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There May be Cracks in the Foundation: An Analysis of Pennsylvania’s Current Approach to Legislative Review of Agency Rulemaking

Nicholas J. Johnson*

As the legislative delegation of power to administrative agencies has grown over recent decades, so have calls for controls on agencies’ exercise of that power and particularly for controls on agency rulemaking. In response, various state legislatures have introduced a myriad of designs introducing legislative oversight and control over administrative regulations. Pennsylvania has joined these states by offering a means of legislative review of agency rulemaking in the form of the Regulatory Review Act of 1989 (Act 19).

Pursuant to the Act, the Pennsylvania Legislature created an entity called the Independent Regulatory Review Commission (Commission) and assigned to the Commission the task of reviewing administrative regulations. Upon review, the Commission is to make a recommendation to special House and Senate Standing Committees (also established by the Act), that the regulation should be approved or disapproved.

Final disapproval of any regulation occurs only after passage of a concurrent legislative resolution barring the publication of the reg-


I would like to thank Dr. Sidney Wise, Professor of Government, Franklin and Marshall College, for sharing with me the materials that he has collected pertinent to this Article and Anthony DeCusatis, Esq., my former colleague at Morgan, Lewis and Bockius, whose initial comments concerning the Commission prompted this work.


3. The Act also anticipates that there may be disagreement between the Commission and the Standing Committees regarding the propriety or wisdom of particular rules. Ultimate authority over disapproval is ceded to the legislature. Regulatory Review Act, supra note 2, at § 6(c).
ulation. Absent such a vote, the administrative regulation is deemed approved and is promulgated through traditional channels. Partly in response to criticism that disapproval of regulations purely by legislative resolution is constitutionally suspect, especially in light of recent federal and state cases prohibiting substantive lawmaking from being undertaken through the instrument of a legislative resolution, the statute was reenacted to include a provision requiring presentment of concurrent resolutions of disapproval to the Governor for veto or approval.

Although the decision to permanently bar publication of a regulation is left to the legislature, the Commission possesses the power to bar temporarily the publication of proposed final form regulations. Additionally, in the case of emergency regulations which initially may bypass the rule review structure, after 120 days the Commission may suspend those regulations on its own authority pending legislative determination of their propriety.

The Act creates two standards under which the Commission may recommend disapproval of a regulation. The first is established when the regulation is ultra vires. The second, which is reached only if the regulation survives the first, is whether the regulation imposes undue costs upon the Commonwealth according to designated criteria. Separately, the Act permits the legislature to exercise its

4. Id. §§ 6-7.
5. The standing prerequisite to agency rule promulgation is publication of the final rule—after preliminary submission of the regulation as proposed and a period of public comment—in the Pennsylvania Bulletin in accordance with section 201 of the Commonwealth Documents Law, P.L. 769, No. 240, Act of July 31, 1968.
8. Regulatory Review Act, supra note 2, at § 7(d).
9. Id. § 6(b).
10. Id. § 5(d).
11. Section 5(e) of the Act permits a disapproval recommendation by the Commission upon the Commission’s determination that the regulation is not in the best interests of the public. This determination is made following an assignment of the following criteria:
   (1) Economic or fiscal impacts of the regulation or rule which include the following:
      (i) Direct and indirect costs to the Commonwealth, to political subdivisions and to the private sector. 
      (ii) Adverse effects on prices of goods and services, productivity or competition.
      (iii) The nature of any reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organizations in the private and public sectors where such reports, forms or other paperwork would be required.
      (iv) The nature and estimated cost of any legal, consulting or ac-
ultimate power of disapproval on the basis that the rule is *ultra vires* or for any other reason, regardless of the recommendation of the Commission.\(^{13}\)

The Pennsylvania design has been applauded by many as a necessary and effective measure.\(^{14}\) Notwithstanding these accolades there remain blemishes and weaknesses in the structure of the statute that mark potential constitutional deficiencies. This Article attempts to illuminate and examine those infirmities to determine whether the response to rule review under Act 19 should be applause and acceptance of the Act as a proper instrument of the State’s governmental process or instead, recognition and treatment of the constitutional infirmities that recommend against the Act’s continuation in its current form.

The analysis is separated into four parts. The first section examines the validity of the Commission’s authority to take direct action in light of the possibility that it may be characterized as a legislative agency. The second section analyzes whether the Act’s empowerment of the legislature to determine whether an agency rule is *ultra vires* usurps the authority of the judiciary. The third section evaluates whether the character of the legislature’s disapproval of proposed rules permits the criticism that the legislature has interfered

\[\text{ counting services which the private or public sector would incur.} \]

\((v)\) The impact on the public interest of exempting, or setting lesser standards of compliance for, individuals or small businesses when it is lawful, desirable and feasible to do so.

\((2)\) The protection of the public health, safety and welfare, and the effect on this Commonwealth’s natural resources.

\((3)\) The clarity, feasibility and reasonableness of the regulation to be determined by considering the following:

\((i)\) Possible conflict with or duplication of statutes or existing regulations.

\((ii)\) Clarity and lack of ambiguity.

\((iii)\) Need for the regulation or rule.

\((iv)\) Reasonableness of requirements, implementation procedures and timetables for the public and private sectors.

\((4)\) Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

\((5)\) Approval or disapproval by the designated standing committee of the House of Representatives or the Senate.


with the powers constitutionally entrusted to the executive branch of government. The last section examines whether the rule review under Act 19 generates antidemocratic fallout that impairs the goals of governmental accountability and efficiency.

I. The Commission as a Legislative Agency and the Impact of that Characterization on the Validity of its Nonadvisory Powers

A. Classification of the Commission

Section 6(b) of Act 19 empowers the Commission to temporarily suspend publication of a proposed final form regulation in the Pennsylvania Bulletin. This, in effect, bars promulgation that otherwise would become effective, and separately, permits the Commission to temporarily invalidate emergency regulations (after they have been in effect for 120 days). The characterization of the Commission is perhaps crucial in determining the constitutional validity of these provisions. If the Commission is viewed as a traditional executive agency, the temporary bar and suspension powers can be fairly considered valid delegations of enforcement authority. If, however, the design and operation of the Commission cause it to fall within the category of a legislative agency then the validity of the Commission's exercise of these powers is questionable.

The existence of legislative agencies and the range of their functions was recently considered by the Pennsylvania Supreme Court in Commonwealth v. Sessoms. The court in Sessoms examined the constitutionality of certain powers exercised by the Pennsylvania...

15. Section 7.1 of the Act introduces another procedure that appears to fall subject to the same criticisms applicable to the temporary bar and suspension powers. This section permits the Joint Committee on Documents, at the impetus of either the Commission or one of the Standing Committees, to "determine whether [a published or unpublished document utilized by an agency] should be promulgated as an agency regulation and may order an agency either to promulgate the document as a regulation within 180 days or to desist from the use of the document in the business of the agency." This grant of power also appears to be subject to the same observations and criticisms made about the propriety of legislative interpretation of statutory meaning. See infra notes 33-69 and accompanying text.

16. The legislature is embodied with the power to delegate enforcement authority to administrative agencies of the executive branch so long as those delegated powers are controlled by adequate standards that define the scope of agency authority. Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A.2d 198 (1975).

17. A dispute over the characterization of the Commission has already surfaced. The two sides of this dispute are evidenced in the opposing opinions of the Commonwealth Counsel and Counsel for the Commission, which respectively support and oppose the conclusion that the Commission is a legislative agency. See Opinion of Cmwlth. Office of General Counsel (May 16, 1988) and Opinion of Commission Counsel (June 14, 1988) (copies of both opinions on file at the Dickinson Law Review office).

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Sentencing Commission.\textsuperscript{19} As part of its analysis, the court concluded that the service of four members of the General Assembly\textsuperscript{20} on the Sentencing Commission placed the Commission into the category of a legislative agency.\textsuperscript{21} Acknowledging the paucity of authority defining the nature and functions of legislative agencies, the court drew fairly predictable boundaries delineating the scope of permissible legislative agency action.\textsuperscript{22}

Beginning from the theory that “a ‘legislative agency’ has as its purpose the furtherance of some aspect of the legislative power,”\textsuperscript{23} and placing the legislative agency in the same functional category as a legislative committee, the court concluded that the legislative agency could exercise no greater power than the legislature itself holds.\textsuperscript{24} Thus, while a legislative agency legitimately may be assigned to exercise nonlawmaking powers entrusted to the legislature,\textsuperscript{25} it is not authorized to take actions that would be classified as lawmaking if undertaken by the legislature. In view of these limitations, the characterization of the Commission as a legislative agency would raise serious doubts about the validity of its power to temporarily bar or suspend otherwise lawfully promulgated executive agency rules.\textsuperscript{26}

Construed narrowly, \textit{Sessoms} might be read to define a legisla-

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} Four judges and three appointees of the Governor also served on the Sentencing Commission. \textit{Id.} at 375, 532 A.2d at 780.

\textsuperscript{21} “Most significant [indications of the commission’s status] is the composition of the commission.” \textit{Id.} at 375, 532 A.2d at 780.

\textsuperscript{22} \textit{Id.} at 375-80, 532 A.2d at 780-82.


\textsuperscript{24} The court compared the functions of the legislative agency to those of a special or standing committee of the legislature and constrained it by the same limitations that would restrict such committees’ actions. \textit{Id.} at 376-78, 532 A.2d at 780-82.

\textsuperscript{25} These nonlawmaking powers may include investigation, evaluation, and classification. See \textit{id.} at 376, 532 A.2d at 780.

\textsuperscript{26} The court in fairly clear language indicated its seriousness about the idea that agency administration of statutes is indeed executive in nature and that, short of a statutory enactment, the legislature cannot control the executive function of rulemaking. “Notwithstanding the view that such regulations are adopted under a delegation of the legislative power to the agency, administrative rulemaking may be viewed as entirely executive in nature.” Commonwealth v. \textit{Sessoms}, 516 Pa. 365, 374, 532 A.2d 775, 779 (1987) (citing Consumer Energy Council of Am. v. Federal Energy Regulatory Comm’n, 673 F.2d 425, 473-74 (D.C. Cir. 1982)). “To the extent that a statute establishes governmental policy, the legislature may not further control the execution of that policy except through legislation.” \textit{Id.} at 374, 532 A.2d at 780.

This appears to directly reject the position asserted by many at the federal level that the power exercised by executive agencies is, in part, plainly legislative and therefore the separation of powers doctrine should not be construed to so rigidly exclude the legislature from exercising some direct control over those bodies. See, e.g., Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (White, J., dissenting); \textit{Farina, Statutory Interpretation and the Balance of Power in the Administrative State}, 89 \textit{COLUM. L. REV.} 452, 484, 528 (1989).
tive agency as one that necessarily includes legislators among its members, thus protecting the Commission from that designation. Such a narrow reading, however, would exclude bodies made up entirely of nonlegislators that are created to assist the legislature in some fashion and assigned the power to exercise certain nonlawmaking legislative functions. Although the court's discussion of the issue in Sessoms focused upon legislative agencies that "[include] other [members] as well" there is no obvious reason why the legislature could not, for example, assign its evaluation authority to a special body of nonlegislators that might legitimately be considered a legislative agency. That such a body could be labeled a legislative agency would seem to turn not on its composition, but instead on its role as an agent controlled by and designed to serve the legislature.

If legislative control over the subject agency is the definitional touchstone, and the absence of legislators on the Commission is not dispositive, then there is some reason to believe that the Commission is at risk of being categorized as a legislative agency.

The five members of the Commission are chosen respectively by the Speaker of the House, the President Pro Tempore of the Senate, the House Minority Leader, the Senate Minority Leader, and the Governor. This appointment power is perhaps a fair basis upon which to conclude that the legislature is positioned to assert a significant amount of influence and control over the functioning of the Commission.

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27. The court did not rule out this possibility.
28. One might suggest that the test should focus on function rather than legislative control. However, this appears to be insufficient given that certain functions, e.g., investigation, are shared by the branches of government. See Dauphin County Grand Jury Investigation Procedure (No. 2), 332 Pa. 342, 2 A.2d 802 (1938) (Dispute between the judiciary and the legislature resulting from their concurrent attempt to exercise constitutionally granted powers to respectively investigate criminal and impeachable actions committed by a governmental officer.).
29. No members of the legislature serve on the Commission. Indeed, the enabling statute explicitly prohibits this. See Regulatory Review Act, supra note 2, at § 4(a). This prohibition has been offered as a justification for viewing the Commission as an executive rather than a legislative agency. See Opinion of Commission Counsel, supra note 17, at 4.
30. Regulatory Review Act, supra note 2, at § 4(a).
31. Whether this level of legislative control is sufficient to classify the Commission as a legislative agency was debated in the opinions of the Commonwealth Office of General Counsel and Counsel for the Commission which argued respectively in support of and in opposition to the idea that the Commission is a legislative agency. See Opinion of Cmwlth. Office of General Counsel, supra note 17, at 11-20; Opinion of Commission Counsel, supra note 17, at 5-12. The Commission counsel argued, inter alia, that the propriety of the current appointment process and the characterization of the Commission as an executive agency is supported by the silence of the Pennsylvania Constitution on who shall have the power of appointment. Unlike the federal constitution, the Pennsylvania Constitution does not explicitly give the Governor the authority to appoint officials to Commonwealth agencies. The Appointments Clause of the Pennsylvania Constitution dictates only that the Governor shall appoint the "Secretary of Edu-
It should be noted, however, that although the Commission members are selected by legislators, no legislators sit as members, and conditional power to remove Commission members is ceded to the Governor. This places the Commission perhaps two stages away from the precise mechanism deemed improper in *Sessoms*. Whether this is a sufficient surrender of legislative control to keep the Commission out of the legislative agency category depends substantially on how the court views the Pennsylvania Constitution's grant of legislative authority and the degree of control achieved through the appointment power. It would not be unreasonable to conclude that a commissioner, selected personally by a powerful member of the legislature, might be swayed by the wishes of that legislator in carrying out Commission actions. Indeed, there is the potential that this commissioner would act in a highly subordinate fashion, especially when the professed goal of the enabling statute is to infuse significant legislative control into the rulemaking process. If the court is sufficiently concerned about the legislative exercise of powers in an indirect fashion outside the boundaries of traditional law making, it might easily conclude that the power of appointment awards too much control to the legislature that the Commission's powers must be limited to those legitimately exercised by legislative agencies. Given this possibility, it is apparent that the Commission’s status as an executive agency is somewhat unsecure.

B. Limitations on the Commission's Functions Resulting from its Classification as a Legislative Agency

If the Commission is deemed to be a legislative agency, its functions and powers must be reassessed in light of the limitations that have been prescribed for such bodies. As currently designed, the Commission’s power certainly ranges into the area of altering legal
rights and duties that the Sessoms court adopted as the standard for distinguishing the legislature's lawmaking function from its other entrusted powers. Exercise of the temporary bar and the power to suspend emergency regulations directly impairs the legal rights and duties of members of the executive branch to promulgate regulations in accordance with an agency's enabling statute, and, therefore, fits squarely within the category of actions that if undertaken by the legislature would require bicameral passage of a bill and presentation to the chief executive.

At the point in the process when the Commission exercises its temporary bar or suspension power there has been no legislative enactment modifying or withdrawing the agency's rulemaking authority. Act 19 has not placed temporary suspension conditions on all or any specific rule promulgations, but has only granted to the Commission the power to apply those conditions at its discretion.

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33. Sessoms used the standard of alteration of legal rights and duties as a guideline for defining legislative action that must be considered lawmaking. Commonwealth v. Sessoms, 516 Pa. 365, 374-75, 523 A.2d 775, 780 (1987). This approach draws from a similar standard set forth in the U.S. Supreme Court's decision in Chadha in which the Court invalidated a house resolution that had "the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch." Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983).

34. For rulemaking that is considered ultra vires, there is obviously some argument concerning the agency's authority to promulgate the disputed regulation. However, with respect to a rule that is disapproved on the ground that it is simply unwise or inefficient, it is apparent that promulgation of the rule is authorized by the enabling statute. See supra note 12 and accompanying text.

35. There is some broad similarity between this power of the Commission and the judicial power to issue preliminary injunctions pending adjudication of the merits of a dispute.

36. See, e.g., Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 470 (D.C. Cir. 1982) ("Merely styling something as a condition on a grant of power does not make that condition constitutional. Otherwise Congress could, for example, provide that all rights and duties established by legislation are conditioned on the vote of either house of Congress to eliminate them, thus enabling instant repeal of all statutes by simple resolution. In effect, Congress could use 'conditions' as a means of circumventing completely the stringent restrictions on the legislative power in Article 1."). The ostensible movement of the legislature one step from the decision may be insufficient if the decisionmaker is in reality a conduit or a direct agent for the legislature.

37. A roughly similar issue, which arises under the Minnesota statute creating the Legislative Commission for Review of Agency Rules (LCRAR), is analyzed by Professors Hamilton and Prince. See Hamilton & Prince, Legislative Oversight of Administrative Agencies in Minnesota, 12 WM. MITCHELL L. REV. 223-89 (1986). The Minnesota statute differs from Pennsylvania's Regulatory Review Act in the sense that the Minnesota Legislature allows the LCRAR to temporarily suspend agency regulations until it has an opportunity in the next legislative session to introduce legislation permanently barring the promulgation of the rule. The authors observe that the suspension provision is almost certainly unconstitutional in light of the Supreme Court's decision in Chadha. Drawing on the Court's characterization of lawmaking as any action that has "the purpose and effect of altering the legal rights, duties and relations of persons including the Attorney General, Executive Branch Officials and Chadha, all outside the Legislative Branch," the authors argue that the impact of the LCRAR's suspension procedure is indeed legislative in nature because it impacts the duties, powers, and
It is apparent that a process that permitted the legislature to, by a direct order, without passage of a bill and presentment to the Governor, prevent promulgation of a rule that is permitted under an existing statute would be improper. Moreover, the fact that the action was taken pending the consideration of a bill that addresses the same issues would not appear to lend it any credibility. This process would be no more valid where undertaken by a legislative agency rather than by the legislature itself.

The Commission’s power to bar or suspend otherwise lawful regulations pending a decision of the legislature to permanently disapprove them, seems then to hinge on the strength of the Commission’s status as a legitimate executive agency. Since the Commission’s hold on that designation is tenuous, there is significant reason

responsibilities of individuals serving in the executive branch. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983). Hamilton and Prince conclude that “in Minnesota as [at the Federal level under Chadha] . . . any legislative action meant to have the effect of law must be the product of the law-making process described in the Minnesota Constitution and no other. Nor is it constitutionally feasible for the legislature to circumvent the constitutional limitations by creating an ‘executive branch’ agency with rule veto or suspension power and then providing that legislators be appointed as members of that agency.” Hamilton & Prince, supra, at 238.

In this last clause, while not using the precise nomenclature, the authors recognize the potential for improper utilization of legislative agencies as mechanisms for circumventing the restrictions on direct legislative action. If Pennsylvania’s Commission is considered a legislative agency, it falls subject to this same line of reasoning. The temporary bar and the suspension of emergency regulations directly impair the legal rights and duties of members of the executive branch to promulgate regulations in accordance with the agency’s enabling statute. Although the enabling statute attempts to award this power to the Commission, that empowerment is no more valid than if it were entrusted to a legislative committee or subcommittee.

Finally, Hamilton and Prince acknowledge the principle argument for the validity of the suspension power—that the power is statutory and that no suspension is permanent. Hamilton & Prince, supra, at 238. The opinion of the Commission’s counsel pressed a similar argument with respect to Act 19. Opinion of Commission Counsel, supra note 17. Hamilton and Prince proceed to point out that regardless of the duration of its effect, the suspension unquestionably alters the legal rights of persons outside the legislative branch within the meaning of Chadha. Hamilton & Prince, supra, at 238-39.

This response is compelling in its application to the equivalent issue under the Regulatory Review Act, especially in light of the fact that under the Sunset Act, P.L. 508, No. 142, Act of December 22, 1981, various enabling statutes and agencies, including the Commission, have only a limited duration. PA. STAT. ANN. tit. 71, §§ 1795.1-14 (Purdon Supp. 1989). Indeed, given the continuous power of the legislature to amend or repeal legislation, this observation can be made about all legislative enactments and administrative agencies. Thus, the fact that the bar and suspension powers are temporary can be viewed as an insufficient basis on which to distinguish them from “traditional” lawmaking powers.


39. Indeed, the current process can be viewed as only slightly removed from that which was clearly invalidated in Sessoms. The principle difference being that the Commission, through a nonlegislative process, bars publication of regulations on a temporary rather than a permanent basis. Except for this difference in the duration of the disapproval, and assuming the Commission is a legislative agency, the current process is structurally no different from that which already has been invalidated.

40. See supra notes 16-17 and accompanying text.
to believe that its temporary bar and suspension powers are at risk of being invalidated.\textsuperscript{41}

II. Impact on the Judicial Function

Although much of the debate over the constitutional validity of Act 19 has centered on presentment and the status of the Commission as a legislative agency,\textsuperscript{42} in light of the discussion in \textit{Sessoms} and the court's adoption of the \textit{Chadha} analysis, there remain other reasons to question the Act's constitutional validity. These emanate in part from the Act's empowerment of the legislature to engage in functions that appear to significantly duplicate the powers of the judiciary,\textsuperscript{43} and, secondarily, from the mechanics of the "legislative" process through which the General Assembly ultimately disapproves a regulation.

\textbf{A. Impact on the Judiciary's Power to Interpret Law}

Pennsylvania's Regulatory Review Act prescribes evaluation and disapproval of proposed regulations under two criteria. First, that the regulation is \textit{ultra vires},\textsuperscript{44} and second, that it is simply unwise as measured against the criteria set out in section 5(e).\textsuperscript{45} It is the first criterion that raises the initial question of the statute's constitutional propriety.

By its terms, the statute authorizes interpretation of the enabling statute to determine whether the rule is grounded on powers beyond those granted to the agency. At the outset there is some room for dispute over whether this power is exercised by the legislature (and directly subject to constitutional criticism) or by the Commission (and perhaps a legitimate exercise of quasi-adjudicative powers by a properly empowered executive agency).

It is possible to conclude that the authority to administer the \textit{ultra vires} criterion is vested in the Commission and not the legisla-

\textsuperscript{41} The objective of the temporary bar function might be achieved through an alternative mechanism that would stand on firmer constitutional footing. This instrument, sometimes dubbed "report and wait," inserts a delay function in all rulemaking that would give the legislature time to enact disapproving legislation. \textit{See} Levinson, \textit{supra} note 1, at 93 (describing state statutes that combined a report and wait mechanism with pre-\textit{Chadha} one or two house legislative vetos).

\textsuperscript{42} \textit{See} IRRC \textbf{ANNUAL REPORT}, \textit{supra} note 6, at 2-3, 15-16; \textit{Opinion of Cmwlth. Office of General Counsel}, \textit{supra} note 17.

\textsuperscript{43} Furthermore, if the Commission is considered a legislative agency, its authority to undertake similar actions might be criticized along the same lines.

\textsuperscript{44} Regulatory Review Act, \textit{supra} note 2, at \S\ 5(d), (e).

\textsuperscript{45} For the text of \S\ 5(e), \textit{see} \textit{supra} note 12.

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ture. This view is supported by the language of sections 5(d) and (e), which expressly charge the Commission with making the ultra vires and efficiency determinations. Neither the legislature nor the standing committees are mentioned in this provision, but there are two rather obvious responses to this position.

First, section 5(b)(2) of the Act separately permits the Legislative Standing Committees to make their own ultra vires determination and recommend to the full legislature a resolution disapproving a particular rule on that basis.46 Moreover, when the legislature adopts a Commission recommendation of disapproval, it may also adopt and enforce the Commission’s determination that the rule is ultra vires.

Second, if the Commission is deemed a legislative agency there is nothing gained from the argument that it is the Commission and not the legislature that determines a regulation’s compliance with the enabling legislation. If, however, the Commission is considered a proper executive agency, there is some initially perceived merit to the argument that such bodies legitimately have and may exercise quasi-judicial powers. This approach, however, remains susceptible to the criticism that the granting of adjudicatory power to administrative agencies is typically reviewed de novo by the judiciary.47 The Act, however, specifically states that no substantive rights are created by its provisions and apparently attempts to withhold from aggrieved citizens or executive branch officials the opportunity to obtain judicial review of a Commission ultra vires determination.48 Therefore, the Act lacks the fundamental element that has validated agency exercise of adjudicatory powers. This would seem to substantially weaken the conclusion that the adjudicative function designed by Act 19 can be properly performed by the Commission acting as an executive agency.

Thus, it is difficult to conclude that statutory interpretation (and application of the efficiency and other criteria) is not a direct and predominate function of the legislature under the Act. It becomes

46. Section 5(b)(2) also permits the standing committees to evaluate the propriety of proposed regulations on the basis of other unspecified criteria that they may deem appropriate. This provision grants a standing committee the power to disapprove a rule based on grounds potentially more expansive than those available to the Commission.


appropriate then to examine whether the legislative power to interpret statutory language, to the degree envisioned by Act 19, infringes upon or usurps the power of the judiciary.

Statutory interpretation traditionally has been one of the core functions of the judiciary and a power that has been jealously guarded against legislative incursions. This is perhaps best illustrated by the evolution of the Pennsylvania Supreme Court's decisions ultimately invalidating expository statutes. These statutes, widely utilized in Pennsylvania until the last quarter of the nineteenth century, attempted to control the administration and execution of existing legislation by directing the judiciary to interpret legislation in the manner prescribed in the expository statute. Prior to Pennsylvania's adoption of the 1874 constitution, the judiciary had either fully acquiesced to these legislative commands, or limited them by giving them only prospective effect. Near the turn of the century the court completely invalidated the use of expository statutes in a case that remains at the foundation of Pennsylvania constitutional jurisprudence. In *Titusville Iron Works v. Keystone Oil Co.*, the court held that legislative attempts to direct the judiciary's interpretation of statutory language were invalid. Although the activity at issue was different from the rule review process in that it involved direct legislative commands to the judiciary, the court's analysis is highly pertinent to questions raised by rule review under the Regulatory Review Act.

At issue in *Titusville* was the Act of June 17, 1887, whose purpose was to change the construction of the Acts of 1836 and 1845 to broaden the category of workmen who could file mechanics liens against property. The fashion in which the legislature implemented

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49. Commonwealth v. Sutley, 474 Pa. 256, 262-63, 378 A.2d 780, 783-84 (1977). "The domain of the judiciary is in the field of the administration of justice under the law; it interprets, construes and applies the law." *Id.* at 262, 378 A.2d at 783 (quoting Commonwealth v. Widovich, 295 Pa. 311, 322, 145 A. 295, 299 (1929)). "[I]t necessarily follows that any encroachment upon the judicial power by the legislature is offensive to the fundamental scheme of our government." *Id.* at 262, 378 A.2d at 783. "It is also true . . . that there may be some areas where the dividing lines between the respective responsibilities of the three branches may be difficult to define. [But] the fact that the distinctions in some areas may be obscure does not lessen the responsibility of this Court to be ever vigilant for any encroachment upon the authority of the judicial branch." *Id.* at 262-63 n.5, 378 A.2d at 783 n.5 (citing *Stander v. Kelley, 433 Pa. 406, 422, 250 A.2d 474, 482 (1969).*). In very certain terms the legislature has proclaimed that the legislature may not direct that a statute be construed in a certain way. "[T]he Courts have the power, the duty and the responsibility of interpreting the Constitution and all legislation . . . ." *Stander v. Kelley, 433 Pa. 406, 422, 250 A.2d 474, 482 (1969).*

51. 122 Pa. 627, 15 A. 917 (1888).
52. *Id.* at 631, 15 A. at 918.
this change was not through passage of an act extending the right to file a mechanics lien to a new class of workers, but rather a direction to the courts that existing statutes governing the use of mechanics liens should be construed to permit the filing of liens by a broader class of individuals than previously had been permitted by judicial decisions.\textsuperscript{53} The court invalidated this statute as well as those statutes similarly structured on two grounds. First, the statutes were held to violate the doctrine of separation of powers and second, they failed to satisfy the directive of article III, section 6 of the Pennsylvania Constitution.\textsuperscript{54}

On both accounts, the constitutional infirmities that the court revealed in the Act of June 17, 1887 arise from structural characteristics that are shared by the Regulatory Review Act. The core of the court's analysis prohibits legislative activity that is remarkably similar to that which is authorized by Act 19. After expressing the belief that the legislative action at issue was an unmasked attempt to direct the judiciary in its interpretive function, the court, in perhaps its most descriptive recitation of this doctrine, explained:

Now, the constitution provides in section 6, of article III., that "No law shall be revived, amended, extended, or conferred by a reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length;" while the act of 1887 extends and confers the benefits of the acts of 1836 and 1845 to a large class of claimants, without the re-enactment of a single one of the provisions of the acts so extended, and by a reference to their titles only. It would be difficult to imagine a plainer violation of the constitutional provision. But this is not the only clause of the constitution against which the act of 1887 offends. Section 1, of article V., vests in the clearest manner possible the judicial power of the commonwealth in the several courts. The legislature can no more exercise judicial powers than the courts can arrogate to themselves legislative powers. The legislative and judicial departments of the government are independent and co-ordinate. The act of 1887 is in no respect a legislative declaration of the rights and privileges of the class of persons to whom it relates, but it is a judicial order or decree directed to the courts. It undertakes to give a new and final interpretation to the acts of

\textsuperscript{53} Id. at 632, 15 A. at 918.
\textsuperscript{54} Id. at 632-34, 15 A. at 919-20. Article III, § 6 of the Pennsylvania Constitution provides that "No law shall be revised, amended, extended, or conferred by a reference to its title only, but so much thereof as is revised, amended, extended, or conferred shall be re-enacted and published at length." Id. at 632, 15 A. at 918.
1836 and 1845, and directs the courts to adopt that interpretation in all cases that may be before them. Obedience to this order requires an abandonment of a long line of cases, and makes it incumbent on the courts to declare that a large class of claimants is within the provisions of those statutes which they have heretofore solemnly adjudged was not within them. To make this objection still more apparent it may be borne in mind that the act of 1887 is not an expository statute following upon the heels of that which it seeks to explain, but that it refers to a law which has been on the statute book for over half a century, and the meaning of which has been long and well settled by the courts; and it attempts to overturn the judicial construction given to its provisions, and to force upon the courts the new one which it furnishes ready made. This is a clear case of the exercise of judicial powers by a department of the government that does not possess them, and is a violation of Article V., section 1, of the constitution.

Under the constitution, as it stood prior to 1874, the limits within which legislative power was to be exercised were not as closely drawn as they now are. Many things were then permissible, as to the character and form of legislation, which the present constitution plainly forbids. Expository statutes, and statutes directing the courts what construction should be given to previous legislation were not uncommon prior to 1874, and the courts, while pronouncing all such legislation to be judicial in its character and void as to any retroactive effect intended, yet sought to give effect to the legislative will however expressed as to future cases. As the constitution prescribed no form or order into which the legislative expression was to be cast, the court sought to give effect to the purpose, however expressed. But the constitution of 1874, section 6, of article III., already referred to, requires all statutes to be self-explanatory and complete in their provisions, and forbids the extension, amendment, revival, or the use of any other method of conferring the benefits of previous legislation short of a re-enactment at length. This effectually closes the old and well-worn short-cut route, and we cannot, no matter how much inclined we might be to do so, give effect, even as to future cases, to expository acts like that under consideration. They are void as an unauthorized exercise of judicial power, and they are void because of the infraction of section 6 of article III.

55. Id. at 632-33, 15 A. at 918-19.
The command of *Titusville* has not been diminished, and the court has continued to defend the judicial prerogative, ruling on various occasions that the legislature may not properly constrain or direct the judiciary in its interpretation of statutory language.\(^5\)\(^7\)

On several fronts, the types of legislative efforts that are disfavored by *Titusville* and its progeny are the primary gears driving the rule review mechanism. The activity that those cases seek to prohibit is legislative interference with the judiciary through laws ordering that statutes be interpreted in a certain manner.

Act 19 arguably commits the same infraction in a more direct and imposing fashion. Rather than issuing a direct order to the judiciary that a statute should be construed in a particular fashion, the Act takes that approach a step further by circumventing the judiciary and allowing the legislature itself to interpret statutory meaning. Sections 5(b)(2), (d), and (e) permit the legislature, in conjunction with or through the Commission, to consider and analyze the following factors: statements offered by members of the legislature; historical evidence of legislative intent; the words of the statute; and pertinent judicial decisions. Based on an analysis of these factors, the legislature may then decide whether the statute gives the agency authority to promulgate the regulation in question, and on that basis disapprove or approve the regulation.\(^5\)\(^8\)

Additionally, the style and mechanics of the prohibited expository statute are strikingly similar to the resolution process through which the legislature asserts its will under Act 19. Like the expository statute disapproved in *Titusville*, the concurrent resolution disapproving an agency regulation does not purport to modify or amend the agency's enabling statute—although it does move toward the status of proper legislation through its presentment to the Governor. Descriptively, it is a direct order that a particular regulation is disapproved and shall not be promulgated.\(^5\)\(^9\) In effect, it is the vehicle of enforcement of the legislature's determination that the disapp-

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58. Roughly the same issue has been faced by the judiciary in other states, resulting in the conclusion that legislative interpretation of existing statutes under the auspices of agency rule review was an usurpation of the power of the judiciary and thus invalid. See, e.g., Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 919 (Ky. 1984).

proved regulation is *ultra vires* (or is unwise when measured against the efficiency criteria of Act 19). In the face of an unimpaired enabling statute that serves as a grant of authority to the agency to promulgate the regulation, the resolution takes on a curious status. The resolution does not purport to set policy or prevent essentially the same regulation from being reintroduced under another label. Moreover, at least for those regulations that are not deemed *ultra vires* (and arguably even for these, depending of the view one takes of the validity of the legislative *ultra vires* determination) the resolution does not dispute the agency's statutory authority to issue the rule.

These characteristics place the presented resolution in an odd quasi-legislative posture. The validity of such a resolution is dubious as a mechanism for implementing legislative modifications of an existing statute. This is especially so in light of the commitment in *Sessoms* that "to the extent that a statute establishes governmental policy, the legislature may not further control the execution of that policy except through legislation."  

In at least two respects, however, Act 19's concurrent resolution provision diverges from the structure of the expository statute. The first distinction between an expository statute and an Act 19 resolution is that the latter does not, on its face, purport to broadly construe the meaning of the enabling statute. Rather, it is tailored to the precise regulation it affects, and thus, does not prohibit the agency from proposing or promulgating the same, or a similar regulation, in a separate future process. There is some superficial appeal to the point that the limitation on the impact of the resolution to a specific regulation, rather than the overall authority of the agency under the enabling statute, distinguishes it sufficiently from a judicial *ultra vires* decision that the Act 19 process can be considered decidedly nonjudicial in nature. This argument survives, however, only when the focus remains on the precise form of the legislative action and the resolution document. True, the resolution in precise terms applies only to a specific regulation. As a practical matter, however, a successful legislative disapproval of a particular regulation will likely be as effective a prohibition on future promulgation of

61. See *supra* note 59.
62. This argument is double edged. Since the legislature's decision is specifically tailored to a single regulation, the analysis moves away from the classification of valid legislative policymaking into the arena of interference with the details of executive agency enforcement of legislative enactments. *See infra* notes 70-74 and accompanying text.
the same or similar regulation as would be any court decision. Indeed, in light of the subtle variations in facts and circumstances that can generate different outcomes in broadly equivalent judicial proceedings, the legislative disapproval of a particular regulation, with all the implicit messages that accompany it, might serve as an even broader and more static prevention against future similar regulations than would judicial disfavor. This is especially true in light of the powers of appropriation and potential modification of the enabling statute that the legislature may always exert to control agency action.

The second distinction between the structure of the expository statute and that of rule review is that the resolution expressing the legislative disapproval of the regulation might not explicitly indicate that the basis for the decision is the legislative determination that the regulation is ultra vires. This allows the argument that the official statement implementing the legislature’s decision of disapproval does not refer to or purport to interpret any existing statute, but rather is simply a valid implementation of legislative resolve that the agency should not take certain actions. This position, however, ignores the fact that the legislature’s view that a rule is ultra vires is indeed communicated through operation of section 5(b)(3). Moreover, the statute itself boldly professes that the legislature’s purpose when construing the meaning of agency enabling statutes is to determine whether proposed agency regulations exceed the powers delegated. This statement, combined with the fact that the agency has received both a statement interpreting the parameters of its enabling statute and an order, stemming from that interpretation, that a proposed regulation shall not be promulgated, place the legislature’s action on par with the impact and procedure of interpretive actions normally undertaken by the judiciary.

63. A case in point at the federal level is the agency reaction to the decision in American Mining Congress v. E.P.A., 824 F.2d 1177 (D.C. Cir. 1987). The decision had the effect of limiting the agency’s power to regulate otherwise hazardous materials that were being recycled. Almost immediately, the agency response was to narrowly interpret the decision, sparking a debate that the agency had failed to give proper credence to the court’s ruling. See Current Developments, 19 Env’t Rep. (BNA) 202 (June 10, 1988); Current Developments, 19 Env’t Rep. (BNA) 263 (June 24, 1988). Given the noncombative disposition of the judiciary toward the other branches, this response by the agency entailed little risk. One can project, however, that if the statement made by the court had come from the Congress through a mechanism like that established in Act 19, it would have produced a much more submissive agency response.

64. See Regulatory Review Act, supra note 2, at § 2 (Preamble).
65. Id. § 5(b)(3).
66. In addition, this position would remain subject to the attack that even conceding that no legislative statutory interpretation has occurred, the resolution may still contradict
The similarity between the prohibited expository statute and the Act 19 resolution process continues with both concepts' failure to satisfy the command of article III, section 6 of the Pennsylvania Constitution.\(^6\) Section 6 requires that any amendment or modification of an existing statute can only occur if the amended provision is reenacted and published at length.\(^6\) The expository statute violated this provision by attempting to affect the rights and responsibilities extended under existing legislation without specifically amending or modifying the language of that legislation.\(^6\) Similarly, the Act 19 resolution process directly impacts the ability of executive agency officers to enforce and administer the law in accordance with the mandate of an existing enabling statute, and yet does not amend or modify the statute. Although it is possible to argue that the agency has no such mandate when it acts beyond the authority granted by the statute (ignoring for the moment the arguable impropriety of the legislature making the determination) it remains true that the Act also permits the legislature to disapprove regulations that are unquestionably authorized by the enabling statute. In those cases, disapproval is based on the conclusion that the regulation is simply unwise as measured against the efficiency criteria listed in section 5(e), or on some other basis, as anticipated by section 5(c).

B. Impact on the Judiciary's Authority to Resolve Disputes Between Branches of Government

The powers of the judiciary are not solely defined in terms of the authority to interpret statutes, but also by the court's authority to resolve disputes between the branches of government.\(^7\) One potential result of Act 19 is to give the legislature plenary power to resolve disputes with the executive over the scope of the enforcement policy decisions contained in existing legislation and impair the powers vested in the agency without satisfying the constitutional requirements for valid lawmaking. See infra notes 74-85 and accompanying text.

67. Although Titusville was decided under the Pennsylvania Constitution of 1874, the language of article III, § 6 which appeared in that document was carried over into the current constitution, adopted in 1968.

68. PA. CONST. art. III, § 6.


70. See Commonwealth v. Sutley, 474 Pa. 256, 261-62, 378 A.2d 780, 782-83 (1977) (quoting Dauphin County Grand Jury Investigation Procedure (No. 2), 332 Pa. 342, 352-53, 2 A.2d 802, 807 (1938)) (“Accordingly, when the Constitution of 1873 was adopted, the people acted in the light of generations of experience with the operation of the doctrine of the separation of powers, and with the resulting necessity for judicial review to resolve differences of opinion between the legislative, executive or judicial departments concerning the scope and extent of the delegated powers.”).
and rulemaking authority granted by a particular enabling statute.

Even a cursory examination of the relationship between the legislature and the executive agency reveals that invocation of the rule review mechanism stems from a direct conflict between the legislature and executive branches. It has been widely observed that, even absent statutes providing for legislative review of agency actions, the legislature possesses various and wide ranging informal methods of controlling agency action and shaping executive agency rules.\(^7\) Given this reality, it is apparent that in cases in which the formal mechanism for legislative disapproval of a regulation is exercised, these informal methods of control have failed. Thus, there most likely exists substantial conflict and disagreement between the legislature and the executive branch administrative agency (and perhaps the chief executive) about the range of power entrusted to the particular agency by the enabling statute.\(^7\) As currently structured, the rule review statute equips the legislature with plenary authority to resolve these conflicts in its favor by disapproving the disputed rule and overriding any veto of that decision by the Governor.\(^7\) Since the power to resolve conflicts between the branches of government is one

71. *See, e.g.*, Hamilton & Prince, *supra* note 37, at 248 (Control can be exercised through a number of mechanisms including submission of detailed committee reports to the agency explaining legislative expectations, committee oversight hearings, legislative investigations, and statutory provisions (similar to the Pennsylvania Sunset statute) which provide that designated agencies must cease operation after a specified period unless they are reauthorized by legislative action); *see also* Note, *The Independent Agency After Bowsher v. Synar—Alive and Kicking*, 40 *VAND. L. REV.* 903, 920 (1987) (the legislative control over appropriations is an obvious and significant instrument through which the legislature may exert control over the executive agency and a lever that may be used to enforce legislative rulemaking preferences).

Furthermore, the ever present possibility that the legislature will amend the enabling statute lends substantial weight to the expressed wishes of individual lawmakers and especially to members of the legislative body who are charged in some fashion with responsibility for a particular agency or area of regulation. *Id.* at 920.

72. Although one can conceive of a system in which legislative guidance to an agency regarding an ambiguous statute would be viewed as welcome explanation to an administrative subordinate about an unclear passage in the law, the reality of the American structure of lawmaking, with its designed interaction between the legislative and the executive branches, is much different. There will very often be a significant degree of conflict and compromise between the legislature and the executive over the content of proposed laws. Concessions may be made by the executive precisely because of the potential to exercise some level of control in the execution phase. If the legislature, through the mechanism of rule review and the potential for veto override, retains absolute control over execution by controlling agency regulation, the legislature maintains absolute authority to resolve these conflicts. This power shifts the legislature’s relationship with the executive out of balance, and removes the courts from their constitutionally designated position as arbiter of interbranch conflicts.

73. Although the statute provides for presentment, the option of the legislature to override any veto gives the legislature complete power to prevail in any such disputes when it possesses the requisite resolve. The legislative assumption of this power has the potential to introduce even greater inefficiencies and rigidity into the lawmaking process by diminishing the ability of the executive to compromise on issues that may impede the passage of new legislation. *See supra* note 63 and accompanying text.
of the fundamental powers of the judiciary, the validity of the legislative effort to independently resolve this category of conflicts with executive branch is highly questionable. Although the separation of powers doctrine presents no plain seams along which functions of the separate branches can be rigidly defined, resolution of interbranch conflicts, especially over the meaning of legislation, would appear to fall at the core of the judiciary's power. Other than political expediency, which has been largely discounted as a justification for diminishing the protections enforced by the separation of powers doctrine, there is little to recommend or justify the type of intrusion that is inherent in Act 19.

C. Legislative Inability to Fairly Interpret Statutory Intent

An additional indicator of the dubious propriety of the legislature's license to interpret statutory intent rises from the body of law prescribing the fashion in which the judiciary shall interpret statutes. As American jurisprudence has evolved, the courts have developed an evaluative system and structure aimed at achieving fair and objective interpretations of legislative enactments. The process seeks to ensure that to the degree possible, the policies set in place by the body that drafted the words of the statute are respected and enforced until they are amended or modified in a subsequent legislative session.

Arguably, this essential facet of the interpretive process cannot exist when the task of statutory interpretation is undertaken by the legislature. Due to its design, the legislative process for gleaning statutory intent is inadequate to achieve the goal of fair interpretation of existing statutes. Although returning to the source of lawmaking to determine the meaning of laws may appear quite sensible initially, the folly of that approach is quickly revealed upon a closer examination of the nature of legislation and the legislature.

74. See, e.g., Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to the executive and independent agencies . . . ."); United States v. Brown, 690 F. Supp. 1423, 1428 (E.D. Pa. 1988) (quoting Chadha, 462 U.S. at 951) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."). But see Chadha, 462 U.S. at 998-1002 (White, J., dissenting).

The legislature is a fluid, changing body. Its overall direction and the policy views of individual legislators and their mandates change with the tides of the political process. Once the legislative body that enacts a particular statute passes out of session, the General Assembly is perhaps one of the last places one could reasonably expect to find an objective interpretation of the language of the statute that would respect the intent of those who drafted and enacted it. Indeed, it may be difficult to obtain a legislative consensus about statutory meaning even at the moment the vote occurs, given the purposeful ambiguity of legislation that often results from the compromises necessary to pass a bill into law.

Members of a different legislative session cannot be expected to subordinate their own current views about the meaning and wisdom of an existing statute to some objectively derived view of the intent of the body that originally enacted it. Indeed, failure by a legislator to use every legitimate means made available to further the interests of his constituency, including the Act 19 provisions for legislative statutory interpretation, might be a basis for criticism of his performance as a representative. Therefore, it is reasonable to expect that legislative interpretations of existing enabling statutes will be controlled by prevailing political attitudes and that legislative interpretations of statutory meaning will adhere to any discoverable intent of the enacting legislature only by coincidence.

Thus, if any lasting effect is to attach to legislative enactments, there must exist an interpretive body designed to be objective and apolitical, and which will attribute fair meaning to statutory language based on reasoned criteria. The judiciary is precisely such a body. Despite the often levied criticisms of its political nature, the judiciary’s ability to fill the role of arbiter of statutory meaning is immeasurably greater than that of the legislature.

III. The Disapproval Mechanism and its Potential for Intrusion into the Executive Function

Two of the basic objections to pre-Chadha legislative rule review mechanisms were that they permitted improper legislative con-

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76. The provision in section 5(d) of Act 19 prescribing that current statements of members of the legislature may be considered in the determination of statutory intent presents members of the body with a direct opportunity to affect current interpretation given to previously enacted statutes.
77. See Farina, supra note 26, at 476-99 (Professor Farina provides a thoughtful analysis of the danger of continuing statutory amendment through interpretation at the federal level).
control over the executive branch through an instrument other than the lawmaking process and that absent a legislative change in the enabling statute that modified or clarified the authority or mandate of the agency, legislative interference with the executive function of rule promulgation was an impermissible intrusion into the executive domain.\(^7\)

In *Sessoms*, the Pennsylvania Supreme Court acknowledged the validity of these criticisms and adopted much of the *Chadha* rationale, ruling that legislative control over executive agency rulemaking could only occur through properly enacted legislation.\(^8\) Partly in response to this decision, the Regulatory Review Act was amended to include the requirement that legislative resolutions disapproving particular agency rules be presented to the Governor for approval or veto.\(^9\) Whether this process satisfies the prescription of *Sessoms* has gone untested. However, because of its unusual character, this "legislation," which was designed to validate legislative rule review under Act 19, may indeed be inadequate to overcome criticisms that the legislature continues to intrude improperly into the executive function.\(^10\)

In light of *Sessoms*’ designation of agency rulemaking as an executive function, and its prescription that the legislature shall only

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78. See *Chadha*, 462 U.S. at 976 n.12 (listing commentary generally unfavorable to the legislative veto).
80. See *IRRC ANNUAL REPORT*, *supra* note 6, at 2.
81. The Pennsylvania Constitution, with specifically enumerated exceptions, prescribes legislation as the only mechanism through which the legislature may directly impact persons and entities outside the legislative body. *Pa. Const.* art. III, § 1.

At the federal level, attempts to permit legislative control over agencies through instruments short of lawmaking are supported by the argument that administrative agencies are involved in more than administration and enforcement and that pursuant to enabling statutes almost completely devoid of standards or policy guidance, agencies are exercising quasi-legislative power. See *Farina supra* note 26, at 483-88. This criticism is supported in part by the manner of application of the federal nondelegation doctrine, which lends a good level of support to advocates of the need for mechanisms permitting some measure of legislative control over the legislative or quasi-legislative functions of executive agencies. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting).

Although this approach to controlling agencies that are perceived to have run wild may be a sensible response, in light of an apparent inadequacy of traditional judicial and legislative controls at the federal level, the approach is less supportable in Pennsylvania.

Due perhaps to a more rigorous application of the state nondelegation doctrine, see, e.g., *Gilligan v. Pennsylvania Horse Racing Comm’n*, 492 Pa. 92, 422 A.2d 487 (1980), and a more manageable quantity of matters requiring legislative attention, statutory controls on agency action have been more restricted.

While it may be a fantasy when applied at the federal level, the concept of a fairly clear boundary between lawmaking and execution has been maintained in Pennsylvania. "Notwithstanding the view that such regulations are adopted under a delegation of the legislative power to the agency, administrative rulemaking may be viewed as entirely executive in nature." *Sessoms*, 516 Pa. at 374, 532 A.2d at 779.
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act through traditional legislative mechanisms, legislative efforts under Act 19 to control the process must be closely evaluated, and are open to criticisms on more than one front.

As noted above, the "legislation" that is enacted to disapprove an agency rule is of an unusual character. By definition, it is a concurrent resolution that is presented to the Governor for approval. It does not purport to either amend the statute under which the agency draws its authority or to express a continuing policy that similar or indeed precisely the same regulation shall not be promulgated in the future.

Sessoms and the concepts that it draws from Chadha appear to require that in order to impair agency power granted by statute, that statute must be amended, superseded, modified, or somehow adjusted to remove or change the policy that initially entrusted specific powers to the agency. The analysis in Sessoms of federal cases in this area is illuminating. In describing what it views to be the core principle guiding the federal and its own assessment of the validity of legislative oversight, the court quoted from the United States Supreme Court's decision in Bowsher v. Synar: "[o]nce [the legislature] makes its choice enacting legislation, its participation ends. [It] can thereafter control the execution of its enactment only indirectly—by passing new legislation."

This passage suggests that legislative control over executive agency rulemaking requires more than presentment to the executive of a legislative resolution which has not modified the enabling statute. This construction is supported by the position that an existing statute, which permits the promulgation of regulations that might be deemed inefficient and disapproved under Act 19, represents a decision by the enacting body that the described inefficiencies are an acceptable cost of achieving the statutory goal. Viewed through this lense, legislative control of agency rulemaking must involve a change in the statute that, in some fashion, overcomes existing policy choices in favor of new ones. On this score, the current rule review process fails.

Furthermore, if the statement that the legislature may control agency rulemaking only through "new legislation" actually refers to

82. The Sessoms case is fairly clear in its requirement that the legislature cannot, through a one house or two house veto, interfere or prohibit executive agency action. Sessoms, 516 Pa. at 375, 532 A.2d at 780.
legislation in the traditional sense, then the Pennsylvania Constitution comes directly into play. Article III, section 1 of the Pennsylvania Constitution provides that “[n]o law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.” The Act 19 process, utilizing a concurrent legislative resolution, does not satisfy this provision or attendant sections that require, for example, that no bill shall be approved unless it is considered in each house for three concurrent days prior to passage.

Further indications that the Act 19 quasi-legislative process of disapproving regulations is constitutionally deficient grow from the tension between this process and article III, section 6 of the Pennsylvania Constitution. This section requires that the portion of a statute that is amended or modified shall be republished at length. The resolutions of disapproval under Act 19, however, are not subject to this process. Although the resolutions prevent the exercise of powers that are granted by an existing statute, they fail to satisfy the constitutional requirement for legislation that amends or modifies an existing statute. This reinforces the view that disapproval resolutions under Act 19 reside in a nether world located somewhere between conventional resolutions, which typically do not undergo presentment and do not gain the status of law, and traditional legislation, which directly addresses existing laws whose directives it overturns.


[T]he differences between laws and resolutions are fundamental. A law is a bill that has been passed by a majority of the members of both Houses of the General Assembly and has either been signed by the Governor or has not been acted upon by him within the time prescribed by the Constitution after its passage by the legislature, or if it has been vetoed by the Governor, has again been passed by both Houses with an approving vote of at least two-thirds of the members of each House. Resolutions, on the other hand, may be adopted by either one, or both, of the Houses of the General Assembly and do not require the Governor's signature or approval to validate them and are not subject to veto by the Governor. . . . [T]his court, in pointing out the difference between a law and a resolution, said: "Section 1 of Article III of the Constitution provides: ‘No law shall be passed except by Bill and no Bill shall be so altered, or amended, on its passage through either House, as to change its original purpose. . . .’ When the Constitution provided that ‘no law shall be passed except by bill,’ it meant by a ‘form or draft of a law submitted to the legislature for enactment;’ it did not recognize a mere ‘formal expression of opinion’ as adequate to the creation of a law."

*Id.* at 320-21, 164 A.2d at 430.
89. Although Act 19 anticipates that some regulations will be disapproved because their impact ranges beyond the legislative view of delegated authority, disapproval is permitted also at a second level when the legislature perceives that the regulation fails to meet the efficiency
Thus characterized, the resolutions passed pursuant to Act 19 cannot be viewed as new legislation amending the policy decisions of a previous session. Instead, they emerge as hybrid direct orders to the executive agency, seeking validity through the addition of the presentment requirement. The indications are that a valid modification of an existing grant of authority and constitutionally valid legislative control over agency rulemaking require more than this.

IV. The Policy Implications of Rule Review Under Act 19

Aside from constitutional concerns over the rule review process, its failure to provide for legislative action directly addressing the pertinent enabling statute raises questions about its wisdom as a tool of governmental policy. Since the legislative disapproval process does not amend or modify the enabling statute, it falls subject to many of the same criticisms that have been leveled against earlier renditions of legislative rule review—e.g., direct one or two house vetos which made no attempt to comply with the requirements for passing new legislation.

One criticism that remains relevant is that Act 19 complicates the mechanics of the rulemaking process so that it is clouded to the detriment of all but the most adept observers. Some commentators have argued that any rule review short of new legislation increases the disparity of power between the astute special interests and the general public because the selection of the rules reviewed and the ultimate outcome of the process may be largely affected by lobbyists. This outcome is further subject to criticism because this type of ex parte influence on the process is inconsistent with rulemaking pol-
icy.\textsuperscript{91} While it is true that even absent Act 19, some legislative control over rulemaking may be exerted, the provisions of the Act advance the impact of that control, giving the legislature essentially plenary power over the outcome of the process. In essence, this grants the legislature the ultimate trump card with which to informally force rule modifications. Under such conditions, the rulemaking procedure, pursuant to which the public has theoretically been granted an opportunity for input, arguably becomes an empty gesture, with the true instruments of control shrouded in the mist of hallway compromises under the pressure of legislative disapproval.

Moreover, with this increased power ceded to the legislature, the admonitions of individual powerful legislators about the direction of rulemaking are more likely to be heeded, with the result that a relatively few members of the legislature might substantially impact rulemaking on particular issues.\textsuperscript{92} While it is true that every rule proposed by a state agency is submitted to the Commission for analysis,\textsuperscript{93} the Commission's decision to focus on a particular rule is discretionary. In light of the Commission's potential status as a legislative agency, it is not unreasonable to believe that the influence of individual legislators also might be wielded to affect the rules chosen by the Commission for review.

Furthermore, due to the mystery surrounding rule review, and the less public nature of the concurrent resolutions that disapprove the regulations, the antidemocratic tendencies that are perhaps an inherent part of rulemaking are aggravated. This is manifested initially in an increased lack of accountability to the polity for the results of rulemaking. One commentator has argued that permitting the legislature to control rulemaking justifies not only applauding it for controlling excessive rulemaking, but also holding it directly accountable for permitting the promulgation of unwise regulations.\textsuperscript{94} From this viewpoint, the Act 19 rule review process can be criticized because it is not designed to permit the public to discern a clear trail of responsibility toward those legislators who voted on resolutions to approve or disapprove the regulation and are still in office when the ill effects of that decision are felt. The disapproval process remains


\textsuperscript{92} Atloff & Greig, supra note 91, at 78.

\textsuperscript{93} Regulatory Review Act, supra note 2, at § 5(a).

ambiguous enough that legislators may concurrently take credit for popular regulations, claim victories over unpopular ones, and continue to cast the blame on the agency when a regulation that has been “approved” later falls subject to criticism. As a result, the accountability that is so important in our governmental structure is impaired.95

Accountability for governmental policy is further clouded because now the legislature can, without overturning a popular statute or even acknowledging opposition, effectively repeal or subvert the statute by controlling its interpretation and execution.96 Moreover, as currently structured, the resolution process, perhaps unwisely, limits the interplay between the legislature and executive in the lawmaking process. Lawmaking is a process of compromise and concessions. Given the executive’s veto power over proposed legislation, the executive’s inclination and capacity to compromise is an important element in the efficient enactment of legislation. The ability of the executive to compromise is undoubtedly affected by the options available to it, particularly the executive’s capacity to control the execution of that policy. However, if the executive’s control over enforcement through the use of rulemaking is usurped by the legislature, the executive loses a significant measure of flexibility and, as a result, must hold out for statutory language much closer to the policy desired. Indeed, since such language is also subject to enforceable interpretation by the legislature in subsequent disputes over statutory intent, the executive must in every significant case demand the clearest achievable statement of policy that approximates the executive’s own viewpoint. It is doubtful that such an extremely inflexible attitude can lead to efficient or flexible lawmaking.

Finally, the efficient administration of governmental policy is impaired by Act 19-style rule review because of its reactive nature. There is significant merit to the argument that a process that permits the massive expenditure of publicly funded time, effort, and resources, and that evaluates the wisdom and efficiency of the rule only after it has reached the final stages in the rulemaking process, is inefficient and thus suspect under its own terms.97

95. The professed aim of these types of efforts is enhancement of accountability and control over agency bureaucracy. However, these efforts might also fairly be characterized as fallout from a struggle over who—the legislature or the executive—will control them, not whether they will be controlled.
96. See Farina, supra note 26, at 500. Professor Farina’s observation that “the prospect that regulatory statutes will routinely be amended or even repealed by ‘interpretation’ should at least give us pause” is indeed an understatement. Id.
97. There are potential solutions to this problem. One that is promising in theory is the
V. Conclusion

The constitutional weaknesses in the framework of Act 19 are numerous and significant enough to call into question the Act’s continued viability. These flaws emerge from an apparent legislative desire for a direct and speedy method of controlling details of administrative agency actions. The alternatives of relinquishing control over the disapproval process to a truly independent or traditional executive agency, or of utilizing the traditional legislative process to control agency activities appear to be unpalatable. Absent some notable change in the scope of the constitutional powers granted to the legislature, however, its pursuit of the goals that appear to have generated Act 19 will perhaps inevitably fail to pass constitutional muster.

Idea of awarding to the agency a shadow budget that authorizes it to impose only a limited amount of costs on the Commonwealth in a particular year. This could force agency efficiency in setting its regulatory agenda and satisfy the concerns over costs imposed by overzealous regulators. Indeed, the current legislation requires these types of calculations to be made by the agency. Regulatory Review Act, supra note 2, at § 5(a)(4)-(6). Quantification might be sensibly administered even after the passage of the budget year to avoid delays in policy implementation, with deficits or surpluses carried over to subsequent years.