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Legislation - Procedure and Interpretation

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LEGISLATION—PROCEDURE AND INTERPRETATION

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For the most part, the decisions of the Louisiana appellate courts during the past term on the subjects of legislative procedure and interpretation of legislation applied well-established rules. For example, it was held that the legislature is presumed to enact a statute with full knowledge of all others on the subject, justifying the interpretive rule of construing statutes *in pari materiae* with other statutes on the same subject matter.[1] It was also held, consistent with earlier cases,[2] that the understanding of one legislator is not determinative of legislative intent,[3] and indeed is not even admissible for the purpose of demonstrating that intent.[4] There were predictable holdings that a statute should be interpreted in a manner in which it would be valid,[5] though this principle did not prevent one court from holding that a criminal statute concerning driving while intoxicated did not make it a crime to ride a horse while intoxicated.[6] There were also decisions on the sufficiency of the title of legislation,[7] and the distinction between promulgation and publication.[8]

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1. Bunch v. Town of St. Francisville, 446 So. 2d 1357 (La. App. 1st Cir. 1984); Turner v. City of Shreveport, 437 So. 2d 961 (La. App. 2d Cir. 1983).

2. See Ethyl Corp. v. Collector of Revenue, 351 So. 2d 1290 (La. App. 1st Cir. 1977), cert. denied, 353 So. 2d 1035 (La. 1978).

3. Macon v. Costa, 437 So. 2d 806 (La. 1983).

4. Delahoussaye v. State Racing Comm'n, 446 So. 2d 490 (La. App. 4th Cir. 1984).

5. See, e.g., Weeden Eng'g Corp. v. Hale, 435 So. 2d 1158 (La. App. 3d Cir.), cert. denied, 441 So. 2d 764 (La. 1983).

6. State v. Williams, 449 So. 2d 744 (La. App. 3d Cir. 1984). The accused was intoxicated and rode a horse onto a highway, where he was involved in an accident with a motor vehicle. He was charged under La. R.S. 14:98 (Supp. 1984), which makes it a crime for a person to operate "any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when under the influence of alcoholic beverages . . . ." Using the familiar *ejusdem generis* rule that general words following particular classes of things should be construed to refer to things of the same general nature as those specifically enumerated, the court concluded that "other means of conveyance" did not include a horse. Id. at 744.

7. Anzelmo v. Louisiana Comm'n on Ethics for Pub. Employees, 435 So. 2d 1082 (La. App. 1st Cir. 1983).

8. State v. Miller, 448 So. 2d 137 (La. App. 1st Cir.) (A criminal proceeding: statute under which charge was brought was made effective upon governor's signature on June 29, 1979, though not actually published until July 14, 1979, five days after the commission of the crime; held that the legislature had constitutional authority to fix an effective date

In addition to these relatively mundane holdings, there were some decisions meriting extended comment. One involves what may be simply an error in terminology, but the others call for more lengthy discussion.

NICETIES OF LEGISLATIVE PROCEDURE

The "terminology" problem arose in *In re Hamilton*.[9] The case was interesting on its merits, for the court had to decide whether a beneficiary under a life insurance policy who had pleaded guilty to manslaughter of the insured was barred from recovery under a statute barring beneficiaries "criminally responsible" for the death. The issue was far from clear because of the legislature's insertion of the phrase "intentional acts exclusion" in the heading[10] of the statute, indicating perhaps that the bar applied only where the conduct of the beneficiary had been intentional, as opposed to being merely reckless or driven by passion.

In interpreting the enactment, the court correctly observed that the "title" to the bill could be considered to determine legislative intent, but it apparently had the "heading" in mind when it said "title." It spoke of a conflict between the "title" and the "text" and then quoted from the "preamble" in an attempt to resolve the ambiguity. The actual interpretation seems sound, but the confusion about the parts of the enactment calls for a definition of terms.

The "heading" of a statute is a short description of its contents, usually printed in some form of bold-face type immediately after the section number. The heading is not part of the statute,[11] though the legislature has followed a custom in recent years of enacting a heading along with the body of the statute. The heading is neither the "title" to the enactment nor a "preamble."

The "title" to an enactment is the only portion with constitutional importance. The constitution requires that every bill have a brief title indicating its object,[12] but does not require that a bill have either a heading or a preamble. The title is that portion of the enactment which, in current legislative drafting custom, follows the words "An Act" at

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even prior to publication, and that such a "promulgation" would make the statute effective as of the time of the governor's signature.), cert. denied, 449 So. 2d 1355 (La. 1984).

9. 446 So. 2d 463 (La. App. 4th Cir. 1984). For a discussion of the insurance law aspects of the decision, see McKenzie & Johnson, Developments in the Law, 1983-1984—Insurance, 45 La. L. Rev. 325, 326 (1984).

10. "Heading" is a term of art used to describe the short description of the contents of a statute, usually printed in bold-face type immediately after the section number. See infra text accompanying notes 11-13.

11. La. R.S. 1:13 (1973) provides that the "Headings to sections, source notes and cross references are given for the purpose of convenient reference and do not constitute part of the law." The problem in *Hamilton* arose because the enactment added "intentional acts exclusion" to the heading but the broader "criminally responsible" language to the text of the statute.

12. La. Const. art. III, § 15(A).

the beginning of the bill, and terminates just before the constitutionally-required enacting clause. The *Hamilton* court properly quoted from the title in an attempt to resolve the interpretive problem, but erroneously termed the title the "preamble." In fact, the act in question did not contain a preamble.

The "preamble" to an enactment is a recitation of either the facts or the policy which the legislature announces as its reason for the enactment.[13] It generally serves very little purpose other than to allow some high-sounding language at the opening of a statute, or to attempt to establish some constitutional ground for an enactment which may have a shaky constitutional basis. Though it is not inconceivable that a preamble might be of some use in interpretation (though one is rarely included in the ordinary Louisiana enactment), the title to a bill is much more instructive. The court in *Hamilton* was actually using the "title"; it simply called the title the "preamble." Since that could lead to confusion in future cases, this brief explanation has been offered.

The second decision of note is *State v. Stirgus*,[14] a criminal proceeding in which a local law was declared unconstitutional because the constitutionally-required advertisement period prior to its enactment never occurred. The local statute in question had been advertised on April 3 and 4, 1980, and was introduced on April 23, 1980. Only nineteen days—rather than the thirty days required by the constitution—had elapsed. Nevertheless, the bill contained the customary recitation that notice of intention to introduce the act had been published in accordance with the constitution.

This recitation, clearly at variance with demonstrable facts, presented the court with the question of whether it could look behind the recitation, and receive evidence that the legislature had not in fact done what it said it had. Citing an earlier comment in this review,[15] the supreme court properly held that the scope of judicial inquiry into conformity with constitutional standards may well differ from that into a legislative body's adherence to its own internal rules of procedure. The courts must retain the power to ascertain whether a constitutionally prescribed procedure has been followed. Otherwise, the legislature would be free to assert that it had complied with the constitution, and there would be no way to determine whether it had or not.

RETROACTIVITY

A voluminous dissertation could and should be written on retroac-

13. See generally Note, Legal Effect of Preambles—Statutes, 41 Cornell L.Q. 134 (1955).

14. 437 So. 2d 249 (La. 1983).

15. Comment, Judicial Review of the Legislative Enactment Process: Louisiana's "Journal Entry" Rule, 41 La. L. Rev. 1187 (1981).

tivity of legislation in Louisiana. Unfortunately, this is neither the time nor the place for such an exercise. But the decision in *Coates v. Owens-Corning Fiberglass Corp.*[16] does present the opportunity to offer a few remarks on the subject.

Few people realize that a Louisiana statute provides that no section of the Revised Statutes is retroactive unless it is expressly stated to be.[17] This codifies the usual rule for legislative enactments, and is the opposite of the customary rule for judicial pronouncements. Use of this principle might go a long way toward settling disputes over the application of an enactment. The results of application of this principle might not necessarily conform with some of the past jurisprudence, which developed certain "exceptions" to the rule of prospectivity.[18] These exceptions are usually applied despite the fact that the legislature may not have expressed itself on the question of retroactivity as required by Louisiana Revised Statutes 1:2. Thus the judiciary has sometimes "assumed" that a retroactive application was intended in the face of legislative silence when the enactment falls into certain categories. A literal reading of Louisiana Revised Statutes 1:2 would eliminate these exceptions. The legislature is free to announce a retroactive application, of course, thus freeing the court from the need to make such a decision, unless there are constitutional problems.

The *Coates* opinion does not blaze any new trails, falling within the established pattern of discussing the usual exceptions. The claimants sought retroactive application of the recent amendment to Civil Code article 2315 allowing damages for loss of consortium. It was urged that the amendments were merely "interpretive" and should therefore fall within one of the exceptions permitting retroactive application. There is serious doubt about the validity of this exception in any event, both for the reasons expressed above, and because an "interpretive" enactment begins to give the legislature judicial power.[19] But the court did not reach the issue of the validity of the exception, since it found that the enactment was not merely an interpretation of article 2315. Rather, the amendment added a concept to Louisiana law. A frontal assault on the problem of retroactive application and the judicially crafted exceptions will have to await another case and another day.

DELEGATION OF AUTHORITY

Easily the most interesting case is *State v. Broom.*[20] *Broom*, a criminal proceeding, brought to the forefront an issue long simmering

16. 444 So. 2d 788 (La. App. 4th Cir. 1984).
17. La. R.S. 1:2 (1973).
18. Among these are when a statute is "procedural," "interpretive," or "remedial."
19. See La. Const. art. II, §§ 1-2.
20. 439 So. 2d 357 (La. 1983).

in Louisiana: delegation of legislative authority. Broom had been charged with violating regulations of the Louisiana Explosive Code. The legislature had given the Director of Public Safety authority to establish regulations "reasonably necessary" to protect public health and safety and had made violation of those regulations punishable as a felony.

The accused had urged, and the trial court agreed, that this was an unauthorized delegation of legislative authority. The trial court therefore quashed the bill of information, and the state appealed. On original hearing, the supreme court reversed. But on rehearing, a divided court affirmed the trial court's holding that the enactment was unconstitutional as a violation of separation of powers.

Delegation of legislative authority is a complex problem, and is becoming more so. An historical perspective might be useful here. Neither the federal Constitution nor the various state constitutions specifically provide for delegation of legislative power, much less division of legislative power. In fact, it is usually said that the basic principle must be that legislative power cannot be delegated.[21] But this is true in theory only; in practice a great number of pronouncements appearing to be the exercise of legislative power are in the hands of non-legislators. The usual explanation is that legislative power has not been delegated, only subordinate authority to fill in details of legislative enactments, or to act independently but within the confines of an enabling legislative pronouncement.

Since our constitutions do not provide for delegation of legislative power, we must look elsewhere to find the criteria by which such power is exercised, though in a subordinate fashion. The primary source must be in court decisions on whether legislative power had been properly delegated in a particular instance, or whether the power of delegation had been abused. These decisions are those of judges who are grappling with questions of abuse of an implied constitutional doctrine. They are not those of the legislators who did the delegating, and in the ordinary

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21. In part, this is based upon the common law maxim *delegata potestas non potest delegari* (a delegated power cannot itself be delegated). Since both the Congress and the various state legislatures possess powers delegated by the people, in theory no further delegation may be made. This principle is also based upon the traditional tripartite division of government into executive, legislative, and judicial branches, and the supplementary injunction in many state constitutions that no branch may exercise the powers granted to another. See, e.g., La. Const. art. II, § 2. Statement of the principle, to which there are numerous exceptions and modifications, is a *sine qua non* in most opinions on the subject. Despite this oft-stated principle, it is clear that delegations are increasing. The opinion was recently expressed that the ratio of federal regulations to federal statutes is of the order 18:1. The Administrative Rule Making Reform Act: Hearings on H.R. 1766 Before the House Subcomm. on Rules of the House of the House Committee on Rules, 96th Cong. 1st Sess. 4 (1979) (remarks of Rep. Baumen).

case we have no way of knowing whether the legislators entertained any of the thoughts expressed by the judges.

The early federal cases appeared to be faithful to the principle of non-delegation. "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[22]

The earliest exceptions were simple ones. If all the legislature had done was to delegate fact-finding authority, then power to legislate had not been delegated. The earliest reported case involved a challenge to a statute authorizing the President, upon a determination that a foreign nation had violated the neutral commerce of the United States, to issue a proclamation prohibiting imports from that nation.[23] Upheld later was the power granted to the President to ascertain whether certain tariffs were unequal and unreasonable, and to act accordingly.[24]

Somewhat later, the United States Supreme Court appeared to recognize a broader basis for grants of authority to administrative agencies. A federal statute authorized the Secretary of Agriculture to make rules and regulations to carry out the objectives expressed in the statute. This was more than the mere finding of facts. The Court held that the regulations issued by the Secretary were the exercise of a power merely to "fill up the details" in the statute. Thus the Secretary exercised no legislative power, only administrative or rule-making power.[25]

> In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power.[26]

Significant as this announcement was, this period did not last long. The Supreme Court soon began to speak in terms of invalidating delegations made without adequate standards to guide the behavior of the administrative agency.[27] This approach was a frank recognition that legislative powers, in addition to administrative duties, could be delegated to agencies if sufficient standards were provided to govern the conduct

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22. Field v. Clark, 143 U.S. 649, 692, 12 S. Ct. 495, 504 (1892).

23. The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813).

24. Field v. Clark, 143 U.S. 649, 12 S. Ct. 495 (1892).

25. United States v. Grimaud, 220 U.S. 506, 31 S. Ct. 480 (1911). See B. Schwartz, Administrative Law § 32, at 69-70 (1976).

26. *Grimaud*, 220 U.S. at 516, 31 S. Ct. at 482-83.

27. See J.W. Hampton & Co. v. United States, 276 U.S. 394, 48 S. Ct. 348 (1928).

of the administrators.[28] It had proven difficult to draw the fine line between "filling up" details and actual legislation. To provide for this conceptual problem, and to acknowledge that the growing complexity of society required some exercise of authority by agencies, the Supreme Court agreed that a delegation of power with appropriate standards to guide the administrator was not a "forbidden" delegation of legislative power.[29]

More recently, even a search for appropriate "standards" is not often required by the Supreme Court. Though the present practice of the Supreme Court is somewhat unsettled, it appears that an inquiry into the reasonableness of the delegation is required, considering the subject matter of the regulated area, the type of agency to which the delegation is made, and the necessity for the regulation.[30]

In summary, it may be said that approval of delegated legislative power has expanded as the years have passed, virtually without exception.[31] The criteria for approval appear to be very similar in the United States Supreme Court and the state courts.

State courts, on the whole, have scrutinized delegations of legislative authority more carefully than the Supreme Court has. There is a fairly regular pattern in the types of delegation which have been upheld, and which have been disapproved. An examination of these types of cases and the reasons given by the state courts will be useful in establishing a workable list of criteria for deciding whether delegation of legislative authority is proper.

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28. See the excellent summary and discussion in Note, Safeguards, Standards, and Necessity: Permissible Parameters for Legislative Delegations in Iowa, 58 Iowa L. Rev. 974 (1973).

29. *Hampton*, 276 U.S. at 409, 48 S. Ct. at 352. See B. Schwartz, supra note 25, § 12, at 35.

30. Note, supra note 28, at 987. Most states have seen similar progressions. Louisiana, for example, went through a period recognizing only fact-finding powers. State ex rel. Porterie v. Grace, 184 La. 443, 166 So. 133 (1936). It permitted an administrator to "fill up" details in a statute according to standards set by the legislature. State Bd. of Embalmers v. Britton, 244 La. 756, 154 So. 2d 389 (1963). More recently, the courts have upheld delegation of authority to an administrative agency so long as the delegation is "reasonable and appropriate" in carrying out legislative policy. Faul v. Superintendent of Educ., 367 So. 2d 1267 (La. App. 3d Cir. 1979).

31. The only notable exceptions were Panama Ref. Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241 (1935), and Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837 (1935), which involved extremely broad delegations. These cases are usually explained as the reaction of a conservative Supreme Court to some of the more radical features of the New Deal. Yet some disfavor of broad delegation, especially of the taxing authority of the Congress, has recently been demonstrated by National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 94 S. Ct. 1146 (1974). See B. Schwartz, supra note 25, § 19, at 47; Freedman, Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307, 318-29 (1976).

Criteria Favoring Delegation[32]

Established Legal Concepts Limiting An Agency's Discretion Within a Grant of Authority

A delegation of authority to an agency is more likely to be upheld if, within the grant of authority, there are certain recognized and established legal concepts which inherently limit the agency's discretion.[33] For example, in 1972 the Louisiana legislature enacted the Unfair Trade Practices and Consumer Protection Law.[34] The Act declares unlawful "unfair methods of competition and unfair or deceptive acts or practices" in commerce. No attempt was made to define these terms, but a "director" (an executive assistant to the governor) was empowered to make "rules and regulations interpreting the provisions" of the Act and related statutes.[35] Significantly, the Act does not apply to "any conduct which complies with" the unfair trade practices section of the Federal Trade Commission Act.[36] This is a clear indication that the director should make reference to federal statutes, regulations, and case law defining and punishing "unfair trade practices"—a well-developed[37] concept. The legislature undoubtedly felt safe in permitting legislative power to be exercised by the executive in an instance, such as this one, in which established legal concepts were already available. There are numerous other examples.[38]

Expert Subject Matter, and Qualification of Agency to Exercise It

If the subject matter of the delegation is one most efficiently and knowledgeably dealt with by experts, and if the agency to which the delegation is made is qualified to make such expert judgments, the

32. The author gratefully acknowledges his reliance on the comprehensive discussion of various criteria in 1 F. Cooper, State Administrative Law 74-91 (1965). In some instances, these criteria have been combined and modified for discussion in this article. References have been made to specific Louisiana applications of these criteria, sometimes with additional criteria beyond those of Cooper.

33. 1 F. Cooper, supra note 32, at 74-75.

34. La. R.S. 51:1401-1418 (Supp. 1984).

35. La. R.S. 51:1405(B) (Supp. 1984).

36. La. R.S. 51:1406 (Supp. 1984).

37. See, e.g., 15 U.S.C. § 45(a)(1) (1982).

38. The federal statutes granting broad regulatory authority to the Securities and Exchange Commission contain phrases which have taken on special meaning, and may now be considered "established" legal concepts: "fair dealing," "just and equitable principles of trade," and "maintenance of a fair and orderly market." 15 U.S.C. §§ 78k, 78f (1982). See also Reyburn v. State Bd. of Optometry, 247 Minn. 520, 78 N.W.2d 351 (1956) (holding that power to revoke optometry license for "unprofessional conduct" properly delegated as professional experience and judicial decisions had established the meaning of that concept); State ex rel. Dalton v. Land Clearance Auth., 364 Mo. 974, 270 S.W.2d 44 (1954) ("fair value" of land).

delegation is often upheld. A prominent example is state regulation of public utilities and common carriers (e.g., telephone, electricity, trucking). In many states, including Louisiana, this delegation of "legislative" authority is actually made by the citizens in the state constitution.[39] This delegation usually authorizes the commission to adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties. In other instances, the legislature may delegate its authority to legislate on a particular subject matter requiring some expertise, such as transportation[40] and disposal[41] of hazardous substances, such as radioactive waste. This would be the area where the *Broom* delegation arguably would fall. Again, there are a number of examples.[42]

Tradition of Regulation by Administrative Agency

There are also subject matters traditionally governed through delegation of legislative power; a long history of regulation outside the legislature supports a broad reading of a delegation of power. Insurance and banking are two examples. Indeed, it is interesting to observe that until recently the Louisiana statutes on insurance contained no general reference to the rulemaking authority of the commissioner of insurance.[43] The lawmakers may well have felt that a general reference was unnecessary in light of the long tradition of regulation of the insurance industry. Neither did the banking statutes have any such general reference until fairly recently, when it was provided that the "commissioner of financial institutions shall have the power to enact . . . such regulations as he deems necessary in the best interest of banks . . . consistent with

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39. See La. Const. art. IV, § 21.

40. La. R.S. 32:1504 (Supp. 1984).

41. La. R.S. 30:1136 (Supp. 1984).

42. See F. Cooper, supra note 32.

> Courts show a readiness to sustain delegations of virtually unlimited discretionary power if the sphere of regulation is characterized by baffling technicalities so complex that the judges entertain doubts as to the adequacy of judicial knowledge and techniques to deal with the matter effectively, or if they sense a need for experimentation in a new and untrodden field.

Id. at 83. Thus broad delegations have been upheld in Burnham v. Board of Apps., 333 Mass. 114, 128 N.E.2d 772 (1955) (zoning commission); Yelle v. Bishop, 55 Wash. 2d 286, 347 P.2d 1081 (1959) (state treasurer); O'Meara v. Union Oil Co., 212 La. 745, 33 So. 2d 506 (1948) (conservation practices). Cf. State v. Billot, 154 La. 402, 97 So. 589 (1923) (invalidating a delegation to the commissioner of conservation to establish deer seasons). *Billot* may also be explained by the fact that a definition of crime was left to the commissioner's regulations.

43. There appears to have been no specific reference to the power of the commissioner of insurance to issue necessary regulations until Act 83 of 1977, which reorganized all departments of the state government and expressly provided such power. See La. R.S. 36:1-960 (Sp. Pamph. 1984) (as amended by 1977 La. Acts, No. 83); see also La. R.S. 36:682(B)(3) (Supp. 1984) (providing that regulations must be made "in accordance with the Administrative Procedure Act").

[federal regulations, services offered by national banks, and powers granted to state banks by pertinent statutes]."[44]

Power to govern certain professions is traditionally delegated to an administrative agency—frequently composed of the governed. One need only note the medical[45] and legal[46] professions as examples. And sometimes, the "tradition" of regulation by an administrative agency is one of relatively recent origin. In Louisiana, for example, there are administrative boards which govern and regulate cosmetologists,[47] watchmakers,[48] and electrologists.[49]

Adequate Safeguards and Review

In this exercise of quasi-judicial and quasi-legislative authority, administrative agencies engage both in making rules and in deciding whether the rules have been violated. This combination of law-giver and law-interpreter would be strenuously condemned in other contexts (courts, for example, are very reluctant to accept a legislature's "interpretation" of a statute).[50]

There is a greater likelihood that matters will be left to regulation, and that this choice will be upheld, if there exist adequate safeguards both in the formulation of rules and in ascertainment of compliance with them. In fact, so many delegations of power have occurred during the last decades that most jurisdictions have adopted the model Administrative Procedure Act.[51] This Act provides for notice of proposed regulations, hearings on the proposals, notice of hearings of possible violations, hearings on violations, and complete judicial review of any final order of an administrative body. Though by its terms the Act would apply to almost any administrative agency, it is not uncommon for the legislature to specify in a delegation of power to an agency that any regulations or decisions of the agency are subject to the Administrative Procedure Act.[52]

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44. La. R.S. 6:237(B) (Supp. 1984). The statute also requires that all such regulations shall be "subject to all provisions of R.S. 49:951 through R.S. 49:953, and R.S. 49:954.1" of the Administrative Procedure Act. Id.

45. See La. R.S. 37:1261-1360.27 (Supp. 1984), especially La. R.S. 37:1263, creating the State Board of Medical Examiners, consisting of seven members appointed by the governor from lists of names submitted by the State Medical Society and the Louisiana Medical Association. All the members must be "graduate physicians or surgeons and practitioners." La. R.S. 37:1263(c) (Supp. 1984).

46. See La. R.S. 37:211-218 (1974 & Supp. 1984) (providing for general supervisory control of the profession of law by the Supreme Court of Louisiana, and for day-to-day control by a Board of Governors composed entirely of members of the bar).

47. See La. R.S. 37:491-556 (1974 & Supp. 1984).

48. See La. R.S. 37:1581-1612 (1974 & Supp. 1984).

49. See La. R.S. 37:3051-3077 (Supp. 1984).

50. See *Ethyl Corp.*, 351 So. 2d at 1290 and cases cited supra notes 3 & 4.

51. See La. R.S. 49:950-970 (Supp. 1984).

52. See supra notes 43-44.

Today, when decisions of administrative agencies directly affect the lives of many citizens, the criteria for adequate procedural and substantive safeguards for the rights of those citizens are very important. One may speculate that without a general provision such as the Administrative Procedure Act, there might have been less delegation of legislative power than has occurred in recent times.

Public Health, Safety, and Morals Involved

Matters of public health, safety, and morals have traditionally been considered within the constitutional province of government, so it is not surprising to find that legislatures have been given broad discretion in dealing with these problems. Such matters may require more detailed supervision than a legislature can give, and may sometimes require immediate action. Thus it is not uncommon to find the great bulk of legislative authority in these areas delegated to administrative agencies. One need only think of regulatory authority over cultivation, transportation and sale of food,[53] transportation of hazardous substances,[54] and disposition of nuclear waste[55] as important examples. Again, the *Broom* decision involved regulations which might find a place under this heading.

Criteria Not Favoring Delegation

Special Legislative Precision for Protection of Individual Human Rights

There are some subject matters where American history and constitutional law have required that the legislature retain almost exclusive power. The definitions of crimes and their sanctions are prime examples. There are numerous cases invalidating legislation giving an administrative agency the power to define a crime,[56] even by reference to regulations of a

53. La. R.S. 36:621-629 (Supp. 1984). See Schwegmann Bros. Giant Super Mkts. v. McCrory, 237 La. 768, 112 So. 2d 606 (1959) (Milk Marketing Act); Francis v. State Livestock Sanitary Bd., 184 So. 2d 247 (La. App. 1st Cir. 1966) (disease control in swine).

54. La. R.S. 32:1504 (Supp. 1984).

55. La. R.S. 30:1136 (Supp. 1984). See also the following instances in which a broad delegation has been upheld where the state police power in matters of public health, safety, or welfare was squarely at issue: Johnson v. Pearce, 313 So. 2d 812 (La. 1975) (upholding regulations concerning eradication of brucellosis disease among animals); City of Lake Charles v. Wallace, 247 La. 285, 170 So. 2d 654 (1965) (upholding charges imposed on garbage disposal); Baton Rouge Waterworks Co. v. Louisiana Pub. Serv. Comm'n, 156 La. 539, 100 So. 710 (1924) (regulation of water supply); State v. Syas, 136 La. 628, 67 So. 522 (1915) (sewage disposal; delegation upheld even though regulation defined crime); State v. Snyder, 131 La. 145, 59 So. 44 (1912) (use of saccharin; delegation upheld even though regulation defined crime).

56. See Comment, Unauthorized Delegation of Legislative Authority to Administrative Agencies Under the North Carolina Constitution, 11 Wake Forest L. Rev. 269, 284-87 (1975). These cases are often based on a specific provision in a state's criminal code

federal agency such as the Drug Enforcement Administration.[57] There is certainly a feeling that when a citizen's life or liberty is at stake, it is desirable that any sanctions be clearly expressed, and that they lie within the hands of representatives directly accountable to the public.[58] This was a major factor in the court's reaction in *Broom*.

Substantial Property Rights or Opportunity to Earn a Living

Close judicial scrutiny is given to delegations of legislative authority when substantial property rights of citizens are directly affected,[59] or when the opportunity to earn one's living may be at stake. Vague or non-existent standards here are much less likely to be upheld than those in such subjects as public health and safety. For example, expropriation procedures (eminent domain) are usually carefully detailed in the constitution and statutes, with nothing left to regulations of administrative agencies.[60] Some statutes for licensing of occupations may be invalidated as making too broad a delegation of authority,[61] and may be upheld only when amended to become more specific and limiting.[62]

Presence of Special-Interest Groups

Legislative power should represent an entire society, and should not be delegated to any single interest group without the opportunity for participation or review by other groups. Thus both the legislating body

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declaring that the only conduct which is criminal is that defined as criminal in acts of the legislature or in the state constitution. See, e.g., La. R.S. 14:7 (1974).

57. State v. Rodriguez, 379 So. 2d 1084 (La. 1980).

58. This is the one area where any delegation of legislative power is scrutinized most carefully. Delegation of authority to the executive branch to define crimes was invalidated in State v. Maitrejean, 193 La. 824, 192 So. 361 (1939) and State v. Billot, 154 La. 402, 97 So. 589 (1923). Cf. State v. Vaccaro, 200 La. 475, 8 So. 2d 299 (1942) (legislature could not provide for "triple offender" punishment by reference to a statute of another state). Similar delegation to the judiciary has also been invalidated, State v. Arkansas Louisiana Gas Co., 227 La. 179, 78 So. 2d 825 (1955); State v. Truby, 211 La. 178, 29 So. 2d 758 (1947); State v. Whitlock, 193 La. 1044, 192 So. 697 (1939); State v. Gaster, 45 La. Ann. 636, 12 So. 739 (1893). But see State v. Burch, 365 So. 2d 1263 (La. 1978) (terms "contemporary community standards," "prurient interest," and "patently offensive" not so indefinite as to constitute delegation of legislative authority to criminal jury).

59. See F. Cooper, supra note 32, at 79-80 (noting the invalidation of delegation of power to agencies to set "prevailing wage schedules" affecting large numbers of individuals, or to fix minimum prices for dry cleaning). See, e.g., Dr. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., 231 La. 51, 90 So. 2d 343 (1956) (unconstitutional delegation of power to fix prices under fair trade law).

60. See La. Const. art. I, § 4 (guaranteeing a trial by jury in expropriation proceedings). See also La. R.S. 48:441-460 (1984) (detailed provisions for so-called "quick-taking" expropriation proceedings).

61. See, e.g., State v. Morrow, 231 La. 572, 92 So. 2d 70 (1956).

62. Louisiana Bd. of Examiners in Watchmaking v. Morrow, 188 So. 2d 160 (La. App. 4th Cir. 1966).

and the judiciary often mistrust a delegation to a special-interest group, which might tend to perpetuate its own self-interest rather than seek the common good.[63]

Sometimes these factors may peacefully co-exist. In the banking industry, for example, both a long history of delegation and specific reference to the Administrative Procedure Act justify a broad delegation of legislative power. The problem of hazardous waste is closely related to public health and safety, and also requires considerable expertise to be properly resolved. When several factors coincide, it it likely that a broad delegation of legislative power will be upheld.

Legislative Review

Finally, legislative review of administrative regulations and decisions might favor a broad delegation of power. If the legislating body knows that the power it delegates cannot be exercised without being exposed to legislative disapproval, there is less reason to fear the initial delegation. The legislating body may state a general policy, assign the development of specific details to administrative consultants, and then review the product to assure that it comports with the original policy, and does not create more problems than it solves.

Legislatures at the federal and state levels have developed several techniques of legislative review. Many are similar to the "laying" system practiced in the British Parliament,[64] in which proposed administrative regulations are laid before a committee of the Parliament, which examines them for harmony with the established criteria.[65] Without regard

63. See State Licensing Bd. of Contractors v. State Civil Serv. Comm'n, 110 So. 2d 847 (La. App. 1st Cir. 1959), aff'd, 240 La. 331, 123 So. 2d 76 (1960); Dr. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., 231 La. 51, 90 So. 2d 343 (1956); City of Alexandria v. Alexandria Fire Fighters Ass'n, 220 La. 754, 57 So. 2d 673 (1952). Cf. Faul v. Superintendent of Educ., 367 So. 2d 1267 (La. App. 3d Cir. 1979) (upholding a delegation to local school boards to set up a "second language" program upon the petition of 25% of the heads of households of students attending a school, against the claim that it permitted a minority to control the majority).

64. Boisvert, A Legislative Tool for Supervision of Administrative Agencies: The Lay System, 25 Fordham L. Rev. 638 (1957); Comment, Legislative Control Over Administrative Action: The Laying System, 10 J. Mar. J. Prac. & Proc. 515 (1977).

65. The criteria requiring Parliamentary examination of a regulation are:

> (i). that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government Department or to any local or public authority in consideration of any license or consent, or of any service to be rendered, or prescribes the amount of any such charge or payments;
>
> (ii). that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;
>
> (iii). that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made;

to the wisdom of the particular regulation, the committee decides whether the regulation so substantially deviates from the expressed legislative policy as to merit full review by the entire Parliament.[66] The committee thus operates as a "screening" group, protecting Parliament from the expenditure of time which would be required to review all regulations in a committee of the whole. The committee also serves as an important deterrent to administrators who might otherwise feel free to take liberties with the legislature's delegation.

For a while, the so-called "legislative veto" was popular, though it recently suffered a serious setback in the Supreme Court.[67] A legislative veto might take several forms, assuming it could pass constitutional muster. A legislature might authorize an agency to draft regulations to be submitted to the legislature for approval. Another veto procedure might be to require that both houses vote to disapprove the regulations; if both houses did not so vote, the regulations would be approved. A modification of this procedure would permit disapproval by a vote of one house only. Another possibility is to require that both houses vote to approve the regulations; legislative inaction would amount to disapproval. Or the legislature could vest some form of veto power in a committee or group of committees. Language in *State v. Broom* casts serious doubt on the validity of such a system.[68]

(iv). that it purports to have retrospective effect where the parent statute confers no express authority so to provide;

(v). that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;

(vi). that there appears to have been unjustifiable delay in sending a notification to Mr. Speaker under the proviso to subsection (1) of section 4 of the Statutory Instrument Act, 1946, where an Instrument has come into operation before it has been laid before Parliament;

(vii). that for any special reason its form or purport calls for elucidation.

Boisvert, supra note 48, at 644 (citing Select Comm. on Statutory Instruments, Reports, House of Commons Paper No. 178, at 2 (1950)).

66. Comment, supra note 64, at 523.

67. See INS v. Chadha, 103 S. Ct. 2764 (1983).

68. The legislature has not only delegated to the director of public safety the authority to create felonies, it has relinquished most of the supervision over that authority to its subcommittees and the governor. Even if the delegation were constitutional, the lack of legislative direction would make the enactment procedures suspect. Lawmaking is not an executive function.

439 So. 2d at 369. Cf. La. R.S. 30:1136(A)(1) (Supp. 1984).

One may speculate about what might happen to review by other than legislative means in Louisiana. See La. R.S. 51:1405 (Supp. 1984), which requires that regulations issued by the director of the office of consumer affairs be submitted to the "permanent advisory board on consumer protection and the attorney general." The statute provides that "[u]pon approval by the attorney general," the regulation shall be adopted in accordance with the Administrative Procedure Act. Id.

See also S. 854, 855, 8th Sess., 1 La. Senate J. 213 (1982), authored by Mr. Nunez, which would have made some interesting changes in the review of agency rules.

A system in which a proposed regulation takes effect if the legislature or its appointed committees fail to disapprove is no doubt the most practical, though it can be argued that in modern legislative practice such a review is more theoretical than real. On the other hand, if no regulation takes effect before legislative approval, more thorough review is ensured, but most of the advantages of the delegation of legislative authority have been lost. If the legislature becomes involved in the details of the regulation, then perhaps it should have drafted them in the first place.[69]

CONCLUSION

Delegation of legislative authority has not followed any sophisticated, pre-conceived formula with established criteria. Rather, the various branches of government have created a *modus vivendi* based on the practical necessities of modern society. Nevertheless, essential legislative powers have been reserved and protected from administrative encroachment. Though the task is difficult, some conclusions about the issue of delegation may be drawn.

If the power in question is one that directly affects the liberties of individual citizens, it is likely that there will be, and should be, little or no delegation of authority to regulatory agencies. If the power is an important legislative one, but one traditionally left to regulations, greater delegation may be made with the protection of standards adequate to guide the administrator, and safeguards sufficient to protect the rights of individual citizens. If the power is one over matters requiring considerable expertise, a broader delegation may be justified. In any event, a legislating body should carefully consider the possibility of some form of legislative review, even after the delegation has been made.

Though there is no extended discussion in the opinion, it is apparent that the doom of the *Broom* delegation lay in a combination of factors: (a) a specific constitutional prohibition which, by analogy,[70] suggested

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69. Some legislative bodies had adopted a harsher and more pervasive review procedure: "sunset" legislation. See, e.g., La. R.S. 49:190-199 (Supp. 1984). Administrative agencies must justify their entire existence periodically. If they do not appear, or having appeared cannot convince the legislature of the importance of their continued existence, they then go out of existence. The legislative review mechanism contained in "sunset" legislation has a fixed date for "sunset"; if not affirmatively re-created by the legislature within the prescribed time period, the statutory foundation simply disappears. More importantly, in most states no further appropriations may be made to the agency in question. "Sunset" legislation has proved to be only of limited success. In part, this is due to limitations on legislative staff making it very difficult to conduct a thorough review.

70. In his dissent, Justice Blanche observed that article 6, § 9(A)(1) of the Louisiana Constitution prohibits a "local governmental subdivision" from defining a felony, and that the Department of Public Safety does not fit within the definition of a "local governmental subdivision" in article 6, § 44(1). 439 So. 2d at 376 (Blanche, J., dissenting).

that only the legislature could define a felony; (b) the criminal context in which the issue arose, putting at risk the liberty of an individual citizen; and (c) the lack of any adequate legislative review, leaving the matter in the hands of a committee or sub-committee and a member of the executive branch. Future cases may not be quite so clear; perhaps this discussion will provide food for thought about how best to proceed in future cases.