) was insufficient by itself (for some unexplained reason).

its parts—all of the statutory provisions can together provide the rulemaking authority that none can provide individually. However, this requires accepting the idea that zero plus zero somehow equals one. It clearly does not. If 1012.83(1) is insufficient, 1012.855(1)(a) is insufficient, *and* 1001.02(6) is insufficient, then together they still add up to nothing.<sup>168</sup>

*B. Sections 1001.02(6), 1012.83(1), and 1012(1)(a) Do  
Not Have to Delineate Every Aspect of Tenure*

The majority's finding that sections 1001.02(6), 1012.83(1), and 1012.855(1)(a) were grants of rulemaking authority also violates the legislature's explicit revocation of the class of powers and duties analysis set out in *Consolidated-Tomoka*.<sup>169</sup> In doing so, it begs the question: how "specific" does a grant of authority have to be in order to qualify as a grant of rulemaking authority under section 120.52(8)? Section 1001.02(6) specifically allows the Board to create minimum guidelines for contracts but says nothing about what the limitations of those guidelines should be. Neither section 1012.83(1) nor section 1012.855(a)(1) expressly states that the Board can enact rules regarding continuing contracts. In combination, they only reference a legislative intent that "the Board adopt rules concerning employment contracts for college instructional personnel and that such rules address 'tenure' and other terms and conditions of employment."<sup>170</sup>

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168. The way in which the *United Faculty* majority used an amalgam of statutory provisions to create "specific" rulemaking authority is questionable in and of itself. The idea that a mash-up of several different statutory provisions somehow creates a specific grant of rulemaking authority does not appear to conform to the limitations set forth in section 120.52(8). As the First DCA stated in *Day Cruise*:

Under the 1996 and 1999 amendments to the APA, it is now clear, agencies have rulemaking authority only where the Legislature has enacted a *specific statute*, and authorized the agency to implement it, and then *only if* the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.

State, Bd. of Trs. of the Internal Improvement Tr. Fund v. Day Cruise Ass'n, 794 So. 2d 696, 700 (Fla. 1st DCA 2001) (emphasis added) (footnote omitted). This quote suggests that in order to comply with section 120.52(8), the agency must be able to point to a specific provision within a single statute that provides rulemaking authority, not (as the *United Faculty* majority would have it) to a multitude of vague statutory provisions.

169. See § 120.52(8).

170. *United Faculty*, 157 So. 3d at 517 (combining section 1012.83's reference to contracts and section 1012.855's reference to tenure but not contracts).

1. *Section 1001.02(6)*

Section 1001.02(6) states that “[t]he State Board of Education shall prescribe minimum standards, definitions, and guidelines for Florida College System institutions” for personnel and contracting.<sup>171</sup> As discussed above, the majority opinion in *United Faculty* did not explain why the ALJ was incorrect in determining that section 1001.02(6) was sufficient in and of itself to grant the Board rulemaking authority as applied to continuing contracts. If section 1001.02(6) was not sufficient by itself,<sup>172</sup> the majority did not explain why that would be.

Under one reading of the statutory text, section 1001.02(6) is sufficiently broad to encompass continuing contracts under the legislature’s directive that the Board establish minimum standards and guidelines for contracting.<sup>173</sup> Because the legislature directed the Board to establish minimum guidelines for contracting, the legislature did not need to say anything more “specific” in order to create a grant of rulemaking authority.<sup>174</sup> This interpretation highlights a problem inherently intertwined with section 120.52(8)’s mandate that rulemaking authority stem from a specific legislative grant: how much specificity is required in order to find that the legislature has granted the agency rulemaking authority? Here, authorizing the Board to create minimum standards for contracting is a very broad grant of authority, and the legislature did not indicate what the “minimum guidelines” should address. Is that a “specific” power granted to the Board, as section 120.52(8) requires? Finding that section 1001.02(6)’s directive to establish minimum guidelines for contracting is sufficient to create rulemaking authority is arguably in conflict with section 120.52(8)’s provision that “[n]o agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation.”<sup>175</sup>

As the dissent in *United Faculty* noted, just because a rule “is related to the subject of the enabling legislation—personnel and contracting—that is insufficient.”<sup>176</sup> The dissent argued that section 1001.02(6) was not a sufficient grant of rulemaking authority because the legislature only gave a general grant of rulemaking authority without subsequently identifying specific, identified powers or du-

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171. FLA. STAT. § 1001.02(6) (2015).

172. See *United Faculty of Fla.*, Case No. 13-2373RX, 2013 WL 6837574, at \*10 (Fla. Div. Admin. Hearings Dec. 23, 2013) (finding that only section 1001.02(6) provided the necessary rulemaking authority).

173. See *id.*

174. See *id.*

175. FLA. STAT. § 120.52(8) (2015).

176. *United Faculty*, 157 So. 3d at 520 (Clark, J., dissenting).

ties.<sup>177</sup> Thus, a determination that section 1001.02(6) granted the Board rulemaking authority would violate section 120.52(8). Of course, following the dissent's analysis in *United Faculty* could lead to the problem that *Consolidated-Tomoka* and *Save the Manatee Club* advocated against: an implementing statute does not need to be detailed, it just has to be specific. Requiring the legislature to enumerate what exactly constitutes "contracting" may demand more detail than is necessary or mandated by section 120.52(8).

The decision whether section 1001.02(6) is a specific grant of legislative authority is a close call, and it is a perfect example of the difficulties that section 120.52(8) places on the legislature as well as the courts.<sup>178</sup> "Contracting" is a broad, undefined word, and it is by no means clear that "continuing contracts" should fall under that category.<sup>179</sup> It is difficult for the courts to adhere to a strict rulemaking authority standard when the legislature promulgates enabling statutes that walk a thin line between being statements of "general legislative intent or policy" (which are not sufficient to create rulemaking authority) and broadly drafted—yet still specific—powers or duties (which are sufficient).<sup>180</sup> The courts are forced to balance the strictures of section 120.52(8) with the knowledge that the legislature intended to let the agencies do *something*.

However, section 120.52(8) addresses this problem as well: "Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute."<sup>181</sup> Section 120.52(8) places the burden on the legislature to draft clearly. If there is a dispute over whether the legislature actually granted the agency authority for a particular rule, then the court should err on the side of caution and deny deference to the agency.<sup>182</sup> On the sliding scale of specificity,<sup>183</sup> the legislature chose to require *more* specificity, not less. The *United Faculty* dissent was correct; there was nothing specific in the statutory provisions cited by the Board that provided the Board the authority to "develop[] broad policy for continuing contracts for State

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177. *Id.* at 521.

178. See Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 350-51.

179. See *infra* Section VI.B.2.

180. See § 120.52(8).

181. *Id.*

182. See Boyd, *Legislative Checks on Rulemaking*, *supra* note 13, at 351 ("The new legislative check provisions, operating in concert, urge the possibility that policy not clearly established in the statute should simply not be enforced until it is clarified by the Legislature itself.").

183. See *supra* Section III.B. (illustrating the difference between the degree of specificity required under the class of powers and duties analysis and the degree of specificity required under the 1999 Amendments).

university and college faculty.”<sup>184</sup> In a situation in which the legislature says nothing about continuing contracts, section 120.52(8) places the burden on the legislature to draft more clearly and, concurrently, a burden on the courts to narrowly construe legislative grants of rulemaking authority.

## 2. Sections 1012.83(1) and 1012.855(1)(a)

As discussed above, section 1012.83(1) entitles employees to contracts, and section 1012.855(1)(a) subjects employees to the rules of the Board in certain employment contexts.<sup>185</sup> There are two problems with sections 1012.83(1) and 1012.855(1)(a): (1) the failure to classify continuing contracts as a form of tenure or a contract and (2) the uncertain level of specificity required to grant rulemaking authority. This Note addresses each of these problems in turn.

The *United Faculty* majority opinion did not specify whether it considered continuing contracts to be a form of tenure or a “tenure-like” contract.<sup>186</sup> It is more likely that the court considered continuing contracts to be a hybrid.<sup>187</sup> But the position that continuing contracts are a hybrid—both contracts and tenure—is a statutory nightmare for two reasons: (1) “tenure” and “contract” are not defined by the legislature, and (2) “contracts” and “tenure” are mutually exclusive terms in these statutory provisions.

### a. Defining Tenure and Continuing Contract

The legislature did not define “tenure” or “continuing contract.” When the legislature does not define a term, canons of construction take over.<sup>188</sup> Further, when a term is not defined by the legislature, the canons of construction require that the words be given their “plain and ordinary meaning,” allowing the meaning of those words to be derived from a dictionary.<sup>189</sup>

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184. *United Faculty of Fla. v. Fla. State Bd. of Educ.*, 157 So. 3d 514, 521 (Fla. 1st DCA 2015) (Clark, J., dissenting).

185. See FLA. STAT. §§ 1012.83(1), .855(1)(a) (2015).

186. Compare *United Faculty*, 157 So. 3d at 516 (“Continuing contracts . . . are viewed as a form of tenure”), with *id.* at 517 (describing continuing contracts as “tenure-like contracts”). But see *id.* at 520 (Clark, J., dissenting) (stating that “[t]he parties agree that continuing contracts are the equivalent of tenure.”).

187. See *id.* at 517-18 (“[A]ll that is necessary is for the statutes to specifically authorize the Board to adopt rules for college faculty contracts and tenure, which the statutes clearly do.”) (emphasis added).

188. See *Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 204 (Fla. 2003).

189. *Id.* at 204-05.

“Tenure” is “a status granted after a trial period to a teacher that gives protection from summary dismissal.”<sup>190</sup> “Continuing contract” is simply a descriptive phrase: it is a contract that is “continuous” or “constant.”<sup>191</sup> These terms are given further meaning by looking to other statutory provisions.<sup>192</sup> In a separate title of the *Florida Statutes*, the legislature defined “continuing contract” as “a written agreement that is automatically renewed until terminated by one of the parties to the contract.”<sup>193</sup> From a simple comparison of the terms, it appears that tenure can exist without a contract, but a continuing contract is necessarily premised on a contract that does not end.

It is clear from the definitions of “tenure” and “continuing contract” that they overlap, because both make it difficult to terminate the employment relationship. Continuing contracts are different from tenure because continuing contracts are also (surprise) “contracts.” One would expect the legislature to recognize the dual nature of continuing contracts and either put them squarely in (1) the “contract” class, (2) the “tenure” class, or (3) a class unto themselves. In numerous statutory provisions, the legislature had the opportunity to use the words “continuing contracts” or to otherwise clarify the relationship between continuing contracts and tenure. It did not. This suggests that there cannot be rulemaking authority for a concept that is not mentioned anywhere in the statutory text cited by the Board.

### *b. Contracts and Tenure Are Exclusionary Terms*

The statutory text also suggests that contracts and tenure are mutually exclusive: if continuing contracts are classified as “contracts,” they cannot also be “tenure,” and vice versa.<sup>194</sup> Section 1012.83(1) only mentions an employee right to contracts, but section 1012.855(1)(a) distinguishes between tenure and other conditions of employment. Conditions of employment would presumably include contracts (and

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190. *Tenure*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/tenure> (last visited Feb. 9, 2016).

191. *Continuing*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/continuing> (last visited Feb. 9, 2016).

192. *See, e.g.*, *Fletcher v. Fletcher*, 573 So. 2d 941, 944 (Fla. 1st DCA 1991) (finding that courts are to harmonize interpretations of statutes dealing with the same subject matter when possible).

193. FLA. STAT. § 443.091(3)(g)2 (2015).

194. *See Lamar Outdoor Advert.—Lakeland v. Fla. Dep’t of Transp.*, 17 So. 3d 799, 802 (Fla. 1st DCA 2009) (“A subsection of a statute cannot be read in isolation; instead, it must be read ‘within the context of the entire section in order to ascertain legislative intent for the provision’ and each statute ‘must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.’” (quoting *Fla. Dep’t of Env’tl. Prot. v. Contractpoint Fla. Parks*, 986 So. 2d 1260, 1265 (Fla. 2008))).



within that term, continuing contracts), since each employee is entitled to a contract pursuant to section 1012.83(1). The use of the word tenure, as separate from conditions of employment—which encompasses continuing contracts under the term “contracts”—suggests that tenure is a distinct condition of employment that is not included within the term “contracts.”

There would be no tension between sections 1001.02(6), 1012.83(1), and 1012.855(1)(a) if continuing contracts were classified as contracts and tenure was treated as its own separate concept. Section 1012.855(1)(a) is the only statutory provision to mention tenure and the catch-all provision, “conditions of employment.”<sup>195</sup> If “conditions of employment” was interpreted to include “contracts,” and continuing contracts were a form of contract, then there would be no conflict within section 1012.855(1)(a). But this is not the route the majority took.

The majority stated that continuing contracts are a form of tenure, irrespective of the suggestion that the majority may have thought of continuing contracts as both tenure and contracts.<sup>196</sup> By finding that continuing contracts are a form of tenure, the majority put the statutory provisions in conflict. In essence, defining continuing contracts as a form of tenure, or equivalent to tenure, makes section 1012.855(1)(a) redundant. The canons of statutory construction forbid this.<sup>197</sup> Therefore, a finding that tenure was the equivalent of a continuing contract should have led to the exact opposite result in this case: that there could be no rulemaking authority for continuing contracts because of the tension between the terms “tenure” and “contract.”

### 3. *The Specificity of the Statutory Provisions: What Degree of Specificity Is Required Under Section 120.52(8)?*

As previously discussed, the dubious grant of statutory authority in section 1001.02(6) has already raised the issue of how specific a grant of authority needs to be in order to actually grant rulemaking authority.<sup>198</sup> With section 1001.02(6), the legislature arguably created the very class of powers and duties analysis it sought to avoid by

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195. FLA. STAT. § 1012.855(1)(a) (2015).

196. See *supra* Section VI.B.2.

197. See *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198-99 (Fla. 2007) (“[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.” (quoting *Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005))).

198. Section 1001.02(6) states that “[t]he State Board of Education shall prescribe minimum standards, definitions, and guidelines for Florida College System institutions” for personnel and contracting. FLA. STAT. § 1001.02(6) (2015).

drafting the statutory provision too broadly. In the case of sections 1012.83(1) and 1012.855(1)(a),<sup>199</sup> however, the *United Faculty* majority created the class of powers and duties difficulties all on its own. The problem rests in the misuse of *Save the Manatee Club*'s well-known statement: "The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*. Either the enabling statute authorizes the rule at issue or it does not."<sup>200</sup>

When taken out of the defining context of *Consolidated-Tomoka*, the quote can be interpreted to mean that the courts may use very broad statutory language to satisfy the specificity requirement. This is exactly what the court did in *United Faculty* when it determined that mere implications of legislative intent were sufficient to satisfy a grant of rulemaking authority. Unfortunately, not only did the majority in *United Faculty* misconstrue the context in which *Save the Manatee Club* framed the statute, it also ignored the legislature's express prohibition against allowing grants of rulemaking authority that fall within an agency's class of duties and powers. *United Faculty* effectively returned to the *Consolidated-Tomoka* analysis.

#### VII. JUSTIFICATIONS, EXPLANATIONS, AND SOLUTIONS—WHY DID *UNITED FACULTY* RETURN TO *CONSOLIDATED-TOMOKA* AND WHAT CAN BE DONE ABOUT IT?

Although this Note fully expects that *United Faculty*'s decision has reopened the door to the class of powers and duties analysis that the legislature expressly prohibited, is that opinion justified? The short answer is that *United Faculty* is a very recent decision; its effect, if any, on section 120.52(8) challenges remains to be seen. As of yet, only one DOAH decision has cited *United Faculty*.<sup>201</sup> The order did no more than state that *United Faculty* "neatly summarizes the standards for a rule challenge under section 120.52(8)(b),"<sup>202</sup> and find that the Agency for Health Care Administration had met those

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199. Section 1012.83(1) entitles employees to contracts, and section 1012.855(1)(a) subjects employees to the rules of the Board in certain employment contexts. See FLA. STAT. §§ 1012.83(1), .855(1)(a) (2015). Section 120.52(8) states that "[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required." FLA. STAT. § 120.52(8) (2015).

200. Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

201. Bayfront Med. Ctr., Inc., No. 14-4758RU, 2015 WL 1875289 (Fla. Div. Admin. Hearings Apr. 20, 2015).

202. *Id.* at \*14.

standards.<sup>203</sup> Beyond that, however, the order did not analyze *United Faculty* in depth.<sup>204</sup> Thus, only time will tell what impact *United Faculty* will have on section 120.52(8) rulemaking challenges.

*United Faculty*'s return to the *Consolidated-Tomoka* class of powers and duties analysis, despite the fact that the legislature clearly overturned *Consolidated-Tomoka*'s reasoning, raises the question as to why *United Faculty* would essentially ignore a legislative mandate. Section 120.52(8) rulemaking authority challenges often involve close questions about the specificity of statutory language. This Note does not suggest that the court in *United Faculty* was intentionally trying to reach a result contrary to that required by section 120.52(8). Rather, the outcome of *Consolidated-Tomoka* is a combination of the influence of the federal standard of review of agency decisions and the misapplication of the "specific enough" quote from *Save the Manatee Club*. Thus, the courts should return to the *Day Cruise* analysis because of (1) the courts' track record of returning to the federal administrative system every time the legislature has attempted to curb agency discretion and (2) the misapplication of *Save the Manatee Club*. Federal influence on Florida courts' analysis of agency decisions can be seen particularly after the amendments the legislature made in the 1974 APA.<sup>205</sup> After the adoption of the 1974 APA, Florida courts started to import federal administrative law into their analyses wholesale.<sup>206</sup> As a result, the legislature tried again to change the course that the courts had chartered in its 1996 and 1999 amendments.<sup>207</sup> But it appears that federal administrative law has a tremendous pull on Florida courts, and they are still unwilling to follow the legislature's decision to have a less deferential administrative law system.<sup>208</sup>

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203. See *id.* at \*15.

204. See *id.* at \*14-15.

205. See Boyd, *A Traveler's Guide*, *supra* note 16, at 250-56 (describing three models of administration (classical, procedural, and evaluative) and Florida's compilation of the classical and procedural models in the 1974 APA).

206. *Id.* at 263-70.

207. *Id.* at 270 (discussing the success of the 1974 APA and its integration of the classical and procedural models, and stating that "[i]t 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") (footnote omitted).

208. See Jim Rossi, "Statutory Nondelegation": *Learning from Florida's Recent Experience in Administrative Procedure Reform*, 8 WIDENER J. PUB. L. 301, 341-42 (1999) (discussing the 1996 and 1999 APA reforms and stating, "[i]n Florida, something similar to Chevron deference has been endorsed de jure, but given our institutional setup there is a de facto reluctance to apply it across the board"); see also Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 839 (2011) (noting that section 120.536 of the Florida APA, which is the same language of the flush-left paragraph in section 120.52(8), "clearly reflect[s] a more limited view of agencies' powers than *Chevron*").

This trend of the Florida courts to steer back to a broader deference standard—irrespective of the legislature’s mandates—is concerning. It indicates that no matter what the legislature does, the courts will find a way to get around it. In a way, the misapplication of *Save the Manatee Club* and the deliberate avoidance of *Day Cruise* can be seen as the manifestation of that trend.<sup>209</sup> Statements of law and how that law should be implemented can easily be taken out of context, of which the *Save the Manatee Club* quotation is a perfect example. But it is astounding that for *fifteen years*, no one in the Florida courts has questioned the application of that quote in rule-making challenge decisions. It is equally astounding that the judiciary has allowed *Day Cruise*, which is a much narrower interpretation of the 1999 version of section 120.52(8), and *Save the Manatee Club* to stand side-by-side without comment.

Thus, the legislature should not attempt to amend section 120.52(8) again; rather, the judiciary should return to *Day Cruise*. It would be feasible for the courts to adopt the analysis of *Day Cruise*, even at this late date. In fact, the courts could use *Day Cruise* to limit the *Save the Manatee Club* quote.<sup>210</sup> This would at the very least harmonize the two decisions, and the result would probably lead to a stricter adherence to the text of section 120.52(8). So while it seems a legislative amendment would have little to no effect, a conscious choice in the judiciary to return to an already-existing strain of analysis would have that result.

### VIII. CONCLUSION

The line between permissible agency action pursuant to delegated rulemaking authority and an invalid exercise of rulemaking authority can often be a close call. The Florida legislature determined in 1996 and again in 1999 that it would prefer to restrict agency rulemaking authority to those actions that are specifically delegated to the agency. In furtherance of that policy choice, the legislature invalidated *Consolidated-Tomoka*, which would have allowed agency rulemaking authority as long as the promulgated rule fell within the agency’s “class of powers and duties.” *United Faculty* has returned to the *Consolidated-Tomoka* analysis, and as a result, it has once again provided a way for the Florida courts to defer to agency discretion. The court’s return to a broader rulemaking authority standard is

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209. This Note recognizes that *Day Cruise* is often cited in court opinions; however, *Day Cruise* is not usually cited independently of *Save the Manatee Club*. The courts equate the opinions when they cite them together, which, for reasons discussed in Part V, is incorrect.

210. See *Lamar Outdoor Advert.—Lakeland v. Fla. Dep’t of Transp.*, 17 So. 3d 799, 801-02 (Fla. 1st DCA 2009) (citing the *Save the Manatee Club* “specific enough” statement but limiting its opinion with the *Day Cruise* three-part analysis).

due in large part to the misapplication of *Save the Manatee Club's* "specific enough" quotation. If courts recognize how that quote has been misapplied, they can change course and conform with the legislature's intent once again.