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A Time for Change: A Critical Analysis of the Nebraska Administrative Procedure Act

The Nebraska Administrative Procedure Act\(^1\) is like an ever-expanding patchwork quilt. The center was sewn in 1945 from fabric provided by the National Conference of Commissioners on Uniform State Laws.\(^2\) Since then, patches of varying dimensions and colors have been added by no less than twenty-five separate legislative bills,\(^3\) and yet there is no indication that the quilt is near

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1. NEB. REV. STAT. §§ 84-901 to -919 (Reissue 1976 & Cum. Supp. 1980) [hereinafter cited as "the Act" or "Nebraska APA"].

2. The Nebraska APA as originally enacted was based on the 1946 Model State Administrative Procedure Act that was prepared by the National Conference of Commissioners on Uniform State Laws. Compare Administrative Procedure Act, Ch. 255, 1945 Neb. Laws 794 with MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 1, 3-4, reprinted in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE 191, 202-07 (1946) [hereinafter cited as 1946 MODEL ACT]. See Gretna Pub. School Dist. No. 37 v. State Bd. of Educ., 201 Neb. 769, 771-72, 272 N.W.2d 268, 269 (1978). Although the 1946 Model Act was not formally approved until 1946, it was prepared and widely distributed to members of state administrative commissions, to bar associations, and to other interested groups and persons in 1943 and 1944. See UNIFORM LAWS ANNOTATED 401 (Cum. Supp. 1980). See also Uniform Administrative Procedure Act, reprinted in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS & PROCEEDINGS OF THE ANNUAL CONFERENCE 230-45 (1943). Thus, although pre-dating it, the Nebraska APA was based on the 1946 Model Act. See 13 UNIFORM LAWS ANNOTATED 405 (Cum. Supp. 1980); Merrill, Oklahoma’s New Administrative Procedure Act, 17 OKLA. L. REV. 1, 2 n.3 (1964).

completion. The center cannot hold. The seamstress should begin anew.

This article is a critical analysis of the Nebraska APA. The analysis demonstrates that the Act has been rendered obsolete. This obsolescence is not accounted for solely by the existence of legislative indecision or by the legislature's ill-advised decisions over the past thirty-six years, although those have certainly been contributing factors. In addition, Nebraska's administrative superstructure has greatly increased in size and complexity since 1945; there has been considerable experience at the state legislative level with administrative procedures; and there has been a veritable explosion of scholarly work in the area. The time for change is at hand. It is hoped that this article will not only provide


4. See Neb. L.R. 238, 88TH LEG., 1ST SESS., NEBRASKA LEGISLATIVE JOURNAL, at 23-24 (1980) (review of current rules and regulations of state administrative agencies; organization of system in manner which is easily accessible); Neb. L.R. 239, 88TH LEG., 1ST SESS., NEBRASKA LEGISLATIVE JOURNAL, at 24-25 (1980) (review of Nebraska APA).

5. Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the center cannot hold . . . .

Undoubtedly, a complete reworking of the Nebraska APA would merely begin another "gyre" in the history of Nebraska administrative procedures—a gyre that will surely be marked by as much uncertainty and change as the first. A new gyre is advocated in this article with the hope that, unlike Yeats' pessimistic view of civilizations, administrative procedures can be improved if the lessons of the past are noted and heeded.


7. This growth is as much intuitively perceived as it is empirically demonstrable. Nevertheless, coverage in the NEBRASKA BLUE BOOK is an indication of the growth; the description of administrative agencies that covered barely 40 pages in 1946 required over 200 pages in 1978. Compare NEBRASKA LEGISLATIVE COUNCIL, 1946 NEBRASKA BLUE BOOK 220-64 with NEBRASKA LEGISLATIVE COUNCIL, 1978-1979 NEBRASKA BLUE BOOK 363-566.


the catalyst for that change, but will also provide guidance on the nature of the necessary change; that is, it will attempt to gently guide the seamstress’ hand.

I. AN ANALYSIS OF THE NEBRASKA APA

The Nebraska APA prescribes the minimum administrative procedures required of all state agencies which are subject to the Act. This article first presents a discussion of the Act’s coverage: which agencies are, and which are not, subject to the Act’s mandates? Second, the distinction between rules and contested cases is examined: What is a rule? What is a contested case? How can each be identified? Since different procedures are prescribed for each, the distinction is crucial to an informed interpretation of the Act. Finally, the four major areas covered by the Act are analyzed: (1) rule-making procedures, including notice to the public of agency rules; (2) contested case procedures; (3) legislative review of agency rules; and (4) judicial review of agency rules and contested cases.

A. Coverage

The coverage of the Nebraska APA is governed by section one of the Act. That section provides a general definition for the term “agency”: “Agency shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules...” It then specifically exempts certain entities. This “general definition” approach to coverage is commendable; it is better, for example, than a “specific enumeration” provision which lists each agency subject to the Act. The paramount purpose of the Act is to impose a minimum uniform procedure on all, or almost all, state administrative agencies. The “general definition” approach to coverage better effectuates this purpose than the “specific enumeration” approach. It avoids the possibility that the legislature may

10. This article will focus on the Nebraska APA. It will not consider additional administrative procedures that may be required of specific agencies by statute or by agency rules or practices, nor will it discuss other administrative law issues in Nebraska except, of course, to the extent they may have an impact on the Nebraska APA.
13. The Adjutant General’s office, the courts, including the Nebraska Workmen’s Compensation Court, the Court of Industrial Relations and the Legislature are specifically excluded from the definition of “agency.” Id.
15. See note 11 & accompanying text supra.
inadvertently fail to list an agency that should be subject to the Act, eliminates the need to amend the statutes to provide for coverage each time the legislature creates a new agency, and it may result in coverage for state entities which under the "specific enumeration" approach are not specifically listed, but which are subordinate to agencies which are listed. Nevertheless, for several reasons the Nebraska APA's definition of "agency" is inadequate.

First, the "agency" definition contains a basic defect which is peculiar to the Nebraska APA. The Nebraska APA's coverage is limited to agencies that are "authorized by law to make rules." The language of the Revised Model State Administrative Procedure Act—"authorized by law to make rules or determine contested cases"—is broader. Therefore, in contrast to the Model Act, and even though the Nebraska APA clearly has provisions intended to apply to contested cases, if an agency is authorized to determine contested cases, but not authorized to make rules,

16. F. Cooper, supra note 14, at 98-99; Bonfield, supra note 8, at 760-61. But see note 35 & accompanying text infra.
19. A clarifying note on the model administrative procedure acts of the National Conference of Commissioners on Uniform State Laws is perhaps necessary. The Conference first adopted a model state administrative procedure act in 1946. 1946 Model Act, supra note 2. It adopted a substantially revised model state administrative procedure act in 1961. 1961 Model Act, supra note 18. Another revision has been proposed and a draft of the revision was read for the first time at the Conference's 1980 annual meeting. 1980 Proposed Act, supra note 9. The distinction between "model" acts, such as the model administrative procedure acts referred to above, and "uniform" acts is explained by the commissioners as follows:

Where there is a demand for an Act covering the subject matter in a substantial number of the states, but where in the judgment of the National Conference of Commissioners on Uniform State Laws it is not a subject upon which uniformity between the states is necessary or desirable, but where it would be helpful to have legislation which would tend toward uniformity where enacted, Acts on such subjects are promulgated as Model Acts.

21. For an example of such an agency, see Crowell v. Benson, 285 U.S. 22, 43-45 (1932). See also Tushnet, Invitation to a Wedding: Some Thoughts on Article III and a Problem of Statutory Interpretation, 60 Iowa L. Rev. 937, 951 (1975).
that agency is not subject to the Nebraska APA’s contested case or judicial review procedures.

This defect was probably the result of legislative oversight. The Nebraska APA as initially enacted in 1945 imposed only rule-making requirements.22 Although based on the 1946 Model Act,23 which provided procedures for contested cases, the Nebraska APA contained no such procedures. Consequently, the definition of “agency” in the 1945 Nebraska APA was narrowed from the Model Act language to encompass only those agencies “authorized by law to make rules.”24 Contested case procedures were added to the Nebraska APA in 1959.25 However, the legislature failed to correspondingly expand the definition of “agency”26 and, as a result, Nebraska is left with the anomalous situation described above.27

Ironically, the solution to this coverage problem may not be to expand the Nebraska definition to include the 1961 Model Act language of “or determine contested cases,”28 but rather to omit the phrase entirely. The 1980 Proposed Act recommends omitting the requirement that the agency be “authorized by law to make rules or to determine contested cases” so that the coverage of the state administrative procedure act is extended to as many state governmental units as possible.29 Such an omission would expand the Act’s coverage to include (1) agencies that affect private rights through means other than making rules or determining contested cases, e.g., through informal action or investigations, and (2) agencies that are not authorized by law to make rules or determine contested cases, but attempt to do so anyway.30

The Nebraska APA definition of “agency” can also be criticized for its specific exclusions. As noted before, the definition specifically excludes “the Adjutant General’s office . . . , the courts, including the Nebraska Workmen’s Compensation Court, the Court of Industrial Relations, and the Legislature.”31 Admittedly, there are fewer exclusions in the Nebraska APA than there are in the

23. See note 2 supra.
25. Ch. 456, §§ 1, 6-8, 1959 Neb. Laws 1510.
27. See notes 20-21 & accompanying text supra.
29. See 1980 PROPOSED ACT, supra note 9, at 9, 12.
30. See Bonfield, supra note 8, at 761-62. Nebraska APA coverage of agencies in the latter category would ensure the availability of judicial review under the judicial review provisions of the Act. See Neb. Rev. Stat. §§ 84-917 to -918 (Reissue 1976). See also notes 185-87 & accompanying text infra.
administrative procedure acts of some other states;\textsuperscript{32} nevertheless, there may be too many.

The exclusion of the courts and the legislature is appropriate for obvious reasons.\textsuperscript{33} However, the exclusion of the Adjutant General's office, the Nebraska Workmen's Compensation Court and the Court of Industrial Relations is less appropriate. As stated by one commentator:

[I]f one agency succeeds in having itself entirely excluded by name from [an administrative procedure act,] the scramble is on for all other agencies to seek such exemptions as well. . . . Many states wisely exempt no agencies from their act. Many states, however, list a host of named agencies that are entirely exempt from their act. One wonders what, aside from raw political clout, dictated the exemption in states A-D of certain agencies that were not exempted in states E-I, especially when those agencies in states E-I do operate successfully under their administrative procedure acts.\textsuperscript{34}

A third shortcoming of the Nebraska APA's definition of "agency" is that it fails to explicitly specify coverage where a subordinate division of a covered agency makes rules or determines contested cases.\textsuperscript{35} The 1980 Proposed Act resolves this issue by adding the following sentence to its definition of agency: "To the extent it purports to exercise authority subject to any provision of this Act, an administrative unit otherwise qualifying as an 'agency' shall be treated as a separate agency even if the unit is located within or subordinate to another agency."\textsuperscript{36}

The Nebraska Supreme Court has construed the Nebraska APA's arguably flawed definition of "agency" in several cases.\textsuperscript{37}


\textsuperscript{33} See Bonfield, supra note 8, at 763-64.

\textsuperscript{34} Bonfield, supra note 8, at 767-68 (footnotes omitted). See also Hazard, The Oregon Administrative Procedure Act: Status and Prospects, 39 Or. L. Rev. 97, 101 (1960).

\textsuperscript{35} See Bonfield, supra note 8, at 768-69.

\textsuperscript{36} 1980 PROPOSED ACT, supra note 9, at 9.

\textsuperscript{37} Richardson v. Board of Educ., 206 Neb. 18, 25, 290 N.W.2d 803, 808 (1980) (State Board of Education is an "agency" under the Nebraska APA); J K & J, Inc. v. Nebraska Liquor Control Comm'n, 194 Neb. 413, 417, 231 N.W.2d 694, 697 (1975) (Nebraska Liquor Control Commission is an "agency" under the Nebraska APA); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 785, 199 N.W.2d 752, 760 (1972) (Court of Industrial Relations is an "agency" under the Nebraska APA) (Court of Industrial Relations was later specifically exempted by statute, L.B. 819, § 1(3), 1974 Neb. Laws 709, 710); Harnett v. City of Omaha, 188 Neb. 449, 451, 197 N.W.2d 375, 377 (1972) (city personnel board is not an "agency" under the Nebraska APA); County of Gage v. State Bd. of Equalization & Assessment, 185 Neb. 749, 752, 178 N.W.2d 759, 762 (1970) (State Board of Equalization & Assessment is an "agency" under the Nebraska APA); The Flamingo, Inc. v. Nebraska Liquor Control Comm'n, 185 Neb. 22, 24, 173 N.W.2d 369, 371 (1969) (Nebraska Liquor Control Commission is an
However, it has never been confronted with coverage issues with respect to two entities: (1) constitutional agencies such as the Board of Regents of the University of Nebraska, and (2) political subdivisions such as local school districts. In both situations, coverage issues are difficult and important.

A plain reading of the Nebraska APA's definition of agency indicates that the Board of Regents of the University of Nebraska, as well as other constitutional agencies, is within the Act's coverage. The Board is an administrative office or unit of the state government, it is authorized by law to make rules, and it is not specifically exempted from the Act's coverage. That conclusion is supported by *Catania v. University of Nebraska*, a 1979 Nebraska Supreme Court case. In *Catania*, the plaintiff brought a negligence action against the University. The Nebraska Supreme Court held that the University was a state agency for purposes of the Tort Claims Act, which provides for a partial waiver of the sovereign immunity defense when claims are brought against the state or state agencies. Since the Tort Claims Act contains a definition of agency that is slightly different from the Nebraska APA definition of that term, *Catania* does not conclusively determine that the Board of Regents is an agency for purposes of the Nebraska APA.

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38. The original source of the Board of Regents' authority is the Constitution of Nebraska. NEB. CONST. art. 7, § 10.

39. The other constitutional agencies are the Board of Parole, NEB. CONST. art. 4, § 13; the Nebraska Public Service Commission, id. § 20; the Board of Educational Lands and Funds, id. art. 7, § 6; the Board of Trustees of the Nebraska State Colleges, id. § 13; and the State Department of Education, id. §§ 2-4. Of these agencies, the Nebraska Public Service Commission, the Board of Educational Lands and Funds, and the State Department of Education have filed rules with the Revisor of Regulations pursuant to the Nebraska APA. Therefore, they appear to consider themselves covered by the Act. The Board of Pardons, the Board of Trustees of the Nebraska State Colleges and the Board of Regents of the University of Nebraska have not filed rules with the Revisor of Regulations and, hence, appear to consider themselves outside the coverage of the Act. Although the textual discussion is limited to the Board of Regents of the University of Nebraska, the reasoning should be applicable to the other constitutional agencies.


41. See note 13 supra.

42. 204 Neb. 304, 282 N.W.2d 27 (1979).

43. NEB. REV. STAT. § 81-8,209 to -8,239 (Reissue 1976).

Nevertheless, a plain reading of the definition of agency in the Nebraska APA and the Catania holding provides persuasive, although not apodictic, support for coverage.45

As in the case of the Board of Regents, Nebraska APA coverage of political subdivisions such as local school districts or natural resources districts is also unresolved. The resolution depends on the interpretation of the word “state” in the Nebraska APA's definition of agency. If the word is construed to require statewide jurisdiction, obviously the Act does not apply to political subdivisions. If, however, the word is construed to require only financial dependence on the state or power derived from the state, the Act could apply to political subdivisions. The former is the more desirable interpretation.47

Although a standardized administrative procedure for political subdivisions may be useful,48 a separate statute

45. Other jurisdictions are split on the issue. Compare In re Rhode Island Bar Ass'n, 118 R.I. 489, 491, 374 A.2d 802, 803 (1977) (agency is governmental entity created by “statute, executive order, or the Constitution”) (emphasis added) (dicta) and State Bd. of Regents v. Gray, 551 S.W.2d 140, 142-43 (Tenn. 1978) (Board of Regents is an agency under state's administrative procedure act) with Sholes v. University of Minn., 236 Minn. 452, 456, 54 N.W.2d 122, 125-26 (1952) (Board of Regents is not an agency under state's administrative procedure act) and Fort Sumner Mun. School Bd. v. Parsons, 82 N.M. 610, 616, 485 P.2d 366, 372 (1971) (Sutin, J., concurring) (constitutional agency is not an agency under state's administrative procedure act).

46. The Board of Regents of the University of Nebraska could argue that Board of Regents v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1977), precludes coverage. Generally, Exon limited the extent to which the legislature could infringe on the Board's constitutional authority to govern the University of Nebraska. The Board could argue that if the Nebraska APA is construed to cover the Board, it exceeds the limits Exon placed on the legislature. The Nebraska APA, however, is distinguishable from the statutes considered by the court in Exon. It does not prescribe substantive powers and duties and, hence, does not affect the Board's discretion or authority (except in the very limited sense of imposing a duty to follow certain procedures in making rules and adjudicating contested cases). See id. at 149, 256 N.W.2d at 353. In addition, the Nebraska APA does not delegate the Board's authority. See id. at 152-53, 256 N.W.2d at 335. But see Neb. Rev. Stat. § 84-908 (Cum. Supp. 1980) (rules not effective until approved by the Governor); id. at § 84-908.01 to .05 (legislative committee has power to suspend the rules and legislature has power to repeal rules). Rather, the crux of the Nebraska APA is procedural; it prescribes procedures without limiting or expanding the Board's powers. Cf., University Police Officers Union v. University of Neb., 203 Neb. 4, 10-11, 277 N.W.2d 529, 534 (1979) (court holds that certain statutes governing the University of Nebraska do not conflict with Exon).


48. For example, an administrative procedure act for political subdivisions could simplify the often complicated process of judicial review. See Bloomenthal,
is necessary because of the differences between state-wide agencies and political subdivisions.\textsuperscript{49}

B. Rules and Contested Cases: Definitional Issues

The definitions of "rule" and "contested case" are crucial to an informed interpretation of the Nebraska APA. The procedures prescribed by the Act for the promulgation of rules are different than those established for the adjudication of contested cases.\textsuperscript{50} Rules, but not contested cases, are subject to review and revocation by the Legislature's Committee on Administrative Agency Rules and Regulations.\textsuperscript{51} In addition, there are separate and distinct judicial review provisions provided for rules and contested cases.\textsuperscript{52} Despite its importance, the distinction between rules and contested cases (which is merely a particularized manifestation of the distinction between legislation and adjudication) is particularly muddy in Nebraska.\textsuperscript{53}

Like most such definitions in state administrative procedure acts,\textsuperscript{54} the Nebraska APA's definition of rule contains both inclusionary clauses and exclusionary clauses. The Act's inclusionary clauses are as follows: "Rule shall mean [1] any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof . . . and [2] designed to implement, interpret, or make specific the law enforced or administered by it [3] governing its organization or procedure . . . ."\textsuperscript{55} This language requires an agency action to meet clause one and either clause two or clause three to fall within the definition. The language contains most of the elements which should be included in the definition: it is broadly inclusive,\textsuperscript{56} it covers interpretative\textsuperscript{57} as well as substantive

\textsuperscript{49} See 1980 PROPOSED ACT, supra note 9, at 12.
\textsuperscript{50} Compare NEB. REV. STAT. §§ 84-902 to -906, 84-906.05 to -907.01, 84-908 to -908.01, 84-909 to -912 (Reissue 1976 & Cum. Supp. 1980) with NEB. REV. STAT. §§ 84-913 to -915, 84-917 to -919 (Reissue 1976).
\textsuperscript{51} See NEB. REV. STAT. §§ 84-908.01 to .05 (Cum. Supp. 1980). See also notes 153-63 & accompanying text infra.
\textsuperscript{53} Compare, e.g., Kelly v. John, 162 Neb. 319, 75 N.W.2d 713 (1956) (rezoning ordinance with right of appeal was an administrative matter) with Scottsbluff Improvement Ass'n v. City of Scottsbluff, 183 Neb. 722, 164 N.W.2d 215 (1969) (rezoning ordinance was a legislative matter).
\textsuperscript{54} See F. COOPER, supra note 14, at 107-19.
\textsuperscript{55} NEB. REV. STAT. § 84-901(2) (Cum. Supp. 1980) (numbers added).
\textsuperscript{56} F. COOPER, supra note 14, at 108. Despite the apparent broadness of the definition, some agencies may attempt to escape it by issuing manuals, memos
rules, it encompasses procedural and organizational matters, and it includes amendments and repeals of rules. Nevertheless, there are shortcomings. An obvious shortcoming of the definition is its circularity—"Rule shall mean any rule . . . ." Perhaps more significantly, the current inclusionary clauses do not contain either of the two accepted factors that distinguish rules from contested cases: general applicability and future effect. Ironi-

and the like, instead of rules, regulations or standards. See id.; Bonfield, supra note 8, at 827. If this is a problem in Nebraska, the definition could easily be broadened further to encompass the manuals and memos. See 1980 PROPOSED ACT, supra note 9, at 11-12; Bonfield, supra note 8, at 827.

57. For a definition of interpretative rules, see 1980 PROPOSED ACT, supra note 9, at 10.

58. F. COOPER, supra note 14, at 108. The Nebraska definition covers agency statements designed to interpret the law. While this coverage in the Nebraska APA's definition of "rule" is appropriate, it may be desirable to exempt interpretative rules from the advanced notice and public participation requirements for other types of rules. See 1980 PROPOSED ACT, supra note 9, at 43-44.


60. Id.


62. Until 1959, the Nebraska APA's definition of rule contained the "general applicability" distinction. See note 63 infra. As initially enacted in 1945, the definition read: "'Rule' means the written statement of any rule, regulation, standard or policy of general application, issued by an agency . . . and designed to implement, interpret or make specific the law enforced or administered by it, or governing its organization or procedure . . . ." Administrative Procedure Act, Ch. 255, 1945 Neb. Laws 794 (emphasis added). In 1947, the legislature added the following proviso to the definition: "Provided, that for the purpose of this act every rule which shall prescribe a penalty shall be presumed to have general applicability . . . ." Ch. 350, 1947 Neb. Laws 1097, 1098. Thus, a rule that prescribed a penalty was presumed to have general applicability and, as a result, fell within the inclusionary clause of the 1945 Act.

In 1959, however, the legislature omitted the "of general application" clause from the 1945 definition, Ch. 456, 1959 Neb. Laws 1510, leaving the inclusionary clause substantially in its current form. See note 55 & accompanying text supra. This amendment not only resulted in an overly inclusive definition, see notes 65-67 & accompanying text infra, but it undercut the "general applicability" reference in the 1947 proviso to the definition. That proviso, and the essentially meaningless "general applicability" reference, is in the current Nebraska APA definition of "rule." NEB. REV. STAT. § 84-901(2) (Cum. Supp. 1980).

63. That is, rules are addressed to indicated, but unnamed and unspecified persons or situations and must be applied in a further proceeding before the legal position of any particular individual will be definitely affected, while contested cases operate concretely upon individuals in their individual capacity. See Schwartz, Administrative Terminology and the Administrative Procedure Act, 48 Mich. L. Rev. 57, 67 (1949). See also American Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624, 636 (D.C. Cir.), (Burger, J., dissenting) cert. denied, 385 U.S. 843 (1969) ("Rulemaking is normally directed toward
cally, this renders the definition overly inclusive. Specifically, the definition of "rule" may encompass "contested cases" and, hence, fails to provide any guidance on a distinction that is both basic and essential to an enlightened interpretation of the Nebraska APA.

The Nebraska APA's definition of rule also contains exclusionary clauses: "Rule . . . [does not include] regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public . . . [or] permits, certificates of public convenience and necessity, franchises, rate orders, and rate tariffs, and any rules of interpretation thereof . . . ." These exclusionary clauses are dated. While the exclusion of, inter alia, internal management concerns and permits are still justified, experience with administrative proce-
dure acts has demonstrated the need for several additional exclusions.\footnote{71}

The Nebraska APA's definition of "contested case" is based, virtually verbatim, on the 1946 Model Act.\footnote{72} It defines contested case as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."\footnote{73} This definition may require the formal procedures for a contested case\footnote{74} to be utilized in situations where less formal procedures would be more appropriate. For example, assume that the Nebraska APA covers local school districts;\footnote{75} that a teacher has observed student A tearing notices off of a bulletin board; and that the standard punishment for infractions of that nature is a one day suspension from school. It is clear that student A has a "constitutional right" to some kind of a hearing before the standard punishment can be imposed.\footnote{76} The Constitution, however, does not require an overly formalized hearing prior to suspending student A. Rather, student A need only be given an oral notification of the charge and, if he denies it, an explanation of the evidence and an opportunity to present his side.\footnote{77} The Nebraska APA requires more. Since student A is entitled to a hearing by "constitutional right," the formal procedures of the Act would be mandated even though the Constitution (and common sense) require much less. This problem cannot be corrected by merely removing the "or constitutional right" language from the definition; the phrase "required by law" in the definition has been interpreted to include both statutory and

rate-making, despite its apparent adjudicative nature, was rule-making. \ See Ch. 342, 1951 Neb. Laws 1128; Mogis v. Lyman-Richey Sand & Gravel Corp., 90 F. Supp. 251 (D. Neb. 1950), aff'd, 189 F.2d 130 (8th Cir. 1951). \ See generally Merrill, \ supra note 2, at 9.

\footnote{71} See, e.g., 1980 PROPOSED ACT, supra note 9, at 54-56. \ See generally Bonfield, \ supra note 8, at 833-40; F. COOPER, \ supra note 14, at 109; Curran & Sacks, The Massachusetts Administrative Procedure Act, 37 B. U. L. Rev. 70, 78 (1957).


\footnote{73} Id. §§ 84-913 to -915 (Reissue 1976). \ See notes 136-47 & accompanying text infra.

\footnote{74} But see notes 47-49 & accompanying text supra. Obviously, the problem illustrated by this example is not eliminated if local school districts are found not to be subject to the Act; this description of the problem is merely an example of a generic problem. For other examples of situations in which less formal procedures may be more appropriate than the Nebraska APA contested case procedures, see 1980 PROPOSED ACT, supra note 8, at 105.


\footnote{76} Id. at 581-82. \ See generally Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1287 (1975).
A more detailed exclusion is necessary or, in the alternative, an optional and less formal contested case procedure should be provided by the Act. A final point should be made about the interrelationship of the “rule” and “contested case” definitions in the Nebraska APA. Unlike the Federal Administrative Procedure Act and the 1980 Proposed Act, the two definitions in the Nebraska APA are not mutually exclusive and comprehensive. That is, the Nebraska APA does not, as the other acts do, specifically define “rule” and then label everything else a “contested case.” Rather, the Nebraska APA specifically defines both terms. Under the Nebraska APA approach, there exists the possibility that the definitions will be interpreted so as to leave a gap between the two definitions. This gap may be advantageous if it allows preliminary, informal and routine agency actions to escape the Act, since these actions should not be covered by the Act anyway. On the other hand, the gap may render certain agency action unreviewable under the judicial review provisions of the Act and may allow actions other than those that could be classified as preliminary, informal and routine to escape the Act. Having mutually exclusive and comprehensive definitions with specific exclusions which provide a policy-based “gap” are preferable to the uncertain gap left by the Nebraska APA.

C. Rule-Making Procedure

The Nebraska APA prescribes a minimum procedure that must be followed by covered agencies when they engage in rule-making. The goal of the procedure is to provide interested persons an opportunity to present information and viewpoints to agency decisionmakers during the rule-making process without unduly handcuffing the agency’s ability to act expeditiously and economically.

78. See Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). See also F. Cooper, supra note 14, at 120.
79. See 1980 Proposed Act, supra note 9, at 105-07.
81. 1980 Proposed Act, supra note 9, §§ 1-102(1), (12), (17) at 8-12.
82. Obviously, another possibility is that the two definitions will be interpreted to overlap one another. See notes 65-67 supra.
83. See Hazard, supra note 34, at 102-03. See generally Comment, supra note 44, at 79.
84. See Bloomenthal, supra note 48, at 623.
86. See Bonfield, supra note 8, at 845-48. See also Attorney General’s Commit-
In addition, the procedure includes certain filing and notice requirements intended to inform interested persons of agency law. The Nebraska APA provides that any "interested person" may attempt to initiate the rule-making process by petitioning an agency to promulgate, amend or repeal a rule.87 The Act also requires agencies to "prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition."88 As noted, the language only allows "interested persons" to file such petitions. Presumably, this limitation is intended to provide agencies with a screening mechanism in the "unlikely event that an agency is overwhelmed by a mob of eager beavers."89 However, there is no evidence of a need for such a screening mechanism90 and the 1980 Proposed Act allows "any person" to file such petitions.91 As a result, it may be advisable to remove the "interested person" requirement, especially since there is some indication that Nebraska agencies may be strictly construing the requirement.92

The Nebraska agency response to the required rule-making noted above has varied. Acting in good faith, some agencies have promulgated detailed rules describing the petition procedure;93 others have promulgated only skeletal procedures which barely meet the legislative intent;94 while still others have not promulgated procedures at all.95 Finally, the Nebraska APA, like the 1946 Model Act upon which it is based,96 does not provide any time limi-

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87. NEB. REV. STAT. § 84-910 (Reissue 1976).
88. Id.
89. Merrill, supra note 2, at 16. See also Comment, supra note 44, at 86-87.
90. See, e.g., 13 UNIFORM LAWS ANN. 439-40 (Cum. Supp. 1980) (no cases are cited which interpret the phrase "interested person" under the analogous provision of the 1961 Model Act).
91. 1980 PROPOSED ACT, supra note 9, at 56.
94. See, e.g., Rule 20, Nebraska Pub. Serv. Comm'n, 3 Neb. Ad. Rules & Regs. 20-1 provides that "[a]n application for the promulgation, amendment, repeal or adoption of any Commission rule or regulation shall state the precise wording of the proposed rule and regulation and shall state briefly the reasons for such promulgation, amendment, repeal, or adoption . . . ." See also Rule 2(5), State Records Bd., 1 Neb. Ad. Rules & Regs. 2-2.
96. See 1946 MODEL ACT, supra note 2, at 207.
tations on the agency's response to a petition to promulgate, amend or repeal a rule. Although some Nebraska agencies have imposed such limitations on themselves, a statutory limitation that would apply to all agencies is preferable.

Once initiated, either by an interested person or the agency itself, the rule-making procedure prescribed by the Act is relatively simple and straightforward. Agencies intending to engage in rule-making must first hold a public hearing on their proposed action. Notice of the hearing must be given to the Revisor of Regulations and the public at least twenty days prior to the hearing. Rules, once they are promulgated, must be submitted to the Attorney General for his consideration as to statutory authority and constitutionality, then approved by the Governor and, finally, filed with the Revisor of Regulations and with the Secretary of State.

The rule-making procedure, then begins with a notice of hearing that the agency must give to the Revisor of Regulations and publish in a newspaper having general circulation in the state.


98. See 1961 MODEL ACT, supra note 18, at 212 (30 days); 1980 PROPOSED ACT, supra note 9, at 56 (60 days).

99. The Nebraska APA requires agencies to engage in certain rule-making: (1) §§ 84-909(1) and 84-913 require agencies to adopt rules governing their procedures, see, First Fed. Sav. & Loan Ass'n v. Department of Banking, 187 Neb. 562, 569, 192 N.W.2d 736, 740 (1971); School Dist. No. 8 v. State Bd. of Educ., 176 Neb. 722, 732-34, 127 N.W.2d 458, 464-65 (1964) (failure to promulgate required procedural rules resulted in invalidation of Board's authority to hold hearings); see also Weiner v. State Real Estate Comm'n, 184 Neb. 752, 754, 171 N.W.2d 783, 785-86 (1969) (required rule-making does not require agencies to set out statutory, procedural requirements in their rules); and (2) § 84-910 requires agencies to adopt rules relating to petitions by persons requesting the agency to promulgate, amend or repeal a rule, see notes 92-96 & accompanying text supra. In addition, § 84-909(2) directs agencies to promulgate descriptive statements of their procedures. Since these "descriptive statements" are described as a "supplement" to agency rules, the inference is that their promulgation need not follow the rule-making procedure required by the Act. Nevertheless, the descriptive statements do fall within the Act's definition of "rule." See NEB. REV. STAT. § 84-901(2) (Cum. Supp. 1980). Legislative clarification would be helpful.

100. NEB. REV. STAT. § 84-907 (Cum. Supp. 1980). The Governor, for good cause, can waive the notice requirements. Id. See note 115 infra.


102. This term is intended to cover not only the initial promulgation of rules, but also the amendment or repeal of rules. See id. §§ 84-901(2), 84-907 (Cum. Supp. 1980).

103. Id. § 84-905.01 (Reissue 1976).


Presumably, the notice to the Revisor of Regulations must be accompanied by draft copies or working copies of the proposed rule, since such copies must be available at the office of the Revisor of Regulations (and at the business office of the agency) at the time of giving notice.\footnote{106} The required contents of the notice itself are inadequately delineated by the Act. The Act specifically requires that the notice contain a declaration of the availability of draft or work copies of the proposed rule,\footnote{107} and since it is a notice of hearing, the Act implies that information as to the general purpose, time, date and place of the public hearing must also be provided.\footnote{108} The Act does not specifically require the notice to contain the text of the proposed rule,\footnote{109} information on the nature of the hearing,\footnote{110} or background or explanatory information.\footnote{111} The Act permits the Governor to waive the notice of hearing for good cause.\footnote{112}

The Nebraska APA vests broad discretion in agencies to deter-

\footnote{106} Id. § 84-907 (Cum. Supp. 1980). The requirement that draft copies be available to the public is of only limited utility. While it provides some notice to the public of the agency's intended direction and focus, nothing precludes the agency from substantially revising the rule before final promulgation. It would be preferable if the statute precluded a substantial change in the proposed rule.\ See 1980 Proposed Act, supra note 9, § 3-107, at 40-41. Then, if public comment dictated a substantial change in the initially proposed rule, that rule-making proceeding could be terminated and a new one with the substantially changed rule as the proposed rule could be commenced. Such a procedure would better insure full and informed public comment.


\footnote{108} Id.

\footnote{109} Indeed, since the Act requires draft rules to be on file and the notice to contain a declaration of the availability of such draft rules, the clear inference is that the text of the proposed rule need not be contained in the notice of hearing. That is certainly the interpretation of the Act that has been followed by state agencies as evidenced by the numerous notices of hearing in the Nebraska Administrative Rules and Regulations. Publication of the full text of the proposed rule in the notice of hearing would "assure that affected parties have fully adequate warning of the precise terms of the contemplated rule before the rule is finally adopted." 1980 Proposed Act, supra note 9, at 34. In particular, such publication would assure adequate warning to affected parties in western Nebraska who do not have ready access to the draft copies filed at the Lincoln offices of the agency and the Revisor of Regulations.

\footnote{110} The Nebraska APA gives agencies broad discretion as to the nature of the hearing in rule-making proceedings. See notes 113-18 infra. Consequently, some information in the notice on the nature of the hearing would be helpful. See 1980 Proposed Act, supra note 9, § 3-103(4), (5), at 34.

\footnote{111} See 1980 Proposed Act, supra note 9, § 3-103(1), (2), at 34.

mine the nature of the subsequent rule-making hearing. All that is explicitly required is that it be a "public hearing." A largely duplicative provision that required that "interested persons [be afforded] an opportunity to submit data or views orally or in writing" was repealed in 1980. In contrast to the 1961 Model Act and the 1980 Proposed Act, the decision to allow or disallow oral testimony is left solely to the discretion of the agency. Ironically, even though a public hearing is required, there is no requirement that the agency consider in any manner the arguments advanced by interested persons. The viability of the public hearing requirement is further weakened by the timing of the filings and approvals required by the Act.

To complete the rule-making process, the agency must submit the rule to the Attorney General for his consideration as to its stat-

114. L.B. 846, 1980 Neb. Laws 855. The quoted language was derived from the 1946 Model Act, supra note 2, § 2(3), at 205, and vested broad discretion in the rule-making agency. See United States v. Florida East Coast R. Co., 410 U.S. 224 (1973); Merrill, supra note 2, at 16. Although a colorable argument could be forwarded that the repeal of the quoted language permits an agency to deny interested persons an opportunity to submit oral or written data or views, that interpretation would undercut the "public hearing" requirement of § 84-907. A preferable interpretation is that the repealed section, see L.B. 846, § 2, 1980 Neb. Laws 855, 856, merely duplicated the requirements of § 84-907; that its repeal was a housekeeping move; and that, while the agency still retains broad discretion as to the nature of the hearing, the discretion does not extend to prohibiting written or oral statements since that would undercut the essence of the public hearing requirement.
115. The 1961 Model Act requires an oral hearing for substantive rules if requested by 25 persons, a governmental subdivision or agency, or an association having not less than 25 members. 1961 Model Act, supra note 18, § 3(a)(2), at 209-10.
116. The 1980 Proposed Act adds a legislative committee to monitor agency action and its counsel to those individuals or groups listed in the 1961 Model Act who can trigger an oral hearing. 1980 Proposed Act, supra note 9, § 3-104, at 35-36. See note 115 supra.
117. Both the 1961 Model Act and the 1980 Proposed Act impose an obligation on agencies to pay some attention to comments received during the rule-making process. 1961 Model Act, supra note 18, § 3(a)(2), at 210 ("The agency shall consider fully all written and oral submissions respecting the proposed rule"); 1980 Proposed Act, supra note 9, § 3-106(c), at 39 ("Before the adoption of a rule, an agency shall consider the written and oral submissions or any memorandum summarizing oral submissions provided for by this Article").
118. The Act requires approval by the Governor and filing with the Revisor of Regulations "after a hearing has been set on such rule . . . ." Neb. Rev. Stat. § 84-908 (Cum. Supp. 1980) (emphasis added). Thus, an agency can seek the Governor's approval of a rule and file it with the Revisor of Regulations before the required public hearing has been held. Clearly, an agency which has received the Governor's approval will be inhibited from subsequently amending the rule in response to comments received at the public hearing.
utory authority and constitutionality, have it approved by the Governor, and file it with the Revisor of Regulations and the Secretary of State. No rule is valid unless it has been (1) approved by the Governor, (2) filed with the Revisor of Regulations for five days, and (3) filed with the Secretary of State on the date designated and in the form prescribed by the Revisor of Regulations.

119. NEB. REV. STAT. § 84-905.01 (Reissue 1976). The submission to the Attorney General is curious since the Attorney General's decision is completely toothless. If he approves the rule, the rule is stamped with his dated and signed stamp of approval. If he disapproves the rule, presumably the rule is not stamped, but the rule-making procedure can continue unimpeded. The purpose of the requirement must be to notify the agency and the public of questionable rules. It is doubtful whether this purpose justifies the burden and expense of the review.

120. See notes 104-05 & accompanying text supra.


123. NEB. REV. STAT. § 84-906 (Reissue 1976). The timing of the required filing with the Secretary of State is particularly obscure; the drafting of § 84-906 is particularly inartistic. The 1947 enactment of § 84-906 was clear: "No rule required under this act to be filed with the Secretary of State shall be valid as against any person until the certified copy of the rule shall have been so filed . . . ." Administrative Procedure Act, Ch. 350, § 6, 1947 Neb. Laws 1097, 1100. Thus, under that Act, rules were not effective until they had been filed with the Secretary of State. See School Dist. No. 228 v. State Bd. of Educ., 164 Neb. 148, 150, 82 N.W.2d 8, 10 (1957). In 1973, however, the legislature amended § 84-906. It created the position of Revisor of Regulations and required agency rules to be filed with the Revisor for five days before they could become effective. L.B. 134, § 4, 1973 Neb. Laws 369, 372. In addition, the legislature revised the language quoted above from the 1947 Act: "No rule required under this act to be filed with the Secretary of State and Revisor of Regulations shall remain valid as against any person until the certified copy of the rule shall have been so filed on the date designated and in the form prescribed by the Revisor of Regulations. . . ." Id. The amendment is inartfully drafted because the term "remain valid" and the word "until" simply do not make sense together in this context. What the legislature probably intended was that the word "until" be read "unless." Thus, no rule required to be filed shall remain valid unless the rule is filed with the Secretary of State on the date designated and in the form prescribed. As a result, a rule can become valid, assuming the other requisites of the Act have been met, five days after filing with the Revisor of Regulations. A filing with the Secretary of State is not required. However, the rule will not "remain valid" "unless" the rule is filed with the Secretary of State on the date "designated." The date "designated" by the Nebraska APA is no later than June 30 of each year. NEB. REV. STAT. § 84-902(2) (Cum. Supp. 1980). So if new rules are not filed with the Secretary of State by June 30, they will become invalid on that date.

The complex statutory analysis required by the obscure language of § 84-906 should not, however, overshadow a more basic point: the function of the Secretary of State under the Nebraska APA is an anachronism. While the
The Nebraska APA provides a triple-barreled procedure for notifying interested persons of rules that have been promulgated pursuant to the Act. 124 First, the agency itself is required to publish its rules "in such manner as the agency shall determine, to bring, as far as practicable, the existence and scope of the rule to the attention of all persons affected thereby." 125 Second, each agency is required to make copies of its rules available to interested persons on request. If the agency does not do so, its rules are not effective. 126 Third, and most significantly, the Revisor of Regulations is required to compile the rules of all agencies and distribute copies of the compilation to the state library, to each county law library, and (at a price) to all interested persons. 127 As a result of these requirements, the rules of Nebraska agencies are for the most part available to interested persons. However, mere availability does not fully satisfy the goal of providing notice; the available rules must also be organized and indexed so that they can be used effectively and efficiently. 128 The volumes of the Nebraska Administrative Rules and Regulations are deficient in this regard; they are poorly indexed and difficult to use. 129

Finally, the Nebraska APA provides for a review of agency rules after they have been in effect for a year. The Act provides that, if

124. The Nebraska APA contains a number of drafting oversights which probably resulted from the "patchwork quilt" nature of the Act's enactment. See notes 1-5 & accompanying text supra. For example, in several places the Act refers to "rules and regulations." See Neb. Rev. Stat. §§ 84-901.02(1), -904(2), -906.03, -908.01, .02(2), .03, .04 (Cum. Supp. 1980). That is careless drafting since the Act defines the word "rule" to include both rules and regulations. Id. § 84-901(2) (Cum. Supp. 1980). Similarly, the Act makes several references to the "Administrative Rules and Regulations Review Committee," see, e.g., Id. §§ 84-904, -908.02(1) (Cum. Supp. 1980), even though the word "Committee" is defined to mean the Administrative Rules and Regulations Review Committee. Id. § 84-901(4) (Cum. Supp. 1980).

126. Id. § 84-905.
127. Id. § 84-906.03(3).
129. The Nebraska Legislature has exhibited an awareness of this problem. Neb. L.R. 238, 88TH LEG., 1ST SESS., NEBRASKA LEGISLATIVE JOURNAL, at 23-24 (1980) (review of current set of rules and regulations of state administrative agencies and organization of system in a manner which is easily accessible).
persons are interested in testifying about a rule, the Revisor of Regulations must hold a public hearing on it within fifteen days before or after the first anniversary of the rule’s filing date. The purpose of the hearing is to gather information to enable the Legislature’s Administrative Rules and Regulations Review Committee to determine whether the rule is “carrying out the legislative intent of the act which authorized [its] adoption.”

D. Contested Case Procedures

The Nebraska APA provides an exiguous procedure for administrative adjudications covered by the Act. All administrative procedure acts that prescribe adjudication procedures walk a tightrope between procedures so general or minimal as to be meaningless and procedures so specific that they unduly restrict agency flexibility. The Nebraska APA topples off the tightrope to the overly general or minimal side.

The contested case procedures require agencies to afford to all parties an opportunity for a hearing after reasonable notice.

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130. NEB. REV. STAT. § 84-906.03(5) (Cum. Supp. 1980). If no one responds to the notice of hearing, the Revisor of Regulations is to cancel the hearing.

131. Id. § 84-906.03(4) (Cum. Supp. 1980).

132. Id.

133. As noted before, the Nebraska APA contested case procedures only apply to “formal” adjudications, i.e., adjudications “required by law or constitutional right to be determined after an agency hearing.” Id. § 84-901(3) (Cum. Supp. 1980); see note 68 supra.

134. [With respect to administrative procedures,] effort must be made to avoid not only the Scylla of no restatement of norms governing agency procedure but also the Charybdis of a rigid procedural code judicializing’ administrative processes or over-standardizing them. . . . [That is], creators of a true administrative procedure act must be aware of the tendency to make legislation so general as to be meaningless, or, at the other extreme, so concrete as to force dissimilar agencies into the same Procrustean mold. Davis, supra note 128, at 27.

135. See notes 148-52 & accompanying text infra.

136. Even though the Act affords “parties” many rights, see NEB. REV. STAT. § 84-913 (Reissue 1976) (notice of and opportunity for hearing, right to present evidence and argument); id. § 84-914(1) (right to request that rules of evidence be applied); id. § 84-914(4) (right to cross-examine witnesses and present rebuttal evidence); id. § 84-914(5) (right to notification of official notice); id. § 84-915 (right to notice of agency decision), the term “party” is not defined in any way by the Act. Perhaps this was done on the theory that the issue would vary greatly from agency to agency and, thus could best be handled by case-by-case adjudication. See Tunks, The Model Act Route to Improvement of Iowa Administrative Procedure, 33 IOWA L. REV. 356, 362 (1948). On the other hand, although the absence of cases on the issue in Nebraska would indicate this has not been a major problem, a definition could help reduce harassment of agencies by persons with remote interests seeking to intervene as parties. See Curran & Sacks, supra note 71, at 87. See also, 1961
The Act specifies the contents of the notice of hearing\textsuperscript{138} and confers certain powers on agencies to enable them to conduct orderly and meaningful hearings.\textsuperscript{139} A relaxed evidentiary standard is provided by the Act,\textsuperscript{140} recognizing both that administrative hearing officers are not always capable of making fine-tuned evidentiary distinctions\textsuperscript{141} and that those same officers sometimes possess an

\textsuperscript{137} Model Act, supra note 18, § 1(5), at 207, 1980 Proposed Act, supra note 9, §§ 1-102(13), 4-209, at 11, 85-86.

\textsuperscript{138} Neb. Rev. Stat. § 84-913 (Reissue 1976). Of course, nothing in the Act precludes a disposition by informal settlement or default. \textit{Id}.

\textsuperscript{139} The statute specifies that the notice must contain the time and place of the hearing and the issues involved, "but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable." \textit{Id.} § 84-913 (Reissue 1976). See J K & J, Inc. v. Nebraska Liquor Control Comm'n, 194 Neb. 413, 417-18, 231 N.W.2d 694, 697-98 (1975); County of Blaine v. State Bd. of Equalization & Assessment, 180 Neb. 471, 473, 143 N.W.2d 880, 882 (1966). The 1980 Proposed Act requires more information in the notice. 1980 Proposed Act, supra note 9, § 4-206, at 82.

\textsuperscript{139} The Act confers on agencies the power to administer oaths, issue subpoenas, compel the attendance of witnesses and the production of books, and cause the depositions of witnesses to be taken. Neb. Rev. Stat. § 84-914(2) (Reissue 1976). This conferral of power is important because (1) it would be extremely difficult for agencies to hold hearings without these basic powers, and (2) in the absence of such a statutory conferral of power, agencies have no such inherent powers. See F. Cooper, supra note 14, at 295. Although the Nebraska APA does not provide an enforcement procedure, presumably if an agency subpoena is not obeyed the agency can seek judicial enforcement. Cf., Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894) (Court upheld the constitutionality of provisions of the Interstate Commerce Act which provided for judicial enforcement of agency subpoenas).

\textsuperscript{140} The general evidentiary standard provided by the Act is as follows:

   "An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. . . ."

Neb. Rev. Stat. § 84-914(1) (Reissue 1976). The standard permits agencies to accept evidence that would be inadmissible in most courts. See City of Lincoln v. Nebraska Pub. Power Dist., 191 Neb. 556, 567, 216 N.W.2d 722, 729 (1974); County of Sioux v. State Bd. of Equalization & Assessment, 190 Neb. 196, 202, 207 N.W.2d 219, 221 (1973). See also Lawrence v. Kozlowski, 171 Conn. 705, 710, 372 A.2d 110, 115, cert. denied, 431 U.S. 969 (1976); Wallace v. District Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. App. 1972); Michel v. Department of Public Safety Alcoholic Beverage Control Bd., 341 So.2d 1161, 1165 (La. App. 1976). However, "agencies are not turned loose to utilize evidence of the 'King John, somebody told me, said to a person he knew' type," Merrill, supra note 2, at 28. The standard has been criticized, though, as too liberal. As one commentator has noted "[e]very hearing officer considers himself a reasonably prudent man . . . and so, under this rule, the hearing officer is free to accept whatever he may wish to rely on." F. Cooper, supra note 14, at 386.

\textsuperscript{141} The Act, e.g., provides that agencies: "\textit{may} exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence . . . ." Neb. Rev. Stat. § 84-
expertise that should not be constricted by overly formalistic standards. Nevertheless, the Act provides that parties may, in effect, "buy" more stringent evidentiary rules. Under the Act, parties are entitled to cross-examine witnesses and to submit rebuttal evidence. The agency is required to prepare an official record and the Act requires that the decision be based exclusively on that record. The decision, if adverse to a party, must be in writing or stated in the record; must include findings of fact and conclusions.

142. Section 84-914(5) provides that agencies can take notice of some facts that judges could judicially notice and, "in addition, may take notice of general, technical, or scientific facts within [their] specialized knowledge." Neb. Rev. Stat. § 84-914(5) (Reissue 1976). The Act provides that the parties must be notified of the agency's intent to take official notice of certain facts and be afforded an opportunity to contest the noticed facts. See Durousseau v. Nebraska State Racing Comm'n, 194 Neb. 288, 294, 231 N.W.2d 566, 570 (1975); J K & J, Inc. v. Nebraska Liquor Control Comm'n, 194 Neb. 413, 418, 421-22, 231 N.W.2d 694, 698 (1975).

143. The Nebraska APA provides that a party can bind an administrative agency to the rules of evidence applicable in district court if a timely, written request is made and the party agrees to pay the resultant costs, including the cost of court reporting services. Neb. Rev. Stat. § 84-914(1) (Reissue 1976). See Gateway Bank v. Department of Banking, 192 Neb. 109, 219 N.W.2d 211 (1974).

144. Neb. Rev. Stat. § 84-914(4) (Reissue 1976). The right to cross-examination, however, is less than absolute. In Box Butte County v. State Bd. of Equalization & Assessment, 206 Neb. 696, 295 N.W.2d 670 (1980), the counties contended that they were denied their right of cross-examination. The Nebraska Supreme Court rejected their claim. Noting that there were 2,000 pages of testimony and five transfer cases containing documentary evidence, the court held that the Nebraska APA should not be strictly applied. Thus the seemingly absolute language of § 84-914(4) can be overridden by a sufficiently compelling manageability interest.


Unfortunately, the Nebraska APA's contested case procedures are as notable for what they do not contain as for what they do contain. The Act simply ignores several problem areas. For example, the Act provides no guidance on the appropriate agency review procedure where a subordinate hearing officer, rather than the agency itself, conducts the hearing and renders the initial decision. The Act does not deal with disqualification problems, that is, problems arising when the agency's decisionmaker is unfit by reason of prejudice, partiality or interest. Ex parte communications between contested case decisionmakers and other agency employees or parties to the proceedings are not limited by the Act. The Act does not include an explicit guarantee of a right to counsel in contested cases. In summary, the minimal contested case procedures of the Nebraska APA are insufficient, particularly in light of the many issues left untouched by the Act.

E. Legislative Review of Agency Rules

In 1972, the Nebraska Legislature created a legislative committee to continuously study agency rules. The Administrative Rules and Regulations Review Committee was directed to pres-
ent recommendations to the legislature at the beginning of each session. In 1978, the Nebraska Legislature significantly expanded the powers of the Committee by giving it the power to temporarily suspend agency rules and, if necessary, to introduce a bill in the legislature to repeal the suspended rules.

The Act prescribes the procedure which the Committee must follow in exercising its expanded powers. Agency rules are referred to the Committee by the Revisor of Regulations. When complaints are received on a rule, the Committee may hold a public hearing. If the Committee finds that the rule does not "conform to the needs of the people affected by such rule" or is not "consistent with legislative intent or responsive to the issue addressed by the enabling legislation," it can recommend to the agency that it amend or repeal the rule. If the agency has not done so within thirty days of the recommendation, the Committee can, after complying with the rule-making requirements of the Act, suspend the rule. After suspension, the Committee must place the issue before the legislature in the form of a bill to repeal the rule. If the bill is defeated, the rule is "unsuspended" and the Committee cannot suspend it again for twelve calendar months. If the bill passes, the rule is repealed and the agency cannot re-issue it absent specific legislative authorization.

Although it is beyond the scope of this article to fully discuss the issue, the Committee's power to suspend and the legisla...


155. Id. In 1973, the Act was amended to provide that the power to make recommendations to the Legislature included "the power to recommend to the legislature that the original enabling legislation serving as authority for promulgation of such rules be repealed, changed, altered, amended, or modified in such manner as it deems advisable." L.B. 134, § 2(2), 1973 Neb. Laws 369, 371. The 1973 Act also provided that if such legislative action was taken the targeted rule would become null and void. Id. Obviously, this merely reaffirmed, but did not increase, the Legislature's power over administrative agencies.


157. Id. § 84-908.04 to .05.

158. Id. § 84-908.

159. Id. § 84-908.02(2).

160. Id.

161. Id. § 84-908.03.

162. Id. § 84-908.04.

163. Id. § 84-908.05.

tute's power to repeal agency rules are of questionable constitutional validity.\textsuperscript{165} It can be argued that the legislature's power to repeal agency rules violates the separation of powers provision of the Nebraska Constitution.\textsuperscript{166} That is certainly the opinion of the Attorney General of Nebraska:

\begin{quote}
[W]e believe the repeal of rules and regulations, like their adoption, is an administrative function, and cannot be exercised even by the legislature itself. Without question the legislature could, if it saw fit, accomplish the invalidation of almost any rule or regulation by amending the statute under which it was promulgated, removing the foundation upon which the rule or regulation was based. But to simply 'repeal' the rule or regulation (which was not 'passed' by the Legislature in the first place) would create an anomaly. The basic statute would continue to authorize the rule or regulation, but the 'repealer' would forbid it. In any event, we believe it would be difficult to sustain such an action against an attack based upon Article II, Section 1.\textsuperscript{167}
\end{quote}

This opinion of the Nebraska Attorney General is an overly formalistic interpretation of the separation of powers doctrine and of the legislative repeal provisions of the Nebraska APA.

The Attorney General believes that the legislature cannot adopt or repeal rules, which may be true. However, the legislature can certainly amend an agency's statutory authority to mandate or preclude certain rules. By "repealing" an agency rule, the legislature is doing nothing more than amending the agency's statutory authority. To illustrate, assume that the Nebraska Legislature, concerned over a proliferation of shocking deaths, passes a law prohibiting the use of hair dryers in bathtubs. The legislature then creates an agency to administer the statute, giving it the power to promulgate rules. The agency promulgates a rule interpreting the statute to preclude the use of toaster ovens in bathtubs.\textsuperscript{168} The Attorney General states that the agency's promulgation of the rule was an administrative function and could not have been exercised.

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\textsuperscript{167} Article II, section 1 of the Nebraska Constitution provides: "The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

\textsuperscript{168} Obviously on the dubious theory that toaster ovens can be used to dry hair.
by the legislature itself.\textsuperscript{169} Even if correct, the statement is irrelevant. The legislature, if it desired to do so, did not have to promulgate a rule to outlaw the use of toaster ovens in bathtubs; it could have simply included the prohibition in the statute itself. Similarly, if the legislature utilizes the Nebraska APA procedure and repeals the agency rule, the legislature is not invading some ill-defined administrative province. Rather, it is merely limiting the statutory authority of the agency to promulgate rules; in effect, it is amending the initial statutory enactment.\textsuperscript{170} Certainly, the Attorney General would not say that the legislature is precluded, after he sees the agency's toaster oven rule, from amending the initial statute to outlaw the use of hair dryers, but not toaster ovens, in bathtubs. Although in a slightly different form, that is what the legislature does when it repeals a rule under the Nebraska APA.\textsuperscript{171}

The Committee's power to suspend regulations does not fare as well under constitutional analysis. As the Attorney General points out,\textsuperscript{172} the Committee's action in suspending a rule cannot be legislative. Legislative powers can only be exercised by the legislature itself and then only in the manner prescribed by the Constitution.\textsuperscript{173} Thus, the Attorney General concludes, the act must be administrative and, hence, beyond the power of a legislative committee. But what if the action of suspending rules is administrative in nature? Has not the legislature merely created an administrative agency with the power to suspend rules and appointed to it members who happen to be legislators? Even if the Committee is viewed in this light, its power to suspend rules can probably not be upheld. First, if the Committee is characterized as

\begin{itemize}
  \item \textsuperscript{169} "[T]he repeal of rules and regulations, like their adoption, is an administrative function, and cannot be exercised even by the legislature itself." 24 Op. Neb. Att'y Gen. 35, at 38 (1977).
  \item \textsuperscript{170} See 1980 PROPOSED ACT, supra note 9, at 63 ("A legislative veto, in effect, would constitute a pro tanto narrowing of the authorizing legislation. . . ."). Viewed in this light, the anomaly noted by the Attorney General is illusory. The "repealer" limits the agency's rule-making authority by effectively amending its statutory basis. As a result, the basic statute can no longer be said to authorize the disapproved rule.
  \item \textsuperscript{171} The repeal provisions of the Nebraska APA are certainly less troublesome than so-called "one-house veto" provisions whereby one house of the legislature can disapprove regulations. See Atkins v. United States, 556 F.2d 1028 (Cl. Cl. 1977). See also State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980). See generally 1980 PROPOSED ACT, supra note 9, at 63. The Nebraska APA provisions do not, obviously, present bicameralism issues, nor do they undermine the Governor's veto powers. See NEB. REV. STAT. § 84-908.05 (Cum. Supp. 1980) (preserves Governor's right to veto a bill which repeals an agency rule).
  \item \textsuperscript{173} Id.
\end{itemize}
an agency, its members must be appointed by the Governor\textsuperscript{174} and not elected by the legislature, as the Nebraska APA provides.\textsuperscript{175} Second, the exercise of discretion by an agency must be circumscribed by legislative standards.\textsuperscript{176} The standards circumscribing the Committee's suspension powers may not be specific enough to withstand constitutional analysis.\textsuperscript{177}

Finally, it must be noted that, even if the legislature's power to repeal and the Committee's power to suspend are constitutional, the legislative review provisions of the Nebraska APA may be unwise. The benefits received from enhanced legislative oversight may be outweighed by other foreseeable effects of the legislative review process. For example, it seems probable that when agency decisionmakers begin formulating proposed rules, they will negotiate with members of the Administrative Rules and Regulations Review Committee to insure that the rules are acceptable to the Committee. Since the negotiations would not be open to the public, the political accountability of the legislators would be weakened and the open rule-making process favored by the Nebraska APA would be undermined:\textsuperscript{178}

Because legislators could effectively make law without casting votes, the public would have no way to know who advocated what position. Because administrators would be revealing their conclusions through off-the-record discussions, the courts would be unable to test their logic and their inferences. Rather than making the agencies more accountable..., such political rule making would render the entire government less accountable to the people.\textsuperscript{179}

In addition to this concern, vigorous legislative oversight may result in less agency rule-making. To the extent the legislative review process renders rule-making unpredictable or politically hazardous, agencies, if they have a choice, may conduct their business through adjudication rather than rule-making.\textsuperscript{180} If this oc-

\textsuperscript{174} Neb. Const. art. IV, § 10.
\textsuperscript{177} The Nebraska APA permits suspension of a rule if the rule does not "conform to the needs of the people affected by" the rule or if the rule is not "consistent with legislative intent or responsive to the issue addressed by the enabling legislation." Neb. Rev. Stat. § 84-908.02(2) (Cum. Supp. 1980).
\textsuperscript{179} Reich, Carter, Congress Plot Strategies to Win Control Over Regulations, Nat'l L.J., July 16, 1979, at 21, col. 1.
\textsuperscript{180} Many, if not most, agencies have the statutory authority to both make rules and conduct adjudications. Agencies have considerable discretion in deciding whether to proceed by rule-making or adjudication: "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one
curred, the many advantages of rule-making, including participation by interested parties with a broad range of views, greater certainty and advance notice of agency standards, and increased efficiency, would be lost. Consequently, the legislative review provisions of the Nebraska APA are subject to question on both constitutional and policy grounds.

F. Judicial Review of Rules and Contested Cases

The power of courts to review agency action is largely a negative power. That is, courts generally act to curb excessive exercises of agency power; they seldom compel agency action that was improperly withheld. Despite this limitation, judicial review serves to cause "overzealous officials to... think once, at any rate, even if not twice, before they act," to preserve the judiciary as the final arbiter of constitutional and statutory provisions, and to provide an avenue of relief for persons adversely affected by agency action.

The Nebraska APA has three basic provisions which provide for judicial review of agency rules and contested case determinations. These provisions are particularly important in Nebraska because the supreme court has determined that "[t]he right of appeal [from agency action] in this state is clearly statutory and unless [a] statute provides for an appeal... such right does not exist." Thus, in the absence of such provisions or other statutes specifically providing for review, agency rules or contested case determinations in Nebraska would not be subject to judicial review. The Nebraska APA, however, has no provision providing for review of an agency action which is neither a rule nor a contested case,

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1. See Reich, supra note 179, at 21. See also SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (rule-making is the preferred mode of proceeding).
2. HORSKY, THE WASHINGTON LAWYER 78 (1952), quoted in, Davis, supra note 128, at 29.
3. See generally Davis, supra note 128, at 29.
6. A substantial number of agency actions, if not the vast majority, falls within this class. For example, a decision by a prosecutorial agency not to prosecute, a decision to respond or not to respond to certain correspondence, a decision not to issue a declaratory ruling under § 84-912 and host of other decisions of relatively low saliency would be in this class. Contrary to the
and there is no provision for review of an agency's refusal to act. Consequently, many agency actions are not subject to judicial review under the Nebraska APA. This section, however, discusses those sections of the Act which provide for judicial review.

Section 84-911(1) provides for judicial review of agency rules:

The validity of any rule may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

This section is based on the 1961 Model Act and in light of the dearth of cases nationally and in Nebraska, it has not been problematic. The Nebraska Act adds to the Model Act by specifying the standard of review. The standard, recognizing the distinction between exercises of quasi-legislative power in rule-making and exercises of quasi-judicial power in adjudications, provides a narrower scope of review than that provided for contested case determinations.

Section 84-912 provides for judicial review of declaratory rulings issued by agencies. Under this section, agencies, if petitioned by an interested person, may issue declaratory rules that are binding on the agency and the petitioners. The declaratory ruling is then subject to judicial review in the same manner as a contested case.

The statute apparently vests the agency with the discretion to issue a declaratory ruling. assertion of one commentator, see Note, supra note 185, at 1154 n.94, agency action falling within the Nebraska APA's definitions of rule and contested case comprise only a segment, albeit the most visible and publicized segment, of an agency's actions. See notes 80-89 & accompanying text supra. 187. See Comment, The Wyoming Administrative Procedure Act, 1 LAND & WATER L. REV. 497, 511 (1969) (Wyoming administrative procedure act expands judicial review to encompass agency inaction and agency action which is neither rule-making nor adjudication). See also Bloomenthal, supra note 48, at 622-23.

189. 1961 MODEL ACT, supra note 178, § 7, at 213.
191. In the only reported Nebraska case interpreting the section, the supreme court held that the granting of declaratory relief under § 84-911(1) is discretionary with the court. Millard School Dist. No. 17 v. State Dept of Educ., 202 Neb. 707, 710-11, 277 N.W.2d 71, 73 (1979) (declaratory relief denied where petition presents a claim for money against the state and where declaratory judgment would not terminate controversy giving rise to proceeding).
192. NEB. REV. STAT. § 84-911 (Reissue 1976).
issue or refuse to issue such declaratory rulings.194 If agency refusals to issue such rulings are not subject to judicial review (as seems likely),195 the viability of the section 84-912 review procedure is seriously undermined; agencies could easily avoid such review by simply refusing to issue declaratory rulings.196

Section 84-917 is the major judicial review provision of the Nebraska APA. This section, in large part based on the 1946 Model Act,197 provides for review of agency decisions in contested cases. Generally, the section provides that “aggrieved” persons are entitled to judicial review of “final” agency decisions in contested cases.198 A single form of proceeding is prescribed199 and the agency’s action is reviewed on the basis of the record of the agency.200 While appeal of an agency action does not automatically stay enforcement of the agency decision, section 84-917 allows the entry of such a stay either by the agency itself or by a court.201 In addition, the section provides the applicable standard of review for the reviewing court.202

As noted above, any “aggrieved” person is entitled to judicial review under section 84-917. In effect, this skeletal language imposes a standing requirement.203 Although the language is not as

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196. The 1961 Model Act avoids this problem by providing that “[r]ulings disposing of petitions” are subject to judicial review. 1961 Model Act, supra note 18, § 8, at 213. Presumably, this language, in contrast to the Nebraska APA language which is based on the 1946 Act, see 1946 Model Act, supra note 7, § 7, at 208, permits judicial review of an agency refusal to issue a declaratory ruling. See Dakin, supra note 141, at 817.


199. Id. § 84-917(2).


202. Id. § 84-917(5). Section 84-918 provides for appeal from the district court to the supreme court. Although the section appears to envision a de novo review by the supreme court, the supreme court has wisely interpreted it to limit the scope of review to that governing the district court’s decision, i.e., to the standard provided by § 84-917(6). Southwestern Bank & Trust Co. v. Department of Banking & Fin., 206 Neb. 599, 600-01, 294 N.W.2d 344, 344 (1980); Gosney v. Department of Pub. Welfare, 206 Neb. 137, 140, 291 N.W.2d 708, 711-12 (1980); The 29’s Inc. v. Nebraska Liquor Control Comm’n, 190 Neb. 761, 764, 212 N.W.2d 344, 346 (1973).

203. See Comment, supra note 44, at 107.
specific as it could be,\textsuperscript{204} it is Model Act language that has been delineated to a great extent by cases in other jurisdictions.\textsuperscript{205} As such, it probably fulfills its function of screening out frivolous or unwarranted claims.

Even if a person has standing under the Act, only "final" agency decisions are appealable. This statutory language imposes an obligation to exhaust administrative remedies,\textsuperscript{206} and, as with the "aggrieved" person requirement, this language is not overly specific.\textsuperscript{207} Nevertheless, it does serve as a mechanism to avoid "premature interruption of the administrative process."\textsuperscript{208}

The Nebraska APA prescribes a form of proceeding to obtain judicial review of an agency's decision in a contested case.\textsuperscript{209} Model acts, presumably including the Nebraska APA, provide a form of proceeding in an attempt to avoid the technical procedural problems associated with prerogative writs.\textsuperscript{210} Although the

\begin{enumerate}
\item \textsuperscript{204} See 1980 Proposed Act, \textit{supra} note 9, at 117-18.
\item \textsuperscript{205} See 13 Uniform Laws Ann. 399, 482-85 (Cum. Supp. 1980); McCrory, \textit{supra} note 9, at 17-19.
\item \textsuperscript{206} Cox, \textit{supra} note 9, at 907.
\item \textsuperscript{207} See 1980 Proposed Act, \textit{supra} note 9, at 118-19; 1961 Model Act, \textit{supra} note 18, § 15(a), at 220.
\item \textsuperscript{209} The Act provides that review can be obtained by filing a petition in the district court of the county where the challenged agency action was taken within thirty days of service of the agency's final decision. All the parties of record must be made parties to the review proceedings and a summons must be served on the agency. The court may permit intervenors. Neb. Rev. Stat. § 84-917(2) (Reissue 1976). Such a petition can result in affirmance, remand, reversal or modification of the agency's decision. \textit{Id.} § 84-917(6).
\item \textsuperscript{210} The prerogative writs, whether in common law or statutory form, present many problems for the lawyer seeking review of agency action:

The common law remedies available are the equitable and the extraordinary legal remedies, which as applied by state courts are mutually exclusive. The determination of which method of review is applicable is made on concepts of whether the agency action is judicial, nonjudicial, discretionary, or ministerial; and these concepts do not lend themselves to accurate definition. A party is put to the task of choosing which remedy is applicable to the decision appealed from, and if he makes the wrong choice his appeal will fail. Certiorari is the wrong method of reviewing nonjudicial action, mandamus will not reach discretionary action, and since neither certiorari nor mandamus is good for an action which is both nonjudicial and discretionary; the remedy is equitable, so that concepts such as irreparable injury are applicable even though such concepts would not affect certiorari or mandamus. The result of such a system may be that the court becomes so taken with the technical procedural problems that the appeal fails to reach the merit of the case.

Comment, \textit{supra} note 187, at 515 n.133 (citations omitted). But the dangers of the prerogative writs was not limited to courts becoming "taken" with them; the plaintiff was forced to make a choice and if he chose wrong, his cause of action could be doomed:
Nebraska Act is a step towards the achievement of this objective, it falls short. First, it provides different procedures for review of rules and for review of determinations in contested cases. Second, even with respect to review of contested case determinations, it does not make the Act's form of proceeding exclusive.

In Nebraska, judicial review is based "on the record" of the agency. Obviously, the purpose of the provision is to require litigants to try their cases "fully and carefully before the administrative tribunal itself and not [to] use that body as a mere stepping stone to the courts." Nevertheless, certain exceptions to the rule would be desirable. For example, the reviewing court should


212. The Nebraska APA explicitly provides that the Act's form of proceeding does not prevent resort to other means of review provided by law, Neb. Rev. Stat. § 84-917(1) (Reissue 1976), see Weeks v. State Bd. of Educ., 204 Neb. 659, 662-63, 284 N.W.2d 843, 845-46 (1979); Downer v. Ihms, 192 Neb. 594, 597-98, 223 N.W.2d 148, 150 (1974), and, indeed, provides that the Act's procedures do not apply where "other provisions of law prescribe the method of appeal." Neb. Rev. Stat. § 84-917(7) (Reissue 1976). The latter provision must be intended to preserve judicial review procedures that have been tailored for specific agencies. See, e.g. id. §§ 48-638 to -640 (Reissue 1978) (appeal procedures from decisions of appeal tribunal under the Unemployment Compensation Act), id. § 60-420 (Reissue 1978) (appeal procedure from certain decisions of Director of Motor Vehicles). Cf. Scott v. Board of Nursing, 196 Neb. 681, 691-92, 244 N.W.2d 683, 690 (1976) (appeal procedure from certain decisions of Board of Nursing). Nebraska's preservation of various forms of proceeding and concomitant refusal to make the Act's form of proceeding exclusive has not been without its problems. See, e.g., Harrigfeld v. Nebraska Liquor Control Comm'n, 203 Neb. 741, 280 N.W.2d 61 (1979). Contrast the Nebraska approach with that of Wisconsin. When Wisconsin adopted its administrative procedure act, it specifically modified the sundry methods of review in seventy-odd separate statutes to provide that "[a]ny order of the board shall be subject to review in the manner provided in [the administrative procedure act]." Hoyt, The Wisconsin Administrative Procedure Act, 1944 Wis. L. Rev. 214, 229.


214. Hoyt, supra note 212, at 234.
be able to take additional evidence if the objection to the agency's decision is that the agency harbored improper bias against the petitioner or acted with an improper motive.215

Finally, the Nebraska APA specifies the scope of judicial review of agency action.216 The standards provided are general, but it is important to recognize that standards with such broad applicability must be general and can only be made clear through elaboration and application by the courts.217 Other than merely reciting the statutory language, the courts in Nebraska have not construed the standards to any great extent.218 It should be noted, however, that the Act's language appears to embrace the legal residuum doctrine. Under that doctrine, despite the fact that the evidentiary rules are eased,219 an agency's determination is not substantially supported, and hence cannot be upheld by a court, unless there is at least a residuum of evidence supportive of the decision that is competent under the exclusionary rules. For example, a determination could not be upheld if the only supportive evidence was hearsay.220 The Nebraska APA requires the agency's decision to be supported by "competent, material and substantial evidence."221 The word "competent" arguably imports the legal resid-

215. See, e.g., 1980 PROPOSED ACT, supra note 9, § 5-114, at 124.
216. NEB. REV. STAT. § 84-917(6) (Reissue 1976).
217. Curran & Sacks, supra note 71, at 96.
218. See Southwestern Bank & Trust Co. v. Department of Banking & Fin., 206 Neb. 599, 601, 294 N.W.2d 343, 344 (1980); Box Butte County v. State Bd. of Equalization & Assessment, 206 Neb. 698, 709, 295 N.W.2d 670, 679 (1980); The 20's Inc. v. Nebraska Liquor Control Comm'n, 190 Neb. 761, 212 N.W.2d 344 (1973). See generally Gosney v. Department of Public Welfare, 206 Neb. 137, 146-47, 291 N.W.2d 708, 711-12 (1980); American Motor Sales Corp. v. Perkins, 198 Neb. 97, 251 N.W.2d 727 (1977). Despite the relative dearth of authority, the statutory standard of review in the Nebraska APA does not appear to differ significantly from the standard of review in error proceedings, see Davis v. Board of Educ., 203 Neb. 1, 277 N.W.2d 414 (1979) (administrative decision in error proceeding must be supported by "sufficient evidence"); Stradley v. City of Omaha, 201 Neb. 378, 381, 267 N.W.2d 541, 543 (1978) (administrative decision in error proceeding affirmed if agency acted within its jurisdiction and competent evidence supports findings and order), or from the standard of review under other statutes. See Herink v. State Real Estate Comm'n, 196 Neb. 241, 292 N.W.2d 172 (1977) (order of Nebraska State Real Estate Commission upheld if supported by substantial evidence, within scope of Commission's authority and not arbitrary, capricious or unreasonable); Hartman v. Glenwood Tel. Membership Corp., 197 Neb. 359, 372-73, 249 N.W.2d 468, 476 (1977) (order of Public Service Commission upheld if Commission acted within scope of its authority, its order is reasonable and not arbitrary, and there is evidence to support findings).
219. See notes 140-43 & accompanying text supra.
221. NEB. REV. STAT. § 84-917(6)(e) (Reissue 1976) (emphasis added).
uum doctrine, a result that is probably unfortunate.

III. CONCLUSION

This analysis of the Nebraska APA demonstrates that the Act is seriously deficient in several aspects. Clearly, this is the time for legislative change. While the change should not be merely another piecemeal attempt to patch the Act's most glaring deficiencies, neither should the legislature adopt the 1980 Proposed Act in toto without critical consideration. Change in this area affects virtually every state agency and, therefore, has an enormous disruptive potential. The legislature should consider the current Act and the procedures it establishes and review the 1961 Model Act and the 1980 Proposed Act for approaches that are adaptable to Nebraska's peculiarities. It should tailor an Act that, hopefully, best effectuates the goals of a uniform administrative procedure act while minimizing to the greatest extent possible the cost-producing disruption to settled agency practices and expectations. In addition, although this article has focused on the legislative shortcomings of the Act, increased awareness of the Act's potential by the legal community as a whole, and specifically practicing attorneys, is important. The Nebraska APA is a valuable tool that is all too often overlooked. To the extent the Act is increasingly utilized as a tool, clients can be better served and, of equal importance, the Act can be refined to better effectuate the admirable policies that resulted in its initial enactment thirty-six years ago.


223. One cannot help wondering, however, whether the legislatures really meant to produce a hybrid situation in which commissions could freely hear all the incompetent evidence they pleased, but could make no legal use of it—especially since the avowed object of the provision, that of escaping the bickerings which had so long discredited the rules of evidence in common law trials, would thereby be thwarted; for the same old quarrels would be staged, the only difference being that they would be fought in the name of probative-value-to-support-awards rather than in the name of admissibility.


224. See, e.g., Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N.W.2d 221 (1975). In Board of Regents, Lancaster County challenged a rule promulgated by the Board of Regents. While the rule was upheld, the County never made the Nebraska APA argument available to it, specifically, that the rule was invalid because it had not been filed as required by the Act.