Florida Law Review

Volume 28 | Issue 4 Article 9

June 1976

Delegation of Power: Judicial Fetters Loosened?

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would adversely affect retail sales[71] is sufficient to justify the equation of the shopping center owner's right to privacy to that of a private home owner.[72]

The evolution of new legal concepts to meet changing social conditions has rarely proceeded along a continuum. The principal case represents a retreat from earlier decisions that had recognized that the spread of privately owned community centers demanded a reassessment of traditional views on the availability of private property for use as a forum for free expression. In light of the instant case, the description of the modern shopping mall quoted by Justice Powell in *Lloyd Corp. v. Tanner* takes on an unsettling quality.

> Here the shopper is isolated from the noise, fumes, confusion and distraction which he normally finds along city streets, and a controlled, carefree environment is provided. . . .[73]

GERRY S. GIBSON

DELEGATION OF POWER: JUDICIAL FETTERS LOOSENED?

Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976)

Appellee Lee Rogers, who was doing business as American Holiday Association,[1] solicited Floridians to participate in a crossword puzzle game in which contestants paid an entry fee in return for an opportunity to win cash prizes.[2] The Department of Legal Affairs (DLA) charged Rogers with conducting an unfair or deceptive trade practice in violation of section 501.204[3] of the Florida Statutes. The case bypassed an administrative pro-

public property. *See* Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

71. See note 69 *supra*.

72. See Comment, *supra* note 34, at 587.

73. 407 U.S. 551, 554 (1972).

1. From his principal place of business in Los Angeles, California, Lee Rogers was engaged in conducting puzzle contests. He sent advertisements and promotional literature through the mail and advertised in newspapers of general circulation in various states. *See* Brief for Federal Trade Commission as Amicus Curiae, App. A, Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976).

2. The challenged contest was a crossword type puzzle entitling a contestant to win a stated amount of prize money. Although initially contestants were not required to pay money, they were encouraged to play for extra cash prizes by submitting a specified amount of money. Payment of an entry fee of one dollar qualified the contestant for a chance to win an additional $500 prize; payment of two dollars raised the possible prize money to $1,000; and payment of three dollars raised the possible prize money to $1,500. Winners were selected on scores obtained through submission of a succession of progressively and significantly more difficult word puzzle contests. In order to proceed from one contest to the next, contestants were required to correctly and promptly complete all previously submitted puzzles. Department of Legal Affairs v. Rogers, 329 So. 2d 257, 259-60 (Fla. 1976).

3. FLA. STAT. §501.204 (1975) provides: "(1) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby

ceeding by Rogers' request for a trial on the issues.[4] The circuit court found the statutory language to be unconstitutionally vague and the delegation of power to the DLA beyond permissible limits.[5] On direct appeal, the Florida supreme court reversed the trial court, and HELD the key provisions of Florida's "little FTC act" are neither vague nor an unconstitutional delegation of legislative authority.[6]

Courts have employed the term "vague" in at least two different contexts in constitutional litigation involving powers delegated to administrative agencies.[7] In one context the concern centers around the due process rights of the individual. If the statute is so vague as to fail to give citizens fair notice as to the proscribed activity, then due process rights are violated.[8] In a second context, courts are concerned with the proper separation of legislative and executive functions. Vague statutory direction may delegate excessive authority to a particular administrative agency to interpret the intent and purpose of the law while in the process of enforcing it.

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declared unlawful. (2) It is the intent of the legislature that in construing subsection (1) of this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." This section is the declaration of unlawful activities under the Florida Deceptive and Unfair Trade Practices Act, commonly known as the state's "little FTC act." FLA. STAT. §§501.201-.213 (1975). *See generally* Tennyson, *The Deceptive and Unfair Trade Practices Act: A New Approach to Trade Regulation in Florida*, 2 FLA. ST. U. L. REV. 223 (1974).

4. This procedure is authorized under FLA. STAT. §501.2091 (1975).

5. State v. Rogers, Case No. 74-1510 (2d Cir. Ct. Fla., May 23, 1975). Specifically, the court ruled that §501.204 was unconstitutionally vague and that §501.205 was an unconstitutional delegation of legislative power. FLA. STAT. §501.205 provides: "(1) The department shall propose rules to the cabinet which prohibit with specificity acts or practices that violate this part and which prescribe procedural rules for the administration of this part. Such rules shall be adopted by majority vote of the cabinet. All rules prescribed by the cabinet and administrative actions taken by the department shall be pursuant to chapter 120. The Department of Legal Affairs shall, at least 30 days before the meeting at which such rules are to be considered by the cabinet, mail a copy of such rules to any person filing a written request with the Department of Legal Affairs to receive copies of proposed rules. The Department of Legal Affairs may charge a reasonable rate for providing copies of such rules, which rate shall not exceed the actual cost of printing and mailing. (2) All substantive rules and regulations promulgated under this part shall be consistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of s. 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended."

The trial judge also ruled that the puzzle game was not in violation of FLA. STAT. §849.08 (1975), which prohibits games of chance for money or prizes. He ruled the game was not a wagering scheme condemned by this statute but rather a contest of skill for a prize. The court also found Rule 2-9.07, which states that it is an unfair or deceptive trade practice for a person to engage in any kind of game of skill, contest, or other promotion that requires an entry fee or similar consideration, to be invalid and void.

6. Department of Legal Affairs v. Rogers, 329 So. 2d 257, 267 (Fla. 1976).

7. *Compare* Papachristou v. Jacksonville, 405 U.S. 156 (1972) *with* Neblett v. Carpenter, 305 U.S. 297 (1938).

8. *See, e.g.*, Jordan v. DeGeorge, 341 U.S. 223 (1951) (challenged as unconstitutionally vague a federal statute making convictions of any two crimes involving moral turpitude a ground for deportation of an alien).

Courts concerned with the due process question consider whether the statute is sufficiently definite to give fair notice to affected parties as to what is required or prohibited.[9] Obscenity[10] and vagrancy[11] statutes are examples of laws frequently subjected to this type of vagueness challenge. The United States Supreme Court has recognized that a statute is unconstitutionally vague when it "either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application."[12] The degree of definiteness required is relative to the subject matter of the statute[13]—criminal statutes requiring more precision than civil statutes.[14] Regulatory statutes governing business activities have been allowed the greatest leeway.[15] Statutes employing technical terms are generally sustained if those expected to apply these terms can understand their meaning.[16] Furthermore, state statutes that deal with offenses difficult to define are accorded sympathetic treatment by the Supreme Court when not entwined with competing first amendment privileges.[17]

The terminology in the instant case, "unfair methods of competition and unfair or deceptive trade practices," has been challenged as unconstitutionally vague on several occasions. As early as 1919 in *Sears, Roebuck & Co. v. FTC*,[18] the Court of Appeals for the Seventh Circuit upheld the Federal Trade Commission Act[19] against a vagueness challenge, concluding that the term "unfair methods of competition" was no more vague than other legal terms accorded wide deference such as "due process of law."[20] State courts in Washington[21] and Wisconsin[22] have upheld similar phrases utilized in the consumer protection acts of those states.

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9. *See generally* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

10. *See, e.g.*, Winters v. New York, 333 U.S. 507 (1948); State v. Aiuppa, 298 So. 2d 391 (Fla. 1974).

11. *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156 (1972).

12. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (held unconstitutionally vague an Oklahoma minimum wage statute requiring government contractors to pay a per diem wage rate not less than the current rate in the locality).

13. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Winters v. New York, 333 U.S. 507 (1948).

14. *See, e.g.*, Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973).

15. *See, e.g.*, Neblett v. Carpenter, 305 U.S. 297 (1938); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

16. *See, e.g.*, Winters v. New York, 333 U.S. 507, 515 (1948); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

17. 333 U.S. at 517.

18. 258 F. 307 (7th Cir. 1919) (considering a complaint by the FTC against Sears in its mail order business, the court discussed the charge that the FTC Act was unconstitutionally vague).

19. 14 U.S.C. §45 (1970).

20. 258 F. at 314. The question of the vagueness of "unfair practices" proscribed in §5 of the FTC Act has not been before the Supreme Court; however, the Court has acknowledged that the terms are not capable of precise definition. FTC v. Raladam Co., 283 U.S. 643 (1931).

21. Washington v. Reader's Digest Ass'n, 81 Wash. 2d 259, 501 P.2d 290 (1972).

22. Carpets by the Carload v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973).

Unlike the due process vagueness question, which centers on individual rights, the doctrine of nondelegation of legislative power was historically a corollary to the separation of powers principle.[23] At the federal level nondelegation never existed except in theory,[24] and only twice in American history has congressional delegation of power to public agencies been held invalid.[25] On the other hand, state courts have consistently given more deference to the nondelegation doctrine, and the doctrine still survives in some form in most state courts.[26]

In 1908 the Florida supreme court rendered an exhaustive opinion on the issue of delegation of legislative power in *State v. Atlantic Coast Line R.R.*[27] Arising out of a suit to exact penalties for violation of a railroad commission rule, the case focused on the constitutionality of the broad powers conferred on the railroad commission by the legislature. Although the court recognized that the legislature may not delegate its powers, it circumvented the nondelegation doctrine by holding that the legislature may enact a law, which is complete in itself and is designed to accomplish a general public purpose, by authorizing designated officials within definite limitations to provide rules and regulations for the operation of the statute.[28] A valid delegation of power takes place when the legislature has the power to enact the statute, when the statute is complete, and when the limits of the delegated power are fixed in the statute.[29] Limiting parameters should include standards to guide the agency's action, a designation of the public purposes to be served, and the grounds on which the agency could initiate action.[30]

The distinction between a valid and an invalid delegation has not always been clearly discernible.[31] For example, in *Campoamor v. State Live Stock*

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23. *See generally* Green, *Separation of Governmental Powers*, 29 YALE L.J. 369 (1920); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935).

24. *See generally* K. DAVIS, ADMINISTRATIVE LAW 26-36 (3d ed. 1972).

25. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

26. K. DAVIS, *supra* note 24, at 36-41.

27. 56 Fla. 617, 47 So. 969 (1908).

28. *Id.* at 619, 47 So. at 971. This language has led one commentator to state that: "Stripped of its eloquence and reduced to a single statement, the opinion merely states that the legislature may not delegate legislative power, but may authorize administrative agencies to act legislatively. This distinction is a nebulous one, if indeed a distinction exists at all. It would appear that the prohibition against delegation is but a legal fiction arising from the separation doctrine, for the functions allowed the agency are the same as those permitted where such a fiction is not maintained." Fuguay, *Separation of Powers in Florida*, in PAPERS ON FLORIDA ADMINISTRATIVE LAW 51-52 (E. Bartley ed. 1952).

29. 56 Fla. at 624, 47 So. at 976.

30. *Id.*

31. The Florida supreme court has upheld a statute allowing a licensing board to issue certificates only to persons who were sober, law abiding, and of good character. State *ex rel.* Hubbard v. Holmes, 53 Fla. 226, 44 So. 179 (1907). In another case the Commissioner of Agriculture has been given authority to promulgate standards for the distribution of eggs that in his judgment would promote honest and fair dealing in the interests of the consumer. Mayo v. Bossenbury, 152 Fla. 16, 10 So. 2d 725 (1942). However, a statute that directed the Comptroller to consider the adequacy of existing facilities and

Sanitary Board,[32] the statute at issue permitted the board to "take such measures as in the judgment of [the] Board may be necessary and proper to control infectious cattle diseases."[33] The Florida supreme court held that this was a proper delegation of legislative authority.[34] In contrast, *Robbins v. Webb's Cut Rate Drug Store*[35] involved a statute that empowered the Barbers' Sanitary Commission to provide rules to prevent "unfair and unreasonable economic practices among barbers or barber shops."[36] Finding the statutory language to be an inadequate standard, the *Robbins* court concluded that the terms were so vague as to give the commission unbridled discretion.[37] Similarly, in *Connor v. Joe Hatton, Inc.*,[38] a constitutional question was raised over a provision in the Celery and Sweet Corn Marketing Act that allowed the commissioner of agriculture to develop regulations for the "removal of trade barriers" and "the prohibition of unfair trade practices."[39] The *Connor* court concluded that the phrases were so vague and lacking in definite meaning in law or common usage as to vest the commissioner with unlimited discretion to define the terms.[40]

The approach of the Florida supreme court to delegation of legislative power has been to focus generally on the adequacy of the standards; however, the court has usually failed to examine the legislative purpose in defining the particular delegation in broad or specific terms. The court has also given little consideration to the safeguards against arbitrariness.[41] Judicial decisions have focused only minimal attention on the agency rule or regulation that was promulgated under the authority of the legislative enactment. Once the adequacy of the standard is determined, the regulation is accordingly held valid or invalid.[42]

An exception to this approach is *State v. Griffin*.[43] Although the focus was still on the adequacy of the standard, the court did examine the public

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the need of the area to be served before issuing permits for new cemeteries was held invalid. Dickinson v. State, 227 So. 2d 36 (Fla. 1969). In 1944 a statute that required the business manager of labor organizations to obtain a license if a state board was of the opinion that the public interest so required was held to be too broad. Hill v. State *ex rel.* Watson, 155 Fla. 245, 19 So. 2d 857 (1944), *rev'd on other grounds*, 325 U.S. 538 (1945). Another case in 1962 declared invalid a statute that allowed a commission to impose restrictions on the transfer of licenses if this would serve the public interest. Delta Truck Brokers v. King, 142 So. 2d 273 (Fla. 1962).

32. 136 Fla. 451, 182 So. 277 (1938).
33. *Id.* at 453, 182 So. at 279.
34. *Id.*
35. 153 Fla. 822, 16 So. 2d 121 (1943).
36. *Id.* at 824, 16 So. 2d at 123.
37. *Id.*
38. 216 So. 2d 209 (Fla. 1968).
39. *Id.* at 210.
40. *Id.* at 213.
41. See note 31 *supra*. *But cf.* Lewis v. Florida State Bd. of Health, 143 So. 2d 867 (1st D.C.A. Fla. 1962).
42. See cases cited in notes 31, 32, 35, & 38 *supra*.
43. 239 So. 2d 577 (Fla. 1970).

purpose to be accomplished by the statute.[44] The court recognized that some problems require a more general approach to legislation and that judicial scrutiny ought to be accompanied by recognition and appreciation of the need for flexibility.[45] *Griffin* illustrates a new approach to the delegation doctrine that accommodates greater grants of administrative power. Five years later, the supreme court in the instant case again faced the delegation issue.

In the instant case the due process vagueness issue was analyzed with almost complete reliance on the Supreme Court of Washington's reasoning in *Washington v. Reader's Digest Association*,[46] a case that considered the same allegedly vague terminology.[47] Citing United States Supreme Court precedents,[48] the Washington court noted three propositions: vagueness and fair notice are relative concepts that depend on the subject matter of the statute; criminal statutes and statutes limiting first amendment freedoms require a greater degree of definiteness to satisfy due process requirements; and business regulatory statutes and those dealing with offenses difficult to define are to be treated sympathetically.[49] Both the Washington and the Florida statutes specified that the three decades of decisions by the Federal Trade Commission (FTC) and the federal courts interpreting the FTC Act should be used as interpretive guides to give meaning to the terms "unfair methods of competition and unfair or deceptive trade practices."[50] Considering the statute in light of these factors, the Florida supreme court determined that the language under attack was sufficiently definite to give an individual fair warning of the activity proscribed. Therefore, the statute was upheld since it was not so vague as to deny an individual due process.[51]

The instant court next considered the issue of whether the "little FTC act" constituted an improper attempt to delegate legislative power to the executive branch, focusing on the question of whether there were adequate standards to guide the rulemaking and enforcing authority. Initially, the court adopted the appellant's position that the word "shall" in section 501.205(2) should be construed as a mandatory requirement that the rulemaking authority be in compliance with federal trade law standards in effect on or before the effective date of the law.[52] Given this construction,

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44. *Id.* at 581.

45. *Id.*

46. 81 Wash. 2d 259, 501 P.2d 290 (1972).

47. WASH. REV. CODE §19.86.020 (1961). Both statutes were derived from the Model Unfair Trade Practices and Consumer Protection Act. *See* Brief for Appellant at 9-12, Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976).

48. Papachristou v. Jacksonville, 405 U.S. 156 (1972); Winters v. New York, 333 U.S. 507 (1948); Connally v. General Constr. Co., 269 U.S. 385 (1926). See text accompanying notes 9-15 *supra.*

49. 329 So. 2d at 264 (*quoting* 81 Wash. 2d at 268-71, 501 P.2d at 299-302). Florida's "little FTC act" is in essence a civil statute that carries no civil or monetary penalties until violation of a consent or cease and desist order.

50. WASH. REV. CODE §19.86.020 (1961); FLA. STAT. §501.204(2) (1975).

51. 329 So. 2d at 265.

52. *Id. See also* Brief for Appellant at 22-23, Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976).

the court concluded that adequate standards had been announced to provide specific guidance to the administrative agency.[53]

In reaching its conclusion, the court went beyond an adequacy of the standards approach. The court quoted at length from its earlier opinion in *State v. Atlantic Coast Line R.R.*,[54] selecting language that emphasized the need to look at the public purpose to be accomplished when determining the adequacy of those standards.[55] Emphasizing that on certain subjects the legislature could only codify a general policy,[56] the court reiterated its duty to sustain the legislative will when it is not clearly and plainly unconstitutional.[57]

In a concurring opinion Justice England reached the same results as the majority on the issues of vagueness and delegation of legislative power but emphasized different factors.[58] On the vagueness issue he pointed out that the legislature had previously attempted to prohibit specific market place activities, and the result had been unsuccessful.[59] Therefore, he viewed the "little FTC act" as a corrective law that the court should be reluctant to invalidate since the original approach to the problem was unsuccessful. Justice England also noted that the terms used in section 501.204(1) have a more definite meaning to those individuals in the marketplace, whose conduct the act seeks to govern, than to citizens and individuals in general. Significantly, he interpreted the majority opinion as not restricting the reach of the act solely to unfair and deceptive trade practices as defined by federal courts and the FTC on the date that the Florida law became effective.[60]

In analyzing the standards the supreme court applied to both the vagueness and delegation issues, a comparison with the trial court's opinion is helpful. On both issues the lower court[61] looked at the language of the statute standing alone and ignored the FTC and federal court decisions, which were not deemed to be controlling under the statute.[62] From the face of the statute, the trial judge concluded that a person could not state with certainty what would be a violation of the law; therefore, he held that the law was unconstitutionally vague.[63] Applying the same standard, he found that the statute was vague, indefinite, and lacked adequate guidelines to properly limit the rulemaking power of the DLA. Thus, in the lower court's

53. 329 So. 2d at 265.
54. 56 Fla. 617, 47 So. 969 (1908).
55. See text accompanying notes 30 & 44 *supra*.
56. State v. Griffin, 239 So. 2d 577 (Fla. 1970).
57. 329 So. 2d at 266.
58. *Id.* at 268. Justice England, as the consumer advisor to the Governor of Florida, received a federal grant to conduct a survey of consumer market problems in Florida in 1972. The results of his survey were submitted in CONSUMER AFFAIRS IN FLORIDA: A REPORT TO GOVERNOR REUBEN O'D. ASKEW (1973). As a result of the recommendations in this report, legislation was drafted that eventually became Florida's "little FTC act." *See* Brief for Appellant at 4-7, Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976).
59. 329 So. 2d at 268.
60. *Id.* at 269.
61. State v. Rogers, Case No. 74-1510 (2d Cir. Ct. Fla., May 23, 1975).
62. *Id.* at 6.
63. *Id.* at 7.

view, this was an invalid delegation of legislative power.[64] No distinction was drawn in regard to the type of statute involved or the purpose to be accomplished. Furthermore, although unarticulated in the lower court's opinion, the viewpoint of men of common intelligence was the vagueness standard utilized for both issues.[65]

Significantly, the instant court adopted a different approach and distinguished the standard to be used on the delegation and due process issues. Since the vagueness issue involves the due process rights of the individual, the type of statute and the penalties involved are factors directly considered.[66] Moreover, the perspective of the businessman in the marketplace rather than the average individual was used as the measuring standard.[67] As to the delegation issue, the subject matter of the statute and the viability of alternative approaches were weighed.[68] In addition, the adequacy of the legislative standard was determined in light of the purpose to be served by the statute.

Although the supreme court took a more liberal approach, federal courts and some state courts have moved even further in upholding statutes against constitutional attacks.[69] On the vagueness issue, these courts have been concerned with actions taken by the courts and the agency after enactment of the statute that serve to make uncertain terms more definite.[70] On the delegation issue, they have ceased to focus on the adequacy of the standard and look instead at the use of the power by the agency.[71] Thus, the courts have considered whether the agency utilized fair procedures in its decision making.[72]

In the instant case, the court did not include the more specific administrative rule as a factor in the notice requirement.[73] In fact, the opinion contains no analysis of the rule or whether the rule falls within the FTC's interpretation of an unfair trade practice.[74] Also, scant attention was given to the statutory procedures by which DLA rules are promulgated. This is significant

64. *Id.*

65. *Id.*

66. 329 So. 2d at 264.

67. Although the majority opinion does not state whether a standard of the average man or of the businessman of the marketplace is to be used when applying the vagueness test, the opinions emphasized that 30 years of federal court and FTC decisions gave more definiteness to the terminology. 329 So. 2d at 264-65. The opinion also quoted from Winters v. New York, 333 U.S. 507 (1948), which indicated that statutes with special terms were to be construed in light of those expected to use them. Justice England stated explicitly that the perspective of the businessman was the test of the vagueness issue. 329 So. 2d at 268.

68. 329 So. 2d at 266.

69. *See* K. DAVIS, *supra* note 24, at 40-43.

70. *Id.* at 43-52.

71. *Id.*

72. *Id.*

73. This point is not mentioned either in the Brief for the Appellant or in the Brief for the Appellee.

74. In a brief discussion upholding the rules, the court stated: "Finally, we determine that Administrative Rule 2-9.07, Florida Administrative Code, promulgated under the authority of Sections 501.204 and 501.205, Florida Statutes, is a valid and reasonable rule." 329 So. 2d at 267.

in that one purpose of the nondelegation doctrine is to prevent an arbitrary exercise of power by the agency.[75] The statute at issue actually provides an abundance of safeguards since rules promulgated must meet the requirements of the Florida Administrative Procedure Act[76] and must in addition be approved by the cabinet.[77]

Under section 501.205(1) over 60 specific types of unfair or deceptive trade practices have been identified by the DLA.[78] A person charged with violating one of these rules can no longer claim constitutional defenses based on vagueness and delegation of legislative power. However, a rule will always be subject to challenge for failure to follow the provisions of the Florida Administrative Procedure Act.[79]

Each rule adopted is also open to the argument that it is inconsistent with federal trade law as of October 1973 since the instant court approved the appellant's argument that each rule must comply with the federal standards utilized before the effective date of the statute.[80] Whether a particular rule meets this latter requirement is likely to be a source of much future litigation. Moreover, the latter requirement is complicated further by the apparent contradiction that exists between the majority's opinion and Justice England's interpretation of the majority's view.[81] Although the majority appeared to limit the agency's rulemaking power to the existing federal trade law precedent at the time of the enactment of the statute,[82] Justice England stated that the court's opinion permitted the agency to utilize future federal trade law as state policy dictated.[83] If the majority's restriction is accepted, the purposes

75. *See generally* K. DAVIS, *supra* note 24, at 26-43. *See, e.g.*, Delta Truck Brokers v. King, 142 So. 2d 273 (Fla. 1962); Lewis v. Florida State Bd. of Health, 143 So. 2d 867 (1st D.C.A. Fla. 1962).

76. FLA. STAT. §120 (1975) contains requirements such as notice and publication before adoption of a rule, mandatory public hearings on proposed rules, a standing committee of state legislators to supervise agency rulemaking, independent hearing examiners when an individual is charged with violating a rule, and provisions for declaratory rulings by agencies. *See generally* Note, *Rulemaking and Adjudication Under the Florida Administrative Procedure Act*, 27 U. FLA. L. REV. 755 (1975).

77. FLA. STAT. §501.205(1) (1975). This is a separate requirement in addition to the requirements of chapter 120.

78. *See, e.g.*, 1 FLA. ADMIN. CODE 2-20.02.

79. See note 76 *supra*.

80. 329 So. 2d at 265.

81. 329 So. 2d at 267, 269. For an analysis of the instant case that rationalizes this contradiction, see Tennyson, *Florida Little FTC Act: New Consumer Rights in the Marketplace*, 50 FLA. B.J. 375 (1976).

82. "Another aspect of the issue of delegation of legislative authority concerns the question of whether the legislature by the subject act intended to incorporate future (subsequent to the effective date of the statute) decisions of the Federal Trade Commission and federal court decisions. To preserve the constitutional validity of the act, we would have to say that the legislative enactment intended only decisions made prior to its enactment." 329 So. 2d at 267.

83. "I agree with the majority that it is not necessary to restrict the act, as appellant suggests, solely to unfair and deceptive trade practices as defined by the courts and the Federal Trade Commission on the date our law became effective." *Id.* at 269. Justice England's approach allows the rulemaking authority more flexibility and would prevent a potentially incongruous result if a post-1973 FTC decision invalidated a pre-1973 decision.