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# LEGISLATIVE OVERSIGHT OF THE ADMINISTRATIVE STATE: THE SOUTH DAKOTA LEGISLATURE’S REVIEW OF AGENCY RULES

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*Like the federal government, the executive branch of South Dakota’s government includes administrative agencies. But unlike the federal government, the South Dakota Legislature exercises greater oversight. One such example is the Legislative Interim Rules Review Committee. This article not only explains the purpose of the Committee and the rules review process, but it also describes the results of an empirical study that analyzed the Committee’s level of involvement in administrative rules’ promulgation. In particular, this study examined the Committee’s actions during the calendar year of 2019—whether the rules were reverted, passed, or later passed with modifications, and why such actions were taken. Ultimately, this article concludes that the state legislature keeps a much closer eye on state administrative agencies than the federal government does on its federal agencies. Finally, this article recognizes areas for further empirical study on this topic.*

## I. INTRODUCTION

As the administrative state grows larger and more active, concerns grow about the public accountability of administrative agencies. Criticism of the lack of democratic accountability continues to be both robust and escalating. Most of the concerns and criticisms focus on the state of the law and practices of federal administrative agencies.<sup>1</sup> Indeed, the U.S. Congress seems to have significantly withdrawn from any impactful oversight of the federal administrative state, and the courts have largely acquiesced in this withdrawal.<sup>2</sup> Consequently, fears abound that the administrative state has grown to a point where any meaningful

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1. Sidney J. Hardy & Patrick M. Garry, *Reinvigorating Congress’ Role in the Administrative State: What the Major Questions Doctrine Suggests About Nondelegation*, 69 S.D. L. REV. (2024).

2. See Federalist Society Panel, *Federalism: Deference Meets Delegation: Which is the Most Dangerous Branch?*, 43 U. DAYTON L. REV. 31, 37 (2018) (discussing how Congress has transferred much authority to Article II and that “[t]he problem has been exacerbated by Article III”).

public accountability has greatly diminished.<sup>3</sup> However, this conclusion focuses only on one level of the administrative state.<sup>4</sup>

Under the federalism scheme of the U.S. Constitution, states occupy a separate level of governing authority and sovereignty. The structure of state governments mirror that of the federal government, containing three distinct branches: legislative, executive, and judicial. Within the executive branch of state governments exists an array of state administrative agencies.<sup>5</sup> This network of agencies operates under the direction of the governor and the funding and authorization of the state legislature. The status and accountability of state agencies appear not to have been studied as much as that of federal agencies.

This article seeks to examine, in general, the relationship between the state legislature and the state administrative agencies. In particular, the article will explore one way in which the South Dakota Legislature oversees the rulemaking of state agencies. To do so, the article will discuss a study of the workings of the Legislative Interim Rules Review Committee (“Committee”)—a legislative committee charged with reviewing proposed agency rules prior to those rules going into effect. In its review, this Committee either approves those rules or sends the rules back to the agency for further consideration and/or revision.<sup>6</sup> Through this process, the Committee provides a continuing legislative oversight of administrative rulemaking in the State of South Dakota.<sup>7</sup>

As the study suggests, through the Committee’s workings and the agency responses to Committee action, legislative oversight of state administrative agencies appears more vigorous than such oversight on the federal level. Thus, as indicated in the case of the State of South Dakota, perhaps state administrative agencies are held to a higher level of democratic accountability than are federal agencies.

## II. ADMINISTRATIVE ACCOUNTABILITY AT THE FEDERAL LEVEL

The relationship between Congress and the administrative state begins at the point where Congress delegates to the executive branch the power to implement policy through agencies. According to the nondelegation doctrine, rooted in the separation of powers structure of the Constitution, Congress cannot delegate lawmaking power to the executive branch.<sup>8</sup> Under Article I of the U.S.

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3. *Id.* at 51 (asserting that “independent agencies are a unique problem because of the lack of accountability”).

4. *See infra* Part III (describing South Dakota oversight of administrative rulemaking).

5. *See infra* Part III (detailing the South Dakota Legislature’s oversight of state agencies).

6. *See* SDCL § 1-26-4.9 (2023).

7. *See infra* Part V (describing the actions of the Committee in 2019).

8. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989). The argument is that by giving “all legislative Powers” to Congress, the Constitution, by implication, gives such powers to no other entity. *See, e.g., Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472-73 (2001) (holding that the Constitution does not give legislative power to any other entity); *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring) (asserting that legislative power cannot be transferred to other entities).

Constitution, only Congress can exercise legislative power.<sup>9</sup> The U.S. Supreme Court developed the nondelegation doctrine to enforce this constitutional principle.<sup>10</sup> However, notwithstanding the foundational aspect of this principle in the separation of powers scheme, the Court has virtually gutted the principle of any enforcement power.

Not since 1935 has the Court struck down any congressional delegation as violating the nondelegation doctrine.<sup>11</sup> The Court has upheld delegations so broad and ambiguous that generalized commands for agencies to act in the general interest have been ruled to sufficiently guide those agencies in the promulgation of policy.<sup>12</sup> Consequently, through its broadly worded delegations, Congress has displayed a willingness to convey nearly unlimited and undefined power to the administrative state.<sup>13</sup> At the same time, courts have consistently acquiesced in such delegations.<sup>14</sup> Not surprisingly, much criticism has been levied against this lax state of the nondelegation doctrine.<sup>15</sup>

With no controls or limits at the front end of the administrative process—with agencies having no front-end controls on the use of delegated power—desires for more democratic oversight of agency operations eventually led to the

9. U.S. CONST. art. I, § 1.

10. *Marshall Field v. Clark*, 143 U.S. 649, 692 (1892).

11. In 1935, the Court struck down various provisions of the National Industrial Recovery Act of 1933 (NIRA) in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In *Schechter Poultry*, the Court struck down on nondelegation grounds a provision of the NIRA empowering the President to approve “codes of fair competition” for “a trade or industry.” 295 U.S. at 521-22. The Court found that because the term “fair competition” was undefined, the President possessed “virtually unfettered” discretion in implementing the law. *Id.* at 532, 542. The Court stated that “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.” *Id.* at 537-38. Since *Schechter Poultry*, however, the Court has never again used the nondelegation doctrine to overturn any legislative delegations from Congress to the executive branch.

12. See, e.g., *Touby v. United States*, 500 U.S. 160, 162, 167 (1991) (sustaining a delegation under the Controlled Substances Act); *Lichter v. United States*, 334 U.S. 742, 787 (1948) (sustaining a delegation of power to determine excessive profits); *Am. Power & Light Co. v. Sec. Exch. Comm’n*, 329 U.S. 90, 96, 106 (1946) (upholding a delegation to the SEC to regulate voting power of security holders); *Bowles v. Willingham*, 321 U.S. 503, 516 (1944) (sustaining a delegation to the Price Administrator to regulate rents).

13. See, e.g., *Mistretta*, 488 U.S. at 415-16 (Scalia, J., dissenting) (“[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”). The Court’s unsympathetic response to nondelegation doctrine challenges is reflected by the fact that “the combined vote in the Supreme Court on nondelegation issues from *Mistretta* through *American Trucking* was 53-0.” Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

14. “[T]he Supreme Court has found intelligible principles in even the most vague standards.†.†. .” Jeffrey A. Wertkin, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO. L.J. 1055, 1080 (2002) (footnote omitted). The statutory language of “as ‘public convenience, interest, or necessity requires’” was approved in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (quoting 47 U.S.C. § 303(r) (2000)). Even “compelling public interest” was held to be constitutionally sufficient in *Milk Indus. Foundation v. Glickman*, 132 F.3d 1467, 1471 (U.S. App. D.C. 1998).

15. See, e.g., PETER J. WALLISON, *JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE* 114 (2018); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL* 387 (2014); D.A. Candeb, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 94 (2017); C. Boyden Gray, *The Nondelegation Canon’s Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619, 646 (2015).

legislative veto. Seeking to provide Congress with a convenient way to overrule unwanted agency action, the legislative veto gave to one house of Congress a means by which to nullify unwanted individual agency action. However, despite the popular and widespread use of this veto power, the Court in *INS v. Chadha*<sup>16</sup> struck it down, holding that congressional exercise of the legislative veto violated the constitutional lawmaking requirements of bicameralism and presentment.

A further erosion in Congress's ability or inclination to control administrative agencies occurred with the development of the *Chevron* doctrine.<sup>17</sup> This doctrine, as articulated by the U.S. Supreme Court, commands that when interpreting federal statutes courts must defer to agency interpretations whenever the statutes are ambiguous. As it significantly expands the power of the administrative state, allowing agencies to make policy through ambiguous statutes passed by Congress, the *Chevron* doctrine has become the object of vigorous criticism.<sup>18</sup>

Perhaps because of all the ways in which the administrative state has gained power and lessened its democratic accountability, the U.S. Supreme Court has crafted its major questions doctrine. This doctrine, most recently applied in *West Virginia v. EPA*,<sup>19</sup> permits courts to strike down agency action that is so consequential and unprecedented that Congress could not have possibly intended to authorize it.<sup>20</sup> Given the impact of this doctrine, courts infrequently apply it, as it amounts to a judicial nullification of agency policymaking.<sup>21</sup>

A primary criticism of the major questions doctrine is that no clear parameters exist to indicate when precisely an agency is exercising its power on a "major question."<sup>22</sup> Nonetheless, in contrast to the lack of nondelegation doctrine scrutiny at the front end of the agency process, the major questions doctrine does

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16. 462 U.S. 919, 921-922 (1983).

17. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court issued a groundbreaking opinion mandating the judiciary to defer to an agency's interpretation of an ambiguous congressional statute with which the agency was charged with administering. 467 U.S. 837, 842-43 (1984).

18. See J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 925 (1996); see also Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 759 (1991) ("Chevron represents a usurpation of judicial power and results in excessive concentration of power in administrative agencies."); Michael Pollack, *Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y. U. L. REV. 316, 317 (2011) ("[W]e may fairly criticize Congress for passing off politically sensitive or complicated policy questions to these administrative actors."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) ("The danger of Chevron's song lies in its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state.").

19. 142 S. Ct. 2587 (2022).

20. *Id.* at 2610; see Hardy & Garry, *supra* note 1.

21. On the other hand, during the same session in which *West Virginia v. EPA* was decided, the Court in *National Federation of Independent Business v. Dept. of Labor*, 142 S. Ct. 661, 665 (2022), in ordering a stay of OSHA rules mandating COVID-19 vaccines for all workplaces with one hundred or more employees, stated that "we expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."

22. For criticisms of the doctrine, see Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY, (Sept. 6, 2022), <https://perma.cc/HX2V-V8DM>; Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 966-67 (2021).

afford courts an opportunity to address at the back end of the process situations in which the agency has acted beyond the bounds of congressional authorization. The major questions doctrine can also be seen as a judicial means of ensuring that Congress take ultimate responsibility for the important and highly consequential decisions being made by the administrative state. Moreover, the need for the major questions doctrine, as a judicial remedy, may arise from the failure of Congress to adequately articulate and enforce its intent vis a vis delegated authority.

The current status of federal administrative law and practice have intensified concerns about democratic control of agencies. However, the bulk of these concerns focus on the federal level. The state level, as reflected in the case of South Dakota, may present a quite different matter. In the state of South Dakota, the legislature has implemented specific structures and procedures to oversee agency rulemaking.

### III. SOUTH DAKOTA OVERSIGHT OF AGENCY RULEMAKING

Aside from the South Dakota Supreme Court scrutinizing legislative delegations more closely than do the federal courts toward congressional delegations,<sup>23</sup> the South Dakota legislature has also established an independent means of monitoring the rulemaking of state agencies.

In 1972, the legislature formed the Interim Rules Review Committee to provide such oversight.<sup>24</sup> This permanent legislative committee is composed of six members, three from the Senate and three from the House.<sup>25</sup> The Committee “shall review all proposed agency rules and make recommendations to the agencies regarding rules and legislation authorizing rules.”<sup>26</sup> Pursuant to its

23. See Gabrielle J. Unruh & Patrick M. Garry, *The Nondelegation Doctrine in the States: How the Doctrine Has Been Applied in South Dakota*, 69 S.D. L. REV. (2024).

24. SDCL § 1-26-1.1. The statute was amended in 1975, 1983, and 2005. See S.D. Sess. Laws 1975, ch. 16, § 9; S.D. Sess. Laws 1983, ch. 13, § 1; S.D. Sess. Laws 2005, ch. 17, § 1. The amendments did not materially alter the statute. See S.D. Sess. Laws 1975, ch. 16, § 9; S.D. Sess. Laws 1983, ch. 13, § 1; S.D. Sess. Laws 2005, ch. 17, § 1. The amendments in 1975 and 1983 changed the timing of when committee members’ terms ended. The 1983 amendment added “pro tempore” after “president” and before “of the senate.” See S.D. Sess. Laws 2005, ch. 17, § 1.

25. SDCL § 1-26-1.1.

26. SDCL § 1-26-1.2. A federal analogy to the Interim Rules Review Committee is the Congressional Review Act, 5 U.S.C. §§ 801-808, which gives Congress a means of overturning certain federal agency actions. Enacted in 1996, the CRA provides Congress with special procedures, in the form of a joint resolution of disapproval, to overturn rules. However, the CRA has only very rarely been used. Only twenty rules have been overturned over the life of the CRA. CONGRESSIONAL RESEARCH SERVICE, *THE CONGRESSIONAL REVIEW ACT: A BRIEF OVERVIEW* (2023), <https://crsreports.congress.gov/product/pdf/IF/IF10023>. These twenty overturns have generally occurred during a change in presidential administrations and when a shift in congressional majorities occur. *Id.* National Conference of State Legislatures, “Congressional Review Act: Overview and Tracking,” (Feb. 20, 2023). The CRA reflected Congress’ attempt to somewhat replicate the kind of control over the administrative that the legislative veto exerted and that would be allowed by *INS v. Chadha*, 462 U.S. 919 (1983). See Paul J. Larkin, Jr. *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL’Y 187, 197 (2018). But Congress has never once sought to negate a rule that was enacted years ago. *Id.* at 234. Moreover, despite the scores of thousands of rules submitted pursuant to the CRA since 1996, Congress has “passed only seventy-two joint resolutions of disapproval, [with] only one bec[oming] a law, and [that one] involved a then-recently promulgated rule.” *Id.* Consequently, as one commentator has

duties, the Committee may either approve the proposed agency rule, or it may send the rule back to the agency, or move to suspend the rule.<sup>27</sup>

In its review of proposed rules, the Committee “seeks to ensure that the spirit and intent of the legislation is carried out.”<sup>28</sup> The Committee particularly looks to see if the public received sufficient notice of the rules and whether public complaints were addressed.<sup>29</sup> The Committee may suspend a rule that is either provisionally effective or has not yet taken effect.<sup>30</sup> This authority derives from Article III, section 30 of the South Dakota State Constitution.<sup>31</sup>

The Committee has infrequently used its power to suspend rules.<sup>32</sup> More commonly, the Committee takes the intermediate step of requiring the agency to reconsider or hold additional public hearings. Such a process often occurs “if the rules have been significantly and substantially altered from the original proposal and those changes were not a result of public testimony, or if the rules need to be substantially rewritten to achieve the intent of the agency.”<sup>33</sup>

Through the structure and procedures of the Committee, the South Dakota Legislature assumes a responsibility for the final rules promulgated by an agency. It does not simply pass the buck to agencies to handle difficult regulatory matters, thereby insulating itself from criticism directed at the impact of those rules. In contrast, one complaint often made about Congress is that it uses agencies as a kind of scapegoat—it hands off problems to agencies with nothing more than a vague delegation and then lets the agency grapple with the issue.<sup>34</sup> If the rules promulgated by that agency prove unpopular, Congress can then place the blame on the agency rather than on itself.<sup>35</sup> In South Dakota, through the Interim Rules Review Committee, the legislature retains accountability for the final rules adopted and implemented by the agency.

A review of the actions of the Committee may indicate just how scrutinizing the legislature is toward the proposed action by agencies. These actions form the basis of the study presented in this Article.

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noted: “[t]he rarity with which Congress has taken up the CRA to nullify a rule is powerful evidence that neither the Congress that adopted that law nor any of the Congresses since then thought that the CRA could be applied in a broad manner.” *Id.*

27. SDCL § 1-26-4.9.

28. S.D. LEGIS. RSCH. COUNCIL, THE ADMINISTRATIVE RULES PROMULGATION PROCESS: A PRIMER, Issue Memorandum 2018-03 (2018).

29. SDCL § 1-26-4.1; *see also* SDCL § 1-26-4(8) (explaining that written comments must be submitted to the Committee prior to the hearing).

30. *See* SDCL § 1-26-4.9.

31. *See* S.D. CONST. art. III, § 30.

32. *Id.*

33. S.D. LEGIS. RSCH. COUNCIL, *supra* note 28.

34. Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POLITICS 239, 239, 248 (2012).

35. *Id.*; *see also* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1602 (2020) (stating that Congress uses agencies as scapegoats, hiding behind them to avoid blame for an unpopular decision).

#### IV. METHODOLOGY OF THE STUDY

The study examined the actions of the Committee during the calendar year of 2019. This year was chosen because it preceded the COVID-19 disruption and was far enough in the past to allow for an examination of how agencies responded to the Committee's actions.

In studying the work of the Committee, an examination was made of all the rules it considered. The approved rules were identified, as were the rules sent back to the respective agency. Of those reverted to the agency, an analysis was attempted to determine the general reason for reversion. Finally, the rules reverted to the agency were then tracked to identify the final outcome—e.g., whether they were eventually passed, and whether if passed they had been modified by the agency.

Under South Dakota statute, the Committee may require an agency to revert to any step in the adoption procedure.<sup>36</sup> The Committee's decision can be based on nine different statutory reasons.<sup>37</sup> When the Committee does revert a proposed rule for one of those statutory reasons, the agency then considers the Committee's concerns, reassesses its proposed rule, and then, if it chooses, resubmits the rule to the Committee.

Whenever the Committee does consider a proposed rule, it holds a hearing at which public and agency input is obtained.<sup>38</sup>

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36. SDCL § 1-26-4.7.

37. The nine reasons are as follows:

- (1)The substance of the proposed rule has been significantly rewritten from the originally proposed rule which was not the result of testimony received from the public hearing;
- (2)The proposed rule needs to be significantly rewritten in order to accomplish the intent of the agency;
- (3)The proposed rule needs to be rewritten to address the recommendations or objections of the Interim Rules Review Committee;
- (4)The proposed rule is not a valid exercise of delegated legislative authority;
- (5)The proposed rule is not in proper form;
- (6)The notice given prior to the proposed rule's adoption was not sufficient to give adequate notice to persons likely to be affected by the proposed rule;
- (7)The proposed rule is not consistent with the expressed legislative intent pertaining to the specific provision of law which the proposed rule implements;
- (8)The proposed rule is not a reasonable implementation of the law as it affects the convenience of the general public or persons likely affected by the proposed rule; or
- (9)The proposed rule may impose more than nominal costs upon a unit of local government or school district when the unit of local government or school district may not have sufficient funding to perform the activity required by the proposed rule.

SDCL § 1-26-4.7.

38. S.D. LEGIS. RSCH. COUNCIL, DRAFTING MANUAL: ADMINISTRATIVE RULES OF SOUTH DAKOTA (2023) [hereinafter DRAFTING MANUAL]. The agency is required to give all interested persons an opportunity to give comments at a public hearing prior to the Committee hearing. SDCL § 1-26-4(5). In addition, an agency must accept written comments either for a period of ten days after a public hearing if the promulgating authority is a secretary, commissioner, or officer; or for a period of seventy-two hours before the public hearing if the promulgating authority is a part-time citizen board, commission, committee, or task force. *Id.* § 4(6). The agency may continue the hearing for the purpose of taking additional comments. *Id.* While the agency is to consider both written and oral comments given by interested parties, it must submit the written comments to the Committee. *Id.* §§ 4(7)-(8).



## V. OUTCOME OF THE STUDY

It is estimated that in 2019 over eight hundred<sup>39</sup> proposed agency rules were considered by the Committee.<sup>40</sup> Of all of those proposed rules or amendments to those rules, forty-six rules were reverted by the Committee.<sup>41</sup> Many of these proposed rules were eventually passed, some with modifications after Committee input, some without modifications. Fourteen of the forty-six proposed rules or amendments were never adopted.

In 2019, the Committee's decision to revert a rule rested on one of three reasons: procedural errors, grammatical errors, and substantive concerns.<sup>42</sup>

### A. PROCEDURAL ERRORS

In 2019, there were two primary examples of rules being reverted for procedural errors. At the Committee hearing on November 4, 2019, the South Dakota Electrical Commission proposed amendments to agency rules regarding inspections.<sup>43</sup> While some Committee members expressed concern as to the fees contained within the rules, the proposed amendments were ultimately reverted because the Commission had failed to publish the required notice of the proposed rules.<sup>44</sup> The purpose of publishing notice of the proposed rules is to give those persons who might be affected by the rules an opportunity to comment.<sup>45</sup> Adequate notice requires publication of the notice at least three times, "in at least three newspapers of general circulation in different parts of the state."<sup>46</sup> The Commission had only published its notice twice.<sup>47</sup> Senator Craig Kennedy, who moved to revert the rules, noted that although the Commission had attempted to

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39. The exact number of proposed rules and amendments that were presented to the Committee was unable to be obtained from the Interim Rules Review Committee. Eight hundred is an approximation based on first reviewing the Committee's hearing minutes to determine which agencies presented rules at which hearings. Then, those agencies were selected from the "archive" section of rules.sd.gov. Within each individual agency was a chart containing various information, including a column that identified a particular Committee hearing at which the rules document within that row of the chart would be presented. Once the 2019 Committee hearing dates were identified, the accompanied rules documents were accessed and summed. Each section was counted as a separate rule. This process repeated for each hearing for each agency.

40. See generally *Archive*, S.D. ADMIN. RULES, <https://perma.cc/4R7Y-BYC9> (last visited Mar. 25, 2023) (showing that the committee considered the proposed agency rules); *Rules Review 2019*, S.D. LEGIS. RSCH. COUNCIL, <https://perma.cc/47KW-4DTN> (last visited Mar. 25, 2023) (providing the same).

41. See *infra* Appendix A (detailing 2019 proposed rules, amendments, and adoptions).

42. While SDCL § 1-26-4.7 designates nine specific reasons for which the Committee may decide to revert a rule, more generally, the reasons the Committee reverted rules in 2019 can be put into these three different categories.

43. INTERIM RULES REV. COMM., MINUTES: THREE HUNDRED EIGHTY-FOURTH MEETING, at 9 (Nov. 4, 2019), <https://perma.cc/J9F4-2N4H> [hereinafter NOVEMBER MINUTES].

44. *Id.* The rule was reverted under SDCL § 1-26-4.7(6). This Committee action illustrates an example of judicial efficiency, remedying a flaw in agency procedure that might otherwise have required a litigation challenge after the final issuance of the rule.

45. DRAFTING MANUAL, *supra* note 38, at 2.

46. SDCL § 1-26-4.1.

47. NOVEMBER MINUTES, *supra* note 43.

publish a third time, that final publication was unsuccessful.<sup>48</sup> Therefore, the rules were reverted for a procedural error.<sup>49</sup>

These rules were eventually adopted by the Committee in 2020.<sup>50</sup> The rules as adopted largely reflected the form and substance of the proposed 2019 rules with some modifications that improved readability and grammar.<sup>51</sup> One rule in particular, rule 20:44:20:03 (“Inspection fee for circuit installations or alterations”), added some limiting language that appears to have responded to some of the Committee members’ concerns regarding fees.<sup>52</sup> Other rules were not modified at all after reversion.<sup>53</sup>

Another example of rules being reverted for procedural error can be seen in the rules presented by the Department of Game, Fish, and Parks and proposed at the July 8, 2019, Committee hearing.<sup>54</sup> Three amendments proposed by the Department at that hearing were reverted because of the agency’s failure to incorporate certain Legislative Research Council (“LRC”) recommendations.<sup>55</sup>

At least twenty days prior to a hearing, an agency must submit the proposed rule and other documents to the director of the LRC.<sup>56</sup> Once received, the LRC reviews the proposed rule and then sends a letter to the agency containing “recommended” corrections.<sup>57</sup> The agency is required to incorporate these recommendations or appeal them.<sup>58</sup> Here, the Department submitted the proposed amendments to the LRC, and the LRC provided recommendations.<sup>59</sup> However, the Department neither incorporated these recommendations nor appealed them; therefore, the Committee determined that the Department had exceeded its

48. South Dakota Interim Rules Review Committee Hearing No. 384, held by the South Dakota Interim Rules Review Committee, at 5:12:05 (Nov. 9, 2021), <https://sdpb.sd.gov/sdpbpodcast/2019/interim/rul11042019.mp3>.

49. NOVEMBER MINUTES, *supra* note 43.

50. See *South Dakota Electrical Commission: Committee Meetings: April 21, 2020, Proposed Rules*, S.D. DEP’T OF LAB. & REGUL., <https://perma.cc/WZA4-62M8> (last visited Mar. 25, 2023) [hereinafter *Electrical Commission Revised Rules*]; S.D. ADMIN. R. 20:44:16:23 (2023); S.D. ADMIN. R. 20:44:18:02 (2023); S.D. ADMIN. R. 20:44:20:01 (2023); S.D. ADMIN. R. 20:44:20:02 (2023); S.D. ADMIN. R. 20:44:20:03 (2023); S.D. ADMIN. R. 20:44:20:04 (2023); S.D. ADMIN. R. 20:44:20:05 (2023); S.D. ADMIN. R. 20:44:20:06 (2023); S.D. ADMIN. R. 20:44:20:07 (2023); S.D. ADMIN. R. 20:44:20:08 (2023); S.D. ADMIN. R. 20:44:20:09 (2023); S.D. ADMIN. R. 20:44:20:10 (2023); S.D. ADMIN. R. 20:44:20:13 (2023); S.D. ADMIN. R. 20:44:24:05 (2023).

51. *Electrical Commission Revised Rules*, *supra* note 50.

52. *Id.* at 15.

53. *Id.* at 1-23.

54. INTERIM RULES REV. COMM., MINUTES: THREE HUNDRED EIGHTY-FIRST MEETING, at 1-3 (July 8, 2019), <https://perma.cc/9XLC-P2W2> [hereinafter JULY MINUTES].

55. *Id.* at 3.

56. DRAFTING MANUAL, *supra* note 38, at 1.

57. *Id.* at 2.

58. *Id.* This illustrates the potential power of the LRC, which could be seen as a “legislative agency,” to influence executive agency action at an early stage. With one “agency” influencing the other, the questions might be raised as to whether this reflects a more democratic process and/or accountability.

59. JULY MINUTES, *supra* note 54, at 2.

delegated authority and reverted the rules.<sup>60</sup> These amendments were later adopted at the end of 2019 with no change to their form or substance.<sup>61</sup>

## B. GRAMMATICAL ERRORS

The second reason the Committee reverted rules in 2019 was because of grammatical or form errors.<sup>62</sup> For example, the Committee reverted rule 41:03:03:03.01, proposed by the Department of Game, Fish, and Parks, because of a numbering error.<sup>63</sup> Although this error was rectified in a later proposed amendment, it was not adopted.<sup>64</sup> Instead, other amendments were subsequently adopted that expanded park entrance license exemptions to additional groups that had not previously been included.<sup>65</sup>

In the majority of the rules that were reverted and then later adopted, the only modifications made to the rules were those that remedied grammatical errors or improved clarity and readability.<sup>66</sup> These modifications were not necessarily made in response to comments from the Committee. For example, in rules 41:06:62:01 and 41:06:62:02 the capitalization of “Hunt for Habitat” was changed to “hunt for habitat.”<sup>67</sup> No other modification was made.<sup>68</sup> Additionally, after the amendments proposed by the South Dakota Electrical Commission had been reverted, the Department had done some simple wordsmithing to the amendments that were later adopted. For example, in rules 20:44:18:02 and 20:44:20:01, “0 to 200 amperes, inclusive” was modified to read “0 through 200 amperes.”<sup>69</sup> In some other rules, “pursuant to” was replaced with “in accordance with.”<sup>70</sup> Similar changes that had no substantive effect were made to various other rules.<sup>71</sup>

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60. *Id.* at 2-3.

61. See S.D. ADMIN. R. 41:03:01:16.02 (2023); S.D. ADMIN. R. 41:03:01:16.04 (2023); S.D. ADMIN. R. 41:03:01:16.05 (2023).

62. INTERIM RULES REV. COMM., MINUTES: THREE HUNDRED SEVENTY-NINTH MEETING, at 2 (May 6, 2019), <https://perma.cc/K3NG-CF23> [hereinafter MAY MINUTES].

63. *Id.* at 2-3. See *Department of Game, Fish, and Parks: March Proposals/April Finals: Proposed Rule*, S.D. ADMIN. RULES, at 5-6, <https://perma.cc/4F2K-F9L5> (last visited Mar. 25, 2023) [hereinafter *GFP Proposed Rule I*].

64. Compare *Department of Game, Fish, and Parks: Special Commission Meeting – May 23, 2019: Proposed Rule*, S.D. ADMIN. RULES, at 5-6, <https://perma.cc/4MWF-EW8L> (last visited Mar. 25, 2023) (stating the proposed rules), with S.D. ADMIN. R. 41:03:03:03.01 (2023) (History > Versions) (demonstrating that the proposed amendment was not adopted).

65. See S.D. ADMIN. R. 41:03:03:03.01 (2023) (History > Versions) (stating the adopted rules). See S.D. ADMIN. R. 41:03:03:03.01 (2023) (History > Versions) (stating the adopted rules made to the rules).

67. Compare *GFP Proposed Rule I*, *supra* note 71, at 5-6 (stating the proposed rules), with S.D. ADMIN. R. 41:06:62:01 (History > Versions) (illustrating modifications made to the rules).

68. Compare *GFP Proposed Rule I*, *supra* note 71, at 18 (stating the proposed rules), with S.D. ADMIN. R. 41:06:62:01 (History > Versions) (showing that no other modifications were made).

69. Compare *Electrical Commission Revised Rules*, *supra* note 50, at 12-13 (stating proposed rules), with S.D. ADMIN. R. 20:44:20:02 (History > Versions) (illustrating modifications made to the rule).

70. Compare *Electrical Commission Revised Rules*, *supra* note 50, at 17, 18 (stating the proposed rules), with S.D. ADMIN. R. 20:44:20:06 (History > Versions) (illustrating a replacement made to the rule).

71. See, e.g., *Electrical Commission Revised Rules*, *supra* note 50, at 17-18 (suggesting amendments to S.D. ADMIN. R. 20:44:20:06).

## C. SUBSTANTIVE CONCERNS

The last reason that the Committee reverted rules in 2019 was for substantive concerns with the rules. In these instances, the Committee determined that the rule, as written, was not ready to be adopted.

For example, at the May 6, 2019 hearing on rule 41:03:01:07 proposed by the Department of Game, Fish, and Parks,<sup>72</sup> Committee members expressed concerns with the way the rule was written and the effect it would have.<sup>73</sup> The rule sought to charge a fee for commercial photography and videography taken in state parks and used to promote or sell a product or service.<sup>74</sup> This amendment responded to the fact that the photographers, in pursuit of their commercial interests, would sometimes restrict the use of areas of the park in ways that would not benefit the Department.<sup>75</sup> A Representative inquired into the impact this would have on wedding photographers and videographers.<sup>76</sup> The Department expressed that it did not intend for this rule to apply to those types of vendors; however, the Committee was not convinced that, as written, the rule would not apply to such photographers and videographers.<sup>77</sup> Representative Ryan Cwach said that “he was unsure the photography fee language was ready to be approved as written.”<sup>78</sup> Therefore, the rule was reverted.<sup>79</sup>

Although an amendment to this rule was later adopted by the Committee; the particular amendment proposed by the Department at the May 6, 2019, meeting was never adopted.<sup>80</sup> Therefore, the amendment, as it stands today, does not specifically address permits and fees for photography and videography.<sup>81</sup>

Similarly, at the September 9, 2019, hearing, thirteen amendments proposed by the Department of Social Services were reverted by the Committee because of substantive concerns.<sup>82</sup> Two of these rules contained a “payment standard” chart that determined the amount of assistance to be paid based on certain factors.<sup>83</sup> In the amendments proposed by the Department, the charts were no longer contained within the text of the rule.<sup>84</sup> Instead, the chart was replaced with a link to the

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72. MAY MINUTES, *supra* note 62, at 2-3.

73. *Id.*

74. *Id.* at 3.

75. *Id.* at 2.

76. *Id.* at 2-3.

77. *Id.*

78. *Id.* at 3.

79. *Id.*

80. Compare *GFP Proposed Rule 1*, *supra* note 67, at 1-2 (stating the proposed rule), with S.D. ADMIN. R. 41:03:01:07 (2023) (History > Versions) (illustrating that the rule was never adopted).

81. See S.D. ADMIN. R. 41:03:01:07 (2023).

82. INTERIM RULES REV. COMM., MINUTES: THREE HUNDRED EIGHTY-THIRD MEETING, at 4-5 (Sept. 9, 2019), <https://perma.cc/3ZQT-HZ4M> [hereinafter SEPTEMBER MINUTES]. Most were reverted under section 1-26-4.7(4) as not being a valid exercise of delegated authority. *Id.* One rule (67:16:39:07) was reverted under section 1-26-4.7(2) for needing to be significantly rewritten in order to accomplish the intent of the agency. *Id.*

83. *Department of Social Services: Proposed Rule*, S.D. ADMIN. RULES, at 1-4, <https://perma.cc/P533-6P77> (last visited Mar. 25, 2023) [hereinafter *DSS Proposed Rules*].

84. *Id.*; see S.D. ADMIN. R. 41:03:01:07 (2023).

Department's website.<sup>85</sup> The other eleven amendments proposed similarly replaced fee language with a link to the Department's website.<sup>86</sup>

Committee members were concerned that such amendments would allow the Department to bypass the Committee and, therefore, would permit the Department to act beyond its statutory authority.<sup>87</sup> For these reasons, the amendments were reverted.<sup>88</sup> In the adopted versions, the charts or fee language were added back into the text of the rules, but the dollar amounts were increased.<sup>89</sup> These rules have since been amended again, reflecting another increase in the dollar amounts.<sup>90</sup>

## VI. CONCLUSION

This study did not attempt to conduct a qualitative review of the Committee's actions. The study made no attempt to examine proposed rules that were never reverted by the Committee back to the appropriate agency. Nor did this study attempt to evaluate the propriety of the Committee's actions regarding the rules it did revert in 2019. Instead, this study simply attempted to take a first look at legislative oversight of agency rulemaking in South Dakota. Through the work of the Committee, the legislature appears to exercise a close supervision of the proposed rules of state agencies, retaining a responsibility for agency action throughout the rulemaking process.

Having addressed only one year of the Committee's work, this study suggests a number of areas of future research. One area of future study might involve comparing the frequency of the different types of reversions found—e.g., substantive, procedural, or grammatical. All three types constitute reversions and reflect Committee oversight; however, the three types reflect different kinds of legislative oversight. Another subject of future research might involve the relationship between substantive reversions and public opinion: for instance, does a substantive reversion actually reflect public or political opposition to the rule? Finally, research could be conducted into whether there might be a misalignment of the Committee and the legislative majority—e.g., might this single committee be undermining the full legislature vis a vis regulations desired by the legislature.

As cited previously in this Article, the CRA provides a somewhat analogous means by which Congress can review the rules of federal agencies. However, the

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85. *DSS Proposed Rules*, *supra* note 83, at 1-4.

86. *Id.* at 1-94.

87. *SEPTEMBER MINUTES*, *supra* note 82, at 3-4.

88. *Id.*

89. S.D. ADMIN. R. 67:10:05:03 (2023) (History > Versions); S.D. ADMIN. R. 67:10:05:05 (2023) (History > Versions); S.D. ADMIN. R. 67:16:29:04.01 (2023) (History > Versions); S.D. ADMIN. R. 67:46:05:15 (2023) (History > Versions); S.D. ADMIN. R. 67:46:07:12 (2023) (History > Versions); S.D. ADMIN. R. 67:61:12:03 (2023) (History > Versions); S.D. ADMIN. R. 67:61:13:04 (2023) (History > Versions); S.D. ADMIN. R. 67:61:14:04 (2023) (History > Versions); S.D. ADMIN. R. 67:61:16:05 (2023) (History > Versions); S.D. ADMIN. R. 67:16:39:07 (2023) (History > Versions).

90. S.D. ADMIN. R. 67:10:05:03; S.D. ADMIN. R. 67:10:05:05; S.D. ADMIN. R. 67:16:29:04.01; S.D. ADMIN. R. 67:46:05:15; S.D. ADMIN. R. 67:46:07:12; S.D. ADMIN. R. 67:61:12:03; S.D. ADMIN. R. 67:61:13:04; S.D. ADMIN. R. 67:61:14:04; S.D. ADMIN. R. 67:61:16:05; S.D. ADMIN. R. 67:16:39:07.

congressional use of the CRA to do this has been almost nonexistent. Nonetheless, a more detailed study of the differences between the CRA and the South Dakota Interim Rules Review Committee may prove instructive on the general issue of legislative oversight of administrative agencies. Furthermore, a wider examination of review practices and procedures in other states may provide further insights on the democratic responsiveness of state legislatures versus Congress.

**APPENDIX A<sup>91</sup>****2019 INTERIM RULES REVIEW COMMITTEE****REVERTED RULES**

	<b>AGENCY</b>	<b>RULE #</b>	<b>DATE</b>	<b>RESULT</b>
1	Dep't of Game, Fish, & Parks	41:03:01:07 Amendment	5/6/2019	Proposed amendment never adopted. Other amendments adopted: Effective 12/2/2019 (46 SDR 74)
2	Dep't of Game, Fish, & Parks	41:03:03:03.01 Amendment	5/6/2019	Proposed amendment never adopted. Other amendments adopted: Effective 6/24/2019 (45 SDR 155) Effective 12/2/2019 (46 SDR 74) Effective 9/15/2020 (47 SDR 27)
3	Dep't of Game, Fish, & Parks	41:06:01:20 Rule proposal	5/6/2019	Never enacted
4	Dep't of Game, Fish, & Parks	41:06:02:03(56)(d)(e) Rule proposal	5/6/2019	Never enacted
5	Dep't of Game, Fish, & Parks	41:06:62:01 Rule proposal	5/6/2019	Promulgated 6/24/2019 (45 SDR 155)
6	Dep't of Game, Fish, & Parks	41:06:62:02 Amendment	5/6/2019	Amendments adopted: Effective 6/24/2019 (45 SDR 155)

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91. This chart was created after comparing the 2019 meeting minutes, the text of proposed and adopted rules, and South Dakota's administrative regulations as they stand today.

7	Dep't of Game, Fish, & Parks	41:06:62:03 Amendment	5/6/2019	Amendments adopted: Effective 6/24/2019 (45 SDR 155)
8	Dep't of Game, Fish, & Parks	41:06:62:04 Amendment	5/6/2019	Amendments adopted: Effective 6/24/2019 (45 SDR 155)
9	Dep't of Game, Fish, & Parks	41:08:02:13 Amendment	5/6/2019	Amendments adopted: Effective 6/24/2019 (45 SDR 155)
10	Dep't of Game, Fish, & Parks	41:08:03:02 Rule proposal	5/6/2019	Never enacted
11	Dep't of Game, Fish, & Parks	41:03:01:16.02 Amendment	7/8/2019	Amendments adopted: Effective 12/2/2019 (46 SDR 74)
12	Dep't of Game, Fish, & Parks	41:03:01:16.04 Amendment	7/8/2019	Amendments adopted: Effective 12/2/2019 (46 SDR 74)
13	Dep't of Game, Fish, & Parks	41:03:01:16.05 Amendment	7/8/2019	Amendments adopted: Effective 12/2/2019 (46 SDR 74)
14	Dep't of Game, Fish, & Parks	41:04:06:02 Amendment	11/4/2019	Never adopted
15	Dep't of Soc. Servs.	67:10:05:03 Amendment	9/9/2019	Amendments adopted: Effective 7/1/2021 (47 SDR 138) Effective 7/4/2022 (48 SDR 131)



16	Dep't of Soc. Servs.	67:10:05:05 Amendment	9/9/2019	Amendments adopted: Effective 7/1/2021 (47 SDR 138) Effective 7/4/2022 (48 SDR 131)
17	Dep't of Soc. Servs.	67:16:29:04.01 Amendment	9/9/2019	Amendments adopted: Effective 11/25/2019 (46 SDR 64)
18	Dep't of Soc. Servs.	67:46:05:15 Amendment	9/9/2019	Amendments adopted: Effective 9/10/2020 (47 SDR 24) Effective 7/1/2021 (47 SDR 138) Effective 7/4/2022 (48 SDR 131)
19	Dep't of Soc. Servs.	67:46:07:12 Amendment	9/9/2019	Amendments adopted: Effective 9/10/2020 (47 SDR 24) Effective 7/1/2021 (47 SDR 138) Effective 7/4/2022 (48 SDR 131)
20	Dep't of Soc. Servs.	67:61:12:03 Amendment	9/9/2019	Amendments adopted: Effective 8/22/2021 (48 SDR 14)
21	Dep't of Soc. Servs.	67:61:13:04 Amendment	9/9/2019	Amendments adopted: Effective 8/22/2021 (48 SDR 14)
22	Dep't of Soc. Servs.	67:61:14:04 Amendment	9/9/2019	Amendments adopted: Effective 8/22/2021 (48 SDR 14)

23	Dep't of Soc. Servs.	67:61:15:04 Amendment	9/9/2019	Never adopted
24	Dep't of Soc. Servs.	67:61:16:05 Amendment	9/9/2019	Amendments adopted: Effective 8/22/2021 (48 SDR 14)
25	Dep't of Soc. Servs.	67:61:17:09 Amendment	9/9/2019	Never adopted
26	Dep't of Soc. Servs.	67:61:18:06 Amendment	9/9/2019	Never adopted
27	Dep't of Soc. Servs.	67:16:39:07 Amendment	9/9/2019	Amendments adopted: Effective 11/25/2019 (46 SDR 64) – in minutes
28	Dep't of Health	44:59:01:04 Amendment	11/4/2019	Never adopted
29	Dep't of Health	44:59:01:05 Amendment	11/4/2019	Never adopted
30	Dep't of Health	44:59:01:06 Amendment	11/4/2019	Never adopted
31	Dep't of Health	44:59:01:07 Amendment	11/4/2019	Never adopted
32	Dep't of Health	44:59:01:08 Amendment	11/4/2019	Never adopted
33	SD Electrical Comm'n	20:44:16:23 Amendment	11/4/2019	Repealed by 46 SDR 128, effective May 26, 2020.
34	SD Electrical Comm'n	20:44:18:02 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)

35	SD Electrical Comm'n	20:44:20:01 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
36	SD Electrical Comm'n	20:44:20:02 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
37	SD Electrical Comm'n	20:44:20:03 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
38	SD Electrical Comm'n	20:44:20:04 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
39	SD Electrical Comm'n	20:44:20:05 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
40	SD Electrical Comm'n	20:44:20:06 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
41	SD Electrical Comm'n	20:44:20:07 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
42	SD Electrical Comm'n	20:44:20:08 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020

				(46 SDR 128)
43	SD Electrical Comm'n	20:44:20:09 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
44	SD Electrical Comm'n	20:44:20:10 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
45	SD Electrical Comm'n	20:44:20:13 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)
46	SD Electrical Comm'n	20:44:24:05 Amendment	11/4/2019	Amendments adopted: Effective 5/26/2020 (46 SDR 128)