1987

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Bonfield on State Administrative Rulemaking: A Critique

Carl A. Auerbach*

Despite the pioneering scholarship and pedagogical efforts of Frank Goodenow and Ernst Freund in the 1890s and early 1900s, administrative law came late to the American Law School. It was not until after World War II that a Harvard Law School student could take a course in administrative law for credit towards the LL.B. degree. Before then, Professor Felix Frankfurter offered administrative law as a Harvard Law School seminar for graduate students, to which third year students were admitted by special permission. Kenneth Culp Davis informs me that he never received any instruction in administrative law at Harvard because during his third year Professor Frankfurter was away at Oxford.

When administrative law was finally admitted to the law school curriculum, it came in federal dress, which it has not significantly changed to this day. The teaching and study of federal administrative law has flourished. But there is no casebook in print dealing exclusively or significantly with state administrative law. Few law schools teach the subject. The scholarly resources devoted to it are meager. Most of the writing in state administrative law is for the purposes of continuing

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* Professor of Law, University of Minnesota.
2. The 1939-40 Directory of Law Teachers in member schools of the Association of American Law Schools lists 80 teachers of administrative law in 78 schools. See A. Am. L. Sch., Directory of Teachers in Member Schools 1939-40 (1939). Only eight were listed as having taught the subject for more than 10 years. See id. James M. Landis reported that of the eight, two were active only in the Philippine Islands, two were part-time teachers and only four were regular members of law school faculties. Landis, Crucial Issues in Administrative Law, 53 Harv. L. Rev. 1078, 1079-80 (1940). The 1985-86 Directory lists 638 teachers of administrative law, of whom 105 have taught the subject for more than 10 years. See A. Am. L. Sch., Directory of Law Teachers 1985-86 (1985). The teachers of state administrative law are not listed separately.
legal education. Frank E. Cooper's work has no successor. Those who, like myself, think that state administrative law should be studied and taught owe thanks to Professors Arthur Earl Bonfield and Harold L. Levinson, the scholarly Reporters-Draftsmen of the 1981 Model State Administrative Procedure Act (Model Act) proposed by the National Conference of Commissioners on Uniform State Laws, pertinent provisions of which are set out in the Appendix.  

Bonfield's book, _State Administrative Rule Making_, is the first major work dealing with the Model Act. It should be followed by a volume on state administrative adjudication. Bonfield's book admirably accomplishes its dual purpose—to stimulate the teaching and study of state administrative law and to persuade state legislatures to adopt the Model Act.

Bonfield does not approach his subject from the standpoint of the procedural acts now governing administrative rulemaking in the fifty states and their interpretation and application by the fifty state courts. Instead, the book is intended to propose and analyze, “in a comprehensive and detailed way, an ideal system of procedures for the governance of state agency law making.” In actuality, it is an exposition and justification of the Model Act, which Bonfield apparently regards as “ideal” in view of the few disagreements with its provisions that he expresses. In the process of his exposition, Bonfield compares the 1981 Model Act with the various state administrative procedure acts, the Federal Administrative Procedure Act (FAPA) and the 1961 Model State Administrative Procedure Act. In the course of evaluating their respective merits, Bonfield manages to discuss and illuminate the major current issues of administrative rulemaking.

Bonfield's evaluation unfolds by asking which procedures for administrative rulemaking best accommodate the “comprehensive rationality model” of administrative rulemaking with

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3. F. Cooper, _State Administrative Law_ (1965).
6. Scholars must also begin to pay attention to the administrative law of municipal and county agencies. But I agree with Bonfield that “the problems of dealing with both state and local agencies in one statutory scheme are insurmountable.” _Id_. at 47.
7. _Id_. at 15.
the "political" model\textsuperscript{9} and the need for "workable, effective, efficient, and economical government administration."\textsuperscript{10} The comprehensive rationality model, which Bonfield accepts as embodying the "ideal" toward which administrative procedure should strive,\textsuperscript{11}

demands not only a precise specification of the goals of agency law making and a clear identification of all alternative means by which those goals may be realized; it also requires a careful, complete, and technically sophisticated consideration of all the consequences of each of those alternatives, followed by an agency decision.\textsuperscript{12}

The political model "creates, and makes effective, opportunities for public political pressures to shape the product of administrative law making, and to prevent agencies from adopting law that is unacceptable to the current interest group balance of power in the community at large"\textsuperscript{13} no matter "how lawful, technically sound, and reasonable a particular administrative policy may be."\textsuperscript{14} It subordinates the "will of the agency experts . . . to the will of the people."\textsuperscript{15}

It is difficult to evaluate the respective merits of different administrative procedure acts by the criteria Bonfield proposes. In one of the most interesting chapters in the book, however, Bonfield undertakes to assess the overall costs and benefits of the Model Act from the point of view of these criteria.\textsuperscript{16} Difficult as this task is, it is even more difficult to assess the relative costs and benefits of different provisions in different administrative procedure acts dealing with the same particular subject matter.

Bonfield recognizes that "scientific" assessments are impos-

\begin{footnotes}
\textsuperscript{9} A. Bonfield, supra note 5, at 4-11.
\textsuperscript{10} Id. at 9.
\textsuperscript{11} Id. at 7.
\textsuperscript{12} Id. at 6. Bonfield opposes the comprehensive rationality model to the incrementalist model, under which agencies make law in the course of adjudicating particular cases. See id. at 5. He also opposes the technocratic model to the "political" model. See id. at 8-9. In this opposition, the technocratic model requires that agency lawmaking be "effectively insulated from everyday public political pressures" lest "it thwart the proper resolution of problems by the official experts." Id. at 8. But expert or technocratic lawmaking would be expert only to the extent it sought to follow the comprehensive rationality model. I shall use the terms "comprehensive rationality" and "technocratic" interchangeably. The extent to which the comprehensive rationality or technocratic model should yield to political pressures is a separate question.
\textsuperscript{13} Id. at 9.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} See id. at 441-52.
\end{footnotes}
sible, but that reliable empirical data would help. Alas, such data are lacking and their lack points to one of the greatest deficiencies in contemporary administrative law scholarship. Conclusions as to which administrative procedures best accommodate the comprehensive rationality and political models, therefore, require close judgment calls and Bonfield does not shirk them. Bonfield defends them "primarily on the basis of certain value choices and the quality of the arguments marshalled to support them."  

I shall follow Bonfield's example in evaluating the Model Act's major rulemaking procedures and his justifications of them. I shall confine myself to the comparison between the Model Act and FAPA.

I. THE DEFINITION OF RULEMAKING AND ADJUDICATION

Like FAPA, the Model Act's procedures for rulemaking differ fundamentally from those for adjudication and so the definitions of the two processes of agency lawmaking are crucial. Unlike FAPA, the Model Act defines as an "order" and not a "rule" all agency statements of particular applicability (those addressed to named or specified parties), even if they involve "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." Consequently, under the Model Act, the procedures for adjudication, not rulemaking, would govern such agency action. But the FAPA definitions assume that rulemaking procedures are better suited to such action, which "is primarily concerned with policy considerations" and does not involve the determination of evidentiary facts concerning a single person's past conduct, "as to which the veracity and demeanor of witnesses would often be important."  

Although we may agree with Bonfield that the Model Act's definitions are far more defensible than are FAPA's "from an

17. See id. at 443-44.
18. Id. at 443.
21. Id.
analytic point of view," it does not follow that adjudicative procedures are necessarily best for all kinds of adjudication. Bonfield justifies the Model Act’s definitions on the ground that FAPA, “in combination with the enabling acts of the various federal agencies engaged in rate making of particular applicability, subjected that rate making . . . to most of the adjudicatory procedures of the Federal Act.” It took congressional action, however, apart from FAPA, to impose these adjudicatory procedures. Furthermore, because the agency action involved was defined as rulemaking, the adjudicatory procedures were accompanied by provisions for public participation which are absent from the adjudicatory procedures of the Model Act. Nor were the internal separation-of-function requirements of FAPA made applicable to such proceedings. But the Model Act prescribes adjudicatory procedures, including the internal separation-of-function procedures, for all agency action of particular applicability. Some other state statute may, of course, overrule this prescription, but the general rule of FAPA is preferable.

Bonfield supports the decision of the United States Court of Appeals for the Tenth Circuit in Anaconda Co. v. Ruckelshaus that rulemaking, not adjudicatory, procedures were required when the Environmental Protection Agency (EPA) promulgated a rule limiting sulfur oxide emissions in Deer Lodge County, Montana, even though Anaconda was the only source of emissions in the county and it was “inconceivable” that any other sources would come into existence in the future. Almost all the reasons advanced by Bonfield to justify

22. A. Bonfield, supra note 5, at 78.
23. Id. at 77-78.
24. FAPA requires the notice of rulemaking, whether published in the Federal Register or personally served on named persons “subject” to the rulemaking, to state “the time, place, and nature of public rule making proceedings.” 5 U.S.C. § 553(b) (emphasis supplied). If the rule in question is required by the enabling statute to be made on the record after opportunity for an agency hearing, the public rulemaking proceedings must consist of hearing and decision in accordance with 5 U.S.C. §§ 556-557. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE [FEDERAL] ADMINISTRATIVE PROCEDURE ACT 32 (1947).
26. MODEL ACT, supra note 4, § 4-214.
27. 482 F.2d 1301 (10th Cir. 1973).
28. See A. Bonfield, supra note 5, at 82.
the use of rulemaking procedures in the *Anaconda* case would apply to a ratemaking proceeding involving a single, named utility in a particular locality that the Model Act requires to be adjudicatory in nature: *Anaconda* was not, and the named utility would not be, "the only person or entity with important interests at stake". 30 *Anaconda*'s activities had, and the named utility's activities would have,

a significant impact on the general public [and, therefore,] it is desirable to allow members of the general public an opportunity to have input into the decision-making process of the responsible agency. Rule-making procedures provide the most reliable, inexpensive, and uncomplicated means of obtaining that input. If adjudicative procedures were employed to issue the agency statement, members of the general public would not necessarily have a right to present their views. And even if the general public did have that right in such an adjudicative proceeding, it would be more expensive and complicated to exercise. 31

If these considerations advanced by Bonfield are controlling, surely they should have been controlling even if EPA had not adopted a general standard for acceptable emissions but had taken action against *Anaconda* by name and alone. To assume otherwise is to exalt form over substance. 32

Defining a "rule" to include certain kinds of agency action of particular applicability may not be the best way to take care of the problem posed. It may be better to adopt the Model Act's definition but provide for public participation in certain kinds of adjudication. This is an example of the difficulty cre-

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30. A. BONFIELD, *supra* note 5, at 82.
31. Id. At a later point in his book, Bonfield acknowledges that a refusal to characterize an agency statement as a "rule" means that "the agency will not be required to allow and to facilitate broad public input into [the] process [of considering the adoption of the statement]." Id. at 86.
32. See id. at 84 (discussing one commentator's criticism of the *Anaconda* rule as an individualized action "masquerad[ing]" as a rule) (citing B. SCHWARTZ, *ADMINISTRATIVE LAW* § 5.8, at 218-19 (2d ed. 1984)).
ated by making the applicability of radically different administrative procedures depend upon the classification of the agency action as "rulemaking" or "adjudication" and not upon the nature of the particular issues involved or the individuals and groups interested in the action. Yet we must accept Bonfield's justification of the rule/order dichotomy\textsuperscript{3} if we are to have an administrative procedure act at all.

II. THE CHOICE BETWEEN ADJUDICATION AND RULEMAKING

Unlike FAPA, the Model Act expresses a preference for rulemaking rather than adjudication as the means of administrative lawmaking. The Model Act requires each agency "as soon as feasible and to the extent practicable, [to] adopt rules, [legislative or interpretative] . . . embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers."\textsuperscript{34} Bonfield construes "to the extent practicable" to mean "with as much precision and detail as is capable of being accomplished successfully under the circumstances."\textsuperscript{35} Although Bonfield's reasons for preferring rulemaking over adjudication are persuasive, we should be skeptical about entrusting to judges the task of invalidating otherwise proper adjudications on the ground that, in their opinion, the agency failed to issue a rule when it was feasible to do so or failed to issue a rule with the "precision and detail" that was "capable of being accomplished successfully under the circumstances."

The Model Act recommends requiring each agency "as soon as feasible and to the extent practicable" to "adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases."\textsuperscript{36} Bonfield explains that rules adopted under this provision may codify case law or may be broader or narrower than, or prospectively overrule, case law.\textsuperscript{37} This provision, too, makes

\textsuperscript{33} See id. at 68-70 (arguing that it would not have been better for the Model Act to have prescribed that the procedure to be used should depend upon an adjudicative facts/legislative facts differentiation, rather than on the traditional rule/order distinction).

\textsuperscript{34} MODEL ACT, supra note 4, § 2-104(3), Appendix p. 590 infra.

\textsuperscript{35} See A. BONFIELD, supra note 5, at 127.

\textsuperscript{36} MODEL ACT, supra note 4, § 2-104(4), Appendix p. 590 infra. The provision is bracketed, which means that the Uniform Law Commissioners do not regard its adoption as essential.

\textsuperscript{37} A. BONFIELD, supra note 5, at 134.
sense, but again we may doubt whether it should be made mandatory so that there will be judicial review of claims that the agency failed to comply with it. According to Bonfield, failure to comply with the provision will mean that the agency may not subsequently rely on the line of precedent that should have been the subject of a rule.\textsuperscript{38} “Instead, it would have to readjudicate wholly de novo, and free of prior precedent, whatever principles of law might apply to those circumstances.”\textsuperscript{39} Bonfield recognizes, however, that “this remedy may not be particularly effective in practice [because] the agency would probably readjudicate the same principle of law embedded in the prior precedent upon which the agency could no longer lawfully rely.”\textsuperscript{40} This same result would follow even more surely if a court decided that an agency had not adopted an interpretative rule “as soon as feasible and to the extent practicable.” Why then make these requirements mandatory and subject to judicial review?

III. RULEMAKING PROCEDURES

A. ONE SET OF RULEMAKING PROCEDURES

FAPA sharply differentiates between the procedures prescribed for informal (notice-and-comment) rulemaking\textsuperscript{41} and those prescribed for formal (on-the-record) rulemaking.\textsuperscript{42} The Model Act provides for only one set of procedures for rulemaking that resembles FAPA’s informal procedures.

B. ADVICE ON POSSIBLE RULES BEFORE NOTICE OF PROPOSED RULE ADOPTION

Unlike FAPA, the Model Act expressly authorizes agencies to solicit comments, and to appoint committees to comment, on subject matters of possible rulemaking under active consideration within the agency.\textsuperscript{43} Federal agencies were expected to, and do, engage in these practices, which are permitted by FAPA. But one justification advanced by Bonfield for such consultation may be dubious; namely, that agencies are committed to the rules they propose for adoption and therefore should

\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} 5 U.S.C. § 553.
\textsuperscript{42} Id. §§ 554, 556, 557.
\textsuperscript{43} MODEL ACT, supra note 4, § 3-101, Appendix pp. 590-91 infra.
consult affected interests even prior to proposing rules. I know of no study that has tested this hypothesis.

C. Notice of Proposed Rule Adoption

Unlike FAPA, the Model Act requires the notice of the proposed rule to include the text of the proposed rule unless the conditions of a narrowly drawn exception are satisfied, an exception that assumes the agency will have a text of a proposed rule in every case. Bonfield thinks this requirement is sound because it will resolve doubts about the adequacy of the contents of a notice of proposed rulemaking and deter the agency from adopting a rule substantially different from the one proposed. But if agency commitment to a proposed rule is undesirable because it negates the purpose of public participation in its formulation, the requirement is undesirable since the agency is more likely to be committed to a proposed rule the text of which has been the subject of consultation with interested groups than to a proposed rule the precise contents of which have not yet been formulated.

D. Public Participation

The Model Act requires the agency to schedule an oral proceeding on a proposed rule if a written request therefor is submitted by a political subdivision, another agency, or a specified minimum number of persons. Federal agencies may conduct oral proceedings on proposed rules but are not compelled to do so by any provision of FAPA governing informal or even on-the-record rulemaking. The Model Act does not, however, call for a trial-type oral proceeding. Bonfield suggests "it might have been desirable to add an explicit provision . . . au-

44. See A. BONFIELD, supra note 5, at 157-58.
45. MODEL ACT, supra note 4, §§ 3-103(a), Appendix p. 592 infra, 2-101(e), Appendix p. 589 infra.
46. A. BONFIELD, supra note 5, at 177.
47. MODEL ACT, supra note 4, § 3-104(b), Appendix pp. 592-93 infra. The minimum number suggested is 25. It is also suggested that the administrative rules review committee (described in § 3-203, Appendix pp. 601-02 infra) and the administrative rules counsel (described in § 3-202, Appendix p. 601 infra) be authorized to request an oral proceeding.
48. 5 U.S.C. § 556(d) authorizes each agency to “adopt procedures for the submission of all or part of the evidence in written form” if no party will “be prejudiced thereby.”
49. The nature of the oral proceeding is left to each agency to determine by rule. MODEL ACT, supra note 4, § 3-104(b), Appendix pp. 592-93 infra. Even in the case of federal on-the-record rulemaking, FAPA permits the
E. THE REGULATORY ANALYSIS

The Model Act requires each agency to issue a regulatory analysis of each proposed rule if requested to do so by politically responsible state officials, a political subdivision, another agency, or a specified minimum number of persons. The regulatory analysis must contain an analysis of the costs and benefits of the proposed rule quantified "to the extent practicable" and take into account "both short-term and long-term consequences." If the agency makes a "good faith" effort to produce the required regulatory analysis, the rule "may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate." Although FAPA does not call for a regulatory analysis, the President has required executive agencies to prepare such analyses and have them reviewed by the Office of Management and Budget.

Bonfield carefully weighs the merits of the Model Act's requirements. The justifications he advances for them are sound. One may agree that cost-benefit analyses will not produce principled, objective, and reliable answers to every specific
issue of regulation. Nevertheless, agencies should be made to utilize, in the most reasonable fashion, the best information bearing upon their problems that is available or can be obtained.

Bonfield does not discuss the timing of the regulatory analysis requirement. To mandate that the regulatory analysis accompany the proposed rule will tend to commit the agency to the proposed rule. If the agency responds to the comments on its proposal, it may have to alter its regulatory analysis. To encourage agency receptiveness to public criticism of its proposal and lessen the burden on the agency, it may be preferable to require the agency to accompany its adopted, but not its proposed, rule with a regulatory analysis. In publishing its proposed rule, the agency should be required to specify that it desires to have comments on the costs and benefits of the proposal.

Bonfield thinks it is unwise for private persons to be permitted to request a regulatory analysis because they may do so "only to delay or harass agencies."58 Because a regulatory analysis will contribute greatly to the evaluation of the rationality of a rule, it should not be required only when demanded by elected officials with general responsibility for state government. It would be preferable to require a regulatory analysis of all important rules.59 Because it is difficult to formulate criteria of importance, a request for an analysis by a significant number of private persons may be a satisfactory surrogate for such criteria. Even so, it would be desirable to exempt from the regulatory analysis requirement those rules that codify "principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases."60 These principles have been justified in the decided cases; to require a regu-

58. Id. at 215.
59. Executive Order No. 12,291, for example, requires a regulatory analysis only in connection with a "major rule," defined as any rule that is likely to result in
(1) an annual effect on the economy of $100 million or more;
(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
(3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.
60. Model Act, supra note 4, § 2-104(4), Appendix p. 590 infra.
ulatory analysis for such codification rules may discourage agencies from adopting them.

Bonfield explains that the regulatory analysis may be considered by a court reviewing a challenge to the validity of a particular rule on the ground that it is arbitrary and capricious. But he doubts the wisdom of the Model Act's provision that a rule may be invalidated because the agency failed to make a good faith effort to comply with the specifications regarding the contents of the analysis. Inevitably, the claim of agency failure to act in good faith will be made most strongly in cases in which the claim of arbitrary and capricious agency action is weakest. To avoid the mischief inherent in this provision, Bonfield suggests that the courts hold that an agency has acted in "good faith" if the analysis "on its face . . . actually addresses in some manner all of the points specified" in the Model Act regarding its contents. Reviewing courts, however, may not accept Bonfield's view that such agency performance amounts to a "good faith" effort in every case. It would be better for states to adopt the language of an earlier draft of the Model Act that the adequacy of the contents of the regulatory analysis is not subject to judicial review.

F. AGENCY CONSIDERATION OF COMMENTS ON PROPOSED RULE

The Model Act requires the agency to "consider the written submissions, oral submissions or any memorandum summarizing oral submissions [prepared by agency staff], and any regulatory analysis." FAPA provides simply that "[a]fter consideration of the relevant matter presented" by interested persons, the agency will or will not adopt a rule. The more explicit command of the Model Act, Bonfield concludes, may convince courts that they should subject agency heads in some situations to examination in court "as to the extent to which they in fact had the requisite understanding of all the submissions and presentations in a particular rule making." One such situation would be present if the parties challenging the rule showed by extrinsic evidence ("all evidence other than the

61. A. BONFIELD, supra note 5, at 223.
62. Id.
63. Id. at 221 (quoting MODEL ACT, supra note 4, § 3-105 comment).
64. See id. at 223-24.
65. MODEL ACT, supra note 4, § 3-106(c), Appendix pp. 594-95 infra.
66. 5 U.S.C. § 553(c).
67. A. BONFIELD, supra note 5, at 228.
legally compelled testimony of the agency heads themselves, [such as] voluntary admissions, testimony of other persons, and all circumstantial evidence that "the agency head issuing a rule did not personally read the written submissions or personally preside at the oral presentations." The reviewing court could then invalidate the rule if it was not satisfied with the agency head's understanding of the contents of the written submissions and oral presentations.

Bonfield thus envisages that agency heads could be examined in court even if they carefully studied memoranda prepared by agency staff summarizing written and oral submissions by interested persons but did not personally preside at oral presentations or personally read all the written submissions. Bonfield thinks heads of state agencies personally preside and read submissions much more frequently than heads of federal agencies. This may be the case, but I doubt they do so very often and I know of no study of actual practice in this regard. Even if agency heads do so frequently, they should not be subject to examination in court in the particular cases in which they did not follow this practice.

Certainly the Model Act provision in question no more mandates such examination than the comparable FAPA provision mandated the dubious result in *Citizens to Preserve Overton Park, Inc. v. Volpe.* In that case, the Secretary of Transportation's failure to issue findings impelled the Supreme Court to hold that he could be subjected to interrogation about the reasons for his action. Overton Park, therefore, is not precedent for Bonfield's conclusion.

Bonfield thinks that *Morgan IV,* which held that the reviewing court should not probe the mental processes of the administrator, may apply only when the agency is engaged in adjudication, not rulemaking. But rulemaking is an a fortiori case for applying *Morgan IV* because the burden of personally reading all the written submissions and personally presiding at the oral presentations is greater in rulemaking than in adjudication.

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68. *Id.*
69. *Id.*
70. *Id.*
71. *See id. at 229.*
73. *Id. at 420.*
75. *Id. at 422.*
lication. Justice Frankfurter's admonition to the courts in Morgan IV about inquiring into the administrative decision-making process is as applicable to rulemaking as it is to adjudication: "[A]lthough the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." 78

G. TIME FOR ADOPTION OF RULE

Unlike FAPA, the Model Act requires the agency to terminate the rulemaking proceeding if it does not adopt a rule within a specified period of time (180 days is suggested) after publication of the notice of the proposed rule or the end of the oral proceedings thereon, whichever is later. 79 Bonfield justifies this provision as contributing to the political function of rulemaking procedures by ensuring that agencies will take final action on proposed rules "while the attention of the public is still focused upon them" 80 and not delay final action "until the public furor over [them] has died down and the public has forgotten the proposal is still pending." 81 Bonfield reports that there "have been occasions" when agencies have acted in this fashion. 82

H. VARIANCE BETWEEN ADOPTED RULE AND PROPOSED RULE

Unlike FAPA, the Model Act expressly provides that an agency may not adopt a rule that is "substantially different" from the proposed rule. 83 If the agency does adopt a substantially different rule, the reviewing court may invalidate it. 84 The court may find a substantial difference on the basis of any one of the following factors, which are not intended to be exclusive:

1. the extent to which all persons affected by the adopted rule

78. 313 U.S. at 422 (citing United States v. Morgan, 307 U.S. 183, 191 (1939)).
79. Model Act, supra note 4, § 3-106(b), Appendix p. 594 infra.
80. A. Bonfield, supra note 5, at 231.
81. Id. at 230-31.
82. Id. at 231-32.
83. Model Act, supra note 4, § 3-107(a), Appendix p. 595 infra.
84. Id. § 5-116(c)(5), Appendix pp. 609-10 infra.
should have understood that the published proposed rule would affect their interests;

(2) the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule; and

(3) the extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead. 85

Although I agree with Bonfield that meaningful public participation requires “some limits” on the variance between the adopted rule and the proposed rule, 86 I doubt that the Model Act has imposed satisfactory limits. I would not object if the first specified factor to be considered in determining substantial difference were the exclusive test. Adding the other two factors and authorizing courts to consider additional factors as well will discourage agencies from changing proposed rules in response to public submissions for fear of provoking litigation or successive rounds of rulemaking proceedings. The possibility of variance is enhanced by Bonfield’s view that the Model Act requires agencies to formulate the notice and text of a proposed rule so as to give “fair notice of the precise contents of the rule” that might be adopted. 87 It should be sufficient if the agency gives the public adequate notice of the general scope of the proposed rulemaking proceeding and of the interests that may be affected thereby.

The only example Bonfield gives of a substantial difference on the basis of factor (2) or (3) is of a utility commission that publishes the text of a proposed rule limiting annual rate increases by electric utilities to three percent but adopts a final rule allowing annual increases of six percent. 88 Bonfield agrees that the “class of persons affected by the adopted rule probably would have understood that the published proposed rule implicated their interests [and that] the subject matter of the adopted rule—a fixed rate increase—was identical to the subject matter of the proposed rule, and the issues involved would probably also have been deemed to be similar.” 89 Nevertheless, Bonfield would find a substantial variance because “the impact of the adopted rule would be 100 percent greater than the im-

85. Id. § 3-107(b), Appendix p. 595 infra; A. Bonfield, supra note 5, at 235-36.
86. A. Bonfield, supra note 5, at 232.
87. Id. at 237.
88. Id. at 238, 240.
89. Id. at 240.
pact of the published proposed rule.90

But why should that difference in impact be sufficient to invalidate the rule? Certainly the interests opposed to the electric utilities reasonably could be expected to understand that the utilities would strive for a rate higher than three percent and that they had better be prepared to support a rate no higher than three percent. In what way can they reasonably claim to have been prejudiced by the variance between the proposed and the adopted rule? If the record showed that the anti-utility interests presented data and argued against a six percent increase, would they be held to have been “substantially prejudiced”91 because of the variance within the meaning of the applicable scope of review provision of the Model Act?

I. EXEMPTIONS FROM PUBLIC RULEMAKING PROCEDURES

1. General Exemption

Like FAPA, the Model Act makes the basic rulemaking procedures inapplicable whenever the agency for “good cause” finds that they are “unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule.”92 But unlike FAPA, the Model Act imposes the burden on the agency, in any action to invalidate a rule exempted for “good cause,” to persuade the reviewing court that the exemption was justified.93

Unlike FAPA, the Model Act authorizes the administrative rules review committee of the legislature,94 or the governor,95 within two years after the effective date of a rule exempted for good cause, to require the agency to conduct a proceeding on the rule that will afford the procedures from which the rule was exempted.96 Once such a request is filed, the rule becomes

90. Id.
91. See MODEL ACT, supra note 4, § 5-116(c)(5), Appendix pp. 609-10 infra.
92. Id. § 3-108(a), Appendix p. 595 infra. Such rules are exempt from §§ 3-103 (notice of proposed rule adoption), 3-104 (public participation), 3-105 (regulatory analysis), 3-106 (time and manner of rule adoption) and 3-107 (variance between published and adopted rule). They remain subject to §§ 3-101 (advice on possible rules), 3-102 (public rulemaking docket), 3-110 (concise explanatory statement), 3-111 (contents, style and form of rule), 3-112 (agency rulemaking record), 3-114 (filing of rules), 3-115 (effective date of rules) and 3-117 (petition for adoption of a rule or the amendment, repeal or suspension of an existing rule).
93. Id. § 3-108(b), Appendix p. 595 infra.
94. Id. §§ 3-203, 3-204, Appendix pp. 601-03 infra.
95. Id. § 3-202, Appendix p. 601 infra.
96. Id. § 3-108(c), Appendix pp. 595-96 infra.
a temporary rule; that is, it ceases to become effective 180 days thereafter, unless reissued in original or modified form after the public rulemaking proceeding runs its course.\footnote{97}

I doubt the wisdom of this provision. Once a rule has gone into effect, the legislative committee and the governor, like any other person, should be required to file a petition to amend, repeal, or suspend it.\footnote{98} This would require the petitioner to state what is undesirable about the rule and assist the agency in its further consideration of the rule. A governor who is very dissatisfied with an existing rule is empowered by the Model Act to rescind or suspend it.\footnote{99}

2. Interpretative Rules

Like FAPA, the Model Act also exempts interpretative rules but, unlike FAPA, it provides that a reviewing court should then determine their validity de novo,\footnote{100} that is, "without any deference to the agency's view of the matter."\footnote{101} This is a troublesome provision. The merit of an agency interpretation of a statute should stand on its own feet. The reviewing court's judgment of its merit should not depend on whether it is embodied in an ad hoc adjudication, legislative rule, interpretative rule preceded by public rulemaking procedures, or exempt interpretative rule. It should depend on the nature of the issue raised by those objecting to the interpretation and the respective competencies of agency and court to determine that issue. The general rule stated by Bonfield that "a court may properly substitute its judgment for that of the agency as to the propriety of an interpretative rule, but not with respect to the propriety of a legislative rule"\footnote{102} does not always reflect the realities of the review process.\footnote{103}

As a practical matter, furthermore, it would be extremely
difficult for a court to heed the mandate of the Model Act to review exempt interpretative rules without any deference to the agency’s view of the matter. The interpretative rule would still be before the reviewing court and would have an effect upon the court even if it stated that it engaged in the mandated de novo review.104

3. Other Exemptions

Finally, the Model Act exempts from practically all the rulemaking procedures certain specified classes of rules.105 I have commented elsewhere on most of these exemptions, which are modeled upon the Iowa Administrative Procedure Act,106 and Bonfield responds to my comments.107 Bonfield recommends generally that states should add a provision to the Model Act that “[t]o the extent that it is practicable an agency shall, before adopting a rule [falling into one of these exempt classes], give advance notice in some suitable manner of the contents of the contemplated rule to persons who would be affected by it, and solicit their views thereon.”108 This would soften the objections I voiced against some of the exemptions.

J. CONCISE STATEMENT EXPLAINING THE RULE

FAPA requires the agency simply to “incorporate in the rules adopted a concise general statement of their basis and purpose.”109 The Model Act’s requirement is not much more specific. It states that the concise explanatory statement accompanying the rule must contain the agency’s “reasons for adopting the rule” and “an indication of any change between the text of the proposed rule . . . and the text of the rule as fi-

104. For the same reason, I would question whether an interpretative rule should be subject to § 3-115, which provides that no rule shall become “effective” until thirty days after “its filing in the office of the [secretary of state or] its publication and indexing in the [administrative bulletin],” whichever is later. See Model Act, supra note 4, § 3-115(a), Appendix p. 598 infra.

105. These classes of rules are exempt from all rulemaking procedures except Model Act, supra note 4, §§ 3-101, Appendix pp. 590-91 infra, (advice as to possible rules), and 3-117, Appendix p. 600 infra, (petition for adoption of a rule or the amendment, repeal or suspension of an existing rule) under § 3-116, Appendix pp. 599-600 infra.

106. See Auerbach, Administrative Rulemaking in Minnesota, 63 Minn. L. Rev. 151, 238-51 (1979).

107. See A. Bonfield, supra note 5, at 396-421. The only classes of exempt rules not commented upon are those set forth in § 3-116(7), (8), (10), Appendix pp. 599-600 infra, which obviously warrant exemption.

108. A. Bonfield, supra note 5, at 421.

nally adopted, with the reasons for any change.”\footnote{110} But, unlike FAPA, the Model Act goes on to say that “[o]nly the [factual, legal and policy] reasons contained in the concise explanatory statement may be used by any party [including the agency] as justifications for the adoption of the rule in any proceeding in which its validity is at issue.”\footnote{111} Bonfield disagrees with the decision of the Uniform Law Commissioners to delete from an earlier draft of the Model Act the requirement that the concise explanatory statement also contain “all the arguments for and against the rule considered by the agency” as well as “[the agency’s] reasons for rejecting the arguments against adoption of the rule.”\footnote{112} Despite this deletion, Bonfield thinks the agency is still obliged “to respond briefly in the required explanatory statement to the principal issues raised in the public submissions and rule-making record.”\footnote{113}

What Bonfield wishes to add to the concise explanatory statement is essentially what FAPA requires with respect to formal, on-the-record rulemaking, that is, “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.”\footnote{114} Some federal statutes contain similar requirements for informal rules issued thereunder. Even apart from such statutory provisions, the developing federal concept of an exclusive administrative informal rulemaking record for purposes of judicial review has led federal courts to interpret the requirement of a “concise general statement” of the “basis and purpose” of an “informal” rule so as to accomplish the essential objectives of the “findings and conclusions” requirement in connection with a “formal” rule.\footnote{115} I shall discuss below\footnote{116} the merits of Bonfield’s suggestion, and of the Model Act’s provision, that only the factual, legal and policy reasons contained in the explanatory statement may be used to justify the rule in any proceeding in which the validity of the rule is challenged.

Bonfield also would have liked the Model Act to contain a requirement that a concise explanatory statement accompany

\footnote{110}{ MODEL ACT, supra note 4, § 3-110(a), Appendix p. 596 infra.}
\footnote{111}{ Id.; A. BONFIELD, supra note 5, at 316-17.}
\footnote{112}{ A. BONFIELD, supra note 5, at 310.}
\footnote{113}{ Id. at 312-13.}
\footnote{114}{ 5 U.S.C. § 557(c)(3)(A).}
\footnote{116}{ See infra text accompanying notes 238-46.}
an agency's decision to abandon a proposed rule. Because agency inaction may affect the public interest as seriously as agency action, such a requirement would be valuable.

K. PETITIONS FOR THE ADOPTION, AMENDMENT, REPEAL OR SUSPENSION OF A RULE

The Model Act, like FAPA, gives any person the right to petition an agency for the adoption, amendment, repeal or suspension of a rule, including an interpretative rule. Within a stated period of time, the agency must either “deny the petition in writing, stating its reasons therefor, . . . initiate rule-making proceedings in accordance with [the Model Act], or . . . if otherwise lawful, adopt a rule.” Failure of the agency to conform to these requirements would constitute “agency action” subject to judicial review.

The Model Act, explains Bonfield, “in no way limits the agency’s discretion in deciding whether the law should continue as it is or should be changed.” The reviewing court may, however, determine whether “any of the agency’s proffered reasons for failing to act are facially inadequate, unreasonable, or otherwise improper.” If the court finds the agency action to be improper, all it may do, except in “the most rare and egregious situations,” is order the agency to reconsider. To illustrate an egregious situation, Bonfield gives the case “where the agency states that it would have adopted the rule requested but for a particular reason that is clearly unconstitutional.”

While I recognize that an agency's failure to act may be as harmful to the public interest as its positive action, I doubt the wisdom of subjecting its inaction to judicial review. The possibility of such review will encourage interest groups to try to impose their own priorities upon agencies that are always struggling with problems of allocating limited resources. The limited grounds upon which Bonfield envisages judicial review would proceed are not sufficiently protective of the agency's allocative decisions. In determining whether the agency's proffered reasons for inaction are reasonable, the reviewing court

117. A. BONFIELD, supra note 5, at 313-14.
119. MODEL ACT, supra note 4, § 3-117.
120. A. BONFIELD, supra note 5, at 431.
121. Id.
122. Id. at 432.
123. Id.
will not be in a position to see the whole picture as the agency sees it. The reviewing court will concentrate on the matter before it. It may be said, in response, that it is up to the agency to present the whole picture to the reviewing court in justification of its particular failure to act. Does such litigation serve the public interest?

Even if judicial review makes sense with respect to the denial of petitions for the adoption of legislative rules, it does not make sense with respect to denials of petitions for the adoption of interpretative rules. Considering the function interpretative rules perform, their issuance should be left entirely to the agency's discretion.

IV. AGENCY REVIEW OF RULES

The Model Act contains an innovative provision to assure that agencies periodically evaluate and reconsider their rules.124 It "is intended," Bonfield explains, "as a practical substitute for the more drastic sunset proposals for agency rules."125 At least once every seven years, the agency must perform an in-depth analysis of each rule to determine the rule's effectiveness in achieving its objectives. The agency is required to make public a "concise statement" setting forth its analysis and include "a summary of any available data supporting the conclusions reached."126 With respect to some rules, Bonfield writes, "this will undoubtedly require the accumulation of empirical data by agencies that is not yet in existence but that is accessible to the agencies at a reasonable cost."127

V. GUBERNATORIAL REVIEW OF AGENCY RULES

To implement the political model of rulemaking, the Model Act, unlike FAPA, gives the governor complete authority over every agency's rules. The governor is empowered "[t]o the extent the agency itself would have authority . . . [to] rescind or suspend all or a severable portion of" any rule by executive order.128 The governor also may "summarily terminate any pending rulemaking proceeding by an executive order to that effect, stating therein the reasons for the action."129 An administra-

124. MODEL ACT, supra note 4, § 3-201, Appendix pp. 600-01 infra.
125. A. BONFIELD, supra note 5, at 436.
126. MODEL ACT, supra note 4, § 3-201(1), Appendix pp. 600-01 infra.
127. A. BONFIELD, supra note 5, at 438.
128. MODEL ACT, supra note 4, § 3-202(a), Appendix p. 601 infra.
129. Id. § 3-202(b), Appendix p. 601 infra.
tive rules counsel is created within the office of the governor, appointed by and serving at the pleasure of the governor, to advise the governor in exercising this authority over agency rules.\textsuperscript{130}

The Model Act gives the governor greater power over agency rules than the President has sought to exercise over federal executive agency rules.\textsuperscript{131} Although the Model Act, unlike Executive Order 12,498, does not expressly empower the executive to require agencies to submit to the executive annual statements of their "regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned,"\textsuperscript{132} this authority may be implied as necessary and proper for the exercise of the governor's authority to "summarily terminate any pending rulemaking proceeding."

Executive Order 12,498 requires the Director of the Office of Management and Budget (OMB) to "consider the consistency of the draft regulatory program [of each agency] with the Administration's policies and priorities and the draft regulatory programs submitted by other agencies [and to] identify such further regulatory or deregulatory actions as may, in his view, be necessary in order to achieve such consistency."\textsuperscript{133} Although the Model Act would permit the governor to authorize the administrative rules counsel to perform a similar function, it does not authorize the governor to order an agency to institute a proceeding for the adoption of a new rule. Because the governor may rescind or suspend a rule for any reason, however, an agency would undoubtedly honor a suggestion from the governor that it institute a proceeding to amend, repeal or suspend an existing rule. Because the failure of an agency to act may be contrary to the public interest as viewed by the governor, there is no reason why the Model Act, going as far as it does, should not also authorize the governor to order a proceeding for the adoption of a new rule. Bonfield does not discuss this possibility.\textsuperscript{134}

Bonfield presents the arguments against gubernatorial re-

\textsuperscript{130} Id. § 3-202(c), Appendix p. 601 infra.

\textsuperscript{131} See executive orders cited supra note 56.


\textsuperscript{134} Bonfield does point out that the Model Act "does not vest the governor with any affirmative authority to adopt a rule on behalf of an agency."
view of agency rules, but concludes that it is necessary to coordinate state policy and assure rulemaking that is acceptable to the body politic. Although I agree with this conclusion, I am troubled by the grant of power to the governor to "summarily terminate any pending rule-making proceeding."

The practice of presidential (OMB) review of federal executive agency rulemaking is heatedly criticized and defended. A good deal of the criticism is directed at the secrecy of the review process. This criticism cannot be leveled at the Model Act insofar as it authorizes the governor to rescind or suspend agency rules because the governor may do so only after following the public rulemaking procedures prescribed by the Act. This criticism can be leveled at the Model Act insofar as it authorizes the governor to summarily terminate any pending rulemaking proceeding because the governor may do so without following the public rulemaking procedures.

Bonfield justifies this distinction on the ground that because the agency may summarily terminate a pending rulemaking proceeding, the governor should be able to do so. But there is an important difference between the consequences of an agency and gubernatorial summary termination. Affected parties may secure judicial review of the agency's failure to act but probably not of the governor's summary termination. Bonfield does not think there would be judicial review of gubernatorial action suspending or rescinding a rule except on procedural grounds and even then review "would probably be ineffective in most cases." He does not read the limitation in

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BONFIELD, supra note 5, at 465. This, however, is not the suggestion I am making.

135. Id. at 460-63, 478-81.
136. Id. at 478-79.
137. See MODEL ACT, supra note 4, § 3-202(b), Appendix p. 601 infra.

139. See MODEL ACT, supra note 4, § 3-202(a), Appendix p. 601 infra.
140. See id. § 3-202(c), Appendix p. 601 infra.
141. Id. § 3-106(b), Appendix p. 594 infra.
142. A. BONFIELD, supra note 5, at 470.
143. Id. at 480.
the Model Act that the governor may rescind or suspend a rule only "[t]o the extent the agency itself would have authority" to do so as requiring the governor to employ the standards the agency would have to use in taking such action. He explains that the limitation is intended to apply when a rule has been issued pursuant to a statutory mandate that vests no discretion in the agency as to its precise terms or content. Because the agency would then have no authority to rescind or suspend the rule, the governor, too, would have no such authority. If there will be no judicial review of gubernatorial action to rescind or suspend a rule, clearly there also will be no judicial review of gubernatorial action to terminate a rulemaking proceeding summarily.

The most troublesome aspect of a gubernatorial power to terminate a rulemaking proceeding summarily is not the absence of judicial review. It is the fact that such termination may prevent the most informed exercise of the executive's political function. It is a mistake to think of the rationality and political models of rulemaking in separate, unrelated compartments. Greater knowledge about the factual and policy justifications for a proposed rule, which can be developed by the agency in a rulemaking proceeding, may cause the executive to change its mind about what is desirable as a matter of policy and acceptable to the body politic. With this consideration in mind, a forceful argument can be made against giving the executive power to terminate a rulemaking proceeding summarily and for requiring the executive to await the outcome of the proceeding and see how the agency has accommodated the "rational" and "political" considerations in the particular instance. Indeed, Bonfield's justification of this gubernatorial power ignores the wise view he expresses in the introduction to the book that the "political model" may "successfully be accommodated with [the "comprehensive rationality" model only] by assuming dominance in the [agency law making] process only after the ["comprehensive rationality" model] has largely run its course."

Yet because of the hazards of a general rule one way or the other, the Model Act should not prohibit the governor from

144. See MODEL ACT, supra note 4, § 3-202(a), Appendix p. 601 infra.
145. See A. BONFIELD, supra note 5, at 480.
146. See id. at 467-68.
147. Id.
148. Id. at 9-10.
ever terminating a rulemaking proceeding summarily. In some instances, the executive may be certain that any rule the agency may adopt following a pending proceeding will be inconsistent with its policy and have to be superseded. The governor should then be able to terminate the proceeding summarily. One can only urge governors armed with this power to use it sparingly.149

VI. LEGISLATIVE REVIEW OF AGENCY RULES

Unlike FAPA, the Model Act creates a bipartisan committee of both houses of the state legislature to review agency rules.150 The administrative rules review committee is required to "selectively review possible, proposed, or adopted rules."151 It is given no veto power but may "recommend that a particular rule be superseded in whole or in part by statute."152 In addition, the committee may file in the office of the secretary of state an objection to all or a portion of a rule on the ground that it is "beyond the procedural or substantive authority delegated to the adopting agency."153 It must state concisely the reasons for its objection.154 Within a specific number of days, the agency issuing the rule must respond in writing to the committee.155 If the committee does not then withdraw or modify its objection, "the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency."156 The committee, unlike the governor, is given express authority to recommend that the agency adopt a new rule and to require the agency to publish notice of the committee's

149. As a practical matter, prohibiting the governor from terminating a rulemaking proceeding summarily is not likely to achieve its objective as long as the governor retains the power to rescind rules. Because of this power, as Bonfield appreciates, the governor's administrative rules counsel "is likely to be actively and continuously involved on a consultative basis in the rule making of the various state agencies." Id. at 471. A strong intimation from the counsel that the governor will rescind any rule that may eventuate from a particular rulemaking proceeding will undoubtedly lead the agency, on its own, to terminate the proceeding.

150. MODEL ACT, supra note 4, § 3-203, Appendix pp. 601-02 infra.
151. Id. § 3-204(a), Appendix p. 602 infra.
152. Id. § 3-204(c), Appendix p. 602 infra.
153. Id. § 3-204(d)(1), Appendix pp. 602-03 infra.
154. Id.
155. Id. § 3-204(d)(4), Appendix pp. 602-03 infra.
156. Id. § 3-204(d)(5), Appendix pp. 602-03 infra.
recommendation as a proposed rule of the agency and allow public participation on it.\textsuperscript{157}

These provisions for legislative review of agency rules must be evaluated in light of the Model Act’s rejection of a possible alternative—the legislative veto—as undesirable\textsuperscript{158} and probably unconstitutional under most state constitutions.\textsuperscript{159} Nevertheless, these provisions are unwise. On its face, the power given to the administrative rules committee to object to a rule does not implement the political model of rulemaking because the committee may not object on the policy ground that the rule is “unsound or undesirable,” but only on the ground that it is ultra vires, that is, “beyond the procedural or substantive authority delegated to the adopting agency.”\textsuperscript{160} Bonfield adds, however, that the committee may object that the rule is ultra vires if it “is convinced beyond a reasonable doubt”\textsuperscript{161} that the rule “is so unreasonable, arbitrary, or capricious as to be unauthorized.”\textsuperscript{162}

I agree with Bonfield that the committee should not be given authority to object to an agency rule on policy grounds. That “would divest the agencies of the very discretion that they were authorized to exercise by statute, . . . deny the public the benefit of the agencies’ expertise on policy matters within their lawful authority,”\textsuperscript{163} and allow the committee to undercut the legislature as a whole that authorized the rule in question.\textsuperscript{164} I would add only that such authority would also give undue weight to the interest groups that could afford to maintain continuous contacts with the committee and its staff.

Yet Bonfield recognizes that, in practice, the line drawn by the Model Act will be thin indeed because “a committee might be inclined to substitute its judgment as to the desirability of a rule for that of the agency, and then cloak that judgment in the mantle of the statutory terms.”\textsuperscript{165} Nevertheless, Bonfield concludes that although “this potential danger is significant and troublesome, it appears to be outweighed by the potential bene-

\textsuperscript{157} Id. § 3-204(e), Appendix p. 603 infra.
\textsuperscript{158} See A. Bonfield, supra note 5, at 507-14.
\textsuperscript{159} See id. at 497-507; Frickey, The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota, 70 Minn. L. Rev. 1237 (1986).
\textsuperscript{160} A. Bonfield, supra note 5, at 519.
\textsuperscript{161} Id. at 520.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 521.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
fits of this legislative device to check illegal agency rule making.”

This conclusion underestimates the likely dynamics of the committee review process, which Bonfield well understands. The combination of the committee's restricted power to object to an adopted rule with its unrestricted power to require the agency to institute a public proceeding on its recommendation to repeal, amend or suspend an existing rule or adopt a new rule, and to make its views known on possible and proposed rules will cause the agency to heed the committee's wishes in most cases. At the very least, the review process will encourage negotiation between committee and agency staffs that may produce compromises the agency would not otherwise have accepted. Concurrent negotiations with the governor's administrative rules counsel may reinforce the legislative committee's position and add to the pressures on the agency or produce deadlocks.

These dynamics are more important than shifting the burden to the agency to establish the validity of a challenged rule whenever the agency has refused to heed the committee's objection. The shifting of the burden may not, itself, have an in terrorem effect upon the agency, but the consequences of the shifting will have to be considered by the agency along with all the political implications of the legislative review process. Although Bonfield views these implications as implementing effectively the political model of rulemaking, their consequences may be even more undesirable than the legislative veto. The veto at least fixes responsibility on the legislative

166. Id.
167. See id. at 548-49.
168. Bonfield envisages a two-step process of judicial review of an agency rule to which the committee has objected. The court will first review the validity of the objection. In determining its validity, "[t]he question is not whether the committee is correct in its assessment that the rule . . . is illegal [but] whether a reasonable committee could believe the rule to be illegal." Id. at 532. If so, the committee objection is proper and the burden of persuading the court that the rule is valid shifts to the agency. If not, the committee objection is improper and the burden of persuading the court that the rule is invalid remains with the challengers. Id. No matter who has the burden, "the court may determine de novo the legality of the rule." Id. at 533. But if the committee objects to a rule, "in borderline or unclear cases, the court is likely to find the rule in question to be unlawful." Id. One may question the ability of any reviewing court to make these distinctions and this doubt may add to the in terrorem effect of shifting the burden.
169. See id. at 549.
body exercising it. The committee review process may operate effectively behind the scenes.

Finally, to give the administrative rules committee of the legislature power to check illegal agency rulemaking is to give it authority traditionally exercised by the courts, which it is not nearly as competent as the courts to exercise. Furthermore, despite the Model Act's provision that the failure of the committee to object to a rule is not an implied legislative authorization of the rule,\(^{170}\) the likelihood is that reviewing courts will not scrutinize an ultra vires challenge as carefully when there is no committee objection to a rule as when there is an objection. There will be even less of a judicial "hard look" if the committee failed to object to a rule after instituting a public proceeding to assist it in its review. Persons affected by agency rules may come to rue this consequence of the legislative review process and have added reason to maximize the political pressures on the committee.

VII. GUBERNATORIAL AND LEGISLATIVE REVIEW OF INTERPRETATIVE RULES

Undoubtedly, as Bonfield writes, the provisions for gubernatorial and legislative review of agency rules are among the Model Act's "most important and controversial innovations."\(^{171}\) Even if these provisions are accepted for the review of legislative rules, all the doubts expressed about the review process are magnified with respect to interpretative rules, which also are subject to it. The governor and the legislative rules review committee are not as competent as the agency, let alone a court, to interpret the enabling statute or the legislative rules adopted by the agency. We should not lightly countenance the intrusion of political considerations into this area of law interpretation and law application.

There may also be constitutional objections to the governor's power to rescind or suspend, and the legislative committee's power to object to, all or part of an interpretative rule on the ground that their exercise usurps the traditional role of the judiciary.\(^{172}\) Bonfield concludes, however, that while "there may be some residual doubts as to the constitutionality" of the

\(^{170}\) MODEL ACT, supra note 4, § 3-204(d)(6), Appendix pp. 602-03 infra.

\(^{171}\) A. BONFIELD, supra note 5, at 550.

committee's power to object to an agency's rule, this power is likely to be upheld under most, if not all, state constitutions. These doubts are much stronger with respect to interpretative rules than legislative rules.

VIII. JUDICIAL REVIEW OF AGENCY RULES

A. AGENCY ACTION REVIEWABLE

The Model Act subjects all "final agency action" to judicial review and defines "agency action" to include "the failure to issue a rule," as well as "every other species of agency activity." It also subjects nonfinal agency action to judicial review if "postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement."

Bonfield does not discuss the applicability of these provisions to the judicial review of interpretative rules. As I indicated previously, I doubt the wisdom of subjecting to judicial review an agency's failure to issue interpretative rules. It is not clear whether the Model Act subjects all interpretative rules to direct, pre-enforcement review. As examples of nonfinal agency action, Bonfield gives "preliminary or procedural agency action in the course of a rule-making proceeding." An interpretative rule does not fall into this category. But the Model Act's definition of nonfinal action is broader than these examples would indicate. It includes "the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency."

An interpretative rule may reasonably be viewed as a de-

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173. See A. BONFIELD, supra note 5, at 547. Bonfield does not discuss the constitutionality of the governor's power over interpretative rules.

174. See MODEL ACT, supra note 4, § 5-102, Appendix pp. 604-05 infra.

175. Id. § 1-102(2), Appendix p. 588 infra; see also A. BONFIELD, supra note 5, at 558.

176. MODEL ACT, supra note 4, § 5-103(2), Appendix p. 605 infra.

177. See supra notes 100-04 and accompanying text.

178. A. BONFIELD, supra note 5, at 558.

179. MODEL ACT, supra note 4, § 5-102(b)(2), Appendix pp. 604-05 infra. "Final agency action" is defined as "the whole or part of any agency action other than non-final agency action." Id. § 5-102(b)(1), Appendix p. 604 infra.
termination “preparatory . . . or intermediate with regard to subsequent agency action.” If so, there would be only a limited right to secure direct judicial review of the rule. Such a reading of the Model Act would put it more in conformity with current federal law than a reading that allows direct review of all interpretative rules. The validity of an interpretative rule usually comes into question when it is reflected in some other action taken by the agency—an adjudication or enforcement proceeding, for example—or is material to an issue raised in an action between private parties. On the federal level, review of an interpretative rule is normally postponed until the subsequent action is reviewed. It will then be reviewed on the basis of the record made in the proceeding involving that action. Yet a particular interpretative rule may be subject to direct, pre-enforcement review if it is “a general, interpretative ruling signed by the head[s] of an agency” that “has been crystallized following reflective examination in the course of the agency’s interpretative process”; there is not “in preparation or imminent” an enforcement action “close in time” that “permits an equally convenient determination” of the validity of the interpretative rule; the issue of validity of the interpretative rule does not “turn on the development of specific fact situations,” so that “[t]here is no ‘record’ to be studied or made” except “that established by such materials as the law and its legislative history”; the parties seeking direct review of the interpretative rule will suffer hardship if review is postponed; and “the [judicial] determination in [the direct review proceeding] will have a reasonably broad res judicata effect.”

If the Model Act is read to make all interpretative rules subject to direct pre-enforcement review, it should be changed by states that adopt it so that an interpretative rule is nonfinal

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180. Id. § 5-102(b)(2), Appendix pp. 604-05 infra.
181. See id. § 5-103, Appendix p. 605 infra.
182. See, e.g., Skidmore v. Swift & Co., 323 U.S. 134 (1944) (civil suit by employees to recover damages for overtime pay required interpretation under the administrative regulations of whether the hours in question were “hours worked” under the Fair Labor Standards Act).
184. Id. at 702.
185. Id. at 703.
186. Id.
187. Id. at 695.
188. Id. at 696.
189. Id. at 704.
agency action subject to a limited right to direct review—limited in accordance with Judge Leventhal’s opinion in National Automatic Laundry and Cleaning Council.\textsuperscript{190}

B. STANDING, EXHAUSTION OF ADMINISTRATIVE REMEDIES AND RIPENESS

Unlike FAPA, the Model Act courageously specifies the requirements that a person must meet to have standing to obtain judicial review of agency action. Both the “injury in fact”\textsuperscript{191} and “zone of interests”\textsuperscript{192} requirements must be satisfied. The latter test for standing is stated most succinctly and admirably: the “person’s asserted interests [must be] among those that the agency was required to consider when it engaged in the agency action challenged.”\textsuperscript{193}

Unlike FAPA, too, the Model Act also specifies in unexceptionable fashion the elements of the doctrine that a person may seek judicial review only after exhausting available administrative remedies.\textsuperscript{194} The Model Act, however, says nothing about the ripeness doctrine, except to the extent that the doctrine is inherent in the Model Act’s provisions that guarantee to persons who satisfy all other requirements the right to judicial review of final agency action but confer on such persons only a limited right to judicial review of nonfinal agency action. But even under federal law, which has greatly expanded the direct, pre-enforcement review of legislative rules,\textsuperscript{195} certain legislative rules, though constituting final agency action, may still not be ripe for judicial review.\textsuperscript{196} Bonfield does not discuss the applicability of the ripeness doctrine under the Model Act. It

\textsuperscript{190} Id. at 702 (“The ultimate question is whether the problems generated by pre-enforcement review are of such a nature that, taken together, they outweigh the hardship and interest of plaintiff's members and establish that judicial review of the interpretative ruling should be deferred.”); see also supra notes 183-89 and accompanying text. This case allowed direct, pre-enforcement review of an interpretative rule of the Administrator of the Wage and Hour Division of the Department of Labor that coin-operated laundries were subject to the Fair Labor Standards Act as amended in 1966. Id. at 691.


\textsuperscript{192} Id. at 153.

\textsuperscript{193} MODEL ACT, supra note 4, § 5-106(a)(5)(ii), Appendix p. 606 infra.

\textsuperscript{194} Id. § 5-107, Appendix pp. 606-07 infra.

\textsuperscript{195} See Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) (“[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress.”); Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 168 (1967) (same).

\textsuperscript{196} See, e.g., Toilet Goods Ass'n v. Gardner, 387 U.S. at 162-63 (Although
would be unfortunate if the Model Act intended to discard the ripeness doctrine entirely. Reviewing courts should have discretion to determine the ripeness of particular legislative rules for direct, pre-enforcement review.

C. THE RECORD FOR JUDICIAL REVIEW

1. Nonexclusivity of Administrative Rulemaking Record

I have elsewhere 197 lamented the fact that, by requiring the informal administrative rulemaking record to be the exclusive basis for judicial review and, consequently, for administrative decision, judicial decisions and provisions in some enabling statutes have eliminated the radical difference FAPA makes between the procedures prescribed for informal, notice-and-comment rulemaking 198 and those prescribed for formal, on-the-record rulemaking. 199 This development has contributed significantly to the length and complexity of federal rulemaking proceedings and has encouraged resort to judicial review to upset adopted rules on procedural grounds. 200

For these reasons, I have suggested that the administrative procedures for rulemaking not be formulated with the thought of building a record for judicial review. 201 Any person seeking to attack the validity of a rule should be required first to file a protest against the rule with the agency. The agency would then conduct an on-the-record, though not necessarily a trial-type, proceeding to determine the merits of the protest. The agency's disposition of the protest would be subject to judicial review on the basis, exclusively, of the record made in the protest proceeding. 202

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197. See generally Auerbach, supra note 115, at 16 ("This article proposes a return to the original understanding of the APA which distinguishes between the administrative proceedings on the basis of which an agency promulgates an informal rule and the record on the basis of which the courts determine the rule's validity.").


199. Id. §§ 553(c), 556, 557.


201. Auerbach, supra note 115, at 61.

202. See id. at 61-68.
The Model Act does not accept this suggestion. Nevertheless, it rejects the notion of an exclusive administrative rulemaking record for purposes of judicial review. For this reason alone, it is preferable to the developing federal law. It does, however, make important concessions to the concept of an exclusive administrative rulemaking record that are unnecessary and unwise.

2. The Official Agency Rulemaking Record

The Model Act calls for the making of an "official rulemaking record" for each proposed or adopted rule.203 Bonfield reads this requirement very broadly to include in this record "[w]ritten materials from inside or outside the agency that were in its possession prior to the formal proposal of a rule, as well as materials that come into its possession after the start of [the rulemaking] proceeding, [if they] relate in some way to the 'formulation' or 'proposal' of the rule" and even if the agency heads did not consider them but agency employees did.204

Ex parte oral communications need not be summarized in writing and included in the official rulemaking record.205 Such communications are not prohibited by the Model Act because they are essential to the implementation of the political model of administrative lawmaking. These oral communications, Bonfield explains, convey to the agency the kind of information and subject it to the pressure "that would be focused on the legislature if it sought to make [the] rules itself."206 They make possible off-the-record negotiations that will help to assure the acceptability of the rules to the legislature and the community at large.207

The issue of ex parte oral communications in informal rulemaking is one of the thorniest issues in current administrative law. Bonfield handles it with full awareness of its implications, but some of his conclusions need to be qualified. In the first place, the distinction between oral and written communications is difficult to justify in all cases. Ex parte written communications also are not barred by the Model Act but, unlike ex parte oral communications, they must be included in the official rulemaking record. Yet off-the-record written communi-
cations may also be necessary to facilitate negotiations and assure the political acceptability of the rules.

More is involved than the accommodation of the rationality and political models of rulemaking. As Bonfield indicates, there also is involved the question whether ex parte communications deprive parties of fair opportunity to challenge the factual and other justifications for the rule—an issue of fundamental fairness bordering on constitutional due process.

Of course, a challenged rule will stand or fall on the basis of the factual support for it in the record to which the reviewing court is confined, whether that record is the administrative rulemaking record, a record made anew in the court, or the administrative record plus whatever supplementation is permitted during the course of the review proceedings. Fairness requires that the parties challenging the rule should have had full opportunity to comment on this factual support before the court decides the matter. So long as this opportunity is afforded, it may not matter whether there were also ex parte oral or written communications to the agency that were not made part of the record for judicial review. Yet if these communications, written or oral, contain factual material bearing upon the merits of the rule, failure to disclose that material to the parties challenging the rule may diminish the insight and effectiveness with which they will be able to attack the record support for the rule.

Fairness to affected parties may be assured, Bonfield recognizes, by allowing ex parte oral communications but requiring them “to be summarized in writing and included in the agency rule-making record” whenever they contain “factual material relevant to the technical merits of a proposed rule.” Requiring all written, but not oral, communications to be included in the record may then be justified because “it is unlikely that significant or dispositive factual information relevant to the technical merits of a proposed rule will often be communicated to an agency through oral ex parte communications,” but the reverse is true about written ex parte communications.

208. Bonfield explains the result in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), on the ground that the prohibition of ex parte oral communications in that case was thought essential to implement the rationality model of rulemaking. A. BONFIELD, supra note 5, at 336.

209. Id. at 338.
210. Id. at 340.
211. Id.
212. Id. at 341.
communications. This is the “compromise” adopted in *Sierra Club v. Costle*, which Bonfield states the Model Act rejected. With all due respect to the reporter-draftsmen of the Model Act, this conclusion needs important modification. Like the Model Act, neither FAPA nor the Clean Air Act involved in *Sierra Club v. Costle* bans ex parte oral or written communication. Like the Model Act, the Clean Air Act requires all written communications, but not such ex parte oral communications, to be included in the rulemaking record. Unlike the Model Act, however, the Clean Air Act provides that the administrative rulemaking record is to be exclusive for purposes of agency action and judicial review. Under the Model Act, “the agency rulemaking record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof.”

Because of the exclusivity of the administrative rulemaking record under the Clean Air Act, the court in *Sierra Club v. Costle* took the position that ex parte oral communications made to the EPA during its consideration of regulations to control the emissions of new coal-burning electric power plants had to be summarized in writing and included in the record if they contained “information central to the justification of the rule.” If the parties challenging the EPA regulations were to have full opportunity to comment on such information, and the administrative record was to be exclusive, they had to be given this opportunity before the agency completed its rulemaking proceeding.

Although Bonfield explains that the Model Act rejects this “compromise” or “solution” of *Sierra Club v. Costle*, nothing in the language of the Model Act would prevent the parties challenging a rule from persuading the reviewing court to require ex parte oral communications containing factual information critical to a proposed rule to be summarized in writing and

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213. 657 F.2d 298, 404, 407 (D.C. Cir. 1981) (stating that all written responses prior to promulgation from the executive branch should be docketed, id. at 404; however, documentation of such oral ex parte proceedings need not be docketed unless the rule is based “on any ’information or data’ arising from that meeting,” id. at 407).

214. See A. Bonfield, supra note 5, at 340.

215. See *Sierra Club*, 657 F.2d at 392 n.464 (citing, in part, the Clean Air Act, § 307, 42 U.S.C. § 7607(d)).

216. See id.

217. MODEL ACT, supra note 4, § 3-112(c), Appendix pp. 597-98 infra.


219. A. Bonfield, supra note 5, at 340.
added to the record for judicial review, together with the comments of the parties on this information. The purpose served by the *Sierra Club v. Costle* solution would thus be served under the Model Act, but at the judicial review stage and not during the rulemaking proceeding.

Bonfield apparently accepts this conclusion when he writes that "[i]f an agency fails to disclose adequately the contents of an ex parte communication that is relevant to the merits of a proposed rule, and opposing parties are seriously prejudiced thereby, the failure can be challenged on judicial review." But it would never be necessary in such a case, as Bonfield supposes, to reverse the agency's action with respect to the particular rule. It would only be necessary, as indicated above, for the reviewing court to order that the contents of these ex parte communications be added to the record and provide an opportunity to the opposing parties to comment on the contents.

In sum, agencies should be required to summarize in writing and include in the administrative rulemaking record all ex parte oral or written communications containing "information central to the justification of the rule." But the failure of an agency to do so should not invalidate the rule. Instead, the court should require this information to be disclosed and commented upon at the judicial review stage.

3. The Agency Record for Judicial Review

The Model Act provides that the agency record for judicial review may consist not only of the official agency rulemaking record, but also of documents that may not have been inserted in that record but are "identifying by the agency as having been considered by it before its action and used as a basis for its action." Furthermore, the agency record for judicial review may be supplemented by additional evidence taken in a number of different ways.

The reviewing court may remand the matter to the agency if it finds that:

new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, until after the agency action, and the interests of justice would

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220. *Id.* at 338.
221. *Id.* at 339.
222. MODEL ACT, *supra* note 4, § 5-115(a), Appendix p. 609 infra.
223. *Id.* §§ 5-113, 5-115, Appendix pp. 608-09 infra.
be served by remand to the agency; the agency improperly excluded or omitted evidence from the record; or a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

If remand to the agency is not warranted, the court itself may receive additional evidence relating to the validity of the agency action at the time it was taken and needed to decide disputed issues regarding improper constitution as a decision-making body, or improper motive or grounds for disqualification, of those taking the agency action; unlawfulness of procedure or of decision-making process; or any material fact that was not required by any provision of law to be determined exclusively on an agency record of a type reasonably suitable for judicial review. This last provision would enable those challenging the rule to refute or comment on the material facts in the agency record for judicial review that were not inserted in the agency rulemaking record. It would also enable the agency to add material facts buttressing its rule.

The Uniform Law Commissioners suggest, as an alternative to the reviewing court itself receiving additional evidence, that the court, “having due regard for the convenience of the parties,” appoint a referee, master, or trial court judge to do so.

Bonfield recognizes that the Model Act provision authorizing the reviewing court to remand a matter to the agency is a “partial substitute” for my proposed protest proceeding. But even if the protest procedure is not adopted, why should the Model Act limit the reviewing court’s authority to remand? Why should not the reviewing court be encouraged to remand to the agency whenever it decides it is appropriate to do so in light of the issues raised by the challengers’ or agency’s offer of additional evidence? Generally, a remand is the more desirable alternative. If a reviewing court remands, instead of itself receiving additional evidence that bears on the merits of the agency action, the agency will take the opportunity to reconsider its action and modify it to meet valid objections. It may

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224. Id. § 5-114(b)(2), Appendix p. 608 infra.
225. Id. § 5-114(b)(3), Appendix pp. 608-09 infra.
226. Id. § 5-114(b)(4), Appendix pp. 608-09 infra. Section 5-114(b)(1) also authorizes a remand if “the agency was required by [the Model] Act or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record.” Id. § 5-114(b)(1), Appendix p. 608 infra.
227. Id. § 5-114(a), Appendix p. 608 infra.
228. Id.; see also id. Alternative B § 5-104(c), Appendix p. 605 infra.
229. A. BONFIELD, supra note 5, at 568 n.21.
be reluctant to take such steps when placed in the adversary position of defending its action in court.

Furthermore, why is the reviewing court merely authorized but not required to take additional evidence under the specified conditions? The need for such a requirement is urgent because the Model Act provides that "a petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal." Such a petitioner should have the right to adduce at the judicial review stage whatever evidence it has that challenges the validity of the rule.

4. The Time When Validity of a Rule Is To Be Determined

The Model Act requires the reviewing court to determine the validity of the agency action "at the time it was taken." Bonfield clarifies this limitation in important ways. He points out that the term "agency action" includes not only the initial adoption of a rule but also "subsequent agency action relying upon that rule as effective law." Thus, a petition for judicial review may challenge an agency's "subsequent reliance on the rule," and its validity must be determined "exclusively on the basis of the factual and legal circumstances relevant to its legality" at the time the agency relies upon the rule. New evidence, therefore, may be offered as to these factual and legal circumstances. If this new evidence demonstrates illegality, the rule should be held to be illegal "only for the period subsequent to the existence" of the evidence, assuming, of course, the rule "was legal at the time it was initially adopted, on the basis of factors relevant to [its] legality . . . at the time of its adoption." Bonfield further explains that "material created or accumulated subsequent to the adoption of a rule will often be relevant to the legality of the rule at the time it was initially adopted" and so may be offered to supplement the agency record in a judicial review proceeding challenging the rule at the

230. MODEL ACT, supra note 4, § 5-107(1), Appendix p. 606 infra.
231. Id. §§ 5-116(a)(2), 5-114, Appendix pp. 608-09 infra.
232. A. BONFIELD, supra note 5, at 571. The Model Act's definition of "agency action" does not spell this out. See MODEL ACT, supra note 4, § 1-102(2), Appendix p. 588 infra.
233. A. BONFIELD, supra note 5, at 571.
234. Id.
235. Id.
time of adoption.\textsuperscript{236}

5. Limitation of Issues That May Be Raised on Review

At the same time, the agency and the parties supporting the rule may use "[only the ['particular factual, legal, and policy'\textsuperscript{237}] reasons contained in the concise explanatory statement . . . as justifications for the adoption of the rule."\textsuperscript{238} But "the agency may, in a proceeding challenging the validity of the rule, add further materials to the existing agency rule-making record to demonstrate the propriety of those particular reasons contained in the concise explanatory statement."\textsuperscript{239}

Few would dispute the soundness of Bonfield’s view that agencies should not be permitted "to offer at a later time false, but convenient, rationalizations for their earlier, otherwise unsupportable actions."\textsuperscript{240} Even so, Bonfield does not fully take account of the fact that the Model Act does not make the agency rulemaking record the exclusive record for judicial review.\textsuperscript{241} Any person challenging a rule, having participated in the rulemaking proceeding or not, may raise in the reviewing court issues that were not raised before the agency, provided only that "the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise" these issues.\textsuperscript{242} The challenger may introduce new evidence that is material to these issues. Even without raising new issues, those challenging a rule may supplement the record with new material evidence attacking the legislative facts upon which the rule is based. The agency, of course, may meet the new issues and the new evidence. Out of this exchange new justifications for the rule may emerge. Why should not these new justifications be considered by the reviewing court?

Bonfield fears that

\textsuperscript{236} Id. at 572.
\textsuperscript{237} See id. at 316; see also supra text accompanying note 116.
\textsuperscript{238} MODEL ACT, supra note 4, § 3-110(b), Appendix p. 556 infra.
\textsuperscript{239} A. BONFIELD, supra note 5, at 316.
\textsuperscript{240} Id. at 319.
\textsuperscript{241} All the cases cited by Bonfield in support of the provision in question assume that the formal adjudicatory record or informal rulemaking record will be the exclusive record for judicial review purposes. See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947); SEC v. Chenery Corp., 318 U.S. 80, 87, 95 (1943); Rodway v. United States Dep’t of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975); Tri-State Generation and Transmission Ass’n v. Environmental Quality Council, 590 P.2d 1324, 1330-33 (Wyo. 1979).
\textsuperscript{242} MODEL ACT, supra note 4, § 5-112(3), Appendix p. 607 infra.
if agencies could rely, in defending their rules, on reasons invented subsequent to the adoption of those rules, they could also make their rules in a way that would entirely remove from the scrutiny of the rule-making process those later justifications which ultimately become the basis for upholding the rule. 243

But if this occurred, the parties challenging the rule would have full opportunity during the judicial review proceedings to refute these reasons with additional evidence and argument. This may also produce a situation in which the reviewing court would remand the matter to the agency. There is no reason to assume that the agency, aware of these possibilities, would rather litigate the validity of the new reasons than consider them in the rulemaking process whenever that was possible.

Bonfield’s concern would be alleviated if the reviewing court required the agency to amend its explanatory statement whenever the agency wished to add to, delete, or change the reasons for the rule incorporated in the statement. This would assure the reviewing court that the agency itself was taking this action and that the court was not faced with post-hoc rationalizations invented by lawyers anxious to win a case.

Bonfield acknowledges that the limitation of the agency to the reasons contained in the concise explanatory statement is not “foolproof.” 244 “An agency bent on making a rule for the wrong reasons may do so... if it is careful enough to provide a statement of reasons for cosmetic effect.” 245 But does not the limitation in question give added encouragement to such statements of reasons? Will there not also be fruitless litigation about whether agency statements of reasons, which will become more and more general because of this limitation, encompass the particular justifications advanced by the agency in the judicial review proceeding?

I may be forgiven mention of the fact that my suggested protest procedure would completely obviate these difficulties envisaged by Bonfield. In any case, when a rule otherwise lawful is challenged because the reasons justifying it were not articulated in the concise explanatory statement to the reviewing court’s satisfaction, the proper course of action would be for the court to remand the matter to the agency and not, as Bonfield contends, to invalidate the rule and require the agency to initiate an entirely new rulemaking proceeding. 246

243. A. BONFIELD, supra note 5, at 319.
244. Id. at 320.
245. Id.
246. See id. Although the Securities and Exchange Commission’s (SEC’s)
Finally, it should be noted that the limitation in question initial order in SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943) (Chenery I) was set aside, the case was remanded to the agency and the SEC's new order was upheld even though it was applied retroactively. SEC v. Chenery Corp., 332 U.S. 194, 203, 207 (1947) (Chenery II). Relying, in part, on Chenery I, the Supreme Court also remanded to the agency in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978), to allow the agency to reconsider an action that was not sustainable on the informal administrative rulemaking record; it did not require the agency to institute a new rulemaking proceeding. See also Camp v. Pitts, 411 U.S. 138, 142-43 (1973) ("If ... there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing but, ... to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.").

National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975), and Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972), are in accord with Vermont Yankee, although both were decided before that case. In National Nutritional Foods Ass'n, the Second Circuit found the FDA Commissioner's stated reason for a rule classifying high potency vitamins as "prescription drugs" (their potential toxicity in high doses, 512 F.2d at 692, and demonstrated uselessness as food for most people make them "appropriate only for therapeutic purposes," id. at 693, 703) to be insufficient as a matter of law. Id. at 703. It remanded the matter to the agency to enable it to adduce a different reason that was legally sufficient and might be supported by the record ("higher dosage forms [vitamins] were used almost exclusively for therapeutic purposes"). Id. In Kennecott, the court found that the informal rulemaking requirement of a "concise general statement" of the basis and purpose of the regulation had been satisfied but that the statement provided was not sufficient to allow judicial review. The record was remanded to the Administrator to supply an implementing statement for judicial review. 462 F.2d at 850-51.

In Rodway v. United States Dept' of Agriculture, 514 F.2d 809 (D.C. Cir. 1975), the agency failed to follow any of the informal rulemaking procedures of 5 U.S.C. § 553 with respect to the challenged rules. Rodway, 514 F.2d at 814. No notice of the proposed rules was given, no comments respecting them were received, and no statement of their basis and purpose was issued. Id. No administrative rulemaking record was compiled. Id. at 816. Because of these deficiencies, the agency was required to institute a new proceeding. Id. at 817. In view of their importance, however, the challenged rules were left in place pending the outcome of the new proceeding. Id.

In Tabor v. Joint Bd. for the Enrollment of Actuaries, 566 F.2d 705 (D.C. Cir. 1977), the reviewing court vacated the rules and remanded for the institution of a new rulemaking proceeding, but only because, as in Rodway, the agency accompanied the issuance of the rule with no published statement of its basis and purpose, but sought to produce such a statement as a litigation document. Id. at 709, 712. The D.C. Circuit stressed not only the "potential unreliability" of such a litigation document but also the fact that "the Board's failure to publish a contemporaneous statement of basis and purpose made it practically impossible to file an intelligent petition for reconsideration ... a method of challenge less expensive and time consuming than judicial review." Id. at 711. Nevertheless, one may question whether it may not have been preferable, even in this situation, to remand to the agency to give it the alternative of producing a statement of basis and purpose consistent with the record
makes no sense whatsoever with regard to the judicial review of interpretative rules, whether or not adopted in accordance with the rulemaking procedures applicable to legislative rules. Nor, indeed, do the Model Act's provisions regarding the agency record for judicial review and its supplementation in the reviewing court make sense for interpretative rules.

6. Scope of Review

The standards for judicial review of rulemaking specified in the Model Act are, on the whole "familiar and non-controversial."248

a. The Substantial Evidence Test.

Unlike FAPA, however, the Model Act provides that the reviewing court may set aside agency action "based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court."249 Bonfield explains that "the 'substantial evidence' standard . . . applies to judicial review of legislative facts on which a rule rests."250 Under FAPA, the substantial evidence standard applies only to formal, on-the-record rulemaking; if the rule is the result of informal, notice-and-comment rulemaking, the "arbitrary, capricious, an abuse of discretion" standard applies.251

On the whole, Bonfield may be correct that the use of the substantial evidence standard to review the legislative facts underlying a rule is likely to produce the same result as use of the arbitrary and capricious standard.252 Yet it may alter the presented to the court for review or reopening the rulemaking proceeding to supplement that record.

In Tri-State Generation and Transmission Ass'n v. Environmental Quality Council, 590 P.2d 1324 (Wyo. 1979), the agency did not state any reasons for its rule. See id. at 1329. The rule was not invalidated, nor was the agency required to start an entirely new proceeding; it was simply asked to state its reasons for the challenged rule formally. Id. at 1332.

247. MODEL ACT, supra note 4, § 5-116, Appendix pp. 609-10 infra.
248. A. BONFIELD, supra note 5, at 574.
249. MODEL ACT, supra note 4, § 5-116(c)(7), Appendix pp. 609-10 infra.
250. A. BONFIELD, supra note 5, at 576.
251. 5 U.S.C. § 706(2)(A), (E). Section 706(2)(E) also makes the substantial evidence standard applicable if the rule is "otherwise reviewed on the record of an agency hearing provided by statute." This provision would not apply to these cases in which the courts, without such a statutory provision, have imposed the concept of an exclusive administrative informal rulemaking record for purposes of judicial review.
252. See A. BONFIELD, supra note 5, at 576.
viewing court's approach to its task in cases like *Industrial Union Dep't, AFL-CIO v. Hodgson.* Reviewing standards fixed by the Secretary of Labor under the Occupational Safety and Health Act (OSHA) to limit the atmospheric concentrations of asbestos dust in industrial workplaces, Judge McGowan drew a distinction in that case between two categories of legislative fact determinations. The first category consists of legislative fact determinations based on the evaluation of data and conclusions drawn therefrom. The court, according to Judge McGowan, is able to apply the substantial evidence standard to these determinations; it "can review that data in the record and determine whether it reflects substantial support for the Secretary's findings." The other category consists of legislative fact determinations "on the frontiers of scientific knowledge [as to which] insufficient data is presently available to make a fully informed factual determination." In this area, "[d]ecision making must . . . depend to a greater extent upon policy judgments and less upon purely factual analysis."

Judge McGowan continued: “[P]olicy choices . . . are not susceptible to the same type of verification or refutation by reference to the record as are some factual questions. Consequently, the court's approach must necessarily be different no matter how the standards of review are labeled.” In reviewing the policy choices, the court will require the agency to identify carefully the reasons why it chose "to follow one course rather than another." If the choice "purports to be based on the existence of certain determinable facts, [the agency] must, in form as well as substance, find those facts from evidence in the record." If the agency "is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, [the agency] should so state and go on to identify the considerations [it] found persuasive."

It may be that state reviewing courts will adopt the approach under the Model Act's substantial evidence test that

253. 499 F.2d 467 (D.C. Cir. 1974).
254. Id. at 469-70.
255. Id. at 474.
256. Id.
257. Id.
258. Id. at 475.
259. Id.
260. Id. at 475-76.
261. Id. at 476.
Judge McGowan adopted under OSHA's substantial evidence test. State courts will be encouraged to do so by Bonfield's view that "the actual substance of the test used by courts to determine the legality of agency fact-finding in rule making is the same" under the Model Act as under FAPA.262 Under both the "substantial evidence" and "arbitrary or capricious" standards, "courts must uphold agency fact-finding if it is rational—that is, if it is within the range of well-considered dispassionate judgment."263 Nevertheless, the Model Act would have a better chance of achieving this desirable result if it embodied the "arbitrary or capricious," rather than the "substantial evidence," standard for the review of the legislative facts underlying the adopted rule. The former standard is appropriate for both the categories of legislative fact determinations distinguished by Judge McGowan; the latter is not.

**b. Erroneous Interpretation or Application of Law.**

The Model Act also authorizes the reviewing court to invalidate a rule if the agency "has erroneously interpreted or applied the law."264 Bonfield is displeased with this provision because it does not "adequately identify . . . those matters as to which a reviewing court may substitute its judgment de novo for that of the agency, and those matters entrusted to authoritative agency resolution over which a court has only limited review powers."265 He urges state reviewing courts to read this provision in light of the Uniform Law Commissioners' comment, which distinguishes between the scope of review of the agency's interpretation of law and the scope of review of the agency's application of law. The comment states that "a court may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation [but] a court should find reversible error in the agency's application of the law only if the agency has improperly exercised its discretion."266 Bonfield finds this distinction "to be sound in principle."267

The Model Act provision in question, we may agree, is poorly drafted. It also reveals the pitfalls of drafting too de-

262. A. BONFIELD, supra note 5, at 577.
263. Id.
264. MODEL ACT, supra note 4, § 5-116(c)(4), Appendix pp. 609-10 infra.
265. A. BONFIELD, supra note 5, at 587-88.
266. Id. at 584 (quoting MODEL ACT, supra note 4, § 5-116 comment).
267. Id.
tailed standards for judicial review. The generalization in the comment is to be preferred over the generalization in the provision in question. But even the generalization in the comment is not always valid. The scope of review may depend on the nature of the issue being raised. Courts often do not overturn an agency interpretation, even if they disagree with it, if both the agency interpretation and the interpretation the court would adopt independently are reasonably born by the statutory language and are consistent with the statutory purpose but the agency reasonably maintains that its interpretation will better effectuate the statutory objectives. On the other hand, agency application of law often has legal aspects and raises issues that Bonfield recognizes\(^\text{268}\) the reviewing court should determine independently.

**CONCLUSION**

Assessing the Model Act as a whole, I find that many of my objections to particular provisions of the Model Act are provoked by one of its central characteristics. The Model Act, and often Bonfield's justifications, assume agencies are capable of the worst and so procedures must be devised to prevent the worst from happening. This assumption may reflect the realities of current state government in action. Nevertheless, legislatures considering the adoption of a new administrative procedure act should appreciate that agencies must have a modicum of official, if not popular, trust if they are to be effective instruments of democratic government. The effort to control the administrative process too tightly may be counterproductive.

Yet, all in all, the Model Act is so superior to the existing state administrative procedure acts that it merits adoption, even without change. Bonfield's book should hasten its adoption and stimulate scholarly interest in state administrative law.

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268. A. Bonfield, *supra* note 5, at 582.
ARTICLE I GENERAL PROVISIONS

§ 1-102. [Definitions]

As used in this Act:

(2) “Agency action” means:
(i) the whole or a part of a rule or an order;
(ii) the failure to issue a rule or an order; or
(iii) an agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

(5) “Order” means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons. [The term does not include an “executive order” issued by the governor pursuant to Section 1-104 or 3-202.]

(10) “Rule” means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule.

(11) “Rule making” means the process for formulation and adoption of a rule.

ARTICLE II PUBLIC ACCESS TO AGENCY LAW AND POLICY

§ 2-101. [Administrative Rules Editor; Publication, Compilation, Indexing, and Public Inspection of Rules]

(a) There is created, within the executive branch, an [administrative rules editor]. The governor shall appoint the [administrative rules editor] who shall serve at the pleasure of the governor.

(c) The [administrative rules editor] shall cause the [ad-
ministrative bulletin] to be published in pamphlet form [once each week]. . . . The [administrative bulletin] must contain:

(1) notices of proposed rule adoption prepared so that the text of the proposed rule shows the text of any existing rule proposed to be changed and the change proposed;

(2) newly filed adopted rules prepared so that the text of the newly filed adopted rule shows the text of any existing rule being changed and the change being made;

(3) any other notices and materials designated by [law] [the administrative rules editor] for publication therein; and

(4) an index to its contents by subject.

(d) The [administrative rules editor] shall cause the [administrative code] to be compiled, indexed by subject, and published [in loose-leaf form]. All of the effective rules of each agency must be published and indexed in that publication. . . .

(e) The [administrative rules editor] may omit from the [administrative bulletin or code] any proposed or filed adopted rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if:

(1) knowledge of the rule is likely to be important to only a small class of persons;

(2) on application to the issuing agency, the proposed or adopted rule in printed or processed form is made available at no more than its cost of reproduction; and

(3) the [administrative bulletin or code] contains a notice stating in detail the specific subject matter of the omitted proposed or adopted rule and how a copy of the omitted material may be obtained.

* * *

(g) Except as otherwise required by a provision of law, subsections (c) through (f) do not apply to rules governed by Section 3-116, and the following provisions apply instead:

(1) Each agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its rules within the scope of Section 3-116. Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Section 3-116(2), the compilation must be made available for public inspection and copying. Certified copies of the full compilation must also be furnished to the [secretary of state, the administrative rules counsel, and members of the
administrative rules review committee], and be kept current by the agency at least every [30] days.

(2) A rule subject to the requirements of this subsection may not be relied on by an agency to the detriment of any person who does not have actual, timely knowledge of the contents of the rule until the requirements of paragraph (1) are satisfied. The burden of proving that knowledge is on the agency. This provision is also inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

§ 2-104. [Required Rule Making]

In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of the organization of the agency which states the general course and method of its operations and where and how the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency; [and]

(3) as soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this Act, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers; [and] []

[(4) as soon as feasible and to the extent practicable, adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases.]

ARTICLE III RULE MAKING

Chapter I Adoption and Effectiveness of Rules

§ 3-101. [Advice on Possible Rules before Notice of Proposed Rule Adoption]

(a) In addition to seeking information by other methods, an agency, before publication of a notice of proposed rule adoption under Section 3-103, may solicit comments from the public on a subject matter of possible rule making under active consideration within the agency by causing notice to be published in
the [administrative bulletin] of the subject matter and indicating where, when, and how persons may comment.

(b) Each agency may also appoint committees to comment, before publication of a notice of proposed rule adoption under Section 3-103, on the subject matter of a possible rule making under active consideration within the agency. The membership of those committees must be published at least [annually] in the [administrative bulletin].

§ 3-102. [Public Rule-Making Docket]

(a) Each agency shall maintain a current, public rule-making docket.

(b) The rule-making docket [must] [may] contain a listing of the precise subject matter of each possible rule currently under active consideration within the agency for proposal under Section 3-103, the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of that possible rule.

(c) The rule-making docket must list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication of a notice of proposed rule adoption, to the time it is terminated, by publication of a notice of termination or the rule becoming effective. For each rule-making proceeding, the docket must indicate:

(1) the subject matter of the proposed rule;
(2) a citation to all published notices relating to the proceeding;
(3) where written submissions on the proposed rule may be inspected;
(4) the time during which written submissions may be made;
(5) the names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
(6) whether a written request for the issuance of a regulatory analysis of the proposed rule has been filed, whether that analysis has been issued, and where the written request and analysis may be inspected;
(7) the current status of the proposed rule and any agency determinations with respect thereto;
(8) any known timetable for agency decisions or other action in the proceeding;
(9) the date of the rule’s adoption;
(10) the date of the rule’s filing, indexing, and publication; and
(11) when the rule will become effective.

§ 3-103. [Notice of Proposed Rule Adoption]

(a) At least [30] days before the adoption of a rule an agency shall cause notice of its contemplated action to be published in the [administrative bulletin]. The notice of proposed rule adoption must include:

(1) a short explanation of the purpose of the proposed rule;
(2) the specific legal authority authorizing the proposed rule;
(3) subject to Section 2-101(e), the text of the proposed rule;
(4) where, when, and how persons may present their views on the proposed rule; and
(5) where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

(b) Within [3] days after its publication in the [administrative bulletin], the agency shall cause a copy of the notice of proposed rule adoption to be mailed to each person who has made a timely request to the agency for a mailed copy of the notice. An agency may charge persons for the actual cost of providing them with mailed copies.

§ 3-104. [Public Participation]

(a) For at least [30] days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit in writing, argument, data, and views on the proposed rule.

(b)(1) An agency shall schedule an oral proceeding on a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for an oral proceeding is submitted by [the administrative rules review committee,] [the administrative rules counsel,] a political subdivision, an agency, or [25] persons. At that proceeding,
persons may present oral argument, data, and views on the proposed rule.

(2) An oral proceeding on a proposed rule, if required, may not be held earlier than [20] days after notice of its location and time is published in the [administrative bulletin].

(3) The agency, a member of the agency, or another presiding officer designated by the agency, shall preside at a required oral proceeding on a proposed rule. If the agency does not preside, the presiding official shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and be recorded by stenographic or other means.

(4) Each agency shall issue rules for the conduct of oral rule-making proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

§ 3-105. [Regulatory Analysis]

(a) An agency shall issue a regulatory analysis of a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for the analysis is filed in the office of the [secretary of state] by [the administrative rules review committee, the governor, a political subdivision, an agency, or [300] persons signing the request]. The [secretary of state] shall immediately forward to the agency a certified copy of the filed request.

(b) Except to the extent that the written request expressly waives one or more of the following, the regulatory analysis must contain:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(2) a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons;

(3) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(4) a comparison of the probable costs and benefits of
the proposed rule to the probable costs and benefits of inaction;

(5) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; and

(6) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

(c) Each regulatory analysis must include quantification of the data to the extent practicable and must take account of both short-term and long-term consequences.

(d) A concise summary of the regulatory analysis must be published in the [administrative bulletin] at least [10] days before the earliest of:

(1) the end of the period during which persons may make written submissions on the proposed rule;

(2) the end of the period during which an oral proceeding may be requested; or

(3) the date of any required oral proceeding on the proposed rule.

(e) The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding thereon if one is not already provided.

(f) If the agency has made a good faith effort to comply with the requirements of subsections (a) through (c), the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate.

§ 3-106. [Time and Manner of Rule Adoption]

(a) An agency may not adopt a rule until the period for making written submissions and oral presentations has expired.

(b) Within [180] days after the later of (i) the publication of the notice of proposed rule adoption, or (ii) the end of oral proceedings thereon, an agency shall adopt a rule pursuant to the rule-making proceedings or terminate the proceeding by publication of a notice to that effect in the [administrative bulletin].

(c) Before the adoption of a rule, an agency shall consider the written submissions, oral submissions or any memorandum
summarizing oral submissions, and any regulatory analysis, provided for by this Chapter.

(d) Within the scope of its delegated authority, an agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

§ 3-107. [Variance between Adopted Rule and Published Notice of Proposed Rule Adoption]

(a) An agency may not adopt a rule that is substantially different from the proposed rule contained in the published notice of proposed rule adoption. However, an agency may terminate a rule-making proceeding and commence a new rule-making proceeding for the purpose of adopting a substantially different rule.

(b) In determining whether an adopted rule is substantially different from the published proposed rule upon which it is required to be based, the following must be considered:

1. the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests;

2. the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule; and

3. the extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.

§ 3-108. [General Exemption from Public Rule-making Procedures]

(a) To the extent an agency for good cause finds that any requirements of Sections 3-103 through 3-107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection.

(b) In an action contesting a rule adopted under subsection (a), the burden is upon the agency to demonstrate that any omitted requirements of Sections 3-103 through 3-107 were unnecessary, impracticable, or contrary to the public interest in the particular circumstances involved.

(c) Within [2] years after the effective date of a rule
adopted under subsection (a), the [administrative rules review
committee or the governor] may request the agency to hold a
rule-making proceeding thereon according to the requirements
of Sections 3-103 through 3-107. The request must be in writing
and filed in the office of the [secretary of state]. The [secretary
of state] shall immediately forward to the agency and to the
[administrative rules editor] a certified copy of the request. No-
tice of the filing of the request must be published in the next
issue of the [administrative bulletin]. The rule in question
ceases to be effective [180] days after the request is filed. How-
ever, an agency, after the filing of the request, may subse-
quently adopt an identical rule in a rule-making proceeding
carried out pursuant to the requirements of Sections 3-103
through 3-107.

§ 3-109. [Exemption for Certain Rules]

(a) An agency need not follow the provisions of Sections
3-103 through 3-108 in the adoption of a rule that only defines
the meaning of a statute or other provision of law or precedent
if the agency does not possess delegated authority to bind the
courts to any extent with its definition. A rule adopted under
this subsection must include a statement that it was adopted
under this subsection when it is published in the [administra-
tive bulletin], and there must be an indication to that effect ad-
djacent to the rule when it is published in the [administrative
code].

(b) A reviewing court shall determine wholly de novo the
validity of a rule within the scope of subsection (a) that is
adopted without complying with the provisions of Sections 3-
103 through 3-108.

§ 3-110. [Concise Explanatory Statement]

(a) At the time it adopts a rule, an agency shall issue a
concise explanatory statement containing:

(1) its reasons for adopting the rule; and

(2) an indication of any change between the text of
the proposed rule contained in the published notice of pro-
posed rule adoption and the text of the rule as finally
adopted, with the reasons for any change.

(b) Only 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.
§ 3-112. [Agency Rule-making Record]

(a) An agency shall maintain an official rule-making record for each rule it (i) proposes by publication in the [administrative bulletin] of a notice of proposed rule adoption, or (ii) adopts. The record and materials incorporated by reference must be available for public inspection.

(b) The agency rule-making record must contain:

1. copies of all publications in the [administrative bulletin] with respect to the rule or the proceeding upon which the rule is based;

2. copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

3. all written petitions, requests, submissions, and comments received by the agency and all other written materials considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based;

4. any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by a presiding official summarizing the contents of those presentations;

5. a copy of any regulatory analysis prepared for the proceeding upon which the rule is based;

6. a copy of the rule and explanatory statement filed in the office of the [secretary of state];

7. all petitions for exceptions to, amendments of, or repeal or suspension of, the rule;

8. a copy of any request filed pursuant to Section 3-108(c);

9. a copy of any objection to the rule filed by the [administrative rules review committee] pursuant to Section 3-204(d) and the agency's response; and

10. a copy of any filed executive order with respect to the rule.

(c) Upon judicial review, the record required by this section constitutes the official agency rule-making record with respect to a rule. Except as provided in Section 3-110(b) or
otherwise required by a provision of law, the agency rule-making record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof.

§ 3-113. [Invalidity of Rules Not Adopted According to Chapter; Time Limitation]

(a) A rule adopted after [date] is invalid unless adopted in substantial compliance with the provisions of Sections 3-102 through 3-108 and Sections 3-110 through 3-112. However, inadvertent failure to mail a notice of proposed rule adoption to any person as required by Section 3-103(b) does not invalidate a rule.

(b) An action to contest the validity of a rule on the grounds of its noncompliance with any provision of Sections 3-102 through 3-108 or Sections 3-110 through 3-112 must be commenced within [2] years after the effective date of the rule.

§ 3-114. [Filing of Rules]

(a) An agency shall file in the office of the [secretary of state] each rule it adopts and all rules existing on the effective date of this Act that have not previously been filed. The filing must be done as soon after adoption of the rule as is practicable. At the time of filing, each rule adopted after the effective date of this Act must have attached to it the explanatory statement required by Section 3-110. The [secretary of state] shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the [secretary of state].

(b) The [secretary of state] shall transmit to the [administrative rules editor], [administrative rules counsel], and to the members of the [administrative rules review committee] a certified copy of each filed rule as soon after its filing as is practicable.

§ 3-115. [Effective Date of Rules]

(a) Except to the extent subsection (b) or (c) provides otherwise, each rule adopted after the effective date of this Act becomes effective [30] days after the later of (i) its filing in the office of the [secretary of state] or (ii) its publication and indexing in the [administrative bulletin].

(b)(1) A rule becomes effective on a date later than that
established by subsection (a) if a later date is required by another statute or specified in the rule.

(2) A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection (a) if the agency establishes such an effective date and finds that:

(i) it is required by constitution, statute, or court order;

(ii) the rule only confers a benefit or removes a restriction on the public or some segment thereof;

(iii) the rule only delays the effective date of another rule that is not yet effective; or

(iv) the earlier effective date is necessary because of imminent peril to the public health, safety, or welfare.

(3) The finding and a brief statement of the reasons therefor required by paragraph (2) must be made a part of the rule. In any action contesting the effective date of a rule made effective under paragraph (2), the burden is on the agency to justify its finding.

(4) Each agency shall make a reasonable effort to make known to persons who may be affected by it a rule made effective before publication and indexing under this subsection.

(c) This section does not relieve an agency from compliance with any provision of law requiring that some or all of its rules be approved by other designated officials or bodies before they become effective.

§ 3-116. [Special Provision for Certain Classes of Rules]

Except to the extent otherwise provided by any provision of law, Sections 3-102 through 3-115 are inapplicable to:

(1) a rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public;

(2) a rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would:
(i) enable law violators to avoid detection;
(ii) facilitate disregard of requirements imposed by law; or
(iii) give a clearly improper advantage to persons who are in an adverse position to the state;
(3) a rule that only establishes specific prices to be charged for particular goods or services sold by an agency;
(4) a rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property;
(5) a rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property;
(6) a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital;
(7) a form whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form;
(8) an agency budget; [or]
(9) an opinion of the attorney general [; or] []
(10) [the terms of a collective bargaining agreement.]

§ 3-11Z [Petition For Adoption of Rule]

Any person may petition an agency requesting the adoption of a rule. Each agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Within [60] days after submission of a petition, the agency shall either (i) deny the petition in writing, stating its reasons therefor, (ii) initiate rule-making proceedings in accordance with this Chapter, or (iii) if otherwise lawful, adopt a rule.

Chapter II Review of Agency Rules

§ 3-201. [Review by Agency]

At least [annually], each agency shall review all of its rules to determine whether any new rule should be adopted. In conducting that review, each agency shall prepare a written report summarizing its findings, its supporting reasons, and any pro-
posed course of action. For each rule, the annual report must include, at least once every 7 years, a concise statement of:

1. the rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached;

2. criticisms of the rule received during the previous 7 years, including a summary of any petitions for waiver of the rule tendered to the agency or granted by it; and

3. alternative solutions to the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes. A copy of the annual report must be sent to the administrative rules review committee and the administrative rules counsel and be available for public inspection.

§ 3-202. [Review by Governor; Administrative Rules Counsel]

(a) To the extent the agency itself would have authority, the governor may rescind or suspend all or a severable portion of a rule of an agency. In exercising this authority, the governor shall act by an executive order that is subject to the provisions of this Act applicable to the adoption and effectiveness of a rule.

(b) The governor may summarily terminate any pending rule-making proceeding by an executive order to that effect, stating therein the reasons for the action. The executive order must be filed in the office of the secretary of state, which shall promptly forward a certified copy to the agency and the administrative rules editor. An executive order terminating a rule-making proceeding becomes effective on the date it is filed and must be published in the next issue of the administrative bulletin.

(c) There is created, within the office of the governor, an administrative rules counsel to advise the governor in the execution of the authority vested under this Article. The governor shall appoint the administrative rules counsel who shall serve at the pleasure of the governor.

§ 3-203. [Administrative Rules Review Committee]

There is created the ["administrative rules review committee"] of the legislature. The committee must be bipartisan and composed of 3 senators appointed by the president of the senate and 3 representatives appointed by the speaker of the house. Committee members must be appointed within 30
days after the convening of a regular legislative session. The term of office is [2] years while a member of the [legislature] and begins on the date of appointment to the committee. While a member of the [legislature], a member of the committee whose term has expired shall serve until a successor is appointed. A vacancy on the committee may be filled at any time by the original appointing authority for the remainder of the term. The committee shall choose a chairman from its membership for a [2]-year term and may employ staff it considers advisable.]

§ 3-204. [Review by Administrative Rules Review Committee]

(a) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.

(b) Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].

(c) The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

[(d)(1) If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the of-
office of the [secretary of state]. The filed objection must contain a concise statement of the committee's reasons for its action.

(2) The [secretary of state] shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question, the [administrative rules editor, and the administrative rules counsel]. The [secretary of state] shall also maintain a permanent register open to public inspection of all objections by the committee.

(3) The [administrative rules editor] shall publish and index an objection filed pursuant to this subsection in the next issue of the [administrative bulletin] and indicate its existence adjacent to the rule in question when that rule is published in the [administrative code]. In case of a filed objection by the committee to a rule that is subject to the requirements of Section 2-101(g), the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.

(4) Within [14] days after the filing of an objection by the committee to a rule, the issuing agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(5) After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency.

(6) The failure of the [administrative rules review committee] to object to a rule is not an implied legislative authorization of its procedural or substantive validity.

(e) The committee may recommend to an agency that it adopt a rule. [The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of Sections 3-103 through 3-104. An agency is not required to adopt the proposed rule.]

(f) The committee shall file an annual report with the [presiding officer] of each house and the governor.
ARTICLE V  JUDICIAL REVIEW AND CIVIL ENFORCEMENT

Chapter I Judicial Review

§ 5-101. [Relationship Between this Act and Other Law on Judicial Review and Other Judicial Remedies]

This Act establishes the exclusive means of judicial review of agency action, but:

(1) The provisions of this Act for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this Act, by other applicable law.

(3) If the relief available under other sections of this Act is not equal or substantially equivalent to the relief otherwise available under law, the relief otherwise available and the related procedures supersede and supplement this Act to the extent necessary for their effectuation. The applicable provisions of this Act and other law must be combined to govern a single proceeding or, if the court orders, 2 or more separate proceedings, with or without transfer to other courts, but no type of relief may be sought in a combined proceeding after expiration of the time limit for doing so.

§ 5-102. [Final Agency Action Reviewable]

(a) A person who qualifies under this Act regarding (i) standing (Section 5-106), (ii) exhaustion of administrative remedies (Section 5-107), and (iii) time for filing the petition for review (Section 5-108), and other applicable provisions of law regarding bond, compliance, and other pre-conditions is entitled to judicial review of final agency action, whether or not the person has sought judicial review of any related non-final agency action.

(b) For purposes of this section and Section 5-103:

(1) “Final agency action” means the whole or a part of any agency action other than non-final agency action;

(2) “Non-final agency action” means the whole or a part of an agency determination, investigation, proceeding,
hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

§ 5-103. [Non-final Agency Action Reviewable]

A person is entitled to judicial review of non-final agency action only if:

1. it appears likely that the person will qualify under Section 5-102 for judicial review of the related final agency action; and
2. postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

[Alternative A.]

§ 5-104. [Jurisdiction, Venue]

(a) The [trial court of general jurisdiction] shall conduct judicial review.

(b) Venue is in the [district] [that includes the state capital] [where the petitioner resides or maintains a principal place of business] unless otherwise provided by law.

[Alternative B.]

§ 5-104. [Jurisdiction, Venue]

(a) The [appellate court] shall conduct judicial review.

(b) Venue is in the [district] [that includes the state capital] [where the petitioner resides or maintains a principal place of business] unless otherwise provided by law.

(c) If evidence is to be adduced in the reviewing court in accordance with Section 5-114(a), the court shall appoint a [referee, master, trial court judge] for this purpose, having due regard for the convenience of the parties.

§ 5-105. [Form of Action]

Judicial review is initiated by filing a petition for review in [the appropriate] court. A petition may seek any type of relief available under Sections 5-101(3) and 5-117.
§ 5-106. [Standing]

(a) The following persons have standing to obtain judicial review of final or non-final agency action:

(1) a person to whom the agency action is specifically directed;

(2) a person who was a party to the agency proceedings that led to the agency action;

(3) if the challenged agency action is a rule, a person subject to that rule;

(4) a person eligible for standing under another provision of law; or

(5) a person otherwise aggrieved or adversely affected by the agency action. For purposes of this paragraph, no person has standing as one otherwise aggrieved or adversely affected unless:

(i) the agency action has prejudiced or is likely to prejudice that person;

(ii) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(iii) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

[(b) A standing committee of the legislature which is required to exercise general and continuing oversight over administrative agencies and procedures may petition for judicial review of any rule or intervene in any litigation arising from agency action.]

§ 5-107. [Exhaustion of Administrative Remedies]

A person may file a petition for judicial review under this Act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, but:

(1) a petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal;

(2) a petitioner for judicial review need not exhaust
administrative remedies to the extent that this Act or any other statute states that exhaustion is not required; or

(3) the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies, to the extent that the administrative remedies are inadequate, or requiring their exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

§ 5-108. [Time for Filing Petition for Review]

Subject to other requirements of this Act or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by Section 3-113(b).

§ 5-112. [Limitation on New Issues]

A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:

(1) the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue;

(2) the person did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue;

(3) the agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue;

(4) the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this Act; or

(5) the interests of justice would be served by judicial resolution of an issue arising from:

   (i) a change in controlling law occurring after the agency action; or

   (ii) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.
§ 5-113. [Judicial Review of Facts Confined to Record for Judicial Review and Additional Evidence Taken Pursuant to Act]

Judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this Act, supplemented by additional evidence taken pursuant to this Act.

§ 5-114. [New Evidence Taken by Court or Agency Before Final Disposition]

(a) The court [(if Alternative B of Section 5-104 is adopted), assisted by a referee, master, trial court judge as provided in Section 5-104(c),] may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) improper constitution as a decision-making body, or improper motive or grounds for disqualification, of those taking the agency action;

(2) unlawfulness of procedure or of decision-making process; or

(3) any material fact that was not required by any provision of law to be determined exclusively on an agency record of a type reasonably suitable for judicial review.

(b) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(1) the agency was required by this Act or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(2) the court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, until after the agency action, and (ii) the interests of justice would be served by remand to the agency;
(3) the agency improperly excluded or omitted evidence from the record; or
(4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

§ 5-115. [Agency Record for Judicial Review—Contents, Preparation, Transmittal, Cost]

(a) Within [———] days after service of the petition, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this Act as the agency record for the type of agency action at issue, subject to the provisions of this section.

* * *

(f) Additions to the record pursuant to Section 5-114 must be made as ordered by the court.

(g) The court may require or permit subsequent corrections or additions to the record.

§ 5-116. [Scope of Review; Grounds for Invalidity]

(a) Except to the extent that this Act or another statute provides otherwise:

(1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity; and

(2) The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court’s decision is based.

(c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

(1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.
(2) The agency has acted beyond the jurisdiction conferred by any provision of law.

(3) The agency has not decided all issues requiring resolution.

(4) The agency has erroneously interpreted or applied the law.

(5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

(6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.

(7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.

(8) The agency action is:

   (i) outside the range of discretion delegated to the agency by any provision of law;

   * * *

   (iv) [otherwise unreasonable, arbitrary or capricious.]