THE 1996 REVISED FLORIDA ADMINISTRATIVE PROCEDURE ACT: A SURVEY OF MAJOR PROVISIONS AFFECTING FLORIDA AGENCIES

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I. INTRODUCTION

In the spring of 1996, the Florida Legislature adopted a revised Administrative Procedure Act (APA),[1] the first massive overhaul of Florida's APA since its initial adoption over twenty years ago, in 1974. This Article examines the recent history of APA reform in Florida and surveys several provisions of the 1996 revised Florida APA that are likely to have a major effect on agency governance.

Part II of this Article briefly reviews the recent history of regulatory reform in the state of Florida. Part III discusses an interesting innovation in Florida's 1996 APA revisions that governs agency waiver of rules and is designed to make agency decisionmaking more flexible. Part IV addresses three new provisions in Florida's APA meant to make rulemaking more accountable. Despite the many major changes from the status quo in the 1996 APA revisions, Part V concludes, on a skeptical note, that it will only be a short matter of time before Florida revisits the issue of APA reform.

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1. Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147 (codified in scattered sections of FLA. STAT. ch. 120 (Supp. 1996)).

II. AN OVERVIEW OF FLORIDA APA REFORM AND THE 1996 REVISIONS

For the past three years, comprehensive APA reform has been at the forefront of Florida's legislative agenda, in large part a result of a populist political upsurge that had been brewing in the state for over a decade. The recent reform debate began in the 1980s, when Florida agencies were perceived as operating largely in a phantom mode. After amendments to Florida's APA in 1991, the pendulum swung the other way: the problem was no longer seen as phantom government, but a government of published rules. This perceived problem has led to several proposals in recent years aimed at reducing published rules and encouraging more flexible and more accountable agency governance.

A. The 1991 Amendments: A Rulemaking Revolution

Following the passage of a growth management act in 1975,[2] Florida agencies were widely criticized for invoking policy decisions that were not published in rules as a basis for refusing to approve local development plans.[3] Yet agency failure to promulgate rules for each policy decision is understandable. Agencies have scarce resources. It is well-recognized that, because rulemaking is procedurally burdensome, subject to rigorous judicial review, and a victim of the whims and politics of legislative oversight, agencies often opt to forego rulemaking for less burdensome and less accountable ways of policymaking.[4]

Attempting to bring agency policymaking back into the sunshine, the Florida Legislature amended the APA in 1991 by adding section 120.535, *Florida Statutes*, which took away an agency's discretion to choose the methodology by which it makes policy.[5] The provision states that "[r]ulemaking is not a matter of agency discretion"[6] and *requires* agencies to use rulemaking as a means for making state-

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2. Local Government Comprehensive Planning Act of 1975, ch. 75-257, 1975 Fla. Laws 794 (codified as amended at FLA. STAT. §§ 163.3161-.3243 (1995)). The Act was one of a series of statutes that delegated mid-level policy decisions affecting landowners to administrative agencies.

3. *See, e.g.*, David Gluckman, *1994 APA Legislation: The History, The Reasons, The Results*, 22 FLA. ST. U. L. REV. 345, 349-50 (1994).

4. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1456 (1992).

5. *See* Act effective Jan. 1, 1992, ch. 91-30, § 3, 1991 Fla. Laws 241, 244-46 (current version at FLA. STAT. §§ 120.54(1), .56(4), .595(4), .80(13)(a), .81(3)(a) (Supp. 1996)). The 1996 revisions subsume previous section 120.535, *Florida Statutes*, within the requirements of sections 120.54, 120.56, 120.595, 120.80, and 120.81. The text above, however, refers to section 120.535 for ease of discussing the concept.

6. FLA. STAT. § 120.535(1) (1995) (repealed and recodified 1996). The revised APA moved this language to section 120.54(1)(a). *See id.* § 120.54(1)(a) (Supp. 1996).

ments of general applicability and future effect to the extent that it is "feasible and practicable."[7] Still, agencies in Florida retain some flexibility in selecting their method for setting policy,[8] but an agency bears the burden of showing that rulemaking is not feasible or practicable.[9] If an agency, attempting to make a statement of general applicability and future effect, fails to meet this burden, then the provision authorizes any person substantially affected by the statement to seek an adjudicative hearing with the Division of Administrative Hearings (DOAH) to determine whether rulemaking procedures were required.[10] Ultimately, affected persons can seek judicial review if necessary.[11]

Florida's attempt at "presumptive rulemaking" is not unique. Similar standards appear in the 1981 Model State Administrative Procedure Act,[12] Oregon case law,[13] and, more recently, statutory proposals in Iowa.[14] However, the federal APA contains nothing

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7. *Id.* § 120.54(1) (Supp. 1996). Rulemaking is presumed "feasible" unless the agency proves: (1) it did not have "sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking"; (2) "[r]elated matters are not sufficiently resolved to enable the agency to address a statement by rulemaking"; or (3) it is currently attempting expeditiously and in good faith to pursue rulemaking. *Id.* § 120.54 (1)(a)(1). Rulemaking is presumed "practicable" unless the agency proves that: (1) it is not reasonable under the circumstances for agency decisions to be based on detailed or precise principles, criteria, or standards; or (2) the particular questions addressed are so narrow in scope "that more specific resolution of the matter is impractical outside of adjudication. . . ." *Id.* § 120.54(1)(a)(2).

8. *See* ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULEMAKING § 4.4.1, at 85-86 (Supp. 1993). Bonfield observes that agencies in Florida still have much discretion to make statements of "particular applicability" in adjudicative proceedings, which can be relied upon at some future time as "nonbinding persuasive precedent." *Id.* at 85. According to Bonfield, the language of section 2-101 of the 1981 Model State Administrative Procedure Act avoids this problem. *See id.* at 86.

9. *See* FLA. STAT. § 120.54(1) (Supp. 1996).

10. *See id.* § 120.56(4)(a).

11. The decision of a DOAH administrative law judge that a statement is or is not required to be promulgated by rulemaking procedures constitutes a final appealable order. *See id.* § 120.56(4)(c).

12. *See* ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULEMAKING § 4.4.1, at 131 (1986); Model State Administrative Procedure Act § 2-104(4).

13. The Oregon Supreme Court imposed mandatory rulemaking, based upon implied legislative intent in its state APA, in *Megdal v. Oregon Board of Dental Examiners*, 605 P.2d 273, 313 (Or. 1980) (requiring Oregon Board of Dental Examiners to elaborate the statutory standard of "unprofessional conduct" by rule). However, a more recent case, *Trebesch v. Employment Division*, 710 P.2d 136, 139 (Or. 1985), narrowed the potential applicability of this approach to a limited number of statutory interpretation considerations.

14. *See* TASKFORCE ON ADMIN. L. REFORM, IOWA ST. BAR ASS'N, PROPOSED NEW IOWA ADMINISTRATIVE PROCEDURE ACT (SF 2404) § 2-104(3) (1996) (proposed IOWA CODE § 17A.4106) [hereinafter IOWA APA PROPOSAL]. A weaker standard appears in the Washington APA, which provides that "[e]ach agency that is authorized by law to exercise discretion in deciding individual cases is encouraged to formalize the general principles that may evolve from these decisions by adopting the principles as rules . . . ." WASH. REV. CODE § 34.05.220(4) (1996); *see also* William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 799 (1989). Utah's APA provides that "[e]ach agency shall enact rules incorporating the principles of law not al-

similar to presumptive rulemaking; aside from due process requirements and statutory directives, federal agencies have the discretion to choose the mechanism by which they make policy.[15]

Data suggest that the addition of section 120.535 to Florida's APA led to a large growth in the number of rules promulgated by agencies in the state. In 1991, Florida agencies proposed 4,310 rules.[16] In 1992, the year after the Legislature took away agency discretion to make policy by either rule or adjudication, the number of new rules agencies noticed increased by over sixty-six percent, to 7,160.[17] Agencies have continued to notice new rules at rates higher than 1991 and prior years.[18]

B. The Birth of Counterrevolutionary Politics

Increases in the number of rules, coupled with a pro-rulemaking culture born of the 1991 modification, have inspired a populist counterrevolution in recent years. This counterrevolution has been led by a regulatory reform coalition formed from three distinct sets of interests: proponents of flexibility and rationality in administrative process; those who support accountability to majoritarian—primarily legislative—political processes; and libertarian opponents of any attempt, legislative or otherwise, to regulate markets—even where regulation may enhance social welfare.

The regulatory reform coalition was given particular political momentum following the 1994 gubernatorial campaign, in which incumbent Governor Lawton Chiles defeated challenger Jeb Bush by a razor-thin margin. Regulatory reform was not a major issue on the campaign trail: several APA amendment proposals were considered in the Legislature in 1994, but no single reform proposal was able to pass both chambers.[19] However, following his tight re-election in 1994, Governor Chiles, a Democrat, faced a major defeat in the Legislature. For the first time ever in Florida, the Republican party took control of the state Senate, and the Democratic party's majority in the House was substantially narrowed.[20]

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ready in its rules that are established by final adjudicative decisions within 120 days after the decision is announced in its cases." UTAH CODE ANN. § 63-46a-3(6) (1996).

15. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). Prior to 1991, agencies in Florida had this discretion as well. *See* McDonald v. Department of Banking & Fin., 346 So. 2d 569, 580 (Fla. 1st DCA 1977).

16. *See* FLA. LEGIS. JT. ADMIN. PROCS. COMM., ANNUAL REPORT 7 (1995).

17. *See id.* at 21. Because many of these rules were promulgated to implement new statutory programs, the entire increase cannot be attributed to section 120.535.

18. *See id.*

19. These proposals are discussed in Lawrence E. Sellers, Jr., *1994 Proposals for Rulemaking Reform*, 22 FLA. ST. U. L. REV. 327, 344 (1994).

20. *See* Bill Douthat, *Legislative Delegation Feels GOP Shift*, PALM BCH. POST, Nov. 10, 1994, at A14; Phil Willon & Kevin Metz, *Chiles Faces Assertive Opposition*, TAMPA TRIB., Nov. 10, 1994, at 1.

The Governor, seeking the support of reform-minded Republicans in the Legislature, entered into the regulatory reform debate in 1995 with full force. In his 1995 inauguration address, the Governor, giving a populist endorsement to the reform coalition, requested that the Legislature repeal section 120.535, *Florida Statutes*.[21] He also requested that agencies phase out all regulations except those found by the Governor or Legislature to be essential to the protection of human health and public safety.[22] The Governor followed this with an executive order designed to "bring common sense back to government."[23] It stated that "citizen frustration with government is at an all-time high," "frustration stems not from the job government has set out to do, but the manner in which government has gone about achieving that goal through a complex system of overly-precise rules and regulations," and "rules have become increasingly confusing, complicated, and expensive for both the regulated and the regulators."[24] The order called for the mass repeal of "unnecessary" rules in the *Florida Administrative Code*.[25] Agencies reacted in 1995 by repealing more than 5,000 rules, although hundreds more were added as agencies set about implementing new laws.[26] Time and again in the Governor's battle against staid bureaucracy, he waved Philip Howard's book *The Death of Common Sense*[27] as a virtual mantra of populist reform against complex, inflexible, bureaucratic government.[28]

Meanwhile, in 1995, the Legislature was able to pass some of its own reforms. The 1995 APA reform bill relocated section 120.535, but did not completely repeal the substance of Florida's presumptive rulemaking mechanism.[29] The bill also required agencies to adopt the "least cost" regulation when making new rules.[30] The Governor, who perceived many of the 1995 reforms as too burdensome for

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21. *See* Gov. Lawton Chiles, Inaugural Address (Jan. 3, 1995), *reprinted in 'Government Don't Work People Work'*, TALL. DEM., Jan. 4, 1995, at A11.

22. *See id.*

23. Fla. Exec. Order No. 95-74 (Feb. 27, 1995).

24. *Id.*

25. *See id.*

26. *See Senate Passes Bill to Streamline Government*, ST. PETE. TIMES, Apr. 4, 1996, at B5.

27. PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994). Howard's book decries the explosion of rights, laws, rules, and procedures that have paralyzed government during the last 30 years. For discussion of the influence of Howard's book on Florida APA reform in 1994-95, see Bill Moss, *The Monster that Nonsense Created*, STATE LEGISLATURES, June 1995, at 16.

28. After the Governor read an advance copy of Howard's book, he invited Howard to the Governor's mansion for a breakfast chat and dug into his own pocket to buy copies of Howard's book for all state legislators, cabinet heads, and executive heads. *See* Moss, *supra* note 27, at 17-18.

29. Although Committee Substitute for Committee Substitute for Senate Bill 536 ostensibly repealed section 120.535, *see* Fla. CS for CS for SB 536, § 5 (1995), the bill repositioned the mechanism for requiring rulemaking and the general preference for rulemaking to implement policy in a new section 120.547, *see id.* § 10.

30. *See id.* § 5.

agencies and insisted upon the repeal of the substance of section 120.535, vetoed this legislation.[31]

Finally, the Legislature passed and the Governor signed a revised APA in Spring 1996.[32] Although APA reform had been on the legislative agenda for several years, the 1996 revisions owe their passage to the executive-led counterrevolution against regulation.[33] In the executive order accompanying his veto of 1995 reform legislation, the Governor expressed his view that presumptive rulemaking results in "a proliferation of overly-precise rules, overwhelming red tape and deprives agency decision-makers of the ability to exercise good judgment and common sense."[34] He created an Administrative Procedure Act Review Commission (Review Commission) and charged it with reforming Florida's APA.[35] Notably, the fifteen-member Review Commission, which was comprised of legal practitioners, legislators, and a representative of the Governor's office, did not contain a single internal agency representative.

C. *The 1996 Revisions*

The revisions adopted into law in 1996 make some obvious organizational changes to Florida's APA. Upon the recommendation of the Review Commission, which produced a final report in February 1996, the 1996 revisions attempt to "simplify" the APA by making it more precise, less duplicative, and better organized.[36] For example, the revisions consolidate the APA's rule challenge provisions, which were previously scattered throughout three different sections of the APA,[37] into a single section.[38] The result, most would agree, is a more

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

32. The Legislature passed the 1996 revised APA on April 25, 1996. *See Senate Passes Bill to Help Citizens Cut Through Red Tape*, ORLANDO SENT., Apr. 26, 1996, at D5. The Governor signed it into law on May 1. *See* Act effective Oct. 1, 1996, ch. 96-159, § 44, 1996 Fla. Laws 147, 213.

33. The point is made clearly, and with much more detail, in Stephen T. Maher, *The Death of Rules: How Politics Is Suffocating Florida*, 8 ST. THOMAS L. REV. 313, 325 (1996). For an argument that, in the federal administrative system, the executive branch, rather than Congress, has a comparative advantage in overseeing regulatory reform, see Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 286 (1996). The Governor's efforts at APA reform succeeded in the executive branch and the Legislature despite the fact that in Florida, unlike the federal system, the executive branch is fragmented between the Governor and elected cabinet heads. This suggests widespread electoral support for regulatory reform.

34. Fla. Exec. Order No. 95-256 (July 12, 1995).

35. *See id.*

36. *See* GOV.'S ADMIN. PROC. ACT REV. COMM'N, FINAL REPORT 6-8 (1996) [hereinafter REVIEW COMMISSION REPORT].

37. *See* FLA. STAT. § 120.54(4) (1995) (amended 1996) (proposed rules); *id.* § 120.56 (amended 1996) (final rules); *id.* § 120.535 (repealed and recodified 1996) (nonrule policy).

readable, better-organized APA, although one that no doubt will still rank low on the average citizen's summer reading list.

However, the more significant changes in the 1996 revisions to the APA are not organizational, but substantive. The Review Commission not only set out to simplify the APA, but also sought more flexible and accountable agency regulation.[39] To ensure more flexibility, the 1996 revisions address the perceived problem of the growth of inflexible rules by adding to Florida's APA a waiver provision that intended to allow agencies the discretion to apply rules more prudently. This Article argues that to the extent that this provision allows increased agency discretion, while also encouraging the usage of rulemaking by agencies, it provides some hope for sound democratic agency decisionmaking. However, if the waiver provision is not properly implemented, the measure may swing too far toward mandatory waiver, thus undermining its apparent objective of flexibility.[40]

Although less novel than the waiver provision, the accountability provisions in the 1996 APA revisions are likely to have far more significant repercussions for agency governance in Florida.[41] Following discussion of Florida's new waiver provision, this Article addresses three "accountability" provisions in the revised APA that promise to make agency rulemaking more difficult. First, the 1996 revisions severely limit agency authority to adopt new rules without express legislative direction and provide a "lookback" process for phasing out existing rules that exceed this authority by the year 1999.[42] Second, the 1996 revisions allow for stringent cost assessment of new regulations and incorporate a "least cost" review standard, potentially inviting DOAH and the courts to assess the policy merits of agency decisionmaking.[43] Third, by shifting the burden of proof to agencies in rule challenge proceedings, the 1996 revisions will likely force agencies to handle an increased number of rule challenges by special interests, and to sustain a higher burden in each individual challenge that goes before DOAH and the courts.[44]

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38. *See id.* § 120.56 (Supp. 1996). The new section is entitled "Challenges to Rules." *See id.*

39. *See* REVIEW COMMISSION REPORT, *supra* note 36, at 1.

40. *See infra* Part III.

41. This Article does not address all of the legislative accountability provisions contained in the revisions. With the exception of section 120.536, *Florida Statutes*, discussed *infra* Part IV.A, this Article is in considerable agreement with most of the pre-adoption legislative oversight provisions that apply to rules in the revised APA. For further discussion of these provisions, see F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA*, 24 FLA. ST. U. L. REV. 309 (1997).

42. *See* FLA. STAT. § 120.536 (Supp. 1996); *see also* discussion *infra* Part IV.A.

43. *See* FLA. STAT. § 120.541 (Supp. 1996); *see also* discussion *infra* Part IV.B.

44. *See* FLA. STAT. § 120.56 (Supp. 1996); *see also* discussion *infra* Part IV.C.

Together, these provisions provide some endorsement for Florida's rulemaking counterrevolution, a movement that threatens to make rulemaking more difficult for administrative agencies without necessarily improving the quality of regulation. If left to continue along its course, the counterrevolution signals an ominous future for administrative procedure—indeed, for democracy—in the state of Florida. Although I hope this assessment is wrong, the counterrevolution's results are likely to be a bonanza for special interests, coupled with fewer new rules and an increased effort by agencies to avoid rulemaking.

III. INTRODUCING FLEXIBILITY TO ADMINISTRATIVE PROCESS

One of the more novel innovations in the 1996 revisions is the addition of a section to the APA that requires agencies to waive or grant variances to rules in certain cases. As discussed in the contribution to this issue by Donna Blanton and Bob Rhodes, the Reporter and Chair, respectively, for the Revision Commission, this new waiver provision was added to Florida's APA with the objective of enhancing "common sense."[45] Although some states, such as Minnesota,[46] have provisions that allow flexibility in the interpretation of regulations, Florida's new provision appears to be unique in that it expressly requires agencies to promulgate criteria for granting waiver, to respond to waiver petitions, and, where certain conditions have been met, to suspend application of published regulations by granting waivers or variances.[47]

The waiver provision in the 1996 Florida APA revisions states:

> Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. This section does not authorize agencies to grant variances or waivers to statutes.[48]

Under the new Florida provision, waivers or variances must be granted[49] when a person subject to a rule has demonstrated that:

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45. Donna E. Blanton & Robert M. Rhodes, *Loosening the Chains That Bind: The New Variance and Waiver Provision in Florida's Administrative Procedure Act*, 24 FLA. ST. U. L. REV. 353 (1997).

46. *See* MINN. STAT. § 14.05 (1996); *see also id.* §§ 465.795-.797.

47. *See* FLA. STAT. § 120.542 (Supp. 1996).

48. *See id.* § 120.542(1).

49. Some states, in contrast to requiring waiver, have adopted provisions that prohibit agencies from granting waivers or variances unless they establish waiver guidelines

(1) "the purpose of the underlying statute will be or has been achieved by other means . . . ."[50] and (2) "application of a rule would create a substantial hardship or would violate principles of fairness."[51] Upon receipt of a request for a waiver, an agency is required to publish notice of the petition within fifteen days, provide an opportunity for comment by interested persons, and then grant or deny the petition within ninety days of its receipt.[52] If the agency fails to grant or deny a petition within this time period, the petition is deemed granted.[53]

This provision contrasts with a proposed amendment to Iowa's APA drafted by Arthur Bonfield, the reporter for the 1981 Model State Administrative Procedure Act. The language in Iowa's proposed waiver provision is less broad, focusing primarily on the goals of the regulatory program—not the specific impact on the regulated party. According to the Iowa proposal, "[a]n agency shall issue an order granting a petition for a waiver of a rule, in whole or in part, if application of the rule to the petitioner on the basis of the particular facts specified in the petition would not serve any of the purposes of the rule."[54] Under Iowa's proposal, an applicant for a waiver will only be entitled to waiver if *none* of the purposes of the statute would be met by application of the rule.[55] By comparison, in Florida, an applicant for waiver is entitled to waiver if suspension of the rule does not thwart the statutory purpose and the circumstances at hand indicate substantial hardship or unfairness.[56] Thus, the Florida Legislature intended for persons subject to regulation to be granted waiver in a broader range of circumstances than the language of Iowa's proposed provision would allow.

Under Florida's new waiver provision, an order granting or denying a waiver petition is required to contain a statement of facts and reasons supporting the agency's action or inaction and must be supported by competent substantial evidence.[57] Although the statute

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or procedures by rule. *See, e.g.*, N.H. REV. STAT. ANN. § 541-A:22 (Supp. 1995) (stating that no agency shall grant waivers without amending its rules or "providing by rule for a waiver or variance procedure"); N.C. GEN. STAT. § 150B-19 (1995) (prohibiting agencies from waiving regulations unless a rule establishes specific guidelines for the agency to follow); VT. STAT. ANN. tit. 3, § 845 (WESTLAW through 1995 Sess.) (prohibiting agencies from granting routine waivers without amending the rules or providing for waiver by rule).

50. FLA. STAT. § 120.542(2) (Supp. 1996).

51. *Id.* "Substantial hardship" is defined as "a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver." *Id.* "Principles of fairness" are "violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule." *Id.*

52. *See id.* § 120.542(6)-(7).

53. *See id.* § 120.542(7).

54. IOWA APA PROPOSAL, *supra* note 14, § 2-104(3).

55. *See id.*

56. *See* FLA. STAT. § 120.542(2) (Supp. 1996).

57. *See id.* § 120.542(7).

does not expressly provide for third-party intervenors, agencies are required to allow "interested persons" an opportunity to provide comments on a waiver petition.[58] Each agency is required to maintain a record of the disposition of every petition, and to file annual reports with the Governor and the Legislature listing the number of temporary and permanent waivers and variances.[59]

At first blush, the concept of waiver of published rules seems inconsistent with the goals of Florida's APA, which favors rulemaking over adjudication in virtually all cases.[60] To the extent that waivers are case-specific, they eschew some of the basic objectives of rulemaking, such as generality and universality. In addition, Florida's waiver provision may invite agencies to create new policies by granting of exceptions to published rules.

Taken in context, however, waiver is a desirable addition *in concept* to Florida's APA for two reasons. First, the addition of a waiver provision was part of a political compromise to introduce flexibility into the regulatory process without sacrificing the apparent values of Florida's presumptive rulemaking mechanism. The waiver provision helped to earn political support for the retention of section 120.535 and its rulemaking presumption—which the Governor had previously sought to repeal—by allowing Governor Chiles refuge in its putative flexibility objective.[61]

Second, the language of Florida's APA prior to the 1996 revisions suggested that agencies could not grant waivers unless they had provided for waiver in published regulations related to the matter at issue.[62] Agencies wishing to retain flexibility in the application and enforcement of existing regulations faced two choices if they were to comply with the letter of the APA and case law. They could refuse to

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58. *See id.* § 120.542(6).

59. *See id.* § 120.542(8).

60. The language of previous section 120.535, which now appears in section 120.54, would suggest this. *See id.* § 120.54(1)(a).

61. *See supra* notes 21-28 and accompanying text.

62. The language of Florida's APA at the time of the 1996 revisions provided for remand where an agency exercise of discretion is "inconsistent with an agency rule." FLA. STAT. § 120.68(12) (1995) (amended 1996). At one time, Florida's APA expressly allowed for more flexibility. Section 120.68(12) of the APA used to provide that a court should remand a case to an agency if it finds the agency's exercise of discretion to be "[i]nconsistent with an agency rule, an officially stated agency policy, or a prior agency practice, if deviation therefrom is not explained by the agency." *Id.* § 120.68(12)(b) (1983). Florida courts developed an "explication" doctrine, which allowed agencies to deviate from published rules when they explained the deviation. *See* General Tel. Co. v. Florida Pub. Serv. Comm'n, 446 So. 2d 1063, 1069 (Fla. 1984); Best Western Tivoli Inn v. Department of Transp., 435 So. 2d 321, 324 (Fla. 1st DCA 1983); *see also* F. Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 ST. THOMAS L. REV. 287, 301 (1995). In 1984, however, the Legislature amended section 120.68(12), directing remand where a court finds that an agency's exercise of discretion is "inconsistent with an agency rule." Act effective June 11, 1984, ch. 84-173, § 4, 1984 Fla. Laws 519, 524.

promulgate rules, instead claiming that rulemaking was not required under section 120.535.[63] Alternatively, they could promulgate rules but do so in a vague and ambiguous manner, thus retaining some interpretive discretion in the application and enforcement of rules.

Neither of these choices is desirable. The first approach is problematic to the extent that it contravenes the purpose of the 1991 amendments. The second choice, assuming it withstands a vagueness challenge, is problematic to the extent it encourages imprecision in the language of rules, thus discouraging oversight by the Legislature and notice to the public at large.[64]

Of course, no agency will ever be able to foresee all future contingencies, whether dependent upon technology, the economy, or other facts. In concept, increased agency discretion to waive rules should allow additional flexibility, while also encouraging agencies to promulgate rules with a reasonable amount of precision. Although there is a risk of exceptions redefining rules, the legislative oversight process in Florida provides an opportunity to modify rules if this should occur,[65] and agency attempts to develop new policy through waiver of rules will potentially be subject to challenge before DOAH, pursuant to the mechanisms that previously appeared in section 120.535.[66] Thus, introduction of agency discretion to waive rules may provide some hope for those who wish to continue Florida's rulemaking revolution.

However, it is unfortunate that the language of Florida's new waiver provision, in contrast to federal case law,[67] requires agencies to grant waivers. Because of its language, which states agencies "shall" grant waiver where certain conditions are present, Florida's new waiver provision potentially goes from one extreme—no waiver—to another—mandatory waiver. This result may open agency floodgates to requests for special treatment from regulated

63. *See* FLA. STAT. § 120.535(1)(a)-(b) (1995) (repealed 1996) (current version at FLA. STAT. § 120.54(1)(a)(1)-(2) (Supp. 1996)) (requiring rulemaking unless agency proves absence of feasibility or practicability).

64. For a discussion of the problems associated with courts policing the precision of rules, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 106 (1983).

65. *See* FLA. STAT. § 120.545 (Supp. 1996).

66. *See id.* § 120.56(4).

67. *See* WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (reasoning that authority to grant or deny waivers may be implied by Congress' directive to regulate in the public interest). For further examination of waiver in the federal regulatory context, see Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255, 274 (1995); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 183; Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 279.

persons. Moreover, regulated interests will face increased incentives to appeal to DOAH or the courts, inviting these nonpolitical institutions to second-guess agency judgment regarding a regulatory program's goals.

To the extent that regulated parties begin to perceive an entitlement to waiver, the new Florida provision may undermine its flexibility objective—the provision will have reduced, not increased, agency discretion.[68] Thus, in interpreting waiver provisions such as those adopted by Florida and proposed in Iowa, administrative law judges and courts should defer to agency judgments regarding the purposes of a statutory program, and whether each factual scenario raises issues of hardship or unfairness. Failure to defer to agencies in the implementation of waiver will undermine flexibility objectives.

IV. THE RULEMAKING COUNTERREVOLUTION

If properly implemented, Florida's new waiver provision provides some limited hope for continuing the rulemaking revolution begun by the Legislature in 1991. However, rules are rules, and the unprecedented growth of the *Florida Administrative Code* in recent years has created a potential political target of published regulation among many constituencies. In their effort to reform Florida's APA, advocates of flexibility and rationality were joined by those who fear decisionmaking by nonmajoritarian bodies and those who simply fear any attempt by government to regulate markets. Much of the growing counterrevolution against rules has been fueled by regulated interests, such as developers and industry, who have been dissatisfied with the outcomes of agency regulation.[69]

In an attempt to enhance "accountability," three particular provisions in the 1996 Florida APA revisions endorse this fledgling counterrevolution. These provisions suggest that the movement may have more than a transitory effect upon Florida administrative law. First, the 1996 revisions contain a new provision that severely limits agency authority to adopt rules absent express legislative authority and, through a "lookback" process,[70] provides a means for phasing

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68. Those who supported this particular provision certainly did not intend this. When he signed the revisions to Florida's APA, Governor Chiles stated, "This gives our agencies the flexibility to use a more common sense approach—encouraging state employees to solve problems rather than create roadblocks." Press Release from Exec. Office of the Gov. (May 1, 1996) (detailing changes in Florida's Administrative Procedure Act) (on file with Exec. Office of the Gov., Tallahassee, Fla.).

69. The APA reform proposals vetoed by Governor Chiles in 1995, for example, were produced by the same Legislature that passed Florida's landmark Bert J. Harris, Jr., Private Property Rights Protection Act. *See* FLA. STAT. § 70.001 (1995).

70. A lookback process attempts to apply subsequently adopted regulatory analysis requirements to preexisting rules. *See* Leslie Kux, *Looking Back at Existing Rules: Agency Perspectives on Analysis Requirements*, 48 ADMIN. L. REV. 375, 375 (1996).

out all rules exceeding this authority by the year 1999.[71] A second provision adds a more rigorous cost assessment burden for agencies.[72] A third provision abolishes the presumption of validity that has historically attached to rules, heightening the burden for agencies seeking to promulgate rules.[73] This part of the Article addresses each of these provisions in turn.

A. Restricting Rulemaking Authority

Florida is one of a handful of states that continues to adhere to a bright-line separation of powers doctrine. In perhaps the most quoted passage in Florida's case law on delegation, the Florida Supreme Court expressed the following limits on delegated rulemaking power, which are established by the Florida Constitution:[74] "Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy."[75] Cases issued by the Florida Supreme Court articulate a range of standards, requiring legislative delegation of policy-making authority to contain an "intelligible principle,"[76] have "adequate standards" to guide the agency,[77] have "objective guidelines and standards,"[78] be "accompanied by adequate guidelines,"[79] or contain "reasonably definite standards."[80] Despite harsh rhetoric in the Florida Supreme Court's treatment of the nondelegation issue, courts in the state seldom find statutes unconstitutional.[81]

Thus, notwithstanding the courts' continued rhetorical adherence to strict separation of powers, many Florida regulatory programs operate under fairly general legislative grants of power. For example, the Board of Medicine, which regulates the licensing of physicians, is authorized to promulgate rules "as may be necessary to carry out the

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71. *See* FLA. STAT. § 120.536 (Supp. 1996).
72. *See id.* § 120.541.
73. *See id.* § 120.56(a), (c).
74. *See* FLA. CONST. art. II, § 3.
75. Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978) (holding unconstitutional a state statute delegating agency authority to define restrictiveness levels). Florida has expressly rejected Kenneth Culp Davis's widely accepted shift in emphasis in nondelegation doctrine from legislatively imposed standards to procedural safeguards. *See id.* For further discussion, see John E. Fennelly, *Non-Delegation Doctrine and the Florida Supreme Court: What You See Is Not What You Get*, 7 ST. THOMAS L. REV. 247, 254 (1995).
76. Phillips Petroleum Co. v. Anderson, 74 So. 2d 544, 547 (Fla. 1954).
77. Delta Truck Brokers, Inc. v. King, 142 So. 2d 273, 275 (Fla. 1962).
78. High Ridge Mgmt. Corp. v. State, 354 So. 2d 377, 380 (Fla. 1977).
79. Smith v. State, 537 So. 2d 982, 986 (Fla. 1989).
80. B.H. v. State, 645 So. 2d 987, 993 (Fla. 1994).
81. *See* Johnny C. Burris, *Administrative Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 7, 11 (1991).

duties and authority" conferred specifically by statute and "as may be necessary to protect the health, safety, and welfare of the public."[82]

The 1996 revisions to the APA, however, seriously limit agency rulemaking authority in future rulemaking proceedings. The revisions add a remarkable new section to Florida's APA that states:

> 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.*[83]

Florida's attempt to radically curtail agency rulemaking authority is not unique—it echoes a provision added to Washington's state APA in 1995[84] and section 627 of Senate Bill 343, former Senator Bob Dole's stalled regulatory reform bill.[85]

The exact meaning of the new language in Florida's APA is unclear. Of course, if the Legislature has given particular powers and duties to an agency—as it has granted the Board of Medicine rulemaking power "as may be necessary to carry out the duties and authority" conferred specifically by statute—then exercising this authority to promulgate rules would not contravene the meaning of this new provision. For example, the authorizing statute requires the Board of Medicine to certify applicants who have "completed the equivalent of two academic years of preprofessional, postsecondary education" that includes certain core pre-med courses "as determined by rule of the board."[86] A rule promulgated pursuant to this statutory provision specifying acceptable subject-matters and levels of pre-med courses would certainly be valid.

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82. FLA. STAT. § 458.309(1) (1995).

83. *Id.* § 120.536 (Supp. 1996) (emphasis added).

84. The Washington statutory language, which applies to major agencies, states that "an agency may not rely solely on the section of 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 any rule." WASH. REV. CODE § 34.05.322 (1995); *see also id.* § 43.12.045 (Commissioner of Public Lands); *id.* § 43.20A.075 (Department of Social and Health Services); *id.* § 43.23.025 (Department of Agriculture); *id.* § 43.24.023 (Department of Licensing); *id.* § 43.70.040 (Department of Health). The legislative intent section of the session law amending the Washington APA states that "substantial policy decisions affecting the public [should] be made by those directly accountable to the public, namely the legislature, and . . . state agencies [should] not use their administrative authority to create or amend regulatory programs." Act of May 16, 1995, ch. 403, § 1.2.a, 1995 Wash. Legis. Serv. (West, WESTLAW).

85. "[A]ny rule that expands Federal power or jurisdiction beyond the level of regulatory action needed to satisfy statutory requirements shall be prohibited." Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. § 627 (1995).

86. FLA. STAT. § 458.311(e) (1995).

A more difficult issue, which courts may need to resolve, is how this language applies to an implied duty to promulgate rules pursuant to a statute that contains a broader grant of rulemaking authority. For example, the same statutory section also gives the Board of Medicine the authority to adopt rules "as may be necessary to protect the health, safety, and welfare of the public."[87] Does this authorize the Board to promulgate rules designed to preclude the licensure of applicants with a history of illicit drug use—or to require applicants to take college-level courses on drug addiction—for the purported purpose of protecting patients, even though there is no "particular" reference to illicit drug use in the statute? Or is an agency attempt to promulgate rules under this general grant of authority invalid ultra vires?

As if this provision alone will not cause agencies enough confusion in future rulemaking proceedings, the Legislature decided to subject existing agency regulations to the same standard. In a look-back provision[88] that may have amazing repercussions for agencies, the 1996 revisions put in place a set of procedures for reviewing agency rules that exceed this grant of authority and provide a mechanism for legislative review of such rules.[89] By July 1, 1997, each agency must submit to the Joint Administrative Procedures Committee (JAPC), Florida's agency oversight committee in the Legislature, a listing of each rule that exceeds the APA's rulemaking authority.[90] During the 1998 session, the Legislature will consider whether specific legislation authorizing the identified rules should be enacted.[91] By January 1, 1999, each agency must initiate proceedings to repeal each rule identified as exceeding its rulemaking authority.[92] As of July 1, 1999, there will be a procedure through which JAPC or any substantially affected person can petition an agency to challenge a rule because it exceeds the APA's new rulemaking authority standard.[93]

B. Cost Assessment: Towards an Administrative Substance Act?

Since the 1970s, Florida has required some degree of cost assessment as a part of its rulemaking procedures. From 1975 until 1992, the APA required agencies to prepare an economic impact statement

87. *Id.* § 458.309(1).

88. Federal reform proposals in the 104th Congress, such as Senate Bill 343 (the Dole regulatory reform bill), Senate Bill 291, and House Bill 994, also have toyed with the lookback process. *See* Kux, *supra* note 70, at 375.

89. This phase-in review process of regulation is discussed further in Boyd, *supra* note 41, at 342-44.

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

91. *See id.*

92. *See id.*

93. *See id.*

(EIS) for virtually every proposed rule.[94] The EIS requirement in place at the time of the 1996 revisions was added to the APA in 1992.[95] Although there was dissatisfaction with the frequency with which agencies took existing EIS procedures seriously, proposals to add more rigorous cost assessment requirements that passed the Legislature in 1995 were vetoed by the Governor, who perceived them as too onerous.[96]

At the time of the 1996 revisions, Florida law required that an agency prepare an EIS, showing the "lowest net cost to society,"[97] for many rules.[98] The EIS was required to contain: (1) an estimate of the cost to the agency of the proposed action and the anticipated cost to other state/local government entities; (2) an estimate of the cost or benefit to all persons affected by the proposed action; (3) an estimate of the impact of the proposed action on competition; (4) an estimate of the impact of the proposed action on small business; (5) a comparison of the probable costs and benefits of the proposed rule to the costs and benefits of not adopting the rule; (6) a determination of whether less costly or less intrusive methods exist for achieving the same purpose; (7) a description of any reasonable alternative methods for achieving the purpose of the proposed rule considered by the agency, and the reasons for rejecting them; and (8) a detailed statement of the data and methodology used in making cost/benefit estimates.[99] Agencies were required to consider the alternative that imposed the "lowest net cost to society" pursuant to a variety of cost and benefit factors.[100] However, a rule could not be challenged based upon this standard.[101] The EIS was reviewable for material procedural errors only;[102] there was no substantive component to either a DOAH or judicial review of an EIS.[103]

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94. *See* FLA. STAT. § 120.54(2)(b) (1991).

95. *See* Act effective July 1, 1992, ch. 92-166, § 4, 1992 Fla. Laws 1670, 1673-76.

96. *See* Fla. Exec. Order No. 95-256 (July 12, 1995) (noting that mandates by the Legislature in the 1995 bill are an effort to "micromanage" government). However, in 1995, the Florida APA was successfully amended to require risk assessment by the Florida Department of Environmental Protection and Department of Agriculture. *See* Act effective June 15, 1995, ch. 95-295, § 6, 1995 Fla. Laws 2719, 2723.

97. *See* FLA. STAT. § 120.54(12)(b) (1995) (amended 1996).

98. Under the EIS provision in place at the time of the 1996 revisions, an agency was required to prepare an EIS only if: (1) the agency determined that proposed action would result in a substantial change in costs or prices, or result in significant adverse effects on competition, employment, investment, productivity, innovation, or international trade, and alternative approaches to the regulatory objective exist and are not precluded by law; or (2) within 14 days of notice of the rule, a written request was filed by the Governor, a corporation, or at least 100 people signing a request. *See id.* § 120.54(2)(b).

99. *See id.* § 120.54(2)(c).

100. *See id.* § 120.54(12)(b).

101. *See id.* ("This paragraph shall not provide a basis for challenging a rule.").

102. The Florida Supreme Court endorsed reviewing the EIS only for substantial or material procedural errors in *Florida-Texas Freight, Inc. v. Hawkins*, 379 So. 2d 944, 946 (Fla. 1979).

103. *See id.*

The 1996 revisions to Florida's APA make some major changes to the cost assessment required for proposed rules. Most importantly, the 1996 revisions require a statement of estimated regulatory costs (SERC) in lieu of the previous EIS. Although the SERC requires cost assessment only for proposals that "substantially accomplish" statutory objectives,[104] it excludes completely consideration of the generic benefits of regulation. Otherwise, it is substantially similar to the EIS in cost assessment content. However, the 1996 revisions make two significant procedural changes to agency cost assessment of proposed rules. First, the SERC contains a mechanism for shifting to agencies the burden of presenting the rationales for rejecting lower cost proposals submitted by regulated parties.[105] Second, upon review by DOAH or the courts, procedural errors in the preparation of a SERC are material, and agencies are required to show that there are no "less costly alternatives that substantially accomplish the statutory objectives."[106]

Unlike the EIS, the SERC contains a mechanism to shift the burden of explaining the cost savings of regulatory action to the agency. Whereas preparation of an EIS was triggered by an agency determination of a rule's significance or by a request from the Governor, a corporation, or the signed petition of one hundred or more persons,[107] the SERC requirement is triggered by a substantially affected person submitting to the agency "a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented."[108] The proposal may "include the alternative of not adopting any rule, so long as the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule."[109]

Upon receipt of such a proposal, an agency is required to prepare a SERC.[110] The SERC is not a "supermandate" for Florida agencies, but rather a requirement that a cost-effectiveness determination be made by an agency in response to a proposed alternative.[111] SERCs are required to include: (1) a good faith estimate of the number of

104. *See* FLA. STAT. § 120.541(1)(a) (Supp. 1996).
105. *See id.* § 120.541(1)(b).
106. *Id.* § 120.541(1)(c).
107. *See id.* § 120.54(2)(b) (1995) (amended 1996).
108. *Id.* § 120.541(1)(a) (Supp. 1996).
109. *Id.*
110. *See id.* § 120.541(1)(b).
111. Agencies are "encouraged" to prepare a SERC for all proposed rules. *See id.* § 120.54(3)(b)(1). Yet, they are only required to prepare a SERC where a challenger has submitted a good faith written proposal for a lower cost regulatory alternative. *See id.* § 120.541(1)(b). The 1996 Florida APA revisions carry over, with minor amendments, a previous requirement that agencies consider the impacts of a proposed rule on small businesses, small counties, and small cities and tier rules to reduce disproportionate impacts on those entities. *See id.* § 120.54(2)(a) (1995) (current version at FLA. STAT. § 120.54(3)(b)(2) (Supp. 1996)).

individuals and entities likely to be required to comply with the rule; (2) a good faith estimate of the cost to the agency and other state and local governmental entities of implementing and enforcing the proposed rule and any anticipated effect on state or local revenues; (3) a good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the rule; (4) an analysis of the impact on small businesses, small counties, and small cities; and (5) any additional information that the agency determines may be useful in informing the public of the costs or benefits of complying with the proposed rule.[112] Upon receipt of a proposal for a less costly alternative to the proposed regulation, an agency is required to "either adopt the [proposed] alternative or give a statement of the reasons for rejecting the alternative in favor of the [agency's] proposed rule."[113] The burden of presenting reasons appears to fall on the agency, not on the party proposing an alternative to the rule.

Additionally, the SERC is potentially subject to a more rigorous review by DOAH and the courts than the EIS. Failure to prepare or revise a SERC as provided by the APA is "a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter,"[114] not—as with the EIS—harmless error.

The review requirement, however, does not end there. In addition, the 1996 revisions change the definition of "invalid exercise of delegated legislative authority"—the standard by which most rules are challenged before DOAH and on appeal—to contain a cost assessment requirement.[115] Agencies in Florida have historically been subject to review under standards such as "arbitrary and capricious."[116] However, following the 1996 APA revisions, Florida agencies also may be subject to reversal where a "rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives."[117] This same standard is incorporated into the general requirements for rulemaking,[118] although the revisions clarify that this type of challenge is only available if made in an administrative proceeding within one year of the effective date of the rule.[119]

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112. *See id.* § 120.541(2) (Supp. 1996).
113. *Id.* § 120.541(1)(b).
114. *Id.*
115. *See id.* § 120.52(8)(g). "An invalid exercise of delegated legislative authority" is listed as a grounds for reversal in the APA judicial review provision, *see id.* § 120.68(9), as well as the provisions allowing for rule challenges before administrative law judges, *see id.* § 120.56(1)(a).
116. *Cf. id.* § 120.52(8)(e).
117. *Id.* § 120.52(8)(g).
118. *See id.* § 120.54(1)(d).
119. *See id.* § 120.541(c).

Whether this new cost assessment standard will be applied procedurally—requiring an agency to collect and consider certain types of data—or substantively—inviting DOAH and the courts to reverse because they disagree with an agency that a rule is cost-justified—remains to be seen. A procedural interpretation of the SERC requirement has some obvious advantages for quality agency policymaking. Under this interpretation, if an agency has considered various proposals pursuant to the SERC criteria articulated in the APA, deference to an agency determination that a rule is cost-justified is warranted. Such deference would avoid the problem of an activist evaluation of agency policy judgments by nonpolitical decisionmakers, such as the courts. Deference to agency judgment that a rule is cost-justified would seem appropriate given that the Legislature has not allocated significant additional resources to agencies for them to complete rigorous cost assessment in all cases. However, given language in the 1996 APA revisions suggesting that agencies are required to adopt[120]—not merely consider—the least costly alternative and amend the standards for reviewing rules to contain the least costly alternative,[121] the Legislature likely did not intend deference to the substance of agency cost assessment.

Another issue raised by the new cost assessment provision in the 1996 revisions is the commensurability of costs. The SERC considerations expressed in the 1996 revisions do not allow agencies the opportunity to assert even quantifiable benefits as a way of offsetting the anticipated costs of proposed regulations. However, the new standard does leave agencies an opportunity to argue that lower cost proposals submitted by challengers are incommensurate with the costs of agency proposed rules because they do not yield similar benefits. Because the Legislature did not expressly address the benefits of proposed regulation—quantifiable or unquantifiable—in the 1996 APA revisions, an agency might attempt to evaluate the various costs of different regulatory proposals holding benefits constant.

If application of the regulation would create no benefits, then the alternative of no regulation is certainly a feasible candidate for cost comparison, assuming this is consistent with statutory objectives. On the other hand, if application of a regulation creates large social benefits while the alternative of no regulation creates little or no social benefit, cost comparison makes no sense at all. In such cases, an

120. "In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and, to the extent allowed by law, choose the alternative that imposes the lowest net cost to society." *Id.* § 120.54(1)(d); *see also id.* § 120.541 (allowing for least-cost challenge of rules to be used as a ground for declaring a rule invalid).

121. Upon review, a rule can be reversed when it "imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives." *Id.* § 120.52(8)(g).

agency might reject a challenger's proposal without preparing a SERC at all, although upon review the agency may be required to meet the "least cost" requirement again and preparation of a SERC would only help in convincing an administrative law judge or a court that the challenged rule was cost-justified. Support for this interpretation of the 1996 Florida APA revisions can be found in the language of the statute that requires proposals for a lower cost regulatory alternative to "substantially accomplish[ ] the objectives of the law being implemented."[122] Presumably, an agency's determination of statutory purposes will be entitled to deference, as it historically has been.[123]

Florida's new cost assessment requirement replaces the present EIS, modifying the cost assessment process to the significant disadvantage of agencies. Studies of cost/benefit analysis in federal agencies suggest that such analysis has little effect on agency decisions; an agency's a priori policy choices tend to drive the content of cost/benefit analysis, not the other way around.[124] However, such analysis can have a drastic effect on the agenda of agencies, especially where, as in Florida, the analysis becomes a ground for challenging agency rules.[125] The 1996 revisions make it easier for regulated parties to trigger the cost assessment requirement—indeed, by merely asserting a "no regulation" alternative—while creating a burden of showing least-cost alternatives for the agency. The institutions likely to evaluate the merits of such analysis include DOAH, which may convene a hearing on cost analysis, or the courts, which are hardly competent to dive into least-cost analysis.

C. *The 1996 Revisions Shift to the Agency the Burden of Showing a Rule's Rationality in Proposed Rule Challenge Proceedings*

Florida, like many states, provides a mechanism for challenging rules before a central hearing panel (DOAH) prior to appeal to a court. Under longstanding case law that preceded the 1996 revisions,

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122. *Id.* § 120.541(1)(a).

123. *See, e.g.*, Department of HRS v. Framat Realty, 407 So. 2d 238, 242 (Fla. 1st DCA 1981) ("[T]he judiciary must not, and we shall not, overly restrict the range of an agency's [statutory] interpretive powers.").

124. *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).

125. Florida appears to be returning to the approach of *Department of Environmental Protection v. Leon County*, 344 So. 2d 297, 299 (Fla. 1st DCA 1977) (holding that agency failure to prepare a correct EIS constitutes an invalid delegation of legislative authority), which the Florida Supreme Court disapproved in *Florida-Texas Freight, Inc. v. Hawkins*, 379 So. 2d 944, 946 (Fla. 1979). The earlier approach to challenging an EIS on substantive grounds had been criticized as "an unfair sport akin to shooting fish in a barrel." Patricia A. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U. L. REV. 703, 705 (1991).

proposed and existing rules were entitled to a presumption of validity; the burden was on the person who attacked an existing or proposed rule to prove by a preponderance of the evidence that the rule was arbitrary and capricious or otherwise ran afoul of Florida's APA.[126]

The 1996 revisions 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 DOAH, "the proposed rule is not presumed to be valid or invalid."[127] However, the agency will now bear the burden of proving a rule's rationality. The 1996 revisions require agencies to prove in proposed rule challenge proceedings that the proposed rule is not an invalid exercise of delegated authority in response to each of the objections raised by the challenger.[128]

The 1996 revisions 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.[129] The presumption of validity continues to apply for existing rules in Florida under the 1996 APA revisions, but the agency bears the burden of proving applicable procedures were followed, and failure to follow applicable procedure is presumed material error.[130]

In addition to a heightened burden on the agency, the 1996 revisions provide for attorney's fees in proposed and existing rule challenge proceedings.[131] This section, designed to increase access to rule challenge proceedings, is likely to increase the number of rule challenges and the perceived risk of rulemaking to the agencies, who will now pay some of the costs of attorney's fees previously borne by regulated parties.[132]

The replacement of a presumption of validity with a burden of proof for agencies in proposed rule challenge proceedings is unlikely to lead to either better quality or more democratic agency regulation.

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126. *See* Department of Labor and Employ. Sec., Div. of Workers' Comp. v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994) (holding validity of regulations will be sustained as long as "they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious"); *Framat Realty*, 407 So. 2d at 241 (noting that an agency's interpretation of statutes was entitled to presumption of validity); Agrico Chem. Co. v. Department of Envtl. Reg., 365 So. 2d 759, 762 (Fla. 1st DCA 1978) ("Rulemaking by an agency is quasi-legislative action and must be considered with deference to that function.").

127. FLA. STAT. § 120.56(2)(c) (Supp. 1996).

128. *See id.* § 120.56(2)(a).

129. *See id.*

130. *See id.* § 120.56(1). This presumption, which is rebuttable, contrasts with failure to follow applicable procedures in preparation of the SERC, which, in the APA's language, is a conclusive material error. *See id.* at § 120.541(1)(b).

131. *See id.* § 120.595(2).

132. *See generally* Elizabeth C. Williamson, Comment, *The 1996 Florida Administrative Procedure Act's Attorney's Fees Reforms: Creating Innovative Solutions or New Problems?*, 24 FLA. ST. U. L. REV. 439 (1997).

The previous approach, which placed the burden on the challenger, allowed agencies to invest staff resources in regulatory programs with some degree of certainty, encouraging agencies to experiment with untried—even controversial—policy approaches. The 1996 revisions encourage DOAH and the courts, at the request of special interests, to second-guess agency policy choices.

V. CONCLUSION

At best, the counterrevolution against rulemaking can declare partial victory in the 1996 Florida APA revisions. The real winners appear to be those who wish to stop agency action, even where it would improve social welfare, or those who seek special treatment, even where there are social costs.[133] Flexibility advocates may have lost the reform battle; to the extent that Florida's new waiver provision takes away, rather than increases, agency discretion, it is not a flexibility provision at all. Accountability advocates may have also lost the reform battle to those who wish to have nonpolitical institutions second-guess agency decisionmaking. By contrast, opponents of agency discretion can celebrate; agency regulation is likely to become much more difficult and, where still prevalent, less relevant.

Many provisions in the 1996 reforms will make rulemaking more difficult for agencies, and thus seem to be at odds with the 1991 presumptive rulemaking amendment. The many new requirements and additional burdens on agencies may result in ossification, to the extent Florida agencies are legally able to avoid rulemaking. With fewer new regulations, proponents of regulatory reform may declare victory. For some, less regulation will be perceived as better government. But the need for regulatory programs—whether to protect the environment, workers, or consumers—will not go away. The effects of the counterrevolution in Florida may be an increased tendency by agencies to utilize nonrulemaking mechanisms for making policy. Agencies will not abandon their regulatory agendas, but they will abandon rulemaking to the extent that Florida law allows.[134]

Moreover, where Florida agencies do continue to engage in rulemaking, the 1996 revisions are certain to make the process dysfunctional. Rulemaking is designed to encourage political decisionmaking outside of the legislative process; its success depends on a *political*

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133. *See* Sunstein, *supra* note 33, at 251 (observing tension in federal reform efforts between technocratic forces and those who wish to stop social welfare-enhancing agency action).

134. Following the adoption of a major APA reform bill in the state of Washington, which, like Florida's 1996 APA revisions, included additional burdens regarding rulemaking authority, cost assessments and judicial review, as well as attorney's fees, initial evidence suggests that the volume of rulemaking is sharply down. *See* William R. Andersen, *Of Babies and Bathwater—Washington's Experiment with Regulation Reform*, ADMIN. & REG. L. NEWS, Fall 1996, at 15.

process before agencies and other institutions accountable to the political process. Consider the Contract With America Advancement Act of 1996,[135] which delays the effective date of major rules for sixty days or more and shifts the decisionmaking process to Congress, which may then pass a joint resolution declaring that it "disapproves the rule . . . and such rule shall have no force or effect."[136] Although this joint resolution veto process raises its own set of problems by encouraging lobbying, increased usage of interim rules, and more delay,[137] it keeps the rulemaking process before a politically accountable body.

Some of the reforms adopted by Florida in the 1996 APA revisions encourage continued usage of the rulemaking process as a political forum for exchanging information and ideas and addressing policy issues, and retain supervision of this forum by politically accountable decisionmakers. For example, one improvement in the 1996 Florida APA revisions over prior law is an expansion of the potential dates for filing challenges to proposed rules. In addition to the previous time limit for challenging proposed rules of twenty-one days after notice of a rule is filed,[138] the 1996 revisions also allow a proposed rule to be challenged within ten days of the final hearing on a proposed rule, within twenty days following preparation of a SERC, or within twenty days following publication of a notice of a change in a proposed rule, as is required by section 120.54 of Florida's APA.[139] As the Florida House of Representatives' Committee on Streamlining Government Regulations observed:

> Many times, persons affected by a proposed rule will file a challenge to the rule, even though they believe the issues will be resolved, in order to preserve their right to challenge. This practice is costly both to the state and the private party. By allowing extra time to challenge a proposed rule, a party will be able to determine the content of the proposed rule and avoid a challenge if the issues have been resolved with the agency.[140]

This modification to Florida's APA will discourage needless challenges of rules before DOAH, but it does not require challenging

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135. Pub. L. No. 104-121, 110 Stat. 847 (1996) (codified in scattered sections of 5 U.S.C.).

136. 5 U.S.C.A. § 802(a) (West 1996). Following a legislative invalidation, an agency is prohibited from promulgating a rule in "substantially the same form." *Id.* § 801(b)(2). In requiring a joint resolution of both houses and preserving the President's veto power, the measure is designed to avoid the separation-of-powers problem with the one-house veto at issue in *INS v. Chadha*, 462 U.S. 919 (1983).

137. *See* Pantelis Michalopoulos, *Holding Back Time to Hold Back Rules*, LEGAL TIMES, May 13, 1996, at 25.

138. *See* FLA. STAT. § 120.54(4) (1995) (amended 1996).

139. *See id.* § 120.56(2)(a) (Supp. 1996).

140. Fla. H.R. Comm. on Streamlining Govtl. Regs., CS for SBs 2290, 2288 (1996) Staff Analysis 32 (June 14, 1996) (on file with comm.).

parties to wait for the rulemaking hearing process to run its course before raising a legal challenge to a rule.[141]

While this reform is desirable, many revisions in Florida's 1996 APA reforms may go too far towards encouraging parties to assert substantive grounds for challenging proposed rules before DOAH or the courts—nonpolitical entities—thus prematurely treating rulemaking as a legal, not a political process.

Such reforms, much like recent federal reform proposals,[142] elevate "adversarial legalism"[143] over effective governance. The effort to legalize rulemaking in the 1996 revisions is certain to encourage more opportunistic behavior by interest groups than the traditional process. As a recent article in the *Florida Bar Journal* announces, "practitioners will find themselves with an arsenal of new or strengthened remedies to challenge the actions of state agencies."[144] The 1996 Florida APA revisions, with their many legalistic pre-appeal remedies for agency rules, depart from the political approach to rulemaking, and are thus likely to make rulemaking a less effective tool for agency governance.[145]

At least for agencies, however, there is some reason for optimism about regulatory reform in Florida in the future. The 1996 reforms continue Florida's recent obsession with the erosion of agency discretion, which is no doubt a reaction to the perceived public distrust of agencies chronicled by many.[146] Taking away discretion is consistent with the 1991 presumptive rulemaking amendment that removed most agency discretion to choose the methodology for making policy. Unfortunately, this was not the end of Florida's journey down

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141. Notably, because of this adverse incentive for filing rule challenges prematurely, the rulemaking process in Florida may never have worked as intended. If the process never worked as intended, many of the pre-notice participation innovations included in the 1996 APA revisions, such as mandatory workshops and negotiated rulemaking, *see* FLA. STAT. § 120.54(2) (Supp. 1996), may be wholly unnecessary. Some praise the greater degree of participation such innovations afford. *See generally* Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform*, 48 FLA. L. REV. (forthcoming 1996). However, negotiated rulemaking at the federal level has met some criticism and, especially given improvements to Florida's post-notice rulemaking process, there is little reason to believe that it will work any better at the state level. *See, e.g.*, Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotation*, 43 DUKE L.J. 1206, 1210-12, 1219-20 (1994).

142. *See* Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 420 (1996) (criticizing Senator Dole's proposals in S. 343).

143. *Cf.* Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991) (criticizing efforts to turn administrative process into legal wrangling).

144. Donna E. Blanton & Robert M. Rhodes, *Florida's Revised Administrative Procedure Act*, 70 FLA. B.J. 30, 30 (July/Aug. 1996).

145. For a recent effort defending the legalistic model of agency decisionmaking, see Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423.

146. *See, e.g.*, HOWARD, *supra* note 27.

this road. The new waiver provision, the limitations on rulemaking authority, the new cost assessment provision, and the erosion of the presumption of validity for proposed rules make Florida's 1996 reforms a major attempt to curtail agency discretion.

How long legislative reforms to administrative process will continue to travel down this anti-delegation road is unclear. The recent curtailment of agency discretion, though, is likely to create new pressures for increased legislative delegation of discretion in the future. To the extent that agencies have lost the ability to act autonomously and are mere automatons of the Legislature, so too has the Legislature lost the ability to reap many of the benefits of delegation. The Legislature will no longer be able to take the credit where agency programs are successful and pass the blame where agency programs fail. If agencies have little or no discretion, the failure of regulation will be seen as a failure of the Legislature, not agencies. Thus, although Florida may have traveled too far down the road of curtailing agency discretion in its 1996 APA reforms, there is some reason for agency decisionmakers to be optimistic. It will only be a matter of time before regulatory reform again shifts its focus to restoring discretion to agencies.

Whether in practice Florida's 1996 APA revisions result in ossification, dysfunctional rulemaking, and more attempts to delegate discretion to agencies in the future remains to be seen. But one thing is certain: APA reform will again return to Florida.