


10-1976

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Recommended Citation

C. Anthony Cleveland, *Can the Joint Administrative Procedures Committee Adequately Solve Administrative Conflict*, 4 Fla. St. U. L. Rev. 350 (2014).
<http://ir.law.fsu.edu/lr/vol4/iss3/2>

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NOTES

CAN THE JOINT ADMINISTRATIVE PROCEDURES COMMITTEE ADEQUATELY SOLVE ADMINISTRATIVE CONFLICT

I. INTRODUCTION

The Joint Administrative Procedures Committee is a new factor in Florida administrative law. Its arrival was the product of much legislative study and debate. Its present form and function are the subject of continuing controversy.

The committee was created with the enactment of section 11.60, Florida Statutes.¹ That law expressly dovetails the committee's powers and duties with the new Florida Administrative Procedures Act [hereinafter APA].

The committee shall:

(a) Maintain a continuous review of the statutory authority on which each administrative rule is based and, whenever such authority is eliminated or significantly changed by repeal, amendment, holding by a court of last resort, or other factor, advise the agency concerned of the fact.

(b) Review administrative rules and advise the agencies concerned of its findings.

(c) Have the duties prescribed by chapter 120 concerning the adoption and promulgation of rules.

(d) Generally review agency action pursuant to the operation of the Administrative Procedure Act.

(e) Report to the legislature at least annually, no later than the first week of the regular session, and recommend needed legislation or other appropriate action.²

In contrast to these broadly drawn provisions, the new APA specifically and narrowly describes the committee's function in agency rulemaking. Section 120.54 details the rulemaking procedure to be followed by all agencies. One requirement is that an agency file with the committee a copy of each rule it intends to adopt.³

As a legislative check on *legislatively created* authority, the committee shall [then] examine the proposed rule and its accompanying material for the purpose of determining whether the proposed rule is within the statutory authority on which it is based, whether the rule is in

1. Fla. Laws 1974, ch. 74-310, § 2.

2. FLA. STAT. § 11.60(2) (1975).

3. FLA. STAT. § 120.54(10)(a) (1975).

proper form, and whether [there is] . . . adequate notice of the effect of the rule.⁴

If the committee objects to any proposed rule, it so informs the agency. The agency then has three options: It can (1) modify the rule to satisfy the committee's objections; (2) withdraw the rule in its entirety; or (3) refuse to modify the rule.⁵ An agency's failure to act within 30 days constitutes withdrawal of the rule in its entirety.⁶

Section 120.54(13) of the APA states that "[n]o agency has inherent rulemaking authority"⁷ This statement reflects the legislature's view that agencies are legislatively created bodies and illustrates the lawmakers' desire that such agencies be subject to a legislative check. Agency officials, though, have argued that legislative interference with their delegated rulemaking authority constitutes a usurpation of executive and judicial powers.

This note will trace the committee's roots in administrative law and discuss the practical and political wisdom, as well as the constitutionality, of its present role in Florida.

II. RISE OF THE AGENCIES

It has been said that "[o]ne of the fundamental concepts of our form of government is that the legislature, as representative of the people, will maintain a degree of supervision over the administration of governmental affairs."⁸ Originally this control took the form of the legislature itself exercising all legislative power. Theoretically the executive branch of government alone exercised executive powers and only the judicial branch, judicial powers.⁹ This pristine Montes-

4. *Id.* (emphasis added).

5. *Id.*

6. *Id.*

7. FLA. STAT. § 120.54(13) (1975).

8. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 109 (6th ed. 1974).

9. This contention was based on the argument that since "power is of an encroaching nature . . . it ought to be effectually restrained from passing the limits assigned to it." The means for controlling 'the several classes of power, as they [may] in their nature be legislative, executive, or judiciary . . . is to provide some practical security for each, against the invasion of the others.'" W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 54 (6th ed. 1974), quoting THE FEDERALIST No. 48 (J. Madison) (bracketed insertion in original).

The principle, as stated by Blackstone, was that

[i]n all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.

1 W. BLACKSTONE, *COMMENTARIES* *146.

quieivian separation of powers did not last a year in the new United States government under the Constitution. Federal agencies can trace their lineage without break to the 1789 congressional grant of power to the President to appoint customs collectors to estimate and collect duties on imports.¹⁰

Agencies developed on both the federal and state levels primarily because legislatures found that certain functions, such as regulation of the railroads, had become so complicated that a need had arisen for new governmental bodies with combined legislative, executive, and judicial characteristics.¹¹

Florida had few state boards or commissions prior to the effective date of the 1885 state constitution. The Internal Improvement Fund, dating to 1855, was the prominent exception. After 1885, however, beginning with the Railroad Commission, the number of state agencies increased dramatically.¹²

These new governmental bodies were attacked on the basis of the separation of powers doctrine¹³ and the American tradition of checks and balances.¹⁴ The agencies' simultaneous enjoyment of the three traditional powers of government¹⁵ was said to violate the

10. Act of July 31, 1789, ch. 5, 1 Stat. 29. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04 (1958).

11. "The Legislature is in session only during limited periods, and statutes cannot always anticipate and provide for complicated and contingent conditions in governmental affairs." *Florida Motor Lines, Inc. v. Railroad Comm'rs*, 129 So. 876, 881 (Fla. 1930).

12. See, e.g., *McRae v. Robbins*, 9 So. 2d 284, 288 (Fla. 1942) ("[s]tatutes delegating rule making and enforcement powers to officers and boards . . . are numerous and generally are by the courts sustained"); *South Atl. S.S. Co. of Delaware v. Tutson*, 190 So. 675, 680 (Fla. 1939) ("[s]uch a State policy [of creating administrative agencies] . . . is becoming more and more essential to efficient government . . . [given] the rapid progress and development of a great and growing State").

13. See note 9 *supra*.

14. Representative of those who feared that this tradition was in danger was a former United States solicitor general:

"Uncle Sam has not yet awakened from his dream of government by bureaucracy, but ever wanders further afield in crazy experiments in state socialism. Possibly some day he may awaken from his irrational dreams, and return again to the old conceptions of government, as wisely defined in the Constitution of the United States."

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04, at 27 (1958), quoting J. BECK, OUR WONDERLAND OF BUREAUCRACY ix (1932). In 1937 the President's Committee on Administrative Management reported that federal governmental agencies

constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three.

PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT 40 (1937). See also G. HEWART, THE NEW DESPOTISM (1929) for a similar British reaction to increased agency activity in the United Kingdom.

15. See, e.g., *West Flagler Amusement Co. v. State Racing Comm'n*, 165 So. 64, 65

constitutional guarantee of separation of powers. It was also argued that the legislature could not delegate the power to legislate, that is, give to any other body the power to formulate rules having the force of law. These objections are simply different expressions of the same argument. If governmental powers were separated and allocated so that only the legislative branch received legislative powers, then not only could no other branch assume those powers, but the legislature itself could not delegate them to another branch, whether preexisting or newly created by the legislature.

The argument was long ago rejected by both the federal and state governments.¹⁶ The division and allocation of governmental powers is an abstract concept: absolute separation of powers would render government unworkable. In Florida, the courts have recognized this by permitting a certain degree of mixing through the creation of administrative commissions and boards.¹⁷ The Florida constitution provides that the powers of government shall be divided into three branches, and that no person belonging to one branch shall exercise powers belonging to any other except as otherwise provided in the constitution.¹⁸ The constitution does not, however, specify what powers belong exclusively to any particular branch. Thus the courts have allowed the delegation of legislative or "quasi-legislative" powers to a legislatively created agency where the powers do not accrue exclusively to the legislature¹⁹ or are not "substantive,"²⁰ "essentially,"²¹

(Fla. 1935), quoting *State ex rel. Williams v. Whitman*, 156 So. 705, 707 (Fla. 1934): "Legislative developments in recent years have brought into existence administrative tribunals set up by law and vested with limited statutory powers . . . that amount in substance to delegated exercises of special legislative and executive, and sometimes judicial, functions." In *Louisville & Nashville R.R. v. Brown*, 123 F. 946, 948 (C.C.N.D. Fla. 1903), it was noted that the Florida legislature gave the state railroad commission "executive, legislative, and quasi judicial powers."

16. In 1955 it could be said, "Delegation of legislative power as an argument is probably passé in the federal system and is not spectacularly strong in Florida." Alloway, *Constitutional Law*, 10 U. MIAMI L.Q. 143, 150 (1955) (footnote omitted). See also *Florida Livestock Bd. v. Gladden*, 76 So. 2d 291 (Fla. 1954), which allowed a substantial valid delegation of power in Florida.

17. See notes 12, 15 & 16 *supra*.

18. FLA. CONST. art. II, § 3.

19. "The legislature cannot abdicate that which the Constitution vests in it exclusively." *Robbins v. Webb's Cut Rate Drug Co.*, 16 So. 2d 121, 122 (Fla. 1943). See *Spencer v. Hunt*, 147 So. 282 (Fla. 1933); *McMullen v. Newmar Corp.*, 129 So. 870 (Fla. 1930); *Florida Motor Lines, Inc. v. Railroad Comm'rs*, 129 So. 876 (Fla. 1930); *Bailey v. Van Pelt*, 82 So. 789 (Fla. 1919); *State v. Atlantic Coast Line Ry.*, 47 So. 969 (Fla. 1908).

20. *McRae v. Robbins*, 9 So. 2d 284, 290 (Fla. 1942) (concurring opinion).

21. *Id.*

“purely,”²² or “straight”²³ legislative powers. The focus is on the amount of discretion given to the agency. The legislature may not delegate to an agency its power to pass a statute de novo. It may, however, enact a law which creates a statutory framework and provides for an agency to fill in the details.²⁴ A delegation of rulemaking authority cannot be so broad as to allow the administrative agency itself to decide what public policy should be.²⁵

III. ATTEMPTS AT LEGISLATIVE CONTROL

Even with the acceptance of legislative delegations of power, it was still generally assumed that the legislature would retain control over the agencies it created. In the beginning this control could be achieved by the drafting of very restrictive, detailed enabling legislation that left the agency with almost no discretion or policy-making function. As the twentieth century proceeded through wars and economic crises, however, and the number and complexity of the tasks necessarily assigned to agencies increased, enabling legislation necessarily became much broader. “[T]hey are themselves frequently the choosers of time, method, and intensity of governmental action.”²⁶

Courts have historically functioned as checks on administrative discretion,²⁷ but the very mechanics of agency creation and operation have produced a variety of additional legislative controls. One commentator has called the increasing use of these controls the legislative assertion of “the right of continuous intervention.”²⁸ These controls have included the power of appropriations,²⁹ standing committees,³⁰

22. *Richey v. Wells*, 166 So. 817 (Fla. 1936); *State v. Atlantic Coast Line Ry.*, 47 So. 969 (Fla. 1908).

23. *Robbins v. Webb's Cut Rate Drug Co.*, 16 So. 2d 121 (Fla. 1943).

24. *Department of Citrus v. Griffin*, 239 So. 2d 577 (Fla. 1970); *Dickinson v. State*, 227 So. 2d 36 (Fla. 1969); *Lewis v. Florida State Bd. of Health*, 143 So. 2d 867 (Fla. 1st Dist. Ct. App. 1962).

25. *Barrow v. Holland*, 125 So. 2d 749 (Fla. 1960). *Cf. Lewis v. Florida State Bd. of Health*, 143 So. 2d 867 (Fla. 1st Dist. Ct. App. 1962); *Waring v. Peterson*, 137 So. 2d 268 (Fla. 2d Dist. Ct. App. 1962).

Lord Kilmuir, former Lord High Chancellor of Great Britain, regarding the same issue in the United Kingdom, spoke of the peril of “the overuse of subsidiary or delegated legislation which, if carried to extremes by an enabling bill, might give the Executive a ‘blank cheque.’” Kilmuir, *Individual Freedom Under an Unwritten Constitution*, 45 VA. L. REV. 629, 640 (1959).

26. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 82 (5th ed. 1970).

27. *Id.*

28. Macmahon, *Congressional Oversight of Administration: The Power of the Purse I*, 58 POL. SCI. Q. 161 (1943).

29. *See id.* at 163.

30. *See D. ACHESON, A CITIZEN LOOKS AT CONGRESS* 37 (1974). For a criticism of this

watchdog committees,³¹ investigations,³² intercession in pending matters by individual legislators,³³ and participation in the appointing process.³⁴ Such measures are indirect, though: none involve an actual legislative veto or modification of specific agency action.

IV. DIRECT LEGISLATIVE CONTROL

Since the end of World War II, however, various legislatures have attempted to directly control agency rulemaking. These efforts began in the United Kingdom.

Although parliamentary supervision of rulemaking had existed in various forms since 1833,³⁵ in 1929 the English Parliament grew apprehensive that its control was insufficient. The discretion allowed government ministers had been greatly expanded because of the exigencies of the First World War. Members of Parliament perceived that this wide discretion threatened their own sovereign powers. A committee was formed to study the problem, but perhaps due to the further growth of ministry power during World War II, it was not until 1944 that the committee's recommendations were put into effect. The result was a Select Standing Committee of the House of Commons whose purpose was to examine all administrative "legislation."³⁶ Yet in the United Kingdom, ministers are members of the ruling parliamentary party, as are all executives. It has therefore been suggested that any administration has such effective control of the legislature that, barring a "no-confidence" situation,³⁷ an agency should have no difficulty obtaining parliamentary approval of its rules.³⁸

The British model has been seldom used in the United States. The

control see Armstrong, *Congress and the Securities and Exchange Commission*, 45 VA. L. REV. 795 (1959).

31. See Jones, "Watchdog Committees" in the 80th Congress, 34 A.B.A.J. 726 (1948).

32. See, e.g., *WKAT, Inc. v. Federal Communications Comm'n*, 258 F.2d 418 (D.C. Cir. 1958).

33. E.g., Mike Mansfield (Dem., Mont.) has said "I would be remiss in my duty if I did not try to do for my constituents everything I possibly could to comply with their legitimate requests. I certainly think this is a part of the job of being a Senator." 105 CONG. REC. 14059 (1959).

34. See J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* (1953).

35. Carr, *Legislative Control of Administrative Rules and Regulations: II. Parliamentary Supervision in Britain*, 30 N.Y.U.L. REV. 1045 (1955).

36. For detailed explanation of the British experience see *id.*; Note, "Laying on the Table"—A Device for Legislative Control over Delegated Powers, 65 HARV. L. REV. 637 (1952).

37. See *id.* and text accompanying note 86 *infra*.

38. The Scrutiny Committee has not often brought rules to the notice of the House of Commons. In its first 16 years of operation, it examined nearly 11,000 rules, yet identified only 49 as involving unusual or unexpected administrative action. J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 94 (3d ed. 1963).

federal government rejected it in 1946.³⁹ Nevertheless, the experiments of American states in this area were probably inspired by the British experience. These indigenous experiments have taken a variety of forms, but fall into two main types.

The simpler form allows the legislature to alter an agency rule by resolution. This practice, which does not involve a screening committee, has been adopted by Nebraska,⁴⁰ Alaska,⁴¹ and Kansas.⁴² The second and more complicated version, which closely follows the present British scheme, involves a committee which screens prospective rules. The committee may or may not have the power to suspend a rule until the legislature is in session and can deal with it. Final action is by the legislature, and usually takes the form of a simple resolution.

Nebraska law requires that all agency rules be filed with both the secretary of state and the revisor of regulations for legislative consideration,⁴³ and further provides that the rules may "be repealed, changed, altered, amended, or modified in such manner as [the legislature] deems advisable."⁴⁴ In Alaska "[t]he legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department."⁴⁵ Kansas statutes grant an agency rule "the force and effect of law"⁴⁶ until the legislature adopts "a bill modifying and approving or rejecting any of the rules and regulations so submitted."⁴⁷

Connecticut and Michigan, on the other hand, utilize a screening committee.⁴⁸ The Connecticut Administrative Procedure Act provides that "no adoption, amendment or repeal of any regulation . . . shall be effective until . . . copies thereof [have] been presented to the standing legislative regulation review committee . . ."⁴⁹ Committee disapproval stays the rule's adoption. The rule is then submitted to

39. In that same year the Federal Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946), which did not provide direct legislative control, was adopted. See notes 83 & 84 and accompanying text *infra*. The British "laying on the table" procedure has been provided for, however, in certain specific federal statutes. The most significant have been the Reorganization Acts of 1939 to 1953. Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1036 (1955).

40. NEB. REV. STAT. § 84-904 (Supp. 1974).

41. ALASKA STAT. § 44.62.320 (Supp. 1975).

42. KAN. STAT. ANN. § 77-425, 426 (Supp. 1975).

43. NEB. REV. STAT. § 84-902 (Supp. 1974).

44. NEB. REV. STAT. § 84-904 (Supp. 1974).

45. ALASKA STAT. § 44.62.320 (Supp. 1975).

46. KAN. STAT. ANN. § 77-425 (Supp. 1975).

47. KAN. STAT. ANN. § 77-426(c) (Supp. 1975).

48. CONN. GEN. STAT. ANN. § 4-170 (Supp. 1976); MICH. COMP. LAWS ANN. § 24.235 (Supp. 1975).

49. CONN. GEN. STAT. ANN. § 4-170(b) (Supp. 1976).

the Connecticut general assembly which can either reverse or sustain the disapproval.⁵⁰

Michigan's statute, which is similar to Connecticut's, is the product of 20 years of frequent and major changes in the amount of agency control exercised by the state legislature. The first Michigan statute which put any controls on administrative rulemaking became effective January 1, 1944, and required that rules be submitted to the attorney general for his approval "as to form and legality" and that every rule contain "a citation of the authority" on which it was based.⁵¹

In 1945 the Michigan legislature passed a bill which would have referred agency rules, as bills, to legislative committees; any rule not adopted by concurrent resolution would then be suspended. The governor vetoed the bill.⁵² In 1947 a statute was enacted which provided for a joint interim committee with the power to approve or suspend agency rules. During the legislative session suspended rules would be referred to standing committees. Any rule not disapproved by concurrent resolution would stand.⁵³ In 1953, however, in the midst of a political controversy, the attorney general asserted that the committee's activities were unconstitutional:

The determination of the question as to whether a rule is in conformity with the statute under which it was promulgated appears to be a judicial function. Not having the power to make such a determination, the legislature cannot lawfully delegate such power to one of its committees.⁵⁴

50. CONN. GEN. STAT. ANN. §§ 4-170(b), 4-171 (Supp. 1976). Although the new Connecticut APA reproduced almost exactly the Model State Administrative Procedure Act, the one substantial modification was the retention of legislative control of agency rulemaking. "The objective of (Connecticut's) . . . policy is the prevention of bureaucratic override of legislative delegation through the mechanism of continual legislative control." Trubek, *Will the Connecticut Administrative Procedure Act Frustrate Environmental Protection?*, 46 CONN. B.J. 438, 440 (1972).

51. Mich. Public Acts 1943, No. 88, § 2. See Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J. PUB. L. 135, 138 (1958).

52. In his message accompanying the veto, Governor Kelly gave as his reasons:

1. Instead of an orderly method of legislative condemnation of improper rules and regulations, the act decrees automatic death for all rules which have not met with legislative approval at the time of the short adjournment.

2. The legislative burden of technical detail, already excessive, would be increased tremendously.

3. Legislative attention would be diverted from major issues of public policy.

4. A legislative review of administrative rules, as provided in this act, is doubtful from a constitutional viewpoint. The Attorney General of Michigan shares my opinion in this regard.

Schubert, *supra* note 51, at 142.

53. MICH. COMP. LAWS ANN. § 24.78b, c, e (1967).

54. Schubert, *supra* note 51, at 158. It is significant that in an earlier controversy

Yet the following year the legislature ignored the attorney general's opinion and reconstituted the committee for another year. The special committee had become a standing committee, and was to remain so.

In 1958, however, a statute was passed which eliminated the committee's power to suspend or abrogate rules. By that statute the legislature assumed the power to show disapproval of a rule by concurrent resolution.⁵⁵ The law was a nullity, since in effect the legislature gave itself a power it already had. In 1964 Michigan moved back half a step toward the previous procedure. The Michigan legislature provided that "[i]f authorized by concurrent resolution of the legislature, the committee may suspend any rule or regulation promulgated subsequent to the adjournment of the last preceding regular session of the legislature."⁵⁶ Five years later the state took another step back with the passage of the Administrative Procedures Act of 1969.⁵⁷ That act established the present scheme, which allows the committee itself to introduce, in either house of the legislature, a concurrent resolution disapproving a rule. If the legislature adopts the resolution the rule does not go into effect.⁵⁸ The 1958 provision requiring that rules be abrogated by "statute" now only applies to rules already in effect.⁵⁹

The Wisconsin procedure has similarly undergone many changes. A 1951 law⁶⁰ authorized the governor to suspend certain agency rules until they were approved by the legislature. In 1953 the legislature assumed the power to disapprove by joint resolution *all* agency rules.⁶¹ In 1954, however, the Wisconsin attorney general issued an opinion which declared the statute unconstitutional. He found the joint resolution procedure contrary to the Wisconsin constitution, which required that any law enacted be introduced by bill and be subject to the governor's veto.⁶² In 1955, on the strength of this opinion, the legislature repealed the law. It created a purely advisory committee which was to report its recommendations to the legislature.⁶³ But in 1966 it

the attorney general had gratuitously stated, "The constitutionality of said Act . . . has not been drawn in question, nor is it passed upon, by this opinion." *Id.* at 147.

55. Mich. Public Acts 1958, No. 177, § 8 c.

56. Mich. Public Acts 1964, No. 161, § 8 f (3).

57. MICH. COMP. LAWS ANN. §§ 24.201-315 (Supp. 1975).

58. MICH. COMP. LAWS ANN. § 24.245(4) (Supp. 1975).

59. MICH. COMP. LAWS ANN. § 24.251 (Supp. 1975).

60. Wis. Laws 1951, ch. 653.

61. Wis. Laws 1953, ch. 331, § 4.

62. This reasoning was similar to that expressed in an advisory opinion by the New Hampshire Supreme Court. Opinion of the Justices, 83 A.2d 738 (N.H. 1950). There a law was to take effect upon joint resolution of the legislature. The court found that such a scheme abrogated the executive veto in contradiction to "settled and well understood parliamentary law." *Id.* at 741 (citation omitted).

63. Wis. STAT. § 227.041 (1957).

abolished the committee.⁶⁴ Seemingly, Wisconsin now relies exclusively on judicial review.

Each of the foregoing procedures at some point involved a governmental body with the power to suspend agency rules. The present Oregon system, in contrast to those, is very similar to that of Florida. A "Legislative Counsel Committee," upon request, reviews rules to determine whether they are within the agency's rulemaking powers. The committee reports its findings to the agency, to the person who requested review, and to the legislature at the next session.⁶⁵

V. OBJECTIONS TO DIRECT LEGISLATIVE CONTROL

A. Constitutional Objections

Constitutional questions have arisen regarding any *direct* legislative control over agency rulemaking. Objections have developed along two lines: (1) that such action intrudes on an executive prerogative; and (2) that it usurps a judicial power.

The former argument was illustrated by the Wisconsin attorney general opinion discussed above.⁶⁶ Modifying or abrogating an agency rule *is*, in a sense, legislating. It changes the "rules of the game" which are relied upon daily. A legislature claiming that power would of course assert it to be within the legislative prerogative. But even if it is a proper legislative power there may be constitutional constraints on the manner of its exercise. If legislation is constitutionally required to be introduced by bill and subject to executive veto, then suspension of a rule by a committee or nullification by legislative resolution may be held unconstitutional.

That position has been strongly challenged. First, it is pointed out that agencies are in a very poor position to argue for a strict separation of powers; agencies themselves enjoy a combination of executive, legislative, and judicial powers.⁶⁷

Logically, to apply the separation of powers in this field is to take us back to the days when the maxim against the delegation of powers was inexorably applied (in theory at least) in our administrative law. There is no more reason today to invalidate delegation of the

64. Wis. Laws 1965, ch. 659, § 21. Under the committee the Wisconsin model seemed very similar to that in Florida today. For a brief explanation of the late Wisconsin committee, see Helstad, *New Law on Administrative Rule Making*, 1956 Wis. L. REV. 407, 428-29 (1956). For a critical interpretation of the attorney general's opinion, see Schwartz, *supra* note 39, at 1042.

65. ORE. REV. STAT. §§ 171.707, 171.709, 171.713 (1975).

66. See note 62 and accompanying text *supra*.

67. Schwartz, *supra* note 39, at 1043.

annulment power to the legislature because of the separation of powers than there is to invalidate delegations of the rule-making power to the agencies themselves on similar grounds.⁶⁸

The above author also argued that legislative abrogation of a rule does not correspond with "enacting a statute," and thus need not be subject to executive veto. That procedure, he urges, is not legislation independent of the executive, but " 'is merely one of the checks or restraints upon the exercise of the subordinate legislative power delegated.' " ⁶⁹

The other major constitutional argument is that legislative control of agency rulemaking is a usurpation of judicial power, since the interpretation of laws (enabling statutes) is a purely judicial function. This was the Michigan attorney general's position in 1958.⁷⁰ The short reply to this contention is, in the words of Mr. Justice Cardozo, that separation of powers is not a "doctrinaire concept to be made use of with pedantic rigor."⁷¹ Social conditions have made agencies necessary. As early as 1855 the United States Supreme Court held that

there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.⁷²

The agencies' existence, the argument continues, brings about the further need for legislative controls.

The legislature is the one great organ of the government . . . responsive to the electorate and independent of the administration. As the source of delegations of rule-making power, it must also be able to exercise direct control over the employment of such power.⁷³

A third constitutional objection exists, though it is rarely urged.

68. *Id.* The argument may not always be logically sound. One reason for distinguishing the legislature and agencies in states with comprehensive administrative procedure acts is that, unlike the agencies, neither the legislature nor a legislative committee is bound by the strict procedural requirements of the act.

69. *Id.* at 1043, quoting Opinion of the Justices, 83 A.2d 738, 745 (N.H. 1950) (dissenting opinion).

70. See note 54 and accompanying text *supra*.

71. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting). Contrast this with the pedantic rigor with which the doctrine was applied by the Court in *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

72. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

73. Schwartz, *supra* note 39, at 1044.

All state constitutions require that legislation originate as bills and be passed by a majority of a legislative assembly.⁷⁴ A standing committee with the power to abrogate agency rules has the power, in all but name, to legislate; the constitutionally prescribed legislative procedure is circumvented. Since a legislative majority delegates rulemaking authority by statute, only a legislative majority—not a committee—can constitutionally interfere with that authority.

Finally, there is occasionally asserted a quasi-constitutional objection, which centers upon the committee's de facto powers. The Florida committee cannot invalidate or suspend an agency rule. Like Oregon's committee,⁷⁵ the Florida committee is limited to expressing its disapproval to both the public and the legislature. If an agency insists upon a rule's adoption, it will become effective regardless of committee disapproval.⁷⁶ Although the committee's intervention is *technically* advisory only, the committee actually enjoys substantial political power. The presence on the committee of legislators influential in areas such as appropriations may make agencies less willing to insist upon a rule's adoption. Thus, the argument goes, the effect on agency rulemaking is the same *as if* the committee were granted the veto power; since (it is premised) the latter procedure is unconstitutional, the Florida and Oregon systems are similarly deficient.⁷⁷

B. Practical Objections

The present Florida procedure is probably constitutional; a procedure involving a committee with suspension powers or legislative annulment by proclamation is on weaker ground. Constitutional issues aside, however, policy questions remain: What, if any, legislative controls on agency rulemaking are desirable or necessary?

Legislatures originally delegated power to agencies reluctantly, under the pressure of events. They understandably feared that without effective controls, their own powers would be eroded. But today the situation is somewhat reversed. Legislatures acting other than by statute may invalidate rules an agency finds essential to its operations, even though such rules are within the agency's enabling legislation. The

74. See, e.g., FLA. CONST. art. III, § 7; MICH. CONST. art. IV, § 22.

75. See note 65 *supra*.

76. See note 3 and accompanying text *supra*.

77. Symbolically represented the argument would run: $A \equiv C$, $B \equiv C$, $\therefore A \equiv B$. But the logic fails because neither A nor B equals C in a *static* relationship, but rather a *dynamic* one. So: A causes C , B causes C , but that by no means necessarily results in A being B . In this case it obviously doesn't. C can be caused, independently, by either A or B .

problem is compounded by the existence of committees with suspension or annulment powers. An agency responsible to a standing committee may find itself constantly embroiled in controversy, and perpetually defending its rules and making peace offerings.⁷⁸ Moreover, fractions of a legislature, it has been said, easily turn into *factions* of a legislature. Legislative review of agency rulemaking is bound to have political implications. "If . . . legislative review is to provide another opportunity for irresponsible minorities to checkmate the public interest, traditional reliance on the judiciary would appear to be better advised."⁷⁹ "[E]ven in its most extensive scope, judicial review is confined to inquiring into the extent of the statutory powers of the administrator. . . . [I]t does not provide a review of the wisdom or appropriateness of decisions within the administrator's discretion."⁸⁰

Legal writers have disagreed over the wisdom and practicality of using the British administrative model in the United States. One author observed that "the lack of effective direct legislative supervision constitutes an important lacuna in the American system,"⁸¹ and that direct British-type controls "have worked satisfactorily in those states which have adopted them."⁸²

In contrast, after studying the implications of such controls for the federal government, the Attorney General's Committee on Administrative Procedure stated that it did "'not recommend a general requirement that regulations be laid before Congress before going into effect. Legislative review of administrative regulations, in this particular, [have] not been effective where tried.'"⁸³ Consequently, the federal Administrative Procedure Act of 1946 was enacted without a provision for direct Congressional control of agency rulemaking.⁸⁴ Of the Michigan experiment, Professor Schubert wrote: "And what did

78. See Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 372 (1947).

79. Schubert, *supra* note 51, at 161.

See also Trubek, *supra* note 50, at 440, where it is noted that "[t]o the extent that environmentalists are successful in obtaining progressive regulations, the second chance given anti-environment forces by the legislative review [of agency rules] could be extremely damaging."

Apparently it was the intent of the legislature that the Florida Joint Administrative Procedure Committee would only inquire into the statutory powers of the agency, and not into an evaluation of its policy. See note 5 and accompanying text *supra*. Policy, however, often intrudes.

80. Note, *supra* note 36, at 641.

81. Schwartz, *supra* note 39, at 1033.

82. *Id.* at 1039.

83. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.08, at 387 (1958), quoting ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, REPORT 120 (1941).

84. See Administrative Procedure Act, ch. 324, 60 Stat. 237.

happen? . . . Measured in terms of actual suspensions of administrative rules, the impact of the Committee on Administrative Rules has been very slight. By one means or another, state agencies have been able, in time, to establish the legality of policies which they wanted."⁸⁵

Professor Schubert has argued that the procedure in the United Kingdom has proven effective. However, the unitary form of the British government makes analogies to the American experience difficult. British government ministers control not only the "executive branch" (for these purposes the prime minister and ministerial heads rather than the Crown) but Parliament as well. They also control the nominating process to Parliament. This centralization results in a minimum of conflict between the two "branches." The British committee is reluctant to find fault with an agency rule. A revolt in the Commons, a rare event, generally takes the form of a vote of no confidence. It is difficult, therefore, to judge the effectiveness with which the committee has, in truth, operated.⁸⁶

VI. CONCLUSION

The criticisms leveled at legislative control of rulemaking are generally either that it is ineffective or that it is so effective as to cripple agency operations. One answer might be to place such control in the hands of the judiciary.

The Administrative Procedures Committee's role is limited to "determining whether the proposed rule is within the statutory authority on which it is based, whether the rule is in proper form, and whether the notice issued pursuant to subsection (1) [of section 120.54] is sufficient to give adequate notice of the effect of the rule."⁸⁷ A judicial determination of these issues, instead of a committee determination, would serve all the competing interests involved; the legislature could be given statutory standing to bring such actions.⁸⁸ Agencies

85. Schubert, *supra* note 51, at 160-61.

86. See Note, *supra* note 36, at 638.

87. FLA. STAT. § 120.54(10)(a) (1975).

88. FLA. STAT. § 120.54(3)(a) presently grants standing to substantially affected persons to seek an administrative determination of a proposed rule's validity, which is limited to the following grounds:

1. That the proposed rule is an invalid exercise of validly delegated legislative authority.

2. That the proposed rule is an exercise of invalidly delegated legislative authority.

Id. That determination is subject to judicial review under FLA. STAT. § 120.68 (1975).

Such actions, at least as to whether the rule is within the authority granted by the enabling statute, can also be brought in a circuit court. Section 120.73 expressly preserves the circuit courts' jurisdiction to issue declaratory judgments under chapter 86, Florida Statutes.

legitimately expect to exercise their delegated authority without having to cater to the political considerations of a partisan body. On the other hand, the legislature, as creator of the agencies, rightfully wants to assure that the authority it delegated will not be abused. Allowing the initiative for such judicial action to remain with the legislature would allow that body to control the triggering mechanism for rule review. Putting the actual decision in judicial hands should minimize political considerations. The courts will be less likely to get into the business of second-guessing an agency as to the wisdom or need for particular rules, but under the APA neither does the committee have such a function. Abrogation of agency rules on purely policy grounds would be by statute under either procedure.

Whether substituting the courts for the committee is a feasible alternative cannot at this point be answered with certainty. It is difficult to predict whether the legislature would be willing to divest itself of powers which, in this state, can be constitutionally justified. The conclusion is simply that the suggested alternative is desirable: the demonstrably conflicting interests of the branches of government can be better reconciled in a judicial proceeding than under the present scheme.

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