

LEGISLATIVE CHECKS ON RULEMAKING UNDER FLORIDA'S NEW APA

F. SCOTT BOYD*

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I. INTRODUCTION

Legislation enacted in 1996 substantially amended Florida's Administrative Procedure Act (APA or the Act).¹ The APA now includes provisions for uniform procedural rules,² summary proceedings,³ and additional opportunities to challenge proposed rules.⁴ It includes new sections on mediation,⁵ negotiated rulemaking,⁶ and

* Senior Staff Attorney, Joint Administrative Procedures Committee, Florida Legislature. B.A., Florida State University, 1974; J.D., Florida State University, 1977; M.P.A., Florida State University, 1990; M.S.S.I., Defense Intelligence College, 1991. The views expressed herein are solely those of the author and are not intended to reflect the views of the Joint Administrative Procedures Committee or the Florida Legislature. The author would like to thank Professor Johnny Burris and Mr. Greg Krasovsky for their comments on an earlier draft of this Article.

1. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147 (codified at FLA. STAT. ch. 120 (Supp. 1996)). Clarifying amendments to the Act were added by chapters 96-320, 96-397, 96-410, and 96-423, Florida Laws.

2. See FLA. STAT. § 120.54(5) (Supp. 1996).

3. See *id.* § 120.574.

4. See *id.* § 120.56(2).

5. See *id.* § 120.573.

6. See *id.* § 120.54(2).

waiver of rules.⁷ The entire Act has been renumbered, reorganized, and simplified.⁸ But the most significant change ultimately may evolve from a series of amendments relating to legislative checks on the rulemaking process. Although these changes have drawn scant attention, they alone have the potential to substantially alter the structure of administrative law in Florida.

This Article reviews the new provisions of the APA that involve legislative direction and oversight of agency rulemaking in Florida. Analysis of these new provisions must be grounded in an understanding of the basic legislative and executive branch prerogatives with respect to rulemaking. Part II of this Article provides a brief overview of the principle of separation of powers and Florida's non-delegation doctrine. The new Act's apparently disparate legislative checks on rulemaking are in fact best understood as elements of a rather ambitious plan to return mid-level policy formulation to the Legislature.

Part III considers several new provisions relating to day-to-day oversight of the rulemaking process. The Joint Administrative Procedures Committee (JAPC) has been given new responsibilities. Not only is JAPC to more closely monitor agency rulemaking, but, for the first time, it also must establish measurement criteria to evaluate whether agencies are complying with delegated legislative authority when adopting and implementing rules. The information gathered by JAPC may later help the Legislature decide whether to tighten or loosen some of the new provisions of the Act.

Part IV discusses the controversial "legislative veto," which provides the context for analysis of the new suspension provisions of the Act. Rule suspension in the APA has been carefully constructed to avoid any question of constitutionality. The suspension provisions signal agencies that rule objections have a new importance and bring information about an agency's refusal to accede to objections made by JAPC to the attention of the legislative leadership.

Part V examines the new limitations on an agency's power to adopt rules, the heart of the plan to return mid-level policymaking to the legislative branch. A brief review of historically competing standards of judicial review sets the stage for the APA's rejection of the more liberal standard. After analyzing the new standard, this Article describes the elaborate plan designed to bring existing rules into compliance.

7. See *id.* § 120.542.

8. General simplification of the Act closely followed a draft prepared by a working group organized by the Executive Office of the Governor and endorsed by the Executive Council of the Administrative Law Section of the Florida Bar. See Donna E. Blanton & Robert M. Rhodes, *Florida's Revised Administrative Procedure Act*, FLA. B.J., July/Aug. 1996, at 30.

Part VI discusses the expressed legislative intent to provide more specific statutory guidance for rulemaking. Inherent pressures exist that compel the Legislature toward generality. These pressures will have to be overcome if this effort is to succeed. Recognizing the need for a more comprehensive revision of statutory delegation provisions, the new APA prompts legislative reconsideration of grants made in the past and establishes a review mechanism for the future.

Finally, Part VII concludes that the formidable goal of shifting the distribution of policymaking authority away from agencies in favor of the Legislature will be difficult to achieve. Meeting this goal will require effort by agencies, administrative law judges, the courts, and the Legislature itself.

II. A MIDSUMMER NIGHT'S DREAM

One major purpose behind the enactment of the APA in 1974⁹ was to eliminate phantom government¹⁰ by curbing administrative agencies that the Legislature perceived were acting beyond their delegated authority. Twenty years later, many legislators were disappointed with the results. Some were convinced that major amendments were again needed to move toward this elusive goal.¹¹ In 1994, each house passed an APA reform bill, but the differences between them could not be fully resolved prior to the end of the legislative session.¹² In 1995, a major reform bill passed both houses but was vetoed by Governor Lawton Chiles.¹³ In 1996, portions of the previous year's bill were combined with recommendations of the Governor's Administrative Procedure Act Review Commission¹⁴ and enacted by the 1996 Legislature.¹⁵ The amendments examined here are best understood as a product of the continuing legislative objective to constrain agencies from adopting rules beyond their dele-

9. See Administrative Procedure Act, ch. 74-310, 1974 Fla. Laws 952.

10. A discussion of the 1974 attempt to combine the classical and procedural models of administration in Florida's APA is contained in F. Scott Boyd, *A Traveler's Guide for the Road to Reform*, 22 FLA. ST. U. L. REV. 247, 257 (1994).

11. For an argument that major amendments were actually not needed, see Stephen T. Maher, *Getting into the Act*, 22 FLA. ST. U. L. REV. 277, 282 (1994).

12. For several different perspectives on the 1994 attempts to amend the APA, see Boyd, *supra* note 10; Maher, *supra* note 11; Sally B. Mann, *Reforming the APA: Legislative Adventures in the Labyrinth*, 22 FLA. ST. U. L. REV. 307 (1994); Lawrence E. Sellers, Jr., *1994 Proposals for Rulemaking Reform*, 22 FLA. ST. U. L. REV. 327 (1994); David Gluckman, *1994 APA Legislation: The History, The Reasons, The Results*, 22 FLA. ST. U. L. REV. 345 (1994). At least 17 APA bills were filed in 1994. See *A Brief History of Selected APA Bills in the 1994 Session*, 22 FLA. ST. U. L. REV. 355 (1994).

13. See *Veto of Fla. CS for CS for SB 536 (1995)* (letter from Gov. Chiles to Sec'y of State Sandra B. Mortham, July 12, 1995) (on file with the Sec'y of State, The Capitol, Tallahassee, Fla.).

14. See generally *GOV.'S ADMIN. PROC. ACT REV. COMM'N, FINAL REPORT (1996)* (proposing recommendations for APA revisions).

15. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147.

gated authority.¹⁶ Before examining specific provisions of the new APA, some background information on the separation of powers and the delegation of legislative authority must be considered.

A. Constitutional Limits

The purpose of separation of powers was best described by James Madison.¹⁷ He wrote, “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”¹⁸ Separation of powers was deeply rooted in the political philosophies of Locke and especially Montesquieu, and was a foundation for the text or interpretation not only of the Constitution of the new nation, but also those of all fifty of its states.¹⁹ The doctrine continues to shape our legal system.²⁰

The philosophy of Montesquieu takes form in article II, section 3 of the Florida Constitution: “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any of the powers appertaining to either of the other branches unless expressly provided herein.”²¹ The Florida Constitution goes on to vest the lawmaking power in the two houses of the Florida Legislature.²² The constitution provides limited executive involvement in the lawmaking power in its gubernatorial veto provisions,²³ but contains no grant of quasi-legislative power to administrative agencies.²⁴

16. For a detailed historical review of the Legislature’s continuing efforts, see Dan R. Stengle & James P. Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415, 417-46 (1993).

17. In the Federalist Papers, Madison argued for a flexible conception in the division of government power to gain support for the Constitution. He later championed an even more explicit separation of powers amendment based upon the Massachusetts provision. See Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court’s Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 590-92 (1990).

18. THE FEDERALIST NO. 47, at 244 (James Madison) (Gary Wills ed., 1988).

19. See *infra* notes 104-06 and accompanying text. For a good general discussion of the separation of powers doctrine as a mechanism for restructuring power in the state constitutions, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 150-61 (1969).

20. The phrase “separation of powers” occurs in 10,741 federal and state cases decided since 1944. Search of WESTLAW, Allcases Database (Nov. 12, 1996) (search: “separation of powers” & da(aft 1944)).

21. FLA. CONST. art. II, § 3.

22. See *id.* art. III, § 1.

23. See *id.* art. III, § 8.

24. Cf. *id.* art. V, § 1 (“Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices.”).

Despite this stringent limitation, Florida courts have found the delegation of some lawmaking power to administrative agencies inevitable.²⁵ This exception allowing delegated rulemaking is not based upon conceptual distinction, but upon practical reality.²⁶ 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.²⁷ The power to adopt rules is not inherent in the executive branch, however; therefore, the Legislature must delegate this lawmaking power.²⁸

Nevertheless, the Florida Supreme Court also has stated that there are limitations on the Legislature's ability to delegate lawmaking power.²⁹ Cases over the years have referred to the need for delegations to contain "an intelligible principle,"³⁰ have "adequate standards to guide the ministerial agency,"³¹ have "objective guidelines and standards,"³² be "accompanied by adequate guidelines,"³³ or have "reasonably definite standards."³⁴ In a frequently quoted passage on

25. See, e.g., *Jones v. Kind*, 61 So. 2d 188, 190 (Fla. 1952) ("It was necessary to delegate the authority and power to effectuate the legislative purpose and policy to some agency."). In his oft-quoted dissent in *INS v. Chadha*, 462 U.S. 919 (1983), Justice White stated that "[t]here is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term." *Id.* at 986 (White J., dissenting).

26. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989). "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly 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." *Id.*; cf. *State v. Atlantic Coast Line R.R. Co.*, 47 So. 969, 982-84 (Fla. 1908).

27. See *Department of Legal Aff. v. Rogers*, 329 So. 2d 257, 269 (Fla. 1976) (Florida's "little FTC act" not unlawful delegation of legislative authority; agency may flesh out law to create specific prohibitions); *Atlantic Coast Line*, 47 So. at 976 (railroad commission authorization to prevent abuses, unjust discriminations, and excessive charges not unlawful delegation; commission could adopt rules for complete operation of the law).

28. See *Grove Isle, Ltd. v. Department of Env'tl. Reg.*, 454 So. 2d 571, 573 (Fla. 1st DCA 1984) (administrative bodies have no inherent power to promulgate rules and must derive that power from a statutory base).

29. See *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 819 (Fla. 1983). Professor Johnny C. Burris has termed the Florida courts' treatment of delegation issues the "pragmatic approach." Johnny C. Burris, *Administrative Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 7, 11 (1991). He notes that judicial inquiries are "designed to assure in a minimalistic fashion that the Legislature and not administrative agencies are making fundamental policy decisions." *Id.*

30. *Phillips Petroleum Co. v. Anderson*, 74 So. 2d 544, 547 (Fla. 1954) (invalidating municipal zoning ordinance as unconstitutional delegation of legislative power).

31. *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273, 275 (Fla. 1962) (invalidating portion of statute delegating authority to alter, restrict, or modify terms of an automobile transportation brokerage license).

32. *High Ridge Mgmt. Corp. v. State*, 354 So. 2d 377, 380 (Fla. 1978) (invalidating statute delegating authority for rating of nursing homes).

33. *Smith v. State*, 537 So. 2d 982, 986 (Fla. 1989) (invalidating legislative delegation to the court to set substantive sentencing guidelines).

34. *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994) (invalidating statute delegating agency authority to define restrictiveness levels).

delegation, the court expressed the limits of delegated rulemaking power: "Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy."³⁵ The purpose of the statutory guidelines, then, is to establish public policy, so that a court may have a standard against which to evaluate the agency's rules. Without such guidelines, the courts proclaim,³⁶ a statute attempting delegation is itself invalid.

The distinction, however, between establishing public policy and filling in details is not always easy to see. In one sense, all of the statutes mentioned above contained some general guideline, but the statutes were nevertheless invalidated because the Florida Supreme Court realized that too broad a standard is illusory and delegates the choice of basic policy to the administering agency.

B. Policy Concerns

The details routinely left for agency explication are not mere technical issues without policy impact. The hordes of lobbyists targeting executive branch agencies make it impossible to deny the political nature of agency decisionmaking. This is an inevitable result of the delegation of power. As Professor Theodore J. Lowi succinctly put it, "politics will always flow to the point of discretion."³⁷ The process restraints of administrative procedure acts have been imposed largely because of the political nature of agency decisionmaking. As one able observer of the administrative process noted, "[i]ncreasingly, the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision."³⁸ Indeed, the very structure of many agencies reflects a deliberate attempt to create a politically responsive decisionmaking process to serve in lieu of specific policy direction from the Legislature.³⁹ However, a surrogate political process can never be a fully

35. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 920 (Fla. 1979) (invalidating statute authorizing agency to determine lands subject to protective regime).

36. Professor Burris notes that despite the courts' rhetoric, they seldom find statutes unconstitutional. See Burris, *supra* note 29, at 11-12.

37. Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 297 (1987).

38. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975).

39. See Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). Professor Jim Rossi warns that some of the 1996 amendments to Florida's Act may prematurely legalize the rulemaking process and so undermine the political aspects of rulemaking. See Jim Rossi, *The 1996 Revised Florida Ad-*

satisfactory substitute for the general consensus possible when the Legislature itself establishes policy. The imperfect, but still effective, constitutional structures that pit one interest group against another, one branch of government against another, one political party against another, and one legislative house against another, do not operate at the administrative level.⁴⁰

One serious concern is that the delegation of policy questions to an administrative agency may enhance the power of regulated industries or of other special interests at the expense of the overall public good.⁴¹ This may result from the relatively narrower focus of the agency on a single area of the law that can make it impossible to evaluate proposed programs in a broader context. With delegation, each separate agency controls the political process relating to a given set of issues, and the interest groups concerned with those issues are able to exert their influence unopposed by more general interests.⁴² In what might be viewed as an attempt to artificially broaden agency perspective, legislation has been filed in Florida over the years requiring agencies to give specific consideration in their rulemaking to economic impact,⁴³ small businesses,⁴⁴ family values,⁴⁵ and small counties and cities.⁴⁶

ministrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies, 24 FLA. ST. U. L. REV. 283, 305 (1997).

40. For a discussion of safeguards against factions built into the legislative process, see David Schoenbrod, Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine, 36 AM. U. L. REV. 355, 371 (1987).

41. A number of commentators have asserted "capture" of administrative agencies by regulated industries or other special interest groups. See, e.g., Richard B. Stewart, Madison's Nightmare, 57 U. CHI. L. REV. 335, 354 (1990); Bernard Schwartz, Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power, 72 NW. U. L. REV. 443, 449-50 (1977).

42. See Schoenbrod, *supra* note 40, at 374. ("Delegation creates balkanization in which factions can avoid facing each other in one legislative process. Instead we create a separate administrative process for each major faction.")

43. The APA as enacted in 1974 did not have an Economic Impact Statement (EIS). The following year, the Florida Economic Impact Disclosure Act of 1975 was passed, see Fla. CS for HB 874 (1975), but vetoed by Governor Reubin Askew, see Veto of Fla. CS for HB 874 (1975) (letter from Gov. Askew to Sec'y of State Bruce A. Smathers, June 27, 1975) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.). The bill was passed into law over the veto the following year and became chapter 76-1, Florida Laws. After extensive discussion between the executive and legislative branches, the 1976 Legislature repealed chapter 76-1 and replaced it with a bill containing amendments to chapter 120, which was signed into law by the Governor. See Act effective July 1, 1976, ch. 76-276, 1976 Fla. Laws 750. Since that time, the EIS requirement has been amended several times. The EIS was ultimately replaced with the Statement of Estimated Regulatory Costs. See Act effective Oct. 1, 1996, ch. 96-159, § 11, 1996 Fla. Laws 147, 171-72 (codified at FLA. STAT. § 120.541 (Supp. 1996)).

44. See FLA. STAT. § 120.54(2)(a) (1995) (amended 1996). The Legislature enacted a statute requiring consideration of the effect of rules on small business in 1985 as part of the Florida Small and Minority Business Assistance Act, ch. 85-104, 1985 Fla. Laws 627.

45. In 1996, Committee Substitute for Senate Bill 424 would have required agencies to consider the impact of proposed rules on the family. See Fla. CS for SB 424 (1996). The

The challenge is to decide how much delegation should be allowed. This is an important question. The United States and Florida constitutions require at least a majority vote of both houses of a representative legislative body and the approval of the chief executive as a prerequisite to adoption of public policy. This significant hurdle is not simply a matter of parliamentary procedure. The procedure reflects a profound understanding that, in the long run, a government that acts to implement policies unsupported by general consensus ceases to be a democracy and will eventually become unstable. The process was not designed to be efficient, but to achieve other goals,⁴⁷ one of which was to prevent the adoption of controversial policies not enjoying broad public support.⁴⁸ Delegation of the power to make policy decisions from a democratically elected legislative branch to any entity able to act in the absence of consensus reduces the power of democratic institutions and divorces the government from the people.⁴⁹ One result may be an increase in public frustration with government arising from perceived lack of control.⁵⁰

C. Statutory Goals

The nondelegation doctrine is used to evaluate statutes.⁵¹ The doctrine prescribes the maximum extent to which the lawmaking

Bill passed the Legislature, but was vetoed by Governor Chiles. See Veto of Fla. CS for SB 424 (1996) (letter from Gov. Chiles to Sec'y of State Sandra B. Mortham, May 31, 1996) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.).

46. Under a new provision in section 120.54, Florida Statutes, an agency is for the first time required to consider the impact of its rulemaking upon small counties and small cities. See FLA. STAT. § 120.54(3)(b)(2) (Supp. 1996).

47. For an interesting discussion applying economic analysis techniques to the purpose and effect of logrolling, majority voting rules, and bicameral legislatures, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 119-249 (1962).

48. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting):

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

49. See generally JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978) (reviewing the power of agencies and that power's effects on the public).

50. Professor Theodore J. Lowi is perhaps the most persistent and articulate advocate of the view that excessive delegation is a major cause of public dissatisfaction with government, among other ills. See Lowi, *supra* note 37, at 320. While there are no precise figures measuring Floridians' specific distrust of their state government, they seem to share other Americans' general lack of trust in government. See Robert Putnam, *A Generation of Loners?*, in *THE WORLD IN 1996*, at 60, 60 (Dudley Fishburn ed., 1995) (reporting that the percentage of Americans who said that they trusted their government "to do what is right most of the time" stood at 75% in the 1950s, but has steadily declined, and is barely 20% today). A 1995-1996 poll similarly reports that only 18% of Floridians think one can trust government—local, state, and federal—to do what is right "just about always" or "most of the time." FLORIDA INT'L U., *FLORIDA POLL RESULTS 67-1 to 67-3* (1996).

51. See *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978).

power may be delegated to an agency of the executive branch.⁵² However, while the Florida Constitution authorizes delegation of the power to adopt rules,⁵³ it does not require it. The cases recognize that within constitutional limits, delegation is a matter of political choice. In *Askew v. Cross Key Waterways*,⁵⁴ the Florida Supreme Court, describing the constitutional provisions assigning lawmaking power to the Legislature, declared: "We believe that one of the legislative powers granted by these provisions is the power to determine the amount of discretion an administrative agency should exercise in carrying out the duties granted to it by the legislature."⁵⁵ Thus, Florida may choose to delegate less rulemaking authority to its administrative agencies, or may choose to delegate no rulemaking authority at all.⁵⁶ In the new APA, Florida has expressed its intent to delegate less authority for agencies to formulate policy by rule.⁵⁷ The Legislature has created a stricter test to be applied in determining the validity of agency rules by requiring more specific statutory authority than that minimally required by the Florida Constitution.⁵⁸

The new statutory test is applied to rules, not to statutes.⁵⁹ But the intended effect of the statutory rulemaking provision differs

52. See *id.*

53. See discussion *supra* Part II.A (discussing the constitutional standards requirement).

54. 372 So. 2d 913 (Fla. 1978).

55. *Id.* at 923.

56. See *Commission on Ethics v. Sullivan*, 500 So. 2d 553, 555 (Fla. 1st DCA 1986) (commission determined to have no authority to adopt substantive rules in absence of statutory grant).

57. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147.

58. See *id.* § 3, 1996 Fla. Laws at 152 (codified at FLA. STAT. § 120.52(8)(g) (Supp. 1996)).

59. Given the related purposes of the nondelegation doctrine and certain APA requirements, it is sometimes hard to keep them conceptually distinct. A few cases have even suggested that the test for constitutionality is somehow altered by the disciplines of the APA. See *Department of Rev. v. Nu-Life Health and Fitness Ctr.*, 623 So. 2d 747, 751 (Fla. 1st DCA 1993); *Albrecht v. Department of Env'tl. Reg.*, 353 So. 2d 883, 886 (Fla. 1st DCA 1978); *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1065-67 (Fla. 1st DCA 1977), *aff'd*, 372 So. 2d 913 (Fla. 1978); *cf. Yakus v. United States*, 321 U.S. 414 (1944). While the nondelegation doctrine and the APA share certain policy goals, the idea that the existence of rules or the APA itself could have any effect upon the constitutional validity of a statute is difficult to understand. If a statute purporting to delegate the lawmaking power to an agency is beyond the constitutional power of the Legislature, how can another act (the APA) passed by that same legislative body increase the Legislature's constitutional authority? Can the Legislature enact a statute authorizing it to delegate notwithstanding the constitutional restriction? It is even more bewildering to suggest that the subsequent adoption of a rule by an agency can somehow "save" an otherwise unconstitutional statute. The constitutionality of a statute delegating authority must depend solely upon the terms of the statute and the breadth of the constitutional restriction. The test for constitutionality of a statute must remain unaffected by anything that takes place later: the way the statute may be implemented by an agency; the enactment, amendment, or repeal of an APA; or the extent to which the statute was "refined" through rulemaking. *Cf. B.H. v.*

from the constitutional nondelegation doctrine only in degree, not in direction. The nondelegation doctrine compels the Legislature to enact more detailed laws in response to judicial invalidation of extremely broad delegations of legislative authority. The new rulemaking provision is intended to compel the agency to return to the Legislature for more detailed laws as a response to an invalidation of rules by the Division of Administrative Hearings (DOAH) based upon very broad delegations of legislative authority.

This decision to delegate less is a deceptively simple solution to the perceived problem of administrative agencies exceeding their delegated authority. In fact, it comes with a host of potential problems. First, unless rulemaking is completely prohibited, some level of authority for an agency to adopt policy by rule will still exist. It reasonably might be supposed that the very pressures that before resulted (from the legislative perspective) in an agency going beyond its (larger) grant of authority will still remain. Thus, is it not predictable that the decision to delegate less will similarly result in the agency going beyond its new (smaller) grant of authority? There might even be additional excesses as an agency adjusts to the new stricter standard.

Second, if 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.

A third problem concerns existing rules. Delegation of less authority to adopt rules has no immediate effect upon the thousands of administrative rules currently in effect. If they are all simply grandfathered in as valid rules, the effect of less delegation is tremendously diminished. If they are all declared immediately invalid, great disruption in government programs results.

Finally, not only must agencies redraft rules, but the Legislature also must redraft statutes. The concept of less delegation is linked to the requirement that the Legislature give more policy direction in enabling legislation. If the Legislature declines to delegate very broad power, the agency will be unable to establish the mid-level policy that in the past has been adopted by rule.⁶⁰ The burden will

State, 645 So. 2d 987, 994 (Fla. 1994) ("In simple terms, the language of the statute itself wholly fails to give notice of the prohibited act. The fact that an agency rule may attempt to fill the gap is not a relevant concern . . ."). This is not to say, of course, that a constitutional statute may not be applied unconstitutionally.

60. An agency willing to admit that it had no delegated authority to adopt a particular policy by rule might make the argument that it still had authority to implement the

then fall on the Legislature to provide this guidance if the legislative program is to be effectively implemented. This may be difficult for the Legislature. Also, there is again the problem of existing statutes. Must they all be repealed or rewritten to provide additional guidance? What process should the Legislature use to review existing statutory delegations?

In the provisions discussed in this Article, the Legislature has tried to address some of the problems mentioned herein and has accepted the challenge of returning mid-level policy formulation to the Legislature. It is indeed a formidable dream.

III. MEASURE FOR MEASURE

The 1996 amendments to the APA and to the statute governing the operation of the JAPC⁶¹ attempt to improve legislative oversight of the rule adoption process. JAPC already is active in this function,⁶² and the amendments do not fundamentally change its role.⁶³ JAPC has new responsibility to establish measurement criteria,⁶⁴ maintain a continuous review of agency procedure,⁶⁵ and certify that an agency has responded to committee inquiries.⁶⁶

A. Measurement Criteria

The Legislature has long been concerned that executive branch agencies not exceed their delegated powers when adopting rules.⁶⁷

policy and that the lack of rulemaking power simply proved it was not "practicable" or "feasible" to adopt it by rule. This argument has a superficial appeal, but the APA does not define "practicable" or "feasible" in this way. See FLA. STAT. § 120.54(1)(a) (Supp. 1996). Section 120.57(1)(e)(2)(b), Florida Statutes, also expressly provides that an "unadopted rule" cannot "enlarge, modify, or contravene the specific provisions of law implemented," which is exactly the same standard applied to rules and explained in such detail by the amendments. *Id.* § 120.57(1)(e)(2)(b). Most importantly, this interpretation of the Act would be contrary to the overall legislative intent to prevent agencies from going beyond the bounds of delegated authority to formulate and execute unintended and undesirable policies. The provisions of former section 120.535, Florida Statutes, are now found in sections 120.54(1)(a), 120.56(4), 120.595(4), 120.80(13)(a), and 120.81(3)(a). See ch. 96-159, § 10, 1996 Fla. Laws at 160-61; *id.* § 16, 1996 Fla. Laws at 182-83; *id.* § 25, 1996 Fla. Laws at 196; *id.* § 41, 1996 Fla. Laws at 208-09; *id.* § 42, 1996 Fla. Laws at 211.

61. See FLA. STAT. § 11.60 (Supp. 1996).

62. Chapter 74-310, Florida Laws, created JAPC, required agencies to file rules and supporting documents with JAPC, gave JAPC the authority to object to certain rules, and required agencies to respond to those objections. See Administrative Procedure Act, ch. 74-310, §§ 1, 2, 1974 Fla. Laws 952, 958, 972 (codified as amended at FLA. STAT. §§ 11.60, 120.54(3)(a)(4), .545 (Supp. 1996)).

63. For a discussion of the new rule suspension procedures, which might be considered a new function for the committee, see discussion *infra* Part IV. For a discussion of the committee's new responsibility to review statutes authorizing agencies to adopt rules, see discussion *infra* Part VI.

64. See FLA. STAT. § 11.60(2)(m) (Supp. 1996).

65. See *id.* § 11.60(2)(l).

66. See *id.* § 120.54(3)(e)(4).

67. See *supra* text accompanying notes 9-16.

However, it is hard to determine exactly when and to what extent Florida agencies exceed delegated authority. Constituents bombard their legislators with specific tales of abuse,⁶⁸ but these complaints provide little information of a systemic nature. It would be easier to determine if periodic adjustments to Florida's administrative law system were needed if there were a more structured and continuous monitoring process in place.

One step toward implementing a monitoring process for the exercise of administrative powers is found in section 11.60, Florida Statutes. This section now provides that JAPC shall "[e]stablish measurement criteria to evaluate whether agencies are complying with the delegation of legislative authority in adopting and implementing rules."⁶⁹ This will be a difficult task. The nature of the criteria and the means of collecting data⁷⁰ are not yet clear.⁷¹ Still, several preliminary observations are possible. First, the phrase "measurement criteria" suggests some sort of quantitative yardstick against which agency rulemaking can be evaluated. Such a measure could never be completely objective, but nevertheless it could provide a valuable tool to indicate agency and statewide trends.

Second, the statute directs the committee to measure agencies' compliance with authority not only in adopting, but also in implementing rules.⁷² Concern with implementation of rules is relatively new ground for JAPC. In the past, JAPC oversight has focused on the adoption of rules, not on how a rule is actually implemented after it has been adopted. This may prove to be the most challenging part of the new assignment.

Most importantly, the new requirement indicates a desire to establish a statistical measure of compliance with delegated authority. While the measure is likely to be crude, it still should provide a valuable supplement to the anecdotal information that has to this point been the only information available for legislative consideration. In directing JAPC to adopt these criteria, the Legislature has

68. In response to a perceived rise in constituent complaints, the House of Representatives Select Committee on Agency Rules and Administrative Procedures was established in late 1992 to investigate citizen interaction with agencies and prepare necessary legislation. See FLA. H.R. JOUR. 7 (Org. Sess. 1992). The Select Committee held a number of public hearings throughout Florida that elicited numerous complaints about agency administrative actions. The following year, the Senate created a Senate Select Committee on Governmental Reform, which was given a similar mission. See Mann, *supra* note 12, at 309.

69. FLA. STAT. § 11.60(2)(m) (Supp. 1996).

70. JAPC is sent detailed information from the agency on each rule that is adopted, see *id.* § 120.54(3)(a), receives copies of all rule challenge petitions filed, see *id.* § 120.56(1)(c), and may request additional information from an agency, see *id.* § 120.545(2). JAPC may determine that it also needs to seek information from other sources.

71. At the time this Article was being prepared for publication, JAPC had not yet examined this problem.

72. See FLA. STAT. § 11.60(2)(m) (Supp. 1996).

expressed a desire to have more information about what happens after a statute is passed and an agency adopts its rules. Whatever criteria are adopted, they will undoubtedly be refined over time. One factor that might reasonably be included would be the number of complaints reviewed by JAPC.

B. Review of Complaints

JAPC is required to examine each proposed rule⁷³ and is authorized to examine any existing rule.⁷⁴ JAPC has always welcomed information and comments from any person about a specific rule or about the rulemaking process, either in a particular case or a more general setting.⁷⁵ If a rule is determined to violate the criteria set forth in section 120.545(1), Florida Statutes, it is JAPC's responsibility to object.⁷⁶ JAPC cannot decline to do so based upon the source of the information leading to examination of the rule.⁷⁷ In this sense, JAPC has always received citizen complaints. Section 11.60(2)(l), Florida Statutes, now also requires that JAPC "[m]aintain a continuous review of the administrative rulemaking process, including a review of agency procedure and of complaints based on such agency procedure."⁷⁸ JAPC review of a rule has always included a review of the procedures followed when adopting the rule. This review ensures that all statutory requirements were met. However, the first phrase of the new statute seems to place more emphasis on the rulemaking process itself than on the review of any particular rule.

Complaints about agency rulemaking procedure will certainly include complaints about procedures that were not violations of any specific statutory rulemaking requirement. The new charge to JAPC, therefore, slightly expands the concern of JAPC beyond violations of legally required procedures. An agency following all required procedures can still generate complaints from people who believed the procedures were inadequate to address their concerns, failed to give them sufficient opportunity for participation, or were simply unfair. While these individuals may have no immediate legal recourse, JAPC can at least document their concerns.

This emphasis on the overall rulemaking process, as well as the phrase "continuous review," may be intended to provide a constant

73. See *id.* § 120.545(1).

74. See *id.*

75. On numerous occasions, citizen complaints or concerns about a rule have prompted JAPC to review existing rules. Occasionally, these reviews result in formal rule objections.

76. See FLA. STAT. § 120.545(1) (Supp. 1996).

77. See *id.*

78. *Id.* § 11.60(2)(l).

source of information upon which to base possible future changes to the APA. JAPC may wish to include the results of its continuous review as part of its annual report.⁷⁹

C. Certification

In conducting its examination of an agency rule, JAPC frequently sends comments and questions⁸⁰ to the agency. These comments and questions alert the agency that JAPC has concerns about the rule. Often, the agency can make technical or substantive changes⁸¹ and resolve these potential committee objections before the rule is adopted. Most agencies promptly respond to letters sent by JAPC, stating that they agree with the JAPC comment and will change the rule, that they disagree with the comment and decline to change the rule, or that they invite further dialogue on the rule to resolve the concerns. With some complicated rules, numerous letters are exchanged between JAPC and the agency. A few agencies, however, have simply not responded to letters from JAPC.⁸²

A provision requiring JAPC to certify that the agency had responded to all JAPC inquiries before a rule could be filed for adoption was included in the vetoed 1995 bill,⁸³ and was enacted as part of the new legislation.⁸⁴ Section 120.54(3)(e)(4), Florida Statutes, now provides:

At the time a rule is filed, the committee shall certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The [Department of State] shall reject any rule not filed within the prescribed time limits; that does not satisfy all statutory rulemaking requirements; upon which an agency has not responded in writing to all material and timely written inquiries or written comments; upon which an administrative determination is

79. Section 11.60, Florida Statutes, requires JAPC to submit an annual report and mandates that certain information be included. See *id.* § 11.60(2)(f). JAPC is not specifically required to include the results of the continuous review as part of this report. See *id.*

80. Section 11.60, Florida Statutes, provides that in reviewing a rule, JAPC must advise the agency of its findings. See *id.* § 11.60(2). Section 120.545, Florida Statutes, also states that "the committee may request from an agency such information as is reasonably necessary for examination of a rule." *Id.* § 120.545(2).

81. Section 120.54, Florida Statutes, provides that an agency may make substantive changes to a rule in response to a proposed objection by JAPC. See *id.* § 120.54(3)(d)(1).

82. In testimony given before the Senate Select Committee on Governmental Reform in 1994, Carroll Webb, executive director of JAPC, noted the difficulty in getting a few agencies to respond to the committee. See Fla. S. Select Comm. on Govtl. Reform, tape recording of proceedings (Feb. 24, 1994) (on file with comm.) (comments of Carroll Webb).

83. See Fla. CS for CS for SB 536 (1995).

84. See Act effective Oct. 1, 1996, ch. 96-159, § 10, 1996 Fla. Laws 147, 166 (codified at FLA. STAT. § 120.54(3)(e)(4) (Supp. 1996)).

pending; or which does not include a statement of estimated regulatory costs, if required.⁸⁵

If the Department of State (DOS) rejects a rule for any reason, there is no provision in the APA prohibiting resubmission of the rule after the problem has been corrected. In the meantime, the statutory deadline for filing rules continues to run.⁸⁶ If the time expires before DOS accepts the rule, the rule must be withdrawn.⁸⁷

Under the new certification provision, the authority and responsibility to reject the rule is vested solely with DOS and is predicated upon a factual determination. Regardless of the content or lack of a certification by JAPC, if DOS determines that an agency has not responded in writing to all material and timely written inquiries or written comments, then DOS must reject the rule.⁸⁸ Naturally, the certification from JAPC will serve as *prima facie* evidence, and, in most cases, this will allow DOS to act consistently with the statement in the certification.⁸⁹ However, if contrary evidence appears, DOS, not JAPC, must make the determination. In rare circumstances,⁹⁰ this may become a difficult decision.

It is unclear how the requirement that JAPC certify a rule at the time it is filed will work in practice. Unless JAPC is specifically notified, only the agency is aware of exactly when a rule will be filed. JAPC will be aware of the earliest date that a rule could be adopted because it must receive in advance a notice of changes⁹¹ or a notice that the rule has not been changed.⁹² After this notice, if JAPC has received responses to all of its comments and inquiries—and has nothing further to add—it might be possible for JAPC to prepare its certification. However, it would apparently not meet the statute's requirements to send it to DOS before the rule filing. Also, advance preparation of the certification would not be possible if there were

85. FLA. STAT. § 120.54(3)(e)(4) (Supp. 1996).

86. The APA establishes a 90-day time limit on the rule adoption process, which begins to run with notice of a rule in the Florida Administrative Weekly. See *id.* § 120.54(3). However, the Act provides for several exceptions and extensions to, as well as the tolling of, this 90-day period. See *id.* § 120.54(3)(e).

87. See *id.* § 120.54(3)(e)(5).

88. See *id.* § 120.54(3)(d)(4). This is consistent with current practice regarding rule certifications. For example, if an agency certifies that an administrative determination is not pending on the rule, but DOS determines otherwise, DOS now rejects the rule notwithstanding the certification. This seems to be in accord with the intent and plain language of the statute.

89. See *id.* § 120.54(3)(d).

90. For a discussion of what constitutes a "response," see *infra* text accompanying note 92.

91. A notice of any substantive changes to the rule must be filed with JAPC at least 21 days before filing the rule for adoption. See FLA. STAT. § 120.54(3)(d)(1) (Supp. 1996).

92. A notice that a rule has not been changed or contains only technical changes must be filed with the committee at least seven days prior to filing the rule for adoption. See *id.* § 120.54(3)(d)(1).

unanswered letters that still might receive responses in the time remaining before filing. The certification process will work most efficiently if the agency filing the rule will notify JAPC of the exact date of filing.

More esoteric questions also may arise. What are “material and timely” comments and inquiries? It seems self-evident that the usual correspondence from JAPC regarding a particular rule would be material. Still, agencies may wish to keep the issue in mind because the requirement to respond does not arise if comments and inquiries are not material. Dispute seems more likely over the question of timeliness.

In approaching the timeliness issue, two thoughts come to mind. First, the requirement seems to be for the benefit of the agency, and usually should be considered from that perspective. Second, in routine rulemaking, timeliness seems to be relative to the deadlines for filing the rule. An agency may not reasonably be expected to immediately respond to comments and inquiries received on the eighty-ninth day if taking time to do so would cause them to miss the filing deadline and force them to begin rulemaking anew. On the other hand, comments and inquiries received on the thirtieth day after notice should not be considered untimely just because an agency had planned on filing the rule on the thirty-first day, as there is no requirement that the agency do so. Because JAPC has always received prompt written responses from the vast majority of agencies and maintains a professional working relationship with them, these issues can undoubtedly be resolved in most cases.

Other issues concern the requirement that there be a response. The modifying phrase “in writing” does not seem too hard to understand, or too burdensome, although it will require adjustment in the practice of a few agencies. But exactly what does it mean to respond? It is not reasonable⁹³ to suggest that an agency has not responded to JAPC comments just because the agency disagrees with JAPC’s position and declines to change its rule. The agency is compelled to respond to JAPC, not to adopt its point of view.⁹⁴ At the other extreme, an agency cannot be said to have responded simply because a return letter was received. As a simplistic example, consider a JAPC inquiry as to the day on which the public hearing was held and a re-

93. The legislative history of the provision—coming as a response to the problem of some agencies simply refusing to answer letters from the JAPC, see *supra* note 82 and accompanying text—should refute any suggestion that a response requires the agency to accede to the views of the JAPC regarding a particular rule.

94. The word “respond” is often used to refer to a positive reaction. This connotation of the word in the APA might raise constitutional issues. Direct legislative control over the content of executive agency rules by a committee could constitute lawmaking without compliance with the bicameralism and presentment requirements of the constitution. See *infra* Part IV.A.1.

turn letter with the answer "blue." Classification of this as a legitimate response would defeat the entire purpose of the new provision. The problem is not limited to such extreme examples because failure to respond to the content of an inquiry need not be intentional. When numerous issues are raised, as is often done by JAPC, it is easy to overlook one. But if an agency makes a good faith effort to address all comments and inquiries raised and JAPC quickly points out any failure to respond to an issue, disputes should seldom arise.

Finally, DOS is directed to reject the rule if the agency has not responded in writing to all material and timely written inquiries or written comments.⁹⁵ No specific reference is made to comments and inquiries from JAPC. While the use of identical language leaves no room to doubt that JAPC's comments and inquiries are included, the duty to reject appears broader. If the courts were to confirm such an interpretation, an agency would have the duty to respond to correspondence from the general public.

IV. MUCH ADO ABOUT NOTHING

The new APA legislation does more than effect relatively minor changes to JAPC's oversight of rulemaking. The legislation creates, for the first time in Florida, a process to legislatively suspend an agency rule. Before reviewing these provisions, an examination of the contentious legal debate surrounding legislative veto and suspension powers is necessary.

A. Controversy

As discussed above, the separation of powers doctrine has been found flexible enough to permit the delegation of legislative power to agencies in the form of rulemaking.⁹⁶ However, the result has been less than satisfactory to many legislative bodies. They are convinced that agencies have gone beyond the bounds of the delegation to formulate and execute unintended and undesirable policies. In an effort to stop these perceived excesses, legislative bodies have tried many remedies, but have found most to be ineffective. One proposed remedy legislators have found attractive is the legislative veto.⁹⁷

95. See FLA. STAT. § 120.54(3)(d)(4) (Supp. 1996).

96. See discussion *supra* Part II.A.

97. Several states employ legislative veto or legislative suspension provisions. See ALA. CODE §§ 41-22-23, -27 (1995) (joint committee suspends proposed rules; rule is reinstated *sine die* unless a joint resolution sustains the committee suspension); CONN. GEN. STAT. §§ 4-170 to -171 (1995) (joint committee disapproves proposed and existing rules; legislature may reverse disapproval by resolution, has a constitutional clause); IDAHO CODE § 67-5291 (1996) (standing committees in each house review rules; a concurrent resolution may reject, amend, or modify a rule); 5 ILL. COMP. STAT. 100/5-115(b) (West

1. Inconsistent Holdings on the Constitutionality of the Legislative Veto

The basic concept of a legislative veto is quite simple. If an administrative agency adopts a rule that the legislature doesn't like, the legislature vetoes the rule, much as the President or a governor vetoes legislation. A legislative suspension does the same thing, but is often effected by only a part of the full legislature and is temporary. Actual implementation of this concept has proved to be considerably more difficult. The legislative veto is often held to be a violation of the same "flexible" separation of powers doctrine that initially allowed the legislature to delegate the power. Decisions invalidating the legislative veto essentially conclude that the veto is an exercise of the lawmaking power and therefore must involve the entire legislature and the chief executive, notwithstanding that the more extensive power to craft the same rule in the first place can be carried out without their participation. This logic has confounded more than one member of the bench,⁹⁸ and dissents and splits of judicial

1996) (joint committee statement on proposed rule does not allow filing for 180 days; legislature's joint resolution forbids filing); IOWA CODE § 17A.8 (1996) (joint committee may delay the effective date of proposed rule; rule is effective sine die unless joint resolution disapproves the rule; has a constitutional clause); LA. REV. STAT. ANN. § 49:969 (West 1995) (legislature may suspend or nullify rule by concurrent resolution); MICH. COMP. LAWS § 24.252 (1996) (joint committee may suspend rule promulgated during the interim between regular sessions until the end of the next regular session; has a constitutional clause); MINN. STAT. § 3.842 (1995) (joint committee suspends proposed and existing rules; rule is reinstated sine die unless a bill to repeal the rule is enacted into law); MO. REV. STAT. § 536.037 (1995) (joint committee may suspend rules of administrative hearing commission; grant of rulemaking authority declared nonseverable from this power); OHIO REV. CODE ANN. § 119.031 (Banks-Baldwin 1996) (joint committee suspends proposed rules; rule is reinstated after each house has five floor sessions unless invalidated by joint resolution); S.C. CODE ANN. § 1-23-120 (Law. Co-op. 1995) (proposed rules submitted to legislature; rule takes effect 120 days later unless resolution disapproving rule is filed; sine die tolls the 120-day period for review); S.D. CODIFIED LAWS § 1-26-38 (Michie 1996) (interim rules review committee may suspend proposed rules until July 1 of the year following the year it would have become effective); TENN. CODE ANN. § 4-5-225 (1996) (all rules expire on June 30 of following year; upon vote of standing committees of each house, rule is suspended; resolution of assembly can end committees' suspension); VA. CODE ANN. § 9-6.14:9.2 (Michie 1996) (standing committees of each house, with governor, can suspend effective date of a rule; rule is effective sine die unless a bill to repeal rule is enacted into law); WASH. REV. CODE § 34.05.640 (1995) (joint committee may recommend suspension of an existing rule to the governor, whose suspension extends to 90 days sine die); WIS. STAT. § 227.19 (1995) (joint committee suspends proposed rules; rule is effective sine die unless bill to support objection is enacted into law).

98. As Justice White stated in *INS v. Chadha*, 462 U.S. 919 (1983): If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test.

authority are common. Although opinions on the legislative veto are inconsistent in their holdings, they do identify a few relevant factors for analysis.

2. Factors Affecting the Constitutionality of the Legislative Veto⁹⁹

The first group of factors relates to the structure of the veto process. Statutes may allow veto or suspension of a rule by a committee or subcommittee of the legislature;¹⁰⁰ they may allow veto by a resolution of a single house of the legislature;¹⁰¹ they may allow veto by a resolution to be passed by both houses;¹⁰² or they may allow veto only upon passage of a general bill with presentment to the chief executive.¹⁰³

A second group of factors relates to the state's organic law. One factor relates to whether the applicable constitution has a strict separation of powers clause,¹⁰⁴ a general clause,¹⁰⁵ or only an implied

99. It is beyond the scope of this Article to provide a detailed analysis of the judicial treatment of legislative veto provisions. For a review of some of these cases, see Stengle & Rhea, *supra* note 16, at 446-65. One important case decided too late to be included in their survey is *Martinez v. Department of Industry, Labor & Human Relations*, 478 N.W.2d 582 (Wis. 1992), in which the Wisconsin Supreme Court held that joint committee suspension of administrative rules pending bicameral review by the Legislature and presentment to the Governor for veto or other action was constitutional. See *id.* at 587.

100. See *Martinez*, 478 N.W.2d at 587; *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984) (legislative committee suspension of effective date of administrative rule unconstitutional); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 636 (W. Va. 1981) (statute empowering legislative rulemaking review committee to veto rules unconstitutional); *In re Opinion of the Justices*, 431 A.2d 783, 788 (N.H. 1981) (statute allowing committee rejection of rules unconstitutional, but dictum says temporary suspension pending a bill would be constitutional).

101. See *Chadha*, 462 U.S. at 956, 959 (overturning statute allowing either the Senate or the House of Representatives to countermand administrative decision); cf. *Enourato v. New Jersey Bldg. Auth.*, 448 A.2d 449, 455 (N.J. 1982) (allowing either house to veto a proposed building project by failing to approve it).

102. See *Mead v. Arnell*, 791 P.2d 410, 414 (Idaho 1990) (joint resolution to repeal administrative rule is constitutional); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 779 (Alaska 1980) (annulment of agency regulation by concurrent resolution unconstitutional).

103. See *Martinez*, 478 N.W.2d at 587 (joint committee suspension of administrative rules pending bicameral review by the Legislature and presentment to the Governor constitutional); see also 5 U.S.C.A. §§ 801-808 (West Supp. 1996) (providing for congressional delay and disapproval of major rules).

104. A strict separation of powers clause includes not simply the division of power, but a further instruction that one branch is not to exercise the powers of the others. There are 34 states with strict separation clauses. See ALA. CONST. art. III, §§ 42, 43; AZ. CONST. art. III; ARK. CONST. art. 4, §§ 1, 2; CAL. CONST. art. III, § 3; COL. CONST. art. III; FLA. CONST. art. II, § 3; GA. CONST. art. I, § 2; IDAHO CONST. art. II, § 1; ILL. CONST. art. II, § 1; IND. CONST. art. 3, § 1; IOWA CONST. art. III, § 1; KY. CONST. art. I, §§ 1, 2; LA. CONST. art. II, §§ 1, 2; ME. CONST. art. III, §§ 1, 2; MD. CONST. art. 8; MASS. CONST. part 1, art. XXX; MICH. CONST. chap. 1, art. III, § 2; MINN. CONST. art. III, § 1; MO. CONST. art. II, § 1; MONT. CONST. art. III, § 1; NEB. CONST. art. II, § 1; NEV. CONST. art. 3, § 1; N.J. CONST. art. III, § 1; N.M. CONST. art. III, § 1; OK. CONST. art. IV, § 1; ORE. CONST. art. III, § 1; S.C. CONST. art. I, § 8; TENN. CONST. art. II, §§ 1, 2; TEX. CONST. art. II, § 1; UTAH CONST. art. V, § 1; VT. CONST. chap. II, § 5; VA. CONST. art. III, § 1; W. VA. CONST. art. V, § 1; WYO. CONST.

one.¹⁰⁶ Another factor is whether the rulemaking power is considered essentially an executive power¹⁰⁷ or a legislative one.¹⁰⁸

A third group of factors relates to the nature of the power being exercised in the veto. Some veto provisions include the power to amend,¹⁰⁹ while others include only the power to negate.¹¹⁰ Some statutes require the application of specific criteria,¹¹¹ while others are silent as to the grounds for veto. Some veto provisions apply to all agency rulemaking,¹¹² while others are applicable only to more discrete sets of agency action.¹¹³

art. 2, § 1. The highest courts of four of these states have decided cases on the legislative veto. See *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990); *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984); *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *Enourato v. New Jersey Bldg. Auth.*, 448 A.2d 449 (N.J. 1982); *State ex rel Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

105. A general separation of powers clause simply divides the power of government into the three branches. There are six states with general clauses. See CONN. CONST. art. II; MISS. CONST. art. I, § 1; N.H. CONST. part 1, art. 37; N.C. CONST. art. 1, § 6; R.I. CONST. art. 5; S.D. CONST. art. II. New Hampshire is the only one of these states in which the highest court has decided a case on the legislative veto. See *In re Opinion of the Justices*, 431 A.2d 783 (N.H. 1981).

106. The United States and 10 states have no explicit separation of powers clause in their constitutions; separation of powers is implied from the allocation of power to the branches of government. See U.S. CONST. art. I, II, III; ALASKA CONST. art. II, II, IV; HAW. CONST. art. III, V, VI; N.Y. CONST. art. III, IV, VI; DEL. CONST. art. II, III, IV; KAN. CONST. art. I, II, III; N.D. CONST. art. IV, V, VI; OHIO CONST. art. II, III, IV; PA. CONST. I, IV, V; WASH. CONST. art. II, II, IV; WISC. CONST. art. IV, V, VII. The highest courts of three of these states have decided cases on the legislative veto. See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622 (Kan. 1984); *Martinez v. Department of Indus., Labor & Human Relations*, 478 N.W.2d 582 (Wis. 1992).

107. Kansas and Kentucky consider rulemaking to be essentially an executive power. See *Stephan*, 687 P.2d at 635; *Brown*, 664 S.W.2d at 918.

108. Idaho and Wisconsin consider rulemaking to be a delegated legislative power. See *Mead*, 791 P.2d at 415; *Martinez*, 478 N.W.2d at 585.

109. The Kansas Supreme Court invalidated a provision that would have allowed the Legislature to modify rules by concurrent resolution without presentment. See *Stephan*, 687 P.2d at 635.

110. See *Mead*, 791 P.2d at 415. The Idaho Supreme Court upheld a provision allowing the Legislature only to negate rules, see *id.*, while the West Virginia Supreme Court invalidated a statute empowering a legislative committee only to negate rules, see *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 636 (W. Va. 1981).

111. The Wisconsin Supreme Court expressly noted that rules could be suspended only on the basis of one or more of six enumerated reasons, thus the delegation to the committee permitted no arbitrary action. See *Martinez*, 478 N.W.2d at 585-86; cf. *In re Opinion of the Justices*, 431 A.2d 783, 788 (N.H. 1981) (stating that the legislature could not delegate its legislative authority to a smaller part of the whole legislature). Application of explicit criteria may increase concerns that the legislative branch has encroached on the judicial function. See *INS v. Chadha*, 462 U.S. 919, 963 (Powell, J. concurring) (noting that "Congress impermissibly assumed a judicial function"). The argument that a legislative veto constitutes a judicial function seems stronger in a situation like that in *Chadha*, where the legislative vote directly affects a particular case in controversy, than when rules of general applicability are involved.

112. The legislative veto by concurrent resolution at issue in *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982), applied to all agency rules and was declared unconstitu-

With so many factors and so many possible judicial approaches, it is impossible to predict what a Florida court might conclude with respect to a true legislative veto, but it is reasonably safe to predict that a court would uphold the provisions of section 120.545(10), Florida Statutes. The new suspension process is structured to rely almost exclusively upon traditional legislative powers so as not to encroach upon the executive branch.

B. Modest Amendment

If an agency fails to initiate action to modify, amend, withdraw, or repeal¹¹⁴ a rule consistent with a JAPC objection,¹¹⁵ then under section 120.545(10), Florida Statutes, JAPC may recommend that legislation be introduced to achieve any of those results.¹¹⁶ Initiation of action in the case of a proposed rule refers to the publication of a notice of change or withdrawal¹¹⁷ and, in the case of an existing rule, presumably refers to the first step in the rulemaking process, which now is publication of a notice of rule development.¹¹⁸ Legislation may be recommended if publication does not take place within sixty days following the objection.¹¹⁹ Even if publication does take place within this time, legislation may be recommended if the agency fails to adopt the modified rule¹²⁰ or amend or repeal the existing rule¹²¹ in good faith. A JAPC recommendation has no effect on the rule itself. Despite the recommendation, it is clear that the agency remains free to adopt and enforce the rule, which is neither suspended nor ve-

tional. See *id.* at 448; cf. *Enourato v. New Jersey Bldg. Auth.*, 448 A.2d 449, 455 (N.J. 1982) (decided by the same court on the same day).

113. See *Enourato*, 448 A.2d at 445 (upholding a legislative veto limited in its application to discrete projects proposed by the building authority).

114. Modification and withdrawal are applicable to proposed rules, while amendment and repeal apply to existing rules. See FLA. STAT. § 120.545(3)-(4) (Supp. 1996).

115. The JAPC objection process has not been amended in the new Act, except for slight changes to the grounds for objection. See *id.* § 120.545(1)-(9).

116. See *id.* § 120.545(10).

117. Notice of modification or withdrawal is published in the first available issue of the publication in which the original notice of rulemaking was published, usually the Florida Administrative Weekly. See *id.* § 120.54(3)(d)(4).

118. See *id.* § 120.54(2). It should be noted that no particular length of time between rule development notice and subsequent rulemaking notice is specified by the APA.

119. See *id.* § 120.545(10).

120. No further action is necessary after withdrawal and publication. See *id.* § 120.54(3)(e)(5).

121. As a practical matter, virtually every attempt to change a rule following objection will involve an existing rule. An objection does not itself halt or delay the rule adoption process, so even rules that were only proposed at the time of objection are very likely to be existing by the time an agency attempts to change them. It is true that an agency may voluntarily toll the 90-day period for filing the rule in response to a proposed JAPC objection under section 120.54(3)(e)(6). However, the 90-day clock resumes when JAPC notifies the agency that it has completed its review, presumably prior to voting on the objection. See *id.* § 120.54(3)(e)(6).

toed. Thus, none of the constitutional concerns surrounding a legislative veto come into play at this stage.

JAPC is required to certify the fact of its recommendation to the agency within five days and may request that the agency temporarily suspend the rule or suspend adoption of the proposed rule pending consideration of the legislation during the next regular session.¹²² The statute requires that the agency respond to this request within a set time, advising JAPC either that it will suspend the rule or adoption, or that it refuses to do so.¹²³ If the agency chooses to suspend the rule or adoption, it must give notice of the suspension in the Florida Administrative Weekly, which activates the suspension.¹²⁴ Failure of an agency to respond within the allotted time constitutes a refusal to suspend.¹²⁵ Again, this new provision for voluntary suspension by the agency avoids any encroachment on the executive authority of the agency. The agency is granted new statutory authority to suspend a rule or the adoption of a rule under limited circumstances, but the decision to exercise that option is left to the agency.

JAPC is directed to prepare the bills to modify or suspend the adoption of a proposed rule or to amend or repeal a rule.¹²⁶ While this is new authority for JAPC, it is certainly nothing controversial. Legislative committees routinely draft bills for the Senate and the House of Representatives. Upon enactment by both houses, the bill must be presented to the Governor; thus the procedure meets all constitutional requirements for passage of any general bill.

While the validity of a general law that modifies, suspends, amends, or repeals a rule may not be in doubt,¹²⁷ the precise effect of such a law is less clear. If the bill was drafted to suspend a proposed rule or to repeal an existing rule, there may be few problems,¹²⁸ but what if the bill modifies or amends a rule? DOS is directed to conform the rule in the Florida Administrative Code to the enacted law and to reference the law as a history note.¹²⁹ Such legislative

122. See *id.* § 120.545(10)(b)(1).

123. See *id.* § 120.545(10)(b)(2). An agency must respond within 30 days unless the agency is headed by a collegial body, in which case it must respond within 45 days. See *id.* This is identical to the time provided for agency response to an objection under section 120.545(3).

124. See *id.* § 120.545(10)(b)(3).

125. See *id.* § 120.545(10)(b)(4).

126. See *id.* § 120.545(10)(c).

127. For a contrary view, see T. Andrew Zodrow, *The Use of the Legislative Veto in Florida: A Violation of the Separation of Powers Doctrine*, FLA. B.J., Nov. 1996, at 65.

128. It seems unlikely the agency would attempt to enact an identical rule again, at least not soon after the legislative action, but what if the agency proposes a similar rule?

129. See FLA. STAT. § 120.545(10)(e) (Supp. 1996). Presumably, it would then be effective on the date the law took effect, not on the date DOS conformed the rule. Note that this would have the effect of making a proposed rule immediately effective.

amendment creates a hybrid that is neither statute nor rule, and raises many questions. How is the rule to be amended in the future? Must it be resubmitted to the Legislature each time? If an affected party wishes to challenge the particular language passed by the Legislature, must that be done in court?¹³⁰ Does statutory enactment of one small portion that is dependent upon the remainder of a rule for meaning demonstrate tacit legislative approval of the overall scheme? The Legislature has tried to address some of these questions when ratifying other rules,¹³¹ and it might be wise to do so again.

The suspension provisions of section 120.545(10) take no constitutional chances. They do not do anything that is not clearly within legislative authority. Indeed, with the exception of the new grant of authority to the agency to voluntarily suspend its rule, and to JAPC to draft bills, the Legislature could have employed just such a suspension process without any amendment to the APA. What, then, is the real purpose of the new procedures? It seems the amendments are simply a mechanism to focus legislative attention on disputes regarding the scope of delegated legislative authority. JAPC's experience with this issue makes it the logical choice to draft the bills. Submission directly to the President of the Senate and the Speaker of the House of Representatives assures that the highest levels of leadership are aware of the delegation issue, and that its significance is not lost in consideration of the particular subject matter involved.¹³²

V. THE TEMPEST

Section 120.536, Florida Statutes, is the keystone of the new legislative check provisions.¹³³ Subsection (1) restricts the power of administrative agencies to adopt rules.¹³⁴ Subsection (2) sets up a procedure to evaluate existing rules—those already adopted before the effective date of the law—under this new, more restrictive rule-

130. It would seem so, because on what basis could an administrative law judge conclude that it was an "invalid exercise of delegated legislative authority"? See *Occidental Chem. Agric. Prods., Inc. v. Department of Env'tl. Reg.*, 501 So. 2d 674 (Fla. 1st DCA 1987) (no exhaustion of administrative remedies required before filing challenge in circuit court to rule ratified by statute).

131. Statutory ratification and amendment of the controversial criteria for evaluating compliance of local comprehensive plans, see *FLA. ADMIN. CODE ANN.* ch. 9J-5 (1996), included specific language on the availability of rule challenge proceedings. See *Home Builders and Contractors Ass'n of Brevard, Inc. v. Department of Comm'y Aff.*, 585 So. 2d 965 (Fla. 1st DCA 1991).

132. This is not to say that the subject matter is not also important; the bill will undoubtedly be referred to substantive committees.

133. See *FLA. STAT.* § 120.536 (Supp. 1996).

134. See *id.* § 120.536(1).

making standard.¹³⁵ Subsection (3) establishes some shields for these existing rules to temporarily protect them from rule challenges based upon the new standard.¹³⁶ Finally, subsection (4) clarifies that enactment of the new standard shall not require re-evaluation of any rule that has been declared invalid on other grounds.¹³⁷

Subsection (1) is best understood as a legislative rejection of a long line of cases frequently cited and relied upon by administrative law judges in determining whether rules constitute an invalid exercise of delegated legislative authority. Before examining the language, then, it is helpful to briefly review¹³⁸ the historical struggle of the Florida courts to determine standards for review of administrative rules.

A. Historical Record

As discussed above, the power to adopt rules is a legislative power, delegated within constitutional restrictions.¹³⁹ Rules adopted pursuant to such lawfully delegated authority are valid only if they are adopted in accordance with prescribed procedures,¹⁴⁰ conform to controlling provisions of organic and statutory law other than those relating to the scope and extent of delegated power,¹⁴¹ are supported by an adequate factual basis,¹⁴² are an appropriate exercise of

135. See *id.* § 120.536(2).

136. See *id.* § 120.536(3).

137. See *id.* § 120.536(4).

138. A more detailed look at the troubled evolution of standards of review of rulemaking in Florida is found in Boyd, *supra* note 10, at 263-70. The author argues that the courts have often adopted federal standards of review and not followed the applicable provisions of Florida's APA.

139. See *supra* notes 24-36 and accompanying text.

140. While a particular enabling statute may establish some procedures, it is section 120.54 that prescribes generally applicable rulemaking procedures. Section 120.52(8)(a) provides that a rule is invalid if the agency has materially failed to follow these procedures. See FLA. STAT. § 120.52(8)(a) (Supp. 1996).

141. An otherwise valid rule obviously may not violate the Due Process Clause or any other constitutional provision. Section 120.52(8)(d)—which itself has a constitutional basis—and the new section 120.52(8)(g) are examples of additional statutory restrictions unrelated to the scope or extent of the power delegated by the enabling statute.

142. An otherwise valid rule is invalid if it cannot be factually supported. See *Agrico Chem. Co. v. Department of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1979). Consideration of the empirical basis of a rule has been most often subsumed under the "arbitrary and capricious" rubric, which also is applicable to the exercise of agency discretion within the confines of delegated authority. In *Agrico Chemical*, the court declared that a proposed rule was invalid if it was arbitrary. See *id.* The court went on to say that "[a]n arbitrary decision is one not supported by facts or logic, or despotic." *Id.* The *Agrico Chemical* standard has been cited many times as requiring only this minimum rationality in rulemaking. Section 120.52(8)(f) of the Act now provides, in accordance with a minority of opinions, that an administrative law judge must invalidate a rule not supported by competent substantial evidence. See FLA. STAT. § 120.52(8)(f) (Supp. 1996).

agency discretion,¹⁴³ and are within the scope and extent of the power delegated by the Legislature. Concern here is only with the last of these requirements.

While the courts have employed a wide array of standards¹⁴⁴ to determine whether a rule is within the power delegated to an agency by its enabling statute, two have been preeminent. The first is that a rule cannot “enlarge, modify, or contravene the provisions of a statute.”¹⁴⁵ The second is that a rule must be “reasonably related to the purposes of the enabling legislation.”¹⁴⁶ In generally comparing these two standards, one can immediately see that while the first relates to the provisions of a statute, the second relates to the purposes of a statute. This alone is a significant distinction.

Many statutes include a section containing a statement of purpose or intent.¹⁴⁷ However, a statute almost never consists solely of such a statement. Rather, a statute customarily includes many other

143. Exercise of agency discretion is customarily reviewed under the “arbitrary and capricious” standard. While it has a broken and confused pedigree, the common use of this standard in Florida stems from *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200 (Fla. 1st DCA 1975). Under the federal APA, the highly deferential “arbitrary and capricious” standard is used to review both the factual support and the exercise of policy discretion in informal agency action such as most rulemaking. See 5 U.S.C. § 706(2)(A) (1994). The same has most often been true in Florida. Now that two standards are listed under section 120.52(8), “competent substantial evidence” presumably will become the standard for evaluation of issues concerning the factual basis of a rule, while “arbitrary and capricious” will be reserved as the standard of review for questions of discretion. These are not easy to separate, and administrative law judges and courts have understandably often failed to clarify which they are reviewing. More confusion may lie ahead.

144. See, e.g., *Department of Ins. v. Great Northern Insured Annuity Corp.*, 667 So. 2d 796, 801 (Fla. 1st DCA 1995) (applying reasonable basis standard to statutory classifications); *American Ins. Ass'n v. Department of Ins.*, 657 So. 2d 951, 954 (Fla. 1st DCA 1995) (not in accord with delegated authority); *Department of HRS v. Johnson and Johnson Home Health Care, Inc.*, 447 So. 2d 361, 362 (Fla. 1st DCA 1984) (inconsistent with statutory criteria); *North Am. Publications, Inc. v. Department of Rev.*, 436 So. 2d 954, 955 (Fla. 1st DCA 1983) (interpretation clearly erroneous). Sometimes numerous standards are cited. See *Board of Optometry v. Florida Soc'y of Ophthalmology*, 538 So. 2d 878, 884 (Fla. 1st DCA 1988) (agency cannot exceed its authority; construction of a statute not overturned unless clearly erroneous; cannot enlarge, modify, or contravene statute; reasonably related to purpose of enabling legislation; permissible interpretation of statute must be sustained). Often no explicit standard is invoked in a decision. See, e.g., *Packaging Corp. of Am. v. Department of Envtl. Reg.*, 596 So. 2d 1273, 1275 (Fla. 1st DCA 1992).

145. The standard was first stated in this express tripartite formula in *Department of Business Regulation v. Salvation Ltd.*, 452 So. 2d 65, 66 (Fla. 1st DCA 1984).

146. This test was adopted from federal law in *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st DCA 1975). It was coupled there with the phrase “and [is] not arbitrary or capricious,” which is the standard for review of the factual support and the exercise of policy discretion in a rule. See *id.*; see also *supra* note 143. The standard is almost always expressed with these two parts together, although a case will occasionally explain the component parts. See, e.g., *Department of Correct. v. Hargrove*, 615 So. 2d 199, 201 (Fla. 1st DCA 1993).

147. A policy section, like a preamble, is not a part of the substantive portion of the statute. It is available as an aid to the interpretation and clarification of ambiguous provisions elsewhere in the statute. See 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 20.12, at 97 (5th ed. 1992).

provisions that establish the particular programs and means to be employed to achieve the expressed or implied purposes of the statute. Since there are numerous ways to achieve a given purpose, the provisions of a statute are invariably more specific than its purpose.

Because the standard that a rule cannot "enlarge, modify, or contravene the provisions of a statute" requires a more specific relation to the statute, one might expect that it would be a stricter standard. In applying this standard, fewer rules should be found valid. Conversely, the standard that a rule must be "reasonably related to the purposes of the enabling legislation" does not require such a specific relation to the statute. One might expect that it would be an easier standard to meet, so that in applying that standard, more rules would be found valid. Application of these two standards in Florida has in fact dramatically followed this pattern. Out of nineteen court cases applying the "enlarge the provisions" standard,¹⁴⁸ fifteen cases resulted in invalidation of the rule,¹⁴⁹ while only four

148. "Enlarge," "modify," and "contravene" occur in the same sentence in 27 Florida cases decided since 1975. Search of WESTLAW, Florida Cases Database (Nov. 12, 1996) (search: enlarge /s modify /s contravene & da(aft 1975)). However, examination showed that eight of these were not in fact referring to the standard or were not applying it in the case under consideration. Other cases actually applying the standard were probably not identified in the search because of minor variations in wording, but this computer sample is likely to be representative.

149. See *Campus Communications, Inc. v. Department of Rev.*, 473 So. 2d 1290, 1295 (Fla. 1985) (rule requiring newspaper to be sold to qualify for sales tax exemption modified statute creating exemption); *Department of Rev. v. Zurich Ins. Co.*, 667 So. 2d 365, 368 (Fla. 1st DCA 1995) (rule including workers' compensation administrative assessment enlarged or modified statutory provision excluding special purpose obligations); *Witmer v. Department of Bus. & Prof. Reg.*, 662 So. 2d 1299, 1302 (Fla. 4th DCA 1995) (rule prohibiting corrupt racing practices enlarged statutory provision prohibiting racing of drugged animals); *Garrison Corp., Inc. v. Department of HRS*, 662 So. 2d 1374, 1380 (Fla. 1st DCA 1995) (rule requiring square footage of some private office space to be calculated in determining smoking area enlarged statute exempting such space); *Merritt v. Board of Chiropractic*, 654 So. 2d 1051, 1054 (Fla. 1st DCA 1995) (rule defining appropriate medical treatment to be whatever peer review committee determined it to be enlarged, modified, and contravened statute defining medically accepted standards); *DeMario v. Franklin Mortgage & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4th DCA 1994) (90-day requirement in Department of Revenue rule not mandatory because it would then enlarge, modify, and contravene statute governing excess tax sale funds); *Hillhaven Corp. v. Department of HRS*, 625 So. 2d 1299, 1303 (Fla. 1st DCA 1993) (rules implementing budget cuts illegally ordered by Administration Commission contravened statute requiring actions in compliance with legislative appropriations); *Board of Dentistry v. Florida Dental Hygienist Ass'n, Inc.*, 612 So. 2d 646, 654 (Fla. 1st DCA 1993) (rule allowing licensure of dental hygienists based upon graduation from schools with substantially lower standards contravened statute establishing licensure requirements); *Department of Env'tl. Reg. v. Manasota-88, Inc.*, 584 So. 2d 133, 135 (Fla. 1st DCA 1991) (rule imposing fee of 50 cents per page for preparation of records on appeal enlarged or modified enabling statutes); *Department of Nat. Resources v. Wingfield Dev. Co.*, 581 So. 2d 193, 197 (Fla. 1st DCA 1991) (rule requiring continuous physical activity on structures enlarged, modified, and contravened statute granting exemption to facilities under construction); *Cataract Surgery Ctr. v. Health Care Cost Containment Bd.*, 581 So. 2d 1359, 1364 (Fla. 1st DCA 1991) (rule requiring submission of data by free-standing ambulatory surgical centers enlarged statutory authority relating to hospitals and nursing homes); *United States Shoe Corp. v. Department of Prof'l*

cases found the rule to be valid.¹⁵⁰ The application of the “reasonably related to the purposes” standard in fourteen cases¹⁵¹ resulted in invalidation of only one rule,¹⁵² while the rules in the other thirteen cases were upheld.¹⁵³ Most telling of all, perhaps, are three cases in

Reg., Bd. of Opticianry, 578 So. 2d 376, 381 (Fla. 1st DCA 1991) (rule requiring sponsor of apprentice optician to dispense eyewear and keep equipment on premises where apprentice works enlarges and contravenes the statute on requirements for sponsors); Board of Trust. of the Int. Imp. Trust Fund v. Board of Prof'l Land Surveyors, 566 So. 2d 1358, 1361 (Fla. 1st DCA 1990) (rule defining ordinary high water line enlarged and modified statutory authority to establish minimum technical standards for surveys); Board of Optometry v. Florida Soc'y of Ophthalmology, 538 So. 2d 878, 887 (Fla. 1st DCA 1989) (citing various standards, but holding rule that permitted optometrist to dispense topical ocular drugs without board administered examination was modification of statute and was invalid); Department of Bus. Reg. v. Salvation Ltd., Inc., 452 So. 2d 65, 67 (Fla. 1st DCA 1984) (rule requiring restaurant licensee to prepare meals on premises enlarged, modified, and contravened statute setting forth requirements for restaurant license).

150. See Board of Trust. of the Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995) (rule limiting docks to lesser of 500 feet or 20% of width of water body in aquatic preserves did not enlarge, modify, or contravene statute permitting docks for reasonable ingress or egress of riparian owners); Ameraquatic, Inc. v. Department of Nat. Resources, 651 So. 2d 114, 120 (Fla. 1st DCA 1995) (rules defining eradication program and setting general standards for choice of herbicide did not enlarge, modify, or contravene statutes on aquatic plant management); Stuart Yacht Club & Marina, Inc. v. Department of Nat. Resources, 625 So. 2d 1263 (Fla. 4th DCA 1993) (rules requiring submission of information and detailing specific equipment to be onsite for fuel spills, but allowing substitution, did not enlarge, modify, or contravene statute requiring cleanup equipment to be available); Florida Hosp. Ass'n v. Health Care Cost Containment Bd., 593 So. 2d 1137, 1140 (Fla. 1st DCA 1992) (rule penalizing excessive gross revenues per adjusted admission did not contravene statute requiring penalties to be assessed per day of admission).

151. “Reasonably related” and “purposes” occur in the same sentence in 40 Florida cases decided since 1975. Search of WESTLAW, Florida Cases Database (Nov. 12, 1996) (search: “reasonably related” /s purposes & da(aft 1975)). However, examination showed that 24 of these were not in fact referring to the standard or were not applying it in the case under consideration. For a discussion of two other cases see infra notes 156-58. Other cases actually applying the standard were probably not identified in the search because of minor variations in expression, but the sample is probably representative.

152. In Grove Isle, Ltd. v. Department of Environmental Regulation, 454 So. 2d 571 (Fla. 1st DCA 1984), two rules were under consideration; the court found one of these to be valid and one to be invalid under the “reasonably related to the purpose of the statute” standard. See *id.* at 573.

153. See General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n, 446 So. 2d 1063, 1067 (Fla. 1984) (rule governing the effect of parent debt of regulated companies on federal corporate income tax reasonably related to purposes of statute granting power to prescribe fair and reasonable rates); Marine Indus. Ass'n of South Fla., Inc. v. Department of Env'tl. Prot., 672 So. 2d 878, 882-83 (Fla. 4th DCA 1996) (rule establishing area for slow speed boating reasonably related to “frequent sightings” criteria of statute to protect manatees); Department of Ins. v. Great Northern Insured Annuity Corp., 667 So. 2d 796, 799 (Fla. 1st DCA 1995) (rules regulating association of insurance activity with banking industry reasonably related to purposes of statute to prevent coercion, unfair trade practices, and undue concentration of resources); Charles E. Burkett & Assocs., Inc. v. Department of Transp., 637 So. 2d 47, 48 (Fla. 5th DCA 1994) (rules establishing criteria to qualify as disadvantaged business enterprise reasonably related to the purpose of the legislation to encourage minorities and women to actively participate in the construction services professions); Department of Labor & Employ. Sec. v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994) (rules providing for reimbursement for “physical reconditioning” services reasonably related to statutory purpose to deliver “medically necessary” services to

which both the “reasonably related” and “enlarge the provisions” standards were cited. In the first, the majority held a rule invalid as amending a statutory provision,¹⁵⁴ while the dissent argued the rule was reasonably related to the purposes of the statute.¹⁵⁵ In the second, the majority held a rule valid as being reasonably related to the purposes of the statute,¹⁵⁶ while the dissent would have found it invalid because it enlarged, modified, and contravened the statute’s provisions.¹⁵⁷ In the third, portions of a rule were upheld based upon the “reasonably related to the purposes” standard, while other portions were held invalid as modifying or amending the statute.¹⁵⁸ The fact that application of one standard or the other is apparently so predictive of the outcome might give rise to a suspicion that they are not really employed as standards at all, but rather as justifications. Consciously or unconsciously, the choice of a standard may not precede evaluation of the rule, but in fact may be determined after the decision on whether to uphold the rule is made on other, less well-defined grounds.

It also is possible that circumstances other than the decision of whether to uphold the rule dictate the choice of a standard. Even

injured workers); *General Motors Corp. v. Department of High. Saf. & Motor Veh.*, 625 So. 2d 76, 78 (Fla. 1st DCA 1993) (rule establishing one-year time limit on motor vehicle dealer license reasonably related to purposes of maintaining competition, providing consumer protection and fair trade); *Florida League of Cities, Inc. v. Department of Env'tl. Reg.*, 603 So. 2d 1363, 1370 (Fla. 1st DCA 1992) (rule establishing minimum standards for management and disposal of domestic waste water residuals reasonably related to purposes of statute to control and prohibit pollution of the air and water and to develop and implement a solid waste management program); *Fairfield Communities v. Florida Land and Water Adjudicatory Comm'n*, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988) (procedural rules governing development of regional impact appeals reasonably related to statutory duty to attach conditions and restrictions to its decision to grant or deny permission to develop); *Hobe Assoc., Ltd. v. Department of Bus. Reg.*, 504 So. 2d 1301, 1306 (Fla. 1st DCA 1987) (rule listing specific types of amendments to prospectus that were possible without consent of mobile home park occupants reasonably related to purposes of statute regulating mobile home parks); *Florida Waterworks Ass'n v. Florida Pub. Serv. Comm'n*, 473 So. 2d 237, 240 (Fla. 1st DCA 1985) (rules on “contributions-in-aid-of-construction” reasonably related to purposes of statute to allow PSC to set standards for service availability charges); *Board of Medical Examiners v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st DCA 1984) (criteria selected by Board of Medical Examiners for licensing of previously unlicensed persons “by endorsement” of persons licensed elsewhere reasonably related to purposes of licensing statute); *Roberts v. Florida Parole and Probation Comm'n*, 424 So. 2d 64, 65 (Fla. 1st DCA 1982) (rule setting method for Commission to rate attempted crimes reasonably related to the purposes of statute); *Florida Beverage Corp., Inc. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st DCA 1975) (regulation providing for cooperative or pool buying by liquor vendors had reasonable relationship to the purposes intended by the Legislature).

154. See *Rabren v. Board of Pilot Comm'rs*, 497 So. 2d 1245, 1249 (Fla. 1st DCA 1986).

155. See *id.* at 1251 (Zehmer, J., dissenting).

156. See *General Motors Corp. v. Department of High. Saf. & Motor Veh.*, 625 So. 2d 76, 78 (Fla. 1st DCA 1993).

157. See *id.* at 80 (Booth, J., dissenting).

158. See *Booker Creek Preservation, Inc. v. Southwest Fla. Water Mgmt. Dist.*, 534 So. 2d 419, 423 (Fla. 5th DCA 1988).

though both standards, by their own terms, attempt to measure a rule against the scope and extent of the power delegated by the enabling act, administrative law judges and the courts may find it impractical or impossible to apply a particular standard in some situations. One immediate thought is that the “enlarge the provisions” standard cannot be applied in some instances precisely because there are no specific provisions that can be reasonably identified as the law being implemented by the rule.¹⁵⁹

Regardless of the reasons dictating the choice of a standard, if the standard is determined before a rule is considered against its requirements, two points are clear. First, the initial choice of a standard is vitally important. Second, the “enlarge the provisions” standard is considerably more strict than the “related to the purpose” standard.

After a review of case law,¹⁶⁰ the Legislature in 1987 enacted subsection 120.52(8), Florida Statutes, defining “invalid exercise of delegated legislative authority.”¹⁶¹ The legislation listed several independent grounds for administrative law judges to apply in evaluating a rule. In paragraph (c) of that subsection, the Legislature codified the “enlarge the provisions” standard discussed above as the standard to be applied by administrative law judges.¹⁶² Significantly, the Legislature did not codify the “related to the purpose” standard.

Two years after the 1987 amendments, with the decision in *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*,¹⁶³ one might have supposed that the “related to the purpose” standard would have largely disappeared. If administrative law judges followed the direction of section 120.52(8), and courts reviewed their orders, not the underlying rule, few opportunities to in-

159. In *Department of Health and Rehabilitative Services v. Florida Psychiatric Society, Inc.*, 382 So. 2d 1280 (Fla. 1st DCA 1980), the court, in rejecting the argument that the “reasonably related to the purposes” standard should be applied, stated: “The first difficulty we have with the Department’s argument is the absence of specific ‘enabling legislation.’” *Id.* at 1283. Under these circumstances, section 120.536(1), Florida Statutes, now provides that the agency has no power to adopt the rule. See *infra* text accompanying note 170.

160. See Fla. H.R. Comm. on Govtl. Ops., HB 710 and SB 608 (1987) Staff Analysis 2-3 (rev. Apr. 15, 1987) (available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.) (explaining that section 120.52(8)(e), Florida Statutes (1987), represents a codification of some of the standards that had been applied by courts in determining the validity of rules).

161. Act effective Oct. 1, 1987, ch. 87-385, § 2, 1987 Fla. Laws 2316, 2318.

162. See *id.* (codified at FLA. STAT. § 120.52(8)(c) (Supp. 1996)).

163. 553 So. 2d 1260 (Fla. 1st DCA 1989). The Adam Smith court, on appeal of a DOAH rule challenge proceeding, determined that it had before it for review the administrative law judge’s order, not the agency’s rule. See *id.* at 1274. This determination is in accord with the APA, which provides that it is the order from DOAH that is reviewable final agency action. See FLA. STAT. § 120.56(1)(e) (Supp. 1996).

voke the “related to the purpose” standard would seem to arise.¹⁶⁴ However, some administrative law judges’ orders and court opinions continued to apply this standard.¹⁶⁵

B. New Rulemaking Standard

In the new APA, section 120.536(1) has been created to read:

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.¹⁶⁶

Identical language is found in section 120.52(8), immediately following the paragraphs delineating the independent criteria defining an “invalid exercise of delegated legislative authority.”¹⁶⁷ Because DOAH’s responsibility in a rule challenge proceeding¹⁶⁸ is to determine whether a rule is an invalid exercise of delegated legislative authority, the new language is a clear direction to administrative law judges.¹⁶⁹

164. Adam Smith clarified that the “reasonably related to the purposes” standard applied to direct appeals of rulemaking, citing the Florida Supreme Court’s often quoted formulation:

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

553 So. 2d at 1271 (quoting *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm’n*, 446 So. 2d 1063, 1067 (Fla. 1984)) (internal quotation marks omitted). However, direct appeals of rulemaking were never that common. With the enactment of chapter 92-166, Florida Laws, which limited direct appeals to situations in which the sole issue was the constitutionality of the rule, they became even more rare. The provision has been carried over into the new APA as section 120.68(9), Florida Statutes. This limitation on the right to direct appellate review has been held not to be an unconstitutional denial of access to the courts. See *Baillie v. Department of Nat. Resources, Div. of Beaches and Shores*, 632 So. 2d 1114 (Fla. 1st DCA 1994).

165. See *supra* note 153.

166. FLA. STAT. § 120.536(1) (Supp. 1996).

167. See *id.* § 120.52(8).

168. Proposed rules may be challenged under section 120.56(2). Existing rules may be challenged under section 120.56(3). See *id.* § 120.56(2), (3).

169. JAPC also is directed to use this same standard in its review of rules. See *id.* § 120.545(1)(a).

The first sentence of 120.536(1) 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.”¹⁷⁰ This language is apparently intended to stress that under Florida’s APA, a rule is not within delegated authority solely because the agency has a valid grant of rulemaking power. Under the statutory scheme,¹⁷¹ a grant of power to adopt rules is certainly required, but normally should be of little interest.¹⁷² Almost all agencies have a general grant—usually found in the first part of their enabling statute—which basically states that the agency “may adopt rules necessary to carry out the provisions of this chapter.”¹⁷³ The first sentence emphasizes that such a general grant 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 that grants particular powers and duties, which might be found anywhere in that chapter.

The second sentence states that “[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute.”¹⁷⁴ This language is a restatement of a longstanding APA requirement,¹⁷⁵ but it adds for the first time that only “particular” powers and duties may be implemented, as opposed, presumably, to “general” ones.

The first part of the third sentence, “[n]o 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,”¹⁷⁶ expressly directs administrative law judges not to apply the “reasonably related to the purposes of the enabling legislation” standard discussed above.¹⁷⁷ Use of the term “only” indicates that a rule that is reasonably related to the purpose of the enabling legislation and is not arbitrary or capricious may not be adopted without more. The second part of this sentence, “nor shall an agency have the authority to implement statutory provisions setting forth general

170. *Id.* § 120.536(1).

171. The APA requires that each adopted rule reference not only the grant of rulemaking authority, but also the section of the law being implemented. See *id.* § 120.54(3)(a)(1).

172. Grants to agencies of the power to adopt rules are so common in the Florida Statutes that it is difficult to find a case in which the absence of such a grant has caused a rule to be declared invalid. One case that did revolve around the absence of such a grant of rulemaking power was *State Commission on Ethics v. Sullivan*, 500 So. 2d 553 (Fla. 1st DCA 1986). The Sullivan court determined that the APA itself granted all agencies the power to adopt procedural rules, but that neither the Florida Constitution nor any other statute granted the State Commission on Ethics any authority to adopt substantive rules. See *id.* at 553-54.

173. See, e.g., FLA. STAT. § 198.08 (1995).

174. *Id.* § 120.536(1) (Supp. 1996).

175. See *id.* § 120.54(3), (6).

176. *Id.* § 120.536(1) (Supp. 1996).

177. See *supra* text accompanying notes 146-65.

legislative intent or policy,"¹⁷⁸ further instructs administrative law judges that in the absence of more particular statutory provisions, the power to adopt rules may not be exercised to implement general declarations of intent or policy¹⁷⁹ found in the statutes.

The final sentence states 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."¹⁸⁰ This sentence further clarifies that only express powers and duties conferred upon an agency may be implemented, interpreted, or made specific through rulemaking.¹⁸¹ The language appears to have been adapted from the dissent in a recent case of the First District Court of Appeal.¹⁸² The majority determined that a general rulemaking authority grant to "adopt such rules as it deems necessary or proper"¹⁸³ and the general power to regulate the "licensing of motor vehicle dealers and manufacturers"¹⁸⁴ allowed the agency to adopt a rule creating an automatic expiration of a granted license after one year.¹⁸⁵ The dissent maintained that the particular powers and duties were not assigned by the rulemaking grant, but by more specific sections of the statute, such as section 320.642, Florida Statutes.¹⁸⁶ These more specific sections of the statute established the procedures governing the license application process. Though the statute contained a twelve-month delay after denial before reapplication was allowed, there was no section of the statute that even remotely implied that the agency could impose a time limit on the license.¹⁸⁷ Thus, the dissent concluded that the agency could not rely upon the general grants to create such a requirement.¹⁸⁸ The language of section 120.536(1) is a clear endorsement of the approach reflected in

178. FLA. STAT. § 120.536(1) (Supp. 1996).

179. This one sentence uses the terms "purpose," "intent," and "policy." One commentator suggests that purpose is a broader concept than intent because it entails an examination of the surrounding circumstances leading to the determination of the legislative objective to be sought. See Alexander Dill, Comment, Scope of Review of Rulemaking After Chadha: A Case for the Delegation Doctrine?, 33 EMORY L.J. 953, 978-79 (1984). The APA amendments seem to use these three terms interchangeably, and this Article makes no attempt to draw any distinction between them.

180. FLA. STAT. § 120.536(1) (Supp. 1996).

181. This is not a novel concept. See 1 AM. JUR. 2D Administrative Law § 42 (1962) ("General language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred by the same statute.").

182. See *General Motors Corp. v. Department of High. Saf. & Motor Veh.*, 625 So. 2d 76, 80 (Fla. 1st DCA 1993) (Booth, J., dissenting).

183. FLA. STAT. § 320.011 (1995).

184. See *id.* § 320.605.

185. See *General Motors*, 625 So.2d at 78.

186. See *id.* at 79 (Booth, J., dissenting).

187. See *id.* at 80.

188. See *id.* at 79-80.

the dissent. The powers and duties of an agency that may be implemented are only those particularly granted by sections of a statute; rulemaking grants and general descriptions of functions of the agency cannot be used to expand these particular powers and duties.

The four sentences of 120.536(1) are potentially the most far-reaching of any in the 1996 amendments. They are a simple but clear rejection of the concept that a mere statement of legislative policy or purpose coupled with a broad grant of rulemaking power constitute sufficient authorization for agency rulemaking. Policy choice involves not simply what ends are to be sought, but what means are to be employed to get there. Few, indeed, disagree that it is desirable to have clean air and water, economic prosperity, and good public health.¹⁸⁹ Rather, given limited resources, the controversies arise over the choice of programs. The true formulation of basic policy occurs in determining the approach to achieving these universally shared goals.¹⁹⁰ It is these mid-level policy decisions that require compromises and involve the most difficult political choices.

Thus, even though it is constitutionally permitted to do so,¹⁹¹ the Legislature declined to delegate the authority for agencies to implement the general intent or policy language¹⁹² that commonly appears in the statutes. The new APA explicitly rejects the review standard that would uphold an agency rule because it is "reasonably related to the purposes of the enabling legislation." In evaluating rules, administrative law judges are not to apply the extremely deferential standards minimally required by the separation of powers or the void-for-vagueness doctrines, but rather a stricter test imposed by the statute.¹⁹³ Rules cannot implement statutes that merely describe ends to be sought, but only statutes that describe specific programs

189. In arguing for stricter application of the nondelegation doctrine in Florida, Judge John Fennelly has decried the courts' validation of what have been termed "aspirational" statutes, which direct an ambitious objective to be achieved without providing any standards for accomplishing it. See John E. Fennelly, *Non-Delegation Doctrine and the Florida Supreme Court: What You See is Not What You Get*, 7 *ST. THOMAS L. REV.* 247, 275-76 (1995).

190. One commentator has noted that the constitutional responsibility of Congress is unfulfilled if legislation leaves basic "normative" issues unanswered. See Ernest Gellhorn, *Returning to First Principles*, 36 *AM. U. L. REV.* 345, 347 (1987).

191. An argument can be made that administrative law judges and courts in Florida have generally reviewed rules under those minimal standards that are constitutionally required. That is, they have assumed the legislative intent was to delegate the maximum authority constitutionally permissible. The new amendments clearly establish a stricter statutory limit, and direct administrative law judges to invalidate any rule exceeding it.

192. The difficulty will lie in determining which statutory provisions assign particular duties to an agency and which merely describe general intent or policy.

193. It is clear that Florida is free to apply stricter standards. The constitutional tests establish the minimum statutory standards that must be present, and so allow the maximum amount of delegation, but the state may choose to delegate less by requiring stricter standards. See *supra* text accompanying notes 51-58.

and means to those ends. Rules may be adopted only if there is both a grant of rulemaking authority and a specific law to be implemented that details particular powers and duties.

C. Rules on the Books

Section 120.536(2) demonstrates legislative understanding that the new rulemaking standard established in section 120.536(1) represents a fundamental change in Florida administrative law. Section 120.536(2) establishes an elaborate three-year plan designed to bring the nearly 25,000 existing rules in the Florida Administrative Code¹⁹⁴ into compliance with the new standard.

The statute places the initial burden of evaluating existing rules on agencies themselves. Each agency is to divide all of its existing rules into two categories: those that exceed the new rulemaking authority and those that do not. If the agency can identify a statutory section assigning the particular powers and duties being implemented, interpreted, or made specific,¹⁹⁵ the rule meets the new standard. Any rule or portion of a rule for which this cannot be done is to be included on a list to be submitted to JAPC by October 1, 1997.¹⁹⁶ If only part of a rule exceeds the new rulemaking authority, the list also is to identify the violating portion.¹⁹⁷ Agencies are given a full year to complete their reviews.

JAPC is to submit the combined lists of all of the agencies to the President of the Senate and the Speaker of the House of Representatives.¹⁹⁸ This will give the Legislature the opportunity during the 1998 Regular Session to consider all of the rules that the agencies have determined exceed the new rulemaking authority. If the Legislature finds that the rules contain wise public policy, it may pass specific provisions of law to provide statutory support for the rules under the new rulemaking standard.¹⁹⁹ Alternatively, if the Legislature finds that the policies contained in the rules can be improved, it may pass different provisions of law providing guidance in that direction, or it may pass nothing at all, leaving the rules unsupported by any authorizing legislation.²⁰⁰

At the close of the 1998 Regular Session, the agencies will begin to amend their rules, if necessary, to conform them to the specific statutory provisions passed, or to repeal those rules submitted on

194. Author's estimate as of October 1, 1996.

195. The Florida Administrative Code contains statutory citations to the "rulemaking authority" and "law implemented" following each rule.

196. See FLA. STAT. § 120.536(2) (Supp. 1996).

197. See *id.*

198. See *id.*

199. See *id.*

200. See *id.*

the list for which no statutory authority was enacted into law.²⁰¹ The statute directs that all of these repeals are to be initiated no later than January 1, 1999.²⁰² JAPC is directed to submit a report to the President of the Senate and the Speaker of the House of Representatives by February 1, 1999, identifying any rules without authority that the agencies have not yet begun to repeal.²⁰³ A special right for JAPC or any substantially affected person to petition an agency to repeal a rule which exceeds the new rulemaking authority standard is granted beginning July 1, 1999.²⁰⁴

D. Rule Challenge Shields

As noted earlier, the language establishing the new rulemaking standard in section 120.536(1) also is to be found as part of the definition of “invalid exercise of delegated legislative authority.”²⁰⁵ As part of this definition, the new standard is to be applied by administrative law judges in rule challenge proceedings. Rules filed for adoption²⁰⁶ with DOS on or after October 1, 1996,²⁰⁷ are immediately subject to the new standard. Thus, the law is expressly given a retroactive effect in the sense that the new rulemaking standard is to be applied²⁰⁸ to all rules noticed before October 1, 1996, but filed for adoption on or after that date.

201. See *id.*

202. See *id.*

203. See *id.*

204. See *id.* This new provision does not seem substantially different from the normal petition to initiate rulemaking—which also may consist of a request to repeal a rule—contained in section 120.54(7). One difference is that the new provision expressly extends the right to petition for the repeal of a rule to the committee. It also should be noted that the Act’s definition of “agency action” specifically includes the denial of a petition under section 120.54(7), but does not expressly mention denial of a petition under this new section. See *id.* § 120.52(2). The courts seem likely to consider such a denial to be final agency action for the purposes of section 120.68, even without an express inclusion in the definition.

205. See *id.* § 120.52(8).

206. The initial sentence of section 120.536(3) uses only the term “filed,” but it is clear that the statute is referring to the filing for adoption. First, final adoption is the only time a rule is actually filed. Earlier submissions of rule notices to DOS for publication in the Florida Administrative Weekly do not technically constitute a filing of the rule. Second, in reading the remaining portions of section 120.536(3), it is clear that the overall statutory plan is to eventually bring all rules under the new rulemaking standard. It would not be reasonable to conclude that the legislative intent was instead to create a small group of rules—those initially noticed in the Florida Administrative Weekly prior to October 1, 1996, but not filed for adoption until after that date—that would remain forever unaffected by the new rulemaking standard because they would be neither immediately subject to it nor covered by it upon expiration of either of the two temporary shields.

207. See FLA. STAT. § 120.536(3) (Supp. 1996).

208. See *id.* The new rulemaking standard of section 120.536(1) is effective for the purposes of rule challenge proceedings under section 120.56 and JAPC review under section 120.545. See *id.*

The new amendments temporarily protect all rules filed for adoption before October 1, 1996, from challenges based upon the new rulemaking standard.²⁰⁹ The length of time these rules are protected depends upon whether they are included on the list submitted to JAPC. As shown in Figure 1, rules²¹⁰ included on the list are covered by the long shield and are protected from challenge²¹¹ until July 1, 1999.²¹² The long shield thus lasts for almost three years from the effective date of the new APA, allowing the Legislature to consider the listed rules during the 1998 Regular Session, the agency to amend and repeal its rules in response to this legislative action, and the Legislature to act again during the 1999 Regular Session. Rules not included on a list are covered by the short shield and are protected from challenge only until November 1, 1997.²¹³ This shorter protection, lasting a little over one year, is given to allow the agency to examine all of its rules under the new rulemaking standard. Rules that the agency concludes do meet the new standard are not included on the list when it is submitted, and the shield over them expires shortly thereafter.²¹⁴

VI. AS YOU LIKE IT

The new provisions are not exclusively restraints on agency authority. The 1996 APA reflects an understanding that the Legislature itself must be more specific when enacting enabling legislation. It may seem, at first, that nothing could be easier than for the Legislature to write the statutes exactly as it likes. If there is too much delegation in the statutes, they can simply be written to delegate less. However, when the inherent institutional pressures that make specificity so difficult to achieve are considered, the task seems more daunting. It is helpful to consider some of these pressures briefly before moving to consideration of three mechanisms in the new law designed to help focus legislative attention on the need for more specific delegations.

209. See *id.*

210. Section 120.536(2) refers to "a listing of each rule, or portion thereof" that exceeds the new rulemaking standard, and section 120.536(3) "shields" every rule "included on a list." *Id.* § 120.536(2)-(3). It appears, then, that the shield extends only to the portion of a rule that is included on a list, and not automatically to the entire rule section.

211. The shield is only effective to prevent section 120.56 rule challenges based upon the grounds that the rule exceeds the new rulemaking standard. See *id.* § 120.536(2). Rule challenges may continue to be filed based upon any other criteria set forth in section 120.52(8). The shield does not appear to protect against an objection to the rule by JAPC, which under section 120.545(1)(a) also is required to apply the new rulemaking standard. JAPC does have authority to review any existing rule under section 120.545(1), although such reviews are not common.

212. See *id.* § 120.536(3).

213. See *id.*

214. See *id.*

FIGURE 1
DURATION OF TEMPORARY “SHIELD”
 Against Challenges Based on Failure to Meet New Rulemaking Standard

“Shield” Amendments Effective Oct. 1, 1996 ⌚	Agency Lists Submitted Oct. 1, 1997 ⌚	Part of “Shield” Ends Nov. 1, 1997 ⌚	Regular Legislative Session Ends 1998 ⌚	Remainder of “Shield” Ends July 1, 1999 ⌚
Rules filed before Oct. 1, 1996.	Rules listed by an agency as exceeding new standard.		Rules with no specific implementing authority enacted.	Listed rules are subject to challenge.
			Rules with specific implementing authority enacted.	
	Rules not listed by an agency as exceeding new standard.	Rules not listed by an agency are subject to challenge.		
Rules filed on or after Oct. 1, 1996 are subject to challenge.				

Extent of “shield” shown by shaded area.

A. Pressures

One pressure compelling delegation of lawmaking authority involves the specialized expertise held by an administrative agency.²¹⁵ Expertise is acquired through the very process of administering. Agencies are required to apply the law within a relatively narrow area of responsibility to the realities of the everyday world. They have scientific and technical staff that understand the factual basis behind public policy approaches and are able to determine operative facts as questions arise during implementation of a law.

215. One of the earliest, and perhaps the best, of the proponents of the “expert agency” was JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). This conception of the administrative state was predicated upon the theory that legislative enactments identified objectives to be promoted, but that it was the agency, utilizing its subject matter expertise, that was best able to select from among the range of means to achieve these objectives. See *id.* at 23-26.

Legislatures are not unaware of their relative institutional ineffectiveness in addressing highly scientific and technical questions. The particular specialized knowledge or scientific competence sometimes required to implement a program is not a matter suited for political debate and is often irrelevant as a matter of public policy.²¹⁶ Rather than allow legislation to become bogged down through the inclusion of inconsequential detail, legislators may choose to leave such matters to the technical experts. Legislators may then focus on making basic policy decisions on behalf of the constituents they were elected to represent.

A related, but distinct, pressure to delegate stems from the relatively greater flexibility that an agency has in addressing problems that arise. The real world to which an agency must apply the law is changing. New technological, sociological, political, and economic developments constantly alter the problems that government regulation attempts to address.²¹⁷ Amendment of a statute by a legislature that meets in a sixty-day regular session each year does not allow for a great deal of flexibility. Special sessions can be called to address major problems, but this is not a realistic solution for more routine issues. Amendment of rules is more flexible. Rule amendments can be drafted in response to new circumstances and can be adopted at any time during a year.²¹⁸ Administrative agencies thus are better able to adapt policy to changing conditions as they are encountered or anticipated.

A third pressure contributing to delegation is the desire to ease the often difficult process of passing legislation. One expedient solu-

216. For a discussion of the concept of "administrative science" and the procedural reform reaction, see Thomas O. McGarity, *Regulatory Reform and the Positive State: An Historical Overview*, 38 *ADMIN. L. REV.* 399, 403 (1986).

217. Agency flexibility in applying policy is described as a principle favoring determination of questions by agencies rather than by the judiciary. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 *COLUM. L. REV.* 2071, 2088 (1990).

218. A related debate involves the question of flexibility within the realm of agency policy. After responsibility for certain policy determinations has been delegated to an agency, a subsidiary question arises as to how much of this policy must be adopted as rules and how much may be applied as agency nonrule policy. This issue has been much debated in Florida. See Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 *FLA. ST. U. L. REV.* 661 (1991); Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 *FLA. ST. U. L. REV.* 437 (1991). The Governor's proposal to repeal the statutory requirement that agencies adopt as rules all policies that they are applying was criticized in Stephen T. Maher, *The Death of Rules: How Politics is Suffocating Florida*, 8 *ST. THOMAS L. REV.* 314 (1996). The 1996 legislation retained Florida's strict requirement that all agency policy must be adopted as a rule as soon as it is feasible and practicable to do so, see *supra* note 60, but created a new waiver provision to allow added flexibility, see Blanton & Rhodes, *supra* note 8, at 32. The discussion in this Article involves the earlier determination of how much lawmaking authority is to be directly exercised by the Legislature and how much is to be delegated to an administrative agency.

tion to immediate political impasse in the legislature is simply to relegate the contentious policy decision on which no agreement is possible to an administrative agency to resolve in rulemaking. The more general the provisions of a bill, the greater the likelihood that a majority will support it; disagreements arise if a bill is made more specific. Thus, the solution to dispute often lies in intentional generality. Legislators can retain the level of generality necessary to ensure majority support, and then rely upon the agency to use rulemaking authority to fill out the policy, hopefully in accordance with their unexpressed desires. This pressure to avoid the celebrated evil of gridlock is certainly understandable, but it raises serious concerns in light of our constitutional structure.²¹⁹ Our democratic institutions were designed precisely to ensure that policies unable to command majority support would not become the policy of the state.²²⁰

Another pressure for delegation has been suggested with the assertion that legislators find it in their political interest to pass vague legislation because they can then blame agencies for unacceptable results.²²¹ Economic models have been employed in an attempt to demonstrate that with broadly worded statutes, legislators can claim credit for the agency's specific implementation with those constituents pleased with the results, while at the same time denying responsibility with those constituents unhappy with the agency's actions.²²² If delegation does in fact allow legislators to shift responsibility for political decisions, this might create a powerful incentive to delegate, especially in the most controversial policy areas.

B. Mechanisms

If delegation is to be restricted, it might be necessary to bolster the legislature's ability to resist these subtle inherent pressures toward generality in legislation. The Florida Legislature recognized that special mechanisms could be created that would help focus legislative attention on delegation issues. The Legislature first resolved

219. As Judge Skelly Wright once put it, "[a]n argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." J. Skelly Wright, *Beyond Discretionary Justice*, 81 *YALE L.J.* 575, 585 (1972).

220. See *supra* text accompanying note 48.

221. See Schoenbrod, *supra* note 40, at 373.

222. See Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33 (1982). Another commentator, himself a legislator at the time, harshly but concisely expressed one aspect of this phenomenon in this way: "[There is] growing evidence of a perverse symbiotic relationship between legislators and agencies. This symbiotic relationship not only tolerates but, ironically, may even require legislators to create bureaucratic monstrosities against whose foreseeable excesses they can protest to their political gain." David B. Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform*, 58 *OR. L. REV.* 411, 459 (1980).

to consider these issues with respect to proposed legislation. Section 1 of chapter 96-159, Florida Laws, not codified in the Florida Statutes, provides:

It is the intent of the Legislature to consider the impact of any agency rulemaking required by proposed legislation and to determine whether the proposed legislation provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposed legislation.²²³

This language does not require the Legislature to take any particular action,²²⁴ but it does demonstrate an understanding that the adequacy of statutory standards is directly related to the delegation problem.

Even if all future legislation were to be carefully drafted to include specific guidance to implementing agencies, and thus avoid excessive delegation, concerns would remain with existing statutes. After all, the perceived problems of the past with agency actions exceeding delegated authority occurred under existing statutory language. The responsibility of each agency to review its rules and submit a list of those without authority under the new rulemaking standard²²⁵ provides one mechanism for the Legislature to examine existing statutes. The rules included on the list may well express good policies that the Legislature will wish to validate. New statutory language can be enacted to more clearly authorize the agency to do what it has already done. On the other hand, in the event the Legislature determines that the agency rule policy is ill-advised, or if it prefers another policy, it can enact more specific legislation giving that direction. Some existing statutes will be reviewed under this ratification process. As for rules not included on the list, the rule challenge provisions²²⁶ should occasionally compel some agencies to return to the Legislature to seek more specific provisions of law to implement.

223. Act effective Oct. 1, 1996, ch. 96-159, § 1, 1996 Fla. Laws 147, 149.

224. It is possible that the Legislature might choose to create formal procedures to consider whether proposed legislation contains adequate and appropriate standards and guidelines for an agency. The Governor's Commission recommended that staff analysts discuss this issue. See FINAL REPORT, *supra* note 14, at 17. Similar requirements have been placed in legislative rules. For example, both the Senate Rules and the Rules of the House of Representatives require that a bill contain a fiscal analysis when reported favorably by a committee. See Fla. S. Rule 3.13 (1996); Fla. H.R. Rule 7.16 (1996). It may be unlikely, however, that rule provisions will be created. An earlier draft of the Committee Substitute for Senate Bills 2290 and 2288 would have created section 11.0751, Florida Statutes, requiring legislative consideration of delegated authority, but this was replaced with the current "intent" language during passage. See FLA. H.R. JOUR. 746 (Reg. Sess. 1996).

225. See *supra* text accompanying notes 194-204 for a discussion of section 120.536(2).

226. See FLA. STAT. § 120.56(3) (Supp. 1996).

Chapter 96-159, Florida Laws, also constructs a more methodical process to review statutes delegating rulemaking authority. Chapter 159 creates section 11.60(4), Florida Statutes, which provides:

The committee shall undertake and maintain a systematic and continuous review of statutes that authorize agencies to adopt rules and shall make recommendations to the appropriate standing committees of the Senate and the House of Representatives as to the advisability of considering changes to the delegated authority to adopt rules in specific circumstances. The annual report submitted pursuant to paragraph (2)(f) shall include a schedule for the required systematic review of existing statutes, a summary of the status of this review, and any recommendations provided to the standing committees during the preceding year.²²⁷

This section creates an entirely new role for the JAPC. While it has long examined rules adopted pursuant to delegated authority, JAPC has never before had a responsibility to make recommendations to standing committees regarding the statutes delegating that authority.

It is still too early to know what form this systematic and continuous review will take. The fact that a schedule is to be established suggests that existing statutes will have to be divided into smaller groups to be reviewed over time. JAPC might decide to organize the review by statute number, simply beginning at the front of the statute books and moving through to the end. Another possibility would be to divide statutes by implementing agency, scheduling all of the statutes that a single agency implements for consecutive review, then moving on to the next agency's statutes.

"Systematic" and "continuous" also are broad enough to include, in addition to the scheduled reviews, consideration of delegations of authority in conjunction with JAPC's usual rule review process. As each agency proposes new rules and amendments, JAPC must carefully examine the statutes cited as rulemaking authority and as law implemented. This would appear to be an excellent opportunity to consider the statutory delegation, as well as the rule, and to make any recommendations to the appropriate standing committees.

Whatever the form of this statutory review, it will provide the Legislature for the first time with a mechanism to routinely evaluate statutory delegations in light of the rules the agency actually adopted to implement them. At the time a statute is originally enacted, consideration given to delegation is necessarily abstract—it is impossible to anticipate all possible contingencies and constructions. After an agency has adopted or attempted to adopt rules, it becomes easier to conduct a review of the statute and identify delegations

227. *Id.* § 11.60(4).

that might be clarified. Chapter 96-159 creates a statutory review mechanism to ensure that this is done in a regular and orderly fashion.

VII. ALL'S WELL THAT ENDS WELL

Taken together, these legislative check provisions have the potential to substantially change the structure of administrative law in Florida. The heart of these amendments, section 120.536, Florida Statutes, restricts agency power to adopt rules. The other provisions are designed either to monitor or enforce this restriction, or to assist the Legislature in its corresponding duty to enact more specific laws.

Under the new APA scheme, the goals set forth in statements of general legislative intent or policy are no longer capable of supporting rulemaking. It is no longer sufficient that a rule be reasonably related to the purposes of the statute. Only statutes granting particular powers and duties may be implemented through rulemaking. The goal is for agencies to stop formulating mid-level policies, and for the Legislature to begin doing so. It is an ambitious undertaking, opposed by natural political forces and one strand of Florida's legal tradition. It is by no means clear that it will succeed. It is problematic because it involves so many different players in Florida's administrative law system.

Agencies will have to prepare lists of existing rules that are in need of more specific authority for submission to the Legislature. They will have to keep the new stricter rule standard in mind as they draft rules and, perhaps even more importantly, as they draft proposed legislation, for the law will now have to include more definite policy standards and guidance.

Administrative law judges will have a critical role, for they will initially apply the new rulemaking standard. Should they fail to require that every rule be supported not only by a rulemaking grant and general statutory purpose, but also by specific laws being implemented that set forth the duties and programs to be carried out by the rule, then the entire legislative scheme will fail.

Courts, too, will have to give effect to the legislative intent to delegate no rulemaking authority in the absence of detailed policy guidance within the statute. They will have to abandon the "reasonably related" standard. Courts hearing rule challenge appeals must review the administrative law judge's order, not the rule, and uphold it unless it contains a conclusion of law which is erroneous or a finding of fact unsupported by competent, substantial evidence.

The greatest burden, however, may fall upon the Legislature. It is the Legislature that ultimately must overcome inherent institu-

tional resistance, make the difficult mid-level political decisions, and express these policies in statutes assigning particular powers and duties to the agencies. It is the Legislature that must quickly respond to unanticipated problems that may arise as programs are implemented.

One of American administrative law's greatest struggles has been to decide what is to be done when the legislative branch fails to speak clearly and comprehensively. Some have vehemently insisted that only the judiciary has the power to declare what the law is. Others have as strongly maintained that the courts must defer to whatever the agency decides. These issues will remain, but Florida's APA now suggests that a third option is preferable when important mid-level policy decisions are at issue. 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.