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National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act*

*Dave Frohnmayer***

I. INTRODUCTION

The new Utah Administrative Procedures Act ("UAPA")¹ sets forth important statutory directives governing state agency actions. One of the UAPA's principal drafters asserts that the judicial review provisions may be the act's "most important contribution to the certainty of the law in Utah"²

The agency adjudication and judicial review provisions of the Utah act were developed in large part from the 1981 Model State Administrative Procedure Act ("MSAPA")³. Some features of the UAPA, however, depart from the provisions of the MSAPA.⁴ This can be explained by current trends in Utah administrative practice. Yet larger national controversies and trends in administrative law influenced development of the MSAPA from which the Utah act proceeds generally. Those trends have developed in a national context marked by continuing interest in "regulatory reform"⁵ and amidst criticisms of administrative "malaise." Thus, the forthcoming Utah experience is ripe with potential national significance. Will the act fulfill its promise in bring-

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1. UTAH CODE ANN. §§ 63-46a-1 to 63-46b-22 (Supp. 1988).

2. A. SULLIVAN, OVERVIEW OF THE UTAH ADMINISTRATIVE PROCEDURES ACT 5 (Code Co. 1987).

3. MODEL STATE ADMIN. PROCEDURE ACT (1981), 14 U.L.A. 71 (Supp. 1988) [hereinafter MSAPA (1981)].

4. 14 U.L.A. 70 (Supp. 1981). The UAPA rulemaking provisions were separately considered and enacted. They depart in major respects from the MSAPA. See *infra* text accompanying notes 51-52.

5. See generally Davis, *Deregulation and Administrative Law*, 40 ADMIN. L. REV. 67 (1988); Frohnmayer, *Regulatory Reform: A Slogan in Search of Substance*, 66 A.B.A. J. 871 (1980); *Special Project on State Regulatory Reform*, 1985 ARIZ. ST. L.J. 249.

ing clarity and certainty to a body of developed state administrative law? Or will it instead become another relic of failed administrative law experimentation, destined only for some dusty museum of legal antiquities?⁶

The enactment of a new Utah law, the continuing scholarly debate over the proper functions and scope of judicial review,⁷ and the renewal of judicial attention to administrative law in many state jurisdictions⁸ all coincide to make state administrative law developments a timely topic to revisit. This article examines a number of recent trends in state administrative law. While examining these trends the article canvases and analyzes some principal judicial review provisions of the MSAPA and UAPA. Finally, the article concludes by suggesting briefly the potential for further generations of state administrative law reform which build on the Utah experience.

II. TRENDS IN STATE ADMINISTRATIVE LAW

The extensive development of state administrative law in a typical American jurisdiction has been chronicled elsewhere.⁹ Building upon these studies, it is now possible to identify a number of emergent trends in state administrative practice. These trends underscore the often undervalued importance of state law¹⁰ as a critical area for study and innovation.¹¹

6. "[T]o be blunt, the history of American administrative law is a history of failed ideas." J. Mashaw, *BUREAUCRATIC JUSTICE* 1 (1983).

7. See generally Levin, *Scope of Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986).

8. See, e.g., A. BONFIELD, *STATE ADMINISTRATIVE RULEMAKING* (1986); Bonfield, *State Law In the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95 (1982).

9. See generally Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform*, 58 OR. L. REV. 411 (1980). Parochialism or convenience aside, Oregon serves as a useful example of a typical American state jurisdiction. The state APA, OR. REV. STAT. § 183.310 (1987), both follows and expands upon earlier model acts. The bar is informed and guided by sophisticated practitioners and legal scholars. See, e.g., OREGON STATE BAR, *STATE ADMINISTRATIVE LAW* (A. Johnson ed. 1986). The appellate courts are well grounded in administrative practice and have contributed opinions of national note. See, e.g., *Megdal v. Oregon Bd. of Dental Examiners*, 288 Or. 293, 605 P.2d 273 (1980); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n.*, 16 Or. App. 63, 517 P.2d 289 (1973). Finally, there is a wealth of commentary and analysis in readily accessible form. See, e.g., *ATTORNEY GENERAL'S MODEL RULES OF ADMINISTRATIVE PROCEDURE AND MANUAL* (1985); *ATTORNEY GENERAL'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, PAPERS* (1985, 1987).

10. See generally BONFIELD, *supra* note 8.

11. Federal law occasionally exhibits substantial judicial innovation which is often halted by the United States Supreme Court. Yet except for minor provisions relating to ex parte contacts, the Federal Administrative Procedure Act has remained essentially unchanged since 1946. The experience in the states with new innovations has been vastly more active.

Legal trends are not always examples of judicial creativity. Court decisions may exemplify trends without assuming responsibility for their genesis. In public law, courts follow legislatures and administrative agencies as much as they lead them; and the interaction among the three branches of government has posed questions which will require answers in the equations of new models of judicial analysis. This article, as a consequence, will focus not merely on standards by which courts review administrative action, but will also examine trends generated by legislation or by litigation outcomes in state administrative law as well. In short, the focus is on *what* is reviewed as well as *how* it is reviewed.

A. Trend 1: State Jurisdictions Have Enacted And Have Increasingly Applied Formal Laws Governing Administrative Procedure

Lawyers often give too much attention to case law and consequently, only passing attention to statutes. This failing accounts for the resistance which many statutory reforms of administrative procedure have repeatedly faced, even in the recent past.

Recently, state common law concerning administrative process has yielded to statutory enactments and the methodologies of statutory analysis. Citizens who deal with their governments now must utilize the concepts and procedures of state administrative statutes. A significant majority of states presently subscribe to some variant of the 1961 Revised Model State Administrative Procedure Act ("RMSAPA") and its progeny.¹² More importantly, state appellate courts increasingly apply the literal terms of these enactments to govern and change state agency behavior,¹³ as well as to heighten the awareness of that jurisdiction's practicing bar.

Sensitivity to administrative law formalities translates immediately into a series of essential, yet elementary admonitions to the legal practitioner. Accusations of administrative law malpractice, accompanied by the twin perils of insurance premium increases and blemishes on professional reputation, can be easily avoided. Attorneys who challenge the

12. REVISED MODEL STATE ADMIN. PROCEDURE ACT (1961), 14 U.L.A. 157 (Supp. 1988) [Hereinafter RMSAPA]. The 1988 Supplement to the UNIFORM LAWS ANNOTATED lists thirty jurisdictions in which portions of the jurisdictions' administrative procedure acts can be traced to earlier model acts. REVISED MODEL STATE ADMIN. PROCEDURE ACT (1961), 14 U.L.A. 157 (Supp. 1988) [hereinafter RMSAPA (1961)].

13. State agencies are often the slowest to grasp that procedural statutes are meant to modify official behavior, not just to act as a reservoir of remedies for citizens once the agency has ignored the law. See, e.g., *De St. Germain v. Employment Div.*, 74 Or. App. 484, 703 P.2d 986 (1985) ("[A] judicial version of the primal scream" at agency misbehavior).

actions of public bodies on behalf of their clients should address the following considerations:

1. Does the government act in question proceed from an affirmative grant of constitutional or statutorily delegated authority? Simply put, does the state constitution, a state statute, a validly promulgated administrative rule, a local government charter or a local ordinance even permit the questioned action to occur?

2. Were all required procedural steps by state or local administrative procedure acts or ordinances faithfully observed? If not, what specific recourse is available to challenge such law violations?

3. Does the state or local law require the governmental entity in question to justify its decision, in writing, and with specific reasons?

4. Is the judgment or decision of the governmental entity in question subject to review in some other political, quasi-judicial or judicial forum? If so, what legal standards and what factual evidence, if any, are relevant to, or govern that review?

5. Is there an available avenue through which it may be cheaper, faster or more appropriate to change the law rather than to challenge it?

These obvious inquiries are the daily grist for the mill of an administrative lawyer. The correct answers usually flow from precisely considered statutory sources. Yet citizens and legal counsel unaccustomed to the practice of public law at the state and local level have, until recently, ignored these avenues at their peril, and to the impoverishment of public law.

B. Trend 2: Judicial Enforcement of Procedural Formalities Increasingly Exceeds Minimum Compliance, and in Some Cases Even Extends Beyond the Literal Provisions of Governing Statutes

1. Agency rulemaking generally

a. Federal developments: A backdrop and contrast. Observers of federal administrative law developments have remarked upon the embellishment of statutory formalism developed by certain federal circuits.¹⁴ Yet in two noted cases, the United States Supreme Court has rebuffed efforts by the federal courts to impose administrative proce-

14. See, e.g., *Rodway v. Department of Agric.*, 514 F.2d 809 (D.C. Cir. 1975) (agency record required even in informal rulemaking); Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 ADMIN. L. REV. 59 (1977).

dures more onerous for the agency than those of the Federal Administrative Procedure Act (APA).

In *United States v. Florida East Coast Railway Co.*,¹⁵ the United States Supreme Court rejected the lower court's conclusion that the "hearing" requirement of section 1(14)(a) of the Interstate Commerce Act by itself triggered the formal rulemaking provisions of the federal APA. The Court's conclusion was in keeping with considerable scholarly criticism of trial-type rulemaking procedure,¹⁶ and with the Administrative Conference of the United States, which opposed trial type procedures with the thrust of one of its important recommendations.¹⁷

The message of *Florida East Coast Railway*, however, apparently was received with indifference. Consequently, the most telling blow to the expanding judicial creativity in devising agency procedure was not authoritatively struck until 1978. In *Vermont Yankee Nuclear Power Corp. v. NRDC*,¹⁸ the Supreme Court "authoritatively convicted" the "imperial judiciary [of] riding roughshod over the agencies . . ." ¹⁹ The Supreme Court seems to have read the federal APA to preclude judicial insistence on "hybrid" hearing requirements beyond those expressly and literally imposed by statute. At least some lower federal court judges have not accepted the verdict happily. For example, former Congressman, now Circuit Judge Abner Mikva, recently levelled a broadside blow of his own at the *Vermont Yankee* opinion, stating: "I cannot think of any other decision that has done more to bollix up administrative law in the past decade. The Court tried to clean up a whole area of regulatory doctrine, and it succeeded only in making the mess worse."²⁰

Of course, the United States Supreme Court cannot alone stem the tide of growing formalization of the federal agency rulemaking process. This is especially true since Congress itself often has prescribed additional standards for the rulemaking process going beyond the minimum "notice and comment" requirements of section 553 of the Federal APA. When Congress has spoken, no court is free to bless agency evasion of additional standards,²¹ even when those standards contribute to the loss of procedural uniformity in federal agency practice.²²

15. 410 U.S. 224 (1973).

16. See, e.g., Hamilton, *Procedures for Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972).

17. Recommendation No. 72-5, 1 C.F.R. § 305.72-5 (1975).

18. 435 U.S. 519 (1978).

19. Starr, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 369 (1987).

20. Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 122 (1986).

21. See, e.g., Federal Trade Commission Improvements Act of 1974, 15 U.S.C. § 57(a)(19) (statutorily provided right of cross-examination on disputed factual issues).

22. Variances between the Federal APA's minimum "notice and comment" requirements and

b. State law developments. State jurisprudence on agency rulemaking largely has by-passed both the heated rhetoric of federal courts and the analytical battles of scholars fought at the federal level over the "hard look" doctrine²³ (a detailed factual review of the agency action) and its variants. Yet there are signs that many of the conflicting currents of federal administrative law also find analogues in state administrative law developments.

Many of the theoretical values of the administrative process—speed, efficiency, superior expertise and flexibility—can be lost if the quasi-legislative process is fossilized by excessive overlays of required procedure. Yet those same values remain unfulfilled if, in the pursuit of efficiency and expertise, the agency is allowed lawlessly to ignore its legislatively imposed mandate. Some commentators obviously believe that detailed factual review of the agency action by courts is the only disciplinary mechanism that effectively will insure agency fidelity to law.²⁴

These tensions in the premises of modern administrative law are not easily resolved; in fact they reflect conflicts in fundamental values. As a matter of separation of powers principles, legislatures, courts and agencies often dispute their respective claims to government turf. But this debate is not simply an otherwise value-neutral discourse about how best to implement constitutional commands by allocating duties to government institutions. Citizens and interest groups have high stakes in ultimate political outcomes, not just in the choice of process for its own sake. Court decisions reflect ideological commitments as well as views of the appropriate formality of administrative and judicial processes. Finally, scholars and courts stake out positions on these legal issues based on often unarticulated values concerning the appropriate functions of administrative procedures generally.²⁵

specific statutory requirements are so significant that one court complained overtly that Congress made "a conscious effort never to use the same phraseology twice." *Associated Indus. of New York v. United States Dep't of Labor*, 487 F.2d 342, 345 n.2 (2d Cir. 1973).

23. The phrase is that of Judge Leventhal. See Leventhal, *Environmental Decisionmaking and the Role of the Court*, 122 U. PA. L. REV. 509 (1974). For further analysis, see Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J. L. & PUB. POL'Y 51 (1984); Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 177.

24. See, e.g., Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L. J. 38, 59-60 (1975).

25. See generally Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Frohnmayer, *supra* note 9, at 459-62.

2. State agency rulemaking

a. *Compliance with minimum procedural requirements.* State court decisions now insist almost uniformly that agencies comply with literal statutory requirements respecting the promulgation, amendment or repeal of agency rules. Agencies cannot evade observance of these formalities, for example, by ignoring the definition sections of the administrative procedure acts. If an agency policy declaration fits the definition of "rule," the action is judged by its functional effect, not by the agency's label.²⁶ No semantic manipulation describing the act as a "guideline,"²⁷ a "handbook,"²⁸ or an "internal management directive,"²⁹ properly suffices to evade rulemaking procedural requirements. Similarly, repeal of a rule usually constitutes rulemaking under state acts, and likewise, literal compliance with formalities is enforced.³⁰ Agencies also may be tempted to evade rulemaking formalities, whether due to impatience with bureaucratic delay or a more contemptible desire to evade occasions for available public comment by using emergency or temporary rulemaking procedures. However, both legislative changes³¹ and court decisions³² have rendered this avenue a less likely escape from required legal procedures.

b. *Formal rulemaking in the states.* The thrust of the MSAPA is to avoid excessive procedural formality. Yet its provisions may require delay, expense and interruption beyond the contemplation of its authors. Utah has chosen consciously to avoid several potential pitfalls of the 1981 MSAPA as well as those exemplified by federal developments. This section explores, briefly, the alternatives which are presented.

For the most part, state administrative procedure acts have not mimicked the formal rulemaking requirements of their federal APA counterpart.³³ Consequently, the trial-type model of rulemaking and related issues concerning "hybrid" procedures have not been markedly

26. *Williams v. Public Serv. Comm'n*, 720 P.2d 773 (Utah 1986). See generally *Lane v. Board of Review of the Indus. Comm'n*, 727 P.2d 206 (Utah 1986); see, e.g., *Cheshire Convalescent Center, Inc. v. Commission on Hosp. and Health Care*, 34 Conn. Supp. 255, 386 A.2d 264 (Conn. Super. Ct. 1977). The Utah Supreme Court has followed these trends.

27. See, e.g., *Lehman v. Board of Educ. of City School Dist. of New York*, 82 A.D.2d 832, 439 N.Y.S.2d 670 (N.Y. App. Div. 1981).

28. See, e.g., *Clark v. Public Welfare Div.*, 27 Or. App. 473, 556 P.2d 722 (1976); *Will v. Department of Health and Social Serv.*, 44 Wis. 2d 507, 171 N.W.2d 378 (1969).

29. See, e.g., *Grey Panthers v. Public Welfare Div.*, 28 Or. App. 841, 561 P.2d 674 (1977); *Schinzel v. Department of Corrections*, 124 Mich. App. 217, 333 N.W.2d 519 (1983).

30. See, e.g., *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 686 P.2d 934 (1984).

31. E.g., OR. REV. STAT. § 183.335(5)(a) (1971) (specific findings required).

32. *American Grain Prods. Processing Inst. v. Department of Pub. Health*, 392 Mass. 309, 467 N.E.2d 455 (1984).

33. 5 U.S.C. §§ 553(c), 556, 557 (1982).

evident in state administrative jurisprudence. Unlike the federal APA, state acts often include interpretive rules³⁴ within the ambit of rulemaking requirements. Broad federal exemptions, such as those for policies concerning public property, grants, loans and contracts³⁵ often are not carried into state laws.³⁶ The river of procedural requirements flows more broadly in the states, but it does not cut so deeply.

These observations briefly canvass the differences in the range of agency actions subject to APA coverage. Other state developments suggest that the formality evident at the federal level has some state analogues. The Minnesota Administrative Procedure Act, for example, imposes significant trial-type requirements on agency rulemaking.³⁷ The burdens are so onerous that a leading scholar has condemned them as unwieldy and counterproductive.³⁸ The Minnesota experience should not be replicated by other states.

3. *The agency "statement of need"*

Requirements short of a trial-type hearing might, over time, lead to the evolution of "hybrid" procedures in state jurisdictions. In Oregon, for example, the state APA requires the initial notice of rulemaking to be accompanied by a public articulation of the agency's specific legal authority, and by a "statement of need" for the rule, as well as a justification as to how the proposed rule meets the articulated need.³⁹ This public notice device, however, simply requires a description of the agency's means-ends reasoning. This statutory obligation is far less onerous than the process of limiting the content of rules to considerations formally introduced into an exclusive rulemaking hearing "record." The reasons are obvious. An expanded notice requirement is simply a matter of public information. It does not engage the expansive and time-consuming procedural machinery of formal hearings.

The Oregon approach may recommend itself to other jurisdictions. It does not provide for (and, in fact explicitly disclaims) any evidentiary record in rulemaking.⁴⁰ The required provision of the agency's ration-

34. Cf. Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the APA*, 23 ADMIN. L. REV. 101 (1971).

35. 5 U.S.C. § 553(a)(2) (1982).

36. *But see*, Caldwell v. Amoco Fabrics Co., 165 Ga. App. 674, 302 S.E.2d 596 (1983) (Georgia statute exempts policies relating to state or agency benefits).

37. MINN. STAT. §§ 15.04-.41 (1977).

38. *See generally* Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151 (1979).

39. OR. REV. STAT. §§ 183.335(2)(b)(B-C) (1971).

40. *Id.* at § 183.335(12).

ale for a proposed rule comes at the very initiation of the process. This procedural device maximizes the possibility for public notice, legislative review and political reaction to the proposal before the agency ever takes final rulemaking action.⁴¹

4. Required "reasons" in agency rulemaking: an analysis and critique

State courts have significantly reinforced the language of the Revised Model State Administrative Procedure Act of 1961. The 1961 Act requires an agency to issue a "concise statement of the principal reasons for and against [a rule's] adoption, incorporating therein its reasons for overruling the considerations urged against its adoption."⁴² Even absent a statute directing the articulation of reasons, in *Tri-State Generation and Transmission Association v. Environmental Quality Council*,⁴³ the Wyoming Supreme Court enforced a requirement that an agency must develop a statement justifying the agency's rulemaking decision, and held the agency to the contents of that statement to insure that judicial review of the process could be pursued meaningfully.

The Uniform Law Commissioner's Model State Administrative Procedure Act of 1981 modifies commonly understood agency rulemaking requirements.⁴⁴ In at least one respect, however, the MSAPA imposes ill-advised conditions. Section 3-110(b) of the Act specifically imposes a "reasons" requirement by providing that "[o]nly the reasons contained in the concise explanatory statement may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue."⁴⁵ The official comment to this section justifies this restriction by castigating the evils of post-hoc agency rationalizations for action.⁴⁶ It argues that later-ascribed reasons would be unfairly withheld from scrutiny in the open rulemaking process itself. Finally, the comment contends that administrative agencies should not be protected from failure to consider, prior to the time of decisionmaking, all relevant defensible reasons for a choice.⁴⁷

41. See generally Frohnmayer, *supra* note 9, 455-67.

42. RMSAPA (1961) § 3(a)(2), 14 U.L.A. 387 (1987).

43. 590 P.2d 1324 (Wyo. 1979).

44. See MSAPA (1981) § 3-110, comment, 14 U.L.A. 97-98 (Supp. 1988). The revision sensibly no longer requires the agency to engage in line-by-line rebuttal of policy positions not adopted by it. In a proceeding attracting any volume of responses, prolonging debate over the many roads not taken could readily generate wasteful diversions of time, tax dollars and scarce expertise.

45. MSAPA (1981) § 3-110(b), 14 U.L.A. 97 (Supp. 1988).

46. See *supra* note 44, at 97-98.

47. *Id.*

Notwithstanding the carefully considered reasoning of the Commissioners on Uniform Laws, adoption of subsection 3-110(b) could work substantial mischief. The benefits suggested by the Commissioners do not outweigh the likely adverse realities of implementation on practice.⁴⁸

First, it is not easy to see precisely how any articulated agency "reasons" can bear on the fundamental legal validity of a quasi-legislative rule. The grounds for invalidating agency action under the MSAPA are specified in section 5-116,⁴⁹ which deals with scope of judicial review. In the ordinary case, a rule should survive attack if the agency's action complies with rulemaking procedure, is within the agency's statutorily delegated discretion, and is otherwise constitutional. It is difficult to envision how the agency's articulated reasons for a discretionary policy choice routinely would bear on these exclusively legal questions. The legality of a rule ought to be determined by an objective standard, based upon a textual analysis of the rule's scope and substance.

The plea for an objective standard is grounded in an important reality. Uninvolved third parties and citizens-at-large routinely may have important reliance interests in the validity of agency action. Reliance interests often have accompanying monetary costs, and ought not to be upset by uncertainty regarding whether the agency has described fully all reasons for its otherwise validly chosen policy.

If the "reasons" requirement suggests that more substance of the agency's policy choice can be reviewed, it appears to impose, *sub silentio*, an implied requirement that the agency must produce some factual or policy predicates to justify its choice. Unfortunately, the dimensions of those shadowy requirements are hopelessly unclear. They do not fit easily into the quasi-legislative model of agency policy choice (it is axiomatic that legislators are never required to articulate the reasons for policy choices they enact into statutes). Further, those implied "reasons" requirements advance a disquietingly activist, rather than deferential, posture for the reviewing court—or at least they leave this temptation open to creative advocacy. Repeated litigation would undoubtedly be required to clarify the inevitably murky lines that separate "reasons" from the "facts," "arguments," or "assertions" which support them.

48. This argument goes against the grain of much administrative law theory, and, indeed, against criticism that the MSAPA itself does not go far enough. Rago, *Rulemaking Under the Model State Administrative Procedure Act: An Opportunity Missed*, 34 ADMIN. L. REV. 445 (1982). The critics themselves are taken to task in Rosenblum, *Book Review*, 39 ADMIN. L. REV. 525 (1987) (reviewing A. BONFIELD, STATE ADMINISTRATIVE RULE MAKING (1986)).

49. MSAPA (1981) § 5-116, 14 U.L.A. 151 (Supp. 1988).

Second, the full force of the “comprehensive rationality” model of decisionmaking is implicit in the “reasons” requirement. The rational-technical model here ignores the usual environment of state administrative decisionmaking. The typical state agency is not rich in staff depth. The two commodities in shortest supply in the typical state agency are likely to be political courage and executive time. The stock of each can be rapidly depleted by the burdens of this requirement. Therefore, to expect articulation in advance of all reasons justifying an action imposes a burden of time and delay not easily justified by the likely benefit of more complete articulation of every possible rationale of the agency’s policy.

Furthermore, the exercise of expert judgment—and that is often the essence of a discretionary rulemaking policy choice—is often a mixture of experience, values and refined intuition. Considerations leading to the act of policy judgment may not be as easily reducible to a set of “reasons” as the 1981 MSAPA model assumes.⁵⁰ These problems are compounded in circumstances typically encountered in state government. The agency decision genuinely may be collegial. Thousands of multi-member citizen boards and commissions in the fifty states routinely exercise rulemaking responsibilities. They may do so after hearing or reviewing hundreds of considerations from the affected public favoring or opposing a course of action. To expect the members of a body to reduce their reasoning, or to psychoanalyze that of their colleagues, into a conclusively binding set of reasons, ignores group psychology, risks extension of the decisionmaking process indefinitely, and maximizes the possibility that decisions will be based on the lowest common policy denominator.

Third, the “reasons” requirement devalues the quasi-legislative character of rulemaking generally. Unlike criminal law where courts require police to specify their exact reasons for a search, the prevailing rule is clearly otherwise for the outcomes of legislative action. In determining whether the legislature has acted within the scope of its plenary authority, courts do not look to the considerations legislators overtly advance; they accept those of which a rational person might plausibly conceive.⁵¹ No convincing reasons are given why the Model Act should depart so markedly from this fundamental characteristic of the legislative model.⁵²

50. See generally Levin, *supra* note 7 at 281-82.

51. United States v. Carolene Products, 304 U.S. 144 (1938); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 582 (1988).

52. Professor Bonfield has suggested to the author that the legislative analogy should not apply because the administrative process is not politically accountable to the same degree as the legislature. Three short responses should suffice: first, the agency rulemaking process itself only

Finally, consider the likely institutional consequences of the “reasons” requirement imposed by MSAPA section 3-110(b). It almost assuredly provides full employment opportunity for government lawyers. Apart from the expense and delay occasioned by the staff preparation and legal analysis, it is not clear that the quality of agency decision-making would be improved. It may simply be that predecision rationalizations compiled by agency lawyers, rather than *post hoc* rationalizations advanced by appellate counsel, will mask the processes of decision. This requirement, after all, simply infuses a new game of political anticipation. Agencies and their counsel will be tempted to advance the most all-encompassing (and hence potentially uninformative) “reasons.” They likely will state these reasons at the broadest level of generality lest they later be accused of overlooking specific considerations which those vague but global reasons might subsume. The agency thus has powerful incentives to give less information, albeit in general terms, in order to better protect its own later options. State legislatures should react with caution before adopting a provision which encourages such behavior.

5. *Rulemaking in Utah: agency discretion preserved*

The foregoing discussion will only be of academic interest in Utah given the present direction of legislative policy respecting agency rulemaking. Utah law imposes no requirement that rulemaking policy choices must be justified by a statement of reasons in any form. The Utah act even goes so far as to omit the language, almost universally adopted from the 1961 model act, which requires an agency to “consider fully all written and oral submissions respecting the proposed rule.”⁵³ This omission was deliberate⁵⁴ and was designed to help preclude judicial review of agency policy choice in the rulemaking process.

exists by virtue of direct delegation of authority to the agency from the politically accountable legislatures. Second, the MSAPA abounds with procedural devices that reinforce political control over the administrative process. Finally, the rulemaking result itself is subject to immediate legislative reversal, unlike the outcomes of agency adjudication which might claim immunity from change by virtue of due process considerations.

53. RMSAPA (1961) § 3(a)(2), 14 U.L.A. 387 (1980). It is an open question whether or how compliance with this provision might be judicially enforced. The author has found no reported case of any jurisdiction in which this requirement has been cited or discussed. Presumably an agency’s failure in good faith to consider public comments could be attacked under this directive in a jurisdiction which retained the “arbitrary and capricious” or “abuse of discretion” standard for judicial review of rulemaking. Yet there still remains the threshold question how the factual basis for the challenge might even be discovered or explored. See generally Frohnmayer, *supra* note 9, at 468.

54. Personal conversation with William S. Callaghan, Ph.D., Director, Utah State Division of Administrative Rules (Jan. 22, 1988).

A more definitive form of deference to agency judgment is hard to envision.

6. "Reasons" in rulemaking: a middle course

The RMSAPA and the Utah Act each occupy a polar extreme respecting the desirability of articulated agency reasons in the rulemaking process. Both formulations probably stem from differing underlying models of the administrative process. The Model Act embodies an overt "comprehensive rationality" approach, and the Utah Act is an almost classical exemplar of deference to agency expertise. A middle course is available which avoids the more obvious pitfalls of each extreme.

The middle course requires agency reasoning to be articulated at the outset of the rulemaking process so that informed comments and responses may be developed by the public; yet it avoids excessive entanglement in a substantive judicial process of rule review. The controls on agency discretion are thorough requirements of procedural openness and political oversight: modes of control best lending themselves to the underlying quasi-legislative character of agency rulemaking.⁵⁵

7. Agency regulatory analysis: pitfalls to avoid

One final topic in the area of developing state rulemaking procedures deserves cautionary mention. Several jurisdictions have experimented with requiring agencies to develop "small business impact" statements or other cost benefit studies as a precondition to agency rulemaking.⁵⁶ In an optional provision, the Commissioners on Uniform State Laws for the 1981 Model Act propose section 3-105⁵⁷ relating to required agency "regulatory analysis." The comment by the Commissioners on Uniform State Laws overtly notes that the preparation of such analysis is "burdensome," "hazardous" and potentially "subject to great abuse."⁵⁸

The cautionary language of the Commissioners is well taken. For the bureaucratic complexities of analysis, language and technical expertise which such requirements quickly can produce, the reader need only refer to federal agency paralysis engendered by this subject.⁵⁹ The jum-

55. These thoughts and the models of agency procedure to which they relate are more fully developed in Frohnmayer, *supra* note 9, at 455-68.

56. See, e.g., R.I. GEN. LAWS § 42-35 (1956); IDAHO CODE §§ 67-5201 to 67-5218 (1980); FLA. LAWS, § 120.54(2)(a) (1982).

57. 14 U.L.A. 92 (Supp. 1988).

58. *Id.*

59. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987). See generally A. BONFIELD, STATE ADMINISTRATIVE RULEMAKING 212-25 (1986); Schwartz,

ble of considerations confronting courts which seek to review agency cost-benefit analyses should deter even the most adventurous.

C. *Trend 3: Courts Increasingly Impose Minimal Rulemaking Requirements Beyond the Specification of Statutes*

At the federal level, settled law has permitted administrative agencies to choose, within their discretion, whether to develop agency policy by rulemaking or through case-by-case adjudication.⁶⁰ Despite critical commentary in scholarly journals,⁶¹ no obvious indication of a pending change in direction is apparent.

Developments in some state jurisdictions reflect a trend contrary to the federal approach. In *Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Commission*,⁶² the Oregon Court of Appeals required a liquor licensing agency to articulate rules in advance of licensing actions taken by the agency under a broad statutory mandate. The court reasoned that only under an articulated-rule approach could meaningful standards be devised to govern the decision of contested cases under the Oregon APA.

The *Sun Ray* decision has not been adopted expressly by the Oregon Supreme Court, perhaps in part because the Oregon Administrative Procedure Act cannot be read clearly to require pre-enforcement rulemaking.⁶³ However, the Oregon Supreme Court, and appellate courts of other jurisdictions⁶⁴ have reached similar conclusions.

In a trilogy of important cases—*Trebesch v. Employment Division*, *Springfield Education Association v. Springfield School District No. 19*, and *Megdal v. Oregon State Board of Dental Examiners*,⁶⁵ the Oregon Supreme Court has attempted to define the criteria gov-

The Court and Cost-Benefit Analysis: An Administrative Law Idea Whose Time Has Come — Or Gone?, 1981 SUP. CT. REV. 291.

60. SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947); NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974).

61. See, e.g., Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

62. 16 Or. App. 63, 517 P.2d 289 (1973). The opinion of Judge Tanzer still is one of the single best appellate court sources articulating the values of agency rulemaking.

63. OR. REV. STAT. § 183.355(5) (1971), expressly provides for the validity of general rules arising from the disposition of contested cases.

64. See, e.g., *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 478 A.2d 742 (1984); *Anderson v. State*, 135 Ariz. 578, 663 P.2d 570 (App. 1982). See generally Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J. PUB. L. 161 (1988).

65. *Trebesch v. Employment Div.*, 300 Or. 264, 710 P.2d 136 (1986); *Springfield Educ. Ass'n v. Springfield School Dist. No. 19*, 290 Or. 217, 621 P.2d 547 (1980); *Megdal v. Oregon State Bd. of Dental Examiners*, 288 Or. 293, 605 P.2d 273 (1980). This trilogy is discussed briefly in Frohnmayer, *Of Legislative Intent, the Perils of Legislative Abdication, and the Growth of Administrative and Judicial Power*, 22 WILLAMETTE L. J. 219, 234-35 (1986).

erning an agency's obligation to develop rules in advance of enforcement action (a "pre-enforcement rulemaking obligation"). The pre-enforcement rulemaking obligation in these decisions is treated as an adjunct, not of a requirement internal to the state APA, but as an aspect of the law of delegated authority and of statutory construction. In *Megdal*, the court held that the agency had an obligation to engage in pre-enforcement rulemaking with respect to the term "unprofessional conduct." The term was deemed by the court to be a shorthand delegation of power and as such required agency rules to refine specific standards before enforcement action could occur.⁶⁶ In *Springfield*, the Court articulated refinements of this analysis which attempted to parse types of statutory language into three categories. The characterization of the language of statutory delegation was then said to dictate the extent of the agency's rulemaking obligation.

However, while paying homage to the *Megdal/Springfield* analysis, the court six years later in *Trebesch* cast doubt on whether the agency's clarification of governing law must invariably be accomplished by advance rulemaking.⁶⁷ The purported reasoning of *Trebesch* lies in detailed analysis of the text and legislative history of each statutory scheme at issue.⁶⁸ Whether statutes always give birth to clear answers after such analysis is, of course, open to serious question.

The 1981 Model State Administrative Procedure Act provides more specific guidance than the still-evolving state case law. Sections 2-104(3) and 2-104(4) require an agency "as soon as feasible, and to the extent practicable," to adopt rules articulating standards governing the law it administers, and to adopt rules superseding principles declared in particular adjudications. While the language of the 1981 act is susceptible to dispute concerning the meaning of what is "feasible" or "practicable," the provisions are a potentially flexible and helpful uniform statutory clarification of evolving law at the state level.

D. Trend 4: Constitutional and Statutory Developments Have Expanded Dramatically Both the Nature and Substance of Controversies Requiring the Use of Formal Adjudication Procedures

In federal administrative law, the number of agency actions subject to formal adjudication procedure under the APA is severely limited.

66. For an excellent and thorough discussion of *Megdal* see generally Bonfield, *supra* note 64, at 184-92.

67. See *Trebesch v. Employment Div.*, 300 Or. 264, 267-70, 710 P.2d 136, 137-40 (1986).

68. See also *Ross v. Springfield School Dist. No. 19*, 300 Or. 507, 716 P.2d 724 (1986) (construction of term "immorality" can be achieved either through prior rulemaking or reasoned orders in contested cases).

Not only is formal adjudication procedure in the federal act subject to a number of exceptions,⁶⁹ the adjudication provisions themselves are triggered only if a separate statute requires an agency hearing "on the record."⁷⁰

1. *Broad state statutory entitlements to an agency hearing*

The case is to the contrary on the state level. Formal trial-type procedures required in "on the record" hearings are likely to be far more numerous in the states for several reasons. First, the conditions giving rise to formal hearings usually are specified in self-contained procedural statutes which are broader in scope than the federal APA. The 1961 Model Act, for example, defines a "contested case" more expansively than its federal counterpart defines an adjudication.⁷¹

Second, no statutory mandate limits formal adjudications to those where a statute provides for a hearing "on the record." State APA provisions typically require an agency hearing when the hearing requirement stems from state statute or from a constitutional provision.⁷² Third, some states require agency hearings in conditions extending well beyond those of the Revised 1961 Model Act.

The Oregon APA, for example, creates a "contested case" in instances where the agency has "discretion to suspend or revoke the right or privilege of a person."⁷³ This obviously expansionary language has given rise to surprisingly few legal claims as to what might be characterized inventively as a "right" or "privilege."⁷⁴ In *Morrison v. Oregon Health Sciences University*,⁷⁵ the dismissal of a student from the school of dentistry on the grounds of poor clinical performance was held to give rise to a "contested case" under this provision. The result is of interest because it goes well beyond any explicit command of the Due Process Clause of the Fourteenth Amendment.⁷⁶

A more subtle point relating to APA adjudicatory hearing require-

69. *See, e.g.*, 5 U.S.C. § 554(a)(1)-(6) (1982).

70. *Id.* § 554(a).

71. RMSAPA (1961) § 1(2), 14 U.L.A. 371 (1980).

72. *See, e.g.*, *District of Columbia v. Douglass*, 452 A.2d 329 (D.C. App. 1982); *Dremel v. State Nursing Home Review Bd.*, 119 Wis. 2d 75, 349 N.W.2d 725 (1984).

73. OR. REV. STAT. § 183.310(2)(a)(B) (1971).

74. The entitlement in question, for example, must be broader than one of constitutional dimension, since no government has discretion to "suspend or revoke" a constitutional guarantee.

75. 68 Or. App. 870, 685 P.2d 439 (1984). *See also* *Patton v. State Bd. of Higher Educ.*, 293 Or. 363, 647 P.2d 931 (1982).

76. *See, e.g.*, *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978). However, the Oregon Court of Appeals declined to require a contested case hearing where a faculty member was reassigned but with no loss of salary, rank or privilege. *Walker v. Oregon State Bd. of Higher Educ.*, 66 Or. App. 448, 674 P.2d 88 (1984).

ments deserves attention. In the confrontation between citizens and their governments, the very existence of APA procedures alters the balance of power and shifts the agency's assertive posture to a more defensive one. If a hearing is due to a person entitled to a contested case, the agency has the obligation to initiate the process. The agency must frame the issues and give appropriate notice. The burden of assessing the justification for agency action thus shifts from those adversely impacted by it to those in the agency who propose to undertake it initially.

2. The "due process revolution"

The "due process revolution"⁷⁷ is far more responsible for the increase in scope and volume of state agency contested cases than is any other specific statutory or judicial development. At the federal government and many local government levels, the procedural requirements imposed by the due process clause to protect a particular "interest" are variable according to the nature and weight of the controversy.⁷⁸ However, this appears not to be the case in many states. If the United States Constitution requires a hearing at all, the normal procedures governing conduct of contested cases in the state APA automatically apply in their entirety.⁷⁹ The uncertainties of a flexible due process calculus are avoided at the cost of requiring a high, and perhaps unduly expensive, degree of statutorily required procedural formality.

77. The "revolution" was, for these purposes, largely established by *Goldberg v. Kelly*, 397 U.S. 254 (1970). See generally *Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

78. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) with *Matthews v. Eldridge*, 424 U.S. 319 (1976) and *Gray Panthers v. Schweiker*, 716 F.2d 23 (D.C. Cir. 1983). See generally *Friendly*, *supra* note 77.

79. This result follows from a literal reading of the definition of "contested case" in § 1(2) of the RMSAPA; the definition is triggered when "the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." RMSAPA (1961) § 1(2), 14 U.L.A. 371 (1980) (emphasis added). The due process clause is "law," and the drafters of the RMSAPA omitted the reference to hearings required by "constitutional right" because the phrase simply was unnecessary. 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 120 (1965).

The experience of several states may not, however, be as clear-cut as the definition seems to command. There is continuing ambivalence in some jurisdictions as to whether state laws based on the 1961 Model Act in fact embody the guarantee of an APA adjudicative hearing where constitutional due process is implicated. Letter to the author from Professor Harold Levinson (January 26, 1988). See generally *Herman v. Division of Special Revenue*, 193 Conn. 379, 477 A.2d 119 (1984); *Donnelly Ass'n v. District of Columbia Review Bd.*, 520 A.2d 270 (D.C. App. 1987); *Bay Nat'l Bank & Trust Co. v. Dickinson*, 229 So.2d 302 (Fla. App. 1969). See generally *Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285 (1977). The 1974 Florida Administrative Procedure Act specifically rejected the conclusion of *Bay National Bank* that "quasi-executive" actions such as licensing were not "contested cases." Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 628 (1975).

The United States Supreme Court arguably broadened the reach of due process protections believing the burdens might be tempered by flexibility in prescribing procedures.⁸⁰ The tradeoff of flexibility is lost, however, if contested case procedures always must be observed in their entirety.⁸¹ The concern is not a trivial one, because trivial fact situations may still require expensive complex proceedings.⁸² This all-or-nothing approach to due process analysis clearly is the unintended consequence of tying a single adjudicatory procedure to any legally imposed hearing requirement.

The new MSAPA⁸³ and the UAPA⁸⁴ provide welcome, if as yet untested, innovations to help resolve the quandary of adjudicatory over-formalization. The Model Act provides a structured "formal adjudicative proceeding" (§ 4-201), a "conference adjudicative proceeding" (§ 4-401), an "emergency adjudicative proceeding" (§ 4-501) and the "summary adjudicative proceeding" (§ 4-502).⁸⁵ The latter three procedures are innovations which do much to adapt statutory decisionmaking models to the realities of a broad variety of occasions where less rigorous agency procedures nonetheless fully protect citizens' rights as they confront their governments.

The Utah act does not adopt all aspects of the less formal adjudicative procedures of the 1981 Model Act.⁸⁶ Nonetheless, it provides a welcome and less rigid alternative to be copied by jurisdictions which now utilize the single-tier approach to agency adjudication.

*E. Trend 5: The Power of a State Agency to Adjudicate
Constitutional Issues in Agency Litigation: Developments
Demonstrate Continuing Controversy*

While growing recognition of an administrative agency's responsibility to rule on constitutional issues does not yet deserve the label of a

80. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

81. Only a few states have provided in the past for less than a formally structured adjudicatory proceeding. Maine permits limitation of issues or alteration of procedural requirements upon agreement of the parties and the agency. Delaware, Florida, Montana and Virginia "describe at least the rudiments of less-than-formal adjudication." MSAPA (1981) § 4-102, comment, 14 U.L.A. 114-15 (Supp. 1988).

82. See, e.g., O'Neil, *Recalculating the Cost-Benefit Balance for Trial-Type Procedures*, 38 ADMIN. L. REV. 141 (1986) (replaced faculty string quintet member invokes due process right to contested case hearing).

83. MSAPA (1981) Art. IV, 14 U.L.A. 112 (Supp. 1988).

84. UTAH CODE ANN. § 63-46b-3 (Supp. 1988).

85. See generally Levinson, *An Introduction to the 1981 Model State Administrative Procedure Act, Part II: Adjudication, Judicial Review and Civil Enforcement*, 34 ADMIN. L. REV. 13, 14-21 (1982).

86. See *supra* note 84.

developed trend, this important issue recently has received further judicial articulation. In *Cooper v. Eugene School District No. 4-J*,⁸⁷ the Oregon Supreme Court held that a review agency not only was empowered, but had the affirmative duty to decide constitutional issues arising from the revocation of a teacher's certificate for wearing religious garb in the classroom in violation of a state statute.

Utah⁸⁸ and a number of other jurisdictions⁸⁹ deny an administrative agency the authority to rule upon constitutional questions. Utah appellate courts may wish to revisit this issue in light of the new Utah APA. The order of the presiding officer, under the new UAPA's judicial review provisions, almost axiomatically, is required to state "conclusions of law"⁹⁰ in a formal adjudicative proceeding. It is difficult at first blush to see how considerations of constitutional law could be omitted. Moreover, a reviewing court must grant relief if the agency "has not decided all of the issues requiring resolution,"⁹¹ or has "erroneously interpreted or applied the law."⁹² Most importantly, the reviewing court must grant relief when "the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied."⁹³ Each of these directives to the reviewing court might easily be read to imply that the agency has an implicit duty in the first instance to prevent the identified forms of agency error even from reaching the court. In light of the imperatives of this language, the reviewing court or the agency cannot acquiesce in the agency's failure to resolve a constitutional issue presented in the controversy at the agency level.

F. Trend 6: Judicial Insistence on Strict Compliance with the Statutory Requirement of "Findings" in Agency Adjudicatory Orders is Strict Construction and Much More

One of the most noticeable developments reflected in recent state administrative jurisprudence is appellate court enforcement of statutory requirements governing the content of agency orders. The almost universal requirement that adjudicatory orders must be accompanied by "findings of fact" has received particular attention. Not only must the

87. 301 Or. 358, 723 P.2d 298 (1986), *appeal dismissed*, 107 S. Ct. 1597 (1987).

88. *Shea v. State Tax Comm'n*, 101 Utah 209, 120 P.2d 274 (1941).

89. See generally Comment, *When Constitutional Issues Arise in Agency Adjudications: A Suggested Approach*, 65 OR. L. REV. 413 (1986).

90. UTAH CODE ANN. § 63-46b-10(1)(b) (Supp. 1988).

91. *Id.* at § 63-46b-16(4)(c).

92. *Id.* at § 63-46b-16(4)(d).

93. *Id.* at § 63-46b-16(4)(a).

agency go beyond the mere parroting of statutory language,⁹⁴ but courts also increasingly insist that the agency decision be accompanied by a "reasoned explanation" of its findings and decisions.⁹⁵ The requirement is obviously intended to assure a reasoned decision by the agency and to facilitate meaningful judicial review thereafter.⁹⁶ A mere summary of the evidence, even if comprehensive, will not suffice to meet the statutory requirement.⁹⁷ Beyond the literal "findings" requirements, some courts now require articulation in some depth of the reasoning processes through which the agency decisionmaker relates findings to the conclusions.⁹⁸

Ordinarily, it would come as no surprise that reviewing courts insist on agency compliance with a clearly articulated statutory requirement. Two considerations, however, make mention of this requirement necessary. First, given the volume of state administrative agency adjudications which occur each year, it would be astonishing if more than a small handful of state agencies even now comply fully in every particular with the findings requirement prescribed by most statutes—at least if explicit findings are required in the case of every remotely contested issue of fact. Second, the degree to which reviewing courts overtly have added additional considerations merits attention. Recent Oregon developments are instructive and may signify a further, more cautious judicial mid-course correction of tendencies to require exhaustive articulation of factual findings.

In *Cascade Forest Products v. Accident Prevention Division*,⁹⁹ the Oregon Court of Appeals held an agency contested case order insufficient because it did not list a concise statement of underlying facts supporting the agency's findings as to each "contested issue of fact" and as to each "ultimate fact." In addition, the Oregon Court of Appeals

94. *Texas Health Facilities Comm'n v. Presbyterian Hosp.*, 690 S.W.2d 564 (Tex. 1985).

95. See Schwartz, *Administrative Law Cases During 1979*, 32 ADMIN. L. REV. 411, 430 (1980); Schwartz, *Administrative Law Cases During 1984*, 37 ADMIN. L. REV. 133, 145-46 (1985). See also Voight v. Washington Island Ferry Line, Inc., 79 Wis. 2d 333, 255 N.W.2d 545 (1977).

96. Few decisions fully articulate why the reviewing court adopts either a stringent or a more deferential posture respecting the findings requirement. Some such requirement seems essential to make the already lenient "substantial evidence" standard even remotely meaningful at the agency level. Without articulated findings of some specificity, it might not be discoverable whether the agency has established the factual premises justifying its action.

97. See, e.g., *In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979); *Novell v. Portland Area LGBC*, 43 Or. App. 849, 604 P.2d 896 (1979).

98. See, e.g., *Home Plate, Inc. v. Oregon Liquor Control Comm'n*, 20 Or. App. 188, 530 P.2d 862 (1975) ("substantial reasons" requirement). The source of an obligation to explain conclusions at length is not readily apparent from the text of the typical APA. It may be questioned whether this judicial gloss on statutory law is either justified or appropriate.

99. 60 Or. App. 255, 260, 653 P.2d 574, 577 (1982).

recently has held that, where credibility determinations are important to the decision of a case, the presiding officer or referee must make an explicit finding as to the credibility of a claimant.¹⁰⁰ However, in *Dennis v. Employment Division*¹⁰¹ and *Hyde v. Employment Division*,¹⁰² the Oregon Supreme Court now has cast doubt on the continuing validity of these holdings. In these later companion cases, the court concluded that the agency decisionmakers need not explain every finding of fact based on conflicting evidence as long as the findings are supported by substantial evidence in the record viewed as a whole.

The holdings in *Dennis* and *Hyde* are best explained as a judicial accommodation between the statutory command of particularized findings, and the institutional imperatives of agencies required to decide volumes of cases in an effort to accomplish mass justice. This newly refined balance is welcome. At some point, the imperatives of timeliness, finality and economy in decisionmaking simply outweigh a theoretical desire to make every agency decision a model of exhaustively articulated administrative specificity. Increased specificity will not deter the administrator whose objective is to visit injustice on the innocent. On the other hand, the potential for delay, innocent mistake and procedural confusion can be increased substantially if exhaustive findings must be marshalled for every sub-step of the agency reasoning process.

Notwithstanding these judicial efforts to balance statutory dictates against institutional imperatives, the central requirement of articulated factual conclusions remains clear and eminently sound. The exclusivity of the record and the intelligibility of the ultimate agency decision are at the heart of the fairness of an administrative hearing.¹⁰³ Those considerations generated a potentially far-reaching precedent on another issue in an Oregon case just discussed. In *Dennis v. Employment Division*, both the court of appeals¹⁰⁴ and the Oregon Supreme Court¹⁰⁵ concluded that the agency hearings officer has an affirmative duty to develop the record for decision. The obligation applies even if the as-

100. See *Derochier v. Employment Div.*, 70 Or. App. 521, 690 P.2d 519 (1984); *Ashmore v. Employment Div.*, 70 Or. App. 516, 690 P.2d 522 (1984).

101. 302 Or. 160, 728 P.2d 12 (1986) (agency denial of unemployment benefits).

102. 302 Or. 171, 728 P.2d 19 (1986) (agency disqualification of claimant seeking unemployment benefits).

103. These considerations distinguish the role of the judicial "hard look" in adjudicatory hearings from the more deferential posture earlier advanced respecting judicial review of administrative rulemaking. The underlying constitutional basis of the distinction, which has its roots in considerations of personal liberty, was articulated as early as the famous couplet of *Londoner v. City and County of Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

104. 77 Or. App. 633, 713 P.2d 1079 (1986).

105. 302 Or. 160, 728 P.2d 12 (1986).

signment means assisting the claimant. The court concluded that such assistance does not convert the hearings officer into an advocate. This responsibility, rather, is an accompaniment of the duty to conduct a full and fair inquiry into matters relevant to the inquiry. This court-imposed requirement was in the process of statutory codification during the pendency of the litigation.¹⁰⁶ Therefore, the degree to which the Oregon Supreme Court would agree with the Court of Appeals that this extraordinarily activist consideration was grounded on purported Fourteenth Amendment considerations was effectively mooted.

G. *Trend 7: Continuing Confusion Exists over the Availability, Scope and Standards Governing Judicial Review*

This trend would deserve comprehensive analysis but for the pioneering work of several scholars. A decade ago, Professor Donald Brodie and Justice Hans Linde masterfully chronicled the confusion rampant in existing judicial decisions and statutory standards governing appellate review of state agency adjudications.¹⁰⁷ There is little new to add.

A cursory review of cases decided under variants of the 1961 MSAPA demonstrates that state courts continue to manipulate conclusory epithets such as "arbitrary and capricious," "clearly erroneous," "substantial evidence" and "abuse of discretion" to achieve a bewildering and often contradictory array of outcomes, without furthering the cause of judicial predictability in the process. Moreover, the standards themselves are often confused with, or even melded into each other.¹⁰⁸ Brodie and Linde cautioned against the use of such terms:

Existing statutory and judicial formulations for reviewing the exercise of discretion are among the most unsatisfactory in the area of judicial review of agency action. Words such as "arbitrary," "capri-

106. See OR. REV. STAT. § 183.415(10) (1983).

107. Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537 (1977). A useful project of similar ambition recently has sought to bring much needed clarity to federal law in this area. See generally Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986).

108. See, e.g., Chavez v. Comm'n, 98 N.M. 462, 649 P.2d 1375 (1982) ("substantial evidence" defined in terms of "legal residuum" rule); Billings v. Billings Firefighters, 200 Mont. 421, 651 P.2d 627 (1982) ("substantial evidence" equivalent to review under "clearly erroneous" standard); accord Gulick v. Board of Env'tl. Protection, 452 A.2d 1202 (Me. 1982); *In re Muzzy*, 141 Vt. 463, 449 A.2d 970 (1982) (difference between "substantial evidence" and broader "clearly erroneous" standards, though distinction "more semantic than substantive"); McClure v. Iowa Real Estate Comm'n, 356 N.W.2d 594 (1984) ("unreasonable, arbitrary and capricious" standard incorporates "abuse of discretion" standard); Adelman v. Bahou, 85 A.D.2d 862, 446 N.Y.S.2d 500 (App. Div. 1981) ("substantial evidence" and "arbitrary and capricious" tests apply "rationality" standard).

cious," or "abuse of discretion," state conclusions, not premises from which a conclusion may be derived. When a statute or a line of precedents instructs a reviewing court to set aside action found to be arbitrary, capricious, or an abuse of discretion, it merely provides the terms in which the conclusion of invalidity may be pronounced. These terms do nothing to articulate the process of analysis by which the issue of invalidity is to be litigated and decided. Indeed, the presence of these conclusory epithets in statutes or case law as grounds for reversal is deceptive insofar as they appear to sanction review and reversal of governmental action on the basis of the judge's reaction to the particular circumstances before him, without any need for premises more searching than the stigmatizing phrases themselves.¹⁰⁹

In light of this criticism, two concerns respecting the judicial review provisions of the new UAPA begin to emerge. The UAPA uses old model act language that is arguably surplusage, and dangerous surplusage at that. It also provides for a two-track system of judicial review that, unless monitored carefully, might magnify the dangers of the broad standards. Let us examine these concerns in turn.

1. *Linguistic surplusage*

The 1981 MSAPA includes an optional provision permitting a court to find an action "otherwise unreasonable, arbitrary or capricious" as a ground for invalidity of an agency action.¹¹⁰ The Utah act expressly adopted this language, omitting only the epithet "unreasonable."¹¹¹ The Utah act also departs in a minor but potentially important manner from the Model Act by allowing invalidation of an action which is an "abuse of discretion."¹¹²

It may be that settled judicial decisions construing "abuse of discretion" and the "arbitrary and capricious" standard under prior law give greater comfort to Utah courts and litigants than would be the case of new criteria woven from whole cloth. This conclusion probably is

109. Brodie & Linde, *supra* note 107, at 550.

110. MSAPA (1981) § 5-116(c)(8)(iv), 14 U.L.A. 151 (Supp. 1988).

111. UTAH CODE ANN. § 63-46b-16(4)(h)(iv) (Supp. 1988). Professor Harold Levinson suggested at the Western States Seminar on State and Local Administrative Law in Salt Lake City, in January 22, 1988, that the retention by Utah of the "arbitrary and capricious" standard may simply have been the product of drafters' oversight. Levinson, a co-author of the 1981 MSAPA, recounted that the standard was retained in the MSAPA primarily to apply to judicial review of rulemaking. Yet all MSAPA rulemaking provisions were omitted from the Utah Act. Since the judicial review provisions cover all aspects of administrative procedure, retention of the "arbitrary and capricious" standard may, in part, have been an innocent mistake.

112. UTAH CODE ANN. § 63-46b-16(4)(h)(i) (Supp. 1988). The Model Act uses the more limited, or at least arguably clearer language "outside the range of discretion delegated to the agency by any provision of law." MSAPA (1981) § 5-116(c)(8)(i), 14 U.L.A. 151 (Supp. 1988).

suspect for three reasons.

First, a list of exhaustive and specific standards governing judicial review immediately precedes this catch-all standard in the UAPA. It is difficult to envision a defect in agency action that is not otherwise effectively identified.¹¹³ Those standards serve to invalidate action that is unconstitutional, beyond agency jurisdiction, incomplete, legally erroneous, unlawful in its procedure, taken by an improper decisionmaker, made without adequate evidence, made contrary to rule, or decided contrary to past agency practice.¹¹⁴ The list of methods to attack potential administrative atrocities seems exhaustive on its face.

Second, but related, the mere inclusion of these additional labels suggests that they refer to some characteristic of agency action not subsumed by the other criteria, complete as those criteria seem. This perception will serve to elevate the power—though certainly not the predictability—of reviewing courts. The UAPA drafters may well have intended the UAPA as an ultimate broad judicial check on agency action; but, this authority may unintentionally confer upon the courts a free-floating censorial power which is as standardless as the UAPA otherwise prohibits the actions of agencies to be.

Finally, the phrases “abuse of discretion” and “arbitrary and capricious,” unless construed narrowly, are almost certain to contribute unnecessarily to judicial workload. Litigants who fail to find other statutory bases available may attempt increasingly to import these traditionally baffling common law concepts into statutes when the statutes were designed in major respects to render those concepts obsolete. The benefits of decisive and well-reasoned administrative expertise may be lost if some degree of deference is not given to an agency process not otherwise assailable under the new standards set forth in the UAPA. In short, if these tired phrases are not repealed altogether they should, at

113. Oregon Supreme Court Justice Michael Gillette suggested at the Western States Seminar on State and Local Administrative Law on January 21, 1988, the following hypothetical potentially justifying an “abuse of discretion” standard: Suppose an environmental enforcement agency is delegated authority to fine polluters between \$200 and \$10,000. A corporation thereafter is assessed the full \$10,000 civil penalty for a trivial infraction. Is not the action only challengeable under an “abuse of discretion” standard?

My response is three-fold. First, if the agency action is within the range of delegated discretion, the quarrel should be with the legislature for irresponsible abdication of authority, not with the agency for acting within legally conferred limits. Second, there exist powerful political controls elsewhere in the MSAPA and the UAPA to provide checks on such agency misbehavior through public hearings and legislative and executive review of rules. Finally, unless this were the very first enforcement action taken by the agency, the corporation could claim judicial redress by showing that the action is “contrary to the agency’s prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency. . . .” UTAH CODE ANN. § 63-46b-16(4)(h)(iii) (Supp. 1988).

114. UTAH CODE ANN. § 63-46b-16(4)(a-h) (Supp. 1988).

best, be regarded as surplusage or only as catch-all residue to be relied upon only in the most extreme case of agency lawlessness.

2. *Two-tier judicial review*

A well-intentioned outsider might advance a second concern related to the prospects of the two-tiered system of judicial review under the Utah act.¹¹⁵ Under the new law, formal adjudicative proceedings are reviewed by the Supreme Court, or other appellate courts designated by statute.¹¹⁶ However, informal adjudicative proceedings are reviewable in district courts. The review is *de novo* whether or not there is a record of the proceedings.¹¹⁷

There is no serious quarrel with the appropriateness of *de novo* review of an agency action not based on a record. However, choosing to have trial court review of adjudications, formal or informal, where there is a developed record, presents a more serious set of concerns.

First, such review may initially inhibit the growth of a developed body of consistent law respecting such adjudications. A unified appellate court develops such law by necessity; the many different local jurisdictions may instead simply balkanize the development of administrative law doctrine for no reason other than the potentially large numbers of jurisdictions available as forums. The same agency may be subject to the different law of different counties depending on the choice of district court forum.

Second, if litigants are in doubt respecting what adjudicative process they have undergone, or *should have undergone*, (formal adjudicative proceedings or informal adjudicative proceedings) they may file for review at the wrong appellate level. The possibility of such wasteful accidents is both real and unfair. A multi-tiered system of judicial review encourages such expensive risks.

Third, trial and appellate courts generally apply different standards respecting the formalities of the law of evidence. The UAPA retains the "legal *residuum*" rule.¹¹⁸ Yet under the MSAPA, the generally permissible uses of hearsay evidence in administrative proceedings are far broader than otherwise would be permissible in the trial of civil

115. The author is deeply indebted to Professor Harold Levinson for his initial exploration of these considerations at the Western States Seminar on State and Local Administrative Law. See *supra* note 111.

116. UTAH CODE ANN. § 63-46b-16(1) (Supp. 1988).

117. UTAH CODE ANN. § 63-46b-15(1)(a) (Supp. 1988).

118. Under the legal residuum rule, administrative findings must be supported by some evidence that would be admissible in judicial proceedings, even if the agency's authority to receive evidence is not limited by traditional evidentiary rules. See K.C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE 239 (2nd. ed. 1980).

actions. Restricting administrative proceedings to the standards of Utah Rules of Evidence on judicial review¹¹⁹ may further inhibit the utilization of the administrative process to its fullest potential in seeking informal resolution of disputes.

Fourth, the existence of alternative forums for review may introduce undesirable elements. Litigants or agencies may engage in forum shopping or, even worse, may play gamesmanship as to the very choice of their adjudicative process with one eye securely on the appellate forum most likely to favor them.

Finally, as is well established, there are important differences in the very environments occupied respectively by trial and appellate courts. Trial judges may find it hard to discard their otherwise entirely appropriate judicial habits when faced with the sometimes foreign administrative law concepts of deference to agency discretion, the role of agency expertise, the doctrine of official notice and other legal constructs designed to strike an appropriate balance between executive and judicial branch responsibilities in the development of public law.

CONCLUSION

Notwithstanding the concerns just expressed, the Utah act has great promise of enabling the development of the legal certainty and clarity its framers have promised. But on the horizon of a more distant future lies an even more ambitious undertaking which Utah and other path-breaking jurisdictions may yet contemplate.¹²⁰

This Utah statute speaks to judicial review of agency adjudicatory action. Unlike the Model Act, it does not purport to cover review of agency rulemaking, nor is it designed to encompass in a unified manner the other types of legal remedy for administrative agency action which developed at common law. Finally, it is limited to actions taken by state agencies, not those of local governments.

The next generation of innovation in judicial review is poised to explore a unified approach to this challenge. A unified judicial review statute has both promise and pitfalls. It greatly simplifies the procedural quagmire created by old common law writs and remedies. It must be drafted so that defenses immunities and procedural requirements which presently guard the ambit of legitimate and needed government discretion can be preserved. The task of accommodation will not be easy. Yet, with the experience of its recently enacted and pioneering

119. UTAH CODE ANN. § 63-46b-15(3)(b) (Supp. 1988).

120. See generally Safriet, *Judicial Review of Government Action: Procedural Quandaries and a Plea for Legislative Reform*, 15 ENVTL. L. REV. 217 (1985).

reforms, Utah is ably equipped to help lead this new thrust.

The Utah experience is in broad accord with the state administrative law trends identified in this article. The relative youth of Utah administrative law is not a curse; if anything, it is a benefit. Common law principles respecting administrative procedure have not become encrusted by decades of judicial gloss. Instead, drawing on the best national models available, Utah can implement a modern statutory scheme which is both the product of innovation and the opportunity for further pioneering efforts in public law reform.