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The North Carolina Rules Review Commission: A Constitutional Quandary

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INTRODUCTION:

The process of implementing the law through administrative rulemaking affects nearly every sector of society—from government to businesses and industry, from professional groups to citizens. Stakeholders in administrative regulation are ubiquitous, but each is unique, representing many different interests and values and desiring many different outcomes. Appeasing these stakeholders presents a seemingly insurmountable challenge accompanied by controversy and frustration. The administrative rulemaking process in North Carolina has engendered much contempt during the past several decades,[1] and repeated attempts at regulatory reform have done little but stoke the coals of an already fiery debate. In the middle of the debate surrounding the rulemaking process is the Rules Review Commission ("RRC").

1. *See* Sabra Faires, *The Chair's Comments*, ADMIN. LAW. (N.C. Bar Ass'n), Oct. 1995, at 1 (noting the various failed attempts at creating rulemaking systems and the negative repercussions for stakeholders).

The RRC is the legislatively created body responsible for reviewing rules formulated by administrative agencies. Under current law, the RRC determines the limits of statutory authority granted to agencies, objects to administrative rules that fail to meet three statutorily mandated criteria, and further, vetoes administrative rules proposed by agencies. The RRC's authority raises concern about the constitutionality of the commission; specifically, whether the RRC's authority constitutes a violation of the separation of powers principle expressly articulated in the North Carolina Constitution.[2] In addition, the authority claimed by the RRC raises several important public policy concerns. Former North Carolina Commissioner of Labor, and member of the RRC, Harry Payne expressed the fear felt by many state agencies and individuals as to the authority possessed by the RRC:

> The [RRC] will be asked to pass upon rules about heavy metals in fish flesh, cadmium exposure in the workplace, conductive hearing loss and the appropriate space between beds in migrant housing to avoid the spread of tuberculosis. With practically no review of their decision to veto, the members of the Rules Review Commission wield more power than most elected officials.[3]

The role of the RRC in the rulemaking process is the fulcrum of the debate over the regulatory process in North Carolina. On one side of the debate, state administrative agencies and stakeholder groups are frustrated by the inordinate delay required for a rule to move through the review process and take effect. Administrative agencies and various stakeholder groups are also frustrated by the potential for the RRC to paralyze agencies in their rulemaking efforts on ideological grounds, especially given the political power of the various lobbying organizations which represent major constituents of the regulated community.[4] On the other side of the debate, the regulated community is frustrated by the growing number of rules, the expense of complying with them, and the bureaucratic nightmare

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2. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. Several cases brought in state court have challenged the constitutionality of the RRC. However, courts have not resolved the issue, either because the relevant cases have been settled or because litigation is still pending. *See generally* N.C. Bd. of Pharmacy v. Rules Review Comm'n, 99-CVS-6558, (Wake County Super. Ct. June 18, 1999) and Harry E. Payne, Comm'r of Labor v. Rules Review Comm'n, 00-CVS-5367, (Wake County Super. Ct. May 12, 2000) alleging the RRC's unconstitutionality on separation of powers grounds.

3. Harry E. Payne, Jr., *Regulatory Reform: An Administrator's Viewpoint*, 31 WAKE FOREST L. REV. 789, 795 (1996).

4. *See* John N. (Nick) Fountain, *Administrative Law Section Tackles Reform of Rulemaking Process*, ADMIN. LAW. (N.C. Bar Ass'n), Dec. 2002, at 3 (pointing out that it can take as long as eighteen months for a rule to take effect).

that results from regulatory programs.[5]

An example of a recent controversy illustrates the debate over the role of the RRC in the rulemaking process. Phase II of the Federal Clean Water Act,[6] which was signed into law in 1999, requires the storm sewer systems of smaller communities in urbanized areas to be permitted under the National Pollutant Discharge Elimination System program established under the Act.[7] In order to comply with this law, states are required to promulgate stormwater run-off regulations to ensure that minimum federal standards will be met within the state.[8] These rules are known as the Phase II Stormwater rules. In recent years, North Carolina has undertaken this rulemaking task, which has involved numerous public workshops, stakeholder group meetings, and interviews with potentially affected communities.[9] The North Carolina Environmental Management Commission ("EMC"), the agency charged with developing these rules, adopted a final version of the rules and submitted them to be reviewed by the RRC.[10] The RRC rejected these rules in January of 2004.[11] Stakeholders that assisted in the drafting process, namely environmental conservation organizations, and the EMC contends that the RRC objected to the proposed rules on ideological grounds because of the political consequences of the rules, especially given the political power of the lobbying groups opposed to the rules.[12] The most prominent group opposed to the rules is the North Carolina Home Builders Association.[13]

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5. *Id.*

6. 33 U.S.C. §§ 1251–1387 (2002).

7. United States Environmental Protection Agency, *National Pollutant Discharge Elimination System: Phases of the NPDES Program* (last visited Aug. 25, 2004) *at* http://cfpub.epa.gov/npdes/stormwater/swphases.ctm (on file with the North Carolina Law Review).

8. *Id.*

9. North Carolina Department of Environmental and Natural Resources, *NPDES Phase II Stormwater Program* (last visited Aug. 25, 2004) *at* http://h20.enr.state.nc.us/su /NPDES_Phase_II_Stormwater_Program.htm (on file with the North Carolina Law Review).

10. *Id.*

11. North Carolina Department of Environmental and Natural Resources, *Stormwater Phase II Rule Update* (last visited Aug. 25, 2004) *at* http://h20.enr.state.nc.us/ su/Phase_2_Update.htm (on file with the North Carolina Law Review).

12. See, e.g., Press Release, Southern Environmental Law Center, Conservationists Sue State Officials to Protect Water Quality (Mar. 8, 2004), *available at* http://southernenvironment.org /newsroom/2004/03-08-nc_stormwater.shtml (on file with North Carolina Law Review); Press Release, NEWS & OBSERVER (Raleigh, N.C.), Environmental Group Sues Over N.C. Runoff Rules Rejection (Mar. 8, 2004) (on file with the North Carolina Law Review); and Press Release, NEWS & OBSERVER (Raleigh, N.C.), N.C. Agency Sues Another State Board Over Stormwater Rules (Mar. 11, 2004) (on file with North Carolina Law Review) each alleging that the RRC abused its discretion by rejecting the proposed rules.

13. David McNaught, *Careful with the Water, N.C.*, NEWS & OBSERVER (Raleigh, N.C.), July 11, 2004, at A23.

As a result of the RRC's rejection of the rules, a group of environmental conservation organizations have filed suit in Wake County to challenge the RRC's decision.[14] The EMC, in addition, has filed a separate suit in Wake County challenging the RRC's decision.[15] The suits allege that the RRC abused its discretion in rejecting the rules. While there has been, and likely will continue to be, a long-running debate between proponents of adding further steps in the rulemaking process to make it increasingly difficult for rules to be promulgated and proponents of expediting the process and leaving discretion to the agencies, there lurks an underlying controversy. This controversy concerns the dubious constitutionality of the RRC. Both the environmental organizations' lawsuit and the EMC's lawsuit allege that the RRC is itself unconstitutional and is performing duties assigned to the judicial and legislative branches, in violation of the state constitution.[16]

With these concerns in mind, this Comment utilizes a two-pronged analysis to explore first, the constitutionality of the RRC in terms of the underlying separation of powers issue, and second, the public policy concerns raised by the authority vested in the RRC. This Comment takes the position that the authority granted to the RRC is an unconstitutional violation of the separation of powers doctrine and represents unsound public policy. Part I sets forth the history of the RRC and its authority in the rulemaking process. Part II first explores whether the RRC is likely to be construed by the North Carolina courts as an administrative or a legislative body and takes the position that the RRC is, in fact, a legislative body. Part II then analyzes the separation of powers doctrine as it has been applied in North Carolina, in other states, and at the federal level under circumstances similar to those presented by the RRC. Part III analyzes the major public policy concerns raised by the RRC. Finally, Part IV recommends that the RRC should be removed completely from the rulemaking process as a matter of respect for constitutional norms and for sound public policy.

I. RULEMAKING AND RULES REVIEW COMMISSION

A. *North Carolina's Rulemaking Process*

In general, the rulemaking process in North Carolina is governed by the North Carolina Administrative Procedure Act ("NCAPA").[17] Under the

14. N.C. Coastal Fed'n, et al. v. Rules Review Comm'n, 04-CVS-3153 (Wake County Super. Ct. Mar. 8, 2004).

15. Envtl. Mgmt. Comm'n v. Rules Review Comm'n, 04-CVS-3157 (Wake County Super. Ct. Mar. 8, 2004).

16. *Id.*; N.C. Coastal Fed'n, 04-CVS-3153.

17. N.C. GEN. STAT. § 150B-1 (2003).

current rulemaking system, there are three types of rules that an agency may adopt: emergency rules, temporary rules, and permanent rules. Under emergency conditions, such as those created by a hurricane or other similar disaster, agencies have the authority to adopt emergency rules.[18] The adoption of emergency rules is appropriate when adherence to normal rulemaking requirements would be detrimental to the public well-being and the immediate adoption of rules is necessary to avoid a serious and unforeseen threat to public health and safety.[19] Within forty-eight hours of submission of the proposed emergency rule to the Office of Administrative Hearings, the Codifier of Rules must review the agency's statement of need detailing justifications for the emergency rule.[20] If the Codifier of Rules determines that the rule meets the criteria listed in Section 150B-21.1A of the North Carolina General Statutes, then the rule is entered into the North Carolina Administrative Code on the sixth business day following the approval.[21] If the rule does not meet the criteria, it is returned to the agency, which may supplement its statement of need and resubmit the rule for approval.[22] Under current law, an agency seeking to adopt an emergency rule must begin the rulemaking procedures on a temporary rule at the same time the emergency rule is filed with Codifier of Rules.[23] The emergency rule expires on the earliest of the following dates: (1) the date specified in the rule; (2) the effective date of the temporary rule adopted to replace the emergency rule, if the RRC approves the proposed temporary rule; (3) the date the RRC returns to an agency a temporary rule adopted to replace the emergency rule; or (4) sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule is still before RRC for review.[24]

Similarly, agencies may adopt a second type of rule, the temporary rule, when it is determined that adherence to the normal rulemaking procedures for permanent rules would be contrary to public interest.[25] At least thirty business days prior to adopting a temporary rule, the agency must submit the proposed temporary rule and a notice of public hearing to the Codifier of Rules for publication on the Office of Administrative

18. *Id.* § 150B-21.1A(a).

19. *Id.*

20. *Id.* § 150B-21.1A(b). The Codifier of Rules is the Chief Administrative Law Judge of the Office of Administrative Hearings, or a designated representative thereof, responsible for entering all rules approved by the RRC into the North Carolina Administrative Code. *Id.* § 150B-2(1c).

21. *Id.*

22. N.C. GEN. STAT § 150B-21.1A(b) (2003).

23. *Id.* § 150B-21.1A(a).

24. *Id.* § 150B-21.1A(d).

25. *Id.* § 150B-21.1.

Hearings website.[26] In addition, the agency must notify interested parties of its intent to adopt a temporary rule and of the hearing, accept comments on the proposed temporary rule for at least fifteen business days prior to adoption of the rule, and hold at least one hearing on the proposed rule.[27] Under current law, when an agency adopts a temporary rule, the agency must submit the rule to the RRC for review.[28] It is not until the rule is approved by the RRC that it may be codified in the North Carolina Administrative Code.[29] A temporary rule expires on the earliest of the following dates: (1) the date specified in the rule; (2) the effective date of the permanent rule adopted to replace the temporary rule, if the RRC approves the permanent rule; (3) the date the RRC returns to an agency a permanent rule the agency adopted to replace the temporary rule; (4) the effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule; or (5) two hundred and seventy days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule that has been adopted to replace the temporary rule is before the RRC for review.[30]

The third type of rule that agencies may adopt is the permanent rule. Although the most recent amendments to the North Carolina Administrative Procedure Act subject temporary rules to review by the RRC, this Comment focuses specifically on the review of permanent rules. Rulemaking begins for permanent rules when a state administrative agency proposes an administrative rule per legislative mandate from the General Assembly. The agency proposing the rule must first publish notice of the proposed rule in the North Carolina Register in addition to a short explanation for the proposed rule, a citation to the law that gives the agency the authority to promulgate the rule, the proposed effective date of the rule, the date, time, and place of any public hearing schedule on the rule or instructions on how a person may demand a public hearing on a proposed rule if one is not scheduled, and the process for submitting written comments on the proposed rule.[31] At least fifteen days must elapse following publication of the notice in the North Carolina Register before the agency may conduct any public hearing on the proposed rule, and at least sixty days must elapse before the agency may take any action on the proposed rule.[32] An agency may not adopt a rule that differs substantially

26. *Id.* § 150B-21.1(a3)(1).
27. *Id.* §§ 150B-21.1 (a3)(2) to (4).
28. *Id.* § 150B-21.1(b).
29. *Id.*
30. *Id.* § 150B-21.1(d).
31. *Id.* § 150B-21.2(c).
32. *Id.* § 150B-21.2 (e).

from the proposed form published in the notice until the version that has been adopted has been published in the North Carolina Register for an additional sixty days.[33]

Within thirty days of the adoption of the rule, the adopting agency must file the rule with the North Carolina RRC.[34] Only after approval by the RRC does the adopted rule become effective on the first day of the month following the month the rule is approved by the RRC, unless the RRC receives ten or more written objections to the rule from any concerned parties.[35] This provision was added during the most recent series of amendments to the NCAPA and took effect in August 2003. The purpose of this provision is to separate the controversial rules from the non-controversial rules and to expedite the time required for non-controversial rules to take effect.[36] Rules are classified as controversial if the RRC receives ten or more written objections to the rule from members of the public. If the RRC receives sufficient objections from persons clearly requesting legislative review, the rule, which is deemed to be a controversial rule, is then sent to the floor of the General Assembly.[37] The rule is published in the North Carolina Administrative Code and becomes effective no earlier than the thirty-first legislative day of the next regular session of the General Assembly that begins at least twenty-five days after RRC approves the rule, unless a legislative bill is introduced to disapprove that specific rule.[38] If such a bill is introduced, the rule becomes effective on the earlier of either the day that an unfavorable final action is taken on that bill or the day that the session adjourns without ratifying that bill.[39] A permanent rule disapproved by a bill that is subsequently ratified by the General Assembly does not become effective and is not entered into the North Carolina Administrative Code.[40]

B. History of the Rules Review Commission

North Carolina first considered the establishment of a body authorized

33. *Id.* § 150B-21.2(g).

34. *Id.*

35. *Id.* § 150B-21.3(b2).

36. *See* Fountain, *supra* note 4, at 3 (explaining the purpose of the legislation proposed by the Administrative Law Section of the N.C. Bar); *see also* N.C. GEN. STAT. § 150B-21.3(b2) (2003) (same).

37. N.C. GEN. STAT. § 150B-21.3(b2) (2003).

38. *Id.* § 150B-21.3(b).

39. N.C. GEN. STAT. § 150B-21.3(b1) (2003).

40. North Carolina Office of Administrative Hearings, Rules Division, *Adoption of Permanent Rules*, *at* http://www.oah.state.nc.us/rules (last visited Aug. 25, 2004) (on file with the North Carolina Law Review).

to suspend or to veto agency rules during the late 1970s.[41] In 1977, the General Assembly created the Administrative Rules Review Committee, which was made up of nine legislators.[42] The role of the committee was one of simple legislative oversight: if the committee identified a problem with agency regulations, then it recommended corrective legislation in order to address the problem.[43] Increasing frustration with the rulemaking process led the state to consider establishing a legislative body with the authority to participate more directly in the process by empowering that body to suspend or to veto agency rules.[44] Jim Hunt, the governor at the time, was concerned about the constitutionality of a legislative veto and brokered a compromise in which a commission, a precursor to the current RRC, was created.[45] The commission was granted the right to object on the record, but not to veto, proposed rules.[46] During widespread revision of the NCAPA that took place in 1983, Hunt again intervened in the legislative process and negotiated a compromise for legislative oversight of the rulemaking process.[47] As a result of this compromise, Hunt proposed the appointment of a Governor's Administrative Rules Review Commission to oversee the rulemaking process; however, doubts about the constitutionality of such a commission prevented Hunt from appointing the commission.[48] The current RRC was finally authorized in 1985, after much debate, by Section 143B-30.1 of the North Carolina General Statutes.[49] Its creation was contingent upon an advisory opinion from the Supreme Court of North Carolina; curiously, the court never issued such an opinion.[50] In 1986, General Assembly removed the contingency provision and established the current RRC.[51]

The RRC's ten members are appointed by the Speaker of the House of Representatives and by the President Pro Tempore of the Senate.[52] The members of the RRC are non-legislators,[53] and the term of members

41. M. Jackson Nichols, *Rules Review in North Carolina: History and Constitutional Issues*, ADMIN. LAW. (N.C. Bar Ass'n), Nov. 1997, at 1.
42. *Id.*
43. *Id.*
44. *Id.* at 3.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. N.C. GEN. STAT. § 143B-30.1(a) (2003).
53. The significance, or more importantly the insignificance, of the fact that the members of the RRC are non-legislators as opposed to legislators will be discussed at length later in this Comment. *See* discussion *infra* Part II.B.1.

appointed to the RRC is limited to two years.[54] Additionally, a member of the RRC may leave during his two year term as a result of his or her resignation, dismissal, ineligibility, death, or disability.[55] Interestingly, the statute is not explicit about grounds for dismissal, nor is it explicit about who has the power to dismiss members.

As initially empowered by the General Assembly, the RRC's objections to rules were merely advisory. The RRC could note an exception or objection to the proposed rule on the public register, which induced the agency to make certain that the rule was consistent with statutory authority.[56] Significant amendment to the NCAPA took place in 1995 under the banner of regulatory reform.[57] These amendments, which took effect in 1996, empowered the RRC to veto agency rules. Consequently, under current law, an objection from the RRC completely prevents the rule from being implemented, unless the agency makes the changes to address these objections.[58]

Prior to recent amendments to the NCAPA, the procedure for the judicial review of an RRC decision was at best unclear; the NCAPA was silent as to the review procedure. However, as of August 2003, when the RRC objects to a permanent rule adopted by an agency, the agency may file an action for declaratory judgment in Wake County Superior Court.[59]

When evaluating rules proposed by agencies, the RRC is required to review each rule to determine whether the rule satisfies the following three-pronged test: (1) whether the rule within the statutory authority delegated to the agency by the General Assembly; (2) whether the rule clear and unambiguous; and (3) whether the rule reasonably necessary to fulfill a duty delegated to the agency by the General Assembly.[60] The rule must satisfy each of these three criteria, in the opinion of the RRC, in order for the rule to be approved and, subsequently, to become effective and have the force of law.

Even when an amendment to a rule is before the RRC for review, the entire rule (as opposed to exclusively the amendment to the rule) is on review and can be objected to on any of the above grounds.[61] This provision may have the effect of discouraging agencies from making minor, practical adjustments that may improve the effectiveness of the rule

54. N.C. GEN. STAT. § 143B-30.1(b).

55. *Id.* § 143B-30.1(c).

56. *See* Nichols, *supra* note 41 at 3.

57. *See generally* Payne, *supra* note 3 (describing the reasons behind political pressure for regulatory reform in North Carolina during the mid-1990s).

58. N.C. GEN. STAT. § 150B-21.19(4).

59. *Id.* § 150B-21.8(d).

60. *Id.* § 150B-21.9.

61. *Id.* § 150B-21.8(c).

for fear that the entire rule will be rejected. However, it may be that the recent amendment to the NCAPA that provides a mechanism for separating controversial from non-controversial rules tempers this hesitance.

There is a provision for limited public participation in this process; the RRC is permitted to call a public hearing for review of a permanent rule.[62] In addition, the public has a chance to comment on rules that are before the RRC for review. The public may submit written comments to the RRC[63] and may also request to make an oral statement before the RRC.[64]

The timetable for which the RRC must review proposed rules is specific. The RRC *must* review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month.[65] The statutory language indicates that the RRC must take action on each rule submitted by state agencies and may not elect to take no action.

The first time a rule is before the RRC for review, the RRC must take one of three actions: (1) approve the rule, if the RRC determines that the rule meets the criteria stated above; (2) object to the rule, if the RRC determines that the rule does not meet the criteria; or (3) extend the period for reviewing the rule, if the RRC determines that additional information is necessary to decide whether the rule satisfies the criteria.[66] If the RRC extends the period for reviewing the rule, it is empowered to call a public hearing on the rule; after a public hearing on a rule, the RRC must approve the rule or object to the rule within seventy days.[67] When the RRC objects to a rule, the agency has the choice of revising the rule to address the concerns of the RRC, not revising the rule thereby allowing the rule to die, or filing for a declaratory judgment in Wake County Superior Court.[68] When the RRC approves a rule, it sends a report on the rule to the Joint Legislative Administrative Procedure Oversight Committee, which serves the oversight function of examining rules to which the RRC has objected and determining if any statutory changes are necessary to carry out the intent of the General Assembly.[69]

Theoretically, the RRC's work is limited to an analysis of whether rules are written or amended in a clear and legally sound manner. However, opponents of the RRC argue that the RRC "provides a forum to re-argue policy issues with which agencies have already wrestled"[70] and

62. *Id.* § 150B-21.14.
63. *Id.* § 150B-21.2(f).
64. *Id.* § 150B-21.2(e).
65. *Id.* § 150B-21.9(b).
66. *Id.* § 150B-21.10.
67. *Id.* § 150B-21.14.
68. *Id.* § 150B-21.12.
69. *Id.* § 150B-21.11.
70. John Wagner, *Ten Citizens With Clout Irk Rule Makers*, NEWS & OBSERVER (Raleigh,

that the criteria used by the RRC in reviewing rules are too vague, increasing the risk that the RRC will be able to paralyze agency action based on ideology and political pressure.[71] Because of frustration with the RRC process, many agencies in the past have chosen to adopt temporary rules, which at one point were not subject to review by the Commission,[72] as opposed to permanent rules. However, legislation proposed and approved during the 2003 legislative session subjects even temporary rules to review by the RRC, cutting off the chance for agencies to evade RRC scrutiny.[73]

II. THE SEPARATION OF POWERS IN NORTH CAROLINA AND BEYOND: LEGAL ANALYSIS

A. *The North Carolina Tradition*

The tradition of strict interpretation of the separation of powers doctrine in North Carolina supports the argument that the authority granted to the RRC is unlikely to withstand a constitutional challenge. The North Carolina Constitution expressly mandates that the three branches of the state government be "forever separate and distinct."[74] Further, each of the three constitutions ratified by the people of North Carolina since its inception as a state in 1776 have explicitly embraced the doctrine of separation of powers by providing that the three branches of the government be "forever separate and distinct" from one another.[75] The first two constitutions provided that the three branches of the government "ought to be forever separate and distinct" from each other.[76] The third constitution contains similar language with the substitution of "shall be" for

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N.C.), Feb. 20, 2000, at A1.

71. *See* Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 563 (2001) (suggesting that the RRC has used its authority to veto several controversial rules, likely in response to political pressure from those opposed to the rules).

72. *See* Fountain, *supra* note 4, at 1; *see also* Wagner, *supra* note 70 at A1 (noting that in the wake of Hurricane Floyd, environmental officials pushed through several temporary rules dealing with conditions created by the flooding, such as flooded junk yards, as opposed to formulating permanent rules to address the situation, simply because of the exigency necessitated by the situation and the potential for delay by the RRC).

73. N.C. GEN. STAT. § 150B-21.8(b).

74. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. "The legislative power of the State will be vested in the General Assembly." *Id.* art. II, § 7. "The executive power of the State will be vested in the Governor." *Id.* art. III, § 1. "The judicial power of the State will be vested in the judiciary." *Id.* art. IV, § 1.

75. *See* Wallace v. Bone, 304 N.C. 591, 595, 286 S.E.2d 79, 81 (1982).

76. *Id.*

"ought to be," this substitution further solidifying and making explicit the commitment of the state to the doctrine of the separation of powers.[77]

There are other indications that North Carolina has strictly adhered to the principle of the separation of powers, most notably the relative dearth of cases that have come before the courts contending that one branch of the government interfered with the powers of another.[78] The outcome of these few cases that have come before the courts indicate the courts' traditionally formalistic approach to, and respect for, the separation of powers. The earliest example of an expression of opinion on the separation of powers principle occurred in *Bayard v. Singleton*,[79] in which Justice Ashe of the Supreme Court of North Carolina observed that the separation of powers is the "very foundation of our system of government."[80] In the later case of *State v. Bell*,[81] Justice Stacy of the Supreme Court of North Carolina, in his dissenting opinion, argued that:

> [t]he people of North Carolina have ordained in their Constitution (Art. I, sec. 8) that the legislative, executive, and supreme judicial powers of the Government should be and ought to remain forever separate and distinct from each other. Such is their expressed will, and from the earliest period in our history they have endeavored with sedulous care to guard this great principle of the separation of the powers.[82]

The more recent case of *Wallace v. Bone*[83] illustrates with more specificity the North Carolina courts' respect for the separation of powers. In *Wallace*, the Supreme Court of North Carolina considered a statute governing the appointment of members to the state's EMC.[84] The central issue in the case was whether the statute, by which two members of the House of Representatives and two members of the Senate were appointed to membership on the EMC, violated the separation of powers principle expressly mandated by the North Carolina Constitution.[85] The court concluded that this provision did in fact violate the separation of powers principle and was thus unconstitutional.[86] The court, after commenting on

77. *See id.*

78. *See id.* at 599, 286 S.E.2d at 83–84. Since the *Wallace* decision, the Supreme Court of North Carolina has addressed the issue of separation of power only in advisory opinion. *See* In re Separation of Powers, 305 N.C. 767, 295 S.E.2d 589 (1982).

79. 1 N.C. 5 (1787).

80. *See id.* at 6.

81. 184 N.C. 701, 115 S.E. 190 (1922).

82. *Id.* at 719, 115 S.E. at 199.

83. 304 N.C. 591, 286 S.E.2d 79 (1982).

84. *Id.* at 606–07, 286 S.E.2d at 87.

85. *Id.*

86. *Id.* at 595, 286 S.E.2d at 81.

North Carolina's tradition of strict adherence to the separation of powers, pointed to the statutory language that authorized the EMC and noted that it is the duty of the EMC to promulgate rules and regulations designed to protect the natural resources of the state.[87] Based on the language of the statute, the court found it apparent that the duties of the EMC are executive in nature and thus that the EMC is an administrative agency.[88] According to the court, it is unconstitutional for the General Assembly to "create a special instrumentality of the government to implement specific legislation and then to attempt to retain some control over the process of implementation."[89] Because the actions of the General Assembly represented an attempt to interfere with the duties of the executive branch of the government, the court held that the legislation in question violated the separation of powers principle.[90] The court was careful to note that North Carolina, for many years, has benefited from *cooperation* between the various branches of the government.[91] However, the court noted that respect for this principle by each branch of the government is paramount, because the people of North Carolina have been steadfast in their commitment to maintaining separate and distinct branches of government and have explicitly embraced this principle as the cornerstone of their government.[92]

When asked to comment on a similar constitutional issue in light of its decision in *Wallace*, the Supreme Court of North Carolina, in *Advisory Opinion in re Separation of Powers*,[93] evaluated a statute that authorized a joint legislative committee to make budgetary decisions of the type typically reserved for the executive authorities.[94] Because the statute empowered the legislative committee to "administer the budget," the court observed that it exceeded the legislature's constitutionally mandated power and encroached on the responsibility of the Governor to "administer the budget."[95] This legislative encroachment upon the executive's power was sufficient to violate the principle of the separation of powers and thus rendered the legislation unconstitutional.[96]

87. *Id.* at 607, 286 S.E.2d at 88.
88. *Id.* at 608, 286 S.E.2d at 88.
89. *Id.*
90. *Id.* at 608–09, 286 S.E.2d at 89.
91. *Id.* at 608, 286 S.E.2d at 88.
92. *Id.*
93. 305 N.C. 767, 295 S.E.2d 589 (1982).
94. *Id.* at 768–71, 295 S.E.2d at 590–91.
95. *Id.* at 780, 295 S.E.2d at 596 (quoting N.C. CONST. art. III, § 5).
96. At the same time, evidence exists that adherence to the doctrine of the separation of powers in North Carolina has not been as strict as suggested by the decision in *Wallace* and the advisory opinion that followed. For example, Professor John Orth argued that public policy, rather than legal arguments, may better explain judicial declarations on the separation of powers

B. *Separation of Powers: Legal Analysis*

Research on constitutional challenges based on the separation of powers doctrine beyond North Carolina case law, under circumstances similar to those presented by the RRC, reveals two distinct themes in the grounds for a legal challenge to the RRC's constitutionality: legislative encroachment upon the executive power and legislative encroachment upon judicial power. Consequently, this analysis focuses on these two themes. The analysis and the application of these two themes are dependent upon whether the RRC is a legislative body or an executive body. Therefore, this analysis first discusses that question.

1. Is the RRC a Legislative or an Executive Body?

The General Assembly has asserted that the RRC is an administrative agency under Article III, Section 11 of the North Carolina Constitution.[97] The courts accord deference to such legislative decisions; however, North Carolina precedent establishes that it is the responsibility of the appellate

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in North Carolina, but questioned whether public policy is well served by the results. *See* John V. Orth, *Forever Separate and Distinct: Separation of Powers in North Carolina*, 62 N.C. L. REV. 1, 2 (1983). Orth argued that the court's decision in *Wallace*, based on the history of the separation of powers in North Carolina, is "unpersuasive." *Id.* at 2. Orth noted that North Carolina case law supports a liberal, as opposed to a strict, interpretation of the separation of powers clause, in order to meet the needs of the modern legislature in dealing with the increasing complexity of problems that it must address. To support his contention that the principle of the separation of powers has not been as strictly adhered to as asserted in *Wallace*, Orth referred to *Adams v. North Carolina Dep't of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978), where the Supreme Court of North Carolina upheld a delegation of legislative power to an administrative agency because the court found that it was necessary for the General Assembly to delegate such power in light of the complexities which confronted the General Assembly and that the General Assembly had provided adequate guidance in its delegation of power. *Id.* at 9–10.

Further, Orth argued that the court's opinion in *Advisory Opinion in re Separation of Powers* was incorrectly based in the doctrine of the separation of powers. Orth pointed out that only if the General Assembly had delegated its plenary power to a coordinate branch of the government would there be a violation of the separation of powers, but because the General Assembly had delegated authority to a group of its members, the issue was not one of separation of powers. *Id.* at 23. Orth also mentioned that public policy considerations, which he termed "constitutional morality," may have motivated the decision in *Wallace*, as opposed to a strict adherence to the doctrine of the separation of powers. *Id.* at 26–27. Such "constitutional morality" includes concern about the implications for the executive branch, in that a contrary result in *Wallace* would "imperil the integrity of the office of the governor," and concern about the integrity of the judicial branch, in that the increase in legislative power may weaken the power of the judiciary via the legislature's control over the funds for judicial personnel. *Id.* at 26–27. However, despite Orth's duly noted points, the majority of North Carolina precedent relating to the separation of powers and the history of the state constitution seems to lend support to the credibility of the argument that North Carolina does have a tradition of strict adherence to the doctrine.

97. *See* N.C. GEN. STAT. § 143B-30.1(c) (2003).

courts to examine an agency in order to determine the branch of government to which it must be assigned for purposes of constitutional review.[98]

This Comment takes the position that the RRC is not an administrative body but is instead a legislative body. Because there is no North Carolina case law that addresses this point, it is necessary to look outside of the state for support of this argument. A United States Supreme Court case involved a line of reasoning which supports the argument that the RRC is a legislative body, assuming that the analysis of the North Carolina Constitution would follow federal guidelines. Unlike the North Carolina Constitution, there is not an explicit separation of powers clause in the United States Constitution, thus lending further credence to the argument that the RRC violates the principles expressed in the state's constitution.

In *Bowsher v. Synar*,[99] the United States Supreme Court was faced with the task of determining to which branch of the government the Comptroller General should be assigned. After referring to provisions in the Reorganization Acts of 1945 and 1949, which indicate that Congress has consistently viewed the Comptroller General as an officer of the legislative branch, and after pointing out that comptrollers general traditionally have viewed themselves as part of the legislative branch,[100] the Court noted the fact that the Comptroller General is removable from office only at the will of Congress.[101] Because Congress retained this removal authority over the Comptroller General, the Comptroller General was subservient to Congress, and the Court concluded that the Comptroller General was, for this reason, a legislative body.[102] The Court held that by placing the responsibility for executing the laws in a body that was removable only by the will of Congress, Congress had impermissibly intruded into the province of the executive branch of the government.[103]

By analogy to the *Bowsher* court's reasoning, the RRC is a legislative body because, like the Comptroller General, the RRC is "controlled" by the legislative branch of the government if the General Assembly retains the power to dismiss members of the RRC from office.[104] The power of removal is dispositive under *Bowsher*; according to the *Bowsher* court, because Congress had the sole power to remove the Comptroller General

98. *See generally* 60 N.C. Op. Att'y. Gen. 70, 74 (1991) (pointing out that the rule in North Carolina is the appellate courts determine to which branch of government a body belongs).

99. 478 U.S. 714 (1986).

100. *See id.* at 731.

101. *See id.* at 727.

102. *See id.* at 732.

103. *See id.* at 734.

104. *See* N.C. GEN. STAT. § 143B-30.1(c) (2003) (referring to the General Assembly's power to appoint a new member in the case of dismissal).

from office, the Comptroller General could not be entrusted with administrative powers. Therefore, if the General Assembly retains control over the RRC to the same extent that Congress retains control over the Comptroller General, then the authority vested in the RRC falls within the *Bowsher* court's analysis.[105]

In addition to this federal decision, there is support at the state level for the argument that the RRC is a legislative body. For example, the state of Pennsylvania established a commission similar to that of the RRC to oversee the administrative rulemaking process.[106] When the constitutionality of the Pennsylvania commission was challenged, the commonwealth court held that the commission violated the separation of powers because the commission was a legislative body empowered to interfere with the administrative rulemaking process.[107] The court reached its decision by reasoning that the function of the commission rendered it a legislative body.[108] The commission was composed of legislators appointed by the Speaker of the House, the President Pro Tempore of the Senate and by the Governor; the functions of the commission included overseeing the adoption of rules, reporting violations of statutory authority or legislative intent to the legislature, and delaying the enactment of rules to which it objected.[109] The RRC, under the Pennsylvania court's reasoning, is also a legislative body.

Similarly to the RRC, the Pennsylvania commission was composed of non-legislators appointed by the General Assembly. The commonwealth court noted that the removal power which rested with the General Assembly was sufficient to characterize the commission as legislative.[110] Additionally, as with the RRC in North Carolina, the Pennsylvania commission's powers involved oversight and review, which the commonwealth court designated as legislative functions.[111] The RRC bears significant resemblance to the Pennsylvania commission, which the commonwealth court declared to be an "agent of the legislature" because the commission was "empowered to perform preliminary oversight functions."[112]

However, according to the General Assembly, the RRC is an administrative agency, established pursuant to legislative mandate, to

105. See the discussion of whether the General Assembly has the power to dismiss members of the RRC *infra* Part I.B.

106. Commonwealth v. Jubelirer, 567 A.2d 741, 745–46 (Pa. 1989).

107. *See id.* at 749–50.

108. *See id.* at 748.

109. *Id.*

110. *Id.* at 748.

111. *Id.* at 749.

112. *Id.*

oversee the administrative rulemaking process. This is a flawed argument, because in North Carolina the Governor (*not* the General Assembly) has constitutionally granted power to appoint all officers of the executive branch whose appointments are not otherwise provided for, and to reorganize the allocation of offices and agencies as he considers necessary for efficient administration.[113] This constitutional provision raises an interesting question pertaining to the RRC if it can be interpreted to establish a constitutional appointment power in the Governor.[114] If the RRC were an administrative body as declared by the General Assembly, it would be the constitutional responsibility of the Governor and the executive branch of the government to appoint its members. The United States Supreme Court has said that "legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint agents charged with the duty of such enforcement."[115] The General Assembly's appointment of the RRC members lends further credence to the argument that the body is a legislative and not an administrative body. Further, as a result of this constitutional grant of power, changes may be made to the functions, powers, and duties of agencies as the Governor deems appropriate.[116] There is no mention, however, in the RRC's statutory authority of any power of the Governor over the functions and decisions of the RRC. If the Governor does not have the power to reorganize the RRC or change its functions, powers, and duties, then concluding that the RRC is an administrative agency under the North Carolina Constitution is dubious.

At this point, the composition of the RRC merits discussion in order to facilitate subsequent analysis. The composition of North Carolina's RRC is unlike a majority of the other oversight bodies analyzed in this Comment because the RRC is composed entirely of non-legislators, as opposed to legislators.

However, the composition of the RRC is not indicative of whether the authority granted to the RRC represents a violation of the separation of powers doctrine and is nothing more than the General Assembly's cautious reaction to the *Wallace* decision. In *Wallace*, the Supreme Court of North Carolina reached the conclusion "that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation

113. *See* N.C. CONST. art. III, § 5.

114. This provision has also been interpreted to mean that this appointment power arises only in the absence of legislation. *See* Nichols, *supra* note 41, at 4.

115. *See* Springer v. Philippines Islands, 277 U.S. 189, 202 (1928).

116. *See* N.C. CONST. art. III, § 5.

by appointing legislators" to serve on that body.[117] At issue in *Wallace* was a statute that purported to give the General Assembly the power to appoint its own members to serve on the Environmental Management Commission ("EMC").[118] The court found it "crystal clear" that the duties of the EMC are administrative in character and "have no relation to the function of the legislative branch of government."[119] The court, despite its conclusion, recognized that there should be cooperation between the branches of government and that many study commissions exist on which legislators and persons from other branches of government have served that have made useful recommendations that subsequently have been enacted into law.[120] However, the court was clear in declaring that the General Assembly may not attempt to exert its control over the implementation of the laws by appointing its own members to serve on agencies designed to do just that.

Appointing non-legislators to serve on the RRC was likely a reaction to the court's decision in *Wallace*. If the General Assembly had appointed legislators to serve on the RRC, the RRC would have, both in form and function, been an egregious move by the General Assembly to maintain a degree of control over the implementation of the laws. By appointing non-legislators, the General Assembly acted, by all appearances, in conformity with the court's declaration in *Wallace* that members of the General Assembly cannot be appointed to serve on administrative bodies. Appointing non-legislators lends credibility to the argument that the RRC is an administrative body. Because the General Assembly has a vested interest in the RRC's classification as an administrative body, it is not surprising that the General Assembly took such action to lend credence to its assertion that the RRC is an administrative body, and to mitigate first-glance separation of powers concerns. Regardless, while in form the RRC may appear to be an administrative body, in function it is a legislative body and a flagrant attempt by the General Assembly to retain a degree of control over the implementation of the laws.

2. Encroachment upon the Powers of the Executive

The theme of encroachment by the legislative branch upon the duty of the executive branch to implement laws is prevalent in the separation of powers challenges that have occurred in other states under circumstances analogous to those of the RRC. This theme may be subdivided into two

117. Wallace v. Bone, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982).
118. *Id.*
119. *Id.*
120. *Id.*

sub-themes: interference as a result of unilateral control of administrative rulemaking, and interference as a result of circumventing the usual formal requirements of enactment and presentment. Utilizing both sub-themes as analytical frameworks, this Section of the Comment proposes that the authority granted to the RRC represents an unconstitutional interference by the General Assembly in the constitutional duties of the executive branch. A successful challenge to the RRC's constitutionality under either of these sub-themes rests on the assumption that the RRC is classified as a legislative body.

a. "Special Instrumentality of the Government"

The idea behind the first sub-theme was articulated by the *Wallace* court: the legislature cannot "create a special instrumentality of government to implement specific legislation and then retain unilateral control over the process of this implementation."[121] The precedent of several other states illustrates that the legislature may not retain unilateral control over the rulemaking process, specifically, the case law of states whose constitutions provide expressly for the separation of powers, like that of North Carolina.[122] This Section argues that if North Carolina courts were to follow the analysis of the other states that have addressed analogous bodies, the authority granted to the RRC would represent an attempt by the General Assembly to retain unilateral control over the rulemaking process and would thereby violate the principle of the separation of powers.

In *State ex rel. Barker v. Manchin*,[123] the Supreme Court of West Virginia ruled that the statutory provisions empowering the legislative rulemaking review committee to veto rules and regulations violated the separation of powers doctrine expressly provided for in West Virginia's constitution.[124] The legislative rulemaking review committee was a body comprised of six members of the Senate and six members of the House, and was authorized by the West Virginia Administrative Procedure Act to veto rules proposed by the state agencies.[125] In support of its decision, the court stated that the legislature had attempted to invest itself with the power to promulgate rules having the force and effect of laws without following the constitutional limitations imposed upon the legislative branch in the

121. *Id.*

122. The constitutions of the states relied upon in this section of the analysis—West Virginia, Missouri, Kentucky, and New Jersey—provide explicitly for the separation of powers.

123. 279 S.E.2d 622 (W.Va. 1981).

124. W. VA. CONST. art. V, § 1.

125. *See Barker*, 279 S.E. 2d 622, at 633 (1981).

exercise of that power.[126] The legislature abdicated its power to make rules in favor of the executive and then asserted that because rulemaking power is legislative in nature, it may step into the role of the executive and veto administrative rules free from the constitutional restraints on its power to legislate.[127] The court referred to this attempt by the legislature as an "extra legislative control device" because it allowed the legislature to act as something other than a legislative body to control the actions of the other branches of the government.[128]

The state of Missouri offers a second example. In *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*,[129] the Missouri Supreme Court ruled that the statutory provisions that suspended the promulgation of agency rules pending review by the Joint Committee on Administrative Rules ("JCAR"), and that permit the JCAR to suspend and withdraw rules already promulgated by agencies, violated the separation of powers doctrine, which is explicit in the Missouri Constitution.[130] The JCAR was authorized to delay administrative rules indefinitely, which created, in effect, a power to veto rules.[131] In ruling that this power was unconstitutional, the court, after a preliminary determination that the JCAR was a legislative as opposed to administrative body, noted that the challenged statutory provision permitted the legislature to interfere with the functions of the executive branch and to circumvent the constitution's bill passage and presentment requirements.[132] The court continued that the "legislature may not unilaterally control execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or prior approval of administrative rules."[133]

The state of Kentucky offers a third example. In *Legislative Research Commission v. Brown*,[134] the Kentucky Supreme Court held that statutory provisions authorizing a subcommittee of the Legislative Research Commission, the Administration Regulation Review Subcommittee ("ARRS"), to veto proposed administrative regulations violated the explicit separation of powers doctrine incorporated into the Kentucky Constitution.[135] The ARRS was a committee of seven members of the

126. *Id.*
127. *Id.*
128. *See id.* at 633 (using quotation marks to emphasize the particular phrase).
129. 948 S.W.2d 125 (Mo. 1997).
130. MO. CONST. art. 2, § 1.
131. *See Missouri Coalition*, 948 S.W.2d at 129.
132. *See id.* at 133.
133. *See id.* at 134.
134. 664 S.W.2d 907 (Ky. 1984).
135. KY. CONST. § 27-28.

legislature authorized to oversee administrative rulemaking.[136] In deciding that the veto power granted to the ARRS violated the separation of powers doctrine, the court focused on the interference of the ARRS, which it determined to be a legislative body, with the functions of the executive branch.[137] The court determined that the authority granted to the ARRS encroached on the power granted to the executive branch because the constitutionally mandated role of the executive was to implement and carry out the purpose of legislative enactments.[138]

The state of New Jersey provides a fourth and final example. In *General Assembly of the State of New Jersey v. Byrne*,[139] the New Jersey Supreme Court held unconstitutional, as a violation of the separation of powers, the authority of a legislative committee to veto administrative rules.[140] The court based its determination on the grounds that this authority undermined the performance by executive agencies of their duty to implement statutes through the adoption of regulatory schemes. Further, executive agencies, faced with potential paralysis from repeated use of the veto that would disrupt coherent regulatory schemes, might retreat from fulfilling their constitutionally mandated duties.[141]

Thus, the case law from states with a strong commitment to the separation of powers support the notion that the legislative branch of the government may not retain unilateral control over the process of the implementation of legislation.[142] The RRC, a commission created by the General Assembly to oversee the implementation of legislative enactments through the rulemaking process, while not comprised of legislators, represents an attempt by the General Assembly to exert its influence in the

136. *Brown*, 664 S.W.2d at 911.

137. *Id.* at 920.

138. *See id.* at 919–20.

139. 448 A.2d 438 (1982).

140. *See id.* at 444.

141. *See id.*

142. A minority of states has found that unilateral legislative control of administrative rulemaking does not violate the separation of powers principle. Unlike the constitutions of most states holding that legislative control of rulemaking violates the separation of powers, the constitutions of states upholding the constitutionality of legislative control typically make no express provision for the separation of powers. For example, the separation of powers provision is only implicit in the Wisconsin Constitution. In *Martinez v. Dep't of Indus., Labor, and Human Relations*, 478 N.W.2d 582 (Wis. 1992), an action was brought challenging the constitutionality of a statute empowering the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR") to suspend administrative rules after adoption by administrative agencies. The court held that since the existence of the administrative agency is dependent on the will of the legislature and since its powers are circumscribed by the legislature, it is appropriate for the legislature to delegate rulemaking authority to an agency while retaining a right to review those rules. Therefore, the court concluded that the constitutional challenge to the legislature's power to suspend administrative rules was without merit. *Martinez*, 478 N.W.2d at 586.

rulemaking process, and to retain unilateral control over the implementation of legislation. As this attempt to retain control necessarily impedes the agencies from implementing legislation independent of encroachment from the other branches of the government, the RRC embodies an unconstitutional interference by the General Assembly with the duties constitutionally reserved to the executive branch of the government.

b. Enactment and Presentment Requirements

A second sub-theme under the larger theme of interference with the powers of the executive branch is that allowing the legislature to overturn decisions made by the executive branch without following typical constitutional bicameralism and presentment requirements is a violation of the separation of powers principle because it precludes participation by the executive branch in what is essentially lawmaking action.[143] This Section suggests that if the North Carolina courts were to follow the analysis of other states and of the United States, the authority granted to the RRC would represent an unconstitutional exclusion of the executive branch in lawmaking action, thereby violating the principle of the separation of powers.

The closest that the Supreme Court of North Carolina has come to commenting on this issue occurred in *In re Separation of Powers*, where the court determined that the statute that purported to give the Joint Legislative Committee on Governmental Operations the power to control major line item budget transfers proposed by the executive branch exceeded the power granted to the legislative branch.[144] The court reasoned that the General Assembly could not delegate to a legislative committee the power to make decisions pertaining to the acceptance of the proposed budget because the constitution requires that the General Assembly *enact* the budget, indicating that the budget must undergo bicameral passage and presentment to the Governor.[145] The court concluded that the attempt to

143. Under the federal constitutional scheme, every bill must pass both the House of Representatives and the Senate before being sent to the President for final approval, in order for the bill to become a law. U.S. CONST. art. 1, § 7(2). Similarly, under the North Carolina constitutional scheme, all bills must be approved by each house of the General Assembly before being presented to the Governor for final approval of the bill before it becomes a law. N.C. CONST. art. II, § 22(1). Under the federal scheme and the analogous N.C. state scheme, passage by both houses of the legislature is known as bicameralism; presentment occurs when the bill is delivered to the executive branch for final approval. Bicameralism and presentment are typically required in order for a bill to become a law and are the constitutional foundations of lawmaking action. *See* INS v. Chadha, 462 U.S. 919 (1983); *infra* notes 174–82 and accompanying text.

144. In re Separation of Powers, 305 N.C. 767, 775, 295 S.E.2d 589, 594 (1982).

145. *Id.* at 776, 295 S.E. 2d at 595.

vest certain members of the legislative branch with this power exceeded that given to the legislative branch by the constitution and constituted an encroachment upon the constitutional duty and responsibility imposed on the Governor, thereby constituting a violation of the separation of powers.[146]

The case law of several other states analyzes this sub-theme under circumstances analogous to those presented by the RRC. For example, in *State ex rel. Stephan v. Kansas House of Representatives*,[147] the Kansas Supreme Court analyzed a statutory provision which empowered the legislature to adopt, modify, or revoke administrative rules and regulations.[148] The court held that the statutory provision constituted a "significant interference by the legislative branch with the executive branch and constitute[d] an unconstitutional usurpation of powers."[149] The court based its decision on the fact that the power claimed by the legislature gave it the ability to direct exclusively and to control the exercise of administrative discretion.[150] The legislature, in modifying or revoking the rules proposed by administrative agencies, was effectively enacting legislation because its actions were affecting the legal rights and duties of persons outside of the legislature.[151] As such, the court noted that the legislature must act within the confines of the constitution, complying with enactment and presentment formalities.[152] Non-compliance with the formalities of enactment and presentment forecloses the executive powers from participation in the lawmaking process, thereby violating the separation of powers principle.[153]

Similarly, in *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*,[154] the Missouri Supreme Court analyzed the constitutionality of the Joint Committee on Administrative Rules ("JCAR"), a committee of legislators appointed to review and to oversee the administrative rulemaking process. The JCAR was empowered

146. The court considered whether the General Assembly could delegate to a commission of legislators the power to deny the Governor the authority to make budgetary transfers, a power that is constitutionally reserved for the General Assembly. Professor Orth argues that the delegation of power does not necessarily implicate the principle of the separation of powers. When a legislature delegates its plenary power to a group of its members, a constitutional issue is raised. However, only if that delegation is made to a coordinate branch of the government is the issue one involving separation of powers. *See* Orth, *supra* note 96, at 22.

147. 687 P.2d 622 (Kan. 1984).

148. *See id.* at 626.

149. *See id.* at 635–36.

150. *See id.* at 637.

151. *See id.* at 638.

152. *See id.*

153. *See id.*

154. 948 S.W.2d 125 (Mo. 1997).

to review, suspend, and nullify rules.[155] The court held that the statutory provision authorizing the JCAR to modify, revoke and nullify agency rules permitted legislative circumvention of the Missouri Constitution's bill passage and presentment requirements and was therefore unconstitutional.[156] Like the Kansas court in *Stephens*, the Missouri court reasoned that the JCAR's power to revoke rules was in effect legislative and was subject to the constitutional mandates of bicameralism and presentment to the Governor.[157] Non-compliance with these requirements precluded the Governor's participation and egregiously ignored the process required by the state.[158]

The New Jersey Supreme Court in *General Assembly of the State of New Jersey v. Byrne*,[159] held the Legislative Oversight Act to be unconstitutional on the grounds that the legislative action it permitted contravened the bicameralism and presentment requirements of the New Jersey Constitution.[160] The act allowed the legislature to veto virtually every rule proposed by state administrative agencies.[161] The court noted that any legislative action, such as that authorized by the Legislative Oversight Act, that removes the Governor from lawmaking violates the presentment requirements of the constitution and represents a violation of the separation of powers doctrine.[162] According to the court, the legislature can use the power granted to it under the act "to exert a policy-making effect equivalent to amending or repealing existing legislation. A veto which effectively amends or repeals existing law offends the constitution because it is tantamount to the passage of a new law without the approval of the Governor."[163] This result, the court concluded, violated the separation of powers.[164]

Along these same lines, the New Hampshire Supreme Court in *Opinion of the Justices*,[165] in commenting on the constitutionality of a legislative proposal that would empower a legislative committee to review and to accept or reject rules proposed by state agencies, noted that the legislature may not delegate its lawmaking authority to a smaller legislative

155. *See id.* at 129.
156. *See id.* at 134.
157. *See id.*
158. *See id.*
159. 448 A.2d 438 (N.J. 1982).
160. *See id.* at 447.
161. *See id.* at 440.
162. *See id.* at 443.
163. *See id.* at 444.
164. *See id.*
165. 431 A.2d 783 (N.H. 1981).

body and evade the constitutional enactment requirements.[166] The court reasoned that the approval or rejection of proposed agency rules is undoubtedly an exercise of legislative power and that under the state constitution all resolutions of the legislature must be presented to the executive branch for its approval.[167] Because the proposed legislation did not make provision for participation in the rulemaking oversight by the executive powers of the government, the court concluded that the power granted to the legislature under the proposed legislation was unconstitutional.[168]

The Michigan Supreme Court in *Blank v. Department of Corrections*,[169] when considering the constitutionality of legislation empowering the legislature's Joint Committee on Administrative Rules ("JCAR") to veto administrative rules, concluded that the power granted to JCAR was unconstitutional as a violation the separation of powers doctrine.[170] The court based its decision on the absence of a provision for presentment to the executive powers of the state for the approval of a veto.[171] The court concluded that because there was no provision in the legislation for presentment to the executive of the legislature's veto of a rule, such legislative action goes essentially unchecked, and "unchecked power is precisely what the separation of powers doctrine sought to avoid."[172]

Thus, there is substantial case law from other states that supports the contention that the authority granted to the RRC is unconstitutional because this authority allows the RRC to engage in unchecked legislative action.[173]

The United States Supreme Court ruled on a somewhat similar issue in *I.N.S. v. Chadha*,[174] when the Court struck down a provision of the Immigration and Nationality Act which allowed either house of Congress

166. *See id.* at 788.
167. *See id.* at 788–89.
168. *See id.* at 788.
169. 564 N.W.2d 130 (Mich. 1997).
170. *See id.* at 136.
171. *See id.*
172. *Id.*
173. However, case law from other states arrives at the opposite conclusion under similar circumstances to those presented by the RRC. For example, in analyzing the constitutionality of a statute that authorized the legislative repeal of agency rules and regulations, the Idaho Supreme Court in *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990), held that since agency rules and regulations are less than the equivalent of statutory law, they need not be rejected by bicameral passage and presentment as required for the rejection of statutory law. *See id.* at 416–17. The court further reasoned that agency rulemaking power comes from legislative delegation; rulemaking that comes from a delegation of power is "neither the legal nor functional equivalent of constitutional power." *See id.* at 417.
174. 462 U.S. 919 (1983).

to veto by resolution a certain act by the Attorney General. This provision permitted Congress to overturn a decision made by an officer of the executive branch without following the formal enactment process mandated by the United States Constitution for such "legislative" action.[175] The passage of such a resolution under this Act was interpreted as legislative action because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside of the legislative branch.[176] The Court then pointed out that Article I, Section 8 of the United States Constitution requires that such legislative action be subject to passage by a majority of both houses and presentment to the President for approval.[177] Bicameral and presentment requirements were intended to maintain the separation of powers, and the limits on the circumscribed powers of each branch must not be eroded.[178]

The United States Supreme Court acknowledged that the legislative veto authorized by the provision at issue in *Chadha* was doubtless a convenient shortcut and appealing compromise between the executive and legislative branches.[179] Despite the possibilities of delay and potential for abuse encountered in complying with constitutional mandates, the Court declared that there is no better way to preserve freedom than by making the exercise of power subject to the constraints articulated in the Constitution.[180] Therefore, because the constitutionally mandated procedures of bicameralism and presentment were not required to enact the resolution overturning a decision made by an officer of the executive branch, the provision of the Act allowing for the resolution was unconstitutional as a violation of the separation of powers.[181]

The functions of the RRC appear equivalent to the legislative function analyzed by the *Chadha* court. Undeniably, the veto of administrative rules has the effect of altering the legal rights of persons outside of the legislature.[182] Allowing the RRC to nullify rules proposed by agencies permits the RRC, and arguably the General Assembly, to overturn decisions of the executive branch while circumventing the constitutional bicameral passage and presentment requirements. Therefore, in order to comply with constitutional requirements of the North Carolina Constitution, such action must include bicameral passage and

175. *See id.* at 952, 954–55.
176. *See id.* at 952.
177. *See id.* at 956–57.
178. *See id.*
179. *See id.* at 958.
180. *See id.* at 959.
181. *See id.*
182. *See id.*

presentment.[183]

Additionally, the functions of the RRC are substantially similar to the legislative bodies of the other states which were found to be unconstitutional. The RRC has the power to delay indefinitely and to prevent from taking effect any and all rules proposed by the agencies of the state, and there is no formal enactment procedure that the RRC must follow in exercising these powers. By the reasoning of *Chadha* and other cases in states that have addressed this issue, the authority granted to the RRC violates the separation of powers principle because enactment and presentment procedures are not required of the RRC when it vetoes the rules promulgated by the executive branch of the government.[184]

3. Encroachment upon the Powers of the Judiciary

A second theme prevalent among constitutional challenges made under circumstances similar to those presented by the RRC is that legislative control over the rulemaking process violates the separation of powers doctrine if the process involves a determination by the legislative branch of whether the rule complies with enabling statutory authority. This analysis is not dependent on whether the RRC is classified as an executive or legislative body. Thus, this argument may provide a respectable fall-back position, in that if the constitutionality of the RRC cannot be attacked on the grounds that its authority encroaches on the powers constitutionally mandated to the executive branch of the government, it can be attacked on the grounds that the authority granted to the RRC impermissibly invades the constitutional purview of the judiciary.

The interference with judicial authority by the legislative branch under circumstances similar to those presented by the RRC has been addressed by other states. For example, in *Legislative Research Commission v.*

183. *See* N.C. CONST. art. II, § 22(1).

184. North Carolina could take the position of the Idaho court in *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990), which held that since agency rules are less than the equivalent of statutory law, they need not be rejected by some process of "equal dignity" to legislative enactment. *See Mead*, 791 P.2d at 414–17. The United States Supreme Court, when addressing a similar issue, held that rules and regulations are not of a legislative character in the highest sense of the term, and that Congress might rightfully entrust to administrative agencies the determination of such minor matters as are covered by rules and regulations. *See U.S. v. Grimaud*, 220 U.S. 506, 516–17 (1910). However, in North Carolina, where an agency has the authority to act, its rules and regulations have the binding effect of statutory law and may accordingly alter the common law because regulations that are authorized by statutory law are the tools used to effectuate the policy and purposes of the statutory law. *Taylor v. Superior Motor Co.*, 227 N.C. 365, 367, 42 S.E.2d 460, 461 (1947). Given North Carolina's traditional formalistic approach to constitutional jurisprudence, it seems unlikely that a court would be willing to find that a general power to veto agency regulations by informal legislative action is permissible. *See supra* Part II.A.

Brown,[185] the Kentucky Supreme Court addressed the constitutionality of several acts of the Kentucky General Assembly that confer certain powers on the Administration Regulation Review Subcommittee of the Legislative Research Commission (LRC), which exercised oversight and review of administrative regulations. The subcommittee was charged with determining whether a regulation conformed to the statutory authority under which it was authorized and whether it carried out the legislative intent of that statutory authority.[186] The subcommittee's findings were the basis for the acceptance or the rejection of the regulation.[187] The court found that the review of regulations to determine whether they comply with statutory authority and with legislative intent was "unequivocally" a responsibility that has been constitutionally reserved to the judicial branch of the government.[188] This encroachment on the powers of the judiciary led the court to conclude that the statutory scheme authorizing rules review by the LRC violated the separation of powers doctrine.[189]

The Idaho Supreme Court, addressing a similar issue in *Mead v. Arnell*,[190] came to the opposite conclusion. The court determined that the statutory authority empowering the legislature to review and to interpret rules and regulations in order to determine if they complied with the legislative intent of the enabling statute was constitutional.[191] However, the court distinguished between legislative review to determine whether the rules comport with legislative intent, and legislative review to determine whether the rules conform to the enabling statutory authority.[192] Only because the legislature was empowered to determine whether rules comported with legislative intent, as opposed to statutory authority, did the court reach the conclusion that the legislature, in its review of administrative rules, did not usurp the power constitutionally assigned to the judiciary, which leaves room to infer that the Idaho court might have reached the same conclusion as the Kentucky court if the legislature were determining compliance with statutory authority.

If North Carolina were to look to the precedent of other states by analogy, the grant of judicial power to the RRC would be unconstitutional. The RRC, the functional equivalent of Kentucky's Administration Regulation Review Subcommittee, is charged with determining whether

185. 664 S.W.2d 907 (Ky. 1984).
186. *Id.* at 917–18.
187. *Id.*
188. *Id.* at 919.
189. *Id.*
190. 791 P.2d 410 (Idaho 1990).
191. *Id.* at 420–21.
192. *Id.*

proposed rules conform to the statutory authority under which they are authorized. Because this function is constitutionally reserved to the judiciary, encroachment by the RRC on judicial responsibility represents a violation of the separation of powers. Furthermore, the Idaho Supreme Court's distinction between legislative intent and statutory authority also leads to the conclusion that the power granted to the RRC is a usurpation of judicial power granted by the constitution.

III. THE SEPARATION OF POWERS IN NORTH CAROLINA AND BEYOND: A POLICY ANALYSIS

Professor Orth notes that "interpretation of the constitution may involve considerations of public policy."[193] Certainly, evaluation of the authority granted to the RRC in the rulemaking process raises several important public policy considerations. This Comment concludes, using the criteria of independence and effectiveness to judge the rulemaking process, that the current role of the RRC in the rulemaking process represents unsound public policy.

A. *Independence*

Administrative rules must comport with legislative intent, but this must not come at the expense of the under-enforcement of constitutional norms. North Carolina needs a rulemaking process that is independent of impermissible legislative control and that respects the "constitutional restrictions on legislative oversight."[194] In this context, independence embodies the notion of the principle of separation of powers. Independence ensures that rulemaking decisions are based on the discretion and expertise of agencies, and that regulatory programs are implemented in a coherent manner, without interruption and interference by the General Assembly. The independence of each branch of the government functions to protect the liberty of the citizen and to limit the potential for the abuse of power by the different branches of the government.[195] The current role of the RRC in the rulemaking process involves serious public policy implications regarding the importance of the separation of powers and the ability of each branch of the government to carry out its constitutionally mandated responsibilities independent of the other branches.

The separation of powers serves several goals. First, the separation of powers prevents the concentration of power in any one branch of the government. Such a concentration of power in one branch is understood

193. *See* Orth, *supra* note 96, at 26.
194. *See* Rossi, *supra* note 71, at 563.
195. *See* Orth, *supra* note 96, at 1.

historically as the root of tyranny. Second, the separation of powers provides each branch of the government with weapons to fight off encroachment by the other two branches, in the constitutionally prescribed system of checks and balances. The idea that concentrated, unchecked political power is a danger to civil liberties and to popular rights remains a persistent and characteristic feature of American constitutionalism.[196] Accordingly, maintaining separate and distinct branches of government, and taking care to ensure that each branch operates independently of the others, are necessary to protect our basic freedoms.

To avoid undermining the policy served by the doctrine of separation of powers, the General Assembly should not be empowered to interfere in the rulemaking process. Administrative law and agency action pervade modern society, and will only become more pervasive as the population of the state continues to grow rapidly.[197] Agencies must be allowed the flexibility and discretion to address the growing complexities of our society in order "to improve our community and to protect our personal liberties."[198] Agencies should be free to adopt regulatory programs tailored under agency expertise and knowledge and should not be hampered in adopting coherent regulatory schemes by unconstitutional interference from the General Assembly. Eliminating the role of the RRC in the rulemaking process and thus removing the potential for legislative interference may decrease the likelihood that rules comport with legislative intent; however, North Carolina needs a rulemaking process that is independent from the control of the General Assembly, one that adheres to the important doctrine of the separation of powers in order to minimize political divisiveness and to maximize the protection of civil liberties and public well-being. Removing the RRC from the process would allow agencies to formulate regulatory approaches they find best suited to address their particular problems; should the regulatory approach deviate significantly from the intent of the General Assembly, the General Assembly could pass a bill, via the legislative process mandated by the constitution, which does away with the rule.

B. Effectiveness

At the same time, North Carolina needs an effective rulemaking process that ensures that rules comport with legislative intent but that does not paralyze agencies in their rulemaking efforts or require an inordinate

196. *See id.*

197. *See* Thomas R. West, *The Chair's Comments*, ADMIN. LAW. (N.C. Bar Ass'n), Nov. 1997, at 1–2.

198. *See id.* at 2.

delay in the time required for a rule to become operative. An effective rulemaking process is important because in order to fulfill their responsibilities to the citizens of the state, administrative agencies must be free to implement rules according to their expertise and in a timely manner. The current role of the RRC in the rulemaking process raises concern about the potential for the RRC to succumb to political pressure and to object to agency rules on ideological grounds.

This concern is best illustrated by the recent lawsuits filed by the EMC and state environmental conservation groups. As stated, the pervasiveness of administrative regulation is increasing as society grows and becomes increasingly complex.[199] Concurrently, the burdens on the regulated community are increasing as well, which motivates the regulated community to become more involved in the political process to protect its own interests. The discretion afforded to the RRC in reviewing rules is disturbing because the criteria by which the RRC evaluates rules are vague, and the troubling potential exists of the RRC succumbing to the political pressure from powerful special interest groups. For example, the RRC is not subject to restrictions on lobbying or ex parte contacts that normally apply to administrative agencies.[200] Critics of the RRC's role in the rulemaking process contend that the RRC abused its authority to veto controversial rules in response to political opposition to the rules. For example, Professor Rossi points out that:

> In July 1996 the [RRC] vetoed wetlands rules proposed by the state Environmental Management Commission because the [RRC] thought the rules were vague and that the agency was without the statutory authority to adopt them, despite the state Attorney General's opinion to the contrary. More recently, the [RRC] vetoed a certificate-of-need process for open-heart surgery centers, opposed by large health care interests in the state, and rules restricting sewage from hogs, opposed by the strong farming interests in the state. In both instances, representatives of those interests opposed to the rules made political appeals directly to the [RRC].[201]

The allegations contained in the lawsuits filed by the EMC and by state environmental conservation organizations are analogous to those

199. *See* West, *supra* note 195, at 1–2.

200. *See* Rossi, *supra* note 71, at 563. In general, ex parte contacts are any written or verbal communication, initiated outside of a duly noticed public hearing, between the official with authority and one or more parties involved, but not necessarily all interested parties, related to subject matter which is being considered by that official. Ex parte contacts are dangerous in that they may influence the official's consideration of the subject matter. The lack of statutory restriction seems to indicate that the members of the RRC may be subject to such influence through ex parte contacts.

201. *See* Rossi, *supra* note 71, at 563.

contended by Professor Rossi.[202]

The potential for the RRC to succumb to political pressure is problematic because it contradicts the reasons for delegating the implementation of laws to administrative agencies. The implementation of laws is delegated to administrative agencies because the agencies possess the requisite expertise, knowledge, and human capital to address the complex and technical conditions created by modern society. Succumbing to political pressure represents a complete disregard for the recognized fact that agencies are best suited to formulate rules and regulations, and raises troubling implications for the level of protection afforded to public health, safety, and welfare. North Carolina needs a rulemaking process that is effective, one that ensures that agencies are not paralyzed in their rulemaking efforts by the political power of special interest groups and lobbying organizations, and one that maximizes protection of public health, safety, and welfare.

Another critical component of an effective rulemaking process is the ability of agency regulatory programs to become operative in a timely manner. As mentioned above, it may take as long as eighteen months for controversial rules to take effect.[203] This protracted timeline is troubling for several reasons. The delay is a disservice to the regulated community and to the general public regarding the various public health, safety, and welfare problems addressed by agency action. The agencies are stripped of the ability to act with any degree of exigency in addressing such problems. Rules pending under review may even be rendered useless as conditions, technology, or scientific understanding may change. New circumstances may arise in the eighteen months it takes for a rule to become operative. Additionally, the lag creates confusion for the regulated community as its members can never be certain whether and when rules will become operative. North Carolina needs a rulemaking process that is designed to allow the maximum amount of agency flexibility and discretion in addressing the various conditions necessitating regulation, and that allows agencies to respond to these conditions in a timely manner to ensure that protection of public health, safety, and welfare is maximized. As one critic of the current role of the RRC has written:

> Agencies may gladly live under budget scrutiny and the potential of statutory change, and are quite comfortable with the fact that the legislature as a body can strike any rule at any time. The pocket delay, however, strains the notions of democratic government and

202. *See supra* note 2 (outlining the contours of the lawsuits filed alleging that the RRC has an unconstitutional grant of authority).

203. *See* Fountain, *supra* note 4, at 1.

injects individual politics and agendas into rulemaking.[204]

Removing the RRC from the rulemaking process may mean that rules are more likely to deviate from legislative intent. However, the removal of the RRC from the rulemaking process will allow agencies to enact regulatory schemes that are best suited to address the problems at hand, not merely the schemes that are the most politically appealing, and will allow the agency to do so in reasonable time.

Thus, public policy implications suggest that the current role of the RRC in the rulemaking process poses several different threats that must be balanced against the RRC's purpose of ensuring that rules comport with legislative intent.[205] This Comment takes the position that the potential for slight deviation from legislative intent is outweighed by the need for the separation of powers and respect for agency expertise.

IV. RECOMMENDATIONS

The North Carolina judiciary has respected the principle of the separation of powers for over two hundred years.[206] While the increasing complexity of modern society necessitates some flexibility in the coordination between the branches of the government, this coordination must be implemented in a fashion confined by constitutional limitations, in order to prevent the usurpation of power of one branch of the government from another. With this in mind, the RRC should be completely removed from the rulemaking process. State agencies, charged with the duty of implementing the law, should be free to promulgate rules and regulations based on their own expertise and decisionmaking processes without fear of paralysis by the RRC, potentially based on ideological objections or objections resulting from the political pressure brought to bear on the RRC by powerful special interests. It is in the best interests of the public welfare for agencies to promulgate rules and regulations based on the expertise and skill that each agency possesses and not based on political interjections made by the RRC or the legislative branch of the government.

Those frustrated by the rulemaking process in North Carolina contend that state agency rulemaking has created a bureaucratic and economic nightmare for the regulated community.[207] The crux of this problem lies not with the agencies and the rulemaking process but with legislation enacted by the General Assembly that imposes greater restriction on people

204. *See* Payne, *supra* note 3, at 796.

205. *See* Fountain, *supra* note 4, at 1 (pointing out that the purpose served by the RRC is legislative review).

206. *See* discussion *supra* Part II.A.

207. *See* Faires, *supra* note 1, at 1.

and businesses, and directs agencies to create rules and regulations in order to implement the legislation.[208] The regulated community should pressure the General Assembly to address their grievances by enacting legislation that responds to the needs of the regulated community as opposed to enacting legislation that necessitates further administrative regulation. In this way, the General Assembly could address the situation of over-regulation through its own constitutional means as opposed to interfering with the ability of the administrative agencies to do their jobs in executing the law.

For several years, the Administrative Law Section of the North Carolina Bar Association has been involved in the task of reforming the rulemaking procedures set forth in the NCAPA.[209] After multiple meetings and re-writes, a draft bill was approved by the Administrative Law Section and was considered for inclusion in the Bar Association's legislative package for the General Assembly's 2003 session.[210] Several provisions were well-received by the General Assembly and were adopted as amendments to the NCAPA, taking effect in August 2003.[211] The efforts of the Administrative Law Section, unfortunately, do not address the fundamental constitutional issues raised by the participation of the RRC in the rulemaking process. Reforms such as the elimination of the RRC from the rulemaking process were "discarded as unproductive" during the course of discussion.[212] The reform efforts focused instead on measures developed to shorten the rulemaking timetable and to eliminate some of the cumbersome processes for rules that were deemed to be "non-controversial."[213]

While the proposals of the Administrative Law Section may mitigate some of the frustration with the rulemaking process, they simultaneously acquiesce to the usurpation of executive power and of judicial power by the General Assembly. If there is continued disregard for the constitutional implications of the RRC and continued expansion of the RRC's role in the rulemaking process, the line between creating the laws and implementing the laws will become increasingly blurred. The under-enforcement of constitutional norms is a troubling phenomenon with even more troubling

208. *See id.* at 10.

209. *See* Fountain, *supra* note 4, at 1, 3.

210. *See id.* at 3.

211. Those provisions include the mechanism for distinguishing between controversial and non-controversial rules; the establishment of a rolling deadline for review of controversial rules by the General Assembly; the formalization of the different categories of emergency and temporary rules; the subjection of temporary rules to review by the RRC. Each of these provisions is described in detail in Part I of this Comment.

212. *See* Fountain, *supra* note 4, at 3.

213. *See id.*

consequences. The balance of powers will be tipped even more heavily in favor of the legislative branch, jeopardizing not only the integrity of the other branches of the government but the liberty of the citizens which the separation of powers is designed to protect.

As this analysis points out, many states with constitutions that, like North Carolina's, declare expressly that the powers of the government shall be separate and distinct, have eliminated the power of the legislative branch to paralyze agency rulemaking on the basis of its constitutional implications. For example, in Kentucky the Administration Regulation Review Subcommittee, after its power to veto agency rules was declared to be unconstitutional by the Kentucky Supreme Court, is now authorized to make only non-binding determinations in its review of agency rules.[214]

North Carolina should follow Kentucky's example. The Joint Legislative Administrative Procedure Oversight Committee ("JLAPOC"), organized pursuant to Section 120-70.100 of the North Carolina General Statutes, provides sufficient legislative oversight of the rulemaking procedure to ensure that regulatory programs are operating as intended by their enabling statutory authority and to keep the General Assembly abreast of the current state of administrative agencies. The JLAPOC, unlike the RRC, is not empowered to veto proposed agency rules or to determine whether proposed rules exceed the enabling statutory authority. Instead, this committee merely gathers information regarding state regulatory programs, existing rules, and the rulemaking process, serving as a focal point for legislative inspection of state regulatory agencies and the rules they propose. The JLAPOC should stand in place of the RRC and function to inform the General Assembly as to the state of the regulatory agencies in order to preserve the constitutionally mandated distinctions between the branches of the government. Limiting legislative oversight to this body would also dramatically reduce the time required for a rule to be placed into effect.

CONCLUSION

The state of the administrative rulemaking process in North Carolina is a veritable nightmare from the standpoint of the regulated and the regulators alike. Though there have been many amendments to the NCAPA in an attempt to improve the state of administrative regulation, repeated increases in power granted to the RRC have done little to temper the frustration caused by the rulemaking process. This Comment has argued that the RRC, the body created by the General Assembly to limit the amount of administrative regulation that is imposed upon the people of

214. KY. REV. STAT. ANN. § 13A.030(2) (2000).

North Carolina and to "improve" the regulatory process from the perspective of the regulated community, is an egregious violation of the separation of powers doctrine and is thus an unconstitutional attempt to reform the rulemaking process. This Comment, taking the position that the RRC is a legislative body, has focused on two possible legal challenges to the constitutionality of the RRC: first, the interference by the legislature with the responsibilities constitutionally reserved for the executive branch, and second, interference by the legislature with the responsibilities constitutionally reserved for the judiciary. Additionally, this Comment contends that the role of the RRC in the rulemaking process represents unsound public policy. Research of federal issues and of analogous situations that have arisen in other states suggests the authority granted to the RRC would be unconstitutional, based on the argument that the functions of the RRC interfere with the powers constitutionally reserved to the executive branch.

North Carolina's tradition of a strict adherence to the separation of powers doctrine and relatively formalistic approach to constitutional jurisprudence demonstrates the commitment of the state's citizens to respect the exclusive jurisdiction of each distinct branch of government. With the successive adoption of each of three constitutions, the people of North Carolina have made clear that the separation of powers is the cornerstone of their state government. The attempts of the legislative branch to paralyze the constitutional mandate of the executive branch—implementation of laws of the state—represent an egregious disruption of the balance of powers to which the people of North Carolina have been committed throughout the entire history of the state. This balance will be properly realigned only when the RRC is removed from the administrative rulemaking process entirely and the state agencies are free to carry out the implementation of the laws without interference by the General Assembly. The current state of agency regulation in North Carolina leaves little room to doubt that the process must be reformed. One thing is certain: increasing the presence and the potency of the RRC within the process cannot be the answer.

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