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The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota

Philip P. Frickey*

INTRODUCTION

Since the New Deal, substantial federal and state administrative bureaucracies have been created to implement government programs. Many of these administrative agencies have been endowed with the authority to promulgate rules and regulations that have the force of law. This legislative delegation of rule-making authority to administrative agencies makes good sense when agency expertise is required to unravel the solutions to complex problems, or when the general mandates of a statute need to be fine-tuned to the facts of life. Nonetheless, broad delegations of law-making power to unelected bureaucracies conflict with the American concept of democracy, which envisions law making as a legislative, rather than executive, function.

A major challenge to contemporary American government is to ensure meaningful legislative oversight of administrative rule making. One popular yet constitutionally questionable method of oversight is the legislative veto, which "conditions a delegation of legislative authority upon a later judgment by [the legislature] on whether a rule or act implementing that delegation conforms to [legislative] intent."1 In 1983, in dissenting from Immigration & Naturalization Service v. Chadha,2

* Associate Professor of Law, University of Minnesota Law School. An earlier version of this Article appeared as The Constitutionality of the Legislative Veto in Minnesota (Sept. 1985), a paper prepared for "The Future of the State Legislature," an ongoing study of the Hubert H. Humphrey Institute of Public Affairs, University of Minnesota. Carl Auerbach, Dan Farber, and Royce Hanson provided valuable comments on a draft of that paper. Thanks also go to Sandra K. Radeke, Class of 1985, University of Minnesota Law School, for her research assistance with that paper, and to Daniel Hill, Class of 1986, University of Minnesota Law School, for help with this revision.

the landmark decision of the United States Supreme Court holding that the federal legislative veto violated the United States Constitution, Justice Byron R. White noted that, "over the past five decades, the legislative veto has been placed in nearly 200 [federal] statutes." Many states have similarly embraced the legislative veto, and the constitutionality of the device in this context will depend on state constitutional law.

Minnesota and several other states have adopted a type of legislative veto under which a legislative committee has the authority to suspend the legal effect of administrative rules. This Article evaluates the constitutionality of this approach. The

3. Id. at 968 (White, J., dissenting). An appendix to Justice White's dissenting opinion included a compilation of federal statutes containing legislative-veto provisions. See id. at 1003-13.

4. One commentator, just prior to the decision of the United States Supreme Court in Chadha, stated:

State approaches toward legislative control fall into the following categories. Eleven states have not adopted any system of legislative supervision; they continue to rely on the general power of the legislature to enact statutes whenever needed. Fifteen states have established advisory committees to perform systematic review of agency rules and to make recommendations for legislative action which must be done by statute. One state has a one-house veto of agency rules. Eleven states have a two-house veto of agency rules; additional states had this type of system until it was declared unconstitutional. Nine states provide for final legislative action only by statute and authorize a legislative committee to suspend the effectiveness of a rule for a limited time pending final legislative action. Three states and the 1981 revision of the Model State Administrative Procedure Act provide for final legislative action only by statute pursuant to recommendations from an advisory committee; if the committee finds a rule objectionable, the committee's objection is published with the rule, and the agency has the burden of persuading the court that the rule is valid in any subsequent litigation challenging the rule's validity.


5. A recent effort to survey the status of the legislative veto in the states concluded that, in addition to Minnesota, nine states—Alabama, Alaska, Connecticut, Illinois, Kentucky, Michigan, Nebraska, Nevada, and South Dakota—authorize a legislative committee to suspend administrative rules. See Comment, supra note 4, at 527 & nn. 282-84. In South Dakota committee suspension is expressly authorized by the state constitution and therefore is presumably unassailable under state law. See S.D. CONST. art. III, § 30. The Kentucky scheme was declared unconstitutional in Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 919 (Ky. 1984).
circumstances in Minnesota are used for illustrative purposes, but the analysis presented should be useful in assessing the constitutionality of legislative committee rule-suspension authority in other states as well.

Part I of this Article examines the powers and activities of the Legislative Commission to Review Administrative Rules ("LCRAR" or the "Commission"), the body controlling the legislative veto in Minnesota. Part II addresses whether the legislative veto complies with the Minnesota Constitution. After examining the language and structure of the Minnesota Constitution, relevant state and federal law, and public policy concerns, it argues that LCRAR's authority to suspend agency rules is unconstitutional. Part III examines the apparent inconsistency between the constitutionality of broad delegation of rule-making authority to agencies and the unconstitutionality of the legislative veto. The Article concludes that the different constitutional concerns arising from these mechanisms explain their disparate constitutional treatment.

I. LEGISLATIVE OVERSIGHT OF AGENCY RULE MAKING IN MINNESOTA

Agency rule-making procedures, the form of rules, and legislative and judicial review of final rules are controlled by the Minnesota Administrative Procedure Act ("MAPA"). Although an extended discussion of MAPA is beyond the scope of this Article, several provisions are relevant in the present context.

In most circumstances, MAPA provides two methods of rule making. "Noncontroversial rules" are adopted through rather traditional "notice and comment" procedures, in which persons interested in the rule may participate by submitting written comments in timely fashion. "Controversial rules," in contrast, may be promulgated only through a time-consuming, burdensome process in which full public hearings before an administrative law judge are required. Both schemes would seem to provide sufficient opportunity for public involvement in the rule-making process. Moreover, MAPA further safe-

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10. There is a narrow exception to this general format. MAPA also pro-
guards the public interest by providing several avenues of judicial relief from invalid rules. Any person whose rights have been impaired by a rule may petition the Minnesota Court of Appeals to review the rule. In addition, persons against whom enforcement of a rule is sought ordinarily may defend on the ground that the rule is invalid.

The constitutionality and usefulness of legislative committee authority must be understood in this context. When the legislative committee exercises this authority, it is suspending a rule that has already run the gauntlet of public scrutiny, that could be challenged judicially, and that could be nullified by statute.

A. POWERS OF THE LEGISLATIVE COMMISSION TO REVIEW ADMINISTRATIVE RULES

The Minnesota Legislature created LCRAR in 1974. LCRAR consists of “five senators appointed by the committee on committees of the senate and five representatives appointed by the speaker of the house of representatives.” Its purpose is to “promote adequate and proper rules by agencies and an understanding upon the part of the public respecting them.”

LCRAR is empowered to “hold public hearings to investigate complaints with respect to rules if it considers the complaints meritorious and worthy of attention.” On the basis of testimony received at any such hearing, LCRAR may “suspend...
any rule complained of by the affirmative vote of at least six members.”

Before suspending a rule, however, LCRAR must “request the speaker of the house and the president of the senate to refer the question of suspension of the given rule or rules to the appropriate committee or committees of the respective houses for the committees’ recommendations.” The House and Senate committee recommendations are purely advisory, but LCRAR may not suspend any rule until it has received the committees’ comments or until sixty days after referral of the question to the Speaker of the House and the President of the Senate. In addition, LCRAR must publish notice of suspension in the State Register.

LCRAR’s power is one of suspension, not veto. When it suspends a rule, LCRAR must introduce a bill to repeal that rule at the next year’s legislative session. If the legislature does not enact the bill in that session, the rule becomes reeffective when the session adjourns unless, of course, the agency itself has repealed it. 

19. Id.
20. Id. §§ 14.38 subd. 4, 14.43. In addition to its authority to suspend rules, LCRAR may, by majority vote, “request any agency issuing rules to hold a public hearing in respect to recommendations made” by the Commission. Id. § 14.41. The precise scope of this power is unclear. MAPA provides that LCRAR may request an agency to hold hearings “in respect to recommendations made pursuant to section 14.40, including recommendations made by the commission to promote adequate and proper rules and public understanding of the rules.” Id. Section 14.40 mentions only “recommendations to promote adequate and proper rules and public understanding of the rules.” Id. § 14.40 (Supp. 1985). It is possible, however, that the House and Senate committee pre-suspension recommendations are also included. See Auerbach, supra note 7, at 230 n.359 (discussing the ambiguities of then MINN. STAT. § 3.965(3) (now § 14.41)).
22. Id. The act creating LCRAR originally provided that

[i]f the bill [seeking repeal of the rule] is defeated, or fails of enactment in that year’s session, the rule shall stand and the committee may not suspend it again. If the bill becomes law, the rule is repealed and shall not be enacted again unless a law specifically authorizes the adoption of that rule.

Act of Mar. 30, 1974, ch. 355, § 69, 1974 Minn. Laws 611, 630. These provisions were deleted in a 1981 amendment. See Act of May 21, 1981, ch. 253, § 1, 1981 Minn. Laws 1050, 1051. Thus, currently LCRAR apparently may resuspend a rule after the session if the repealing bill does not pass. See MINN. STAT. § 14.40 (Supp. 1985).
B. ACTIVITIES OF THE COMMISSION

A few empirical studies have been made investigating the ramifications of the federal legislative veto.\textsuperscript{23} A similar study in Minnesota would have the advantage of being able to focus on the records of one entity, LCRAR, rather than having to use the \textit{Congressional Record} and other disparate sources to trace the instances of the federal legislative veto. Nonetheless, any useful empirical investigation of the legislative veto in Minnesota would require a detailed examination of LCRAR records and the use of survey or interview techniques with legislators, executive officials, lobbyists, and others. That form of inquiry is so burdensome, time-consuming, and expensive as to preclude its use in the ongoing study from which this Article arose.\textsuperscript{24} Consequently, the following overview of LCRAR activities is based largely upon the Commission’s reports.\textsuperscript{25}

From 1974 through 1976 LCRAR was both inactive and understaffed.\textsuperscript{26} During that period it suspended no rules, although its intervention with respect to one rule resulted in the functional equivalent of a suspension.\textsuperscript{27} At their early meetings, members of LCRAR discussed the possibility of conducting an ongoing review of agency rules to detect excessive, obsolete, unused, or overbroad delegations of rule-making authority. They concluded that the Commission’s primary focus should be rules that “conflicted with legislative intent and that had fiscal implications.”\textsuperscript{28}

During the 1977-78 biennium, LCRAR acquired its own

\textsuperscript{23} See, e.g., B. Craig, \textit{The Legislative Veto: Congressional Control of Regulation} (2d printing 1984); Bruff & Gelhorn, \textit{Congressional Control of Administrative Regulation: A Study of Legislative Vetoes}, 90 HARV. L. REV. 1369 (1977); see also M. Ethridge, \textit{Legislative Participation in Implementation: Policy Through Politics} 28-29, 76-152 (1985) (empirical investigation of some aspects of state legislative vetoes).

\textsuperscript{24} See the author’s acknowledgment footnote *, on the first page of this Article.

\textsuperscript{25} See also Hamilton & Prince, \textit{supra} note 4, at 235 n.59 (summarizing those reports).

\textsuperscript{26} See Auerbach, \textit{supra} note 7, at 233-34 & n.372.

\textsuperscript{27} LCRAR held a hearing on the question whether hospitals should be excluded from the licensing requirement for residential programs for adult mentally ill persons under Department of Public Welfare (“DPW”) Rule No. 36. As a result of that hearing, DPW withheld implementation of the rule until the next legislative session. \textit{Report of the Joint Legislative Commission for the Review of Administrative Rules} (Nov. 15, 1976). During that session, the legislature exempted certain private hospitals from the licensing requirement. Act of Apr. 13, 1976, ch. 243, § 5(5), 1976 Minn. Laws 904, 908.

\textsuperscript{28} \textit{Report, supra} note 27.
permanent staff, freeing it from complete reliance on part-time assistance from attorneys and staff of the Revisor of Statutes.\(^{29}\) In that biennium LCRAR met sixteen times, received over fifty formal complaints, and investigated forty-four of those complaints.\(^{30}\) It again suspended no rules, but in two instances the agency agreed to amend its rules in accordance with LCRAR's recommendations. Other actions taken by the Commission during this period included two cases in which LCRAR referred its report and recommendations to legislative committees for action by the legislature, one case in which the rule in question was found to comply with legislative intent, one case in which no action was taken because the Commission was split on the issue of compliance with legislative intent, and five instances in which action was carried over to the next biennium.\(^{31}\) In addition, during this biennium LCRAR also monitored agency responsiveness to citizen complaints,\(^{32}\) examined problems and made recommendations regarding publication of rules in the State Register and Minnesota Code of Agency Rules,\(^{33}\) reviewed, pursuant to statutory mandate, the Legal Assistance to Minnesota Prisoners program to determine whether the cases handled by that program were consistent with legislative intent,\(^{34}\) and recommended legislation giving LCRAR subpoena power.\(^{35}\)

The 1979-80 biennium saw a further increase in LCRAR's workload as well as the initial exercise of its suspension powers. LCRAR met twenty-four times and received seventy-one formal complaints and approximately 500 informal inquiries.\(^{36}\) The majority of the formal complaints were handled without formal Commission action, either by LCRAR and the agency providing enough information to satisfy the complainant, by negotiations between the agency and the complainant mediated by LCRAR staff, or by agency action to resolve the problem.\(^{37}\) In eleven instances, however, the Commission took more aggressive steps. A variety of actions resulted, including the


\(^{30}\) See id. at 8-9.

\(^{31}\) See id. at 16-21.

\(^{32}\) See id. at 11.

\(^{33}\) See id. at 11-13.

\(^{34}\) See id. at 14-15.

\(^{35}\) This legislation did not pass in 1978, and LCRAR stated that the legislation would not be reintroduced in 1979. Id. at 22.


\(^{37}\) See id. at 9.
voluntary amendment of the rule by the agency and a transmis-
sion of LCRAR's findings to the legislature for remedial or
clarifying legislation. In several instances, LCRAR exercised
its power to request an agency to hold a hearing on its rules.38

Most significantly, LCRAR suspended three rules. The legisla-
ture later adopted legislation repealing one of these rules, and
the other two were superseded by new rules adopted by the re-
sponsible agency.39

The study paper upon which this Article is based was un-
able to present a reliable overview of LCRAR activities since
the 1979-80 biennium because the Commission has not issued
reports concerning its activities since that time.40 This nonfe-
sance was clearly in violation of LCRAR's statutory mandate to
"make a biennial report to the legislature and governor of its
activities."41

Recently, however, LCRAR did issue a report for the 1983-
84 biennium.42 The report reveals a rather impressive set of ac-
complishments by LCRAR—or at least by its staff. The report
states that LCRAR received seventy complaints, conducted
twenty-five formal reviews of rules, and directed its staff to
monitor agency or legislative committee work or to mediate be-
tween agencies and complainants on six occasions.43 LCRAR
requested an agency to amend or adopt a rule five times, pro-
vided other kinds of advice to agencies on at least eight occa-
sions, sponsored legislation to correct problems revealed during
its rule reviews on three occasions, and referred rules to legisla-
tive committees seven times.44 Although LCRAR initiated
rule-suspension proceedings three times during this period, ul-
timately it suspended the challenged rule in only one of these
proceedings.45 In one of the other two instances legislation was
adopted, pursuant to the efforts of LCRAR members, to rem-

38. See supra note 20.
40. See Frickey, The Constitutionality of the Legislative Veto in Minne-
sota 10-11 (Hubert H. Humphrey Institute of Public Affairs, University of Min-
41. MINN. STAT. § 14.40 (1984). Brief discussions of some LCRAR activi-
ties are available in the June 1983, October 1983, and June 1984 issues of Ad-
inistrative Law News, a publication of the Minnesota State Bar Association.
42. See 1983-1984 LCRAR BIENNIAL REP. The letter from LCRAR's
chairman transmitting the report is dated November 27, 1985. Id.
43. See id. at 2 (executive summary of LCRAR activities).
44. See id. at 2-3.
45. See id. at 9.
edy the perceived problems. In the third instance the agency cooperated in modifying the rule in accord with LCRAR's views.

Because no systematic study of LCRAR has been undertaken, the available evidence regarding the Commission's internal operations and ultimate effectiveness concededly is anecdotal, without scientific trustworthiness, and unrepresentative of all viewpoints. With those caveats in mind, however, a few observations might be ventured. Initially, it appears that LCRAR frequently has performed a useful function in mediating disputes between agencies and citizens affected by administrative rules. LCRAR generally has been reluctant to suspend rules, preferring in those cases deemed to merit its attention to encourage a compromise between the agency and aggrieved citizens. That a compromise apparently was often achieved is a tribute both to the staff of LCRAR, who carried out the function of mediator, and to the simple fact that LCRAR's ability to exert pressure—directly through the rule-suspension process and indirectly through the budgetary process and other means—renders agencies particularly responsive. LCRAR apparently has provided a forum in which legitimate problems with rules can be ironed out, often with the full cooperation of all parties. LCRAR's most recent report, for the 1983-84 biennium, presents this favorable picture most clearly.

Another side of the story emerges as well, however. In his examination of LCRAR in 1979, Professor Carl Auerbach argued that LCRAR's ability to pressure agencies to meet the Commission's objections frustrates the statutory intent that the Commission have the power only to suspend agency rules and that only the legislature, with the approval of the Governor, have the authority to repeal or modify them.

Possibly, the Commission's power is no greater than that of other standing committees that have been known to express displeasure with particular agency rules from time to time and with effect. But agencies have also been known to withstand such legislative committee pressure in the expectation that they would be supported by the legislature as a whole. A standing joint committee with the power to suspend rules is a formidable adversary. It concentrates power to an undesirable degree. In time, too, there will be a tendency for a measure of this power to be exercised by the Commission's staff.

Auerbach's concerns remain valid today, according to the ad-

46. See id. at 13.
47. See id. at 17.
48. Auerbach, supra note 7, at 235-36.
mittedly limited evidence available. Indeed, the recently issued 1983-84 report, though understandably proud of LCRAR's accomplishments, reveals the central role of its staff in those achievements.

II. THE CONSTITUTIONALITY OF LEGISLATIVE COMMITTEE AUTHORITY TO SUSPEND ADMINISTRATIVE RULES IN MINNESOTA

A variety of factors are relevant in considering the constitutionality of LCRAR's rule-suspension authority. The language and structure of the Minnesota Constitution, the similarity of that document to the United States Constitution, and the United States Supreme Court's treatment of the constitutional issues surrounding the federal legislative veto are appropriate starting points for this analysis. In addition, the policy concerns surrounding LCRAR's rule-suspension power must be factored into the ultimate constitutional equation.

A. THE LEGAL FRAMEWORK

The Minnesota Constitution clearly provides: "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution."49 This language seems to install a rigid separation of powers in Minnesota. Under this regime, LCRAR's power to suspend rules is a constitutionally suspect device by which a mere fraction of the legislature may interfere with the executive function of implementing and administering legislation.

The problem, in a nutshell, is that suspension of a rule by LCRAR could be viewed as a legislative act taken without complying with two fundamental requirements of the Minnesota Constitution. The first is bicameralism: the constitution provides that "[n]o law shall be passed unless voted for by a majority of all the members elected to each house of the legislature."50 LCRAR has members from each house, but the constitution plainly mandates legislative law making by the membership of both houses, not by a joint committee to which

49. MINN. CONST. art. III, § 1 (emphasis added).
50. Id. art. IV, § 22.
law-making authority is delegated. The second pertinent constitutional requirement provides that “[e]very bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor” for approval or veto. If LCRAR’s power to suspend rules constitutes legislative law making, it is a circumvention of the governor’s veto power.

These arguments served as the basis for the holding in Immigration & Naturalization Service v. Chadha, in which the United States Supreme Court held unconstitutional federal legislation that allowed either house of Congress, by resolution, to veto the decision of the Attorney General to allow a deportable alien to remain in the United States. The Court concluded that this legislative veto violated two key provisions of the federal Constitution: the requirement that both houses of Congress must pass a bill before it becomes law and the requirement that every bill passed by Congress must be presented to the President for his signature or veto. The

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51. Id. § 23. The legislature may override a veto by a two-thirds vote of both houses. Id.
53. The federal statute in question, 8 U.S.C. § 1254 (1982), provided that the Attorney General must report to Congress when the deportation of an excludable alien is suspended. The legislative-veto provision of this statute stated:

[If during the session of the Congress at which a case [of deportation suspension] is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien’s voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.]

Id. § 1254(c)(2).
54. Article I, section 7 of the federal Constitution provides in relevant 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; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .

Every Order, Resolution, or Vote to which the Concurrence of
Court acknowledged that not everything done by one or both houses of Congress was "legislative" in character and therefore subject to the bicameralism and presentment requirements. The Court concluded that "an exercise of legislative power depends not on their form but upon 'whether [the action] contain[s] matter which is properly to be regarded as legislative in its character and effect.'” The legislative veto involved in that case was "legislative in its character and effect" because it "had the purpose and effect of altering the legal rights, duties, and relations of persons ... outside the Legislative Branch."

Because Chadha represents only an interpretation of the separation of powers contained in the federal Constitution, a state supreme court, of course, is not required to use the same analysis in determining whether a state legislative committee's authority to suspend administrative rules violates the separation of powers contained in the state constitution. In Minnesota, predicting whether the state supreme court would hold that an LCRAR suspension of a rule is unconstitutional is rendered even more difficult by the fact that no decision of that court has involved an analogous issue.

The Minnesota Supreme Court has recognized that the powers of an administrative agency “may be curtailed or enlarged by legislative action,” but in the context of this quotation the court was considering only bicameral action taken in compliance with the presentment clause. The court has also recognized that, although the governor must be presented with the opportunity to exercise the veto power when the legislature “engages in the governmental function of lawmaking,” presentment to the governor is not required when "governmental functions essentially administrative in character are assigned to

the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be 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.


55. Chadha, 462 U.S. at 952 (quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)).

56. Id. For a succinct summary of the arguments favoring and opposing the constitutionality of the federal legislative veto, see Note, Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto, 94 YALE L.J. 1493, 1504 n.55 (1985).


These quotations, however, shed little light on the constitutionality of LCRAR's suspension power. The court has never had any reason to consider whether "the governmental function of lawmaking" could ever be accomplished without compliance with the bicameralism and presentment requirements. Moreover, whatever might be the administrative functions "assigned to [the legislature] as an entity," LCRAR's suspension power cannot be one of them, because that power is not even mentioned in the constitution and is not exercised by the legislature "as an entity."

Although these decisions of the Minnesota Supreme Court do not conclusively demonstrate that LCRAR's suspension authority is unconstitutional, they do seem to view legislative "lawmaking" subject to the bicameralism and presentment requirements as involving instances in which, to use the language of Chadha, the legislative act "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch." Because LCRAR's suspension of a rule undeniably has that "purpose and effect," it seems clear that LCRAR's suspension authority is unconstitutional if the Minnesota Supreme Court adopts the analysis of Chadha in interpreting the Minnesota Constitution's provisions concerning the separation of powers. In predicting what the Minnesota Supreme Court would do, it is instructive to note that the state supreme courts that have been called upon to consider various state legislative-veto schemes since Chadha have followed the reasoning of that decision and have struck down the state schemes in question. Moreover, the Chadha

59. Id. Consider State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (1954). In Gardner, the court stated that an exception to the veto power exists "in those cases where the constitution itself provides that the legislature, quite aside from the exercise of the lawmaking function, shall act without the concurrence of the governor." Id. at 131-32, 62 N.W.2d at 56-57. Gardner held that legislative determination of judicial compensation, pursuant to the Minnesota constitutional provision stating that judges' salaries "should be 'prescribed by the legislature,'" was not subject to gubernatorial veto. Id. at 133. In Duxbury v. Donovan, 272 Minn. 424, 138 N.W.2d 692 (1965), the court concluded that "the function there involved [in Gardner] is more administrative than legislative." Id. at 441, 138 N.W.2d at 703.

60. Chadha, 462 U.S. at 952.

61. See State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 687 P.2d 622 (1984); Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984). Brown is particularly relevant because the Kentucky scheme under review was somewhat analogous to the Minnesota approach to the legislative veto. For an analysis of Brown, see Snyder & Ireland, The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and His-
approach is largely consistent with earlier cases on the constitutionality of state legislative vetoes.\textsuperscript{62}

To be sure, the reasoning of Chadha is subject to criticism.\textsuperscript{63} One basic problem is that Chadha to some extent substituted labeling for analysis. The opinion rather arbitrarily called the legislative veto a "legislative" act, but labeled administrative rule making "executive."\textsuperscript{64} These labels may fit, but


\textsuperscript{62} See State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981); General Assembly of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); see also Enourato v. New Jersey Bldg. Auth., 90 N.J. 386, 448 A.2d 449 (1982). It should be noted, however, that the New Hampshire and West Virginia courts expressed differing views about the constitutionality of committee rule-suspension system such as that found in Minnesota. In dictum, the New Hampshire court suggested that this form of legislative veto might pass constitutional scrutiny. See Opinion of the Justices, 121 N.H. at 561-62, 431 A.2d at 789. The West Virginia court, also in dictum, used language suggesting that the committee rule-suspension system is unconstitutional. See Barker, 279 S.E.2d at 633-36.


\textsuperscript{64} See Chadha, 462 U.S. at 953 n.16.
the Court in Chadha performed no careful analysis of legislative and executive functions to justify them.

Professor Stanley Brubaker has noted another wooden aspect of the Chadha opinion. He stated:

The force of [the Court's] arguments largely depends upon a characterization of the proposed rule or act that Congress reviews as “law.” But the very terms of the legislative veto provisions state that the proposal or act does not have the status of law until after the period of time has elapsed during which Congress has the opportunity to review it.65

Nevertheless, this analysis, however accurate in the context of the federal legislative veto, is irrelevant to consideration of LCRAR’s power to suspend rules. There is no question but that a rule suspended by LCRAR has already become “law” and that the suspension, in the language of Chadha, has “the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch.”66 Thus, in this sense LCRAR’s power to suspend rules is more intrusive on the separation of powers than the legislative veto at issue in Chadha.

In addition, LCRAR has the authority to suspend any rule, no matter how venerable. The typical legislative veto inserted in federal legislation provided Congress only a short time following adoption of a rule in which to exercise its veto.67 The Minnesota approach creates much greater uncertainty regarding the permanency of rules and provides LCRAR with the opportunity to interfere with executive prerogatives at any point during the life of a rule. This extraordinary intrusion upon the separation of powers seems difficult to justify. A more limited suspension power might create less tension among the policies underlying the separation of powers, although that conclusion is debatable.68 Even more limited approaches could not be

65. Brubaker, supra note 1, at 85. In a similar vein, Justice White's dissent in Chadha, see 462 U.S. at 994-98, stressed that the legislative veto is essentially “a functional equivalent of conventional legislation because no change in the status quo is possible using a veto device without the concurrence of both houses and the President.” Smolla, supra note 63, at 520 n.55. For a critique of Justice White's argument, see id. at 520-27.
67. See Brubaker, supra note 1, at 82.
68. Professor L. Harold Levinson contends that the constitutionality of a system whereby a committee has authority to suspend rules is less suspect if it is designed to meet a demonstrated need in a manner that minimizes the constitutional problem. The need can be demonstrated, for example, if the committee suspension system applies only to rules that were adopted during the interim between legislative sessions, because
squared with Chadha, however, because they too result in the altering of legal rights, duties, and relations of persons outside the legislative branch.

In one sense, however, the typical federal legislative veto prior to Chadha was more intrusive into the prerogatives of the executive than would be an LCRAR rule suspension. Congress imposed a permanent veto, but an LCRAR suspension remains temporary unless the Minnesota Legislature, in compliance with the requirements of bicameralism and presentment, adopts a statute repealing the suspended rule. This distinction is important from a policy standpoint, of course, but its recognition in no way changes the fact that during the period in which the rule is suspended the legal rights, duties, and relations of persons outside the legislature have been altered without compliance with the requirements of bicameralism and presentment. Thus, although the Minnesota scheme is factually distinguishable from the approach to legislative oversight taken by Congress and some other states, the distinction is not dispos-

Levinson, supra note 4, at 101-02 (footnotes omitted). Levinson notes that Minnesota “give[s] no criterion for restricting the committee’s suspensive power.” Id. at 102 n.84. In addition, of course, Minnesota's system allows the suspension of any rule, not just rules adopted between legislative sessions. Minnesota does require LCRAR to conduct hearings prior to suspension, a procedural protection that Levinson suggests as a further factor enhancing the potential constitutionality of the committee suspension system. Id. at 102. Without any limitations upon which rules may be suspended or upon why a rule may be suspended, however, the public-hearing requirement, standing alone, seems a weak reed upon which to base an argument that the LCRAR's authority somehow does not impermissibly intrude upon the separation of powers.

In any event, serious separation of powers problems would arise if a legislative committee's authority to suspend administrative rules were limited within well-defined criteria. A legislature is designed to be political as well as principled—it may take expediency into account. To limit the legislative veto to “principled” rather than “political” exercises seems inconsistent with the very nature of a legislature. See Auerbach, supra note 7, at 233. Moreover, when a legislative committee must make findings that various criteria are satisfied before a veto may be issued, that committee is acting very much like a court rather than a legislature, which creates a whole new set of separation of powers concerns. See infra text accompanying notes 70-72.
itive so long as the rationale of Chadha is accepted. If the Chadha rationale is rejected, however, the fact that LCRAR may suspend a rule only temporarily might have more legal significance. There are methods other than rule suspension that could accomplish meaningful legislative oversight of rule making—for example, the creation of a legislative advisory committee to review all new rules and recommend legislation repealing those found to be objectionable. These other methods would leave rules in force during legislative review, however, and thus burden regulated parties with rules that might never have deserved to see the light of day. LCRAR's suspension power is designed to relieve this burden of compliance, and the suspension is only for a finite period. In this respect, LCRAR rule suspension operates much like a stay of the effect of a rule entered by a reviewing court to protect regulated parties from irreparable injury and to ensure that the dispute over the rule will not become moot before the court has the opportunity to render its decision.

This analogy to judicial power is a double-edged sword, however. To be sure, legislatures have some powers that are arguably "judicial" in nature—the inherent power to punish for contempt of the legislature is an obvious example. Nonetheless, when a legislative committee assesses a concrete dispute and issues a stay of a rule that would otherwise have the effect of law to prevent injury to certain parties, that committee arguably has crossed the line separating the legislative power from the judicial. In making this kind of assessment, the courts, not legislative committees, have all of the institutional advantages: independence from the political process, articulated standards to follow, and flexibility of relief, to name but a few. The superior competence of courts to adjudicate such disputes is no accident—that is what courts, not legislative committees, are designed to do.

It has been argued that the Minnesota legislative veto is

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69. See Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 919-31 (Ky. 1984) (in which a scheme somewhat similar to the Minnesota approach was declared unconstitutional).

70. For an overview, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 243-47 (2d ed. 1983).

71. Cf. Chadha, 462 U.S. at 960 (Powell, J., concurring in the judgment) (legislative veto in that case, which amounted to a legislative finding "that a particular person does not satisfy the statutory criteria for permanent residence in this country," was "a judicial function in violation of the principle of separation of powers").

72. See id. at 966.
more “appropriate” to the state legislative process than was the federal legislative veto held unconstitutional in Chadha.\textsuperscript{73} This argument is based on the fact that Congress is frequently in session and, therefore, supposedly has the opportunity to use legislation as an effective means of repealing objectionable administrative rules, whereas the part-time nature of a state legislature arguably renders it impossible for that body to strike down rules through means that comply with the requirements of bicameralism and presentment.\textsuperscript{74} These assertions may be plausible to a certain extent. Yet neither the Congress nor a state legislature can address more than a few of the countless issues potentially worthy of their agendas. Both bodies must determine priorities, and even with its longer sessions it is not apparent that Congress does, or should, pay any greater attention to overseeing federal agency rule making than a state legislature can pay to overseeing state agency rule making. Moreover, even if a state legislature is in fact without the time to carry out meaningful oversight of agency rule making, there are alternatives available—lengthening legislative sessions, making best efforts to avoid passing legislation that contains broad delegations of rule-making authority, or establishing a committee without rule-suspension authority to conduct oversight and to propose legislation to correct objectionable rules, for example—that stop far short of distorting the separation of powers.

When stripped of its veneer, any argument for sustaining a state legislative committee’s authority to suspend administrative rules probably must be based on the premise that a strict approach to the separation of powers is fundamentally at odds with good public policy.\textsuperscript{75} Although the Minnesota Constitution appears to impose a rigid separation of powers,\textsuperscript{76} a realistic

\textsuperscript{73} See Burek & Marinac, Constitutionality of the LCRAR’s Power to Suspend Rules: A Reply to Dean Goldberg, MINN. ST. B.A. AD. L. NEWS (Oct. 1984). This article is a response to Goldberg, Comment on the Constitutionality of the LCRAR, MINN. ST. B.A. AD. L. NEWS (June 1984).

\textsuperscript{74} See Burek & Marinac, supra note 73.

\textsuperscript{75} Id. After noting the difficulty of squaring the federal legislative veto with classical conceptions of the separation of powers, Professor Rodney Smolla stated that “[t]he best defense of the legislative veto is to admit openly that it is in fact a modern ‘political invention’ [that] advance[s] certain political and social values that are shared across the political spectrum.” Smolla, supra note 63, at 527. In the aftermath of Chadha, Smolla proposed a federal constitutional amendment to legitimate the legislative veto. See id. at 527-71. For a discussion of possible policy justifications for LCRAR’s suspension authority, see infra notes 93-124 and accompanying text.

\textsuperscript{76} See supra text accompanying note 49.
analysis must recognize that constitutional law, whether federal or state, is not the product of a mechanical formula. Judges long ago rejected the fiction that a court could avoid consideration of the policies in support of legislation and decide its constitutionality merely by "lay[ing] the article of the Constitution which is invoked beside the statute which is challenged and [deciding] whether the latter squares with the former." Modern courts, including the supreme courts of Minnesota and other states, are not blind to exigencies of public policy that may lead the legislature to invent new methods of addressing modern problems. Yet, considering the obvious tensions between LCRAR's power to suspend rules and the Minnesota Constitution's conception of the separation of powers, the only way in which LCRAR's suspension power might withstand constitutional attack is if the Minnesota Supreme Court finds the policy justifications supporting that power overwhelming.

Before considering whether the policy justifications supporting the legislative veto are compelling, however, it is important to note several problems with any simplistic notion that LCRAR's suspension power should be upheld merely if it is found to be of great importance to the legislature. The United States Supreme Court has sometimes sanctioned a rather free approach to constitutional interpretation when it has concluded that the Framers could not have envisioned the modern problems at hand. The Minnesota Supreme Court has likewise concluded that, "[i]n determining whether an act of the legislature contravenes a constitutional provision we should endeavor to interpret the provision in the light of existing conditions, particularly when those conditions could not have been foreseen at the time the constitution was adopted." Because the framers of the Minnesota Constitution of 1857 could not have foreseen the modern administrative state, it might be argued that LCRAR's rule-suspension authority should be upheld as an effective means of addressing modern problems that does not violate the framers' intent. The same argument, however, could have been made to support the constitutionality of the federal legislative veto, and yet the decision in Chadha invalidated that scheme. The Court in Chadha considered separation

79. Visina v. Freeman, 252 Minn. 177, 193, 89 N.W.2d 635, 649 (1958).
of powers a fundamental aspect "‘woven into the [Constitution]'"80 and concluded that "policy arguments supporting even useful ‘political inventions’ are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised."81 The Minnesota Constitution mandates a separation of powers at least as strict as that required by the federal Constitution; indeed, the Minnesota scheme appears even more rigid.82 These observations suggest that the Minnesota courts will treat Chadha and state precedent in accord with Chadha as persuasive authority strongly counseling against any interpretation of the separation of powers sufficiently flexible to save the legislative veto.

In addition, the Minnesota Supreme Court has stressed that, although the "social and economic changes" that have occurred since the adoption of the Minnesota Constitution are not to be ignored in interpreting that document, the plain language of the constitution "may not be tampered with to accomplish a desired result no matter how archaic it has become . . . . [T]he fact remains that the right to amend the constitution rests with the people and should not be usurped by the courts in the guise of judicial interpretation."83 Thus, those urging the constitutionality of LCRAR’s suspension authority bear the enormous burden of demonstrating that article III, section 1 of the Minne-

80. Chadha, 462 U.S. at 946 (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976)).

81. Id. at 945. The Court reaffirmed the centrality of separation of powers and the lesser importance of “[c]onvenience and efficiency” several times. See id. at 944-45, 959.

82. See supra text accompanying note 49. The Minnesota constitutional provision establishing a rigid separation of powers, MINN. CONST. art. III, § 1, was originally drafted by the Democratic faction of the Minnesota constitutional framers and later accepted by their Republican counterparts. W. ANDERSON & A. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 119 (1921). It has never been amended since its adoption as part of the Constitution of 1857. Its similarity to the federal approach is plain, and the debates of the Democrats who drafted it reveal that it was also modeled after the constitutions of other states. See THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 185-202 (E.S. Goodrich, printer 1857). Not surprisingly, there appear to be no statements in these debates that unequivocally weaken the case for the constitutionality of LCRAR’s suspension authority. There are statements, however, that generally emphasize the importance of a strict separation of powers. See id. at 189, 191 (statement of Mr. Meeker); id. at 193-94 (statement of Mr. Sherburne); id. at 197-98 (statement of Mr. M.E. Ames); id. at 201-02 (statement of Mr. Setzer).

Moreover, the state constitution was generally revised in 1974, and no effort was made to amend its language to accommodate the legislative veto. The obvious question that arises is whether this failure to amend the constitution supports a negative inference concerning the constitutionality of the legislative veto. The study commission for the 1974 revision did not specifically consider and reject any proposal embracing the legislative veto, and thus there is no clear evidence that might support a negative inference concerning the constitutionality of that device. More generally, however, there are at least two reasons why the 1974 revision may provide some limited support for the notion that the legislative veto ought not be held constitutional just because it might be a good idea.

The Constitutional Study Commission organized to propose the 1974 revision was given a statutory mandate to "study the Minnesota Constitution, other revised state constitutions and studies and documents relating to constitutional revision, and propose such constitutional revisions and a revised format for a new Minnesota constitution as may appear necessary. . . . It shall consider the constitution in relation to political, economic and social changes." The Study Commission established several committees to study portions of the constitution and recommend amendments. None of their recommendations concerned legislative oversight of administrative rule making. The Study Commission recognized that additional amendments might be appropriate, and it is possible that it left the question of legislative oversight for later consideration. Moreover, because LCRAR was not established until after the Study Commission report was prepared, there was no formal system of legislative veto to review. Nonetheless, the Study Commission must have been aware of the importance of legislative oversight of administrative agencies, and it might have known of the increasing use of the legislative veto to promote that oversight.

86. Id. at 13-35. In addition, see the individual committee reports.
87. Id. at 13-14.
88. See Hamilton & Prince, supra note 4, at 251-52 & n.131.
All in all, although there is no direct evidence concerning the views of the revision commission members about the advisability of the legislative veto, their failure to consider the question could support an inference—a rather weak one, to be sure—that the legislative veto was not considered a sufficiently important device for legislative oversight to merit express constitutional approval. It is at least equally plausible, however, that no inference whatsoever should be drawn for the revision committee's inaction.89

In addition, as the 1974 revision illustrates, the process by which the Minnesota Constitution may be amended is less burdensome than the procedures for amending the federal Constitution.90 In these circumstances, the argument that the legislative veto ought to be upheld as consistent with an evolving constitution judicially updated to reflect modern developments—an argument that has some force with respect to the rarely amended federal Constitution—may be weaker when applied to the Minnesota Constitution.91 Nor is this an issue concerning judicial protection of the rights of minorities or of fundamental individual freedoms, when rather free constitutional interpretation might be most legitimate.92 Nonetheless, the constitutional amendment process in Minnesota is sufficiently arduous to preclude any argument that Minnesota courts should treat the state constitution as completely incapable of evolution.

All things considered, the argument that the suspension power of LCRAR ought to be upheld because it supposedly is necessary for meaningful legislative oversight of administrative rule making probably should not be dismissed out of hand. It is therefore necessary to consider what policies might be served by that authority.

89. My colleague Carl Auerbach, who was a member of the revision committee, has told me that so far as he knows no member gave the slightest thought to the advisability of the legislative veto. In his view this failure to consider the legislative veto is not relevant to the constitutional inquiry.

90. The Minnesota Constitution provides two methods for amendment. First, a majority of the members of each house may propose amendments subject to ratification by a majority of those voting at a general election. MINN. CONST. art. IX, § 1. Second, two-thirds of both houses of the legislature may propose a constitutional convention, which will be held if a majority of voters approve. Proposals from such a convention require the approval of three-fifths of the voters. Id. §§ 2-3.

91. The Minnesota Constitution was amended 100 times prior to the 1974 revision. See MINN. STAT. ANN. Const. iii (West 1976).

B. **THE LEGISLATIVE VETO AND PUBLIC POLICY**

Because the issue of the constitutionality of the legislative veto cannot be fully addressed without considering the policy issues surrounding the device, commentators who have considered the former have also analyzed the latter.\(^93\) The following summary of the policy issues involved borrows from Professor Stanley Brubaker’s excellent recent overview\(^94\) and then considers these issues in light of the Minnesota legislative-veto scheme.

Brubaker acknowledged that, “[a]lthough the legislative veto does not appear to fit the pristine concept of separation of powers, a strong argument can be made that it does serve constitutional ends.”\(^95\) The legislative veto allows the government, through administrative rule making, to address modern

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94. See Brubaker, supra note 1.

95. Id. at 83.
problems vigorously and efficiently, while the legislature's reservation of authority to review the rules that result promotes balance between the legislative and executive branches and renders rule making by unelected officials ultimately accountable to elected representatives. The anecdotal evidence discussed earlier suggests that LCRAR's suspension authority has served these goals, at least to some extent.

Yet Brubaker also found substantial reason to believe that the availability of the legislative veto warps the political process. Although the anecdotal information concerning LCRAR does not demonstrate that any of the horribles hypothesized by Brubaker has occurred in Minnesota, the existence of the problems he identified is not susceptible of proof in most instances. In addition, some of the dangers noted by Brubaker are particularly worrisome in the Minnesota scheme.

Initially, Brubaker contended that the availability of the legislative veto makes it more likely that a majority of legislators can be formed to support controversial legislation, but at the same time makes implementation of the legislation difficult. Consider Brubaker's example of a bill that becomes law only because a legislative-veto provision was included to mollify legislators' concerns. If the legislative veto is later used to prevent meaningful implementation of the bill by an agency, the result is the same as if the bill had not passed except for one "important difference: with the legislative veto, [the legislature] has signaled to the public that it has taken action on a problem; without the veto, no such pretense exists." Thus, the legislative veto can be a device for the politics of symbolism rather than the politics of substance.

This concern is particularly troublesome in a state, such as Minnesota, where a legislative committee has authority to suspend any rule, not just a rule promulgated pursuant to legisla-
tion containing a legislative-veto provision. Unlike in Congress, in the legislatures of these states supporters of controversial legislation have no opportunity to convince representatives that the legislative veto should not be made available with respect to that legislation. The issue of the legislative veto simply is excluded from the legislative agenda, and controversial legislation contains no evidence that rules implementing it are subject to legislative suspension. In short, compared to the federal system of expressly including legislative-veto provisions in legislation, the Minnesota system fosters a greater pretense that the legislature has taken action on a problem and provides less evidence that the legislature ultimately may thwart agency implementation of legislation.

The ubiquitous nature of the legislative veto in the Minnesota scheme creates another peculiar problem. Since Chadha, the federal courts have been laboring with the issue of whether unconstitutional legislative-veto provisions are “severable” from the remainder of the statutes containing them, so that the other portions of these statutes may remain on the books. The federal judicial inquiry is two-fold: first, whether the portions that remain can stand by themselves, and second, whether what remains would probably have been enacted by Congress without the legislative-veto provision. By contrast, the Minnesota scheme makes it impossible to sort out the severability puzzle. There is no meaningful way to ascertain whether any Minnesota statute delegating rule-making authority would have passed without the LCRAR suspension authority lurking in the background, particularly since the Minnesota Legislature, like many state legislatures, prepares no formal legislative history. The tainting influence of this suspension authority in the legislative process thus cannot be judicially remedied on a


104. Minnesota legislative proceedings are routinely recorded on audio tape, but the rules of both houses express an intent that the recordings not be used by courts to ascertain the legislative intent concerning legislation. See Minnesota Senate Permanent Rule 65; Minnesota House Permanent Rule 1.18; see also Auerbach, The Anatomy of an Unusual Economic Substantive Due Process Case: Workers' Compensation Insurers Rating Assoc. v. State, 68 MINN. L. REV. 545, 586 nn.180-81 (1984) (overview of legislative history in Minnesota and other states). But cf. Stearns-Hotzfield v. Farmers Ins. Exch., 360
statute-by-statute basis. It is at least arguable, therefore, that all statutes delegating rule-making authority that the Minnesota Legislature has passed since LCRAR was created are vulnerable to constitutional challenge. Although the Minnesota Supreme Court is unlikely to adopt such a drastic position, the severability problem provides further reason why that court should hold the LCRAR suspension authority unconstitutional.

Brubaker also persuasively argued that the legislative veto can result in "a significant skewing of the original legislative intent towards the interests of [legislators] on the overseeing committee or subcommittee and the groups and people most responsible for their re-election." At the federal level, most legislative-veto provisions required the vote of one or both houses, rather than simply a committee, to effectuate a veto. The division of labor embodied in the committee system, as well as the reduced visibility and interest in the implementation of legislation as opposed to its passage, rendered it likely that a committee or subcommittee would greatly influence both the substance of the rule and whether the rule would be vetoed. This shift from legislative review to committee control is complete rather than partial in a jurisdiction such as Minnesota, in which the legislative-veto authority is fully vested in one committee.

The risk that the concerns of committee members will replace the original legislative intent regarding a statute becomes even more troublesome over time. An agency charged with implementing a statute is required to do so consistent with the legislative intent that led to the passage of the law. The legislative veto, however, often may encourage responsiveness to a changed legislative intent that may be prompted by nothing more profound than a momentary shift in the mood of the

N.W.2d 384, 389 (Minn. Ct. App. 1985) (treating the recordings as appropriate legislative history for judicial consideration).

105. Brubaker, supra note 1, at 92.
106. See id. at 92, 92.
107. See id. at 92-93.
108. See Auerbach, supra note 7, at 233.
public, the proximity to an election, an altered composition of the overseeing committee, the rise of a new and committed interest group—a change of intent that would not be sufficient to stir the passage of a law, but that would be adequate to affect administrative rules under the threat of a legislative veto.\textsuperscript{110}

This critique, although addressed to the federal legislative-veto scheme, may be even more applicable to a state legislative committee's rule-suspension power. For example, in Minnesota LCRAR has formal suspension authority over essentially all rules, not just the informal control often exercised by congressional committees or subcommittees over regulations within their legislative jurisdiction. Thus, a drift from original legislative intent by a majority of a single state legislative committee could, by itself, dramatically alter the state regulatory scheme.

Brubaker posited two other distortions of the political process that can result from the availability of the legislative veto. First, the legislative veto discourages legislative attention to and compromise on sensitive issues. "[K]nowing that they will have the opportunity to protect themselves and their constituencies through the veto, [legislators] are more likely to legislate at a highly abstract and general level where compromises need not be made and trade-offs need not be faced."\textsuperscript{111} Indeed, it was frustration with this very phenomenon that led Alan B. Morrison, a well-respected Washington, D.C., public-interest lawyer, to provide representation to Jagdish Rai Chadha in his successful challenge to the legislative veto under the United

\textsuperscript{110} Brubaker, supra note 1, at 94. Professor Harold Bruff has also explained how the federal legislative veto subverted primary controls on the fairness of legislation in two ways. The first was to vitiate the effectiveness of the bicameralism and presentment requirements in raising the size of coalitions needed for collective choice. Retention of veto authority systematically favored interest groups having advantages in one or both houses of Congress because of their distribution throughout the nation. Second, the veto device allowed Congress to select its decision rule at the operational stage of policymaking rather than at the constitutional stage. A check on the fairness of selecting decision rules is the difficulty of determining who will profit from their later use in specific cases. Yet at the operational stage it is much easier to predict the winners and losers from a change in the decision rules.

Bruff, Legislative Formality, Administrative Rationality, 63 TEX. L. REV. 207, 221 (1984) (footnotes omitted). Rather than merely a policy argument against the legislative veto, this concern ties well into the institutional requirements of bicameralism and presentment. Indeed, the Supreme Court in Chadha noted that the President's veto power and the requirement of bicameralism protect against the "fear that special interests could be favored at the expense of public needs." INS v. Chadha, 462 U.S. 919, 950 (1983).

\textsuperscript{111} Brubaker, supra note 1, at 94.
States Constitution. Second, the legislative veto, by placing the primary burden on the administrative agencies to put forward proposals, [frees legislators] simply to point out what is wrong with any given proposal rather than weighing the costs and benefits of this proposal against other possibilities. . . . When a tough trade-off appears, the veto permits [legislators] to declare themselves in favor of virtue and blame the administrative agency for bringing forward its blemished proposal.

In effect, then, the legislative veto promotes overbroad, ill-considered delegations of rule-making authority that call upon agencies to exercise enormous discretion without legislative guidance. If the legislature later vetoes a resulting agency rule, the law-making enterprise becomes an exercise in futility and wastefulness; if the legislature fails to veto, the law-making enterprise lacks democratic legitimacy.

To be sure, Brubaker identified only the potential for abuse of the legislative process associated with the legislative veto, and conscientious legislators and their staffs may well be able to avoid at least most of these pitfalls at least most of the time. Nevertheless, the case supporting the legislative veto as a useful instrument of public policy seems weak. The pruden-
tial considerations counseling against the legislative veto are important, as Professor David Martin has said, even though they are not present in the routine majority of cases, but instead will be felt only in the occasional cases at the margin where political controversy tempt evasive or irresponsible behavior. Much of the ordinary business of government could be expected to come out the same way under a variety of different structures. Separation of powers adjudication is about effects at the margin.

The review and suspension powers of state legislative committees create another problem as well: they add yet another layer to the rule-making process, which in Minnesota and some

112. Morrison is the founder and director of the Public Citizen Litigation Group, a public interest law firm that specializes in cases that will advance "notions of open government." Morrison believed that the legislative veto was "constitutionally flawed and politically misguided." Moreover, he saw the legis-

lative veto as "another in for powerful business interests to inhibit the fed-

113. Brubaker, supra note 1, at 94-95.

114. The Alaska Supreme Court, in striking down a legislative veto scheme, noted scholarly literature indicating that "the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative ac-

115. Martin, supra note 93, at 293-94.
other states is already highly formalized. Little is accomplished
if the state legislature enacts vague legislation that forces an
administrative agency to address hard issues of implementation,
the agency becomes mired for many months in a formalized
rule-making process, and a legislative committee then ties up
the resulting rules in a further flurry of hearings or private me-
diation sessions. As a matter of public policy, the legislature
should not be able to have it both ways: either it should be re-
quired to address difficult questions initially and not delegate
expansive rule-making authority, or it should be required to ac-
cept whatever rules result from broad delegations of rule-mak-
ing authority so long as those rules withstand court challenges
and no legislative majority is willing to change them by the pas-
sage of new legislation. As Martin cogently argued in consider-
ing the federal legislative veto,

[well-designed procedures of course help secure sound substan-
tive decisions. But fixation on procedure can be carried to extremes.
Ultimately, procedure cannot shelter us entirely from the need for
painful substantive choice.

... The legislative veto is a product of system-tinkering, nothing
more. It allows Congress to make a great show of determination to
slap down errant agencies, yet it quietly spares Congress much of
the agony of difficult substantive choices. If agencies are "good"—and our
complicated polity necessarily presumes they have that capacity most
of the time—then the veto is not needed. When they fall short, the
right answer, the needed answer, does not lie in another layer of pro-
cedure. It lies in Congress's finding the courage "to be good" itself—
through statutes that embody, rather than escape, the necessary sub-
stantive choices.\[16\]

In the final analysis, the authority of a state legislative commit-
tee to suspend administrative rules seems incompatible with ordi-

nary conceptions of the separation of powers.\[17\]

This suspension authority is also inconsistent with an
emerging constitutional theory, sometimes labeled "structural due process"\[18\] or "due process of lawmaking,"\[19\] that draws its

\[16\] Id. at 301 (footnote omitted).
\[17\] See Hamilton & Prince, supra note 4, at 235-41 (agreeing that LCRAR
rule-suspension authority is unconstitutional). Writing some years before
Chadha, George Bunn and Jeff Gallagher reviewed the Wisconsin legisla-
tive veto scheme then in place, which was similar to that of Minnesota, and con-
cluded that the Wisconsin process violated the Wisconsin Constitution with re-
pect to most if not all administrative rules. See Bunn & Gallagher,
Legislative Committee Review of Administrative Rules in Wisconsin, 1977
Wis. L. Rev. 935, 971-80; see also 1974 Ops. Wis. Att'y Gen. 159 (concluding
that a variety of state legislative veto schemes, including rule suspension by a
legislative committee, see id. at 166, would be unconstitutional).

lifeblood more from the overall nature of the constitutional
document than from any particular constitutional provision.
An extended discussion of this theory must await another day,
but a sketch of it may suggest its usefulness in reinforcing the
separation of powers analysis presented above. As the term
"structural due process" suggests, one aspect of this theory is a
heightened sensitivity to "the structures through which policies
are both formed and applied." This hierarchical component
of public policy analysis suggests that decisions of structurally
"inferior" entities should be subject to judicial invalidation and,
in effect, remanded to the legislature, or perhaps to the chief
executive, for reconsideration. As this Article has attempted
to demonstrate, a committee such as Minnesota's LCRAR is in-
deed structurally inferior: it is an incomplete piece of the most
legitimate policy maker, the legislature. Another aspect of this
constitutional inquiry, expressed well in the phrase "due pro-
cess of lawmaking," considers it a central function of judicial
review to "'guarantee the democratic legitimacy of political de-
cisions by establishing essential rules for the political pro-
cess.'" This focus on "the primacy of process" might
invalidate not only those legislative acts taken without compli-
ance with formal legislative rules, but could also lead courts to
construct "a blueprint for the due process of deliberative, dem-
ocratically accountable government." It has been one burden
of this Article to demonstrate that legislative committee rule-
suspension authority can inhibit, rather than promote, a more
deliberative public policy.

Some policy-making schemes may embody worthwhile
ideas, but nonetheless fall victim to their incompatibility with
the overall structure of government established in a constitu-
tion. To observers who find much to praise in the accomplish-

120. Tribe, supra note 118, at 269.
121. See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). On the re-
mand to the legislature theory generally, see, e.g., A. Bickel, The Least Dan-
gerous Branch 111-98 (1962); Bickel & Wellington, Legislative Purpose and
the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957); Gun-
ther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and
 Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964); Sandalow, Judi-
122. Linde, supra note 119, at 251 (quoting Rostow, The Democratic Char-
acter of Judicial Review, 66 Harv. L. Rev. 193, 210 (1952)).
123. Linde, supra note 119, at 255.
124. Id. at 253. See generally Sunstein, Interest Groups in American Pub-
lic Law, 38 Stan. L. Rev. 29 (1985) (analyzing methods by which courts can
promote more deliberative legislative policy making).
ments of LCRAR members and staff, the rigid separation of powers in the Minnesota Constitution may seem unfortunate. To others, who find LCRAR's rule-suspension authority a potential danger to good policy making as well as technically incompatible with constitutional language and structure, the Minnesota Constitution gives no cause for regret. In the end, the result concerning the constitutionality of LCRAR's rule-suspension power is likely to be the same regardless of which of these views is more compatible with the conclusions of the ultimate judicial arbiter. Such obvious system tinkering short of a properly adopted constitutional amendment, even if expedient in the eyes of some observers, is no way to solve the fundamental problems of modern government.

III. DELEGATIONS OF LEGISLATIVE POWER, AGENCY RULE MAKING, AND THE LEGISLATIVE VETO: SOME COMPETING CONSTITUTIONAL CONCERNS

A supporter of the Minnesota legislative-veto format might argue that because it is constitutional for the legislature to delegate broad rule-making authority to administrative agencies, it should also be constitutional for the legislature to delegate to one of its own committees the authority to suspend any resulting rules.\textsuperscript{125} Although perhaps intuitively appealing, such an argument overlooks several fundamental distinctions between the delegation to an agency of rule-making authority and the delegation to a legislative committee of rule-suspension authority. Furthermore, even though courts may be constrained by practical realities from taking an active role in ensuring that broad delegations of rule-making authority comply with constitutional strictures, constitutional norms nonetheless have a role to play in limiting undue delegations of legislative power. This section begins by exploring a theory under which the state constitution plays such a role—a role that imposes duties on legislators to refrain from enacting legislation that provides no meaningful standards for agency rule making. This duty is the place to begin a restructuring of the proper approach to legislative oversight of the administrative rule-making process.

\textsuperscript{125} See Burek & Marinac, \textit{supra} note 73.
A. THE NONDELEGATION DOCTRINE AND THE CONSCIENTIOUS LEGISLATOR

In 1931, the United States Supreme Court proclaimed that "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard." The Supreme Court applied this "nondelegation doctrine" in 1935 to strike down two statutes adopted at the beginning of the New Deal. The doctrine has lain dormant since that time, however, and Congress has been free to delegate expansive powers to administrative agencies. For example, the federal courts have let stand the delegation of power to the Federal Communications Commission to serve "public convenience, interest, or necessity," and to the Interstate Commerce Commission to set "reasonable" rates. In effect, the Supreme Court has recognized the existence of the modern administrative state, in which the role of government is sweeping and the tasks of government—for example, determining what rates are "reasonable"—are often too complex for legislative resolution. In the words of Judge Stephen Breyer, "Congress delegated broadly to the agencies because it had to do so. The federal judiciary, recognizing the need, ratified the means."

129. See Breyer, supra note 93, at 788.
130. Id. Professor E. Donald Elliot has expanded on this notion, observing that

[the administrative state exists. It is beyond the practical power of the Supreme Court to make it go away or even to modify its essentials significantly. . . . In principle, moreover, broad delegations of lawmaking authority to administrative decisionmakers are not some accidental or incidental development that has come about through a combination of judicial timidity and congressional laziness, although undoubtedly there are particular statutes which are ill-advised or poorly drafted. The growth of administrative lawmaking over the half-century since the New Deal has been fueled by fundamental political and cultural currents that the law is powerless to reverse and to which it must therefore accommodate itself.

The state supreme courts have adopted a variety of differing approaches to the nondelegation doctrine. In Minnesota, the history of the nondelegation doctrine is similar to the federal experience. Initially the Minnesota Supreme Court embraced the doctrine, using it, for example, to strike down a statute that authorized the Insurance Commissioner to prepare and adopt a standard policy form. At the present time, however, the doctrine appears to be toothless: a delegation of power to an agency will be upheld so long as the legislature is not delegating “pure legislative power,” defined as “the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment.” The legislature thus generally is free to delegate broad discretionary power under a statute if the statute furnishes

a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.

nondelegation doctrine to force the legislature rather than administrative agencies to make important policy decisions. See, e.g., J. ELY, supra note 92, at 122-34; T. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 93 (2d ed. 1979).

131. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.14, at 204-06 (2d ed. 1978); R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 3.45, at 61-64 (1985).


133. Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949). Short of delegating “pure legislative power,” the legislature may delegate discretionary power under a statute. For example, the Minnesota Supreme Court has stated that the legislature

“may delegate legislative functions which are merely administrative or executive. It may clothe officials, commissioners, or boards with administrative powers. The legislature has a large discretion in determining the means through which its laws shall be administered. Administrative officers may be clothed with the power to exercise a discretion under a law, but not a discretion as to what the law shall be... The legislature may delegate to a commission the power to do some things which it might properly but not advantageously do itself. It may vest in a commission authority or discretion to be exercised in the execution of the law. It may delegate power to determine some fact or state of things upon which the law makes its own action or operation to depend... The legislature may delegate to a board or commission authority or discretion to be exercised in carrying out the purposes of a statute.”

Hassler v. Engberg, 233 Minn. 487, 515, 48 N.W.2d 343, 359-60 (1951) (quoting 1 DUNNELL, MINN. DIGEST 1600).

134. Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949).
Even this limitation is construed liberally to allow broad, flexible standards when it would be "impracticable to lay down a definite comprehensive rule," when "necessary for the effectuation of legislative policy," or when the "complexity of the subject" of the underlying statute requires broad standards. Under this deferential approach, the Minnesota Supreme Court has upheld broad grants of rule-making authority to agencies.

The federal and Minnesota experiences with the nondelegation doctrine are, at least in part, examples of judicial accommodation of legal doctrine to the reality of the administrative state. In addition, the demise of the nondelegation doctrine can be linked to a judicial inability to discern when a delegation of power is so "excessive" that it constitutes the granting of legislative power to the executive branch in violation of the separation of powers. The separation of powers suggests that law making is to be done by the legislature and that administrative agencies are only to administer and implement the law within legislatively prescribed standards. But drawing the line marking where administration and implementation of the law ends and standardless agency law making begins is an essentially impossible judicial task: the court cannot fully appreciate the reasons why the legislature decided to delegate power as it did and will be extremely reluctant to second-guess the choice made by the more democratic branch of government. Moreover, there is little reason for judicial skepticism of the legislature's act, because the legislature is delegating its own power to a rival

136. Id. at 314-15, 126 N.W.2d at 782.
137. Id. at 315, 126 N.W.2d at 782.
139. As Professor Harold Bruff said,
If Congress is prepared to tolerate executive discretion on some aspect of policy as the price of enacting a program, how is a court to judge whether Congress could have been more specific, and, more important, whether Congress should have been more specific? Moreover, the delegation doctrine is not easily limited, because every statutory standard contains a host of open questions for implementation. Bruff, supra note 110, at 227 (emphasis in original); see also Stewart, The Ref ormation of American Administrative Law, 88 HARV. L. REV. 1667, 1693-97 (1975).
branch of government, not aggrandizing to itself a role properly played by another branch.

Thus, the judicial refusal to impose a strict nondelegation doctrine is based largely upon the self-perceived institutional limitations of courts, and not upon any judicial conclusion that the separation of powers is not threatened by broad delegations of authority to administrative agencies. Indeed, the courts' reluctance to entertain such issues seems to fit nicely within Professor Paul Brest's analysis of instances in which judicial restraint is linked to institutional considerations:

Judicial "restraint" may be a matter of comity, reflecting respect for the decisions of a coordinate branch of the federal government or of a state's chief policymaking body. It may flow from the court's inability to separate constitutional questions from related empirical issues beyond its competence or from matters of policy within the legislature's domain. It may also reflect the court's inability to ascertain how the legislative process has actually worked in a particular case.\(^{140}\)

As Brest noted, however, "[n]one of these considerations suggests that the legislature should exercise restraint in assessing the constitutionality of its own product."\(^{141}\) State legislators must take an oath or affirmation to support the state constitution,\(^{142}\) and it seems beyond argument that they are duty-bound to make an assessment of the constitutionality of legislation before them. Moreover, unless the legislature undertakes this responsibility, constitutional provisions that the courts find themselves institutionally unable to enforce meaningfully will be vitiated.\(^{143}\)

In assessing the constitutionality of legislation, the consci-


\(^{141}\) Brest, *supra* note 140, at 586 (emphasis added). For other commentary on the responsibilities of the conscientious legislator, see Linde, *supra* note 119, at 243-44.

\(^{142}\) See, e.g., MINN. CONST. art. IV, § 8.

\(^{143}\) Brest has argued that, although many legislators are not lawyers and the legislative process is not designed expressly to address constitutional issues,

The modern legislative committee, staffed by lawyers and others having expertise in particular areas of policy and law, is competent to consider the constitutional implications of pending measures. . . . To be sure, legislatures will seldom engage in the disinterested and detailed analysis that we expect of courts. One can reasonably demand, however, that the lawmaking process take explicit account of constitutional values threatened by pending legislation.

Brest, *supra* note 140, at 588. In Minnesota, at least, Brest's generalization
entious legislator must understand not only what the courts have said, but also why they have said it. As Professor Brest explained,

[The legislator must learn not only to interpret the Constitution, but also to interpret judicial decisions interpreting the Constitution. Decisions striking down laws are easy to understand: they mean that the laws are unconstitutional. Decisions not striking down laws do not always mean that the laws are constitutional, however, for a court's failure to invalidate may only reflect its institutional limitations.]

This analysis strongly suggests that state legislators must make best efforts to refrain from excessive delegations of authority to administrative agencies—not just because that is what makes good sense from a policy standpoint, but because that is what the state constitution requires of them.

This discussion is not intended to suggest that the legisla-

seems supportable. Attorneys constitute a major portion of the staff of the Minnesota House and Senate nonpartisan research offices.

144. Id. at 589 (emphasis in original).

145. To be sure, Brest's analysis can be stretched to the breaking point. For example, his conclusion that legislators must usually if not always accept Supreme Court decisions declaring a law unconstitutional contrasts with one classic defense of judicial review:

The Supreme Court's law . . . could not in our system prevail . . . if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only. No doubt, in the vast majority of instances the Court prevails—not as a result of any sort of tacit referendum; rather, it just prevails, its authority is accepted more or less automatically, and no matter if grudgingly. It takes concerted effort at some risk, and hence not a little daring, to fight back, and then there is no guaranty of victory . . . . But given passion, vigor, and hard-headedness, it can be done and has been done. After all, as T.R. Powell once wrote, though by way of emphasis he reduced the matter somewhat too close to the vanishing point, what the Court can do is no more than "to say something. The effect depends upon others." Broad and sustained application of the Court's law, when challenged, is a function of its rightness, not merely of its pronouncement.

In addition to these concerns, it is probably unrealistic to expect legislators to incorporate the judicial function into the legislative process. Indeed, some untoward distortions of the legislative process would probably result if legislators felt compelled to allow their personal readings of the Constitution to control their votes. The point to be made here is that legislators should, at the very least, be sensitive to policy arguments that are based on constitutional values. In the context of the delegation of rule-making authority, the notion that undue delegation is contrary to good policy essentially merges with the constitutional concern about the separation of powers: both strongly counsel that rule-making authority be delegated cautiously.
ture of Minnesota or of any other state has failed to live up to its responsibilities. Nor should it be read as asserting that broad delegations of authority to agencies would disappear overnight if a state legislature would only do its job. To the contrary, conscientious legislative attention to this responsibility will still result in instances in which broad authority is delegated; the modern administrative state is here to stay, and agencies are the only practical vehicles for the consideration and resolution of many issues. But broad delegations of power do raise serious constitutional issues that many courts will not resolve and that legislators are duty-bound to address. Moreover, legislative oversight of agency rule making will be greatly facilitated if the legislature initially resolves issues concerning the delegation of authority in a conscientious manner giving careful regard to the state constitution. If clearer and more thoughtful delegations of authority result, that is all the better; if they do not, at least the courts will be more justified in deferring to the legislature's consideration of the constitutional issues.

B. THE NONDELEGATION DOCTRINE AND THE LEGISLATIVE VETO

In his dissent in Chadha, Justice White stated that, "[i]f the effective functioning of a complex modern government requires the delegation of vast authority . . ., I cannot accept that [the separation of powers] forbid[s] Congress [from] qualify[ing] that grant with a legislative veto."¹⁴⁶ One commentator has responded that "White's point is a non sequitur: The fact that Congress may delegate legislative authority, without more, has nothing to do with whether Congress may reserve a legislative veto in the delegation."¹⁴⁷ Strictly speaking, this criticism undoubtedly is accurate. Nonetheless, Justice White's point seems based on common sense: if the courts will let stand the legislative delegation of essentially standardless authority to an agency, it seems anomalous that they should strike down what would appear to be a less drastic legislative step. Because the Court's formalistic opinion in Chadha did not effectively refute Justice White's contention,¹⁴⁸ the answer must lie elsewhere.

¹⁴⁷. Elliott, supra note 63, at 164.
¹⁴⁸. See Chadha, 462 U.S. at 953 n.16, where the majority labeled lawmaking by Congress "legislative," and therefore subject to the bicameralism and presentment requirements, and labeled administrative agency rule making
The nub of the problem, I suggest, is whether the conception of the separation of powers that courts find themselves institutionally capable of enforcing is endangered more by legislative interference with agency rule making than by legislative delegation of limitless rule-making authority to agencies. As explained above, although standardless delegation of rule-making authority implicates fundamental concerns involving the separation of powers, courts have considered themselves unable to referee in this arena. Moreover, the delegation of legislative authority to a rival branch does not create any suspicions of self-interested institutional abuse, because the legislature is, at most, asking another branch to do the legislature's job rather than attempting to aggrandize to itself any roles that properly belong to another branch. In contrast, Minnesota's approach to the legislative veto seems to create a "super-agency" staffed by legislators whose mission is to review and control administrative prerogatives. When a few legislators attempt to act as "super-administrators" performing functions similar to those of highly placed executive officials, the line between the executive and legislative branches becomes so blurred that basic principles of separation of powers are violated. Judicial suspicion of the functions of these legislators is heightened because here, unlike in the case of unqualified delegation of rule-making authority, the legislature appears to be intruding into the affairs of a coequal branch and conferring executive powers upon some of its members. In short, the problem is that the legislative committee operates somewhat like the federal Office of Management and Budget ("OMB") in reviewing the

"quasi-legislative" or "executive," and thus somehow immune from bicameralism and presentment. The Court stated:

Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

Id. The question-begging nature of this language is apparent. Indeed, many of the commentators who have examined Chadha have considered the tension between the rationale of that decision and the dormancy of the nondelegation doctrine. For illustrative discussions, see Brubaker, supra note 1, at 101-04; Goldsmith, supra note 63, at 751-61; Smolla, supra note 63, at 553-56; Note, supra note 56, at 1495-99.

149. See supra notes 126-140 and accompanying text.

150. For an overview of OMB's supervisory role over the federal rule-making process, which includes a requirement of balancing the benefits of a pro-
appropriateness of administrative regulations, with one crucial difference: OMB is an executive agency.

One answer to Justice White’s question might now be both apparent and plausible. There is an important distinction between a situation in which the legislature gives carte blanche to another branch to make law and a situation in which the legislature appoints a few of its members to decide whether that branch has made law to their liking. When the latter occurs, law is made through a hybrid process subject to enhanced judicial suspicion because it allows the power of the legislature to be exercised by less than its full membership and raises suspicions concerning institutional self-aggrandizement.\(^\text{151}\)

\(^{151}\) See Legislative Research Comm’n v. Brown, 664 S.W.2d 907, 917-19 (Ky. 1984). As one commentator noted, “[a] delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency.” Watson, supra note 93, at 1067 n.430.

In somewhat analogous situations, the federal courts have invalidated attempts to confer executive authority upon officials either appointed by or subject to removal by Congress. See Buckley v. Valeo, 424 U.S. 1, 118-35 (1976) (per curiam) (invalidating provision of Federal Election Campaign Act providing that several members of the Federal Election Commission would be appointed by congressional leadership); Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986) (three-judge court) (invalidating a provision of the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act, that conferred executive powers upon the Comptroller General, who is subject to removal by Congress), \(\text{prob. juris.}\) noted, 106 S. Ct. 1181 (1986). These decisions guarded against the danger, recognized by the framers of the federal Constitution, “that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.” Buckley v. Valeo, 424 U.S. at 129.

Consider also MINN. CONST. art. IV, § 5, which forbids Minnesota legislators from holding “any other office under the authority of the United States or the State of Minnesota, except that of postmaster or of notary public.” The primary purpose of this provision seems to be “to avoid, as an evil, the ‘trafficking in public offices.’” McCutcheon v. City of St. Paul, 298 Minn. 443, 447, 216 N.W.2d 137, 139 (1974) (quoting State \textit{ex rel.} Childs v. Sutton, 63 Minn. 147, 151, 65 N.W. 262, 263 (1895)). Yet the modern standard for assessing the compatibility of legislative and other governmental offices under art. IV, § 5, is whether the other office provides the person with “independent authority under law, either alone or with others of equal authority, to determine public policy or to make a final decision not subject to the supervisory approval or disapproval of another.” \textit{McCutcheon}, 298 Minn. at 447, 216 N.W.2d at 139. This test is animated far more by practical concerns about separation of powers than by the goal of thwarting the illicit securing of public offices. Although it is unlikely that the Supreme Court of Minnesota would apply this standard directly in any challenge to LCRAR’s rule-suspension authority, this interpretation of art. IV, § 5 bolsters the already rigid separation of powers set forth in Minnesota by MINN. CONST. art. III, § 1. See \textit{supra} text accompanying note 49.
Other factors as well may counsel against linking the continued dormancy of the nondelegation doctrine with the viability of state legislative committee rule-suspension authority. One classic tenet of the modern administrative state is that administrative agencies lend expertise to the development and refinement of public policy. However imperfect has been the fit between this ideal and agency practice, a legislative committee is surely less well situated than an agency to exercise expertise or to fine-tune regulation to the complicated facts of modern life. Moreover, resurrecting the nondelegation doctrine because the demise of the legislative veto has supposedly left society vulnerable to democratically unaccountable agency law making could simply mean that, for better or worse, less regulation will occur. Finally, justifying the need for unchanneled delegations of authority to a legislative committee by pointing to unchanneled delegations of authority to an administrative agency seems akin to arguing that two wrongs can make a right.

CONCLUSION

If a new state constitution were being drafted, some form of legislative veto provision would be worth considering, particularly if safeguards could be developed that would lessen the probability that distortions of the legislative process would re-
suit from its presence. Under established notions of the separation of powers, however, there seems little chance that legislative committee authority to suspend administrative rules could survive challenge.

Considering its shaky constitutional foundation, it might be asked why this rule-suspension authority has lasted so long in Minnesota. Part of the answer lies in LCRAR's infrequent use of that authority, thus creating few opportunities for judicial challenge to it. Indeed, LCRAR's reliance upon mediation and agency acquiescence has not only been good politics, but also wise planning to avoid litigation. Moreover, judicial requirements of standing, which ordinarily allow only those actually injured by governmental action to contest that action in court, severely limit the availability of such a judicial challenge.\footnote{\textit{\textit{\textsuperscript{154}}} See, \textit{e.g.}, \textit{City of Minneapolis v. Wurtele}, 291 N.W.2d 386, 392-93 (Minn. 1980) (plaintiffs had no standing to raise constitutional challenge absent a showing of harm resulting from denial of constitutional rights).} In the usual instance, the only entity with standing and with the resources and legal talent readily available to litigate the constitutionality of LCRAR's rule-suspension authority would be the agency that promulgated the rule suspended by LCRAR. For a variety of reasons, including the desire to protect its future budget, that agency is likely to forego a judicial confrontation with the legislature. Thus, LCRAR's rule-suspension authority could remain on the books for many years despite its questionable constitutionality.

Alternative methods of legislative oversight are available, of course, if LCRAR's rule-suspension authority is invalidated. For example, a legislative advisory committee could be created to conduct systematic review of administrative rules and to propose legislation to remedy agency mistakes.\footnote{\textit{\textit{\textsuperscript{155}}} See Levinson, \textit{supra} note 4, at 81 (noting that 15 states had adopted this approach).} A variant of this approach is embodied in the Model State Administrative Procedure Act, under which the advisory committee's objection to a new rule is published with the rule and the agency bears the burden of persuading a reviewing court in any later litigation that the rule is valid.\footnote{\textit{\textit{\textsuperscript{156}}} MODEL STATE ADMIN. PROCEDURE ACT § 3-204(d) (National Conference of Commissioners on Uniform State Laws rev. 1981) (discussed in Levinson, \textit{supra} note 4, at 83, 103-04).} More generally, the legislature's budgetary authority provides some opportunity to encourage agency responsiveness to the legislative will.\footnote{\textit{\textit{\textsuperscript{157}}} The extent to which budgetary authority and other factors can con-}
The solution to the problem of legislative oversight may well be difficult. Constitutional system tinkering, however, is not the answer. Hans Linde once remarked that, "[i]f this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes." The long-term protections that adherence promotes are not worth gambling on the dubious benefits of short-term measures of political expediency, such as legislative committee authority to suspend administrative rules.

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158. Linde, supra note 119, at 255.