

Fall 1993

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Recommended Citation

Dan R. Stengle & James P. Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Control Rulemaking by Executive Agencies*, 21 Fla. St. U. L. Rev. 415 (1994).
<http://ir.law.fsu.edu/lr/vol21/iss2/4>

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PUTTING THE GENIE BACK IN THE BOTTLE: THE LEGISLATIVE STRUGGLE TO CONTAIN RULEMAKING BY EXECUTIVE AGENCIES

DAN R. STENGLE* & JAMES PARKER RHEA**

I. INTRODUCTION

THE formulation of public policy is primarily the responsibility of the Legislature, which fulfills this constitutional duty through the adoption of laws.¹ Shaping public policy through lawmaking is a power exclusively within the domain of the Legislature,² and it may not be exercised by another governmental branch or executive agency.³ While executive agencies may not wield lawmaking powers, they nevertheless play a very important part in the development of public policy through the adoption of administrative rules. Executive agencies, however, do not have inherent rulemaking authority.⁴ It is the prerogative of the Florida Legislature, through enabling statutes, to give agencies authority to adopt rules that implement, enforce, and interpret a statute.⁵ An enabling statute, however, may not provide unbridled authority to an administrative agency to decide what the law is.⁶ A statute providing such a legislative authorization must be

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The views expressed in this Article are those of the authors and are not intended to reflect the views of the Florida Senate or the Department of Community Affairs.

This Article is dedicated to the memory of Professor Patricia A. Dore, whose scholarly contributions to the field of administrative law in Florida are immeasurable.

1. *Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985).
2. *Jones v. Department of Rev.*, 523 So. 2d 1211, 1214 (Fla. 1st DCA 1988); *State ex rel. Dep't of HRS v. Upchurch*, 394 So. 2d 577, 580 (Fla. 5th DCA 1981); *see also A.T. v. State*, 516 So. 2d 1104, 1105 (Fla. 2d DCA 1987); *T.D. v. State*, 486 So. 2d 40 (Fla. 2d DCA 1986).
3. *Smith v. State*, 537 So. 2d 982, 985 (Fla. 1989); *Foley v. State ex rel. Gordon*, 50 So. 2d 179 (Fla. 1951).
4. FLA. STAT. § 120.54(15) (Supp. 1992); *Grove Isle, Ltd. v. State Dep't of Env'tl. Reg.*, 454 So. 2d 571, 573 (Fla. 1st DCA 1984).
5. *State v. Atlantic C.L.R. Co.*, 47 So. 969 (1909).
6. *State ex rel. Davis v. Fowler*, 114 So. 435, 437 (Fla. 1927).

complete in itself,⁷ must declare the legislative policy or standard,⁸ and must operate to limit the delegated power.⁹

While delegations of legislative authority must meet these criteria, the level of detail a statute can contain is limited. Enacting laws that are as specific as administrative rules may cause an over-burdened legislature to become bogged down in quibbling over details not particularly suited to resolution by those constitutionally charged with crafting broad policies. Although the Legislature could draft legislation that is more specific, the Legislature has only a limited ability to anticipate the practical aspects of a regulatory program. The range and complexity of governmental regulatory activities often require more specialized training and expertise than one justifiably could expect of lawmakers and legislative staff. For example, agencies regulating pollution control programs must employ hydrologists, engineers, biologists, and the like to promulgate rules for these programs. In addition, the Legislature may be perceived as "micromanaging" executive agencies if it attempts to anticipate and address the panoply of circumstances confronted in the execution of a regulatory scheme. Thus, an inherent tension exists between the more general legislative policy or standard embodied in an enabling statute and the practical application of the statute through executive agency rulemaking.

The tension between statutory policies or standards and the rules interpreting them may result in the perception that agencies are exercising powers greater than, or at least different from, those which the Legislature intended when it delegated the authority. Legislators, who are more directly accountable to the electorate than bureaucrats, are pressured by constituents to restrain the actions of executive agencies. In particular, complaints revolve around the ever-expanding requirements of administrative rules. As a result, state legislatures continue to seek methods to rein in power previously delegated to administrative agencies.

7. *Spencer v. Hunt*, 147 So. 282, 286 (Fla. 1933); *accord Florida Beverage Corp. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st DCA 1975); *Lewis v. Florida State Bd. of Health*, 143 So. 2d 867, 875 (Fla. 1st DCA 1962), *cert. denied.*, 149 So. 2d 41 (Fla. 1963).

8. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268 (Fla. 1991). In this case, the court stated: "The Legislature can delegate functions so long as there are sufficient guidelines to assure that the legislative intent is clearly established and can be directly followed . . . What the Legislature *cannot* do is delegate its policy-making responsibility." *Id.*; *see also State ex rel. Palm Beach Jockey Club, Inc. v. Florida State Racing Comm'n*, 28 So. 2d 330 (Fla. 1946).

9. *Palm Beach Jockey Club, Inc.*, 28 So. 2d at 335; *accord, Amare v. Daytona Beach Shores*, 181 So. 2d 722, 724 (Fla. 1st DCA 1966); *City Council of N. Miami Beach v. Trebor Constr. Corp.*, 254 So. 2d 51, 53 (Fla. 3d DCA 1971), *cert. denied*, 260 So. 2d 514 (Fla. 1972); *Permenter v. Younan*, 31 So. 2d 387, 389 (Fla. 1947).

The Florida Legislature, like the United States Congress and other state legislatures, has struggled for years to control administrative rulemaking. It has utilized a variety of methods of legislative oversight of executive agencies in general, and executive agency rulemaking in particular. Each method has its imperfections or limitations, and thus far the search for a system of legislative oversight and control has not resulted in a completely satisfactory scheme. This Article examines a number of methods available for overseeing executive agency rulemaking, evaluates many of the issues raised by legislative control, and focuses primarily on the legislative veto of administrative rules. The Florida Legislature and legislatures in a number of other jurisdictions have contemplated the idea of a legislative veto of administrative rules. This Article considers those efforts and discusses their strengths and weaknesses.

II. OVERSEEING AND RESTRAINING EXECUTIVE AGENCIES

In Florida, when the Legislature delegates authority to an agency of the executive branch, it maintains several mechanisms to oversee the agency's exercise of that power. These mechanisms include: (1) exercising plenary oversight of agency activities by giving legislative committees jurisdiction over them; (2) scheduling programs for mandated reviews and repeals; (3) maintaining the Auditor General to audit and evaluate state agencies and programs; and (4) requiring that proposed rules be submitted to a rule oversight committee. In addition to oversight, the Legislature may check the exercise of delegated authority by a variety of methods including: (1) amending the enabling law; (2) subjecting an adopted rule to legislative ratification or amendment by statute; and (3) refusing to appropriate funds necessary to implement the rule, or limiting the expenditure of appropriated funds. Often, the lines between legislative oversight and legislative control are blurred, and some of the enumerated methods contain elements of both oversight and control.

The Legislature's authority to oversee executive agencies originates from its constitutional investigatory powers. Article III, section 5 of the Florida Constitution grants the Legislature the power to investigate matters that it deems to be of concern.¹⁰ Oversight and investigation of administrative agencies and programs occur through the legislative committee system. The Florida Senate and House of Representatives are authorized by section 11.141(1) and (2), *Florida Statutes*, to designate standing committees in such number as they deem

10. FLA. CONST. art. III, § 5.

necessary.¹¹ The standing committees are empowered to exercise a variety of functions including, but not limited to, those powers enumerated in article III, section 5 of the Florida Constitution, and chapter 11, *Florida Statutes*.¹² In addition to standing committees, the President of the Senate and the Speaker of the House of Representatives are authorized to appoint select committees and select joint committees.¹³ Select committees usually are appointed to investigate a particular topic or problem.

Standing and select committees have broad powers.¹⁴ Each is authorized to maintain a continuous review of the work of the state agencies and related governmental functions within its jurisdictional subject area.¹⁵ To carry out its duties, each committee is empowered with the right and authority to inspect and investigate the books, records, papers, documents, data, operation, and physical plant of any public agency in the state.¹⁶ Committees also have the right to subpoena witnesses, compel witness attendance, and compel the production of documentary evidence.¹⁷

Although standing and select committees have broad powers formalized by statute, legislative committee oversight is not conducted by any standard procedure; instead, a variety of methods are employed. General legislative oversight may be conducted by an informal telephone inquiry, or oversight may be more formal, as in the cases of written interim project reviews and formal public hearings with subpoenaed witnesses and sworn testimony. This flexibility is necessary to tailor the legislative response to the complexity and magnitude of the issue under consideration.

General legislative oversight by committee can be an effective tool for directing the Legislature's attention to a specific program. It is not, however, a systematic process for evaluating the actions of the executive branch.¹⁸ While standing and select committees have flexibil-

11. The Legislature has established standing committees by rule in Florida Senate Rule 2.1 and in Florida House of Representatives Rule 6.1.

12. FLA. STAT. § 11.141(3) (1991).

13. *Id.* § 11.141(4).

14. *See id.* § 11.143 (Supp. 1992).

15. *Id.* § 11.143(1).

16. *Id.* § 11.143(2).

17. *Id.* § 11.143(3).

18. Although the oversight process can be an effective coercive power, as Justice White, in his dissent in *Immigration & Naturalization Service v. Chadha*, stated: "Oversight hearings and congressional investigations have their purpose, but unless Congress is to be rendered a think tank or debating society, they are no substitute for the exercise of actual authority . . ." 462 U.S. 919 n.10 (1983) (White, J., dissenting). The *Chadha* case is discussed more specifically *infra* part IV.

ity to investigate matters within their purview, the framework for general legislative oversight is naturally piecemeal. The process depends largely upon the interests of current committee chairpersons and the legislative leadership. Very often, constituents or the media identify problems in programs which pique legislative interests. As a result, the Legislature's attention may be focused reactively, as problems arise, rather than proactively, before problems develop.

On the other hand, simply because an oversight process is systematic does not necessarily mean it is effective. For example, the Legislature established a systematic method for legislative oversight by scheduling some types of enabling statutes for legislative review before a mandatory future repeal date. In the review process, the Legislature evaluated certain programs that had been delegated to executive branch agencies. Legislative oversight of certain executive functions by this method was embodied in the "sunset" law, while particular executive branch entities were targeted for examination under the "sundown" law. Sunset, as embodied in the Regulatory Sunset Act of 1976,¹⁹ served as the mechanism for review of statutes regulating professions, occupations, businesses, and industries. The Sundown Act,²⁰ enacted in 1978 as a supplement to sunset, provided a legislative review of the need for and benefits derived from statutorily created advisory bodies, commissions, and boards of trustees adjunct to executive agencies. Both the sunset and sundown laws set schedules for repeal based on ten year cycles. In addition, both specified criteria for evaluation of the statutory basis or entity being reviewed. The review criteria were established to evaluate public benefits, potential harms, and costs of the system of regulation, as well as the costs of operating the adjunct entity.²¹

In the 1987-88 legislative interim, legislative staff studied the effectiveness of the sunset and sundown laws.²² The initial review of these laws found the oversight benefits intangible, and suggested that the benefits were insignificant when compared to the costs of the systematic reviews conducted under sunset and sundown.²³

19. Ch. 76-168, 1976 Fla. Laws 295 (codified at FLA. STAT. § 11.61 (Supp. 1976)).

20. Ch. 78-323, 1978 Fla. Laws 899 (codified at FLA. STAT. § 11.611 (Supp. 1978)).

21. See FLA. STAT. §§ 11.61, 11.611 (1991).

22. STAFF OF FLA. S. COMM. ON GOVTL. OPS., A REVIEW OF THE SUNSET AND SUNDOWN LAWS OF FLORIDA (1988) (on file with comm.) [hereinafter FIRST SENATE REVIEW OF SUNSET]. The review was assigned by Senate President John Vogt, Dem., Cocoa Beach, 1974-1988. *Id.*

23. The review found that the Senate alone incurred an estimated \$141,827 to conduct 13 sunset reviews assigned in the 1987-88 interim, and \$106,904 to conduct the 28 sundown reviews assigned in the same period. FIRST SENATE REVIEW OF SUNSET, *supra* note 22, at 5-7, 73-79, 89-90. The review recommended that the sunset and sundown laws be scheduled for future repeal,

A second review of the sunset and sundown laws was conducted in the 1991-92 legislative interim.²⁴ This second review reached conclusions similar to those of the first review²⁵ and additionally found the following:

[G]eneral oversight by legislative staff of executive agencies and of the statutes which govern them has decreased as staff has been required to perform an increasing number of reviews assigned by law. Since general oversight responsibilities are of a more discretionary nature, reviews which are required by statute necessarily take precedence over projects which are discretionary.²⁶

In response, the Senate Committee on Governmental Operations, manifesting its dissatisfaction with these systematic oversight processes, introduced a bill to repeal the sunset and sundown laws.²⁷ The

and that criteria (similar to the criteria to which sunset and sundown subjected other laws prior to their reenactment) be established for the review of sunset and sundown laws. *Id.* at 7, 89-90. Ultimately, those recommendations did not become law. Florida Senate Bill 1057 (1988), which contained those recommendations, passed the Senate 31-0 but died in the House of Representatives. FLA. S. JOUR. 568 (Reg. Sess. 1988).

24. STAFF OF FLA. S. COMM. ON GOVTL OPS., A REVIEW OF THE REGULATORY SUNSET ACT AND THE SUNDOWN ACT (Sept. 1991) (on file with comm.) [hereinafter SECOND SENATE REVIEW OF SUNSET]. The review was assigned by Senate President Gwen Margolis, Dem., North Miami Beach, 1980-1992. *Id.*

25. SECOND SENATE REVIEW OF SUNSET, *supra* note 24, at 4, 48-53, 70.

26. *Id.* at 5. With that recognition, the review recommended that the repeal and review cycle, subsequent to the first scheduled repeal and review 10 years after enactment, be extended to 20 years. *Id.* at 5, 7, 68-69, 71-74. This would have effectively lessened the time spent on sunset and sundown reviews, and thus increased the amount of time spent by staff and legislators on more traditional legislative oversight.

27. Fla. SB 296 (1991). Although it did not recommend repeal, the review acknowledged, "[A] credible case can be made for repeal of the Sunset and Sundown laws." SECOND SENATE REVIEW OF SUNSET, *supra* note 24, at 65. A portion of the deliberations in committee following the staff's presentation of the second review, which led to the introduction of the bill to repeal the sunset and sundown acts, is illuminating with respect to the dissatisfaction with the subject acts:

Sen. Jeanne Malchon, Dem., St. Petersburg, 1982-1992, Chair, stated:

I seem to be stuck with two committees that are doing most of [the sunset and sundown reviews], the [Governmental Operations Committee] and the Health Care Committee [in] which we have been just inundated with [reviews]. From my own experience, things that I have discussed with staff of both committees that I thought we should be doing some preliminary investigation . . . possibly leading to legislation or maybe not . . . they [staff] have been unable to do because of the [reviews].

Sen. Bob Johnson, Repub., Sarasota, 1984-1992, stated:

The fact is that this is a "feel good" law. This law doesn't do anything for any person out there that I know of in the State of Florida out of the 13 million citizens, except make some people and maybe some editorial writers feel good.

The beauty of the United States Constitution and our [Florida] Constitution is that we're supposed to be a citizen legislature. We bring to this body our own backgrounds

Legislature, prior to the next ensuing regular session, repealed the Regulatory Sunset Act and the Sundown Act, albeit with a delayed effective date,²⁸ the day following adjournment *sine die* of the 1993 Regular Session.²⁹

Thus, a systematic method of legislative oversight was repealed in favor of general legislative oversight. Although the reviews conducted under sunset and sundown were systematic, they were found to be an inadequate tool for comprehensive legislative oversight, at least when posited against the cost. As noted, the scheduled sunset and sundown reviews were conducted at the expense of general legislative oversight which, while not systematic, is responsive to identified problems and is more comprehensive than the reviews of occupational regulatory schemes, and such entities as boards, commissions, and advisory

which tend to bear upon laws that are passed. There has never been a 10-year cycle or 7-year cycle in which every law in this State has not been reviewed by us in some way and some fashion. I'll give you an example. Under the Educational Accountability Act, every education law in this State was reviewed. It was not really a sunset date; it was just the fact that we had to review every single law to see how it fit into a new philosophy and program that was going to move forward in education. We did some of the same stuff in [the areas of] health care and [health and rehabilitative services].

I would suggest that this [sunset] law is worthless. In truth, the law is worthless, and we ought to be willing to stand up and say it is a "feel good" law. . . . This is a waste of everybody's time, including about 3 days of the Session floor [deliberations]. I don't know why we sit here and suffer through it. We ought to just face it up and say, "Let's repeal the sunset law," and understand that we're doing this review on a regular, recurring, annual, [and] daily basis with our own experiences and our own backgrounds and motivations. I would suggest that we take the highest road we can and save the money and let the staff do important things.

* * *

Sen. Curt Kiser, Repub., Palm Harbor, stated:

Madam Chairman, I think, too, to play on something that Senator Johnson said. . . . In years past, when I was [Governmental Operations Committee] Chairman, at the end of the [legislative] session, I would sit down with [staff] and go over our request to the [Senate] President for interim projects. Every time we would come up with the different issues that had surfaced during the year in the committee, and requests by committee members, [staff] would always remind me, "Well, now, Senator Kiser, we've got this many sundowns [and] sunset projects coming up." So we would have to scale back our requests for these interim projects because half or two-thirds of [the staff] workload was already set by these reviews. [If] you now take that burden off and say, "No, you're not going to have that," if the committee decides they really want to look at [a] whole chapter, in effect doing a "sunset" of a certain area, that's fine, but that's our choosing to do it. It would just open up that many more areas to the wishes of the committee members, and other current issues that surface you'd be able to look at. And so I agree with Senator Johnson, the workload is still going to be pretty much substantial.

Fla. S. Comm. on Govtl. Ops., tape recording of proceedings (Sept. 12, 1991) (on file with comm.) (discussion of PCB 1 (1991)).

28. Fla. SB 28-D (Special Session "D", Dec. 1991) (enacted as ch. 91-429, §§ 4-5, 1991 Fla. Laws 83, 92).

29. Ch. 91-429, § 5, 1991 Fla. Laws 83, 102.

councils. Of course, the Legislature retains the option of scheduling for future repeal and prior review any statutory program or entity it desires, an option which is sometimes exercised.³⁰

While the non-systematic statutory repeal and prior review process has yet to be deemed a fully effective tool for legislative oversight of executive agencies, this device proves useful in checking delegated authority. The initial enactment of an enabling law with a future repeal mechanism ensures that the Legislature will have an opportunity to amend or to allow the repeal of the enabling law when the delegation of authority is set to expire. If the Legislature desires to amend the enabling law to reenact the delegation of authority, it may do so; however, the Legislature's ability to amend the initial delegation is limited. If the Governor finds the amendments offensive, he may veto the reenactment legislation. Nevertheless, there are consequences to the executive veto in these circumstances. A veto of a reenactment operates to repeal all of the law, including the original delegation of authority. Therefore, to retain any delegation of authority in a particular area, the executive branch may be required to capitulate to the legislative amendments to the delegation.

The audit process also acts as a means of legislative oversight of executive agencies and programs. Article III, section 2 of the Florida Constitution directs the Legislature to appoint an auditor to audit public records and perform related duties as prescribed by law or concurrent legislative resolution.³¹ Section 11.41, *Florida Statutes*, designates the constitutional auditor as the Auditor General.³² The Auditor General is required by law to conduct annual financial audits of the accounts and records of all state agencies, of all district school boards, and of all district boards of the state's community colleges.³³ In addition, the Auditor General may, at any time, conduct a performance or financial audit of any governmental entity in the state, including all units of local government.³⁴

Furthermore, the law requires the Auditor General to conduct performance audits of each new major program and each major modification to an existing program within three years following creation or modification.³⁵ Additionally, the Auditor General must conduct per-

30. See STAFF OF FLA. JT. LEGIS. MGMT. COMM., DIV. OF STATUTORY REVISION, 1992 SUNSET/SUNDOWN HANDBOOK AND OTHER LEGISLATIVE REPEALS 193-210 (Dec. 1992) (on file with comm.).

31. FLA. CONST. art. III, § 2.

32. FLA. STAT. § 11.41 (Supp. 1992). The duties of the Auditor General are set forth, generally, in sections 11.42-.50, *Florida Statutes*.

33. FLA. STAT. § 11.45(3)(a)(1) (1991).

34. *Id.* § 11.45(3)(a)(2).

35. *Id.* § 11.45(3)(a).

formance audits for each major state program on a ten year schedule.³⁶ The objective of these audits, which are in-depth studies of individual state programs and functions, is to provide accurate, reliable information that the Legislature or the administering agency may use in evaluating programs.³⁷

Performance audits, which are conducted by the Auditor General, serve several purposes: they review whether programs are meeting statutory requirements,³⁸ state which statutory requirements have been met, and make recommendations to the Legislature and the agency which, if followed, result in statutory compliance.³⁹ The performance audit also contains the agency response to the audit findings.

Performance audits by the Auditor General are comprehensive and thorough and represent a device by which the audited agency may take steps to rectify deficiencies noted in audit findings and recommendations. The audits also serve a prophylactic function because agency activities generally may be more thoughtful, well reasoned, or lawful due to the anticipation of future audits by the Auditor General. The Auditor General's audits, however, generally do not translate directly into legislative action. At best, if an individual legislator or committee determines that a legislative response is necessary, the audit report may form a basis for introducing individual bills.⁴⁰

36. *Id.* § 11.45(3)(b).

37. *See, e.g.*, STAFF OF FLA. OFFICE OF THE AUDITOR GENERAL, PERFORMANCE AUDIT OF THE DIV. OF ADMIN. HEARINGS (May 31, 1990) (on file with office); FLA. OFFICE OF THE AUDITOR GENERAL, PERFORMANCE AUDIT OF THE SENIOR MGMT. SERV. SYS. AND THE SELECTED EXEMPT SERV. SYS. (Dec. 21, 1992) (on file with office) [hereinafter SMS & SES AUDIT].

38. The objectives of the performance audit of the senior management service (SMS) system and the selected exempt service (SES) system dated December 21, 1992, included determining whether the Department of Management Services had adopted necessary rules for recruitment and selection of SMS and SES employees; whether the department complied with statutory requirements to audit agency records in order to ensure compliance with all statutes and rules governing recruitment of SMS and SES employees; whether the department established a classification and pay plan, salaries, benefits for SMS and SES employees as required by law; and whether the department monitored agency compliance with statutes and rules regulating classification, pay, salaries, and benefits of SMS and SES employees. SMS & SES AUDIT, *supra* note 37.

39. For example, in the performance audit of the senior management service (SMS) system and the selected exempt service (SES) system dated December 21, 1992, the Auditor General noted that the statutes specified the responsibilities of the Department of Management Services regarding training of SMS employees, but not SES employees, and recommended that the Legislature consider amending the statutes to specify the Department's responsibilities regarding the training of SES employees. *Id.* at 29. The report also recommended that the Legislature clarify its intent regarding retirement benefit levels for SES employees. *Id.* at 45. In addition, the report recommended to the agency that it adopt rules that require state agencies to develop procedures for selecting SMS and SES candidates, and that these rules, at a minimum, require agencies to develop selection procedures to guide staff in reviewing qualification of individuals in the applicant pool for a specific SMS and SES position. *Id.* at 24.

40. By law, at public hearings, each legislative standing committee is directed to consider

Another mechanism by which the Legislature oversees administrative agencies is directed specifically to rulemaking. This mechanism requires the submission of proposed rules to a rule oversight committee. In 1974, the Legislature created the Administrative Procedures Committee (commonly referred to as the "Joint Administrative Procedures Committee," hereinafter the "JAPC")⁴¹ as a standing joint legislative committee with the duty to keep watch over administrative rules.⁴² Although its primary duties, as explicitly set forth in the statute, were to establish a "legislative check on legislatively created authority,"⁴³ the JAPC does not operate to control directly proposed agency rules, and agencies are not required to capitulate to the JAPC objections. Thus, the requirement that proposed rules must be submitted to the JAPC operates more as an oversight mechanism than as an actual check or control of agency functions.

Section 120.545, *Florida Statutes*, requires the JAPC to examine all proposed executive agency administrative rules and authorizes it to examine any existing administrative rule.⁴⁴ The JAPC is authorized to conduct formative and substantive reviews.⁴⁵ The substantive areas of

performance audit recommendations within the subject area of the committee's jurisdiction. Ch. 91-429, § 1, 1991 Fla. Laws 83, 84. To date, this requirement has not been implemented systematically. See, e.g., Memorandum from Terry Shoffstall, Staff Dir., Jt. Legis. Audit. Comm., to Steve Kahn, Gen. Counsel, Office of the Senate President (Dec. 1, 1992) (on file with comm.).

41. Ch. 74-310, § 2, 1974 Fla. Laws 972.

42. The JAPC is comprised of three state representatives appointed by the Speaker of the House of Representatives and three senators appointed by the President of the Senate. The enumerated duties of the JAPC, which are contained in section 11.60, *Florida Statutes*, include: (a) maintaining a continuous review of the statutory authority upon which each administrative rule is based and, whenever such authority is eliminated or significantly changed by repeal, amendment, holding by a court of last resort, or other factor, advising the agency concerned of that fact; (b) maintaining a continuous review of administrative rules and identifying and requesting that an agency repeal any rule or any provision of a rule that reiterates or paraphrases any statute or for which the statutory authority has been repealed; (c) reviewing administrative rules and advising the agency concerned of its findings; (d) assuming the duties prescribed by chapter 120 concerning the adoption and promulgation of rules; (e) reviewing agency action pursuant to the operation of the Administrative Procedure Act; (f) reporting to the Legislature at least annually and recommending needed legislation or other appropriate action; (g) seeking review in the courts of the state, on behalf of the Legislature or the citizens of the state, of the validity or invalidity of any administrative rule to which the Committee has voted an objection and which has not been withdrawn, modified, repealed, or amended to meet the objection. FLA. STAT. § 11.60 (1991).

43. *Id.* § 120.545(1).

44. *Id.* § 120.545.

45. Section 120.545(1), *Florida Statutes*, authorizes the JAPC, when examining each rule, to review whether: (a) the rule is an invalid exercise of delegated legislative authority; (b) the statutory authority for the rule has been repealed; (c) the rule reiterates or paraphrases statutory material; (d) the rule is in proper form; (e) the notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule; and (f) the economic impact statement accompanying the rule is adequate to accurately inform the public of the economic effect of the rule. FLA. STAT. § 120.545(1) (1991).

review conducted by the JAPC include determining whether the rule is an invalid exercise of delegated legislative authority and whether the statutory authority for the rule has been repealed. Obviously, if the enabling law for a rule has been repealed, the foundation for the rule has been removed and the rule is no longer authorized. Whether the statutory authority for a rule has been repealed requires a more straightforward analysis than does a review of an invalid exercise of delegated legislative authority.

An "invalid exercise of delegated legislative authority" is statutorily defined as an action which goes beyond legislatively delegated powers, functions, and duties.⁴⁶ Such an invalid exercise exists if one or more of the following apply:

- (a) The agency has materially failed to follow the applicable rule-making procedures set forth in section 120.54, *Florida Statutes*;
- (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by section 120.54(7);
- (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by section 120.54(7);
- (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
- (e) The rule is arbitrary or capricious.⁴⁷

The power of the JAPC to review executive agency administrative rules may be described best as a power to influence or pressure, not as a power to require or command. Thus, the JAPC may not require that its objections to an administrative rule be resolved as it desires. Upon notification of JAPC objections, the agency *may* modify, amend, withdraw, or repeal the rule, but it is not *required* to do any of the foregoing. If the JAPC objects to a proposed or existing rule and the agency refuses to modify, amend, withdraw, or repeal it, the JAPC must file with the Department of State a notice detailing its objection.⁴⁸ The Department of State publishes this notice in the *Florida Administrative Weekly*.⁴⁹ The agency, however, may continue to enforce the disputed rule unless the JAPC chooses to take further action.⁵⁰ The JAPC has standing to seek judicial review, on behalf of

46. *Id.* § 120.52(8).

47. *Id.*

48. *Id.* § 120.545(8) (1991).

49. *Id.*

50. *Id.* § 11.60(2)(k).

the public or the Legislature, of any rule to which it has objected and which has not been modified or repealed in response to the JAPC's objection.⁵¹ Should the JAPC decide to seek judicial review, it is required to notify the head of the agency involved, notify the Governor, and provide an opportunity for agency consultation with the committee to attempt to resolve the dispute.⁵² If the issue cannot be resolved through consultation, the JAPC may bring an action in the appropriate court requesting that the rule be declared invalid.⁵³ To date, the JAPC has not sought judicial review of any agency administrative rule. It may be that the JAPC has not been compelled to seek judicial review because agencies have tended to comply with the JAPC's recommendations.⁵⁴

While the legislative exercise of oversight may encourage change, the Legislature also has the fundamental power to mandate change. Very often, mandated change is the direct result of the legislative

51. *Id.*

52. *Id.*

53. *Id.*

54. The table below is a comprehensive listing of the number of proposed rules processed by the JAPC from 1982 through 1992. Column 2 lists the number of agency rules submitted in each calendar year. Columns 3 and 4 show the number of technical and substantive errors as characterized by the JAPC staff in proposed rules and which were changed by the agencies in response to the JAPC staff. Column 5 documents the number of times agencies did not change proposed rules in response to the JAPC staff review and formal objections were actually voted by the committee. Column 6 indicates the number of times an agency initially refused to modify their particular rule after a committee objection. Yet, as indicated by columns 7 and 8, these rules were all ultimately amended to meet the JAPC objections or had their enabling statute amended to conform to the rule (column 8). According to the staff of the JAPC, during this ten year period, after each objection, the agencies either amended their proposed rules or the Legislature enacted legislation clearly authorizing the rules which were originally objected to by the JAPC as invalid exercises of delegated legislative authority.

1 Year	2 Number Noticed	3 Techs Found	4 Subs. Found	5 Obj. Voted	6 Initial Refusal	7 Rules Amended	8 Law Passed
1982	3980	2882	238	0	0	0	0
1983	3417	2975	297	37	0	30	7
1984	4488	10673	838	2	0	2	0
1985	4456	5479	943	89	62	73	16
1986	4121	4088	1173	12	1	12	0
1987	3610	3337	1426	31	4	31	0
1988	3706	3894	1432	14	9	11	3
1989	4865	2878	1069	24	1	13	11
1990	4753	1544	885	4	0	4	0
1991	4310	1361	934	17	0	15	2
1992	7160	1922	1236	0	0	0	0

Document (undated) provided by Jt. Admin. Procs. Comm. (on file with Fla. S. Govtl. Ops. Comm.).

oversight process.⁵⁵ The most readily apparent method for the Legislature to nullify an administrative rule is by the adoption of a statute that either sets forth a new legislative policy or standard or amends an existing statute to clarify the original policy or standard.⁵⁶

One rather unusual method by which the Legislature may compel change is by requiring an executive agency to submit its rule to the

55. For example, in the 1988-89 legislative interim, the staff of the Senate Governmental Operations Committee reviewed and evaluated the effectiveness of laws, practices, and procedures pertaining to the indexing of agency orders issued under the Administrative Procedure Act, chapter 120, *Florida Statutes*. Senate President Bob Crawford, Dem., Winter Haven, 1982-1990, assigned the review at the request of Committee Chair Senator Curt Kiser, Repub., Palm Harbor. STAFF OF FLA. S. COMM. ON GOVTL. OPS., A REVIEW OF INDEXING OF AGENCY ORDERS ISSUED PURSUANT TO CHAPTER 120, F.S., THE ADMINISTRATIVE PROCEDURE ACT (April 1989) (on file with comm.). The report found shortcomings in the law and found agencies failed to effectively institute practices and procedures for adequately indexing administrative orders and making them available to the public. *Id.* at 3-10, 120-136. The report recommended corrective statutory amendments and recommended that the Department of State be vested with the responsibility for devising a plan for the publication of agency orders. *Id.* In response to the interim project report, the Governmental Operations Committee sponsored Committee Substitute for Senate Bill 1334 (1989), which related to subject matter indexing and availability of agency orders. The bill only passed the Senate. FLA. S. JOUR. 503 (Reg. Sess. 1989). In 1990, the committee again studied the issue. STAFF OF FLA. S. COMM. ON GOVTL. OPS., A SUPPLEMENT TO A REVIEW OF INDEXING OF AGENCY ORDERS ISSUED PURSUANT TO CHAPTER 120, F.S., THE ADMINISTRATIVE PROCEDURE ACT (Mar. 1990) (on file with comm.) [hereinafter INDEXING SUPPLEMENTAL REVIEW]. The Governmental Operations Committee again sponsored legislation, Committee Substitute for Senate Bill 2550 (1990), which would have carried out the interim project report's recommendations that the Department of State be given general authority over agency indexing and administrative order availability, and that agencies promulgate rules to carry out their indexing and availability responsibilities. *Id.* at 3-10, 39-48. The bill died in the Senate Appropriations Committee at the conclusion of the 1990 regular session. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1990 REGULAR SESSION, HISTORY OF SENATE BILLS at 204, CS for SB 2550. Based on the previous interim project reports, in 1991, former Governmental Operations Committee Chair Senator Kiser introduced Senate Bill 900, which addressed the indexing and availability of agency orders. The Senate passed the bill, which later died in the House of Representatives at the end of the 1991 regular session. FLA. S. JOUR. 345, 349 (Reg. Sess. Apr. 9, 1991). The entirety of Senate Bill 900, however, was included in House Bill 1879 by amendment on the Senate floor. FLA. S. JOUR. 122 (Reg. Sess. Mar. 14, 1991). The provisions passed and became law without the Governor's signature on April 27, 1991. Ch. 91-30, 1991 Fla. Laws 191, 200. While the passage of indexing legislation was the ultimate result of legislative oversight, it serves as an example of how circuitous and uncertain the legislative oversight process can be. For a more comprehensive treatment of this particular oversight example, see Patricia A. Dore, *Florida Limits Policy Developments Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437 (1991).

56. For example, Rule 10M-12.007(3) of the *Florida Administrative Code* (1986) required for licensing purposes that at least one child care worker per child care facility receive training and certification in accordance with chapter 10D-13 of the *Code*. Private child care providers advocated a change in the statute to exempt child care personnel from this food certification requirement. Committee Substitute for Committee Substitute for Senate Bill 1436 (1991) amended section 381.0072(8), *Florida Statutes*, to specifically exempt child care facilities licensed under chapter 402 from the food certification requirement, which thereby overrode the provisions in chapter 10M-12 of the *Code*. Ch. 91-297, § 31, 1991 Fla. Laws 2832, 2858 (codified at FLA. STAT. § 381.0072(8) (1991)).

Legislature for ratification or amendment. Section 403.817, *Florida Statutes*, requires the Department of Environmental Regulation (now the Department of Environmental Protection)⁵⁷ to maintain, by rule, a vegetative index which assists in the determination of the landward extent of the state's regulatory jurisdiction.⁵⁸ That statute contains the uncommon requirement that the Legislature approve any amendment to the index prior to the amendment becoming effective.⁵⁹ Section 403.817(1) specifies the legislative intent that the Department establish a method of making determinations of the landward extent of waters of the state (which is the basis for the State's regulatory jurisdiction) based upon ecological factors.⁶⁰ Section 403.817(2) grants rulemaking authority for the method.⁶¹ By law, the Legislature has specified that amendments to the dredge and fill rules that make additions or deletions to the vegetative index must be submitted in bill form to the Speaker of the House of Representatives and the President of the Senate for their consideration and referral to appropriate committees.⁶² Amendments to the rules are effective only upon approval by the Legislature.⁶³ Whenever the Legislature amends any exemption relating to dredging and filling, the Department is authorized to amend the rules to be consistent with legislative changes.⁶⁴ Section 403.8171 contains specific legislative ratification of the vegetative index.⁶⁵ Even more significantly, however, the statute makes specific changes, by law, to the rule.⁶⁶ In 1993, the Legislature again specifically directed an agency rulemaking effort in the subject area of the State's regulatory jurisdiction over wetlands. In the bill that merged the Department of Environmental Regulation and the Department of Natural Resources into the newly-created Department of Environmental Protection,⁶⁷ the Leg-

57. See Ch. 93-213, 1993 Fla. Laws 2129.

58. FLA. STAT. § 403.817 (1991).

59. *Id.*

60. *Id.* § 403.817(1).

61. *Id.* § 403.817(2).

62. *Id.* § 403.817(3); ch. 77-170, § 1, 1977 Fla. Laws 710, 710.

63. *Id.*

64. FLA. STAT. § 403.817(3) (1991); ch. 85-269, § 5, 1985 Fla. Laws 1733, 1735; see also JOHN BARTLETT, *FAMILIAR QUOTATIONS* 469, at entry 12 (Justin Kaplan ed., 16th ed. 1992). Although this arguably may serve as a cautionary directive by the Legislature, this is simply no more than a statement of the constitutional limits of delegated legislative authority to the executive branch.

65. FLA. STAT. § 403.8171 (1991); ch. 84-79, § 9, 1984 Fla. Laws 202, 216.

66. FLA. STAT. § 403.8171 (1991); ch. 84-79, § 9, 1984 Fla. Laws 202, 216. The section deletes and adds new vegetation to the vegetative index rule, adds methods for determining types of strata, and provides that certain scientifically-enumerated species of flora are not to be considered submerged, transitional, or upland species, and requires that other plant indicator species must be used.

67. Fla. CS for CS for HB 1751 (1993); ch. 93-213, 1993 Fla. Laws 2129.

islature mandated the adoption of a unified statewide methodology for the delineation of wetlands.⁶⁸ The law provides that the methodology will not be effective unless ratified by the Legislature.⁶⁹

A similar example is contained in the statutes on comprehensive plans. The Legislature effectively requires, in section 163.3177(9), *Florida Statutes*, that administrative rules be submitted for ratification and amendment.⁷⁰ In that law, the Legislature requires the state land planning agency to adopt minimum criteria for the review and determination of compliance of local government comprehensive plan elements, and further specifies particular elements that must be included in the rules.⁷¹

Initially, these rules were effective only after submission to the President of the Senate and the Speaker of the House of Representatives for legislative review.⁷² By law, in its review, the Legislature has specifically authorized itself to reject, modify, or take no action relative to the rules.⁷³ The agency is directed to make such changes to the rules as the Legislature requires and, if the Legislature directs that no action be taken, the law specifies that the rules are effective as adopted by the agency.⁷⁴ When the required rules originally were submitted as mandated by law, the Legislature statutorily acknowledged its review of the rules and specified the legislative intent of the rules in the statute.⁷⁵ Additionally, the law directs the executive department to adopt amendments as necessary to conform the rules with the require-

68. Fla. CS for CS for HB 1751 (1993). The Legislature directed that the methodology should consider vegetation and soil differences between regions, as well as the extent of surface waters other than wetlands. *Id.*

69. *Id.* The bill also repealed the statutes directing and ratifying the vegetative index, sections 403.817 and 403.8171, the repeal to be effective *only* upon legislative ratification of the new methodology. *Id.* § 47.

70. FLA. STAT. § 163.3177 (1991); ch. 85-55, § 6, 1985 Fla. Laws 207, 215.

71. FLA. STAT. § 163.3177(9) (1991). Examples of such required provisions include criteria for determining whether proposed elements are in compliance with part II of chapter 163, whether elements of the local government comprehensive plan are consistent with each other, the state comprehensive plan, and the regional policy plan, and whether elements identify the need for and the processes and procedures to ensure coordination of all development activities and services with other units of local government, regional planning agencies, water management districts, and state and federal agencies.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* § 163.3177(10) (1991); ch. 86-191, § 7, 1986 Florida Laws 1404, 1415. Examples of the legislative intent specified for the required rules included definitions of terms used in the rules, and particular conditions for the exercise of state governmental regulatory authority. The law also specifies that, in the event that any portion of chapter 9J-5, *Florida Administrative Code*, was in conflict with chapter 163, *Florida Statutes* (1986), the appropriate statutory provision would prevail.

ments of the stated legislative intent.⁷⁶ Finally, the law specifically limits authorized challenges to the rules under chapter 120, the Administrative Procedure Act.⁷⁷

The ability of the Legislature to establish a new policy or standard, or to clarify an original policy or standard controlling the content of an administrative rule is limited by the executive power to veto legislation.⁷⁸ Likewise, the executive veto also must be considered when an enabling law requires submission of an executive agency rule for ratification or amendment by the Legislature.⁷⁹ Thus, the Governor's veto power is an important legal and political limitation on the inherent power of the Legislature to shape public policy through the adoption of laws.

The Florida Constitution requires that every bill which is approved by the Legislature be presented to the Governor.⁸⁰ A bill which is presented to the Governor becomes law if the Governor approves and signs it, or if the Governor fails to veto it within seven consecutive days after presentment.⁸¹ The Governor is not authorized to modify or change the effect of a proposed law. With the exception of general appropriations bills, the Governor may only approve or disapprove the bill as a whole, as article III, section 8, subsection (a) of the Florida Constitution provides that a veto extends to the entire bill.⁸² In the case of a general appropriations bill, the Governor may veto any specific appropriation, although he may not veto a restriction or qualifi-

76. FLA. STAT. § 163.3177(10) (1991).

77. Section 163.3177(10)(k), *Florida Statutes*, is known as the "shield law" in common parlance in the subject area of growth management in Florida. The provision states:

It is the intent of the Legislature that there should be no doubt as to the legal standing of chapter 9J-5, F.A.C., at the close of the 1986 legislative session. Therefore, the Legislature declares that changes made to chapter 9J-5, F.A.C., prior to October 1, 1986, shall not be subject to rule challenges under s. 120.54(4) [a proceeding for challenges to proposed rules], or to drawout proceedings under s. 120.54(17) [a formal proceeding to protect the rights of certain persons affected by a rulemaking proceeding]. The entire chapter 9J-5, F.A.C., as amended, shall be subject to rule challenges under s. 120.56 [a proceeding for challenges to existing rules], as nothing herein shall be construed to indicate approval or disapproval of any portion of chapter 9J-5, F.A.C., not specifically addressed herein. No challenge pursuant to s. 120.56 may be filed after July 1, 1987. Any subsequent amendments to chapter 9J-5, F.A.C., exclusive of the amendments adopted prior to October 1, 1986 pursuant to this act, shall be subject to the full chapter 120 [Administrative Procedure Act] process. All amendments shall have effective dates as provided in chapter 120 and submission to the President of the Senate and Speaker of the House of Representatives shall not be required.

Id.

78. FLA. CONST. art. III, § 8(a).

79. *Id.*

80. *Id.* art. III, § 8.

81. *Id.*

82. *Id.* art III, §8(a).

cation without vetoing the appropriation to which it relates.⁸³ Thus, once a legislative standard has been signed into law, the ability of the Legislature to modify or void an administrative rule which was adopted pursuant to the original enabling statute is limited to the extent that the Governor is in agreement with the policy change. Furthermore, situations where the Legislature requires a rule to be legislatively ratified or amended is subject to an executive veto. The Legislature, however, may override a veto of a bill or reinstate the vetoed specific appropriation of a general appropriations bill upon a two-thirds vote of each house.⁸⁴

Historically, statutory requirements that rules be subjected to amendment or ratification by the Legislature are uncommon, and perhaps, justifiably so. These statutes require the Legislature to deal with a level of detail in the statutory enactment that is, at best, cumbersome. This not only creates an incongruence in the law, which is ordinarily of a more general nature than agency rules, it requires the kind of statutory drafting that is not particularly amenable either to logical amendment or effective legislative debate.⁸⁵ The use of legislative ratification and amendment of executive agency rules heretofore has been used sparingly, and only in those cases where the Legislature determined that a high level of legislative control was necessary.

The power of the purse represents a less direct method of checking legislatively delegated authority. Budgeting for state programs has a significant impact on the actions of executive agencies. Both the exec-

83. *Id.*

84. *Id.* art. III, § 8.

85. As an example of the specialized knowledge required for effective consideration of what a rule should contain, section 403.8171, *Florida Statutes*, proves quite interesting. That statutory ratification of the vegetative index, *discussed supra*, provides, in part:

Pursuant to s. 403.817, the Legislature ratifies the rule adopted on January 25, 1984, by the Environmental Regulation Commission with the following changes:

(1)(a) In Rule 17-4.022(2), Florida Administrative Code, the following shall be removed: *Blechnum serrulatum*; *Carex leptalea*; *Carex stipata*; *Carya aquatica*; *Conocarpus erectus*; *Crataegus viridis*; *Cymodocea filiformis*; *Cyper odoratus*; *Dishromena spp.*; *Dryopteris ludoviciana*; *Gleditsia aquatica*; *Gratiola ramosa*; *halodule beaudet-
tei*; *Hypericum fasciculatum*; *Illicium floridanum*; *liriodendron tulipifera* in all counties south of Taylor, Lafayette, Suwannee, Columbia, Baker, and Duval; *Lycopus rubellus*; *Myrica inodora*; *Osmunda spp.*; *Panicum repens*; *Panicum virgatum*; *Pluchea spp.*; *Polygala cymosa*; *Populus deltoides*; *Rhexia*, all species except *R. alifanus*, *R. lutea*, *R. mariana*, *R. petiolata*, and *R. virginica*; *Sabatia bartramii*; *Sarracenia spp.*; *Schizachyrium rhizomatum*; *Sesuvium maritimum*; *Sesuvium portulacastrum*; *Spartina spp.*; *Thalasia testudinum*; and *Woodwardia spp.*

(b) In Rule 17-4.022(2), Florida Administrative Code, the following shall be added: *Muhlenbergia capillaris*; *Muhlenbergia schreberi*; *Osmunda regalis*; *Rhexia perviflora*; *Rhexia salicifolia*; and *Spartina*, all species except *S. bakerii*.

FLA. STAT. § 403.8171 (1993).

utive and legislative branches have important roles in the development of state policies and programs through the budgeting process. Although both branches have significant responsibilities in this endeavor, it is the Legislature that decides whether to fund executive agency programs. In the appropriations process, however, the Legislature does more than simply authorize the expenditure of monies from public coffers. Fundamental policy decisions are shaped through allocating various resources, as well as expressly limiting an expenditure's allocation. Thus, the Legislature, directly and impliedly, sets policy through the appropriations process.⁸⁶

As to the express limitations placed on an allocation, section 216.177, *Florida Statutes*, governs the form and content of the annual statement of intent that accompanies each General Appropriations Act. The law provides that the statement of intent constitutes a manifestation of how the Legislature, as a representative of the people, believes appropriations should be spent.⁸⁷ To establish intent in the development of the approved operating budget, the statement of intent compares the request of the agency or the recommendation of the Governor to the funds appropriated. The law further provides that the statement of intent may give additional direction to executive agencies respecting the purpose, objectives, spending philosophy, and restrictions associated with individual appropriations; however, the statement of intent is not law.⁸⁸

Although the Legislature has the exclusive authority to appropriate funds, the Governor has both statutory and constitutional roles in the appropriations process. His statutory powers and duties include submitting a recommended budget to the Legislature.⁸⁹ The Governor also has a constitutional line item veto authority for general appropriations acts in Florida.⁹⁰ The Governor, however, may not veto a qualification or restriction without vetoing the appropriation to which it relates.⁹¹

86. Three primary elements constitute appropriations bills. The first is the allocation itself, i.e., the amount the Legislature appropriates for each identified program or entity. The second is the Summary Statement of Intent, which is included as part of the same document as the General Appropriations Act, which sets the allocations. The Summary Statement of Intent appears as a column comparing the Governor's Amended Budget Recommendations to the funds actually appropriated for the ensuing fiscal year. The third is the Implementing Bill, which implements and administers the General Appropriations Act. In effect, the Implementing Bill makes substantive law that is not allowed in the General Appropriations Act. *Brown v. Firestone*, 382 So. 2d 654 (Fla. 1980); *Graham v. Firestone*, No.82-1703 (Fla. 2d Cir. Ct. 1982).

87. FLA. STAT. § 216.177(1)(c) (1991).

88. *Id.*

89. FLA. CONST. art. III, §8(a).

90. *Id.*

91. *Id.* This, in some instances, may present a difficult choice for the Governor. If the

As a comprehensive means of setting policy while reflecting legislative will, the appropriations process does have limitations. One difficulty with the system lies in its complexity. Typically, Florida's General Appropriations Act is hundreds of pages long and encompasses thousands of line items. Unlike general bills that deal with a single subject,⁹² the appropriations bill deals with scores of subjects, issues, and policies. For these reasons, the General Appropriations Act is less accessible to the individual legislative member as a means of articulating public policy choices. Few members of the Legislature can become intimately familiar with the multiple facets of any general appropriations bill without risk of neglecting other important legislative duties. As a necessary consequence, many of the policy decisions inherent in the budget are made by a small percentage of each house's membership.⁹³

As demonstrated by the discussions herein, each of the legislative oversight and control mechanisms has attendant drawbacks or limitations. Yet, when considered as a whole rather than individually, these mechanisms represent an effective means through which the Legislature oversees the delegation of powers to the executive branch. As will be seen from the history of the legislative veto in Florida,⁹⁴ it is apparent that the Legislature seeks more effective tools for overseeing and containing executive branch rulemaking.

Legislature imposes its will to restrict or qualify an administrative program through appropriations proviso language, the Governor may veto it. In doing so, however, he is also vetoing the appropriation for the program itself. Presumably, the Governor also may exercise his line item veto to strike proviso language that he finds offensive in areas which compel appropriations for the protection of the public health, safety, or welfare. In these instances, the Legislature is left with the choice of overriding the Governor's veto, or reappropriating the needed funding without the offending proviso.

92. Article III, section 6 of the Florida Constitution requires that "[e]very law shall embrace but one subject and matter properly connected therewith." FLA. CONST. art. III, §6.

93. The House of Representatives and the Senate develop budget documents separately. Although both are loosely based on the Governor's recommendation, each reflects various levels of commitment to priorities of the leadership and membership of each respective house. Usually, the House and Senate general appropriations bills do not agree when they are passed by the respective houses. In an effort to reach a budget agreement, each house's leadership assigns a few individual members to participate in a conference committee. FLA. S. RULE 1.5 (1993); FLA. H.R. RULE 6.58 (1993). When the conference committee agrees, the membership of the conference committee reports the recommended final budget product to their respective houses. FLA. S. RULE 4.5 (1993); FLA. H.R. RULE 6.59 (1993). Because this "conference committee report" reflects the agreement of the conferees, each respective house is limited in its prerogatives with respect to the report. Neither house may amend the report, but may only approve or reject it. *Id.* If the report is rejected, the conference committee resumes its work. Thus, important policy decisions are made apart from the legislative membership as a whole. Further, the membership as a whole is unable to amend the bill without nullifying the consensus built between the houses.

94. See *infra* note 148 and accompanying text.

III. FLORIDA'S EFFORT TO CONTAIN AGENCY RULEMAKING

While the means of oversight and control employed by the Legislature are extensive, evidence exists that the Legislature is not completely satisfied with these methods. In part, this dissatisfaction has been expressed since the adoption of the Administrative Procedure Act in 1974⁹⁵ by the introduction of numerous bills in attempts to increase the level of legislative oversight and to authorize the legislative veto of administrative rules.⁹⁶ These bills have taken different forms and experienced varying levels of success. On the whole, however, the number and variety of bills introduced indicate that the Legislature continues to be interested in new methods of legislative oversight of administrative rulemaking and the concept of the legislative veto of administrative rules.

Legislation introduced in Florida to increase legislative oversight of administrative rulemaking generally falls into three categories: (1) legislation that imposes stricter guidelines for rule adoption and attempts to increase agency adherence to statutory intent;⁹⁷ (2) legislation which increases legislative committee oversight in the area of rule adoption;⁹⁸ and (3) bills or joint resolutions which seek to impose statutorily or constitutionally the concept of the legislative veto of agency rules.⁹⁹ Some legislative proposals contain elements that fall into more than one of the categories. Legislative veto proposals consist of two basic types: (1) those which would allow the Legislature to nullify proposed or existing rules; and (2) those that would require that every agency rule be ratified by the Legislature before becoming effective.

Among the proposals designed to impose stricter guidelines on rule adoption and increase adherence to legislative intent was House Bill 535, which was introduced in 1983.¹⁰⁰ This bill proposed that agencies be prohibited from adopting any rule except where the Legislature had "enacted a specific statute relating to the specific subject matter of the rule."¹⁰¹ It would appear that the bill purported to require more specific authority in a legislative delegation than was the prevailing practice. In effect, however, the language of the bill probably was no more than a statement of the constitutional requirements for a legislative delegation to an agency of the executive branch.¹⁰² Moreover, under

95. Ch. 74-310, 1974 Fla. Laws 952 (codified at FLA. STAT. §§ 120.50-.71 (1975)).

96. *Infra* notes 100-206 and accompanying text.

97. *See infra* note 100 and accompanying text.

98. *See infra* note 111 and accompanying text.

99. *See infra* note 148 and accompanying text.

100. Fla. HB 535 (1983).

101. *Id.*

102. *See supra* notes 1-9 and accompanying text.

chapter 120, *Florida Statutes*, the promulgating administrative agency must specifically determine and provide notice of the specific statutory authority under which the rule is being adopted.¹⁰³ The JAPC then must review this determination in its required evaluation of proposed rules.¹⁰⁴ House Bill 535 was never heard in committee and died at the end of the 1983 legislative session.¹⁰⁵

Two other bills relating to executive agency rulemaking centered on the legislative intent expressed or implied in the enabling law. House Bill 812¹⁰⁶ and Senate Bill 319,¹⁰⁷ introduced in 1985, both prohibited executive agencies from adopting rules that directly contravened

the latest expression of the intent of the Legislature as evidenced by the defeat of a proposal seeking enactment of such practice, procedure, or requirement. However, no such defeat of a proposal shall be considered the latest expression of the intent of the Legislature where a later action of either house of the Legislature, or any committee or subcommittee thereof, reverses such defeat or otherwise revives such proposal.¹⁰⁸

At best, it would have been difficult to comply with this requirement. Indeed, it would have required a subjective analysis of legislative actions and vigilant attention to legislative debate and history, rather than focusing attention on the language of the enabling law. House Bill 812 died in the House Committee on Judiciary,¹⁰⁹ and the Senate Committee on Governmental Operations killed Senate Bill 319.¹¹⁰

Apart from restrictions on the agencies' rulemaking endeavors, proposals to increase legislative committee oversight of executive agency rulemaking also have been introduced. These proposals usually required executive agencies to submit proposed rules to legislative com-

103. FLA. STAT. § 120.54(7) (Supp. 1992).

104. *Id.* § 120.545(1).

105. FLA. LEGIS., HISTORY OF LEGISLATION, 1983 REGULAR SESSION, HISTORY OF HOUSE BILLS at 173, HB 535.

106. Fla. HB 812 (1984).

107. Fla. SB 319 (1985).

108. Fla. HB 812 (1984); Fla. SB 319 (1985). The bills also provided:

Whenever an act of the Legislature is enacted which contains any provision which is in direct conflict with, or otherwise supersedes, a rule, or any portion thereof, adopted by an agency within the executive branch of state government, upon the effective date of such act, said rule or the applicable portion thereof shall be void and inoperative and of no further force or effect.

Id. The need for this provision is unclear, given that it is a basic statement of constitutional law.

109. FLA. LEGIS., HISTORY OF LEGISLATION, 1984 REGULAR SESSION, HISTORY OF HOUSE BILLS at 265, HB 812.

110. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REGULAR SESSION, HISTORY OF SENATE BILLS at 45, SB 319.

mittees for review. In 1981, Committee Substitute for House Bills 181 and 473¹¹¹ proposed that enabling statutes require that every proposed rule be referred to the "appropriate committee in each house of the Legislature for review and comment as to compliance with the legislative intent." If the "appropriate committee" were to determine that the proposed rule was in conflict with the legislative intent as expressed in the enabling statute, and the agency refused to modify, amend, withdraw, or repeal¹¹² the rule, the committee would have been required to file its comments with the Department of State. The bill would have directed the Department of State to publish the committee's commentary in the *Florida Administrative Weekly*.¹¹³ In addition, the bill would have required the Department to publish, as a note accompanying the subject rule in the *Florida Administrative Code*, a summary of the committee's comments and a reference to the issue of the *Florida Administrative Weekly* that contained the full committee commentary.¹¹⁴

The bill neither defined the term "appropriate committee," nor did it appear to limit the referral of a proposed rule to only one "appropriate committee."¹¹⁵ The committee substitute would not have altered the role of the JAPC.¹¹⁶ Presumably, the procedure for review by the "appropriate committee" was meant to augment the JAPC review process, not supplant it.¹¹⁷ Both the statutory JAPC procedure¹¹⁸ and

111. Fla. CS for HBs 181 and 473 (1981). House Bill 473, prior to being included in the combined committee substitute (Committee Substitute for House Bills 181 and 473), was effectively a legislative veto bill which required approval of all proposed rules by an appropriate committee in each house. See *infra* notes 121-136 and accompanying text.

112. Presumably, the word "repeal" was inappropriately included in the list of available agency actions, as the committee substitute only concerned proposed administrative rules, not adopted administrative rules. See CS for HBs 181 and 473 (1981).

113. *Id.*

114. *Id.*

115. Presumably, the noted commentary to accompany a filed rule in the *Florida Administrative Code* could have contained summaries of the comments of more than one "appropriate committee."

116. House Bill 181, as originally filed, prior to being combined with House Bill 473 in the combined committee substitute, would have modified the role of the JAPC and, like House Bill 473, would have authorized a legislative veto. See discussion of House Bill 473 *supra* note 111. Under the original House Bill 181, the JAPC would have recommended legislative invalidation of a rule which exceeded statutory authority, conflicted with another rule, or conflicted with the legislative intent of the enabling statute. The invalidation would have taken place through concurrent resolution of the Legislature. Fla. HB 181 (1981).

117. The JAPC is a joint legislative committee, see FLA. STAT. § 11.60 (1991), whereas the "appropriate committees" contemplated by Committee Substitute for House Bills 181 and 473 are specified to be "of each house." Fla. CS for HBs 181 and 473 (1981). Therefore, the JAPC would not have been considered an "appropriate committee" in terms of fulfilling the bill's directives.

118. See FLA. STAT. § 120.545 (1991).

the procedure contemplated by Committee Substitute for House Bills 181 and 473 would have resulted only in footnotes in the *Florida Administrative Code*, rather than invalidation of the subject rule. Presumably, no substantial consequences would have resulted from differing conclusions by the JAPC and an "appropriate committee" on a proposed rule. The combined bill did little more than bring the substantive legislative committees, as contrasted with the JAPC, into the rule review process. While this would have increased legislative oversight of executive rulemaking, it would have duplicated the existing JAPC rule review process. The combined bill died on the 1981 Calendar of the House of Representatives.¹¹⁹

Bills substantially similar to Committee Substitute for House Bills 181 and 473 were filed in subsequent years, but likewise did not become law.¹²⁰ One of these bills, Senate Bill 921,¹²¹ passed the Legislature, but was vetoed by the Governor.¹²² The bill's provisions and the reasons expressed for the veto warrant examination.

The enacted version of Senate Bill 921, which had been amended in the Senate Committee on Governmental Operations,¹²³ related to "appropriate committee" review and comment of proposed rules.¹²⁴ The final version of the bill also amended section 120.54, *Florida Statutes*, which had long specified that no agency has inherent rulemaking authority.¹²⁵ The amendment added that no agency has authority to adopt any rule unless the Legislature has enacted "a specific statute relating to the specific subject matter" of the rule.¹²⁶

Governor Bob Graham's veto message specified that the bill was objectionable in part because it granted to legislative committees the power to make determinations of legislative intent.¹²⁷ He found this inconsistent with the Florida Constitution's¹²⁸ vesting of legislative power in the whole of the Legislature and not "a select group of legis-

119. FLA. LEGIS., HISTORY OF LEGISLATION, 1981 REGULAR SESSION, HISTORY OF HOUSE BILLS at 49, CS for HBs 181 and 473.

120. See, e.g., Fla. HB 2 (1982); Fla. SB 738 (1982); Fla. SB 921 (1982); Fla. HB 252 (1983).

121. Fla. SB 921 (1982).

122. FLA. LEGIS., HISTORY OF LEGISLATION, 1982 REGULAR SESSION, HISTORY OF SENATE BILLS at 290, SB 921.

123. FLA. S. JOUR. 270 (Reg. Sess. Mar. 1, 1982).

124. Fla. SB 921 (1982).

125. *Id.*

126. *Id.* This provision was included in House Bill 535, discussed in this section, see *supra* note 100 and accompanying text.

127. Veto Message of Governor Bob Graham, Fla. SB 921 (1982) (available at Fla. Dep't of State, Div of Archives, ser. 227, carton 30, Tallahassee, Fla.).

128. FLA. CONST. art. III, §1.

lators.”¹²⁹ Furthermore, the veto message questioned the appropriateness of substantive committees declaring opinions concerning legislative intent for a particular enactment, rather than allowing the expression of intent to be gleaned from the words of the statute.¹³⁰

The Governor further found the bill ambiguous because it did not specify a method for determining the “appropriate committee” in each house or identify who would make the determination.¹³¹ The Governor considered the lack of specific time frames to be problematic in that this could have resulted in agency reliance on the filed rule prior to receiving a negative commentary from a legislative committee.¹³² The Governor also stated: “The possibility also exists that the Senate and House committees asked to review a rule could make different interpretations of the rule’s compliance with legislative intent. This would cause confusion to those who must comply with agency rules and would undermine public confidence in State government.”¹³³

The Governor recited in his veto message that the JAPC’s responsibility “adequately addresses the need for legislative oversight into the rulemaking procedures utilized by the Executive Branch.”¹³⁴ The Governor followed by noting that this type of legislative review would be costly,¹³⁵ which was unjustified given the “marginally useful and potentially detrimental” scheme contemplated by the bill.¹³⁶

The Governor also had objections to the amendment to section 120.54 that would have limited an agency’s authority to those situations where the Legislature had enacted a specific statute: “This [amendment] is totally unnecessary because the Administrative Procedure Act already requires an agency to identify its rulemaking authority and the specific statute implemented for each rule proposed.”¹³⁷ The Governor continued: “Further, the language utilized in [the amendment] may have a negative effect upon the efficient operation of our agencies by virtue of unnecessarily encumbering the deliberative rulemaking process.”¹³⁸ The Legislature took no action to override the veto.¹³⁹

129. Veto Message of Governor Bob Graham, Fla. SB 921 (1982) (available at Fla. Dep’t of State, Div. of Archives, ser. 227, carton 30, Tallahassee, Fla.).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* The cost estimated cited by the Governor was “in excess of \$1 million annually.”

136. *Id.*

137. *Id.*

138. *Id.*

139. FLA. LEGIS., HISTORY OF LEGISLATION, 1982 SPECIAL SESSION “F”, HISTORY OF SENATE BILLS at 290, SB 921.

An attempt was made to address some of the Governor's concerns in at least one subsequently-filed bill. House Bill 252,¹⁴⁰ filed in 1983, clearly specified that the presiding officer would refer proposed rules to select or standing committees in each respective house, rather than to the "appropriate committee" contemplated in Senate Bill 921.¹⁴¹ Perhaps in response to the Governor's concern that time frames should be specified, House Bill 252 provided that, if the review and comment by the committee were not accomplished within thirty days after referral, the committee would have been deemed to have approved the rule.¹⁴² An agency would have had sixty days to modify, withdraw, or repeal the rule before the committee objections were filed with the Department of State.¹⁴³ House and Senate Rules would have established methods for review and comment.¹⁴⁴

Other aspects of the Governor's previous objections were not addressed in House Bill 252 and, in at least one case, the bill's provisions exacerbated some of the Governor's noted objections. The bill provided that committee review and comment could have been "effected by the chairman in lieu of a meeting of the committee."¹⁴⁵ This provision went even further than Senate Bill 921, which, as the Governor characterized it, improperly granted the authority to determine legislative intent to individual committees ("a select group of legislators").¹⁴⁶ House Bill 252 was indefinitely postponed in its first committee of reference.¹⁴⁷

In addition to increasing legislative review of agency rules, the Legislature has expressed an interest in various forms of the legislative veto. Forms of the legislative veto that would have provided for nullification or ratification of administrative rules have been considered in numerous pieces of legislation.

Senate Bill 457¹⁴⁸ proposed that the JAPC be required to "[r]ecommend the adoption, amendment, or rejection of rules when, in the course of its review of an agency's rules, the committee determines that the agency's rules are incomplete, inconsistent, or other-

140. Fla. HB 252 (1983).

141. Fla. SB 921 (1982).

142. Fla. HB 252 (1983).

143. *Id.*

144. *Id.*

145. *Id.*

146. Veto Message of Governor Bob Graham, Fla. SB 921 (1982) (available at Fla. Dep't of State, Div. of Archives, ser. 227, carton 30, Tallahassee, Fla.).

147. FLA. LEGIS., HISTORY OF LEGISLATION, 1983 REGULAR SESSION, HISTORY OF HOUSE BILLS at 83, HB 252.

148. Fla. SB 457 (1981).

wise deficient."¹⁴⁹ Senate Bill 457 would have deleted the JAPC's statutory standing to seek judicial review of rule objections. Additionally, the JAPC would have been authorized to recommend that the Legislature adopt a concurrent resolution invalidating a proposed rule if the committee found that the rule exceeded statutory authority, conflicted with another rule, or conflicted with the legislative intent.¹⁵⁰ The bill also would have empowered the Legislature to adopt a concurrent resolution invalidating or modifying a proposed rule during the regular session.¹⁵¹ The Department of State would have been required to publish the resolution in the *Florida Administrative Weekly*.¹⁵² Furthermore, the bill would have prohibited an agency from proceeding with a proposed rule that was inconsistent with the resolution.¹⁵³

Between legislative sessions, the JAPC would have been empowered, through a two-thirds vote of its membership, to suspend a rule that exceeded statutory authority, conflicted with another rule, or conflicted with the legislative intent of the statute upon which the rule was based.¹⁵⁴ The suspension would have been effective until the Legislature adopted a concurrent resolution invalidating or modifying the rule, or until the end of the next session, whichever would have occurred earlier.¹⁵⁵ If the Legislature did not adopt a concurrent resolution invalidating or modifying a proposed rule, the agency would have been authorized to proceed with adoption.¹⁵⁶

In addition, section 120.545, *Florida Statutes*, which provides for the JAPC review of agency rules,¹⁵⁷ would have been amended by Senate Bill 457 to specify that the JAPC could suspend a proposed or existing rule that had not been modified, withdrawn, repealed, or amended to meet the JAPC's objection.¹⁵⁸ The bill would have required the Department of State to publish a notice of the suspension

149. *Id.* Likewise, House Bill 181, as originally filed in 1981, similarly would have augmented the role of the JAPC. House Bill 181 was combined with House Bill 473 into Committee Substitute for House Bills 181 and 473, which removed any reference to the JAPC and removed any legislative veto provision. See discussion of Committee Substitute for House Bills 181 and 473, this section, *supra*. With respect to Senate Bill 457, presumably the intent was not to encourage the committee to recommend adoption of a rule if inconsistent, or otherwise deficient, in spite of the choice of words used in the bill.

150. *Id.*

151. *Id.*

152. *Id.*

153. Fla. SB 457 (1981).

154. *Id.*

155. *Id.*

156. *Id.*

157. FLA. STAT. § 120.545 (1991).

158. Fla. SB 457 (1981).

in the *Florida Administrative Weekly*, and provide notice of the objection as a history note in the *Florida Administrative Code*.¹⁵⁹ Senate Bill 457 died in the Committee on Governmental Operations.¹⁶⁰

In 1981, the Legislature considered two proposals for a constitutional amendment that would have established a legislative veto. House Joint Resolution 739¹⁶¹ proposed the creation of article III, section 19 of the Florida Constitution. The constitutional amendment would have authorized the Legislature to amend, suspend, or repeal any executive agency administrative rule that exceeded delegated legislative authority or conflicted with another rule.¹⁶² The proposed joint resolution contained no reference for review by the JAPC or any committee of jurisdiction.¹⁶³

Likewise, Senate Joint Resolution 472¹⁶⁴ proposed a constitutional amendment to article I, section 18 of the Florida Constitution, authorizing the Legislature to nullify executive agency rules. Specifically, the resolution would have allowed any rule of the executive branch to be nullified by concurrent resolution of the Legislature, or to be suspended as provided by law on the grounds that the rule was without, or was in excess of, delegated legislative authority.¹⁶⁵ A majority vote of the Governor and Cabinet, however, could have deferred the suspension of a rule until the Legislature acted upon it.¹⁶⁶ Under the provisions of the joint resolution, if the Legislature did not disapprove a suspension of a rule at the next regular session, the suspended rule automatically would have been reinstated.¹⁶⁷ Neither House Joint Resolution 739 nor Senate Joint Resolution 472 survived the committee

159. *Id.*

160. FLA. LEGIS., HISTORY OF LEGISLATION, 1981 REGULAR SESSION, HISTORY OF SENATE BILLS at 151, SB 457. A legislative veto also was proposed in 1981 by House Bill 473 as originally filed. The bill provided that no agency could adopt or promulgate a rule until (1) it submitted a request for adoption of the rule to each house of the Legislature; (2) the requested rule had been referred to the appropriate committee in each house; and (3) the appropriate committee in each house had approved the rule or had approved an amended version of the rule. Fla. HB 473 (1981). The bill also specified legislative intent that the responsibility for approving rules remain with the Legislature since rules are the final expression of the will of the Legislature in adopting the enabling legislation. *Id.* The bill was combined with House Bill 181 into Committee Substitute for House Bills 181 and 473, which removed the legislative veto aspect. See *supra* notes 111-116 and accompanying text.

161. Fla. HJR 739 (1981) (proposed FLA. CONST. art. III, § 19).

162. *Id.*

163. *Id.* An identical joint resolution—House Joint Resolution 3—was filed in 1982. It was referred to the House Committee on Governmental Operations, where it died. FLA. LEGIS., HISTORY OF LEGISLATION, 1982 REGULAR SESSION, HISTORY OF HOUSE BILLS at 1, HJR 3.

164. Fla. SJR 472, at 1 (1981) (proposed FLA. CONST. art. I, § 18).

165. *Id.*

166. *Id.*

167. *Id.*

process. The former died in the House Committee on Governmental Operations¹⁶⁸ and the latter died in the Senate Committee on Rules and Calendar.¹⁶⁹

Another legislative proposal to establish the legislative veto may be of interest, if for no other reason than the fact that it was so recently considered. This proposal, filed in 1992, was an amendment to Senate Joint Resolution 766.¹⁷⁰ The amendment to the joint resolution, adopted by the Senate Committee on Appropriations, proposed a constitutional amendment authorizing the Legislature to veto a proposed administrative rule or repeal an adopted administrative rule by concurrent resolution adopted by three-fifths vote of the membership of each house.¹⁷¹ Because the amended bill was in the form of a concurrent resolution for a constitutional amendment, it would not have been presented to the Governor if the Legislature had adopted it.¹⁷² Furthermore, had the Legislature adopted it and the electorate approved it, the amendment would have authorized legislative vetoes of administrative rules by concurrent resolution, which similarly would not have been presented to the Governor.¹⁷³ The bill as amended, however, died on the Senate Special Order Calendar on the last day of the 1992 Regular Session.¹⁷⁴

These proposals to establish a legislative veto were not novel ideas when introduced. In fact, in 1976, an amendment referendum to establish a legislative veto was placed before the electors for ratification at the general election.¹⁷⁵ At the same time, the Legislature passed a bill that would have implemented the constitutional amendment if ratified.¹⁷⁶

Committee Substitute for Senate Joint Resolutions 619 and 1398¹⁷⁷ would have amended article I, section 18 of the Florida Constitution to permit the Legislature, by concurrent resolution, to nullify or sus-

168. FLA. LEGIS., HISTORY OF LEGISLATION, 1981 REGULAR SESSION, HISTORY OF HOUSE BILLS at 206, HJR 739.

169. FLA. LEGIS., HISTORY OF LEGISLATION, 1981 REGULAR SESSION, HISTORY OF SENATE BILLS at 152, SJR 472.

170. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION, HISTORY OF SENATE BILLS at 83, SJR 766; FLA. S. JOUR. 1418 (Reg. Sess. Mar. 12, 1992).

171. Fla. S. Comm. on Approp., Amendment 1 to SJR 766 (1992) (on file with comm.) (proposed FLA. CONST. art. III, § 19).

172. FLA. CONST. art. III, § 8(a).

173. *Id.*

174. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION, HISTORY OF SENATE BILLS at 83, SJR 766.

175. Fla. Dep't of State, Div of Elections, tabulation of official records of the general election (Nov. 2, 1976) (on file with division).

176. CS for SJRs 619 and 1398, at 1 (1976) (proposed FLA. CONST. art. I, § 18).

177. *Id.*

pend any administrative rule of an executive branch agency on the grounds that it was either without, or was in excess of, delegated legislative authority.¹⁷⁸ The Governor and Cabinet could have, by majority vote, deferred the suspension of the rule until the Legislature acted upon it.¹⁷⁹ Failure of the Legislature to disapprove the suspension at the next regular session automatically would have reinstated the rule.¹⁸⁰

Contemporaneous with the passage of its proposal for the constitutional amendment, the Legislature passed a proposed enabling law.¹⁸¹ The statutory proposal was contained in Committee Substitute for Senate Bill 1384.¹⁸² Under the bill, if the JAPC objected to a rule of an executive agency, and the agency refused to modify, amend, withdraw, or repeal the rule within thirty days of receipt of the JAPC objection, the operation of the rule would have been suspended upon published notice in the *Florida Administrative Weekly*.¹⁸³ The bill would have required the JAPC to report all suspended rules to the Legislature, stating JAPC objections with particularity, thirty days prior to the commencement of each legislative session.¹⁸⁴

The Legislature would have considered the objection of the JAPC and, by concurrent resolution, approved or disapproved the subject rule.¹⁸⁵ If the Legislature were to have failed to disapprove the rule, the suspension would have been lifted by operation of law and the rule would have been effective within five days of the Legislature's vote on the rule.¹⁸⁶

On June 29, 1976, Governor Reubin Askew vetoed the bill.¹⁸⁷ In his veto message, the Governor discussed both the proposed constitutional amendment and the enabling bill, stating:

[T]he proposed constitutional amendment [would] seriously erode our traditional system of checks and balances which results from the separation of the branches of government. . . .

It would jeopardize the rights of the individual citizen through an unwarranted intrusion into the province of the executive and judicial

178. *Id.*

179. *Id.*

180. *Id.*

181. FLA. LEGIS., HISTORY OF LEGISLATION, 1976 REGULAR SESSION, HISTORY OF SENATE BILLS at 386, CS for SB 1384.

182. Fla. CS for SB 1384 (1976).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. FLA. LEGIS., HISTORY OF LEGISLATION, 1976 REGULAR SESSION, HISTORY OF SENATE BILLS at 386, CS for SB 1384.

branches. To a great extent, it would place those rights in the hands of a growing legislative bureaucracy. . . .

Our system already provides a remedy against overreaching by executive rulemaking. Under the Administrative Procedures [sic] Act, any affected person may seek an administrative determination of the validity of an executive rule on the ground that the rule is an invalid exercise of delegated legislative authority. A decision must be rendered upon such a question by an administrative hearing officer within thirty days. The decision of the hearing officer is immediately reviewable by the judicial system. The individual citizen enjoys the procedural protections of notice, a public hearing, and a written record.¹⁸⁸

The Governor's veto message characterized the committee substitute as offering none of the safeguards available under then-existing law.¹⁸⁹ Furthermore, the Governor's veto noted that determinations of whether a rule exceeds legislative authority are "complex and generally hotly contested."¹⁹⁰ The veto message contrasted the extant system of review by an impartial hearing officer with the process contemplated by the bill, which "would [have] substitute[d] the political forum of a legislative committee."¹⁹¹

The Governor noted in his veto message that the Legislature already had the power to amend law and nullify an agency's rulemaking effort.¹⁹² He characterized the bill as an effort to "sidestep the role of the Governor in the lawmaking process."¹⁹³ Governor Askew also questioned whether the judiciary could have reviewed a legislative decision to nullify a rule:

If the constitution, as a result of the proposed amendment, states that the Legislature may nullify a rule on the specific ground that the rule is without authority, the judiciary may not be in a posture to review that decision. There would be nothing to insure that the rule

188. Veto Message of Governor Reubin Askew, Fla. CS for SB 1384 (1976) (available at Fla. Dep't of State, Div. of Archives, ser. 866, carton 13, Tallahassee, Fla.).

189. *Id.*

190. *Id.*

191. *Id.* On this point, the veto message stated:

For example, assume that in question is a Department of Environmental Regulation rule on water quality. A developer with a strong monetary interest may wish to challenge the rule as outside the scope of legislative authority. Nearby homeowners may demand the protection of the rule. Instead of a structured legal proceeding where both sides have their opportunity to present argument, the proposed process would allow one side to lobby, in secret and outside public scrutiny, legislative leadership or, more often, legislative staff.

Id.

192. *Id.*

193. *Id.*

was nullified because of lack of authority rather than a policy disagreement with the rule.¹⁹⁴

The veto message concluded that the proposed constitutional amendment and implementing legislation represented: "an experiment in government foreign to our tradition of checks and balances, supplanting the role of the judiciary and moving the legislative branch far into the arena of executive administration of law. The amendment would be inconsistent with the basic structure of the Florida Constitution."¹⁹⁵ The Legislature took no action to override the Governor's veto of Committee Substitute for Senate Bill 1384.¹⁹⁶ Moreover, the constitutional amendment proposed by Senate Joint Resolution for Senate Bills 619 and 1398 was defeated in the general election.¹⁹⁷

Another type of legislative veto that has been proposed in Florida is one that, rather than authorizing veto or nullification of proposed or existing rules, would require legislative ratification before an administrative rule becomes effective. While this type of proposal has not been common, it is represented in one of the most recent proposals.

Senate Bill 824,¹⁹⁸ introduced in 1992, would have revised the Administrative Procedure Act to require legislative approval or adoption of all agency rules. The bill would have required all proposed rules to be submitted to the JAPC. The committee would have prepared recommendations and statements in support of the recommendations, and prepared and submitted bills authorizing rules for adoption by the Legislature.¹⁹⁹ In addition to a number of other requirements, the JAPC would have reviewed all proposed agency rules and, at its discretion, held public hearings. The JAPC's review would have included, but would not have been limited to, a determination of whether the agency had exceeded its statutory authority, whether the proposed rule was in conformity with the intent of the enabling legislation, and whether the rule conflicted with any provision of chapter 120 or rule of another agency.²⁰⁰

Further, Senate Bill 824 would have required the JAPC to determine whether the proposed rule was necessary to fully accomplish the

194. *Id.*

195. *Id.*

196. FLA. LEGIS., HISTORY OF LEGISLATION, 1976 REGULAR SESSION, HISTORY OF SENATE BILLS at 386, CS for SB 1384.

197. Fla. Dep't. of State, Div. of Elections, tabulation of official records of the general election (Nov. 2, 1976) (on file with division). The vote of the electorate was 1,210,001 opposed and 729,400 in favor.

198. Fla. SB 824 (1992).

199. *Id.*

200. *Id.*

objectives of the enabling statute, whether the proposed rule was reasonable (particularly as it would affect the convenience of the public or other affected persons), whether the proposed rule could be made less complex or more understandable to the public, and whether the proposed rule was otherwise in compliance with law.²⁰¹ Following its review, the JAPC would have been required to recommend whether the Legislature should authorize the agency to adopt the rule, whether the Legislature should adopt the rule with amendments, or whether the rule should be withdrawn.²⁰²

Upon the recommendation of the JAPC that a rule be authorized by the Legislature, the JAPC staff would have drafted a bill authorizing the agency to adopt all or part of the rule, and incorporating any amendments the JAPC wished the rule to include.²⁰³ Any draft bill prepared would have been required to contain a legislative finding that the rule was within the legislative intent of the enabling statute which the rule was intended to implement, extend, apply, or interpret.²⁰⁴ If the Legislature were to fail to act upon all or part of a proposed rule submitted to it, no agency thereafter would be authorized to issue or take action to implement any rule unless legislatively authorized to do so.²⁰⁵ The Senate Committee on Governmental Operations reported the bill favorably, but it died in the Senate Committee on Rules and Calendar.²⁰⁶

It is evident from the foregoing that the Legislature has been, and continues to be, engaged in a search for appropriate additional methods of legislative oversight of executive rulemaking. The search has included proposals for improving adherence to enabling law, increasing legislative committee oversight, and imposing the legislative veto.

IV. THE UNITED STATES SUPREME COURT IN *CHADHA*, AND CASES FROM OTHER STATES

While numerous attempts have been made in Florida to establish some form of legislative veto, thus far they have not been successful. The bills proposing a legislative veto either have died in committee,

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* The provisions of the bill were cumbersome at best and impracticable at worst. For a more complete understanding of the bill, refer to the bill itself and to the Senate Staff Analysis and Economic Impact Statement. Staff of Fla. S. Comm. on Govtl. Ops., SB 824 (1992) Staff Analysis (1992) (on file with comm.).

206. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION, HISTORY OF SENATE BILLS at 87, SB 824.

been vetoed by the Governor or, in the case of attempts to amend the Florida Constitution, did not pass or were rejected by the electors. As a result, there is no Florida case law on the subject of the legislative veto. Other states and the federal courts, however, have examined various legislative veto mechanisms. An examination of some of these cases is beneficial to an understanding of the issues raised by the concept of the legislative veto.

The United States Supreme Court considered the legislative veto in *Immigration & Naturalization Service v. Chadha*.²⁰⁷ At issue in *Chadha* was the constitutionality of the one-house Congressional veto of the United States Attorney General's decision not to deport a resident alien under the Immigration and Nationality Act.²⁰⁸ In its analysis of the veto provision, the *Chadha* Court discussed the separation of powers:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Although not "hermetically" sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, it presumptively acts in an executive or administrative capacity And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere.²⁰⁹

The constitutional inquiry confronting the *Chadha* Court was whether the presentment and bicameral principles of article I, section 7 of the United States Constitution²¹⁰ were violated. The Court found

207. *INS v. Chadha*, 462 U.S. 919 (1983).

208. The congressional veto provision, at section 244(c)(2) of the Immigration and Nationality Act, codified at 8 U.S.C.S. § 1254(c)(2) (1987), authorized the Senate or the House of Representatives to pass a resolution stating that it does not favor the suspension or the deportation of the resident alien, whereupon the Attorney General was directed to deport the alien or authorize the alien's voluntary departure under an order of deportation.

209. *Chadha*, 462 U.S. at 951-52.

210. Article I, section 7 of the United States Constitution provides, in part, "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States" U.S. CONST. art. I, § 7, cl. 2.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be

the presentment provision to be designed "to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures" ²¹¹ The Court found the Constitution's bicameralism requirement to be interdependent with the presentment requirement. ²¹² It found that the bicameralism requirement, which requires that laws have the concurrence of the prescribed majority of both houses of Congress, ensures that legislation is not enacted without careful consideration by the nation's elected officials. ²¹³

The Court established that the procedural requirements of presentment and bicameralism apply to the legislative veto in question. ²¹⁴ The Court stated:

The nature of the decision implemented by the one-House veto in these cases further manifests its legislative character. After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked. ²¹⁵

The Court found that the action by one house of Congress did not fall within any of the expressed constitutional exceptions to the bicameralism requirement ²¹⁶ and thus struck the legislative veto provision as violative of the United States Constitution.

presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3.

211. *INS v. Chadha*, 462 U.S. 919, 947-48 (1983).

212. *Id.*

213. *Id.* at 948-49.

214. *Id.* at 952.

215. *Id.* at 954-55.

216. *Id.* at 959.

Justice Byron White filed a vigorous dissent in which he concluded that the ruling invalidating the legislative veto required Congress

either to refrain from delegating necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policy-making by those not elected to fill that role.²¹⁷

Justice White found other means to ensure executive accommodation and accountability, including writing statutes with greater specificity and engaging in oversight activities, to be insufficient and undesirable.²¹⁸

Justice White did not believe the legislative veto manifested an overreaching by the legislative branch to the detriment of the executive or judicial branches.²¹⁹ Justice White stated:

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches. . . . Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role . . . as the Nation's lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional Committees, the Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.²²⁰

The dissent postulated that the power of the legislative veto is not the power to write new law while circumventing bicameralism and presentment.²²¹ Justice White instead viewed the exercise as nothing more than a reservation of legislative power that Congress originally was not required to delegate.²²² He noted that, absent the veto, agencies

217. *Id.* at 968.

218. *Id.* at 972-73.

219. *Id.* at 974.

220. *Id.*

221. *Id.*

222. *Id.*

receiving delegations of legislative power may themselves issue regulations having the force of law without bicameral approval or executive presentment.²²³ Moreover, Justice White stated that the legislative veto does not intrude upon the executive's constitutional function of executing the law, as the veto conditions a legislative delegation and not a constitutional power.²²⁴ He concluded:

I do not suggest that all legislative vetoes are necessarily consistent with separation-of-powers principles. A legislative check on an inherently executive function, for example, that of initiating prosecutions, poses an entirely different question. But the legislative veto device here—and in many other settings—is far from an instance of legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress.²²⁵

Numerous state courts also have considered the issue raised by a legislative veto of administrative rules.

In *Legislative Research Commission v. Brown*,²²⁶ the Kentucky Supreme Court held what it characterized as "legislative veto" provisions to be unconstitutional as violative of the separation of powers doctrine. The court used a strict review standard because the separation of powers doctrine had been found to be fundamental to Kentucky's tripartite system of government.²²⁷

The Kentucky statutory scheme granted to the Legislative Research Commission (LRC) review authority over executive branch regulations, and required administrative bodies to forward proposed regulations to the LRC for review and approval.²²⁸ The LRC was directed to submit the regulation to one of its subcommittees to determine conformance with statutory authority and to determine whether it carried out the legislative intent of enabling statutes.²²⁹ The LRC either could accept the subcommittee's recommendation or return the regulation with its objections to the promulgating body. The administrative body could revise the regulation to meet the objections, or return it without change to the LRC.²³⁰

223. *Id.* at 986-87.

224. *Id.* at 1000.

225. *Id.* at 1002.

226. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984).

227. *Id.* at 912.

228. All members of the LRC were members of the legislative branch of government. *Id.* at 911.

229. *Id.*

230. *Id.*

In the latter event, the regulation would be placed before the Kentucky General Assembly. If the General Assembly were not in session, objections by the LRC would delay the regulation until the next legislative session. The Kentucky Supreme Court characterized this as a "legislative veto" of the executive branch's administrative policy: "The power to suspend a regulation's effective date for up to twenty-one months is the power to effectively prevent a regulation from having the force of law."²³¹

The court noted that the subject statutes delivered the legislative power into the hands of but a few members of the General Assembly, namely, the membership of the LRC.²³² The court found the greatest infirmity of the "legislative veto" to be in its effect on the separation of powers, however.²³³ The court iterated that the adoption of administrative regulations to implement legislative enactments is constitutionally executive in nature.²³⁴ The scheme in question was found to constitute a legislative encroachment, to the point of usurpation, on the powers of the executive branch and was held unconstitutional.²³⁵

Perhaps as significant, although not analyzed as thoroughly, the court found the scheme to encroach upon the judicial power:

It will also be recalled that the review of the regulations was for the stated legislative purpose of determining if they comported with statutory authority and if they carried out the legislative intent. It requires no citation of authority to state unequivocally that such a determination is a judicial matter and is within the purview of the judiciary.²³⁶

The West Virginia scheme, held unconstitutional in *State ex rel. Barker v. Manchin*,²³⁷ was similar to Kentucky's mechanism. In West Virginia, no agency rule or regulation would be effective until presented and approved by the statutorily-created Legislative Rule-Making Review Committee.²³⁸ The statutes in question required the committee to submit the rules it reviewed to the Legislature, which could, by concurrent resolution, sustain or reverse the committee's ac-

231. *Id.* at 918.

232. *Id.* at 918-19.

233. *Id.*

234. *Id.*

235. *Id.* at 919-20.

236. *Id.* at 919.

237. *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

238. All members of the Legislative Rule-Making Review Committee were members of the Legislature. *Id.* at 626.

tion.²³⁹ The Legislature was required to take formal action on the committee's action only if the rule concerned the implementation of a federally subsidized or assisted program.²⁴⁰ In that instance, the Legislature was required to sustain formally the disapproval; otherwise, the regulation would become effective.²⁴¹ In all other cases, the court found "inaction by the legislature constitutes tacit approval of the Committee action."²⁴² Thus, with the one exception, the court found that the committee's decision served as the final legislative veto of a disapproved rule.²⁴³

The *Manchin* court found the doctrine of separation of powers to be fundamental, and therefore applied a strict standard of review to the challenged statutes, which it held unconstitutional.²⁴⁴ The court stated that it was compelled to restrain one branch of government from "imping[ing] upon the powers conferred upon another branch," unless the constitution "permitt[ed] such interference."²⁴⁵

The court stated that, when the Legislature delegates its rulemaking power to the executive, validly-promulgated rules of the executive "take on the force of statutory law."²⁴⁶ Through the challenged statutes, however, the *Manchin* court found the Legislature to have attempted to alter fundamentally this relationship:

In effect, the legislature abdicates in favor of the executive its power to make rules and then asserts that because the rule-making power so delegated is legislative in nature, it may step into the role of the executive and disapprove or amend administrative regulations free from the constitutional restraints on its power to legislate.²⁴⁷

This, the court found, allowed the West Virginia Legislature to act "as something other than a legislative body to control the actions of the other branches."²⁴⁸ The court, finding this to be a direct conflict with the separation of powers doctrine, stated that "[t]he power of the Legislature in checking the other branches of government is to legislate."²⁴⁹

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 627.

243. *Id.*

244. *Id.* at 630.

245. *Id.*

246. *Id.* at 631.

247. *Id.* at 633.

248. *Id.*

249. *Id.* (citing *State v. Harden*, 58 S.E. 715 (W. Va. 1907)).

The court did not enunciate a complete prohibition on legislative review, and indicated that in some instances, a system of legislative review may be warranted.²⁵⁰ It required that any review of administrative rules, however, not violate the doctrine of separation of powers or the system of checks and balances.²⁵¹

The problem with the West Virginia scheme was that legislative action was being exercised by less than the entire Legislature, which was also the case in *Legislative Research Commission v. Brown*.²⁵² The West Virginia practice was objectionable because it violated the constitutionally-mandated procedure for action by the Legislature through bills.²⁵³ The court analogized the legislative action contemplated by the subject statutes to the powers of the executive, which highlighted the separation of powers infirmity:

The power of a small number of Committee members to approve or disapprove otherwise validly promulgated administrative regulations, and of the entire legislative body to sustain or to reverse such actions either by concurrent resolution or by inertia, constitutes a legislative veto power comparable to the authority vested in the Governor . . . and reverses the constitutional concept of government whereby the legislature enacts the law subject to the approval or the veto of the Governor.²⁵⁴

In *Opinion of the Justices*,²⁵⁵ the Supreme Court of New Hampshire opined on the constitutionality of a proposed statute which (similar to the Kentucky and West Virginia schemes) would have required that administrative rules be approved or rejected by legislative committees. Unlike the Kentucky and West Virginia courts, however, the New Hampshire court stated that the creation of a legislative veto would not be per se unconstitutional. Instead, the court found the proposed legislative plan constitutionally objectionable on the narrower ground that vesting legislative power in subdivisions of the Legislature did not represent the "legislative will."²⁵⁶ According to the court, the New Hampshire Constitution vested the legislative power in the whole body, and not in a part.²⁵⁷

250. *Id.*

251. *Id.* at 634-35.

252. 664 S.W.2d 907 (Ky. 1984).

253. State *ex rel.* Barker v. Machin, 279 S.E.2d 622, 632 (W. Va. 1981).

254. *Id.*

255. Opinion of the J.J., 431 A.2d 783 (N.H. 1981).

256. *Id.* at 788.

257. *Id.*

The New Hampshire court, however, expressed a level of sympathy for the legislative endeavor to control agencies, and stated:

We believe that legislative supervision of administrative agencies through constant statutory modification of their activities could be cumbersome and ultimately be doomed to fail. Likewise, the indirect supervision of administrative agencies through legislative budgetary pressure, as well as the intense scrutiny of executive appointments, is unsatisfactory. The increasing use of provisions allowing for legislative veto of administrative lawmaking is a direct reflection of a growing interest in more effective legislative supervision of agency activities.²⁵⁸

The court expounded on the legislative power in analyzing the "legislative veto" with respect to separation of powers:

Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of laws. Lawmaking is primarily a legislative rather than an executive function. The executive is responsible for the "faithful execution of laws." Although the chief executive has discretion in performing his duties, he has no authority to make laws. This being so, the rulemaking authority of administrative agencies in the executive branch derives solely from that power which the legislature delegates to them. *Because the legislature may delegate some of its lawmaking authority to administrative agencies, it may properly condition the exercise of that delegated authority upon its approval.*²⁵⁹

Finally, the court found that the proposed statute did not violate the separation of powers doctrine, but "*actually buttresse[d] the underlying delegation of rulemaking authority by restricting the extent to which the executive branch can engage in unilateral lawmaking.*"²⁶⁰ Rather than viewing the legislative veto as usurping the executive power, as did the Kentucky court in *Brown* and the West Virginia court in *Manchin*, the New Hampshire court viewed the legislative veto as appropriately limiting the prerogatives of the executive branch.²⁶¹ In evaluating statutory schemes embodying the legislative veto, the New Hampshire court appears to represent the minority view, however.

258. *Id.* at 786-87 (citations omitted).

259. *Id.* at 787 (citations omitted) (emphasis added).

260. *Id.* at 787-88 (emphasis added).

261. *Id.*

A particularly extensive legislative veto power was evaluated in *State ex rel. Stephan v. Kansas House of Representatives*.²⁶² The statute at issue authorized the Legislature to modify, reject, or revoke administrative rules and regulations by concurrent resolution.²⁶³ The Kansas Supreme Court struck the statute because it violated both the separation of powers doctrine,²⁶⁴ and the state constitution's presentment clause.²⁶⁵ To determine whether the Legislature was usurping the Governor's powers, the court applied a four-factor analysis.

First, the court examined the nature of the power being exercised and found it to be executive or administrative, not legislative.²⁶⁶ The court found the power to be delegated to the executive branch by law, and acknowledged that the Legislature could modify the grant of authority to the executive, but only through "proper enactment of another law."²⁶⁷

Secondly, the court looked to the degree of control sought to be exercised by the Legislature over the executive, and found, under the questioned "legislative veto" provisions:

[T]he legislature has total and absolute control to modify, reject or revoke any rules or regulations by concurrent resolution. There is no provision allowing for presentment to the executive branch for approval of the legislature's actions. As such, the executive branch and the agencies involved have no control whatsoever over the actions taken by the legislature in this regard.²⁶⁸

The third factor considered was the objective sought to be obtained by the Legislature, and the fourth factor was the practical result of the blending of powers as shown by actual experience. The court considered these factors as designed to achieve and, in fact, achieving a singular aim: "Here the apparent objective and result actually accomplished is the control by the legislature over the adoption of rules and regulations by administrative agencies and the exclusion of participation by the executive branch in this area."²⁶⁹

The court thus found the Kansas legislative veto provisions unconstitutional because they significantly interfered with the activities of

262. *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622 (Kan. 1984).

263. KAN. STAT. ANN. § 77-426 (Supp. 1983).

264. Not expressly provided in the Kansas Constitution, but a doctrine implicit in the three-branch structure of government. See *State ex rel. Stephan*, 687 P.2d at 634.

265. *Id.* at 635-36.

266. *Id.* at 635.

267. *Id.*

268. *Id.*

269. *Id.* at 635-36.

the executive branch and unconstitutionally usurped its powers.²⁷⁰ Citing *Chadha*,²⁷¹ the Kansas court held that a resolution "must comply with the enactment provisions of the constitution" before the resolution is a proper use of legislative power when the resolution "affects the legal rights, duties and regulations of persons outside the legislative branch"²⁷²

In *State v. A.L.I.V.E. Voluntary*,²⁷³ the Alaska Supreme Court disapproved as violative of the enactment provisions of the Alaska Constitution²⁷⁴ a provision that authorized the Legislature to annul an agency or department regulation by concurrent resolution adopted by vote of both houses.²⁷⁵ In holding the enactment provisions mandatory, the court determined that the Legislature may only adopt resolutions when acting in an advisory capacity; when it wishes to take binding action, it must follow certain enactment procedures.²⁷⁶

The court examined two specific legislative veto mechanisms in the Alaska Constitution that established specific—and separate—time frames for exercise of the legislative veto and specific—and separate—votes to exercise the veto.²⁷⁷ The court found that, based on the Constitution's specificity regarding these two provisions, no other legislative veto powers could be implied.²⁷⁸ In addition, the court found that the constitutionally expressed veto provisions did "not have the same potential for the disruption of public expectations and ongoing executive programs that the blanket veto in question has," because they only "annul proposed executive action, [and] do not change existing law."²⁷⁹

The Supreme Court of Alaska confronted arguments by amici curia that, as the Legislature has the power to delegate a lawmaking func-

270. *Id.*

271. *INS v. Chadha*, 462 U.S. 919 (1983). For an in-depth discussion of the *Chadha* decision, see *supra* notes 211-225 and accompanying text.

272. *State ex rel. Stephan*, 687 P. 2d at 638 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

273. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980).

274. ALASKA CONST. art. II, §§ 13-18. The enactment provisions require that bills be confined to one subject and contain a descriptive title, that there be three readings of a bill each on a separate day, that a recorded vote be taken on final passage of a bill, that the Governor be given the opportunity to veto the bill, and that the bill become effective 90 days after enactment except upon a two-thirds vote of each house's membership.

275. *A.L.I.V.E. Voluntary*, 606 P.2d at 769.

276. *Id.* at 772-73.

277. ALASKA CONST. art. III, § 23 (authorizing the Legislature to disapprove by concurrent resolution changes proposed by the Governor in the structure of the executive branch of government); *Id.* art. X, § 12 (authorizing the Legislature to veto by concurrent resolution municipal boundary changes recommended by the state local boundary commission).

278. *A.L.I.V.E. Voluntary*, 606 P.2d at 775.

279. *Id.*

tion to an administrative agency, it may reserve unto itself part of the delegable power, and may make a delegation conditional.²⁸⁰ The Alaska court responded to this argument, stating that: "while the legislature can delegate the power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by the constitution."²⁸¹ Thus, the court found that the Legislature was bound by the enactment provisions, even though the Legislature could delegate certain legislative powers to others not so bound. As the court stated: "The fact that [the Legislature] can delegate legislative power to others . . . does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate."²⁸²

Unlike the New Hampshire Supreme Court's more favorable view of the legislative veto effort at issue in *Opinion of the Justices*,²⁸³ the court in *State v. A.L.I.V.E. Voluntary* brooked no sympathy for the effort. The Alaska court cited a study of the legislative veto, which it characterized as follows:²⁸⁴ "That study concludes, essentially, that the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action. It is consequences such as these that the enactment provisions of our constitution are designed to guard against."²⁸⁵

The concern expressed in the *A.L.I.V.E.* case²⁸⁶ regarding the disruptive effect of a broad legislative veto mechanism on the operations of the executive branch became the linchpin of the New Jersey Supreme Court's opinion in *General Assembly of State of New Jersey v. Byrne*²⁸⁷ and *Enourato v. New Jersey Building Authority*.²⁸⁸ In decisions issued the same day, the court struck the veto provisions in *Byrne*, and upheld them in *Enourato*.

280. Alaska Legislative Council and Administrative Regulation Review Committee.

281. *A.L.I.V.E. Voluntary*, 606 P.2d at 777.

282. *Id.* (citation omitted). The court similarly answered the arguments that legislative oversight of administrative regulations cannot take place effectively if the Legislature must strictly adhere to the enactment provisions, and that rulemaking is essentially a legislative function and thus the Legislature must be afforded broad latitude to act in an area core to the legislative duty. The court found these arguments to be irrelevant or contrary to the enactment provisions in the state constitution, and thus dismissed them in fairly summary fashion. *Id.* at 778-79.

283. *Opinion of the J.J.*, 431 A.2d 783 (N.H. 1981).

284. Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

285. *A.L.I.V.E. Voluntary*, 606 P.2d at 779 (citations omitted).

286. *Id.*

287. *General Assembly of State v. Byrne*, 448 A.2d 438 (N.J. 1982).

288. *Enourato v. New Jersey Bldg. Auth.*, 448 A.2d 449 (N.J. 1982).

In the *Byrne* case, the court considered a statute authorizing the Legislature to veto by concurrent resolution of both houses "[e]very rule hereafter proposed by a State agency."²⁸⁹ The *Byrne* court found the statute violated the separation of powers doctrine specified in the New Jersey Constitution

by excessively interfering with the functions of the executive branch. The legislature's power to revoke at will portions of coherent regulatory schemes violates the separation of powers by impeding the Executive in its constitutional mandate to faithfully execute the law. The legislative veto further offends the separation of powers by allowing the Legislature to effectively amend or repeal existing laws without participation by the Governor²⁹⁰

The *Byrne* court instructed that the separation of powers doctrine did not require that the branches be completely insulated from each other.²⁹¹ The court stated that each of the branches represents a separate source of power to "check the abuses of the other branches,"²⁹² and relied on *Marbury v. Madison*²⁹³ to conclude that the constitutional role of the court is to prevent the illegitimate exercise of power by one of the branches over another.²⁹⁴

The *Byrne* court also held that the veto provisions violated the state constitution's presentment clause²⁹⁵ which, like the separation of powers doctrine, prevents unwarranted legislative interference with the executive branch and checks excessive legislative lawmaking power.²⁹⁶ The court characterized its charge as evaluating the legislative veto provisions not in abstract constitutional analysis, but in examining the veto's practical effects upon lawmaking by the Legislature and law enforcement by the executive.²⁹⁷ The court then struck the veto mechanism, and summarized:

The chief function of executive agencies is to implement statutes through the adoption of regulatory schemes. The legislative veto undermines performance of that duty by allowing the legislature to nullify virtually every existing and future scheme of regulation or any

289. N.J. STAT. ANN. §§ 52:14B-4.1, 4.4 (West 1986).

290. *Byrne*, 448 A.2d at 439 (citing N.J. CONST. art. III, § 1).

291. *Id.* at 441.

292. *Id.*

293. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

294. *Byrne*, 448 A.2d at 441.

295. N.J. CONST. art. V, § 1, para. 14.

296. *Byrne*, 448 A.2d at 443.

297. *Id.*

portion of it. The veto of selected parts of a coherent regulatory scheme not only negates what is overridden; it can also render the remainder of the statute irrational or contrary to the goals it seeks to accomplish²⁹⁸

The court further complained that the Legislature was not required to explain its reasons for its veto decision, which left the agency with no guidance on methods for enforcing the law.²⁹⁹ The legislative veto gives the Legislature an unlimited policy-making power apart from the constraints imposed by the constitution, the court stated, including the opportunity for gubernatorial approval or veto.³⁰⁰ The court elaborated that the legislative veto provisions also gave the Legislature an unlimited power to foreclose agency action, allowing the Legislature to nullify enabling legislation or to redirect the application as though the statute were repealed or amended, as the case may be.³⁰¹

The *Byrne* court condemned more than the act of the legislative veto, however; it criticized its very existence. The court found that the potential to disrupt coherent regulatory schemes would force officials to “retreat from the execution of their responsibilities” and resort to compromises with legislative committees in drafting administrative rules that it knows the Legislature will accept.³⁰²

The court found that agency regulations differ little from legislatively-enacted laws in scope and effect.³⁰³ Administrative power derives solely from the Legislature’s grant of authority, the court acknowledged, which the Legislature has the power to limit or abolish.³⁰⁴ The court, however, was not persuaded that these arguments favor the concept of the legislative veto of agency actions.

Instead, the court pointed to alternatives for controlling the executive, like the appointment of legislative oversight committees, which can function without “presentment to the Governor and in many cases by the vote of less than a majority of both houses.”³⁰⁵ In addition, the court stated:

Beyond oversight through legislative committees, there is some additional room for legislative input into the execution of laws.

298. *Id.*

299. *Id.*

300. *Id.* at 444.

301. *Id.* at 445.

302. *Id.* at 444.

303. *Id.*

304. *Id.* at 447.

305. *Id.* (citing N.J. CONST. art. IV, § 5).

Certain types of legislative participation create only a minimal danger of the aggregation of power in the legislative branch which the separation of powers seek to prevent. This is particularly true where the Executive has extensive control pursuant to a statutory delegation of authority and the legislature has only limited power to reject discrete projects rather than entire schemes of regulation.³⁰⁶

A scheme meeting this test was upheld against challenge in *Enourato v. New Jersey Building Authority*,³⁰⁷ handed down by the New Jersey Supreme Court simultaneously with *Byrne*. In *Enourato*, the constitutional challenge was to the New Jersey Building Authority Act,³⁰⁸ which authorized the Legislature to veto building projects and lease agreements proposed by the New Jersey Building Authority.³⁰⁹ The authority issued bonds for construction projects for public facilities.³¹⁰ The creditors were repaid by building rentals assessed against state agencies, which payments were subject to legislative appropriation.³¹¹ All actions of the building authority were required to be approved by the Governor.³¹² The Governor could veto any action of the building authority within fifteen days of the authority's meeting at which the action was taken.³¹³

Two provisions of the act were legislative veto mechanisms.³¹⁴ The building authority was required to submit to the Legislature any project with an estimated cost exceeding \$100,000, and if the Legislature did not adopt a concurrent resolution of both houses approving the project within forty-five days, it was deemed disapproved.³¹⁵ In addition, every lease agreement between the building authority and a state agency required approval by the presiding officer of each legislative house.³¹⁶

The objecting plaintiff in *Enourato* alleged that the act violated the constitutional separation of powers³¹⁷ and the presentment clause³¹⁸ re-

306. *Id.* at 448. The court, as an example, cited *Brown v. Heymann*, 297 A.2d 572 (N.J. 1972), upholding as constitutional the New Jersey statutory scheme for executive reorganization wherein the Governor prepared reorganization plans for submission to the Legislature; the plan would take effect unless disapproved by concurrent resolution of both houses within 60 days.

307. *Enourato v. New Jersey Bldg. Auth.*, 448 A.2d 449 (N.J. 1982).

308. N.J. STAT. ANN. § 52:18A-78.1-.32 (West 1986).

309. *Enourato*, 448 A.2d at 450.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* (citing N.J. STAT. ANN. §§ 52:18A-78.6 to 78.8(b) (West 1986)).

316. *Id.* (citing N.J. STAT. ANN. § 52:18A-78.9 (West 1986)).

317. N.J. CONST. art. III, § 1, para. 1.

318. N.J. CONST. art. V, § 1, para. 14.

quirement that bills pass both houses and be presented to the Governor. The *Enourato* court upheld the legislative veto because it fell "within the proper scope of the legislative oversight of executive action." The court found it significant that "[t]he Act's veto power [was] limited to approval or rejection of proposed building projects and leases that require continuing budget appropriations by the legislature."³¹⁹ The court reasoned that legislative oversight thus played a necessary role in assuring continued support by the Legislature for the subject projects.³²⁰

The court determined that the veto provisions did not empower the Legislature to revoke "at will portions of coherent regulatory schemes."³²¹ Therefore, the *Enourato* court reasoned, the veto could not cause substantial disruptions of functions exclusively vested in the executive branch.³²²

The court focused particular attention on the feature of the New Jersey Building Authority Act³²³ that required legislative appropriation for the agency rental fees used to retire the issued building construction bonds: "[I]f the legislature does not veto a particular project and thereby approves it, this action will constitute a strong, if not compelling, basis for the legislature to continue to appropriate sufficient money to support the project."³²⁴

The court found that the veto mechanism, through "[inducing] the Authority to exercise care in selecting its projects," fostered cooperation between the Legislature and the executive in an area "of mutual concern."³²⁵ The court noted that the Governor, as well as the Legislature, had veto power under the Building Authority Act.³²⁶

The *Enourato* court identified three features which distinguished the veto mechanisms upheld in that case from the Legislative Oversight Act struck down in *Byrne*. First, in *Enourato*, the court found that the Legislature could not usurp executive authority due to the "Governor's full control over the selection of building authority projects . . ."³²⁷ The court noted that the Legislature had "absolutely no control" over projects recommended by the building authority

319. *Enourato*, 448 A.2d at 451 (citation omitted).

320. *Id.*

321. *Id.* (citing *General Assembly of State v. Byrne*, 448 A.2d 438 (N.J. 1982)).

322. *Id.*

323. N.J. STAT. ANN. §§ 52:18A-78.1 to .32 (West 1986).

324. *Enourato*, 448 A.2d at 452.

325. *Id.*

326. *Id.*

327. *Id.* at 453.

“unless the Governor first approves them.”³²⁸ The court evaluated this as giving the Governor “extensive authority in the policy-making process.”³²⁹

Secondly, the court found limited potential for the Legislature to interfere with executive action, given that the legislative veto “is limited to the rejection of discreet [sic] projects and leases”³³⁰ Additionally, the Legislature was precluded from vetoing portions of proposed projects and, thus, was required either to “veto the entire project or let the project proceed.”³³¹

Finally, the court in *Enourato* reasoned that even repeated exercise of the veto would not alter legislative intent such that the Constitution would require presentment to the Governor:

In enacting the Building Authority Act, the legislature clearly did not want the Authority to undertake any project unless it met with both legislative and gubernatorial approval. Exercise of the veto provisions is not inconsistent with the regulatory framework the legislature has erected to assume tight controls over the selection of Authority building projects and leases.³³²

The court found “more troubling” the concept that either house, in effect, could veto a project by withholding its approval of the concurrent resolution sanctioning the proposed executive action.³³³ As well, the court recognized that the provision in the law allowing the presiding officer of one house to veto a proposed lease “exacerbates this problem of concentrating legislative control.”³³⁴ The court worried that concentration of authority in one house or in one legislative member “threatens the separation of powers and the principle of bicameralism *unless that power is narrowly circumscribed*.”³³⁵ The court found that the provisions before it met the test specified in the exception:

328. *Id.* Of course, this argument cuts two ways. While arguably the Governor has a role in the veto process in question in *Enourato* that is absent from the veto process at issue in *Byrne*, it is difficult to view the legislative veto of a project receiving gubernatorial approval either as especially cooperative or particularly indicative of executive authority.

329. *Id.*

330. *Id.* at 454.

331. *Id.*

332. *Id.* The court recognized “that future legislators may veto a particular project that the legislators who passed the Act might have thought desirable. But this type of judgment is fundamentally different from a subsequent legislative nullification of a policy that a former Legislature enacted into law.” *Id.*

333. *Id.* at 455.

334. *Id.* (citing N.J. STAT. ANN. § 52:18A-78.9 (West 1986)).

335. *Id.* (emphasis added).

Here, the delegated authority is narrowly limited. No single house or single legislator is empowered to approve new legislation. No danger of precipitate legislative action is posed. To the contrary, the veto provisions of the Act provide ADDITIONAL CHECKS against Building Authority projects which may in the future prove unwise or unduly costly. The presiding officers have power to disapprove the lease agreements only for building projects that the legislature has already approved. These lease agreements involve no policy determinations whatsoever; they merely establish rental rates sufficient to allow the Building Authority to repay its bondholders. Thus, the Act's veto provisions, despite their failure to conform with the principle of bicameralism, do not offend the Constitution.³³⁶

Lastly, at least one state case has upheld the constitutionality of a broad statutory scheme authorizing a legislative veto of executive regulations by concurrent resolution. In *Mead v. Arnell*,³³⁷ the Idaho Supreme Court considered a statute (similar to the statute struck down in *State ex rel. Stephan v. Kansas House of Representatives*)³³⁸ authorizing legislative rejection, amendment, or modification of agency rules deemed violative of the enabling statute's legislative intent.³³⁹

In its analysis, the *Mead* court focused on the nature of administrative rules which "may be given the force and effect of law," but found that they do not rise to the stature of statutory law.³⁴⁰ The court reiterated that "[o]nly the legislature can make law."³⁴¹ In addition, the *Mead* court handled the separation of powers question³⁴² substantially differently than most of the other state courts discussed herein. The *Mead* court did not find the legislative action to impinge on the powers of the executive:

Here, the legislative action has not invalidated the executive department's "execution of law." Such would be the case, for instance, if the legislature had passed a concurrent resolution to prevent the Attorney General from taking legal action for some violation of a statute. Enforcing the law of this state is a constitutionally mandated executive department function resting in

336. *Id.*

337. *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990).

338. *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622 (Kan. 1984).

339. IDAHO CODE § 67-5218 (1989).

340. *Mead*, 791 P.2d at 414 (citations omitted).

341. *Id.* at 415 (citations omitted) (emphasis added).

342. IDAHO CONST. art. II, § 1.

the office of the Attorney General. In such a case no **delegation** would be involved³⁴³

The court distinguished the violative non-delegation hypothetical from the issue before it, and stated:

Rule making that comes from a legislative delegation of power is neither the legal nor functional equivalent of constitutional powers. It is not constitutionally mandated; rather, it comes to the executive department through delegation from the legislature. This court . . . has consistently found the executive rule making authority to be rooted in a legislative delegation, not a power constitutionally granted to the executive.³⁴⁴

Thus, the *Mead* court dismissed the separation of powers argument, finding that the greater mischief under the Idaho scheme is a scenario wherein the Legislature would enact law without containing provisions which, if included, might invite gubernatorial veto. The Legislature might omit the "offensive" provisions to pass gubernatorial review, but then later amend the implementing regulations to include the omitted "offensive" provisions without presentment to the Governor. As the court stated:

We deal here only with the rejection of an administrative regulation. The perceived mischief is not present, or possible, in rejection of a rule or regulation. This holding should not be deemed to apply to any situations, set of facts or possible application other than the rejection of an administrative rule or regulation that has been promulgated pursuant to legislatively delegated authority.³⁴⁵

343. *Mead*, 791 P.2d at 417.

344. *Id.* The court then engaged in an interesting twist of logic: it compared its action to the U. S. Supreme Court, and by way of illustration, referred extensively to Justice White's dissent in *Chadha*:

The action of this Court over the last fifty years so closely parallels that of the United States Supreme Court in approving delegation of rule making authority to the executive that the arguments of Justice White dissenting in *I.N.S. v. Chadha* are directly applicable and state the case far more cogently than could this author

Id. (footnote omitted) (citation omitted). The *Mead* court acknowledged, by way of footnote, however, that the "legislative veto" in *Chadha* was held unconstitutional. *Id.* at 417 n.5. In part, the quotations bemoan a legislative Hobson's choice—to refrain from delegations of authority and thus write laws with an untoward level of specificity to cover endless policy circumstances—or to abdicate lawmaking authority to the executive branch. Further, the *Mead* court notes Justice White's difficulty in understanding why, if lawmaking power may be delegated to the executive branch, the reservation of a check on legislative power through the legislative veto violates constitutional precepts. *Id.* at 417.

345. *Id.* at 418.

The court also disposed of the argument that contributed to the fall of the statute in question in *Legislative Research Commission v. Brown*:³⁴⁶ that the legislative veto violated separation of powers between the legislative and judicial branches. The argument was that the Legislature was exercising a function that was exclusively judicial in reviewing and interpreting rules and regulations to determine if they complied with the legislative intent of the enabling statute.³⁴⁷

The court examined the constitutional role of the judiciary to determine whether an administrative rule conforms to the enabling statute, and contrasted it with the Legislature's "statutory entitlement" to determine whether an administrative rule reflects the legislative intent embodied in the enabling law. The court held that the legislative veto provision "makes clear that the legislature has reserved unto itself the power to reflect an administrative rule or regulation as part of the statutory process. This reservation is not an intrusion on the judiciary's constitutional powers."³⁴⁸

Thus, the constitutionality and appropriateness of the legislative veto remains an open question. The Florida courts have not been presented with the issue. Other jurisdictions, however, have grappled with a number of concerns and issues that must be confronted in Florida if the state ultimately embraces the concept of the legislative veto of administrative rules.

V. CONSIDERATIONS ON THE LEGISLATIVE VETO

This Article neither endorses nor condemns the idea of a legislative veto. Scholars have reached differing conclusions as to its appropriateness and legality.³⁴⁹ Elected officials and courts likewise are divided

346. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984).

347. *Mead*, 791 P.2d at 419.

348. *Id.* at 420. Although the court held the legislative veto provisions not violative of separation of powers principles between the legislative and either of the other branches, the court constrained itself thusly: "However, we do not suggest that all such legislative statutory reservations or rejections of rules or regulations pursuant thereto are necessarily consistent with the separation of powers principles." *Id.*

349. For commentary that generally does not favor the legislative veto, see Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. REV. 423 (1978); John B. Henry II, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979). For commentary that generally favors the legislative veto, see James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Nathaniel L. Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U. L. REV. 1064 (1981); James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 KAN. L.

as to the constitutionality and propriety of the concept. Ultimately, elected officials and the courts will determine the wisdom and suitability of the legislative veto as a tool for legislative oversight of executive agencies.

The numerous attempts in Florida to increase legislative oversight and control of administrative rulemaking generally, and to establish a legislative veto, in particular, appear to evidence a continuing level of dissatisfaction by the Legislature with extant methods of legislative oversight of executive agencies.³⁵⁰ An examination of the legislative history of these attempts indicates that the concept of the legislative veto remains politically viable in this state. If, as it appears, there is a continuing interest in the concept of the legislative veto, its proponents might consider the numerous issues that have been raised in Florida and in other jurisdictions before drafting a proposal. This Article seeks to identify those issues to facilitate their consideration.³⁵¹

Prior to discussing the legislative veto, an analysis of the interplay between the legislative and executive branches is necessary. Article II, section 3 of the Florida Constitution divides the powers of state government into three branches: the legislative, the executive, and the judicial. The provision prohibits any one branch from exercising any power appertaining to either of the other two branches, except as otherwise expressly provided in the Constitution.³⁵² Thus, unless otherwise constitutionally provided, only the Legislature can exercise the legislative power, only the Governor or executive agencies can exercise the executive power, and only the courts can exercise the judicial power.³⁵³

REV. 277 (1975).

For a comprehensive treatment of the legislative veto by individual states to that time, and commentary, see L. Harold Lévinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982). For discussion and commentary on the treatment of the legislative veto in the Model State Administrative Procedure Act, see Arthur E. Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617, 648-55 (1991).

350. See Appropriations Amendment No. 1 to Fla. SJR 766 (1992); Fla. SB 824 (1992); Fla. HB 711 (1992); Fla. SB 319 (1985); Fla. HB 812 (1984); Fla. HB 252 (1983); Fla. HB 535 (1983); Fla. HJR 3 (1982); Fla. SB 738 (1982); Fla. SB 921 (1982); Fla. HB 2 (1982); Fla. SJR 472 (1981); Fla. HJR 739 (1981); Fla. SB 457 (1981); Fla. CS for HBs 181 and 473 (1981); Fla. HB 181 (1981); Fla. HB 473 (1981); Fla. CS for SJRs 619 and 1398 (1976); Fla. CS for SB 1384 (1976).

351. [I]n discussing subjects, and arguing from evidence, conditioned in this way, we must be satisfied with a broad outline of the truth; that is, in arguing about what is for the most part so from premises which are for the most part true we must be content to draw conclusions that are similarly qualified.

THE ETHICS OF ARISTOTLE, THE NICOMACHEAN ETHICS (J.A.K. Thomson, trans.).

352. FLA. CONST. art. III, § 2.

353. State v. Atlantic Coast Line R.R., 47 So. 969 (Fla. 1908); State ex rel. Young v. Duval County, 79 So. 692 (Fla. 1918).

While the Florida Constitution prohibits one branch of government from exercising powers belonging to another, the lines delineating the functions of each branch increasingly have become blurred with the advent of legislative delegation. Some executive functions are derived not only from the Florida Constitution, but from statutory delegations of the Legislature.³⁵⁴ Specifically, the Legislature may delegate certain functions to executive agencies and require the promulgation of rules to facilitate that delegation.³⁵⁵ Delegating legislative power to the executive branch shifts the power to the executive, which in effect, "lets the genie out of the bottle." In delegating its authority, however, the Legislature must limit or condition the exercise of the power in order to maintain the constitutional balance of power between itself and the executive branch.³⁵⁶ If the Legislature is not satisfied with the way the executive exercises its delegated power, it may attempt to recapture a measure of the power delegated. To some degree, however, the executive has the power to resist the exertion of control by the Legislature. The struggle becomes one of forcing a reluctant genie back into the bottle.

Once the delegation is made, the Legislature oversees the executive branch to evaluate its exercise of legislatively delegated power. This Article has identified numerous mechanisms by which the Legislature presently maintains oversight of legislative delegations to the executive branch.³⁵⁷ The effective employment of oversight mechanisms by the Legislature is the first step in checking the executive's exercise of a legislatively delegated function. If the Legislature did not avail itself of these oversight and control options, power over the delegation would be shifted overwhelmingly in favor of the executive.

Through oversight, the Legislature may determine that the executive is not exercising appropriately the delegated legislative power. Alternatively, the Legislature may decide that the scope of the original delegation is flawed. If the Legislature determines that the executive has misapprehended its intent in delegating the powers exercised by the executive, then it has not only a right, but a duty to modify the delegation to clarify its intent. Similarly, it is appropriate for the Legisla-

354. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla. 1991); *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978).

355. *Chiles*, 589 So.2d at 260; *Askew*, 372 So.2d at 913.

356. *Chiles*, 589 So.2d at 260; *Askew*, 372 So.2d at 913.

357. The Legislature maintains oversight and control by exercising plenary oversight by committees of jurisdiction; scheduling programs for review and repeal; auditing programs through the Auditor General; requiring submission of executive branch rules to the JAPC; amending enabling statutes; requiring legislative ratification of executive branch rules; and imposing limitations through the appropriations process. *Chiles*, 589 So.2d at 260; *Askew*, 372 So.2d at 913.

ture to modify its delegation if it finds that the power delegated is too broad or is otherwise faulty. The traditional method by which the Legislature checks the legislative delegation in these events is through amending the enabling statute, either to rectify its deficiencies, or to rein in the power validly delegated but invalidly exercised.

Once the Legislature has made its delegation of power, however, the power has shifted to the executive, as the Governor can foreclose amendments to the enabling statute by exercising the gubernatorial veto. The Legislature, of course, may override the Governor's veto, but only by a two-thirds vote.³⁵⁸ Thus, a legislative override of a gubernatorial veto of an amended enabling statute may be only a theoretical possibility. The percentage of vetoed bills that are overridden by the Legislature is statistically small.³⁵⁹ Thus, one might argue that, as a practical matter, once the Legislature has delegated a function, it has limited power to rein in that delegation through statutory amendment.

It could therefore be argued that the legislative power to amend statutory law is sufficient. Once the legislative delegation has been made and implementation commenced, a compelling legislative interest—or cooperation between the legislative and executive branches—should be required to change the scope of the original delegation through statutory amendment. On the other hand, at least one commentator has argued that the difficulty in reining in the legislative power once delegated imposes too great a burden on the Legislature:

When the delegator is the legislature, it has the power to specify that some actions are within the scope of the delegate's power and that others are not. If the delegate pursues an impermissible action, the legislative power would be an empty one indeed if the legislature lacked the simple power to constrain the delegate's actions within the scope of the delegation. It has been argued that the legislature should, at such a time, enact a new law to more specifically define the scope of the delegation. Such a course, however, would subject the legislative act to executive veto, requiring a two-thirds vote of the legislature to override. This means that a two-thirds vote of the legislature is needed to define more precisely the scope of a delegation, when the original delegation required but a majority vote to take effect. It defies logic to argue that the legislature, having by

358. FLA. CONST. art. III, § 8.

359. For example, with respect to legislation passed in the 1993 regular session, the Legislature passed 413 bills. Of these, the Governor vetoed 16. The Legislature overrode none of the 16 vetoed bills. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, Statistics Report at 6.

majority vote directed an agency to take certain actions, should then be required to muster a two-thirds vote in order to require the agency to stay within the scope of that original delegation.³⁶⁰

Perhaps because of the difficulty of amending the enabling statute to restrict the exercise of a legislative delegation, the Legislature exercises a variety of mechanisms other than traditional statutory amendment to shift power back to the Legislature.

First, the Legislature can restrict or limit an executive program through proviso language attached to a legislative appropriation.³⁶¹ The Governor has significant constitutional power over legislative appropriations through the line item veto; but the Governor may not veto a proviso or restriction unless he also vetoes the appropriation to which it relates.³⁶² If the proviso or restriction is tied directly to an important funding mechanism for the program, the Governor may be forced to accept the proviso or restriction rather than jeopardize the program by vetoing the proviso or restriction and thus the funding mechanism for the program.

Second, the Legislature may assure that a delegation of power to the executive branch will not be perpetual by scheduling the enabling statute for future repeal and prior legislative review. The Legislature generally provides for this mechanism in the enabling law itself. Thus, initially, the Governor must either accept the condition—future repeal with prior legislative review—or veto the enabling legislation and forego the delegation. If a delegation is enacted with a mandated repeal and review, the mechanism facilitates legislative oversight by requiring a legislative staff review. Further, it may serve as a mechanism for enacting amendments to the enabling statute.³⁶³ Since the future repeal date has been set in the enabling law, a law so structured will be repealed unless reenacted by the Legislature and approved by the Governor (or allowed to become law without his signature). To save a delegation from automatic repeal, the Legislature may amend the delegation in the legislative reenactment. The Governor either must accept the amendments in the reenacted legislation, or allow the delegation to expire automatically by operation of the future repeal mechanism.

Third, the Legislature may retain the power to ratify executive agency rules in the initial legislative delegation to the executive

360. *Abourezk*, *supra* note 349, at 332 (footnotes omitted). See also *INS v. Chadha*, 462 U.S. 919, 986-87 (White, J., dissenting); Opinion of the J.J., 431 A.2d 783 (N.H. 1981).

361. FLA. CONST. art. III, § 8(a).

362. *Id.*

363. See *Alterman Transp. Lines v. State*, 405 So. 2d 456 (Fla. 1st DCA 1981).

branch, which subjects the exercise of the delegation to approval by the Legislature.³⁶⁴ In these circumstances, if the Legislature does not ratify the proposed executive agency rules, they do not become effective. Once again, the Governor is confronted with a choice: accept the delegation with the condition that executive rules be legislatively ratified or decline the delegation by gubernatorial veto. As in the case of reenacted legislation, the Governor either must accept legislatively amended rules that are conditioned upon legislative ratification, or lose the delegation that the rule implements.

Although the gubernatorial veto power may be strong enough to overcome the legislative will, the Legislature also wields important powers in conditioning, limiting, or withdrawing the legislative delegation to the executive. Viewed in this context, a properly circumscribed legislative veto perhaps may not be as dramatic an intrusion upon the status quo as it otherwise may first appear. Like proviso limitations in appropriations bills, mandated future repeal dates in enabling legislation, and required legislative ratification of administrative rules, the legislative veto may be seen as conditioning a legislative delegation.

One of the more practical arguments against imposing a legislative veto, however, is that it is unnecessary. Under current law, the JAPC has the authority to object to agency rules which it finds are an invalid exercise of delegated legislative authority.³⁶⁵ In response, the promulgating executive agency may modify, amend, withdraw, or repeal the rule, but it is not required to do any of the foregoing.³⁶⁶ Instead, the agency may adopt the rule, and it may become effective. The JAPC objection in this case merely appears as a footnote to the rule in the *Florida Administrative Code*.³⁶⁷ In fact, an examination of agency and legislative responses to the JAPC objections demonstrates that the process works effectively either to conform the proposed rules to enabling statutes or to motivate change in enabling statutes to embrace the rule to which the JAPC has objected.³⁶⁸

According to the JAPC staff, while a few agencies initially refuse to modify their rules following an objection, virtually all rules ultimately are modified to meet objections.³⁶⁹ Alternatively, in those cases in which the rules are not modified to meet the objections, the enabling

364. See, e.g., FLA. STAT. §§ 163.3177, 403.817, 403.8171 (1991).

365. *Id.* § 120.545 (1991).

366. *Id.*

367. *Id.*

368. See table *supra* note 54.

369. Document (n.d.) provided by Joint Admin. Procs. Comm. (on file with Fla. S. Comm. on Govtl. Ops.).

statute is amended by the Legislature to conform to the rule.³⁷⁰ Based on this experience, it can be argued that the imposition of the legislative veto is unwarranted by the circumstances. The rulemaking process in Florida demonstrates that agencies, although not required to do so, are willing to modify their proposed rules to capitulate to objections by the JAPC. On the other hand, in cases in which executive agencies resolve to adopt rules notwithstanding the JAPC's objections, the Legislature has thus far been willing to amend enabling statutes to reflect the position of the agencies.³⁷¹

In analyzing the need for the legislative veto based upon these experiences, however, one should recognize that the rules modified by an agency are usually proposed rules. There is no systematic method by which by the JAPC examines existing agency rules, and concerns about a rule may not always be formulated at the hypothetical, pre-implementation stage.³⁷² In some instances, an effective comparison of the rule to the scope of the delegated legislative authority may be possible only after the rule has been implemented. Thus, if the Legislature is dissatisfied primarily with existing rules, the fact that proposed rules usually are modified to meet obligations by the JAPC may be of somewhat less importance.

Even if circumstances heretofore have militated against the legislative veto, perhaps the demands of modern governance make a better argument in its favor. Given the complexity of modern regulatory responsibilities and the level of expertise they require, the enabling authority for a delegation may be inadequate to address the circumstances within which the agency operates. As a result, there are those who advocate broader enabling statutes that allow a greater flexibility in the execution of the legislative delegation. A recent example of legislation initiated at the behest of the executive branch is illustrative.

In 1993, the Governor proposed legislation to merge the Department of Natural Resources with the Department of Environmental Regulation.³⁷³ The legislation that was filed, Senate Bill 1500 and House Bill 1751,³⁷⁴ did not set out in full any of the amended acts, sections, or subsections of the enabling statutes that it would have af-

370. *Id.*

371. *Id.*

372. Telephone interview with Staff of the Joint Admin. Procs. Comm. (June 29, 1993) (notes on file with Fla. S. Comm. on Govtl. Ops.).

373. OFFICE OF THE GOVERNOR, PRESS RELEASE (January 28, 1993) (on file with the author).

374. Fla. SB 1500 (1993); Fla. HB 1751 (1993).

fects and purported to amend.³⁷⁵ The bills were written in broad terms at the request of the executive branch in order to give the executive the flexibility to determine appropriate environmental and organizational policies in the reorganization of two environmental departments into a single department.³⁷⁶ The broadness of the language granting reorganization authority to the new department was discussed in at least one committee of reference.³⁷⁷ Some members ex-

375. See FLA. CONST. art. III, § 6. The Florida Constitution requires laws that revise or amend to set out in full the revised or amended act, section, subsection, or paragraph of a subsection.

376. Fla. S. Comm. on Govtl. Ops., tape recording of proceedings (Mar. 10, 1993) (on file with comm.) (testimony of Virginia Wetherell, Secretary, Dep't of Env'tl. Reg.).

377. A portion of the relevant testimony and comments was as follows:
Secretary Wetherell stated:

What happens when you get into all of the detail of an environmental reorganization is what happened years ago . . . everyone got bogged down in all of the detail. When one party or the other attempts to upset the delicate permitting balance that we have in this State, it gets bogged down; it's just as simple as that. And they were not able to make any progress years ago. . . .

* * *

Sen. Buddy Dyer, Dem., Orlando, stated: "But you are asking us to trust you quite a bit and I want your assurance to this committee that that's warranted"

Secretary Wetherell stated:

Let me see if I can address that trust question. I think that as a previous member [of the Legislature] I found that in every bill that I had to look at, there was some level of trust that had to be there. You had to trust the committee staff who helped you prepare it or who gave you their benefit of experience on it and gave you advice. You had to trust other members who had more expertise in an issue than you have on a particular issue. You had to trust yourself to take a vote. You have to trust the executive branch to carry out that law that you passed. So there's a lot of trust on every bill that you ever look at. I'm not asking you to trust me; I'm asking you to hold me accountable for what we're going to do. There have been a lot of people to [sic] look at this form of the bill who believe that it will make a difference in environmental protection for this State; who believe that it will make a difference to business from a streamlining of permitting and who believe that it will work. So I'm asking you to hold me accountable through this report; in 9 months we'll come back with a report; we will have involved all of the stakeholders and we will have a report to you on what we have done. And I plan to be back a year from now, God willing, and I know you do too. So you will hold me accountable, I'm sure

* * *

Sen. Curt Kiser, Repub., Palm Harbor, stated:

[I]f you see the references made in [the staff report on the proposed merger] you'll see that I don't think that the staff has taken this issue lightly. I think that they're concerned about going forward with a bill that's—like she said—brief and says in concept what they [the delegates] want to do

* * *

Sen. Robert Harden, Repub., Fort Walton, Chair, stated:

. . . [T]he reservation I have . . . is [that] by granting a "broad brush" authority to the department . . . to merge those two departments . . . there are going to be some substantial policy decisions that may be made through the rulemaking process Obviously incidental in the merging of those two departments . . . you'll have a great

pressed concern that the grant of power to the executive was broad, and that the enabling bills may not have contained adequate controls on the new executive department.³⁷⁸ Proponents of the legislation responded that legislative debate on the myriad policy issues that underscore such a major proposed reorganization would jeopardize passage of the legislation.³⁷⁹ Further, proponents argued that the statute's flexibility ultimately would be checked by legislative controls, such as reporting requirements, following implementation of the broad reorganization delegation.³⁸⁰ Some executive branch delegates and proponents read the reporting requirement as a promise to submit legislation following the reorganization to conform elements of statutory law to the terms of the implemented reorganization.³⁸¹

The executive branch may find it advantageous to have greater flexibility in implementing complex programs delegated by the Legislature. As it did with the legislation merging the departments of Natural Resources and Environmental Regulation, the Legislature may cooperate with the executive branch and forego highly restrictive delegations. While the Legislature may cooperate with the executive branch by enacting legislation which is less specific and which provides the executive with greater flexibility, the Legislature is likely to seek additional or more effective methods of legislative oversight and control in the bargain.³⁸² In its search, the Legislature may reconsider some form of the legislative veto.

A primary point to consider in any discussion of the legislative veto is the effect of such a proposal on the fundamental scheme of government. As enacted in various other jurisdictions and as proposed in

deal of latitude in dealing with those issues. . . .

Fla. S. Comm. on Govtl. Ops., tape recording of proceedings (Mar. 10, 1993) (on file with comm.) [hereinafter March 10 Committee Debate] (discussion of CS for SB 1500 (1993)).

378. March 10 Committee Debate, *supra* note 376; Fla. S. Comm. on Govtl. Ops., tape recordings of proceedings (Mar. 17, 1993) (Mar. 22, 1993) (on file with comm.) [hereinafter March 17 and March 22 Committee Debates] (discussion of CS for SB 1500 (1993)).

379. See March 10 Committee Debate, *supra* note 376 (testimony of Virginia Wetherell, Secretary, Dep't of Envtl. Reg., and discussion of CS for SB 1500 (1993)); March 17 and March 22 Committee Debates, *supra* note 378 (testimony of Charles Lee, Florida Audobon Society and discussion of CS for SB 1500 (1993)).

380. March 10 Committee Debate, *supra* note 376; March 17 and March 22 Committee Debate, *supra* note 378. The legislation which finally passed, Committee Substitute for Committee Substitute for House Bill 1751, contained a number of traditional legislative controls, including declarations of legislative intent, reporting requirements, mandated future repeals and prior reviews, mandated legislative ratification of selected rules, and appropriations limitations. See Fla. CS for HB 1751 (1993); ch. 93-213, 1993 Fla. Laws 2129.

381. March 10 Committee Debate, *supra* note 376; March 17 and March 22 Committee Debates, *supra* note 378 (discussion of CS for SB 1500 (1993)).

382. See also *INS v. Chadha*, 462 U.S. 919, 974 (1983) (White, J., dissenting); *General Assembly of State v. Byrne*, 448 A.2d 438, 447 (N.J. 1982).

Florida, the legislative veto is intended to serve as an additional means of legislative oversight and control. Unless properly circumscribed, however, the legislative veto may affect negatively the delicate balance of powers between the branches of government.

A legislative veto may be enacted either statutorily or constitutionally. With respect to the issue of separation of powers, statutory schemes appear to present the greatest difficulty.³⁸³ A statutorily established legislative veto that empowers the Legislature to encroach upon the executive or judiciary is invalid in Florida.³⁸⁴ While few courts have embraced the legislative veto, those that have done so have recognized that it cannot curtail or change the exercise of a constitutional executive power. In *Mead v. Arnell*,³⁸⁵ the Idaho Supreme Court upheld a broad statutory legislative veto power to reject, amend, or modify an executive rule, because it found that the legislative veto power did not check the executive's exercise of a constitutionally derived power, as opposed to a delegated power.³⁸⁶ Thus, to evaluate whether a statutory legislative veto offends constitutional precepts, the nature of the power must be determined.³⁸⁷ To avoid infringing upon the executive's constitutional powers, a statutory legislative veto power must be limited to executive functions delegated by the Legislature.³⁸⁸

Notwithstanding the broad statute upheld in *Mead*, a statute authorizing a narrower exercise of the legislative veto more likely would pass constitutional muster than would one giving the Legislature broad power to amend proposed executive actions. In this vein, a statutory legislative veto may intrude less on executive powers if it operates only to reject or repeal, and not to amend, executive agency rules. A legislative veto mechanism that permits the Legislature to amend an administrative rule, as opposed to simply vetoing it, comes perilously close to supplanting the executive function of rulemaking which has been delegated to the executive.³⁸⁹ Chapter 120, *Florida Statutes*, con-

383. See, e.g., Legislative Research Comm'n v Brown, 664 S.W.2d 907 (Ky. 1984); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d 622 (Kan. 1984); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); *Byrne*, 448 A.2d at 438.

384. This is implicit in Article II of the Florida Constitution. See FLA. CONST. art. II, § 3.

385. *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990).

386. *Id.* at 418.

387. *Id.*

388. *Id.*

389. This is not to be confused with the legislative ratification required of rules promulgated pursuant to section 403.8171, *Florida Statutes* (1984), the vegetative index; and section 163.3177(9), *Florida Statutes* (1985), requiring submission of certain rules specifying criteria for comprehensive plan elements, discussed, *supra* note 58-85 and accompanying text. Both of these statutory requirements contemplated alteration or rejection of submitted rules by statutory enactment with presentment to the Governor.

tains a panoply of processes for effective, thoughtful, and public exercises of agency rulemaking.³⁹⁰ A legislative veto mechanism which allows the Legislature to amend rules would shift the focus of these established processes.

Furthermore, a veto that authorizes legislative amendment of agency rules might circumvent the underlying statutory standard or policy without amending the enabling statute itself. A legislative amendment of the underlying statutory standard through legislative amendment of agency rules could, in effect, constitute an exercise of the Legislature's lawmaking function that would bypass the gubernatorial presentment requirements of the Florida Constitution.³⁹¹

The opportunity for the Legislature to change the existing statutory policy or standard through the guise of the legislative veto is diminished, however, when the Legislature is given only the option of vetoing a rule rather than amending it.³⁹² In exercising this type of veto, the inquiry is limited to whether the rule is within the scope of the legislative delegation. This type of legislative veto may be viewed as functioning less as a lawmaking power, which requires presentment to the Governor, and more simply as legislative guidance to the executive in assuring faithful adherence to the enabling statute.³⁹³ This type of legislative veto would require the Legislature to resort to established lawmaking procedures, which include presentment to the Governor, in order to change a statutory standard or policy.

The integrity of the relationship between the legislative and executive branches would more likely be maintained if the legislative veto were restricted to determinations of compliance with the legislative delegation. It is precisely this restriction, however, which makes a legislative veto provision suspect when analyzed in terms of the separation of powers between the Legislature and the judiciary. The legislative veto, by nature, involves interpretation. It is the function of the judiciary to declare what the law is.³⁹⁴ It is not the function of the judiciary to make law, but to interpret it. Administrative agencies are

390. See FLA. STAT. § 120.54 (1991).

391. FLA. CONST. art. III, § 8(a).

392. This point is similar to one of the points raised by the challengers to the legislative veto in *Mead v. Arnell*, 791 P.2d 410, 418 (1990). The point raised was that the legislative veto amendment could be used to change the legislative standard or policy, without gubernatorial presentment, to include policies or standards that could not have survived gubernatorial veto in the initial enactment. *Id.* The *Mead* court noted the issue, but found that only the veto, and not the amendment, was presented by the factual situation before the court and thus it did not pass upon it. *Id.*

393. See, e.g., Abourezk, *supra* note 349.

394. *Jackson Lumber Co. v. Walton County*, 116 So. 771 (Fla.), *appeal dismissed*, 296 U.S. 667 (1928).

subject to judicial power.³⁹⁵ The judicial function includes determinations as to whether administrative rules comport with the legislative delegation.³⁹⁶ If the Legislature is to interpret the law in a circumscribed, non-policymaking fashion, the exercise will closely mirror the function of the judiciary. Therefore, a statutorily created legislative veto may unconstitutionally vest the Legislature with judicial power.

It may not be possible to resolve the problem of legislative intrusion into the prerogatives of the judicial branch in a statutorily enacted legislative veto. In Florida, however, the problem may be avoided by amending the constitution to grant the Legislature veto authority over rules. The Florida Constitution provides an express exception for constitutionally established deviations from separation-of-powers confines.³⁹⁷

While a constitutionally established veto mechanism would eliminate constitutional questions in the separation of powers between the legislative and judicial branches, there are, nonetheless, practical considerations which should be recognized. The Legislature takes public testimony and engages in open debate in making law, whereas the judicial branch functions in a comparatively cloistered environment that is more conducive to strict legal analyses. Public debates infused with the desires of constituents and public policy preferences tend not to be of the same restrained analytical mode as are judicial determinations. Therefore, the Legislature may not be designed to engage in the type of legal analyses for which the courts are designed.³⁹⁸ On the other hand, the Legislature, through reliance on its staff's analyses, often makes legal determinations when it adopts policy. In addition, a significant percentage of the membership of the Legislature historically has been comprised of lawyers. Legal analysis is not, therefore, an evaluation foreign to legislative processes.

It would not appear that authorizing judicial review of a legislative determination to reject or repeal, as opposed to amend, a rule would be advisable. Providing for judicial review of a legislatively vetoed rule would give the judiciary a greater power than it presently has over a gubernatorial veto. The Governor's decision to veto a bill is not reviewable by the judiciary. If the Legislature vetoes a proposed rule,

395. *Florida Motor Lines, Inc. v. Railroad Comm'rs*, 129 So. 876 (Fla. 1930); *Canney v. Board of Pub. Instruction*, 222 So. 2d 803 (Fla. 1st DCA 1969).

396. *Florida E. Coast Ry. v. State*, 83 So. 708 (Fla. 1920).

397. FLA. CONST. art. II, § 3.

398. On the other hand, simply because the judiciary's constitutional role is to interpret the law does not necessarily insulate the judiciary from considering policy issues when adjudicating cases.

that determination may be seen as functionally equivalent to the negation of a bill by the Governor.

On the other hand, the Legislature may decide not to veto a rule that is placed before it. Commentators have grappled with the judicial weight that should be given to the Legislature's determination not to veto a rule.³⁹⁹ It is arguable that the Legislature's inaction should not change the existing processes or considerations by the courts in determining the validity of a proposed or existing rule. Those who maintain that the courts would not fail to be swayed by the Legislature's action (or inaction) should be mindful that the courts are not daunted by popular political support for enactments they find unconstitutional. It is difficult to see the dynamics as fundamentally different in this scenario.

While a carefully crafted, statutorily established legislative veto may satisfy constitutional requirements, a constitutional legislative veto may avoid the potential pitfalls of the statutory method, particularly regarding the separation of powers doctrine. As noted above, the Florida Constitution expressly recognizes exceptions to the separation of powers doctrine.⁴⁰⁰ Thus, even a legislative veto that encroaches to some degree upon the powers of either of the other two branches could be lawful if properly drafted and adopted as a constitutional amendment.

Constitutionally authorizing the legislative veto may have practical benefits, as well. First, it may limit protracted litigation over the constitutionality of the legislative veto. Second, putting the proposal before the electorate for a vote, rather than simply adopting it legislatively, would provide a direct measurement of public sentiment for the concept.⁴⁰¹

Irrespective of the means of establishing the legislative veto, there are additional practical implications to be considered. These include whether a legislative record of the exercise of the legislative veto should be maintained; whether the veto should be exercised by a component comprised of less than the membership of both houses; and whether the legislative veto should be used to invalidate both proposed and existing rules.

Commentators have cautioned that, if the legislative veto is not formulated to guarantee openness, the determination to veto may be secretive and based on inadequate information:

399. See, e.g., Bruff & Gellhorn, *supra* note 349, at 1429.

400. FLA. CONST. art. II, § 3.

401. In November 1976, the Florida electors defeated a constitutional amendment to establish a legislative veto. See discussion *supra* notes 175-97 and accompanying text.

When a legislative veto system is implemented, informal contacts between the agency and the committees, staff personnel, and members of [the legislative body] may increase. By their very nature these contacts are likely to be secret, or at least undisclosed by the administrative record. If the result is to deny interested persons fair treatment, to deflect an agency from its statutory grounds for decision, or to impair the ability of the courts to review rules, a violation of due process or the governing statute may result⁴⁰²

To address this criticism, any legislative veto—whether statutorily or constitutionally established—should ensure that a legislative record is created. When the Legislature enacts enabling statutes, a legislative record is developed through the committee process. The committee process gives the public and the agency opportunities to testify, which thereby assists the Legislature in developing its legislative standard or policy, and also works to inform the agency of the broad outlines the Legislature intends in its delegation. Incorporating this type of legislative record in the legislative veto process would assist an agency to understand the Legislature's perception of where the agency's deviation from the enabling statute occurred.⁴⁰³

The JAPC process and the process of legislative consideration through substantive committees are already well-equipped to formulate a legislative record. Currently, the agency is made aware of the views of some members regarding proposed rules by the JAPC's formal consideration of objections in the rulemaking endeavor. These processes—if used in a legislative veto scheme—would inform the agency as to the specific deviations from the intent of the enabling statute. Additionally, the agency would be given an opportunity to convince the Legislature that the proposed or existing rule is within the scope of the legislative delegation.

Neither the JAPC nor a substantive legislative committee, however, should be the final authority for determining whether a rule is to be legislatively vetoed. The legislative veto should be exercised by nothing less than both houses of the Legislature. Legislative veto provisions that vest final authority in legislative leaders, committees, or a single house violate the concept of bicameralism that forms the foundation of the lawmaking process. Since the entire Legislature deter-

402. Bruff & Gellhorn, *supra* note 349, at 1377-78.

403. A legislative record will not disclose efforts by lobbyists to sway individual legislators in the decision to exercise the legislative veto over an administrative rule. Regardless of the method the Legislature chooses to check an agency's exercise of delegated legislative authority—whether by statutory amendment, limitations on agency appropriations, or otherwise—the same criticism regarding lack of disclosure may be leveled.

mines whether to delegate its power, the entire Legislature should decide whether an executive agency rule falls within the scope of the delegation.

For this reason, a proposed agency rule should not be required to be "validated" by the Legislature before it is effective. If a validation by the Legislature were required, a single house could refuse to approve the validation and effectively veto the proposed rule.⁴⁰⁴ Further, there is scant evidence that executive agencies are so flagrantly violating the scope of their delegated legislative authority in such a widespread manner that the legislative imprimatur is necessary before any agency rule may become effective.

In this regard, chapter 120, *Florida Statutes*, establishes a number of procedures that must be complied with before a rule is effective. These include review by the JAPC, requirements for public hearing if requested, proceedings to challenge a proposed rule, and judicial review.⁴⁰⁵ It does not appear that these multifaceted provisions have been ineffective in assisting agencies in properly formulating a rule. Moreover, legislative validation of agency rules would be cumbersome and duplicative of processes already employed and available in the rulemaking process. Further, it would delay unnecessarily the implementation of statutorily mandated programs. Instead, any legislative veto proposed would be better established if it were calculated to be used sparingly and in the most unusual circumstances. Requiring the executive routinely to submit each rulemaking proposal to the Legislature before implementation likely would require a full-time commitment of members to legislative duties, and would prevent the executive branch from responding to legislative directives in a timely manner.

A final practical consideration is whether the legislative veto should be limited to veto of proposed rules, or whether it should authorize the Legislature to repeal existing rules as well. Limiting the use of the legislative veto to proposed rules would ensure that entire regulatory schemes would not be debilitated by the legislative repeal of an existing rule. On the other hand, as previously noted, very often concerns regarding a rule are not developed until after implementation begins.⁴⁰⁶ A legislative veto which is limited to proposed rules likely would be used more extensively by the Legislature than one which reaches existing rules. The Legislature perhaps would decide close

404. *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

405. See *supra* notes 41-54 and accompanying text.

406. Presumably, this is one of the reasons that section 120.56, *Florida Statutes*, which establishes a procedure to challenge existing rules, was adopted. Further, the JAPC is authorized in section 11.60, *Florida Statutes*, to seek judicial declarations of the invalidity of existing rules, likely for the same reason.

cases by vetoing the proposed rule, rather than allowing the rule to go into effect, and thereafter evaluating whether the agency's implementation exceeds the scope of the delegation. Thus, foreclosing the Legislature from exercising a legislative veto over existing rules actually may encourage the Legislature to veto the proposed rules, rather than resort to current oversight methods while evaluating the rules as implemented.

Although using the legislative veto to repeal existing rules, in some cases, may disrupt a coherent regulatory scheme, the same result could occur under the present system if an existing rule is challenged successfully pursuant to section 120.56, *Florida Statutes*.⁴⁰⁷ Despite this potential, there has been no hue and cry for repeal of this section, which has been in effect since 1974. The disruption of a coherent program through piecemeal invalidation of existing rules is a valid concern, however, and the Legislature would be wise to take steps to ameliorate this negative consequence. One way in which the Legislature could minimize this occurrence would be by subjecting the entire regulatory program to review by appropriate substantive legislative committees when a concurrent resolution is introduced to repeal an existing rule. In such instances, the executive agency whose rule is being reviewed should be given the opportunity to be heard. This process would serve to inform the Legislature about the regulatory program. In the regulatory program review process, a legislative record likewise would be developed to the benefit of the agency and the Legislature.

If the Legislature is given only the authority to veto proposed rules, this may cause a delay in implementation of the rule because the Legislature is a part-time body. In some instances, a proposed rule may become effective before the Legislature convenes to consider a recommendation on a legislative veto. This circumstance would tend to favor the authorization of the legislative veto for adopted rules. If the legislative veto were limited to proposed rules, the alternative in this circumstance would be to give the JAPC the power to suspend the proposed rule until the Legislature convenes. The Florida courts may find, however, as did the Kentucky Supreme Court in *Legislative Research Commission v. Brown*,⁴⁰⁸ that the power to suspend constitutes a "legislative veto" in and of itself. This could be found to vest the "veto" power in the JAPC which, as discussed above, should not be

407. FLA. STAT. § 120.56 (1991).

408. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984).

vested with the whole of the legislative power. These factors should be considered in determining whether a legislative veto power should be extended both to proposed and existing rules.

As is evident from the foregoing discussion, there is ample historical evidence that the Legislature is not completely satisfied with extant methods of legislative oversight and control. Nevertheless, the Legislature may be inclined to cooperate with the executive branch in crafting enabling legislation that guarantees broad executive branch operating flexibility. If more flexibility in enabling legislation is desired, but legislators continue to remain somewhat dissatisfied with present oversight mechanisms, it is likely that additional means of legislative oversight and control of delegations to the executive, including the legislative veto, again will be considered by the Legislature.

Drafters of any legislative veto should be cautioned that such a procedure inherently threatens the balance of power between the branches of government. It should be drafted carefully so as not to strengthen unduly one branch at the expense of another. In order to preserve the balance of power and avoid constitutional infirmities, a legislative veto should require action by the full Legislature, include an open process replete with the development of a legislative record, and be limited to a pure legislative veto—not a legislative amendment—of an executive agency rule.

