"STATUTORY NONDELEGATION": LEARNING FROM FLORIDA'S RECENT EXPERIENCE IN ADMINISTRATIVE PROCEDURE REFORM

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I. INTRODUCTION

> [T]o be blunt, the history of American administrative law is a history of failed ideas.[1]

If Professor Mashaw's observation rings true at the federal level, it might be said to hit us like a steamroller in the states. Most state administrative procedure acts (APAs) are of a more recent vintage than the Federal APA, which was adopted in 1946. Thus, state APAs are more likely to reflect the fashion of the 1960s, 1970s, or 1980s than the time-tested ideas of their federal counterpart. In addition, state APAs are much more detailed than the Federal APA, making it more likely that not courts but state legislatures—hardly known for their competence, let alone their appreciation of administrative governance—are the source of new ideas in administrative procedure. Also, state APAs are amended far more frequently than the Federal APA. Florida's APA, for example, has been amended almost every single year since its adoption in 1974. None of this should come as a surprise. States, after all, are laboratories of democracy and laboratories (like democracies) produce failed experiments as well as successful ones.

In 1996 Florida adopted the most comprehensive set of changes in the history of its APA. Florida's 1996 APA amendments grew out of a reform effort that had been brewing for years, culminating in the appointment by then-Governor Lawton Chiles of a

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[1] JERRY L. MASHAW, BUREAUCRATIC JUSTICE 1 (1983).

fifteen-member APA Review Commission. Following several months of deliberations, the APA Review Commission produced proposals, which the Florida Legislature adopted with significant amendments and which Governor Chiles signed into law in 1996. These amendments were designed to simplify Florida's APA and to promote accountability and flexibility in the administrative process.[2]

Following adoption of Florida's 1996 APA reforms, I expressed cautious skepticism, characterizing them as a rulemaking "counter-revolution":[3] many provisions in the 1996 reforms pose a tension with the Florida Legislature's traditional effort to favor rulemaking as the primary vehicle for the executive branch's implementation of policy in the state.[4] Writing today, I believe that it is highly questionable whether Florida's 1996 amendments have achieved the objectives of the reformers. I think, however, the 1996 reforms provide a useful context for examining reforms in Florida and elsewhere aimed at fixing accountability problems, particularly in the rulemaking context.

In this Article, I assess one of the more notable reforms Florida made to its APA in 1996 with the intention of enhancing the accountability of agency rulemaking, and I discuss the lessons other state reformers can learn from Florida's experience. Part II of this Article discusses rulemaking authority under the Federal APA and the more restrictive approach many states take to ensure that agencies are accountable to the legislature in proposing rules. Some states, including Pennsylvania, have endorsed what I will term "statutory nondelegation": This is a judicially-adopted or

[2] *See* FINAL REPORT OF THE GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION 1 (1996) (citing goals of "simplifying the APA, increasing flexibility in the application of administrative rules and procedures, and increasing agency accountability to the Legislature and the general public").

[3] *See* Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?*, 49 ADMIN. L. REV. 345 (1997) (observing that Florida's 1996 APA amendments were too fresh to provide sound data for criticism, but that they should be re-evaluated in the future when more data and anecdotes regarding their effects are available).

[4] Section 120.54(1)(a) of Florida's APA, added in 1991, requires agencies to use rulemaking to make statements of general applicability to the extent it is practicable and feasible. *See* FLA. STAT. ANN. § 120.54(1)(a) (West Supp. 1999).

APA-imposed clear statement requirement, suggesting that courts or administrative law judges (ALJs) review rules independently to ensure that they are based in apparent and specific statutory authority, rather than promulgated under implied powers from general grants of authority. Similar to the nondelegation doctrine, which exists in many states as a constitutional restraint on legislative delegations of rulemaking authority to agencies absent specific statutory authority and standards, statutory nondelegation is intended to ensure that agencies are accountable to the will of the legislature. States endorse statutory nondelegation with differing degrees of strength: While Pennsylvania judicially endorses a modest form of statutory nondelegation, Florida's 1996 APA reforms exemplify a radical and strong version, similar to what the United States Congress considered more than twenty years ago in the failed Bumpers Amendment to the Federal APA.

In Part III of this Article, I discuss some of the problems with efforts to enhance accountability by requiring statutory nondelegation in state APAs, using the recent Florida reform and its implementation as an example. Part IV discusses Florida's 1999 APA amendments, passed primarily as a reaction to legislative dissatisfaction with judicial interpretation of Florida's 1996 APA amendments. In Part V, I generalize from Florida's experience to suggest some lessons for Pennsylvania and other state reformers.

While statutory nondelegation is consistent with the concerns of states that endorse a stronger constitutional nondelegation doctrine than federal courts, I argue that enforcement of statutory nondelegation is best institutionalized within a legislature, not with ALJs or the courts. States, like Pennsylvania, that have judicially endorsed statutory nondelegation should consider abandoning the doctrine in APA reforms or removing courts and ALJs from its enforcement. Whatever a state does, though, it should steer away from Florida's approach to statutory nondelegation. If a state emulates Florida in adopting this provision of Florida's APA (or a version similar to it), a range of problems relating to judicial review and statutory interpretation are likely to emerge on the reform map, as they have in Florida. If Florida's experience is any indication, the resolution of such problems in the APA reform process will not always promote sound agency policy making.

While Florida's approach to law reform has not generated what I believe to be desirable additions to administrative procedure for the state, other states can learn from Florida's law reform process. Specifically, for as often as it has amended its APA, Florida has generally disfavored the use of law reform commissions as a vehicle for vetting reform proposals. Florida's 1996 APA Review Commission, appointed by its Governor, provided a somewhat tempered forum for considering several modest and reasonable reform proposals, but its temporary life did not work to limit the proposal—and adoption—of radical administrative procedure reforms endorsed by antiregulation interest groups in the state. States considering APA reform might take a lesson from Florida's experience in the APA reform process and consider establishing a long-term administrative procedure revision commission, as California and Michigan have used in recent years.[5] Establishing a long-term commission, with a stake in the reform process and its outcome, might lead to more systematic reform proposals, allowing for evaluation of their implementation and successes or failures.

II. STATUTORY NONDELEGATION IN FEDERAL AND STATE ADMINISTRATIVE PROCEDURE

> No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included.[6]

Madison's axiom–that the general includes the particular–is a fundamental precept of federal administrative procedure. Although a federal administrative agency is required to state the source of its rulemaking authority when it provides notice of proposed rules, it

[5] *See* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229 (1999); Steven P. Croley, *State Administrative Law Reform: Recent Experience in Michigan*, 8 WIDENER J. PUB. L. 347 (1999).

[6] THE FEDERALIST No. 44 (James Madison).

operates under the assumption that general legislative grants of power include the particular. Yet some states, including Pennsylvania, have judicially required more specific statutory authority as a basis for an agency regulation. Such requirements find weak endorsement in the language of the 1981 Model State Administrative Procedure Act (MSAPA),[7] which requires an agency to cite to specific statutory authority for rules. Recent state APA reformers, most notably in Florida, however, have set out to strengthen the requirement of specific authority for rulemaking far beyond what the Federal APA and the 1981 MSAPA would require.

A. Requirements in the Federal APA

Consistent with Madison's well-accepted precept, the Federal APA does not require an agency to have specific statutory authority prior to promulgating a rule. Section 553 of the Federal APA requires an agency's notice of proposed rulemaking (NOPR) to contain a "reference to the legal authority under which the rule is proposed."[8] On occasion, courts have invalidated agency rules for failure to comply with this notice requirement. For example, the United States Court of Appeals for the District of Columbia Circuit held as reversible error the Interstate Commerce Commission's (ICC's) failure to cite the specific statutory authorization for its rulemaking authority in its original notice of rules regarding the licensing of tour brokers.[9]

[7] MODEL STATE ADMIN. PROCEDURE ACT §§ 1-101 to 5-205 (1981), 15 U.L.A. 1-136 (1990). The 1981 MSAPA, adopted by the National Conference of Commissioners on Uniform State Laws, was an update and re-examination of the 1961 MSAPA. *Id.*, historical note, 15 U.L.A at 1.

[8] 5 U.S.C. § 553(b)(2) (1994).

[9] National Tour Brokers Ass'n v. United States, 591 F.2d 896, 900, 903 (D.C. Cir. 1978) (observing, in the sole statute cited, notice was understood to need congressional alteration or amendment and the rule finally issued was based on different statutory authorization than the proposed rule). *But see* Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 864-65 (E.D. Cal. 1985) (noting agency's failure to cite specific statutory authorization for a rule in its notice of proposed rulemaking is not itself a fatal procedural error where statutory authorization is given in other referenced statutes).

Despite this notice requirement, federal case law overwhelmingly suggests that a general grant of rulemaking authority in a statute suffices to establish agency authority to promulgate rules. The Supreme Court endorsed this principle in *Mourning v. Family Publications Service, Inc.*,[10] where it addressed the Federal Reserve Board's "four installment" rule. This regulation requires sellers to comply with the disclosure requirements of the Truth in Lending Act to those to whom they extend consumer credit without finance charges if the sum owed is payable in more than four installments. In reasoning that the Board's rule did not exceed its statutory authority, the Court stated:

> The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth in Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."[11]

Noting ambiguity in the statutory language, the Court observed "where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."[12] To hold the rule outside the scope of the agency's authority, the Court reasoned, "would undermine the flexibility sought in vesting broad rulemaking authority in an administrative agency."[13]

Federal circuit courts routinely follow this deferential approach. In a recent case involving the rulemaking powers of the Surface Transportation Board (STB), the Court of Appeals for the District of Columbia held that the agency acted within its authority when it

[10] 411 U.S. 356 (1973).
[11] *Id.* at 369 (citations omitted).
[12] *Id.* at 371-72 (citations omitted).
[13] *Id.* at 372.

modified criteria adopted for exempting purchasers of short line railroads from normal certification.[14] Challengers argued that STB was authorized by statute to deregulate, rather than adopt new regulations.[15] The District of Columbia Circuit, however, applied *Chevron* deference[16] and upheld the agency's interpretation of its statutory powers to the extent the interpretation was reasonable.[17] On occasion, federal courts, however, have held that the clear meaning of an unambiguous statute can confine an agency's authority to promulgate rules, on either statutory[18] or constitutional[19]

[14] Association of American R.Rs. v. Surface Transp. Bd., 161 F.3d 58, 60 (D.C. Cir. 1998).

[15] *Id.* at 62-63.

[16] Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), federal courts reviewing agency interpretations of statutes apply a two-part test. *See id.* At step one, a court asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. At step two, a Court defers to the agency's permissible construction: "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

[17] *American R.Rs.*, 161 F.3d at 63-64.

[18] *See, e.g.*, Kelley v. Environmental Protection Agency, 15 F.3d 1100, 1106 (D.C. Cir. 1994) (invalidating agency rule defining scope of lender liability as "in excess of agency statutory jurisdiction, authority or limitations" under section 706 of the APA because the court read statutory language to suggest Congress "quite consciously" left liability issues to be decided by the courts, not the EPA); Global Van Lines, Inc. v. Interstate Commerce Comm'n, 714 F.2d 1290, 1294-95 (5th Cir. 1983) (invalidating rule regulating entirely new sector of the industry based solely on general statutory grants of authority, including a provision that authorized issuance of "'only such rules and regulations . . . as may be necessary to carry out [the other] provisions'") (quoting Interstate Commerce Act, pt. IV, ch. 318, § 403(a), 56 Stat. 284, 285 (1942) (superseded 1978)).

[19] A 1999 District of Columbia Circuit panel invoked the nondelegation doctrine as a reason for reversing the Environmental Protection Agency's interpretation of the scope of its authority to set ambient air quality standards under the Clean Air Act. *See* American Trucking Ass'ns, Inc. v. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999). While the District of Columbia Circuit panel drew on the rhetoric of nondelegation, it did not strike down the statutory provision but only the EPA's reading of it. *See id.* at 1037-38. In the panel's view, the EPA's reading of its authority under the statute would have made Congress's action unconstitutional.

grounds. Courts, however, generally defer to reasonable agency interpretations regarding statutory authority for specific rules issued pursuant to general statutory grants of authority.[20]

The principle that agencies have sweeping authority to promulgate rules based on nothing more than general statutory language has on occasion been a target for federal reformers. In the late 1970s and early 1980s, Congress considered a proposal to significantly narrow agency rulemaking authority under the APA. This proposal, advanced by Senator Dale Bumpers, grew out of a dispute between the federal funding agency for education programs and a small school district in the Senator's home state of Arkansas. The Bumpers proposal would have amended the judicial review sections of the APA,[21] directing courts to "require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent."[22] Although the Bumpers Amendment was not enacted into law, it did not die easily and continued to surface for several years in reform discussions before Congress.

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[20] *See, e.g.*, Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Comm'n, 650 F.2d 1235 (D.C. Cir. 1980), *cert. denied* 451 U.S. 984 (1981) (upholding agency authority to promulgate rules regarding matters previously adjudicated where Congress has granted both rulemaking and adjudicative authority); Hooker Chems. & Plastics v. Train, 537 F.2d 620 (2d Cir. 1976) (upholding the EPA's reference to general authority for rules, but reversing and remanding on other grounds). *Cf.* Village of Bergen v. Federal Energy Regulatory Comm'n, 33 F.3d 1385 (D.C. Cir. 1994) (deferring to agency's interpretation of its own jurisdiction as a reasonable interpretation of ambiguous statutory language). One of the reasons courts defer to agency interpretations of jurisdiction is that they are unable to cogently distinguish between jurisdictional and nonjurisdictional interpretations. *See* Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994).

[21] 5 U.S.C. § 706 (1994).

[22] 128 CONG. REC. S1217 (daily ed. Mar. 24, 1982). For criticism of this provision of the Bumpers Amendment, see Ronald M. Levin, Comment, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355, 371–78; James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 773-76 (1980).

In 1994, more than a decade after the extreme Bumpers Amendment failed enactment, Senator Robert Dole proposed, as a part of a cost-benefit restriction bill, a proposal intended to restrict agency authority to promulgate new regulations. Dole's proposal prohibited agencies from promulgating rules where it is not necessary to achieve a statutory objective. The proposal stated: "[A]ny rule that expands Federal power or jurisdiction beyond the level of regulatory action needed to satisfy statutory requirements shall be prohibited."[23] Against the spirit of federal case law, the Dole proposal would have left to courts the task of determining when rules are necessary for purposes of satisfying the minimum level of regulatory action required by statute. This amendment also failed congressional approval.

B. Statutory Nondelegation Requirements in State Courts

Congress accepted neither the Bumpers nor the Dole proposals, but both endorsed a principle that is supported in the decisions of some state courts. In contrast to courts' interpretations of rulemaking requirements under the Federal APA, some state courts impose more stringent standards on agencies promulgating rules. Decisions by these courts, both in rhetoric and result, severely restrict the authority of agencies to promulgate rules (or to regulate more generally) absent specific authority in statutes–in effect, a "statutory nondelegation" doctrine.

The requirement of clear and specific statutory authorization for agency rules assists state courts in implementing the nondelegation doctrine, which is more strongly enforced by state courts than at the federal level.[24] By striking agency rules for failure to comply with specific grants of legislative authority, state courts can achieve the goals of the nondelegation doctrine without explicitly addressing the

[23] S. 343, 104th Cong. § 627(a) (1995).

[24] *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999) (discussing the nondelegation doctrine in the states and explaining the institutional design factors that may make it more necessary than in the federal system).

constitutional issue. Like the constitutional nondelegation doctrine, statutory nondelegation is intended to increase the accountability of agency rulemaking to the will of the legislature. By working as a type of clear statement rule,[25] statutory nondelegation provides some way to assure that agencies regulate activities only where it is manifest that the legislature intended this to occur.

For example, while Pennsylvania's APA endorses a basic rulemaking process similar to that at the federal level,[26] Pennsylvania courts have developed a statutory nondelegation doctrine. Courts in the state observe the standard that "power and authority exercised by an administrative agency in its rule-making must be conferred by language that is clear and unmistakable and the regulatory action must be within strict and exact limits defined by statute."[27] This standard was used to invalidate Board of Medicine rules providing that medical and osteopathic physicians could not use amphetamines to treat a patient unless the physician was treating the patient for a disease the Board had decided could receive long term amphetamine treatment.[28] The reviewing court reasoned the Board did not have the authority to promulgate the challenged regulations because they did not constitute a "standard

[25] *See, e.g.*, John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771 (critiquing clear statement rules, particularly in the sovereign immunity context).

[26] The rulemaking provisions of Pennsylvania's "APA" (three distinct statutes, really) appear at 45 PA. CONS. STAT. ANN. §§ 1102, 1201-1208 (West 1991). Remaining provisions of Pennsylvania's "APA" are codified elsewhere. 2 PA. CONS. STAT. ANN. §§ 101-754 (West 1995) (general provisions for adjudication and judicial review); 71 PA. CONS. STAT. ANN. §§ 745.2-.12 (West 1990) (Regulatory Review Act, providing for oversight of rulemaking by the Independent Regulatory Review Commission). The scattered provisions of Pennsylvania's statutes governing administrative procedure make the administrative process seem more difficult than it really is–probably not just for outsiders, like myself, but for the average citizen. If nothing else, Pennsylvania could benefit from some of the "simplification" measures Florida endorsed in its 1996 reforms.

[27] Pennsylvania Med. Soc'y v. State Bd. of Osteopathic Med., 546 A.2d 720, 722-23 (Pa. Commw. Ct. 1988) (determining regulations are outside the authority of agency) (citing DeMarco v. Department of Health, 397 A.2d 61 (Pa. Commw. Ct. 1979)).

[28] *Id.* at 721.

of care" and the purpose of the statute implemented did not "encompass[] a compulsory patient-specific review of diagnoses and treatment provided by a licensed practitioner where there is no indication that any provision of . . . the Medical Practice Act . . . ha[d] been violated."[29]

The Pennsylvania statutory nondelegation requirement, which can be traced to early Pennsylvania cases,[30] subjects agency rulemaking authority to a type of strict scrutiny on appeal. For instance, in *Morrison v. State Board of Medicine*,[31] a court sustained Board of Medicine objections to a request for declaratory judgment authorizing a particular treatment program for cancer patients.[32] The court reasoned that, since the "purpose of the [Medical Practice] Act [wa]s to provide for the proper licensing of doctors by duly constituted boards that, through administrative regulation, could set standards of care and conduct," approval of the requested treatment program was "outside the scope of power granted by the legislature."[33] Although Pennsylvania courts review the statutory authority for agency rulemaking, they also appear to give agency interpretations of statutes some degree of deference.[34]

Pennsylvania is not unique in its judicial adoption of statutory nondelegation. Texas courts have held that an agency can only adopt rules "within the clear intent of the statutory authority conferred on the agency" and "may not impose additional burdens, conditions, or restrictions in excess of [or inconsistent with relevant] statutory provisions."[35] The Texas approach, by

[29] *Id.* at 723.

[30] *See, e.g.*, Day v. Public Serv. Comm'n, 167 A. 565, 566 (Pa. 1933). The *Day* court determined that "the Public Service Commission, being a creature of the Legislature, is vested only with those powers conferred by statute 'or such as are implied necessarily from a grant of such powers'" and the legislative grant of powers must be clear. *Id.* (quoting Harmony Elec. Co. v. Public Serv. Comm'n, 78 Pa. Super. Ct. 271, 280 (1922)).

[31] 618 A.2d 1098 (Pa. Commw. Ct. 1992).

[32] *Id.*

[33] *Id.* at 1100.

[34] *See* Campo v. State Real Estate Comm'n, 723 A.2d 260 (Pa. Commw. Ct. 1998) (analyzing statutory authority for rule but upholding agency's rule).

[35] Sinclair v. Albertson's, Inc., 975 S.W.2d 662, 666 (Tex. App. 1998).

emphasizing the requirement of *clear and specific* statutory authority,[36] removes from judicial review any notion of deference to agency statutory interpretations where statutes are ambiguous or unclear, instead suggesting de novo review of agency rules for compliance with statutory authority.

For example, a Texas appellate court, applying the doctrine, invalidated as outside of the agency's statutory authority Railroad Commission rules promulgated to protect the correlative rights of oil producers.[37] The Railroad Commission cited several sources of authority as a basis for adopting these rules, including statutory provisions giving the Commission the authority to adopt rules necessary to prevent waste, requiring corrective action when conservation laws or rules are violated, and requiring persons to keep accurate records of oil produced.[38] After noting that none of the statutory provisions cited by the agency *expressly* authorized the use of rulemaking for purposes of protecting the correlative rights of oil producers,[39] the court addressed whether any of the provisions impliedly granted power to the agency. The court reasoned that each grant of rulemaking authority contained provisions delimiting purposes for which the Commission may promulgate rules, and that no designation of purposes included the protection of correlative rights.[40] Thus, applying the canon *expressio unius est exclusio alterius*, the court concluded that the legislature's express designation of purposes implied lack of authorization for other purposes.[41]

[36] *Cf.* Railroad Comm'n of Tex. v. City of Austin, 524 S.W.2d 262, 267 (Tex. 1975). To summarize the decisions regarding rulemaking, "[t]he Court has generally held that the Commission has only such powers as are *specifically* delegated to the Commission." *Id.* at 267.

[37] Railroad Comm'n of Tex. v. Arco Oil & Gas Co., 876 S.W.2d 473, 481 (Tex. App. 1994).

[38] *Id.* at 483.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 483-84. The court also observed that the Commission's enabling legislation contemplated the use of an evidentiary hearing prior to the adoption of production allocation standards. *Id.* at 484.

Although illustrative of what some states do, the rigorous approach of Pennsylvania and Texas courts in reviewing the statutory authority for agency rules is not followed in every state. Consider, for example, the approach of Missouri courts. The Missouri APA, like the Federal APA, required a notice of proposed rulemaking to contain notice of "[t]he legal authority upon which the proposed rule is based."[42] In a notice of proposed rulemaking regarding asbestos removal regulations, the Missouri Air Conservation Commission cited to a general rule enabling statute that granted the agency authority to adopt rules for purposes of complying with the Federal Clean Air Act.[43] The agency failed to cite to a section of Missouri's statutes that specifically authorized the regulation of asbestos removal projects.[44] On appeal the agency conceded the more specific statutory authority was "more proper" than the general grant; but, the Missouri Supreme Court refused to reverse the agency's rulemaking.[45] The court reasoned that the broad grant of authority in the agency's general enabling statute met the APA's notice requirement and provided an adequate legal basis for the rule.[46]

C. Statutory Nondelegation and Recent State APA Reforms

A comparison between the texts of the Federal APA and the 1981 MSAPA suggests some difference in the degree of specific statutory authority required. In contrast to the Federal APA, which only requires a "reference to the legal authority under which the rule is proposed,"[47] the 1981 MSAPA, requires a notice of proposed rulemaking to contain "the *specific* legal authority authorizing the proposed rule."[48] Thus, at least in its text, the language of the 1981

[42] MO. REV. STAT. § 536.021.2(2) (1999).

[43] Corvera Abatement Techs., Inc. v. Air Conservation Comm'n, 973 S.W.2d 851, 855 (Mo. 1998) (en banc) (citing MO. REV. STAT. § 643.050 (1999)).

[44] *Id.* (citing MO. REV. STAT. § 643.225 (1999)).

[45] *Id.*

[46] *Id.*

[47] 5 U.S.C. § 553(b)(2) (1994).

[48] MODEL STATE ADMIN. PROCEDURE ACT, § 3-103 (1981), 15 U.L.A. 35 (1990) (emphasis added).

MSAPA suggests a stricter standard than that in the Federal APA. No states adopting the MSAPA, however, appear to have applied this standard to restrict agency rulemaking authority. Although the language of the 1981 MSAPA might parallel the approach of some state courts, such as those in Pennsylvania and Texas, it is a weaker standard that speaks to the procedure rather than substance of agency rulemaking.[49]

Despite the modest approach of the 1981 MSAPA, more aggressive statutory nondelegation restrictions appear in the language of several state APAs and have been a popular mechanism among APA reformers bent on enhancing the accountability of agencies to the legislative branch. An example is Minnesota's APA, which states: "Authority to adopt original rules [is] restricted."[50] This language suggests some limit on the statutory authority of agencies to promulgate rules, but no cases to date have applied it to restrict agency authority to promulgate rules.

Other recent state APA reforms, perhaps inspired by the provision in the Dole reform bill, also include statutory nondelegation provisions. In 1995 Washington added a section to its

[49] The purpose of this language in the notice standard of the 1981 MSAPA was to reduce, not increase, the number of rules invalidated. Professor Bonfield, reporter for the 1981 MSAPA, wrote:

> Requiring the notice of proposed rule adoption to indicate the specific legal authority supporting the issuance of that rule will help keep rule making lawful. This requirement should increase the likelihood that agencies will carefully consider their authority to adopt each rule they propose prior to the time they first propose it. Over a period of time, that should reduce the possibility that proposed rules will, on closer consideration by agencies, turn out to be outside the scope of their authority. The requirement that agencies specify in their notice of proposed rule adoption the precise legal authority for their contemplated action should also help to reduce the number of instances in which an adopted rule will be declared invalid by a court after the agency has expended substantial time and money to adopt it.

ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULEMAKING 175-76 (1986). It seems that how exacting and rigid courts are in their expectations of statutory precision will determine how frequently agency rules are reversed, but Bonfield's interpretation of the notice requirement suggests that it is a procedural rather than a substantive one.

[50] MINN. STAT. ANN. § 14.05(1) (West 1997 & Supp. 1999).

APA that states "an agency may not rely solely on the section of [the] law stating a statute's intent or purpose, or on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for its statutory authority to adopt the rule."[51] Florida's 1996 APA revisions went a step further, adding to its APA a remarkable section which states:

> 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.[52]

This 1996 Florida reform, which echoes aspects of the lapsed Federal Bumpers Amendment and Dole reform proposal, is perhaps the most restrictive of those in state APAs, and thus worthy of some discussion. Florida's 1996 statutory nondelegation standard modified preexisting case law that held, consistent with the United States Supreme Court's decision in *Mourning*, that a rule is valid if it is reasonably related to the enabling statute and not arbitrary and capricious.[53]

[51] WASH. REV. CODE ANN. § 34.05.322 (West Supp. 1999).

[52] FLA. STAT. ANN. § 120.536(1) (West Supp. 1999) (amended 1999). As is discussed *infra* in Part IV, the language of this standard was amended in 1999, but its overall structure remains in Florida's APA.

[53] As the Florida Supreme Court stated:

> 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.

This statutory nondelegation requirement is also incorporated into the "[i]nvalid exercise of delegated legislative authority" standard for ALJ review of challenged rules in section 120.52(8) of Florida's APA.[54] In Florida, rules can be challenged before an ALJ on several grounds, including failure to comply with this statutory nondelegation standard.[55] Proposed rules are immediately subject to the new standard.[56] For an interim period, existing rules were evaluated by agencies and by the Legislature to determine whether additional statutory authorization was necessary. Following July 1, 1999, all existing rules were subject to legal challenge based on the new statutory nondelegation standard.[57]

Florida's 1996 statutory nondelegation provision caught many agencies by surprise. The proposal, borrowed from language in an APA reform bill Governor Chiles vetoed in 1995, was incorporated into Florida's APA without independent evaluation by the APA Review Commission. Governor Chiles did not express strong protest to this provision, as he did several other aspects of the vetoed 1995 reforms. Notably, the Review Commission did not explicitly recommend adoption of the statutory nondelegation standard in 1997. Instead, the provision (based on a provision in the amended 1995 bill) was added to the APA amendments during the legislative adoption process, at the urging of interest groups attempting to reign in agency power in a climate where antiregulation sentiment ran strong. These same interest groups failed to have the provision adopted in their previous reform efforts, but were able to attach it to the larger, more moderate APA reform bill drafted by the Review Commission. The APA Review Commission did not debate or consider fully the arguments for and

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General Tel. Co. of Florida v. Florida Pub. Serv. Comm'n, 446 So. 2d 1063, 1067 (Fla. 1984) (quoting Agrico Chem. Co. v. State Dep't of Envtl. Regulation, 365 So. 2d 759 (Fla. 1st Dist. Ct. App. 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979); Florida Beverage Corp. v. Wynne, 306 So. 2d 200 (Fla. 1st Dist. Ct. App. 1975)).

[54] *See* FLA. STAT. ANN. § 120.52(8) (West Supp. 1999) (amended 1999).

[55] *See id.* § 120.56 (West 1996). Minnesota also provides for rule validity challenges before an ALJ. *See* WILLIAM J. KEPPEL, 21 MINNESOTA PRACTICE: ADMINISTRATIVE PRACTICE AND PROCEDURE 149-64 (1998).

[56] *See* FLA. STAT. ANN. § 120.536 (West Supp. 1999) (amended 1999).

[57] *See id.* § 120.536(2) (amended 1999).

against adding a statutory nondelegation provision to Florida's APA. Because it focused its efforts on other issues in its limited life, the Review Commission did not assess the impact of this provision on other APA provisions, agency decisionmaking, and judicial review. Hence, Florida in 1996 adopted a major modification to state administrative procedure without serious consideration of its effects on administrative governance.

III. THE PROBLEMS WITH STATUTORY NONDELEGATION

When considered solely through the lens of legislative accountability, statutory nondelegation standards, like the constitutional nondelegation doctrine, appear to be well-intended efforts to enhance the accountability of agency decisionmaking. For many reformers, efforts to restrict the power of agency regulatory authority hold promise to enhance legitimacy and accountability in the regulatory process. Legislators see a particular advantage to such provisions, as statutory nondelegation allows a legislature the constitutional power to delegate and to take credit for reigning in the decisions of agencies, particularly where a constituent is dissatisfied with the regulatory result.

Statutory nondelegation, however, poses some serious operational problems for agency governance to the extent it becomes a part of the general fabric of state administrative procedure—either by judicial adoption or by legislative addition to a state's APA. There are many problems with statutory nondelegation. First, such restrictions are inherently difficult to interpret, introducing high levels of uncertainty into judicial and agency decisionmaking. Like the constitutional nondelegation doctrine, such restrictions are subject to selective enforcement, and thus are not likely to achieve their intended result. Second, because of the conflict between interpretive ambiguities, on the one hand, and legislative directive to restrict agency authority, on the other, such restrictions may invite courts (and ALJs) to tread into the political process, rather than defer to agency interpretations of statutes. Third, while such restrictions are designed to increase the quality of the legislative process—encouraging legislative deliberation about the specifics of regulatory programs before such

programs are authorized–their effects on legislative accountability are questionable.

Florida's experience with its 1996 statutory nondelegation provision illustrates these problems. The false promise of statutory nondelegation has brought other reform issues, such as agency interpretation of statutes and judicial review, to the fore in Florida.

A. Interpreting "Particular Powers and Duties": The Florida Experience

In 1998 the Florida state courts interpreted Florida's new statutory nondelegation provision. The most notable decision is *St. Johns River Water Management District v. Consolidated-Tomoka Land Company*,[58] an opinion written by a panel of Florida's First District Court of Appeal, its main appellate court hearing administrative law cases. Despite the "particular powers and duties" language added to Florida's APA in 1996, this case upheld an agency's authority to promulgate rules without detailed legislative authorization addressing each promulgated rule. In this sense, *Consolidated-Tomoka* might be interpreted as a judicial effort to temper the counter-revolution against rulemaking in Florida's 1996 APA amendments.[59]

The *Consolidated-Tomoka* case began with a challenge to rules promulgated by a Water Management District in the state. The rules established two new hydrologic basins in the District's region and established new standards pertaining to runoff, recharge, storm water systems, and riparian wildlife.[60] In a rule challenge, an ALJ determined that the proposed rules were supported by competent substantial evidence and that they were not arbitrary or capricious.

[58] 717 So. 2d 72 (Fla. 1st Dist. Ct. App. 1998). For discussion of the case and its implications, see Martha Mann, St. Johns River Water Management District v. Consolidated-Tomoka Land Co.: *Defining Agency Rulemaking Authority Under the 1996 Revisions to the Florida Administrative Procedure Act*, 26 FLA. ST. U. L. REV. 517 (1999).

[59] *See* Rossi, *supra* note 3, at 352-53 (discussing the provisions of the 1996 amendments).

[60] *Consolidated-Tomoka*, 717 So. 2d at 75.

The ALJ, however, reasoned that the rules were invalid because they were not within the "'particular powers and duties'" granted by the enabling statutes, as required by the new standard in Florida's APA.[61] Statutory language directed the agency to "'not [allow] harm[] to the water resources,'" to "'delineate areas within the district wherein permits may be required,'" and to "require such permits and impose such reasonable conditions" to comply with state law.[62] Despite this language, the ALJ determined that this statutory authorization was inadequate under the new statutory nondelegation standard.[63]

The *Consolidated-Tomoka* panel unanimously reversed the ALJ's decision.[64] Based on the language of the APA and aided by dictionary meaning, the court observed that there were two possible interpretations of the word "particular" in Florida's statutory nondelegation provision.[65] According to the court, either the APA could mean that the powers and duties designated by the statute must be "particular" in the sense that they are limited to a specifically identified class, or it could mean that they were "particular" in the sense that they were described in detail.[66] The ALJ's decision, which required very detailed description of regulated powers, adopted the latter meaning.

The judicial panel disagreed with the ALJ's interpretation that "particular powers and duties" required a minimum level of detail in the statute.[67] Instead, the court held that section 120.52(8) "restricts rulemaking authority to subjects that are *directly within the class* of powers and duties identified in the enabling statute."[68] The court further elaborated: "The question is *whether the rule falls within the range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its

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[61] *Id.* at 76 (quoting FLA. STAT. ANN. § 120.52(8) (West Supp. 1996)).
[62] *Id.* at 78 (quoting FLA. STAT. ANN. § 120.52(8) (West Supp. 1996)).
[63] *Id.* at 79.
[64] *Id.* at 79, 81.
[65] *Id.* at 79.
[66] *Id.* at 79-80.
[67] *Id.* at 79.
[68] *Id.* (emphasis added).

jurisdiction."[69] The new standard, the court observed, "is a functional test based on the nature of the power or duty at issue and not the level of detail in the language of the applicable statute."[70]

Two concerns with the ALJ's interpretation of the "particular powers and duties" standard animated the court's decision. First, the court reasoned, the ALJ's standard, which requires a statute describing in detail the subject matter of each rule proposed, "would be difficult to define and even more difficult to apply."[71] As the court wrote, "[a]n argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency."[72] Second, the court observed, the ALJ's interpretation, which is more restrictive of agency authority than the court's, would place agencies between two conflicting commands in Florida's APA.[73] While Pennsylvania places some limitations on agency discretion to choose to use rulemaking,[74] Florida is much more restrictive. In Florida, "[r]ulemaking is not a matter of agency discretion"[75] and agencies are *required* to adopt rules to the extent it is "feasible and practicable."[76] But, "[i]f the lack of detail in the enabling statute could be said to prohibit an agency from adopting rules . . ., the agency might not be able to carry out the very task the Legislature assigned to it."[77] By implication, the court reasoned that agencies must have the authority to adopt rules within the class of powers conferred by the applicable enabling statute, and must not be limited

[69] *Id.* at 80 (emphasis added).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See* Terrance J. Fitzpatrick, *The Choice Between Adjudication and Rulemaking for Developing Administrative Policy in Pennsylvania*, 4 WIDENER J. PUB. L. 373, 381 (1995) (indicating that some Pennsylvania cases have held that "agencies have discretion to develop policy via adjudication or rulemaking").

[75] FLA. STAT. ANN. § 120.54(1)(a) (West Supp. 1999).

[76] *Id.*

[77] *Consolidated-Tomoka*, 717 So. 2d at 80.

to adopting rules only where a statute describes "in detail the subject of each potential rule."[78]

Much like the addition of the statutory nondelegation provision to Florida's APA, the case surprised many in Florida. *Consolidated-Tomoka* has been a topic of much controversy—even leading to some additional modifications to Florida's APA in 1999.[79] The case and its aftermath in Florida illustrate some of the problems with statutory nondelegation, whether judicially-adopted or legislatively-imposed in an APA.

B. Enforcement Problems

Statutory nondelegation restrictions are inherently difficult to interpret, introducing high levels of uncertainty into judicial and agency decisionmaking. As the court itself noted in *Consolidated-Tomoka*:

> A standard based on the sufficiency of detail in the language of the enabling statute would be difficult to define and even more difficult to apply. Specificity is a subjective concept that cannot be neatly divided into identifiable degrees. Moreover, the concept is one that is relative. What is specific enough in one circumstance may be too general in another. An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency.[80]

Like the constitutional nondelegation doctrine, statutory restrictions are subject to selective enforcement, and thus are not likely to achieve their intended result.[81]

[78] *Id.*

[79] These amendments are discussed *infra* at Part IV.

[80] *Consolidated-Tomoka*, 717 So. 2d at 80.

[81] *See* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244-47 (1989); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 402-07 (1987); Carl McGowan, *Congress,*

The problem of selective enforcement becomes apparent when the opinion in *Consolidated-Tomoka* is contrasted with that in *Department of Business and Professional Regulation v. Calder Race Course, Inc.*,[82] a decision issued by a different panel of the same court on the same day. In *Calder*, the court applied Florida's statutory nondelegation section to uphold an ALJ's invalidation of Division of Pari-Mutuel Wagering (Division) rules authorizing warrantless searches of pari-mutuel wagering facilities. As its rulemaking authority, the Division cited statutory provisions that empowered it to "'adopt reasonable rules for the control, supervision, and direction of all applicants, permitees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state.'"[83] In addition, the Division cited a provision of the same statute that authorized it to conduct "investigations."[84] The court noted, however, that since "nothing in this subsection identifies the power that the rule attempts to implement, *that is*, to search,"[85] the agency's proposed rules exceeded its grant of authority.

The *Consolidated-Tomoka* and *Calder* duo illustrates the indeterminacy of judicial application of Florida's statutory nondelegation standard. In *Calder*, the court concluded that the "'class of powers and duties identified in the statute'" did not include the power to conduct warrantless searches.[86] At the same time, it seems that a reasonable interpretation of the statute authorizing rulemaking and investigations by the Division could include the power to conduct warrantless searches. Following

Court, and Control of Delegated Power, 77 COLUM. L. REV. 1119, 1128-30 (1977); *see also* SORTIRIUS BARBER, THE CONSTITUTION AND THE DELEGATION OF LEGISLATIVE POWER 62, 76 (1975) (describing nondelegation doctrine as "heavily encrusted with the constructs of judicial myth-making" and revealing a "judicial propensity to manipulate"); LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 51, 56 (1965) (finding court's reasoning in the nondelegation context as "hopelessly fictional rationalization" and "sheer illusion").

[82] 724 So. 2d 100 (Fla. Dist. Ct. App. 1998).

[83] *Id.* at 102 (quoting FLA. STAT. ANN. § 550.0251(3) (West 1992)).

[84] *Id.* (quoting FLA. STAT. ANN. § 550.0251(9) (West 1992)).

[85] *Id.* at 102.

[86] *Id.* at 105 (quoting *Consolidated-Tomoka*, 717 So. 2d at 80).

Calder, it is clear that courts will enforce Florida's statutory nondelegation doctrine, yet for agencies it is not at all clear when. In addition, for the Legislature, which needs to evaluate existing and new statutes for compliance, it is not clear how much specificity is required. Thus, to the extent we rely on courts to implement restrictions on regulatory authority, statutory nondelegation poses some of the same enforcement problems as constitutional nondelegation: Courts are simply not capable of articulating a coherent and consistent set of standards for evaluating the sufficiency of grants of power to administrative agencies.[87]

C. Effects on Agency Accountability: Who Should Interpret the Statutory Authority to Regulate?

Institutionally, a legislature is probably even less capable than a court of articulating a clear and understandable nondelegation standard. No single standard articulated by a legislature in advance of its evaluation of a particular regulatory program, especially a standard that is the product of political compromise, is likely to provide guidance for regulators. At the same time, statutory nondelegation encourages legal challenges to agency regulations. Statutory nondelegation invites courts (and, in some states, ALJs) to tread into the political process, rather than defer to agency interpretations of statutes because of the tension between interpretive ambiguities, on the one hand, and a discernable legislative intent to restrict agency authority, on the other. This impairs agency flexibility in the implementation of regulatory programs and also runs the risk of undermining the agency accountability goals that proponents of statutory nondelegation often embrace.

In *Calder*, for example, a Florida appellate court applied its own independent interpretation of whether investigations included warrantless searches; despite the ambiguity in the Legislature's grant of power, the court refused to defer to the agency's reasonable

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[87] *See supra* note 81 (sources discussing indeterminacy problem with constitutional nondelegation doctrine).

interpretation that investigations included warrantless searches.[88] This raises the issue of who interprets statutes, an issue that is not as settled in the states as it is in the federal system.

Like the courts of many other states, Florida courts have endorsed a doctrine similar to *Skidmore v. Swift*[89] (giving some weight to the agency interpretation) if not *Chevron* (accepting the agency's reasonable interpretation where the statute is unclear or ambiguous)[90] deference in federal courts. If an agency interpretation of a statute in its regulatory area "is within the range of permissible interpretations of the statute," in Florida, the standard of review is well established: courts defer to the agency interpretation, even though other interpretations may be permissible or preferable.[91]

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[88] *Calder*, 724 So. 2d at 102-03.

[89] 323 U.S. 134 (1944). Under *Skidmore*, the degree of weight may "depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it [the] power to persuade, if lacking power to control." *Id.* at 140. The approach is used in many states. *See* William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 768-70 (1991).

[90] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); *see also supra* note 16 (discussing *Chevron* test). According to a 1990 study, eleven states had adopted tests that bear similarity to strong *Chevron* deference. *See* McGrath et al., *supra* note 89, at 763-66. I believe that Florida adopts an analysis very similar to *Chevron*.

[91] State Dept. of Health and Rehabilitative Servs. v. Framat Realty, Inc., 407 So. 2d 238, 241-42 (Fla. 1st Dist. Ct. App. 1981); *see also* Department of Envtl. Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 3d Dist. Ct. App. 1985) (holding that "[c]ourts should afford great deference to administrative interpretations of statutes which the administrative agency is required to enforce"); Pringle v. Marine Fisheries Comm'n, 732 So. 2d 395, 397 (Fla. 1st Dist. Ct. App. 1999) (stating that "[t]he courts are bound to give deference to an agency's interpretation of statutes the agency is charged with implementing"); Smith v. Crawford, 645 So. 2d 513, 520-21 (Fla. 1st Dist. Ct. App. 1994) (providing deference to agency interpretation of statute); Harloff v. City of Sarasota, 575 So. 2d 1324, 1327 (Fla. 2d Dist. Ct. App. 1991) (stating "[b]ecause agency boards are charged with the responsibility of enforcing the statutes which govern their area of regulation, courts give great weight to their interpretation of those statutes"); *accord*, Board of Optometry v. Florida Soc'y of Opthamology, 538 So. 2d 878, 885 (Fla. 1st Dist. Ct. App. 1988) (suggesting agency's interpretation need not be the most desirable one, but needs only to be within the range of permissible interpretations).

While well-established as a standard for reviewing agency interpretations of ambiguous statutory language, Florida courts also recognize that in some instances deference is not appropriate. Some Florida courts have stated that they do not defer to "clearly erroneous" agency interpretations, although they also suggest that they do not review statutory interpretations de novo for reasonableness;[92] thus, clearly erroneous review might be thought of as the judicial basis for rejecting agency interpretations that conflict with clear and unambiguous statutory language, paralleling the step-one *Chevron* inquiry.[93] Florida courts also express some

[92] *See* D.A.B. Constructors, Inc. v. Department of Transp., 656 So. 2d 940, 944 (Fla. 1st Dist. Ct. App. 1995) (stating that "[a]n agency's construction of a statute which it administers is entitled to great weight and will not be overturned unless the agency's interpretation is clearly erroneous"); Orange Park Kennel Club, Inc. v. Department of Bus. and Prof'l Regulation, 644 So. 2d 574, 576 (Fla. 1st Dist. Ct. App. 1994) (noting that, since court is unable to determine that agency's interpretation of a statute is "clearly erroneous," deference is appropriate).

[93] *See* Department of Ins. & Treasurer v. Bankers Ins. Co., 694 So. 2d 70, 71 (Fla. 1st Dist. Ct. App. 1997) (stating that "[w]here a statute draws an uncertain boundary, judicial deference to an agency's jurisdictional determination is appropriate"); Willette v. Air Prods., 700 So. 2d 397, 399 (Fla. 1st Dist. Ct. App. 1997) (rejecting an agency's statutory interpretation as "unmistakably at odds with [the] clear statutory language"); Associated Mortgage Investors v. Department of Bus. Regulation, 503 So. 2d 379, 380 (Fla. 1st Dist. Ct. App.), *review dismissed*, 506 So. 2d 1040 (Fla. 1987) (holding that "interpretation, made by the agency charged with enforcing a statute, should be accorded great deference unless there is clear error or conflict with the intent of the statute"); *see also* Okeechobee Health Care v. Collins, 726 So. 2d 775, 778 (Fla. 1st Dist. Ct. App. 1998) (distinguishing *Willette v. Air Prods.*, 700 So. 2d 397, 399 (Fla. 1st Dist. Ct. App. 1997), and applying deference to ambiguous statutory language).

Clearly erroneous (or "clear err") is a troubling standard to apply to the review of statutes, as it typically is a standard of review for findings of fact. Some Florida appellate courts have conflated, or confused, the clearly erroneous standard in reviewing statutes with a "reasonableness" test. *See* Las Olas Tower Co. v. City of Fort Lauderdale, No. 97-2791, 1999 WL 311248, at *3 (Fla. 4th Dist. Ct. App. May 12, 1999) (noting preference for deference to the agency, but "when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand"). In the rulemaking context, this confusion may be less prevalent because Florida's APA purports to limit courts from independently assessing the rationality of an agency's reasoning process. *See* FLA. STAT. ANN. § 120.68(9) (West 1999) (prohibiting reviewing courts from applying arbitrary and capricious review of rules apart from their review of an ALJ's findings regarding

reluctance to defer to an agency statutory interpretation "if the statute is unrelated to the functions of the agency."[94] Despite these exceptions for clearly erroneous interpretations or interpretations of a statute outside of an agency's regulatory area, principles of deference to agency statutory interpretations are well established in Florida courts.

While deference to agency interpretation of ambiguous statutes is well accepted in Florida, statutory nondelegation threatens it. By requiring courts to assess the specificity of statutory language, statutory nondelegation invites more frequent de novo review of agency statutory interpretation than is expected under the conventional approach. This risks judicial second guessing of agency expertise, as well as reduced accountability, to the extent judges, not as politically accountable as agency heads, become the primary interpreters of statutes.

Further complicating this issue, in some states, such as Florida, rules are subject to challenge before ALJs. ALJs, however, are not bound to agency statutory interpretations, nor does state law always clearly require ALJ deference to agency statutory interpretations. Unlike agency interpretations, which might be legitimated by reference to political accountability or agency expertise, statutory interpretation by ALJs, impartial generalists, should not be subject to the same deference. Thus, to the extent courts review final agency action by ALJs, either deference to the agency or de novo review is necessary to ensure accountable statutory interpretation.

Florida made matters worse in its 1996 amendments by reversing the burden of proof in rule challenges. In Florida until 1996, proposed rules were subject to a "presumption of validity." In other words, when a rule was challenged, the burden was on the person attacking the rule to prove by a preponderance of the evidence that the rule was arbitrary and capricious or otherwise ran

arbitrary and capricious agency action). Nevertheless, when misapplied in Florida, clearly erroneous may be one back door way to see arbitrary and capricious review of agency statutory interpretation where it otherwise is not allowed.

[94] Chiles v. Department of State, 711 So. 2d 151, 155 (Fla. 1st Dist. Ct. App. 1998).

afoul of Florida's APA.[95] Most, if not all, states[96] follow a similar rule. The 1996 Florida APA revisions, however, provide a process for parties to shift the burden of proving the validity of *proposed* rules to administrative agencies. When any substantially affected person seeks to challenge a proposed rule as invalid before a Division of Administrative Hearings (DOAH) ALJ, "the proposed rule is not presumed to be valid or invalid."[97] The agency, however, will now bear the burden of proving a rule's rationality: The 1996 revisions require agencies to prove in a proposed rule challenge proceeding that the proposed rule is not an invalid exercise of delegated authority in response to each of the objections raised by the challenger.[98] The 1996 revisions also allow "[a] substantially affected person [to] seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule."[99] The presumption of validity continues to apply for existing rules in Florida under the 1996 APA revisions. Once a challenger

[95] *See* Department of Labor and Employment Sec. v. Bradley, 636 So. 2d 802, 807 (Fla. 1st Dist. Ct. App. 1994) (noting that the validity of regulations will be sustained so long as "'they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious'") (quoting Adam Smith Enters. v. Department of Envtl. Regulation, 553 So. 2d 1260, 1271 (Fla. 1st Dist. Ct. App. 1989); State Dep't of Health and Rehabilitative Servs. v. Framat Realty, Inc., 407 So. 2d 238, 241 (Fla. 1st Dist. Ct. App. 1981) (stating that agency interpretation of statutes entitled to presumption of validity); Agrico Chem. Co. v. Department of Envtl. Regulation, 365 So. 2d 759, 762 (Fla. 1st Dist. Ct. App. 1978) (holding that "[r]ulemaking by an agency is quasi-legislative action and must be considered with deference to that function").

[96] Pennsylvania is clearly in this group. *See* Snelling v. Department of Transp., 366 A.2d 1298 (Pa. Commw. Ct. 1976) (noting the "presumption that the actions of public officials are within the limits of their discretion").

[97] FLA. STAT. ANN. § 120.56(2)(c) (West Supp. 1999) (amended 1999). Although slightly amended in 1999, this general provision remains in force.

[98] *Id.* § 120.56(2)(a). Section 120.56(2)(a) states:

> The petition [challenging the rule] shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The agency then has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

Id.

[99] *Id.* § 120.56(3)(a).

has established a factual basis for objections to a rule,[100] however, the agency bears the burden of proving it followed applicable procedure and failure to follow applicable procedure is deemed material error.[101] The Bumpers Amendment to the Federal APA also stated a reviewing court "shall not accord any presumption in favor of or against agency action."[102]

When confusion over the review of state agency interpretation of statutes is coupled with the uncertain status of arbitrary and capricious review in many states,[103] a need for state APA reformers to clarify the role of courts in reviewing agency rules is apparent. Indeed, as is discussed below, in Spring 1999, the role of Florida courts was the subject of an APA reform bill that would have prohibited courts from giving any deference or weight to agency interpretations of statutes, as they currently do.[104] Perhaps it would have been better for Florida reformers to address judicial review independent of the statutory nondelegation issue, where conflicts between agency, ALJ, and judicial statutory interpretation are at the heart of prominent regulatory disputes involving constituents with entrenched positions in disputes, such as the environmental regulation matter at issue in *Consolidated-Tomoka*.

D. Effects on Legislative Process and Accountability

In a sense, statutory nondelegation may work as a type of precommitment device for a legislature, deterring future legislatures

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[100] *See* St. Johns River Management Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 77 (Fla. 1st Dist. Ct. 1998) (holding in interpreting section 120.56(2)(a) that "[a] party challenging a proposed rule has the burden of establishing a factual basis for the objections to the rule, and then the agency has the ultimate burden of persuasion to show that the proposed rule is a valid exercise of delegated legislative authority").

[101] FLA. STAT. ANN. § 120.56(1)(c) (West Supp. 1999).

[102] 128 CONG. REC. S2717 (daily ed. Mar. 24, 1982) (statement of Sen. Bumpers).

[103] William Funk, in his 1991 survey of state rationality review, reports that only eight states follow the federal example of providing a statutory basis for judicial review of the rationality of rules. William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 154 (1991).

[104] This 1999 reform bill is discussed *infra* at Part IV.

from delegating without very specific statutory guidance. In practice, it is difficult for a legislature to avoid delegation, because reaching a consensus on specific statutory language may prove costly or impossible. Even if a legislature can overcome this problem, however, it is questionable whether statutory nondelegation works to enhance legislative accountability.

While such restrictions are in part designed to improve the quality of the legislative process–encouraging legislative deliberation about the specifics of regulatory programs before such programs are authorized–they may have the opposite result, placing legislatures in the reactive posture of enacting *en masse* "compliance bills" ratifying agency regulations. For example, following Florida's adoption of a statutory nondelegation standard, over 5,000 agency rules–more than twenty percent of Florida's regulations–were determined to be out of compliance with the new standard.[105] The Legislature sent this list of rules, compiled by Florida's Joint Administrative Procedures Committee with input from each agency's evaluation of its existing rules for compliance, to the President of the Florida Senate and the Speaker of the House. The Legislature then acted on this list, enacting over two dozen rules authorizing bills in 1998.[106] This may have served a useful

[105] *See* JOINT ADMIN. PROC. COMMITTEE, 1997 ANNUAL REPORT, at 62.

[106] The following bill numbers were passed as RABs: S. Res. 734, 16th Leg. (Fla. 1999); S. Res. 768, 16th Leg. (Fla. 1999); S. Res. 770, 16th Leg. (Fla. 1999); S. Res. 1346, 16th Leg. (Fla. 1999); S. Res. 1342, 16th Leg. (Fla. 1999); S. Res. 1350, 16th Leg. (Fla. 1999); S. Res. 1706, 16th Leg. (Fla. 1999); S. Res. 1762, 16th Leg. (Fla. 1999); S. Res. 1152, 16th Leg. (Fla. 1999); S. Res. 1720, 16th Leg. (Fla. 1999); S. Res. 1708, 16th Leg. (Fla. 1999); S. Res. 1700, 16th Leg. (Fla. 1999); S. Res. 1702, 16th Leg. (Fla. 1999); S. Res. 2316, 16th Leg. (Fla. 1999); S. Res. 2000, 16th Leg. (Fla. 1999); S. Res. 2314, 16th Leg. (Fla. 1999); S. Res. 1722, 16th Leg. (Fla. 1999); S. Res. 1144, 16th Leg. (Fla. 1999); S. Res. 1684, 16th Leg. (Fla. 1999); S. Res. 1332, 16th Leg. (Fla. 1999); S. Res.1410, 16th Leg. (Fla. 1999); S. Res. 1716, 16th Leg. (Fla. 1999); S. Res. 1348, 16th Leg. (Fla. 1999); S. Res. 1232, 16th Leg. (Fla. 1999); S. Res. 1334, 16th Leg. (Fla. 1999); S. Res. 1336, 16th Leg. (Fla. 1999); S. Res. 1436, 16th Leg. (Fla. 1999); S. Res. 1440, 16th Leg. (Fla. 1999); S. Res. 1164, 16th Leg. (Fla. 1999); S. Res. 1054, 16th Leg. (Fla. 1999); S. Res. 1052, 16th Leg. (Fla. 1999); S. Res. 846, 16th Leg. (Fla. 1999); S. Res. 1710, 16th Leg. (Fla. 1999). A few (three or four) RABs did not pass and remain under consideration.

housekeeping function, but the conventional understanding is that few, if any, of these statutes were the subject of intense legislative deliberation and debate regarding the scope of delegated power.

If accountability in the form of more specific and clearer statutes authorizing agency rulemaking is the goal of statutory nondelegation, there may be more effective means for achieving this goal. For example, a legislature could adopt better (that is, more specific and clearer) grants of legislative authority if it considered limitations on agency rulemaking authority in subject-specific contexts, referring these to the legislative committees responsible for regulating certain areas. Under this approach, a legislature would be responsible for specifically prohibiting an agency from regulating certain activities, rather than attempting to mandate statutory precision generally through the judicially-imposed APA statutory nondelegation. This is similar to the approach taken by federal courts.

On the other hand, to the extent APA reformers are wed to enhancing agency accountability to the legislature, statutory nondelegation should be enforced by legislative committees rather than courts. To the extent state legislatures affirmatively vest enforcement of statutory nondelegation with courts (and also, as in Florida, ALJs), they can claim credit for limiting the scope of agency powers without taking responsibility for defining these powers in specific regulatory contexts. Legislative definition and enforcement of agency rulemaking powers in specific regulatory contexts, however, would lead to more responsible decisionmaking by a legislature.

Pennsylvania's Independent Regulatory Review Commission (IRRC), for example, already has some authority to review regulations for "conformity to legislative intent"[107] and requires "[a] specific citation to . . . statutory or regulatory authority" for regulations,[108] but this works in conjunction with the possibility of judicial review enforcement of statutory nondelegation. Not all states that adhere to a statutory nondelegation standard for

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[107] 71 PA. CONS. STAT. ANN. § 745.2 (West Supp. 1998).

[108] *Id.* § 745.5(a)(1.1).

rulemaking vest some enforcement with courts. For example, in California the Office of Administrative Law (OAL) has the authority to disapprove rules based on a lack of "necessity" as well as lack of "authority" or failure to include a "reference."[109] "Necessity" means that there is substantial evidence in the record that the regulation is needed.[110] "Authority" refers to "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."[111] The regulations also define "Reference" as "the statute, court decision, or other provision of law which the agency implements . . . by adopting, amending, or repealing a regulation."[112] The OAL regulations include as a source of authority "a California constitutional or statutory provision [which] grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted."[113] Thus the OAL, which wields a heavy stick as the enforcer of California rulemaking limitations, takes the position that an implied grant of authority is sufficient. Nevertheless, even if California's OAL had reached a different conclusion about its role, enforcing statutory nondelegation more strictly, California would have more legislative accountability than states like Pennsylvania, Texas, or Florida, which rely at least in part on courts (or ALJs) to enforce the statutory nondelegation doctrine.

[109] CAL. GOV'T CODE § 11349.1(a)(1), (2), (5) (West Supp. 1999).
[110] *Id.* § 11349(a).
[111] *Id.* § 11349(b).
[112] *Id.* § 11349(e).
[113] CAL. CODE. REGS., tit. 1, § 14(a)(2) (1999).

IV. FLORIDA'S 1999 APA AMENDMENTS: CONTINUED LEGISLATIVE ENDORSEMENT OF THE COUNTER-REVOLUTION AGAINST RULEMAKING

When Florida added statutory nondelegation to its APA in 1996, the new provision received little notice. In the aftermath of its revised APA, the 1997 Florida legislative session addressed some minor APA revisions in a glitch bill,[114] but statutory nondelegation was not an issue before the Legislature at that time. Yet in 1999, following judicial interpretation of Florida's statutory nondelegation provision, Florida's Legislature again considered major APA reforms. Governor Jeb Bush signed new amendments to the Florida APA into law in Summer 1999.[115] Not surprisingly, the major issues addressed by the 1999 APA amendments are statutory nondelegation and agency interpretations of law, issues the Florida Legislature brought to the forefront with its 1996 APA amendments.[116] One distinction, however, exists between the 1999 reforms and those adopted in previous years. The 1999 reforms were produced with little or no input from or deliberation among serious administrative law reformers, including agency lawyers.

The 1999 Florida APA amendments continue Florida's renegade approach to administrative procedure reform among the states. The reform bill that was signed into law as the 1999 APA amendments is much improved over the original bill introduced in the Florida Legislature. Yet the reforms adopted in the 1999 APA amendments–as well as some reforms considered by the Legislature but not adopted–are remarkable in their departure from long-standing principles of administrative procedure and thus are worthy

[114] *See* Stephen T. Maher, *How the Glitch Stole Christmas: The 1997 Amendments to the Florida Administrative Procedure Act*, 25 FLA. ST. U. L. REV. 235 (1998).

[115] *See* 1999 Fla. Laws, ch. 99-379, signed by Governor Jeb Bush, June 18, 1999. The amendments were based on HB 107, prefiled by Representative Ken Pruitt.

[116] *Cf.* Rossi, *supra* note 3, at 360-61 (predicting that judicial review of agency rulemaking authority will become an issue in interpreting Florida's new statutory nondelegation provision).

of some discussion, particularly because they may resurface in Florida and other states experimenting with statutory nondelegation.

The APA reform bill considered by the Florida Legislature in 1999 proposed four major changes to Florida's APA, although the adopted amendments made only two of these changes. First, the APA amendments react to *Consolidated-Tomoka*, effectively overruling the court's test and again expressing the Legislature's preference for specific powers and duties in statutes as the authorization for agency rules.[117] Second, the original bill (but not the adopted version) proposed to overrule *Consolidated-Tomoka*'s interpretation that, in challenges to proposed rules, challenging parties bear the burden of going forward with evidence supporting the invalidity of a rule.[118] Third, the bill (as amended in committee) stated that judges hearing appeals of agency rules shall not defer, or otherwise give any special weight, to an agency's interpretation of law; this provision, however, was deleted from the bill late in the legislative process and was not signed into law.[119] Fourth, the adopted APA amendments change Florida's adjudication process by heightening the burden when agencies reject or modify ALJ conclusions of law.[120]

Consolidated-Tomoka attempted to strike a balance between the requirement that an agency have "particular powers and duties" in a statute prior to promulgating a rule,[121] on the one hand, and its conflicting command that agencies presumptively pursue rulemaking,[122] on the other. The 1999 APA amendments revise this balance against agency rulemaking authority, suggesting a continued

[117] *See* amendment to FLA. STAT. §§ 120.52(8), 120.536, CS/HB 107, 179th Leg., 1999 Fla. Laws ch. 99-37.

[118] *See* proposed amendment to FLA. STAT. § 120.56, HB 107, 179th Leg. (Fla. 1999) (prefiled bill).

[119] *See* proposed amendment to FLA. STAT. § 120.68, HB 107c1, 179th Leg. (Fla. 1999) (first version approved by the House of Representatives Committee on Governmental Rules and Regulation).

[120] *See* amendment to FLA. STAT. § 120.57, CS/HB 107, 179th Leg., 1999 Fla. Laws. Ch. 99-379.

[121] FLA. STAT. ANN. § 120.536(1) (West Supp. 1999) (amended 1999).

[122] *Id.* § 120.54(1)(a)(1).

legislative endorsement of the counter-revolution against agency rulemaking.

In interpreting "particular powers and duties," the *Consolidated-Tomoka* court held that "[a] rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented."[123] The 1999 amendments reject this test by revising the APA standard. In the end, the Legislature appears only to substitute the word "specific" for "particular" in Florida's statutory nondelegation standard and to preclude courts from using the *Consolidated-Tomoka* test to interpret the new standard,[124] although the Legislature has also required agencies to rereview all of their existing rules for compliance with the 1999 statutory nondelegation standard.

The 1999 amendment, as signed into law, states that agencies may only adopt rules that "implement, interpret, or make specific the particular powers and duties granted by the enabling statute."[125] In addition, the 1999 amendment states that "[s]tatutory language granting rulemaking authority . . . shall be construed to extend no further [than implementing or interpreting the specific] powers and duties conferred by the same statute."[126] In adopting this new standard, the Legislature expressed a preference for the test rejected by the appellate panel in *Consolidated-Tomoka*. Although the bill states "it is not the intent of the Legislature to reverse the result of any specific judicial decision,"[127] the 1999 amendments purport to preclude courts and ALJs from applying the *Consolidated-Tomoka* test in future cases. For example, addressing the language of the test endorsed by the panel in *Consolidated-Tomoka*, the 1999 amendment states: "No agency shall have the authority to adopt a

[123] St. Johns River Water Management Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 80 (Fla. 1st Dist. Ct. App. 1998).

[124] Although earlier versions of the bill used the word "detailed," the word "specific" was substituted later in the legislative process.

[125] Amendment to §§ 120.52(8), 120.536(1), CS/HB 107, 179th Leg., 1999 Fla. Laws Ch. 99-379.

[126] *Id.*

[127] *Id.*

rule only because it . . . is within the agency's class of powers and duties."[128]

As with the 1996 statutory nondelegation standard, this new standard applies not only to new rules but also to existing rules. As agencies were required to evaluate all rules following the 1996 amendments, they are again required to evaluate all rules for compliance with the 1999 standard. Effectively, the Legislature has told agencies that it is not satisfied with their evaluation of whether rules are based in "particular" powers and duties, even though agencies evaluated their rules for compliance with this standard well before the *Consolidated-Tomoka* decision was issued.[129] Agencies now must reevaluate all rules to determine whether they are based in "specific" statutory powers and duties. As with the 1996 amendment, the Legislature has established a timetable. Each agency is required to provide the Joint Administrative Procedures Committee a list of rules exceeding statutory authority under the "specific" powers and duties standard, and the Legislature will again consider whether rule authorization bills are necessary to sustain the rules.[130] As of July 1, 1999, existing rules are subject to challenge under the new standard.[131]

As was also the case with the 1996 APA amendments, however, agencies have no meaningful guidance as to what the amended statutory nondelegation standard means and how courts will apply it. Following the 1999 amendments, courts will have to come up with a new definition of "specific," presumably one that is not as broad as *Consolidated-Tomoka*'s definition of "particular." As the *Consolidated-Tomoka* and *Calder* duo illustrate, defining "specific" will not occur without litigation, both before ALJs and

[128] *Id.*

[129] *Consolidated-Tomoka* was issued in Summer 1998, while the 1996 amended APA required agencies to evaluate their existing rules for compliance with the statutory nondelegation standard by October 1, 1997. *See* FLA. STAT. ANN. § 120.536(2) (amended 1999).

[130] *See* amendment to § 120.536(2), CS/HB 107, 179th Leg., Fla. Laws Ch. 99-379.

[131] *See id.* If an agency, however, has failed to include a rule on the list of rules it submits to the legislature, the rule may be subject to immediate challenge. *See id.* § 120.536(3).

appellate courts. As with the constitutional nondelegation doctrine,[132] the development of a determinate standard will likely prove an impossible task for ALJs or appellate courts. Thus, the Florida Legislature's continued tinkering of the language of its statutory nondelegation standard should suggest that the task of defining the scope of agency rulemaking authority by general language in statutes is a questionable effort at enhancing accountability, although members of the Legislature have been quick to claim credit for reining in bureaucracy.[133]

A second change proposed in the introduced version of the 1999 APA reform bill would have overruled *Consolidated-Tomoka*'s interpretation of the 1996 amendment that removes the presumption of validity that attaches to proposed rules and requires agencies to prove the validity of proposed rules in rule challenge proceedings. *Consolidated-Tomoka* interpreted this amendment to require that, although the agency has the ultimate burden of establishing the validity of proposed rules, the challenger has the burden of going forward with evidence supporting the objections. The introduced 1999 reform bill would have modified this standard in proposed rule challenge proceedings by requiring the agency to bear "the burden of going forward and the burden to prove by a preponderance of the evidence" that a rule is not an invalid exercise of delegated legislative authority.[134]

The impact of such a change on agencies would be enormous. As the court noted in rejecting such an interpretation of the existing statutory language in *Consolidated-Tomoka*:

> [I]t would be impractical to impose such a requirement. As the administrative law judge [below] explained, a petition challenging a proposed rule might include numerous

[132] *See supra* note 81.

[133] *See* Julie Hauserman, *New Law Will Ease State Rules Battles*, ST. PETERSBURG TIMES, June 18, 1999, at 1B (noting that business lobbyists and members of the state legislature, including Representative Pruitt, the key sponsor of the bill, "applauded Bush's action [of signing the 1999 APA amendments into law] as a way to rein in the power of Tallahassee bureaucrats").

[134] Proposed amendment to FLA. STAT. § 120.56, HB 107, 179th Leg. (Fla. 1999) (prefiled bill).

> objections, not all of which remain in controversy [at] the time of the hearing. If the agency had the burden of going forward with the evidence, it would be forced to rebut every objection made in the petition, if for no other reason than to avoid the possibility of an award of attorneys' fees for its failure to justify the proposed rule.[135]

Fortunately, the APA amendments that were signed into law dropped this provision and clarified that the person challenging an agency's rule has the burden of going forward.[136] The 1999 amended APA retains the agency's burden of proof in rule challenge proceedings and clarifies that an agency must bear a "preponderance of the evidence" burden of proof.[137]

A third major proposed change that was added to the 1999 APA reform bill during the legislative process is modification of the longstanding principle that courts may defer or give some weight to agency interpretations of law. A committee amendment to the 1999 APA reform bill would have prohibited courts from deferring or giving any weight to agency interpretations of law in rule challenge proceedings, as courts give agency interpretations under current case law in the federal system, in Florida, and in many states.[138] This amendment stated that "judges hearing appeals of agency rules shall not defer, or otherwise give any special weight, to an agency's interpretation of law or a rule."[139]

The adopted 1999 APA amendments did not contain this proposed amendment, because of a late modification to the bill.[140]

[135] *Consolidated-Tomoka*, 717 So. 2d at 76-77.

[136] *See* H.B. 107, 179th Leg. (Fla. 1999) (amending FLA. STAT. ANN. § 120.56 (West 1999)).

[137] *See id.*

[138] *See supra* notes 89-94 and accompanying text.

[139] *See* proposed amendment to FLA. STAT. § 120.68, HB 107c1, 179th Leg. (Fla. 1999) (first version approved by the House of Representatives Committee on Governmental Rules and Regulation); *see also* House of Representatives Committee on Governmental Rules and Regulations Analysis, Report on HB 107 at 11 (Jan. 19, 1999) (adopting amendment).

[140] *Compare* proposed amendment to FLA. STAT. § 120.68, HB 107c1, 179th Leg. (Fla. 1999) (first version approved by the House of Representatives Committee on Governmental Rules & Regulations) *with* CS/HB 107, 179th Leg. 1999 Fla. Laws Ch. 99-379 (making no amendment to § 120.68).

The proposed amendment, introduced in part because of the statutory interpretation issue raised by statutory nondegelation, stood to greatly enhance the role of courts in reviewing of agency rulemaking, at the cost of political accountability and expertise, neither of which reviewing courts possess. Thus, it is fortunate that the final bill signed into law did not include this provision.

Nevertheless, a fourth major modification, which survives in the adopted APA amendment bill, modifies agency authority to make legal interpretations in adjudication, tilting the balance toward ALJ or judicial legal interpretations and away from statutory interpretations by agencies. In what is certainly the most sweeping change in years to adjudication under Florida's APA, the 1999 amended APA prohibits agencies from rejecting or modifying ALJ conclusions of law without overcoming a heightened burden. Under the version of Florida's APA that preceded the 1999 amendments, agencies had the discretion to reject or modify ALJ conclusions of law or policy, but were bound to ALJ findings of fact if supported by competent substantial evidence.[141] The 1981 MSAPA,[142] also provides agencies similar discretion to disagree with the finder of fact on issues of law and policy.[143]

The 1999 Florida APA amendments require an agency rejecting ALJ conclusions of law or interpretation of regulations to "state[] with particularity its reasons" and to "make a finding that its substituted conclusion of law or interpretation of an administrative rule is as or more reasonable than that which was

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[141] Prior to the 1999 APA amendments, Section 120.57(10) stated:

> The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules [over which it has substantive jurisdiction]. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence.

1 FLA. STAT. ANN. § 120.57(1)(*l*) (West Supp. 1999) (amended 1999); *see also* Harloff v. City of Sarasota, 575 So. 2d 1324, 1327 (Fla. 2d Dist. Ct. App. 1991) (noting there is no statutory requirement "that an agency state with particularity its reasons for rejecting conclusions of law that do not involve a penalty").

[142] MODEL STATE ADMIN. PROCEDURE ACT, § 4-215 (1981), 15 U.L.A. 90-91 (1990).

[143] Pennsylvania's APA appears to provide the agency similar authority.

rejected or modified."[144] This new provision restricts an agency's discretion to reject an ALJ's interpretation of a statute or a rule, placing agencies in a posture of justifying their departure from ALJ order. It also introduces an uncertainty: A court might rubber stamp an agency finding that its own legal interpretation is reasonable, but it is likely that the Legislature intended this provision to allow a court more sweeping authority to second guess agency interpretations of law. In this sense, the 1999 amendments risk expanding the authority of ALJs and courts to decide statutory interpretation and policy issues in adjudication as well as rulemaking. Yet neither ALJs nor appellate courts have the degree of expertise and political accountability that agency heads do.

Perhaps of less significance, the 1999 amendments also clarify the APA's definition of an "agency"[145] and prohibit agencies from adopting "retroactive" rules, including rules that are intended to clarify existing law.[146] On the whole, the adopted 1999 APA amendments are far superior to those initially proposed in the Legislature and approved by committees early during the consideration of the bill. Nevertheless, the 1999 Florida APA amendments continue to endorse a statutory nondelegation doctrine; subject existing agency rules to legal challenges that purport to be more restrictive of agency authority to promulgate rules than the 1996 amendments; and require agencies to go through a costly review process that is indistinguishable from what they underwent

[144] FLA. STAT. § 120.57(1)(*l*), CS/HB 107, 179th Leg. 1999 Fla. Ch. 99-379 (amended 1999). In contrast, the prefiled bill would have allowed an agency to modify an ALJ's conclusion of law only if it is "clearly erroneous," but later versions of the bill removed this standard of review. *Compare id.*, *with* proposed amendment to FLA. STAT. § 120.57(1)(*l*), CS/HB 107, 179th Leg. (Fla. 1999) (prefiled bill).

[145] *See* amendment to FLA. STAT. § 120.52(1), CS/HB 107, 179th Leg. 1999 Fla. Ch. 99-379.

[146] *See* amendment to FLA. STAT. § 120.54(1)(f), CS/HB 107, 179th Leg. 1999 Fla. Ch. 99-379. The amendment did not define retroactive, nor did it explain how this new provision interacts with other provisions of section 120.54, which allow agencies to apply rules to clarify existing laws so long as they have initiated rulemaking in good faith. The provision was intended to preclude future application of the court's holding in *Environmental Trust v. Department of Environmental. Protection*, 714 So. 2d 493, 500-01 (Fla. 2d Dist. Ct. App. 1999).

following the 1996 APA amendments. Yet, the amendments provide little guidance to agencies, merely substituting the word "specific" for "particular" in Florida's statutory nondelegation provision. The amendments also further tilt the balance in statutory interpretation away from agencies and toward ALJs and courts. Thus, whatever credit the Legislature may claim for Florida's 1999 APA amendments, on the whole, they do not enhance the accountability of agency decisionmaking.

For this reason, as well as the anticipated effects of the amendments on health and environmental regulation, many in the state urged Governor Bush to veto the 1999 APA reform bill. Environmental groups, in particular, were strongly opposed to the changes and Governor Bush's appointed Secretary of the Department of Environmental Protection urged a veto of the bill.[147] The bill, however, had strong support from the Legislature. Moreover, the Governor's General Counsel, having met with industry lobbyists who supported passage of the bill,[148] had a comfort level with the content of the bill, even though the 1999 APA amendments significantly reduce the power of executive branch agencies vis-a-vis the Legislature, courts, and ALJs. Despite many recommendations that he veto the 1999 APA amendments, Governor Bush signed them into law on June 17, 1999.

[147] *See* Julie Hauserman, *DEP Chief Warns Against Rules Bill*, ST. PETESBURG TIMES, June 17, 1999, at 1B (reporting that Department of Environmental Protection Secretary David Struhs urged the Governor to veto the bill because it "'tips the balance too far' toward the Legislature, and would make government 'less efficient and potentially less effective'"). As Hauserman, *supra* note 133, reports, the Secretary of the Department of Environmental Regulation disavowed his position against the bill when it became clear that Bush would sign it.

[148] *See* Shirish Date, *Bush Down to Wire on Controversial Bill*, PALM BEACH POST, June 17, 1999, at 13A (noting that Bush assistant general counsel Frank Jimenez held a meeting and signed off on a compromise acceptable to two lobbyists for industry and developers, but that no one invited lobbyists for environmental groups who had been following the bill all year).

V. CONCLUSION: WHAT LESSONS CAN REFORMERS IN OTHER STATES LEARN FROM FLORIDA'S RECENT APA REFORM EXPERIENCES?

In its judicial adoption of statutory nondelegation, Pennsylvania preceded Florida in endorsing this questionable idea in administrative procedure. The modest limitations Pennsylvania courts have imposed on agencies, however, can hardly compare to what Florida did when it endorsed statutory nondelegation, in a form similar to the Bumpers Amendment, in its APA. The addition of a rigid statutory nondelegation restriction to Florida's APA was part of a larger effort to reduce agency rulemaking powers. This also included additional cost-benefit requirements and increased opportunities for rule challenges, as well as attorneys' fees for successful challenges to rules.[149] Measured by the goal of reducing agency rulemaking powers, Florida's 1996 APA reforms were a success. Agencies in Florida simply do not have the same power to regulate that they once had. Moreover, because of dissatisfaction with the implementation of many of Florida's 1996 amendments, in 1999, the Legislature passed additional APA amendments, taking still more authority away from agencies.

Given, however, that the destruction of the ends of regulation does not appear to be the goal of most state APA reformers, I would like to suggest more practical lessons from Florida's recent APA reforms. There are five main lessons to be taken from Florida's experience with law reform related to its APA-imposed statutory nondelegation requirement.

First, because of interpretive ambiguities, imposing generic restrictions on agency regulatory authority is not likely to be effective means for enhancing accountability, even where a system of governance has developed a clear understanding of who should interpret statutory authority in the administrative context. In many states, statutory interpretation is complicated because of the presence of a central panel of ALJs or because of reduced political accountability of agencies due to a plural executive branch. In

[149] For description of these reforms, see Rossi, *supra* note 3, at 362-67.

Florida, something similar to *Chevron* deference has been endorsed de jure, but given our institutional setup there is a de facto reluctance to apply it across the board. Statutory nondelegation adds uncertainty about who should interpret statutory authority, as well as uncertainty about how courts and ALJs will apply our restrictions on agency rulemaking. In fact, recent developments in Florida enhance the authority of ALJs to interpret agency statutes, a result that runs counter to the goals of enhanced agency expertise and political accountability promoted by deference to the agency. Much more certainty and legitimacy could be achieved if the application of statutory nondelegation standards were limited to the legislature or legislative oversight committees, such as Pennsylvania's IRRC. I am not sure how successful the judicially-imposed statutory nondelegation requirement has been in Pennsylvania, but there may be some sound reasons for abandoning it in your APA reforms, or limiting its enforcement to a legislative committee.

A second lesson is that extreme measures to reduce agency authority are not always successful. Rather than limiting agency authority to promulgate rules across the board, it may have been more effective for Florida to examine notice requirements or to require an elaboration of means for achieving regulatory ends. The 1981 MSAPA, for example, attempts to enhance the accountability of agencies to a state's legislature by requiring specificity in agency notice. Although problems may ensue if courts adopt strict scrutiny in applying this provision of the MSAPA,[150] the 1981 MSAPA takes a more light-handed approach to statutory nondelegation than states like Florida or Pennsylvania. Another approach, endorsed in the Oregon APA, is somewhere between the approach of statutory nondelegation and the 1981 MSAPA. Oregon's APA requires an agency to make a statement of statutory basis and need for a rule, as well as a justification for how the proposed rule meets the need.[151] Oregon's approach effectively requires an agency to make a statement of means and statutory ends, but does not require rigorous judicial review of either the means or the ends, including

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[150] *See supra* note 49 (discussing Bonfield's rationale for provision).

[151] *See* OR. REV. STAT. § 183.335(2)(b)(B)-(C) (1991).

the statutory authorization for those ends.[152] These are procedural—not substantive–requirements; but we are talking about administrative *procedure* acts.

A third lesson to take from these restrictions is that many reforms to state government–particularly those aimed at the substance of regulation–are better made in subject-matter specific contexts, rather than in across-the-board statutes such as an APA. Statutory nondelegation, I have argued, may adversely affect the accountability by allowing legislators to claim credit for regulatory relief without taking responsibility for making a trade off between agency discretion and limitations on agency power at a more concrete level. For example, in deciding whether a state environmental agency has the authority to prohibit local development, we are likely to get a better result if the legislature addresses this in the specific regulatory context, rather than across-the-board in an APA. APA-imposed statutory nondelegation not only skirts legislative accountability but also leaves much for courts to resolve.[153] If a state legislature wishes to prohibit a specific agency from regulating an activity, so be it. The legislature, however, should be specific in its prohibition, and should have deliberated about its decision to foreclose specific regulatory action by an agency in a particular regulatory context. In a sense, I am advocating the reverse of what Florida adopted in its APA. If the legislature wishes to prohibit otherwise constitutional regulation, let it prohibit particular powers and duties in subject-matter specific statutes, not invite courts, ALJs, or even legislative committees into the political process of regulation. This is akin to the approach that courts take in interpreting the Federal APA, although the recent Florida experience might suggest little political hope for this approach in some states.

[152] For discussion, see Dave Frohnmayer, *National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act*, 3 BYU J. PUB. L. 1, 18-19 (1989).

[153] For criticism of "single-statute regulatory reform" and the conflict it poses for existing statutes and laws, see William W. Buzbee, *Regulatory Reform or Statutory Muddle The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L. REV. 298 (1996).

Fourth, there are no easy answers to reformers' concerns about administrative accountability. Radical quick fixes–I count among these statutory nondelegation–are likely to lead to frustration and a state's revisit of APA reform in subsequent years. Since 1996 Florida has already addressed APA modifications twice, most recently in a set of 1999 APA amendments reacting to judicial interpretation of its 1996 statutory nondelegation provision. The 1999 amendments continue Florida's counter-revolution against agency rulemaking, and will weaken agency discretion to make legal interpretations and impair agency flexibility in the implementation of regulatory programs.

A final–and the most important–lesson to take from Florida's 1996 and 1999 APA reform experiences is the importance of establishing and utilizing independent law reform commissions to guide and evaluate the APA reform process. Although Florida's Governor established an ad hoc APA Review Commission in 1996, the Commission was short-lived. It succeeded in evaluating and recommending many moderate reforms, including several new ideas for the state. Its short life, however, precluded the Commission from fully evaluating the implementation of its recommendations. By the time the Commission finished its main task, the legislative session had already begun, with the Commission's proposals on the agenda. The Commission's moderate proposals opened the door for special interest groups to use the legislative process to make their own radical mark on administrative procedure in the state, outside of the deliberations of or evaluation by an independent committee process. In 1999, this approach to reform continued in the state with little or no serious discussion of the impact of legislative proposals outside of the Legislature itself. Several urged the Governor to veto the 1999 APA reform bill, but the Governor's Office, which participated in some amendments to the bill very late in the process, was not about to reject a bill that had strong legislative support.

Unfortunately, the 1999 Florida APA amendments continue for Florida the counter-revolution against rulemaking it endorsed in 1996. Hopefully, other states can bypass the ad hoc approach to law reform that produced the statutory nondelegation provisions in Florida's 1996 and 1999 APA amendments. Utilization of an independent law reform commission in making and evaluating

legislative proposals, including involvement of a broad range of agency heads in the process, might help avoid turning a state APA into little more than a strategic tool for the clients of lawyers who have not received what they want from agencies or courts. In Florida, that is what the recent APA reform process seems to have become.