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Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus

Kenneth D. Dean*

I. INTRODUCTION

In Michael Crichton's fictional *The Andromeda Strain*,¹ a toxic strain of virus came to earth from a space probe, initially killing all those with whom it came in contact. As scientists sought to contain and eliminate the virus it mutated, eventually becoming harmless, and the world escaped disaster.² A different kind of virus, equally insidious, has infected the constitutional balance of power in Missouri.³ Unlike Crichton's virus, this one was created in a constitutionally sound manner and was benign.⁴ However, it soon began mutating into several major and minor versions that appear in almost 180 Missouri statutes.⁵ The latest versions may be the most lethal in their effect on agencies and may raise the stakes in constitutional brinkmanship.⁶

Similar viruses have appeared in the statutes in other states and at the national level, creating crises in the constitutional balance of power. With few exceptions,⁷ all have been cured by judicial eradication.⁸ The virus has a name and a mission: legislative veto of administrative rulemaking, and its mission is to control rules issuing, or issued from, executive agencies.⁹

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1. MICHAEL CRICHTON, *THE ANDROMEDA STRAIN* (1969).

2. *Id.*

3. See Appendix A (listing the various versions of powers given to the General Assembly's Joint Committee on Administrative Rules).

4. MO. REV. STAT. § 536.037 (1986). See also *infra* text accompanying notes 35-44.

5. See Appendix A for a listing.

6. See *infra* text accompanying notes 417-50; see also Appendix A, Versions IVB, IVC.

7. See *infra* text accompanying notes 185-219.

8. Four states allow legislative veto by constitutional amendment: Connecticut, Iowa, Michigan, and South Dakota. See Nancy Rhyme, *Legislative Review of Administrative Rules and Regulations*, NATIONAL CONFERENCE OF STATE LEGISLATORS 3 (1990).

9. The legislative veto has been the subject of numerous articles and publications. See, e.g., JOHN R. BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* (1977); MARCUS E. ETHRIDGE, *LEGISLATIVE PARTICIPATION IN IMPLEMENTATION: POLICY THROUGH POLITICS* (1985); James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Arthur E. Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95 (1982); Barbara L. Borden, *Legislative Review of Agency Rules in Arizona: A Constitutional Analysis*, 1985 ARIZ. ST. L.J. 493; Daan Braveman, Chadha: *The Supreme Court as Umpire in Separation of Powers Disputes*, 35 SYRACUSE L. REV. 735 (1984); Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984); Stanley Brubaker, *Slouching*

Toward Constitutional Duty: The Legislative Veto and Delegation of Authority, 1 CONST. COMM. 81 (1984); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Joseph Cooper & Ann Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Dennis DeConcini & Robert Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984); Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. REV. 423 (1978); Murray Dry, *The Congressional Veto and the Constitutional Separation of Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 195 (Joseph M. Bessette & Jeffrey Tulis eds., 1981); E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution and the Legislative Veto*, 1983 SUP. CT. REV. 125; John L. Fitzgerald, *Congressional Oversight or Congressional Foresight: Guidelines From the Founding Fathers*, 28 ADMIN. L. REV. 429 (1976); James A. Gazell & Darell L. Pugh, *Voiding the Legislative Veto: Possible Impacts for the Administrative State*, 7 GLENDALE L. REV. 1 (1985); Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HAST. L.J. 1 (1984); Richard I. Goldsmith, *INS v. Chadha and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749 (1984); Neil W. Hamilton & J. David Prince, *Legislative Oversight of Administrative Agencies in Minnesota*, 12 WM. MITCHELL L. REV. 223 (1986); John B. Henry II, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); David L. Howe, *Legislative Review of Administrative Rules*, in CURRENT TRENDS IN STATE LEGISLATION 1955-56, 165 (The Legislative Research Center, University of Michigan Law School ed., 1957); Matthew Hutchins, *Legislative Vetoes and the Administrative Process: A Constitutional and Operational Analysis*, 15 TEX. TECH. L. REV. 307 (1984); Frederick M. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 ADMIN. L. REV. 667 (1980); Frederick M. Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 ADMIN. L. REV. 239 (1985); Jessica Korn, *Institutional Reforms That Don't Matter: Chadha and the Legislative Veto in Jackson-Vanik*, 29 HARV. J. ON LEGIS. 455 (1992); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976); Elliott H. Levitas & Stanley M. Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801 (1984); David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Arthur S. Miller & George M. Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Nathaniel L. Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U. L. REV. 1064 (1981); Frank C. Newman & Harry J. Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953-54); James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 KAN. L. REV. 277 (1975); Peter W. Rodino Jr., *Congressional Review of Executive Action*, 5 SETON HALL L. REV. 489 (1974); Antonin Scalia, *The Legislative Veto: A False Remedy For System Overload*, REGULATION, Nov./Dec. 1979, at 19; Bernard Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U. L. REV. 1031 (1955); Bernard Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); Rodney A. Smolla, *Bring Back the Legislative Veto: A Proposal for a Constitutional Amendment*, 37 ARK. L. REV. 509 (1984); Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Girardeau A. Spann, *Spinning the Legislative Veto*, 72 GEO. L.J. 813 (1984); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789; Laurence H. Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984); Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of the Legislative Veto After*

The last sixty years have witnessed an enormous growth at the federal and state levels in both the number and size of administrative bureaucracies.¹⁰ Agencies have been created to implement and administer legislation passed by the Congress or state legislatures.¹¹ These agencies have been called upon not only to enforce the laws passed by the legislatures, but also to promulgate rules and regulations to "flesh out" the laws adopted by general or specific mandates of rulemaking.¹² The grant of rulemaking authority has been given to executive agencies because legislatures have often found themselves unable, or unwilling,¹³ to fine-tune laws addressing today's increasingly complex society.¹⁴ The fine-tuning has been left to administrative agencies, particularly where scientific, economic, or other expertise is needed to determine how the law should be implemented.¹⁵

The United States Congress, and most state legislatures recognized the need for administrative rulemaking and mandated procedures to ensure due process in rulemaking and judicial review of the product.¹⁶ At the federal level, the Administrative Procedure Act was adopted in 1946 and has been amended several times since.¹⁷ Most state legislatures have adopted their own acts or some version of the Model State Administrative Procedure Act.¹⁸

Chadha, 132 U. PA. L. REV. 1217 (1984); John M. Conley, Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285; Jonathan B. Fellows, Note, *Congressional Oversight Through Legislative Veto After INS v. Chadha*, 69 CORNELL L. REV. 1244 (1984); Robert J. Ivanhoe, Comment, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U. L. REV. 1018 (1977); William F. Leahy, Note, *The Fate of the Legislative Veto After Chadha*, 53 GEO. WASH. L. REV. 168 (1984-85); Emily S. McMahon, Note, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE L.J. 1493 (1985); Geoffrey S. Stewart, Note, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593 (1976); H. Lee Watson, Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); Christian Volz, Recent Developments, *The Legislative Veto in the Arms Export Control Act of 1976*, 9 LAW & POL'Y INT'L BUS. 1029 (1977).

10. See, e.g., KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE 17-52 (2d ed. 1978); see also Schwartz, *The Legislative Veto and the Constitution: A Re-examination*, *supra* note 9, at 353.

11. DAVIS, *supra* note 10, at 152-60.

12. *Id.*

13. See, e.g., RICHARD J. PIERCE JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 44-47 (1985).

14. *Id.* See also DAVIS, *supra* note 10, at 152-60.

15. PIERCE ET AL., *supra* note 13, at 44-47.

16. Rulemaking is governed by the Administrative Procedure Act set out in 5 U.S.C. §§ 551-559 (1988). In Missouri, the procedures are set out in MO. REV. STAT. §§ 536.010-.215 (1986). For the history of rulemaking in Missouri, see ALFRED S. NEELY IV & DANIEL W. SHINN, ADMINISTRATIVE PRACTICE AND PROCEDURE, MISSOURI PRACTICE, Vol. 20, §§ 1.02-.03 (1986).

17. See Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1988).

18. There are three versions of the Act, promulgated in 1946, 1961 and 1981. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 32-33 (3d ed. 1991). The 1961 version has no provisions dealing with legislative veto, while the 1981 model has provisions that have been the subject of

While these state acts addressed the procedural devices for rulemaking, until recently, they typically had no mechanism for legislative control of the rules and regulations that flow from administrative agencies. Today forty-one states exercise some form of legislative oversight of administrative rulemaking, either as part of the acts on rulemaking procedure, as separate legislation, or as part of specific agency enabling legislation.¹⁹

As bureaucracy grew, legislatures became increasingly concerned with establishing mechanisms to oversee administrative rulemaking.²⁰ When *INS v. Chadha*²¹ was decided in 1983, it was estimated that there were almost 200 federal statutes which contained legislative-veto provisions.²² Similarly, many states had attempted some form of experimentation with legislative review or veto of administrative rules.²³ The desire to exercise legislative oversight or control of administrative rulemaking was a common theme that developed in the 60's and 70's.²⁴

Lawmaking is essentially a political function. Administrators and agency heads are usually appointed and not elected. Therefore, as rules and regulations spewed from the agencies, there was increasing demand for politically accountable decisionmaking.²⁵ Most agencies, once created, have a "life of their own."²⁶ As agency-promulgated rules had an adverse effect, actual or perceived, on individuals, businesses, and interest groups, these constituencies complained to their elected representatives, and the move for increased political monitoring by the legislatures began.²⁷

Missouri did not escape the national trend. Efforts begun by the Missouri General Assembly in 1975²⁸ culminated in 1992 with a challenge by the

intense analysis and debate. See ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULEMAKING* § 8.3 (1986 & Supp. 1990); Carl Auerbach, *Bonfield on State Administrative Rulemaking: A Critique*, 71 MINN. L. REV. 543 (1987).

19. See Rhyme, *supra* note 8, at 3; see also L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982).

20. See, e.g., DAVIS, *supra* note 10, at 75-82; Jody K. Falk, *State Regulatory Development and Reform: An Overview*, 1985 ARIZ. ST. L.J. 261, 283-96; *Restoring the Balance: Legislative Review of Administrative Regulations*, NATIONAL CONFERENCE OF STATE LEGISLATURES (1978) [hereinafter *Restoring the Balance*].

21. 462 U.S. 919 (1983).

22. *Id.* at 968 (White, J., dissenting).

23. See FRANK E. COOPER, 1 *STATE ADMINISTRATIVE LAW* 221-30 (1965); see also Levinson, *supra* note 19, at 113-15.

24. *Id.* See also Levinson, *supra* note 19; *Restoring the Balance*, *supra* note 20. The first legislative veto provision at the national level appeared in 1932. *Chadha*, 462 U.S. at 969 (White, J., dissenting). The first state veto appeared in 1939 in Kansas. L. Harold Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 *PUBLIUS* 115 (1987).

25. Falk, *supra* note 20, at 263.

26. *Id.*

27. *Id.* at 292.

28. The "Committee on Administrative Rules" was created by Senate Bill 58, 78th General Assembly, 1st Regular Sess., in 1975 and codified as MO. REV. STAT. § 536.037 (1986)

Department of Natural Resources (DNR) to the powers of the Joint Committee on Administrative Rules (JCAR) to suspend or reject proposed agency rules.²⁹ While the particular case from which the dispute arose is still pending,³⁰ the storm of controversy that it created foreshadows likely challenges and provides the impetus for this Article.

The purpose of this Article is to examine the constitutionality of the legislative veto as it exists in Missouri, specifically the powers of the JCAR.³¹ Part II of the Article traces the history of the JCAR and the various types of powers given to it.³² Part III of the Article examines the experiences of the United States government and other states to determine their applicability to Missouri.³³ Part IV examines the various grants of power to determine whether they comply with the Missouri constitution.³⁴

II. HISTORY OF THE LEGISLATIVE VETO IN MISSOURI

In 1975, the Missouri General Assembly, in Senate Bill 58, created the "Committee on Administrative Rules" (JCAR) which became effective January 1, 1976.³⁵ The Committee is composed of five members of the Senate appointed by the President pro tem and five members of the House of Representatives appointed by the Speaker. Each member serves as a committee member during his/her term of office in the general assembly.³⁶ No major party shall be represented by more than three appointed members from either house.³⁷

The original purpose of the JCAR was to "review all rules promulgated by any agency after January 1, 1976."³⁸ The statute also provides that the

(effective January 1, 1976). While the proper name is the "Committee on Administrative Rules," legislation passed afterwards sometimes refers to the committee as the "Committee on Administrative Rules" and sometimes as the "Joint Committee on Administrative Rules." Since it is a joint committee of the House and Senate and is commonly referred to by that title, it will hereinafter be referred to as the JCAR.

29. *City of Jefferson Mo. v. Department of Natural Resources*, No. CV191-934CC (19th Judicial Circuit, Cole County, Mo., filed July 30, 1991). See also *infra* text accompanying notes 222-36.

30. As of September 1, 1992, no final action had been taken.

31. This Article will focus on the JCAR because virtually all of the provisions relating to administrative rule review and veto are lodged with it. There are however a few legislative veto provisions that allow the General Assembly to act either by a one-house veto procedure (e.g., MO. REV. STAT. § 260.400.5(4) (1986)), or by concurrent resolution, or by bill, (e.g., MO. REV. STAT. § 265.515 (1986)). The bill process appears constitutional. The analysis in the text that follows is generally applicable to the other two provisions: one-house veto and concurrent resolution.

32. See Appendix A for the various versions and variations of JCAR powers.

33. See *infra* text accompanying notes 76-219.

34. See *infra* text accompanying notes 220-450.

35. See MO. REV. STAT. § 536.037 (1986).

36. *Id.* § 536.037(1).

37. *Id.*

38. *Id.* § 536.037(3).

JCAR "may review any or all other rules of any agency,"³⁹ and further "may take such action as it deems necessary which may include holding hearings."⁴⁰ Additionally, "if the Committee finds that any rule whether promulgated before or after January 1, 1976 should be amended or rescinded in whole or in part, it shall report such findings and recommendations to the General Assembly. . . ."⁴¹ This language seems constitutionally sound.⁴² The JCAR was only charged with reviewing rules and making recommendations to the General Assembly as a whole.⁴³ It had no power to veto, suspend, or exercise prior approval over a rule. Rather it was designed to serve as a watchdog for the legislature over administrative rulemaking. The general assembly could decide whether to implement any recommendations of the JCAR through legislation. It is difficult to see how this creation of the legislature conflicts with the Missouri Constitution.⁴⁴

The original grant of power to the JCAR has remained unchanged. What has changed dramatically, however, is the power annexed to specific enabling legislation which gives the JCAR power to suspend, veto, or exercise prior approval of rules.⁴⁵

The annexation of new powers to the JCAR began with language that allowed the JCAR to suspend a rule after hearing if it was beyond the statutory authority of the agency or inconsistent with legislative intent.⁴⁶ Rule reinstatement was allowed if the General Assembly acted affirmatively by concurrent resolution.⁴⁷ This language appears in a substantial number of statutes and represents a change from earlier attempts by the legislature to

39. *Id.*

40. *Id.*

41. *Id.* § 536.037(4).

42. Most commentators and scholars examining the legislative veto provisions have concluded that the "review and recommend" authority of a legislative committee creates no significant constitutional problems. *See, e.g.,* BONFIELD, *supra* note 18, § 8.3.1(b)-(f); *see also* Levinson, *supra* note 19, at 98-99.

43. MO. REV. STAT. § 536.037(4).

44. The Missouri Constitution clearly envisions the creation of committees by the legislature to assist in lawmaking. Article III, § 22 provides in part that: "Each house of the general assembly may provide by rule for such committees of that house as it deems necessary to meet, to consider bills, or to perform any other necessary legislative function during the interim between the session" MO. CONST. art. III, § 22. *See also* State *ex rel.* Jones v. Atterbury, 300 S.W.2d 806, 814-19 (Mo. 1957) (en banc).

45. *See* Appendix A (listing all grants of power to the JCAR).

46. *See, e.g.,* MO. REV. STAT. § 36.070(4) (1986) (noted in Appendix A, Version IIB), which states:

Any such rule or portion of a rule may be suspended by the joint committee on administrative rules if *after hearing thereon* the committee finds that such rule or portion of the rule is *beyond or contrary to the statutory authority of the agency* which promulgated the rule, or is *inconsistent with the legislative intent* of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor.

(emphasis added).

47. *Id.*

provide greater oversight powers to the JCAR.⁴⁸ In a few bills passed in 1979 and 1980, the legislature briefly toyed with the approach of giving the JCAR power to file a complaint before the Administrative Hearing Commission (AHC) to contest the validity of any rule.⁴⁹ Two versions of the early statutory language were used which differ only in small details.⁵⁰ The first version required the AHC to immediately suspend that portion of the challenged rule until the AHC determined, after a hearing held within 10 days, what action to take on the disputed portion of the rule.⁵¹ The second version allowed immediate suspension of the rule by the AHC unless the agency promulgating the rule "within three working days after the receipt of the complaint, files an affidavit with the Commission stating that the suspension of the rule would terminate entitlement to federal funds being received by the state or any political subdivision thereof at the time the rule was published."⁵² This approach was apparently found unsatisfactory and has not been followed since. Indeed, although the statutes still remain on the books, it appears they are unconstitutional after the decision in *State Tax Commission v. Administrative Hearing Commission*.⁵³

A. Versions of JCAR Powers

Missouri is usually listed in the various studies of legislative veto provisions as a state with a rules committee having only advisory authority. This is an inaccurate assessment.⁵⁴ In fact, it is difficult to accurately characterize Missouri's legislative veto provisions because of the various mutations that have been created during the past sixteen years.

There are four principal versions (and several variations) of legislative veto power granted to the JCAR.⁵⁵ The first has already been noted above.⁵⁶ The second version involves the suspension power and has two variations. One variation allows suspension of a rule without hearing.⁵⁷ The other requires a hearing and typically requires the Committee to find the action of the agency beyond the grant of legislative power or inconsistent with legislative intent.⁵⁸ The second version appeared in 1979 and 1980. It is important to note that here the word "suspend" in essence, means "repeal,"

48. See Appendix A, Version IIB for a list.

49. See Appendix A, Versions IA, IB.

50. Appendix A, Versions IA, IB.

51. See MO. REV. STAT. § 344.070 (1986) quoted in Appendix A, Version IA.

52. MO. REV. STAT. § 344.070.

53. 641 S.W.2d 69 (Mo. 1982) (en banc). That case found § 536.050.2 unconstitutional because it gave the AHC declaratory judgment power over administrative rules. *Id.* at 76. The court declared that such a grant of judicial power could not be given by the legislature to the executive. *Id.* at 75. See also *infra* text accompanying notes 308-11.

54. See, e.g., Levinson, *supra* note 19, at 98 n.70.

55. See Appendix A.

56. See *supra* text accompanying notes 49-53.

57. See Appendix A, Version IIA.

58. See Appendix A, Version IIB.

"abolish," or "nullify" indefinitely. There are no time-limit provisions. The word "suspend" as used in most other states usually means a temporary suspension.⁵⁹ This version does indicate that the rule can be reinstated by concurrent resolution,⁶⁰ but requires affirmative action to negate an action already taken by the JCAR, rather than affirmative action to implement a recommendation. No instances were found where a "suspended" rule was reinstated by the general assembly.⁶¹

The third version simply requires agencies to submit their rules to the JCAR for prior approval before the rules can be published and made effective.⁶² The language of prior approval, with no other conditions, appears in only a few statutes, all of which were passed or amended in 1983 or 1984.⁶³ Perhaps because such language would make the JCAR a bottleneck in the rulemaking process, it was only used for a brief time.

The JCAR met on October 31, 1983, to propose new language to be added to all bills granting rulemaking authority.⁶⁴ That language created the fourth version of the "virus." This version has three important variations, IVA, IVB, and IVC. Their common feature is a deadline (usually thirty days) for the JCAR to act after notice of proposed rulemaking is published, or the rules become effective.⁶⁵ The more recent variations require not only concurrent submission of the proposed rule to the JCAR, but also require that any final order of rulemaking be submitted to the JCAR not less than twenty days prior to filing with the secretary of state.⁶⁶ In addition, the power to suspend (i.e., nullify) any rule at any time, whether or not originally approved by the JCAR, remains with the JCAR.⁶⁷

59. See Levinson, *supra* note 19, at 99-102; see also Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1241 (1986).

60. See Appendix A, Version IIB.

61. Interview with Mary Estes, Director of the JCAR, in Jefferson City, Mo. (Sept. 2, 1992). Suspension of rules already promulgated and effective has apparently been quite rare. *Id.*

62. See Appendix A, Version IIIA.

63. See Appendix A, Version III. The JCAR asserts incorrectly that the "prior approval language" first appeared in the lottery bill, S. 44, 83d General Assembly, 2d Sess. (1984). JOINT COMMITTEE ON ADMINISTRATIVE RULES, REPORT ON THE CHANGING SCOPE AND INCREASING WORKLOAD OF THE JOINT COMMITTEE ON ADMINISTRATIVE RULES, at 4 (1986) [hereinafter JCAR REPORT]. In fact this language had been used earlier. The lottery bill, apparently by design, did not include the non-severability clause. Members of the legislature were worried that if the court declared the JCAR powers unconstitutional, that clause might lead to destruction of lottery rules. The statute was subsequently amended in 1988 (after the court upheld a challenge to the lottery) to include the language of version IVC. See *Tichenor v. Missouri State Lottery Comm'n*, 742 S.W.2d 170 (Mo. 1988) (en banc); *infra* notes 230-36 and accompanying text.

64. JCAR REPORT, *supra* note 63, app. 2 at 5.

65. See, e.g., MO. REV. STAT. § 135.285 (1986) ("If the [JCAR] neither approves nor disapproves a rule within thirty days after the notice of proposed rulemaking has been published in the Missouri Register, the rule shall stand approved."); see also Appendix A, Version IVB (listing other statutes).

66. See Appendix A, version IVC.

67. Appendix A, version IVC.

The primary differences among the three variations are that the first does not contain a non-severability clause and, while the other two do, one goes further. Version IVB contains a non-severability clause which typically provides that the "[p]rovisions [of this section, act] are non-severable and the grant of rule-making authority is essentially dependent upon the review power vested with the [JCAR]. If the review power is held unconstitutional or invalid the grant of rule-making authority shall also be invalid or void."⁶⁸ Version IVC is a variation on the above theme, providing in addition that if the review power is held unconstitutional, the grant of rulemaking *and any rules promulgated under it* shall also be void or invalid.⁶⁹

Due to limited staff size, annual reports have not been prepared that summarize the actions taken by the JCAR.⁷⁰ It is therefore impossible without searching years of JCAR files to determine the exact number of rules that have been suspended or that have been denied prior approval. It is clear, however, from the 1986 JCAR Report, and from this author's review of recent JCAR transcripts, that the JCAR has acted to suspend rules, or modify rules, or prevent rules from being adopted.⁷¹ Indeed, the lottery bill passed by the Eighty-third General Assembly resulted in numerous hearings before the JCAR, many rule revisions and rejections, and a great deal of extra work for the JCAR.⁷² The issue, therefore, is not an academic exercise concerning the

68. See Appendix A, Version IVB.

69. Appendix A, Version IVC.

70. The JCAR has only one full-time staff person who has worked for the JCAR since its creation. She currently serves as director. A part-time clerical staff person was added a few years ago. Part-time legal assistance is provided by a person assigned from the Senate Research Staff. Interview, *supra* note 61. See JCAR REPORT, *supra* note 63, app. 1 at 1. This is the only report that has been prepared, although another report detailing activities since 1986, is also being prepared.

71. JCAR REPORT, *supra* note 63, app. 2 at 1-13 & app. 3 at 1-6. See also Memorandum from Mary Estes, Director of JCAR (May 14, 1992) (on file with author) (detailing specific committee action regarding DNR rules from 1989-1992). The committee on several occasions has suggested language changes in rules.

See also the minute book maintained in the office of the JCAR. It shows, for example, that at its meeting in January 1992, the JCAR voted to disapprove paragraph 3 of 4CSR150-7.140 and further to "recommend" (to the agency) the following changes in rule 4CSR150-7.160:

1. Delete the word "office" in the second line of subsection (1).
2. Delete "within twenty-four (24) hours" in the last line of subsection (1).
3. Delete the first two sentences of subsection (2). "The supervision provided to the physician assistant working with the same office facility of the supervising physician must be on-site and direct. Direct supervision means that the supervising physician is on the same premises and readily available for consultation."
4. Delete subsection (3).
5. Delete the word "direct" on the third line of subsection (4).
6. Delete the last sentence of subsection (4), "Direct consultation shall consist of contemporaneous, on-site supervision."
7. Delete subsection (5).

72. See JCAR REPORT, *supra* note 63, at 4-5. The report also blithely asserts that some lottery rules "had to be redrafted." *Id.* at 5.

validity or invalidity of an *unexercised* grant of power. In a short time, JCAR power over agency rulemaking has evolved from the constitutionally safe "review and recommend" authority, to suspension with standards, to suspension for any reason, to prior approval, to prior approval coupled with a "draconian"⁷³ non-severability clause in two lethal varieties. The JCAR has exercised its powers, but even if it had not, the vice lies in the existence of those powers not in their exercise.

B. *Questions Surrounding JCAR Powers*

The key question concerning the powers granted to the JCAR is simply whether the grants of power are constitutional. Several related questions follow. Is there a difference, constitutionally, between the power to suspend (i.e. nullify or revoke) an existing rule and the power to prevent a rule from being adopted (i.e. prior approval)? Does the exercise of powers violate the doctrine of separation of powers? May the legislature delegate rule-revocation authority to a committee? Are the constitutional requirements of bicameralism and presentment violated? If it is determined that the grant of review power is unconstitutional, what is the effect of the non-severability clause on the grant of rulemaking authority? If the non-severability clause is upheld and the agency rulemaking authority declared void, what of existing rules and regulations? Which Missouri cases and constitutional provisions provide guidance?

Before attempting to answer the first question posed above, it is instructive to examine the experiences at the national level and in those few states that have cases addressing the legislative veto. There is some danger in trying to draw upon the experiences of other states because the specific statutes and the constitutions are likely to vary somewhat from Missouri's. However, there is a common theme—separation of powers—that runs throughout legislative veto jurisprudence.⁷⁴ Several state constitutions *explicitly* and the United States Constitution *implicitly* recognize the concept of separation of powers. This theme found its way into virtually every state constitution adopted after the American Revolution.⁷⁵ Therefore, the experiences of other states have some applicability for Missouri.

III. THE EXPERIENCE OF OTHER JURISDICTIONS

Factors to be considered in determining the constitutionality of legislative veto powers granted to the JCAR include the relevant provisions of the Missouri Constitution, the similarity of those provisions to provisions in the

73. This word was used to describe a similar clause in Kentucky. See Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. 169, 223 (1984).

74. See *infra* text accompanying notes 75-219.

75. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 136-61, 446-53 (1969), for an excellent discussion of early state constitutions and separation of powers.

United States Constitution and in the constitutions of other states, and the manner in which those constitutional provisions have been interpreted. While the actions taken by the United States Supreme Court and other state supreme courts are not controlling, they do provide some guidance for Missouri.

A. *United States Supreme Court*

In 1983, the United States Supreme Court in *INS v. Chadha*⁷⁶ declared the legislative veto provision of section 244 of the Immigration and Nationality Act⁷⁷ unconstitutional.⁷⁸ Chief Justice Burger, writing for the majority, said the one-house legislative veto provisions of the statute⁷⁹ failed to satisfy the requirements of bicameral actions and presentment to the President required by Article 1, Section 7 of the United States Constitution.⁸⁰

The Supreme Court declared that "convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ."⁸¹ and gave short shrift to any policy arguments for a legislative veto.⁸² The Court focused on the Article 1, Section 7 requirements of presentment and bicameralism,⁸³ but recognized that not everything done by one or both

76. 462 U.S. 919 (1983).

77. 8 U.S.C. § 1254(c)(2) (1988).

78. *Chadha*, 462 U.S. at 959.

79. That provision of the statute reads as follows:

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

8 U.S.C. § 1254(c)(2) (1988) (emphasis added).

80. *Chadha*, 462 U.S. at 946-51, 957. Similar provisions are found in the Missouri Constitution. See MO. CONST. art. III, §§ 21-35.

81. *Chadha*, 462 U.S. at 944.

82. *Id.* at 945 ("But policy arguments supporting even a useful 'political invention' are subject to the demands of the Constitution.").

83. *Id.* at 946-58. U.S. CONST. art. I, § 7 reads:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)

houses of Congress was subject to the requirements of bicameralism and presentment.⁸⁴ The Court declared that it was not the form of the legislative action that was determinative, but whether the action contains "matter which is properly to be regarded as legislative in its character and effect."⁸⁵ The Court concluded that the legislative veto was "legislative" in its character and effect because it altered "the legal rights, duties and relations of persons . . . outside the legislative branch."⁸⁶

The Missouri Constitution contains language similar to that in the United States Constitution.⁸⁷ Article III, Section 21 declares that no law shall be passed except by bill.⁸⁸ To become a law, a bill requires a series of formal steps which culminate in a majority vote in both houses and endorsement (i.e. approval) by the governor.⁸⁹ Therefore, if the action of the JCAR in suspending a rule or failing to approve a rule can be characterized as "legislative," requiring that its actions follow the form of a bill, then the Constitution would be violated and the reasoning of *Chadha* would be particularly appropriate.⁹⁰

Another United States Supreme Court case, *Bowsher v. Synar*⁹¹ also provides some guidance to Missouri. The Court declared that "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."⁹² In *Bowsher*, the Comptroller General was charged with enforcing the Balanced Budget and Emergency Control Act, but Congress retained the power by joint resolution to remove him from office.⁹³ While none of the legislative veto

shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitation prescribed in the Case of a Bill.

84. *Chadha*, 462 U.S. at 952.

85. *Id.*

86. *Id.* The decision has been criticized, particularly for the definition in it of "legislative act." See generally Peter Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 794-801.

87. MO. CONST. art. III, §§ 21-35 (setting out requirements for lawmaking under the heading "Legislative Proceedings").

88. *Id.* § 21.

89. *Id.* § 31.

90. The United States Supreme Court declared:

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

Chadha, 462 U.S. at 953 n.16.

91. 478 U.S. 714 (1986).

92. *Id.* at 722.

93. *Id.* at 727-28.

provisions in Missouri provide for the removal of executive officers as in *Bowsher*, language from the opinion about separation of powers and the role of Congress in the execution of laws is instructive. For example, the Court declared, "The separated powers of our government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The framers recognized that, in the long term, *structural protections against abuse of power were critical to preserving liberty*."⁹⁴ The structural protections are the checks and balances made possible by separation of powers. The Court went on to declare, "However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation *its participation ends*."⁹⁵ Indeed, interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law.⁹⁶ The Court concluded that Congress' attempt to retain control of execution of the law crossed a constitutionally mandated line separating the powers of the executive and Congress.⁹⁷

Chadha's assertion that legislative acts require compliance with the bicameralism and presentment requirements of the Constitution, coupled with *Bowsher's* separation of powers analysis (that Congress cannot achieve through indirect means what it is restricted from doing directly, and that implementation of legislation is an executive function) strongly suggest that Missouri's legislative veto system is constitutionally infirm.

B. States That Have Rejected the Legislative Veto

In addition to the United States Supreme Court, the courts in ten states and the District of Columbia have considered the procedures for legislative review of agency rulemaking and found them constitutionally impermissible.⁹⁸ These courts too have generally taken the view that the legislative veto is unconstitutional based upon separation of powers, bicameralism and presentment, or unconstitutional delegation of powers.

94. *Id.* at 730 (emphasis added).

95. *Id.* at 733 (emphasis added).

96. *Id.*

97. *Id.* at 734.

98. See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *Maloney v. Pac.*, 439 A.2d 349 (Conn. 1981); *Gary v. United States*, 499 A.2d 815 (D.C. 1985), *cert. denied*, 475 U.S. 1086, *and* 477 U.S. 906 (1986); *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622 (Kan. 1984); *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984); *Montana Taxpayers' Ass'n v. Department of Revenue*, No. 47126 (Mont. Lewis & Clark Co. Mar. 18, 1982); *Opinion of the Justices*, 431 A.2d 783 (N.H. 1981); *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *Commonwealth v. Sessoms*, 532 A.2d 775 (Pa. 1987); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

1. Alaska

In Alaska, the statute in question permitted the legislature to invalidate an agency rule by the mechanism of a concurrent resolution.⁹⁹ Apparently the Alaska Supreme Court viewed the repeal of rules as a "legislative" act requiring bill enactment procedures set forth in the Alaska Constitution to be followed.¹⁰⁰

It was argued that since the original bill creating the two-house, rule-nullification procedure was properly passed and presented to the governor for veto, the constitutional requirements were met.¹⁰¹ The court rejected this approach which would have avoided the presentment problem and presumably the separation of powers issue,¹⁰² when it declared:

Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto. It would also do away with the formal safeguards of article II which are meant to accompany lawmaking. The requirements of the constitution may not be eliminated in this fashion.¹⁰³

The court also declared that the legislature can delegate to an agency the power to make "laws" (by rulemaking) conditionally, but the "condition must be lawful" and the legislature cannot give itself power "to function in a manner prohibited by the constitution."¹⁰⁴

99. ALASKA STAT. § 44.62.320(a) (1991). The statute states in pertinent part that "[t]he legislature, by concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department." *Id.* (declared unconstitutional, and replaced by ALASKA STAT. § 24.20.445 (1991)).

100. *A.L.I.V.E. Voluntary*, 606 P.2d at 772-73, 779. ALASKA CONST. art. II, §§ 13-14 set forth the standard requirements for bill passage and presentment to the governor. Since the statute was declared unconstitutional, new provisions set out in Alaska Stat. § 24.20.445 have resulted in a six member interim committee (three from each house). The committee has "review and recommend" authority only. *Id.* § 24.20.460. However, the committee may suspend the effective operation of a regulation adopted or amended during the period in which the legislature is in recess. *Id.* This suspension lasts only until 30 days after the legislature reconvenes. Such suspension requires a two-thirds vote of the committee members and the suspension cannot be permanent. *Id.* Permanent suspension requires passage of a bill. *Id.*

101. *A.L.I.V.E. Voluntary*, 606 P.2d at 779.

102. *Id.* Alaska does not have a specific separation of powers clause in its constitution but the doctrine has been implied. See *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975).

103. *A.L.I.V.E. Voluntary*, 606 P.2d at 779 (citing *Watson*, *supra* note 9, at 1067).

104. *Id.* at 777.

2. West Virginia¹⁰⁵

In West Virginia, agency rules did not become effective until they were presented to the Legislative Rulemaking Review Committee (LRRC), a body composed of twelve legislators.¹⁰⁶ The committee had a time limit in which to act and the legislature was authorized to sustain or reverse the committee's actions but was not required to do so.¹⁰⁷ The West Virginia Supreme Court declared that when the legislature uses its power to void or amend administrative rules, it is constitutionally required to act collectively and cannot "invest itself with the power to act as an administrative agency in order to avoid [the constitutional requirements for bill passage]".¹⁰⁸ The court recognized that legislative review of rulemaking had "purpose and merit" and may be "beneficially exercised and employed when contained within its proper and constitutional sphere . . . [b]ut [the Court] must require that it be done within the limits of the *separation of powers doctrine* and according to the system of checks and balances in our governmental framework."¹⁰⁹

The court noted that the LRRC abrogated the veto power of the Governor.¹¹⁰ In addition, the court argued that nullification by a committee fosters legislative dominance.¹¹¹ First, the committee "usurps the traditional role of the executive" to implement legislation by rulemaking and decreases executive discretion.¹¹² Second, the legislature can delegate broader powers to the executive because it can control the exercise of discretion, increasing its power in the balance of power relationship.¹¹³ Third, where discretionary power is wielded by a small group (i.e. the LRRC), "the danger of self-interest is also maximized."¹¹⁴ The West Virginia experience is particularly relevant

105. For a discussion of the constitutional issues which presaged the decision cited in the following case, see Alfred S. Neely IV, *Rights and Responsibilities in Administrative Rule Making in West Virginia*, 79 W. VA. L. REV. 513, 559-63 (1977). Neely noted that in 1976 only West Virginia and Connecticut allowed "binding committee approval or disapproval of proposed rules." *Id.* at 560. It is interesting to note that both states now have different procedures; West Virginia as a result of a court decision (*see infra* note 106) and Connecticut because of a change in the constitution (*see infra* note 178).

106. *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 631-32 (W. Va. 1981).

107. *Id.* at 627.

108. *Id.* at 633.

109. *Id.* at 634-35 (emphasis added). The West Virginia Constitution (like Missouri's) provides in art. 5, § 1:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

Id. at 630 (quoting W. VA. CONST. art. V, § 1). The court's decision was specifically made on the basis of violation of the separation of powers doctrine embodied in art. V, § 1. *Id.* at 636.

110. *Id.* at 632.

111. *Id.* at 635-36 (The court drew the arguments from Watson, *supra* note 9).

112. *Id.* at 636.

113. *Id.*

114. *Id.* (quoting Watson, *supra* note 9, at 1056).

to Missouri because of the similarity of the constitutional provisions and of the functions of the LRRC and the JCAR.¹¹⁵

3. New Hampshire

A plan was proposed in New Hampshire whereby proposed rules would be submitted to a standing committee in each house of the legislature.¹¹⁶ If the rules were not acted on within thirty days, they would be deemed approved.¹¹⁷ The Supreme Court of New Hampshire, in an advisory opinion, declared that the proposed legislation was unconstitutional because it delegated legislative authority to a smaller body within the legislature.¹¹⁸ According to the court, "although the legislature may delegate a portion of the legislative authority to an administrative agency . . . it may not delegate its lawmaking authority to a smaller *legislative* body"¹¹⁹ In dicta, the court acknowledged that a legislative veto per se might not be unconstitutional, asserting that the legislature might condition the exercise of its delegation of lawmaking authority to administrative agencies upon some form of legislative approval.¹²⁰ There was some recognition that because executive authority to promulgate rules comes from the delegation of power from the legislature, the legislature might act to restrain the executive.¹²¹ The court stated that a committee might be permitted to (temporarily) suspend a rule when the legislature was not in session to allow the legislature time to act on the proposed rule by bill.¹²²

The opinion is instructive to Missouri for its analysis of improper delegation. The New Hampshire proposal would have given authority to a committee of the legislature to approve rules.¹²³ The court said such authority was legislative and could not be performed by a committee of the whole legislative body.¹²⁴ The system in Missouri is virtually identical.

115. Since the court decision in *Manchin*, West Virginia has implemented a cumbersome system. All rules (other than emergency rules) have temporary status and must then be approved by the legislature after review by the rulemaking review committee. W. VA. CODE §§ 29A-3-9 to -11 (1986).

116. Opinion of the Justices, 431 A.2d 783, 785 (N.H. 1981).

117. *Id.*

118. *Id.* at 788.

119. *Id.* (emphasis added).

120. *Id.* at 787-88.

121. *Id.*

122. *Id.* at 789. New Hampshire has since adopted a committee-review system with review powers only. N.H. REV. STAT. ANN. § 541-A:11 (1991). The burden of proof is shifted to the agency when a rule is challenged judicially. *Id.* § 541-A:3e.

123. *Opinion of the Justices*, 431 A.2d at 785.

124. *Id.* at 788.

4. New Jersey

In New Jersey, proposed rules were referred to a standing committee which had forty-five days in which to report its recommendation to the legislature.¹²⁵ Unless the legislature adopted a concurrent resolution voiding the rule within sixty days of its receipt from the standing committee, the rule was deemed approved.¹²⁶ The New Jersey Supreme Court held that this procedure violated the presentment clause of the New Jersey Constitution because voiding a proposed rule was equivalent to amending or repealing existing law.¹²⁷ The court also declared the legislative veto an unconstitutional violation of separation of powers.¹²⁸ Because one of the primary functions of executive agencies is to implement statutes by promulgating rules and regulations, the veto unduly intruded on the executive power to faithfully execute the law.¹²⁹ However the court also recognized that, in spite of the separation of powers doctrine, "[its] holding . . . [did] not foreclose all legislative veto provisions."¹³⁰ In a companion case, *Enourato v. New Jersey Building Authority*,¹³¹ the court approved a very limited legislative veto provision dealing with the rejection of building projects and leases. There the activity required continuing legislative budget support and thus could be distinguished from the provisions of the legislative oversight act at issue in *Byrne*.¹³² The intrusion on the executive branch was minimal because it was highly limited in scope.¹³³

New Jersey has a constitutional separation of powers provision virtually identical to Missouri's.¹³⁴ While the New Jersey court took a flexible approach in its interpretation,¹³⁵ it nonetheless held that its legislative veto system, which was far more restrictive in scope than Missouri's, violated separation of powers because it encroached too far on the executive.¹³⁶

125. *General Assembly v. Byrne*, 448 A.2d 438, 440 (N.J. 1982).

126. *Id.*

127. *Id.* at 439.

128. *Id.*

129. *Id.* at 443.

130. *Id.* at 448. The court declared that "[w]here legislative action is necessary to further a statutory scheme requiring cooperation between the two branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes, legislative veto power can pass constitutional muster." *Id.*

131. 448 A.2d 449 (N.J. 1982).

132. *Id.* at 453-54.

133. *Id.*

134. N.J. CONST. art. III, § 1 provides: "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

135. *Enourato*, 448 A.2d at 451.

136. Compare *Enourato*, 448 A.2d at 451 (no unconstitutional encroachment) with *Byrne*, 448 A.2d at 443-44 (constitutional encroachment).

5. Kansas

The Kansas Supreme Court declared that the legislative authority to modify, revoke, or veto rules created "significant interference by the legislative branch with the executive branch and . . . an unconstitutional usurpation of powers."¹³⁷ The court held that a statutory legislative veto by means of a concurrent resolution (not presented to the governor) violated separation of powers and the presentment requirement contained in Article 2, Section 14 of the Kansas Constitution.¹³⁸ The infringement upon the power of the executive was two-fold. First, the governor's power to veto proposed changes in the law was removed by the legislative veto since the resolution did not require presentment to him.¹³⁹ In addition, the court declared that the action of rejecting, modifying or revoking rules and regulations was an "essentially legislative" action because it affected "the legal rights, duties, and regulations of persons outside the legislative branch."¹⁴⁰ Additionally, the court held that promulgating rules and regulations was "essentially executive or administrative in nature, not legislative."¹⁴¹ Once the legislature delegated rulemaking to the executive, that power could not be revoked except in accordance with the constitutionally mandated procedures for passing laws.¹⁴² The Kansas court noted that it had always taken a flexible approach to the doctrine of separation of powers.¹⁴³ It considered four factors, developed in an earlier case, to determine whether there had been a violation of the separation of powers doctrine.¹⁴⁴ The four factors are: "(a) the essential nature of the power being exercised; (b) the degree of control by one department over another; (c) the objective sought to be attained by the legislature; and (d) the practical result of the blending of powers as shown by

137. *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 635-36 (Kan. 1984). The statute provided:

(c) At any time prior to adjournment sine die of the regular session of the legislature, the legislature may adopt a concurrent resolution modifying or rejecting any permanent rule and regulation filed in the office of revisor of statutes during the preceding year

(d) Any rule and regulation included in the Kansas administrative regulations or any supplement thereto and any temporary rule and regulation in effect may be modified or revoked by a concurrent resolution adopted by the legislature

KAN. STAT. ANN. § 77-426(c)-(d) (1984) (repealed 1985).

For a further analysis of the case, see Note, *The New Mandamus—State ex rel. Stephan v. Kansas House of Representatives*, 33 KAN. L. REV. 733, 740-44 (1985).

138. *Stephan*, 687 P.2d at 638. Kansas does not have an express separation of powers provision. *Id.* at 634.

139. *Id.* at 638.

140. *Id.* This definition of "legislative" was essentially the same as that used in *Chadha*. See *Chadha*, 462 U.S. at 952.

141. *Stephan*, 687 P.2d at 635.

142. *Id.*

143. *Id.*

144. *Id.* (citing *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 792 (Kan. 1976)).

actual experience over a period of time."¹⁴⁵ Applying those factors, the court first declared rulemaking an "executive function."¹⁴⁶ It then said that the apparent objective and the actual result of the procedure was to give "total and absolute control" to the legislature to the "exclusion of participation by the executive branch."¹⁴⁷

The Kansas court's views on executive and legislative roles are relevant for Missouri. Perhaps more important is the finding that even under a liberal, flexible interpretation of its constitution (which has no explicit separation of powers provision), the retention of control by the legislature was an undue encroachment on the executive.¹⁴⁸

6. Pennsylvania

In 1978, the Pennsylvania Commission on Sentencing was created.¹⁴⁹ The enabling legislation provided that sentencing guidelines could be adopted by the commission after publication in the Pennsylvania Bulletin and an opportunity for public comment.¹⁵⁰ The law further stated that "the General Assembly may by concurrent resolution reject in their entirety any initial or subsequent guidelines adopted by the commission within 90 days of their publication in the Pennsylvania Bulletin . . ." ¹⁵¹ The Pennsylvania Supreme Court determined that "our [c]onstitutionally ordained separation of powers should be understood to be [no] less exacting than that prescribed in the federal Constitution."¹⁵² The court concluded that *if* the *Chadha* rationale were applied, then section 2155 would be unconstitutional.¹⁵³ Following the holdings expressed in other cases, the court also declared that "administrative rulemaking may be viewed as entirely *executive* in nature."¹⁵⁴ However, the court concluded that the sentencing commission was not an administrative agency but was *an agency of the general assembly*.¹⁵⁵ After suggesting that the Sentencing Commission's guidelines did not constitute "legislation," but rather factors to be *considered* by the courts in sentencing, the court asked if

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 635-36.

149. *Commonwealth v. Sessoms*, 532 A.2d 775, 776 (Pa. 1987) (citing P.L. 1316, No. 319 (Nov. 26, 1978), amended in 1980, P.L. 518 No. 107 (July 10, 1980)).

150. *Id.*

151. *Id.* at 776-77 (citing 42 PA. CONS. STAT. § 2155(b) (1988)).

152. *Id.* at 779.

153. *Id.*

154. *Id.* (emphasis added).

155. *Id.* at 780 (emphasis added). The statute was amended in 1986 to explicitly declare that the commission was "an agency of the General Assembly." *Id.* In *Commonwealth v. Kuphal*, 500 A.2d 1205 (Pa. Super. Ct. 1985), five of nine judges believed that the two-house nullification provision in the statute was unconstitutional. They did not consider the sentencing commission as a legislative agency but discussed the constitutional problems of lack of presentment to the governor. *Id.* at 1215-17.

there "[was] room in [the] Constitution for the legislature to exercise its power by means other than passage of a law."¹⁵⁶ It concluded that Article III, Section 9 of the Pennsylvania Constitution suggested a way for the general assembly to override the "policy statements" of its "own creature by action not rising to the level of a law."¹⁵⁷ The court read into the statute an implied condition that the concurrent resolution must be presented to the governor even though the words do not appear in the legislation.¹⁵⁸

By defining the agency as a legislative agency rather than as an administrative one, and by characterizing the commission's guidelines as merely "policy statements" of "its own creature," and by further finding in the statute an implied requirement that a concurrent resolution be presented to the governor, the Pennsylvania court avoided a clear statement on the legislative veto.¹⁵⁹ However, in dicta the court seemed to recognize that the reasoning of *Chadha* would apply in Pennsylvania if the Sentencing Commission had been characterized as an administrative or executive agency.¹⁶⁰

7. Kentucky

The Kentucky Supreme Court, in *Legislative Research Commission v. Brown*,¹⁶¹ gave three major reasons for declaring unconstitutional statutes that gave the Legislative Research Commission (LRC) power to approve rules beforehand and to suspend rules for periods between legislative sessions.¹⁶² The court found that promulgation of administrative rules was a constitutional function of the executive branch of government, and the legislature had impermissibly encroached on this function in violation of separation of powers.¹⁶³ The power given to the LRC to disapprove administrative

156. *Sessoms*, 532 A.2d at 781.

157. *Id.* at 782. Art. III, § 9 provides:

Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

PA. CONST. art. III, § 9.

158. *Sessoms*, 532 A.2d at 782.

159. *Id.*

160. *Id.* at 781.

161. 664 S.W.2d 907 (Ky. 1984). For an excellent analysis of the *Brown* decision, see Snyder & Ireland, *supra* note 73.

162. *Brown*, 664 S.W.2d at 918.

163. *Id.* at 919. Kentucky's constitution provides:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive to another; and those which are judicial, to another.

No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

regulations in the interim between sessions was an exercise of the lawmaking power of the legislature and violated the adjournment clause of the constitution.¹⁶⁴ Finally, the court declared that constitutionally, it is the duty of the judiciary to determine whether an administrative regulation is invalid because it exceeds *the scope or intent of the statute or violates legislative intent*. To give the LRC this power violates separation of powers principles.¹⁶⁵

In addition, the Kentucky case presents one of a few instances in which a court has considered a non-severability clause in the legislative veto context.¹⁶⁶ The statute provided (as do the most recent Missouri statutes) that if the LRC could not veto proposed regulations, then the executive would be prohibited from promulgating regulations under any other statute.¹⁶⁷ The underlying rationale of the non-severability clause is that since the legislature can grant administrative agencies the right to issue rules and regulations, it may also withdraw that grant.¹⁶⁸ The Kentucky court invalidated the non-severability clause, declaring that the constitution required the governor to "faithfully execute" the law, under Section 81 of the Kentucky Constitution.¹⁶⁹ The power to execute the law does not spring from any particular statute but from the constitution.¹⁷⁰ While an agency may not promulgate rules and regulations without a grant of statutory power, the constitution, and not the statute, provides the power of execution, which includes the "adoption

KY. CONST. §§ 27-28. Missouri's constitution is similar in wording. See MO. CONST. art. II, § 1.

164. *Brown*, 664 S.W.2d at 916-17.

165. *Id.* at 919.

166. *Id.* at 919-20. The Supreme Court of Oklahoma in *Davis v. McCarty*, 388 P.2d 480 (Okla. 1964), considered a non-severability clause inserted in a legislative apportionment act. The act provided in part "that if any clause, provision, part or portion of the Act is finally adjudged invalid or ineffective for any reason by final judgement of a court of competent jurisdiction then the entire Act shall be invalidated and become null and void." *Id.* at 488 (quoting OKLA. STAT. tit. 14, § 78.11 (1963 Supp.)). Because of a prior federal court decision, if the Oklahoma court had upheld the non-severability clause, it would have "put an end to the existence of [a] coordinate branch of state government." The court, therefore, declared that the non-severability clause could not be utilized to prevent judicial review. *Id.*

The Superior Court of New Jersey faced a similar difficult difficulty in *Sarner v. Union Township*, 151 A.2d 208 (N.J. Super. Ct. App. Div. 1959). In this unusual case, the statute contained both a non-severability clause and a severability clause. *Id.* at 218. The court concluded that the legislative intent was expressed in the non-severability clause and upheld it. *Id.* at 220.

In *Commonwealth v. Kuphal*, 500 A.2d 1205, 1208, 1218-19 (Pa. Super. Ct. 1985), a lower court decision on the Pennsylvania Commission on Sentencing discussed in the text *supra* at notes 149-60, the 5-4 decision did not squarely face the non-severability issue, but four dissenters said the provision was non-severable and one concurring judge thought it severable.

167. *Brown*, 664 S.W.2d at 919. See also KY. REV. STAT. ANN. § 13.092(3) (Baldwin 1982) (repealed by Acts of 1984, Ch. 417, § 36, effective April 13, 1984).

168. *Snyder & Ireland*, *supra* note 73, at 223.

169. *Brown*, 664 S.W.2d at 919.

170. *Id.*

and use of administrative regulations."¹⁷¹ Therefore, the restriction imposed by a non-severability clause is unconstitutional because it "effectively and unconstitutionally limits and interferes with the governor's mandated duties."¹⁷²

As two observers note, this case suggests that "the issuance of administrative regulations is a necessary incident to the constitutional duty to faithfully execute the law, and it therefore cannot be totally abrogated by the legislature."¹⁷³ Some power to issue rules and regulations in aid of execution is therefore inherent in the executive. Because of the similarities between the Missouri and Kentucky constitutional provisions, and because of the court's finding that the clause impinges on the *constitutional* duty of the governor to "execute" the laws, the Kentucky court's analysis of non-severability clauses is useful to determine the validity of Missouri's non-severability clause. Moreover, Missouri shares a strong cultural heritage with Kentucky as its original 1820 Constitution was strongly influenced by the Kentucky Constitution.¹⁷⁴

8. Other State Courts

At least three other state courts and the District of Columbia have addressed the legislative veto and found it constitutionally defective.¹⁷⁵ A lower court in Connecticut held that a statute allowing a joint legislative committee to veto agency rules was unconstitutional because it violated the doctrine of separation of powers.¹⁷⁶ The Connecticut Supreme Court decided the case on other grounds and did not specifically address the issue of constitutionality, although it did set aside that portion of the lower court opinion dealing with the issue.¹⁷⁷ However, the next year, Connecticut voters approved perhaps the most permissive constitutional amendment in the nation dealing with legislative vetoes. It allows the legislature *or a legislative*

171. *Id.*

172. *Id.* at 920.

173. Snyder & Ireland, *supra* note 73, at 224.

174. *See State ex rel. Jones v. Atterbury*, 300 S.W.2d 806, 814 (Mo. 1957) (en banc).

175. *See infra* notes 176-83.

176. *Maloney v. Pac*, 439 A.2d 349, 355 (Conn. 1981).

177. *Id.* at 357.

committee to disapprove agency rules.¹⁷⁸ Only three other states have constitutional provisions allowing legislative vetoes.¹⁷⁹

A South Carolina trial court held that a statutory provision stating that State Housing Authority regulations were "null and void unless approved by a Concurrent Resolution of the General Assembly" was unconstitutional. The statutory provision was a legislative function which could not be exercised by a concurrent resolution and it infringed on the power of the executive to enforce the law.¹⁸⁰ On appeal, there was no challenge to the finding of unconstitutionality, but the court held the offending clause unseverable and declared the whole act unenforceable because to sever the clause would violate the legislative intent of controlling agency regulations.¹⁸¹

A Montana trial court declared its state's legislative veto unconstitutional¹⁸² and the District of Columbia Court of Appeals, following *Chadha*, declared the Congressional one-house veto of the District of Columbia Self Government Act invalid.¹⁸³

9. Summary

The value of these cases for Missouri is the common theme of violation of separation of powers. Whether or not the doctrine is explicit or implicit in the state constitutions, the analysis is similar with respect to undue legislative encroachment on the executive or judicial branches. Moreover, other jurisdictions' views on issues of bicameralism and presentment, and on the need to follow constitutionally mandated procedures when acting "legislatively," are particularly applicable because of the similar procedures required in

178. CONN. CONST. amend. 18 (adopted Nov. 24, 1982) (amending art. II) provides:

The powers of government shall be divided into three distinct departments and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; *except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.*

Id. (emphasis added).

179. Rhyme, *supra* note 8, at 3. Those states are Iowa, Michigan and South Dakota. *Id.*

180. *Reith v. South Carolina State Hous. Auth.* (Ct. C.P., 11th Judicial Dist., Aug. 28, 1975), *rev'd on other grounds*, 225 S.E.2d 847 (S.C. 1976), *cited in State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 775-76 (Alaska 1980).

181. *Reith*, 225 S.E.2d at 848. South Carolina now uses a system of review by the committees (of the legislature) and review by the legislature. The legislature disapproves a proposed rule by concurrent resolution with presentment to the governor. *See Rhyme, supra* note 8, at 17-18.

182. *Montana Taxpayer's Ass'n v. Department of Revenue*, No. 47126 (Mont. Lewis and Clark Co. Mar. 18, 1982). Montana now provides that the burden of proof is on an agency if the legislative joint review committee files a written objection to the rule. *See Rhyme, supra* note 8, at 13.

183. *Gary v. United States*, 499 A.2d 815, 821 (D.C. Ct. App. 1985), *cert. denied*, 475 U.S. 1086, *and* 477 U.S. 906 (1986).

all jurisdictions for bill passage, or when legislatures undertake "legislative acts." Indeed, most of these states found constitutionally invalid far more restrictive requirements for rule suspension or veto (e.g., concurrent resolutions of both houses) than the Missouri plan, which allows nullification or revocation by a legislative committee (as opposed to the full legislature). Additionally, three states declared committee-nullification systems similar to Missouri's unconstitutional.¹⁸⁴ Missouri's JCAR veto powers, when compared to those granted in the states discussed in this section, appear to violate constitutional principles even more flagrantly than the veto powers ruled unconstitutional.

C. States Approving the Legislative Veto

1. Idaho

In 1990, the Idaho Supreme Court decided the Idaho legislature could rescind rules promulgated by an executive department, board, or agency by means of concurrent resolution.¹⁸⁵ In *Mead*, the court noted that its constitution provides for the separation of powers among the three branches,¹⁸⁶ and that the power to pass bills is vested in the legislature and therefore only the legislature has the power to make "law."¹⁸⁷ The court reasoned that since the legislature cannot delegate its lawmaking authority to an administrative agency, rules and regulations promulgated by agencies are *less than the equivalent of statutory law*.¹⁸⁸ The court asserted that "[r]ule making that comes from a legislative delegation of power is neither the legal nor functional equivalent of constitutional power."¹⁸⁹ The court also stated: "It is not constitutionally mandated; rather it comes to the executive department through delegation from the legislature."¹⁹⁰ This reasoning apparently led the court to conclude that there was no interference with the executive function of enforcing the law.¹⁹¹

The court quoted approvingly from Justice White's dissent in *Chadha*, where he declared that "[t]he veto must be authorized by statute and may only negative what an Executive department or independent agency has pro-

184. West Virginia, New Hampshire and Kentucky. See *supra* text accompanying notes 105-24, 161-74.

185. *Mead v. Arnell*, 791 P.2d 410, 420 (Idaho 1990). At issue was IDAHO CODE § 67-5218 (amended 1985), which provides that "if any rule previously promulgated and reviewed by the legislature should be deemed violative of the legislative intent of the statute under which such rule was made, a concurrent resolution may be adopted rejecting, amending or modifying the same." *Id.* (emphasis added).

186. *Mead*, 791 P.2d at 414 (citing IDAHO CONST. art. II, § 1).

187. *Id.* (citing IDAHO CONST. art. III, § 15).

188. *Id.* at 415.

189. *Id.* at 417.

190. *Id.*

191. *Id.* at 418-19.

posed."¹⁹² The court concluded that since rules and regulations were adopted pursuant to power granted by laws properly passed by the legislature and approved by the governor, and since the concurrent resolution of the legislature was also adopted pursuant to statutory authority properly passed and approved,¹⁹³ "[t]his *conditioned* grant of authority [was] consistent with the principle of separation of powers as set forth in . . . the Idaho Constitution."¹⁹⁴ The court countered the argument that rules have the force and effect of law and thus can only be abolished by something of "equal dignity," by noting that both the regulations and the concurrent resolution spring from a statutory grant of power.¹⁹⁵ This reasoning ignores the fact that the grant of rulemaking was to a co-equal branch of government under defined conditions and was a dispersal of power. The grant of power by the legislature to itself to veto rules was not a dispersal but a concentration of power.

It was also claimed that by permitting the legislature to determine if rules and regulations complied with the legislative intent of the enabling statute, the legislature was given a judicial function.¹⁹⁶ The court reaffirmed its constitutional right to determine what administrative rules "do or do not conflict with statutory law"¹⁹⁷ and framed the issue in this fashion: "The conflict to be resolved is between the judiciary's constitutional authority to determine whether an administrative rule is in conformance with the enabling statute, and the legislature's statutory entitlement to determine if an administrative rule or regulation fails to reflect the legislative intent contained in the enabling statute."¹⁹⁸ The court bluntly, and with no explanation declared that the legislature's reservation "unto itself [of] the power to reject an administrative rule or regulation as part of the statutory process . . . is not an intrusion on the judiciary's constitutional powers."¹⁹⁹ This statement is unsatisfactory since no reason was given for it and no response was made to the dissent's assertions that adjudication of intent is a judicial function.²⁰⁰ It cannot be disputed that the legislature can determine whether a rule or regulation violates the intent of a statute. It has as much right to do so as a court. But the legislature has been provided a constitutionally sound mechanism to voice unhappiness with administrative rules—it can pass a

192. *INS v. Chadha*, 462 U.S. 919, 980 (1983) (White, J., dissenting).

193. *See, e.g.*, IDAHO CODE § 67-5218 (amended 1985).

194. *Mead*, 791 P.2d at 418-19 (emphasis added).

195. *Id.* at 418.

196. *Id.* at 419.

197. *Id.* (quoting *Holly Care Ctr. v. Department of Employment*, 714 P.2d 45, 51 (Idaho 1986)).

198. *Id.* at 420.

199. *Id.*

200. "If the legislature sitting in 1989 can adjudicate whether the intent of the legislature sitting in the years when [the statutes] were enacted has been violated then the legislature has become, in effect, a court." *Id.* at 427 (Johnson, J., concurring and dissenting).

statute nullifying their effect. By exercising something less than statutory action, the legislature becomes a court.²⁰¹

The court cautioned, again without explanation, that not all legislative vetoes would necessarily be consistent with the separation of powers concept.²⁰² However, it went on to conclude that the concurrent resolution was invalid because the resolution did not state, as required by statute, that the regulations violated legislative intent.²⁰³

The Idaho decision is not as applicable to Missouri as other state court decisions. In Idaho, the legislative veto provided that the rules could be "reject[ed], amend[ed] or modif[ied]" by concurrent resolution of the legislature, and then *only if* they violated legislative intent.²⁰⁴ Missouri goes much further than Idaho because it allows a committee of the general assembly to nullify rules for any reason at all.²⁰⁵

However, the Idaho court's view of separation of powers serves as a counterweight to other state court decisions such as Kentucky's. The Idaho court believes that since the executive is without constitutional power to make rules and regulations, the legislature may condition the grant of rulemaking power to the executive, because the only authority to make rules come from the legislature.

2. Wisconsin

A second case upholding the legislative veto was recently decided in Wisconsin.²⁰⁶ Reversing a court of appeals decision finding unconstitutionality, the Wisconsin Supreme Court declared that section 227.26, authorizing the Joint Committee for Review of Administrative Rules (JCRAR) to *temporarily suspend* administrative rules pending bicameral review by the legislature and presentment to the governor for veto, was constitutional.²⁰⁷

201. *Id.* (Johnson, J., concurring and dissenting). See also *id.* at 429 (Bistline, J., dissenting).

202. *Id.* at 420.

203. *Id.* at 421. Therefore, it is possible to view most of the court's discussion on the legislative veto as dicta.

204. IDAHO CODE § 67-5218 (amended 1985).

205. At least in the more recent versions. See Appendix A, Versions III, IV.

206. *Martinez v. Department of Indus., Labor & Human Relations*, 478 N.W.2d 582 (Wis. 1992).

207. *Id.* at 586-87. Section 227.26(2)(d) provides that "[t]he committee may suspend any rule by a majority vote of a quorum of the committee. A rule may be suspended only on the basis of testimony in relation to that rule received at a public hearing and only for one or more reasons specified under s. 227.19(4)(d)." WIS. STAT. § 227.26(2)(d) (1988).

The grounds required by § 227.19(4)(d) are:

1) an absence of statutory authority, 2) an emergency relating the public health safety or welfare, 3) a failure to comply with legislative intent, 4) a conflict with state law, 5) a change in circumstances since enactment of the earliest law upon which the proposed rule is based, and 6) arbitrariness and capriciousness or imposition of an undue hardship.

Wis. STAT. § 227.19(4)(d) (1988).

The court noted that the doctrine of separation of powers was implicitly and not explicitly recognized in the Wisconsin Constitution.²⁰⁸ It further declared that the doctrine "allows the sharing of powers and is not inherently violated in instances when one branch exercises powers normally associated with another branch."²⁰⁹ Separation of powers is violated, however, when one branch interferes "with a constitutionally guaranteed 'exclusive zone' of authority vested in another branch."²¹⁰ The exclusive zone problem does not arise in the area of executive agency rulemaking since both "the legislature and the executive branch share inherent interests in the legislative creation and oversight of administrative agencies."²¹¹ Because the agency has no inherent constitutional authority to make rules, it was "appropriate for the legislature to delegate rulemaking authority to an agency while retaining the right to review any rule promulgated under the delegated power."²¹² The court noted, however, that the legislative veto provisions satisfied the constitution's requirement of bicameral passage and presentment, because the "[f]ull involvement of both houses of the legislature and the Governor are critical elements . . . and these elements distinguish Wisconsin from the statutory schemes found to violate separation of powers doctrines in other states."²¹³

The unique feature of the Wisconsin process is the temporary rule-suspension power of the JCRAR. A *bill* must be introduced by the JCRAR within thirty days of suspension, passed by both houses and presented to the governor for veto, or the rule *remains in effect* and the JCRAR may not suspend it again.²¹⁴ This process differs significantly from Missouri procedures. Wisconsin's JCRAR has temporary powers of suspension and a bill properly passed and signed is required to *uphold* the suspension. In Missouri, when the JCAR "suspends" a rule, there is actually a permanent revocation *unless* the legislature acts, either by concurrent resolution (in a few instances),²¹⁵ or by passing a bill.²¹⁶

D. Summary

The constitutionality of the legislative veto was a matter of speculation for a number of years until the decision of the United States Supreme Court in *Chadha* and the decisions in a handful of state courts over the past dozen

208. *Martinez*, 478 N.W.2d at 585.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 586.

213. *Id.* at 587.

214. *Id.* at 586 (citing WIS. STAT. § 227.26(2)(i) (1988)).

215. See Appendix A, Versions IIA, IIB.

216. See Appendix A. Incredibly, there is no provision in most of the Versions for the legislature as a whole to overturn the action of the JCAR. Apart from removing the members and replacing them with members who would vote to reinstate a rule the whole body wished to revive, it appears the only other means would be by bill passage. See also MO. REV. STAT. § 536.037(1) (1986).

years.²¹⁷ There is still much debate and interpretation of the legislative veto and the policy arguments remain unresolved.²¹⁸ Contrary to the assertions of the *Mead* court, Missouri is not left, as Justice Jackson observed in another context, with a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."²¹⁹ In fact, with the *Mead* exception, the decisions provide a helpful analytic framework that can be applied to Missouri, and they point persuasively to the unconstitutionality of the current grants of authority to the JCAR.

IV. THE CONSTITUTIONALITY OF THE LEGISLATIVE VETO IN MISSOURI

Professor Philip Frickey analyzed Minnesota's legislative veto provisions investing power in a legislative committee to suspend administrative rules. He observed that the committee had gone without challenge for so long because: (1) the committee's powers had been used infrequently and thus few were in a position to make a challenge, and (2) the only likely challenger would be an agency whose rule had been suspended by the committee.²²⁰ However, because the agency might wish to protect its budget, such a confrontation in the courts might be avoided for years in spite of the questionable constitutionality.²²¹ His analysis of the potential negative effect on agency budgets proved prescient. In Missouri there was recently a fierce exchange of charges and counter-charges between the general assembly and Tracy Mehan, then Director of the Department of Natural Resources (DNR).²²² DNR had instituted a law suit in which the issue of the power of the JCAR to veto rules was raised.²²³ Mehan complained that the appropriation for three DNR attorneys had been cut in a vindictive attempt to hinder the DNR's efforts to fight the JCAR in court.²²⁴ Mehan declared: "[W]hat's going on [in the General Assembly] is not open, honest, good government."²²⁵ He asserted that the JCAR's power "[was] clearly unconstitutional, a violation of

217. See, e.g., sources cited *supra* note 9.

218. *Id.* See particularly those articles forthcoming in the aftermath of the *Chadha* decision.

219. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

220. Frickey, *supra* note 59, at 1277. The Minnesota procedure is similar to that of Wisconsin. The Joint Legislative Commission to Review Administrative Rules (LCRAR) has a temporary suspension power only and must introduce a bill to repeal the rule at the next legislative session. *Id.* at 1240-41 (citing MINN STAT. § 14.40 (Supp. 1985)). If the legislature fails to act, the rule becomes effective at the end of the session. *Id.*

221. *Id.* at 1277.

222. See *Senate Rebukes Mehan*, JEFFERSON CITY POST TRIB., May 13, 1992, at 1, 6; Tom Uhlenbrock, *Captial Feud: DNR Director Charges 'Rubber Hose Treatment'*, ST. LOUIS POST-DISPATCH, May 14, 1992, at C1.

223. Uhlenbrock, *supra* note 222. See also *supra* note 29.

224. Uhlenbrock, *supra* note 222.

225. *Id.*

separation of powers.²²⁶ Members of the general assembly refuted Mehan's claim that the budget cut was related to DNR's attack on JCAR's powers, and the Missouri Senate took an unusual action, voting 27 to 2 on a "remonstrance" of Mr. Mehan, its harshest rebuke.²²⁷ The battle continued after the close of the legislative session when Mehan offered a parting shot in a stinging editorial in which he declared that the legislators "[had] tried to make themselves a unitary form of government," and strongly suggested that by vetoing rules, legislators they may have been indirectly responsible for deaths and higher costs to consumers.²²⁸ While the original case that sparked the debate now appears moot, a new case has been filed.²²⁹ It is likely that debate over the role of the JCAR will continue and eventually will be decided by the Missouri Supreme Court.

There are virtually no cases that discuss the JCAR. Therefore, Missouri can only rely on the experiences of other states, the United States Supreme Court, and its own interpretation of the relevant Missouri constitutional provisions to determine the constitutional validity of JCAR powers. The single case that touches on the JCAR sends conflicting messages.²³⁰ In one passage the court declares, "The commission could have made our task easier if it had adopted rules . . . and submitted them to the [JCAR]."²³¹ But the court also declared that section 313.220²³² does not "give the [JCAR] the

226. *Id.*

227. *Id.* at 1.

228. Tracy Mehan, *An Abuse of Power*, ST. LOUIS POST-DISPATCH, June 22, 1992, at 3B.

229. *State ex rel. Mo. Coalition for the Env't v. Joint Comm. on Admin. Rules*, No. 642052 (21st Judicial Circuit, St. Louis Co. Mo., filed Sept. 4, 1992).

230. *Tichenor v. Missouri State Lottery Comm'n*, 742 S.W.2d 170 (Mo. 1988) (en banc).

231. *Id.* at 175.

232. MO. REV. STAT. § 313.220 (1986). This section was amended in 1988 to include Version IVC language. At the time of the court decision it read as follows:

The commission shall promulgate such rules and regulations governing the establishment and operation of a state lottery as it deems necessary and desirable to fully implement the mandate of the people expressed in the approval of the lottery amendment to article III of the Missouri Constitution at the general election in November, 1984. Such rules and regulations shall be designed so that a lottery may be initiated at the earliest feasible and practicable time. No rule or portion of a rule promulgated under this authority shall become effective until it has been approved by the joint committee on administrative rules. Any rule or portion of a rule promulgated under this authority may be suspended by the joint committee on administrative rules at any time. All proposed rules shall be submitted to the committee by the commission, and if the committee neither approves nor disapproves any such rule within thirty days after submission, the rule shall stand approved. The committee, in its discretion, may hold one or more hearings upon any proposed rule within the thirty-day period the rule is being considered by the committee. No other provisions of chapter 536, RSMo, regarding notice, publication or nonjudicial review of any rule promulgated by the commission shall be applicable to such rules. Any person seeking judicial review of any such rule shall be deemed to have exhausted all administrative review procedures.

authority to maintain a continuing supervision over the operations of the commission."²³³ Additional clarity was provided when the court, interpreting the intent of the enabling legislation implementing the constitutionally authorized lottery, said:

We sense no purpose in the enabling legislation of limiting the commission's authority to approve and institute any lottery game Under this construction the [JCAR] is without power to forbid the commission to institute any lottery game permitted by the constitution and the statutes. Any contrary holding *would present substantial problems of separation of power.*²³⁴

While this case hinted at constitutional problems with JCAR powers to disapprove some rules, it also seemed to recognize that rules had to be submitted to the JCAR for review.²³⁵ However this court did not have directly before it the question of JCAR power. What was at issue was whether actions of the lottery commission were supported by the statute, or commission rules previously adopted (and apparently approved by the JCAR).²³⁶

Because of the lack of specific case precedents on the JCAR, it is necessary to delve further into the cases interpreting relevant constitutional provisions.

A. Framework for Analysis

1. Executive or Legislative Function?

Is suspension,²³⁷ revocation or prior approval of agency rules a "legislative" or an "executive" function? While this characterization might not determine constitutionality, it is useful as an approach for analysis.²³⁸ Because the prominent features of the legislative veto involve either (a) suspension of a current rule, or (b) revocation of a current rule, or (c) prior approval of a proposed rule (either by committee, by one house, or by the entire legislature), it could be argued that the three features are in fact different for purposes of characterization. As to the first feature, commentators and courts have come to different conclusions about the constitutionality

233. *Tichenor*, 742 S.W.2d at 175.

234. *Id.* at 175-76 (citing MO. CONST. art. II, § 1) (emphasis added).

235. *Id.* at 175.

236. *Id.* at 174-76.

237. The word "suspension" in this context means temporary ineffectiveness of a rule, whereas revocation means permanent suspension or nullification. In Missouri, the word suspension in the various grants of power actually means *permanent* suspension, revocation or nullification because JCAR action is permanent *unless* there is self initiated further action of the General Assembly or the JCAR. See Appendix A, Versions II-IV.

238. The characterization has been used in several cases as a determinative factor. See *Chadha*, 462 U.S. at 952-54; Frickey, *supra* note 59, at 1251; Levinson, *supra* note 19, at 101-02; *supra* text accompanying notes 76-219.

of the temporary suspension of a rule.²³⁹ This feature is less important in Missouri because the Missouri system involves permanent suspension.²⁴⁰

The second and third features have sparked intense analysis²⁴¹ and are important for Missouri. It is clear that rules properly promulgated and adopted in Missouri have the "force and effect of law."²⁴² Therefore, it could be persuasively argued that any action by the legislature, or a committee of the legislature, that sought to rescind or revoke a rule or regulation having the force and effect of law is "legislative lawmaking" and should follow the constitutionally mandated procedures for bill enactment. In short, the legislature must change the "law" by following the same constitutional provisions it did in enacting the law, under the theory that "equal dignity" is required.²⁴³ There is precedent to suggest that while rules may have the effect of law, they are not law in the *constitutional* sense.²⁴⁴ Interpreting a statute that called for a reorganization plan promulgated by the governor to "be considered for all purposes as the equivalent in force, effect and intent of a public act,"²⁴⁵ the court declared that the plan was not law under Article III, Section 21 of the Missouri Constitution because to so hold would violate Article II, Section 1 as an improper delegation of legislative power.²⁴⁶ The court severed the offending portion of the reorganization plan because it conflicted with the language in another statute.²⁴⁷ However, the court seemed to acknowledge the validity of the plan to the extent that it did not conflict with other statutes.²⁴⁸ This case is not inconsistent with the equal dignity doctrine for it merely states in another fashion the well-recognized

239. Compare *Martinez v. Department of Indus., Labor & Human Relations*, 478 N.W.2d 582, 586-87 (Wis. 1992) (constitutional) with *Frickey*, *supra* note 59, at 1277 (unconstitutional) and *Brown*, 664 S.W.2d 907 (Ky. 1984) (unconstitutional).

240. See Appendix A, Versions II-V.

241. See generally *Chadha*, 462 U.S. at 919; discussion and cases *supra* accompanying notes 76-219.

242. *Page W., Inc. v. Community Fire Protection Dist.*, 636 S.W.2d 65, 68 (Mo. 1982) (en banc) (city ordinance which conflicts with a state regulation is void because it conflicts with state "law"). See also NEELY & SHINN, *supra* note 16, § 5.11.

243. *But cf.* *Mead v. Arnell*, 791 P.2d 410, 414-15 (Idaho 1990) (the doctrine was not followed because regulations "do not rise to the level of statutes").

Missouri agencies may rescind rules. They must do so, however, following the same statutory requirements for rule adoption. MO. REV. STAT. § 536.010(4) (1986) ("Rule means . . . the amendment or repeal of an existing rule."). The equal dignity doctrine applies to both agency rulemaking and revocation. See MO. REV. STAT. § 536.021 (1986). However, the legislature determines *by statute* what procedures are to be followed in the rule-making process. While certain due process rights are guaranteed under the administrative procedure act (MO. REV. STAT. §§ 536.010-.215 (1986)) when rules are made or revoked by administrative agencies, including the right to judicial review of agency action, no such due process is required from the legislature in its lawmaking process.

244. *Moore v. Pelzer*, 710 S.W.2d 416 (Mo. Ct. App. 1986).

245. MO. REV. STAT. § 26.530 (1986).

246. *Moore*, 710 S.W.2d at 421-22 (citing MO. CONST. art. III, § 1 (1945)).

247. *Id.*

248. *Id.*

doctrine that rules must conform with their statutory authorization, and cannot change the enabling statute or other statutes.²⁴⁹

Missouri courts have long recognized that the legislature can delegate authority to the executive branch to issue rules and regulations to aid in the administration or enforcement of a statute.²⁵⁰ These statutes are not unconstitutional delegations of legislative power as long as the legislature provides guidance to the agency in the statute.²⁵¹ The question posed, therefore, is whether rulemaking is an "executive" function because it is performed by an executive agency, or whether it is a legislative function that is permissively delegated to an executive agency. Does the delegation, with guidance, transmute what was "legislative" into something that is now "executive?" The cases do not clearly answer these questions. The *Chadha* court asserted that the legislative veto was "legislative in its character and effect" and that rulemaking was "executive."²⁵² In *Bowsher*, the court went further and said that once authority was given to the executive to accomplish a task, the participation of Congress in *execution* ended and Congress could control execution only "indirectly" by passing new laws.²⁵³ While these cases are not controlling for Missouri, they are persuasive authority because the Missouri Constitution seems to recognize, at least by implication, that administrative rulemaking is an executive function. Article 4, dealing with the executive department, provides: "All rules and regulations of any board or other administrative agency of the executive department, except those relating to its organization and internal management, shall take effect not less than 10 days after the filing thereof in the office of the secretary of state."²⁵⁴ If

249. *Id.* See also NEELY & SHINN, *supra* note 16, §§ 6.01, 7.23; SCHWARTZ, *supra* note 18, § 4.4.

250. *Ketring v. Sturges*, 372 S.W.2d 104, 109 (Mo. 1963) ("[s]uch a grant is in no respect an improper delegation of power"). In *Ketring*, the court stated, "Where . . . legislature has established a sufficiently definite policy, standard, or rule it may, without violating the rule prohibiting the delegation of legislative power, authorize an administrative officer or body to adopt and enforce rules . . . to carry out the purpose of the legislature." *Id.* (quoting 73 C.J.S. *Public Administrative Bodies and Procedure* § 32 (1951)).

251. *State ex rel. Priest v. Gunn*, 326 S.W.2d 314, 320 (Mo. 1959) (en banc) ("[t]he legislature may enact the basic purpose or rule, leaving matters of detail in administering the act to the board or executive, although an exercise of discretion in the latter may thus be involved").

252. *Chadha*, 462 U.S. at 953 n.16. The Court notes that while the Federal APA (5 U.S.C. § 551(4)) defines rule as "an agency statement . . . to . . . prescribe law or policy" the executive does not exercise "legislative" power. The executive acts under prescribed legislative authority subject to judicial review and Congressional power to modify or revoke the authority. *Id.* The Missouri definition of a rule is the same. See MO. REV. STAT. § 536.010(4) (1986).

There are Missouri cases, however, that specifically state that "[t]he power to formulate rules to effect a policy of statute is legislative." *Missouri Hosp. Ass'n v. Missouri Dep't of Consumer Affairs, Regulation & Licensing*, 731 S.W.2d 262, 263 (Mo. Ct. App. 1987); *Missourians for Separation of Church & State v. Robertson*, 592 S.W.2d 825, 841 (Mo. Ct. App. 1979).

253. *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986). See also *supra* text accompanying notes 98-183 for similar holdings of state courts.

254. MO. CONST. art. IV, § 16. This was a new provision not found in earlier constitutions.

rulemaking is viewed as an executive function, then legislatively retained control of the process would represent an intrusion on the executive's constitutional power.²⁵⁵

When the legislature acts by exercising a legislative veto, is that act "legislative" and thus subject to the constitutional mandates for bill passage? The cases suggest an affirmative answer. In fact, as one observer has noted about *Chadha*, if "an exercise of the veto was *not* a 'legislative' act, then perhaps the House had no business exercising it at all."²⁵⁶ The other question that remains is whether the legislative veto is an executive act because it deals with an executive function, and is therefore not subject to the same constitutional mandates for bill passage. The fact that the constitution does not address this except for the general proscription of article II section 1, does not necessarily mean the legislature could not act by means of a statutory legislative veto. However, the constitutional issue of undue encroachment by the legislature on the executive branch would still remain.

As to prior approval of a rule, one view is that it is not lawmaking, or legislative, and thus not subject to the requirement for bill passage.²⁵⁷ The argument is that because proposed rules do not become effective and thus do not have the force and effect of law until a certain point in time—in Missouri at least ten days after filing—before that time they have no legal effect.²⁵⁸ The claim is that prior approval of a rule is the equivalent of failure by one or both houses of the legislature to enact a bill.²⁵⁹ Such an analogy is untenable for Missouri because (1) the legislature, through the JCAR, *has acted*, and (2) "but for" the *action* of the JCAR the proposed rule would have become effective and would have had the force and effect of law.²⁶⁰ While it is true that proposed bills do not become law unless the legislature acts,

See also MO. CONST. art. IV, §§ 45-46 (giving the Conservation Commission implied power to make rules and regulations).

255. *Bowsher*, 478 U.S. at 734. See also *supra* text accompanying notes 161-74 for similar holdings of a state court.

256. Richard I. Goldsmith, *INS v. Chadha and the Non-Delegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749, 753 (1984).

257. See William J. Pohlman, *The Continued Viability of Ohio Procedure for Legislative Review of Agency Rules in the Post—Chadha Era*, 49 OHIO ST. L.J. 251, 270 (1988); see also *Chadha*, 462 U.S. at 958 n.23 (discussing prior approval of a rule); Snyder & Ireland, *supra* note 73, at 220.

258. Pohlman, *supra* note 257, at 270. See also *supra* note 253.

259. Pohlman, *supra* note 257, at 270.

260. One court has asserted that "[a] proposed regulation still nascent affects neither the parties in interest to an administrative proceeding or [sic] the court on judicial review." *St. Louis Christian Home v. Missouri Comm'n on Human Rights*, 634 S.W.2d 508, 515 (Mo. Ct. App. 1982) (emphasis added). But this statement was made in connection with the effect of the proposed rule on a court proceeding that had already been decided. The court discussed the important bearing of the procedure for notice and comment on the final rule. This situation differs significantly from the JCAR process because the agency may already have decided on the final rule. The JCAR prevents that rule from taking effect, even though it may have already passed through the notice and comment process. See, e.g., Appendix A, Version IVC (requiring notice of *final* order of rulemaking to be filed with the JCAR).

rules, before the advent of the JCAR, took on the force of law without legislative action. Since legislative action is required to prevent a rule from becoming law, prior approval has the attributes of a legislative act.

2. Separation of Powers

Unlike the U.S. Constitution, Missouri's constitution, explicitly rather than implicitly recognizes separation of powers:

The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.²⁶¹

This provision has remained substantially unchanged since the original 1820 Missouri Constitution.²⁶² Missouri cases have consistently recognized that, according to the constitution, no branch shall exercise "any power *properly* belonging" to another. But Missouri courts have not strictly demarcated the line dividing the branches.²⁶³ Courts have recognized that "quasi judicial" power can be granted to administrative agencies²⁶⁴ and certain "legislative" powers may be delegated to the executive branch.²⁶⁵ In *State Tax Commission v. Administrative Hearing Commission*²⁶⁶ the court embraced a view of constitutional interpretation, expounded by some United States constitutional scholars. According to this view, one should look not to any particular clause in the Constitution but to the Constitution as a whole to determine the role of the various branches of government.²⁶⁷ The Missouri Supreme Court

261. MO. CONST. art. II, § 1. See *supra* text accompanying notes 75-205 for similar provisions in other state constitutions where the legislative veto has been found unconstitutional.

262. MO. CONST. of 1820, art. II.

263. *Clark v. Austin*, 101 S.W.2d 977, 987 (Mo. 1937) (en banc) (emphasis added). The proper meaning of the word is "solely or exclusively." The constitutional language has "always been liberally construed." *Id.* See also *State ex rel. Manion v. Dawson*, 225 S.W. 97, 100 (Mo. 1920) (en banc) ("The line of demarcation between legislative, executive, and judicial functions is not easy to draw. These functions shade into one another as imperceptibly as the mountain merges into the valley, or the river into the sea.").

264. *State ex rel. State Highway Comm'n v. Weinstein*, 322 S.W.2d 778, 784 (Mo. 1959) (en banc). See also *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69 (Mo. 1982) (en banc).

265. *State ex rel. Wagner v. St. Louis County Port Auth.*, 604 S.W.2d 592 (Mo. 1980) (en banc). See generally NEELY & SHINN, *supra* note 16, §§ 2.02 & 2.03.

266. 641 S.W.2d 69 (Mo. 1982) (en banc).

267. See Frickey, *supra* note 59, at 1265-66, where he briefly discusses the concepts of "structural due process" and "due process of lawmaking," expounded by Lawrence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) and Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

declared that "a careful study of the *whole* Constitution [would]. . . demonstrate that it was not the purpose to make a total separation of these three powers."²⁶⁸ The court further observed that "[f]rom a pragmatic standpoint it is obvious that some overlap of functions necessarily must occur. The complexity of modern government demands the delegation of some administrative and decisional authority to executive agencies because of their particular areas of expertise."²⁶⁹

However, the court has also regularly declared that, unlike the United States Constitution, the Missouri Constitution does not give a grant of power to the legislature so much as a limitation. The court has asserted that "except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute."²⁷⁰ While restrictions on the legislature must be expressed in the constitution or clearly implied from its provisions,²⁷¹ those restrictions will be narrowly construed.²⁷² Legislative enactments are to be held as constitutional when it is "reasonably possible to do so."²⁷³ Nonetheless, it is clear that the whole constitution including Article II (separation of powers), Article III (the legislature), Article IV (the executive), and Article V (the judiciary) all serve as restrictions on the *legislative* power.

Missouri's constitutional separation of powers provision is similar to that found in several other states. The provision was incorporated into the 1820 constitution in much the same way that the language was incorporated in other constitutions of the time.²⁷⁴ At the time of the American Revolution, the colonies feared the powers of the British executive or "governors."²⁷⁵ For a short period of time immediately after the Revolution, many of the new states adopted constitutions that gave virtually all power to the legislative body and little or no power to the executive.²⁷⁶ Additionally, those early states viewed "separation of powers" as a way of "justifying an isolation of the legislature and the judiciary from what was believed to be the corrupting

268. *State Tax Comm'n*, 641 S.W.2d at 74 (emphasis added) (quoting *Rhodes v. Bell*, 130 S.W. 465, 468 (Mo. 1910)).

269. *Id.*

270. *Danforth ex rel. Farmers Elec. Coop. Inc. v. State Envtl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. 1975) (emphasis added). *See also Dalton ex rel. Holekamp v. Holekamp Lumber Co.*, 340 S.W.2d 678, 681 (Mo. 1960) (en banc); *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806, 810 (Mo. 1957) (en banc); *Hickey v. Board of Educ. of the City of St. Louis*, 256 S.W.2d 775, 778 (Mo. 1953); *Kansas City v. Fishman*, 241 S.W.2d 377, 379 (Mo. 1951); *State v. Shelby*, 64 S.W.2d 269, 271 (Mo. 1933) (en banc). *But cf. State ex rel. Harvey v. Wright*, 158 S.W. 823, 825 (Mo. 1913) (unlike the power of the legislature, the powers of the executive are a *grant of power*, not a limitation).

271. *See, e.g., Shelby*, 64 S.W.2d at 271.

272. *Brown v. Morris*, 290 S.W.2d 160, 166 (Mo. 1956) (en banc).

273. *Simpson v. Kalcher*, 749 S.W.2d 386, 391 (Mo. 1988) (en banc).

274. *See, e.g., Atterbury*, 300 S.W.2d at 814-15.

275. WOOD, *supra* note 75, at 138-61.

276. *Id.*

influence of executive power."²⁷⁷ This early concept of separation of powers changed rapidly in the immediate post-revolutionary years. The experience with the early constitutions taught the states that greater power should be given to the executive and the judiciary to check excesses of the legislatures.²⁷⁸ Thomas Jefferson, speaking of the Virginia Constitution, declared that concentration of the three powers "in the same hands is precisely the definition of despotic government."²⁷⁹ Therefore, the new or revised constitutions that emerged in that period began to refine the concept of separation of powers; one where recognition was given to a system of checks and balances.²⁸⁰ Moreover, there was increased recognition that just as the legislature represented the will of the people, so too did the elected executive and the judiciary.²⁸¹ While the general concept of separation of powers is limited by the particular provisions in any state constitution, and the interpretations given to this concept by the courts of the state, the common theme is to preserve the doctrine whether that doctrine has been strictly or liberally construed.²⁸²

a. *Strict or Liberal Interpretation*

Regardless of whether the Missouri Constitution is interpreted in strict or liberal fashion, the powers given to the JCAR cross the line between "legislative" and "executive" powers. It makes no difference if the functions performed by the JCAR are characterized as legislative or executive. The characterization should not save the powers from unconstitutionality. Moreover, members of the general assembly may not hold "any lucrative office or employment under the United States, this state or any municipality thereof" during their tenure.²⁸³ If the senators and representatives who serve on the JCAR are characterized as "executive" because rulemaking is "executive," the constitution would seem to require termination of their tenure as members of the general assembly, because the constitution further provides that "[w]hen any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated . . ."²⁸⁴ Nowhere in the constitution is the legislature given the power to appoint *executive* officials.²⁸⁵ We must conclude that the JCAR is a legislative body. If it performs a "legislative" function, it acts in

277. *Id.* at 449.

278. *Id.* at 451-53.

279. *Id.* at 451.

280. *Id.* at 450.

281. *Id.* at 453.

282. See *supra* text accompanying note 184; see also *State ex rel Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. 1970) (en banc), cert. denied, 400 U.S. 991 (1971), where the court declared that the doctrine was "vital to our form of government."

283. MO. CONST. art. III, § 12.

284. *Id.*

285. However, the senate does exercise advice and consent on some appointments. *Id.* at art. IV, § 17.

violation of the constitutional mandates for bill passage.²⁸⁶ If it performs "executive" functions it intrudes on the executive. But is that intrusion constitutionally impermissible?

b. Encroachment on Executive Functions

According to the Missouri Constitution, "The governor shall take care that the laws are distributed and faithfully *executed*, and shall be a conservator of the peace throughout the state."²⁸⁷ While few Missouri cases have defined "execute," there is authority to suggest that when a function has been delegated to the executive and is "judicial" in nature (and therefore, by analogy, legislative), it becomes an executive function.²⁸⁸ For example, *State Tax Commission* recognizes that executive agencies "may exercise 'quasi judicial' powers that are 'incidental and necessary to the proper discharge' of their administrative functions even though by doing so they are at times determining questions of a 'purely legal nature.'²⁸⁹ Moreover, *State v. Cushman*²⁹⁰ recognizes that the executive may not be delegated naked legislative power but if the General Assembly establishes a "sufficiently definite policy" the executive may make rules and regulations relating to the "administration or enforcement of the law."²⁹¹ The court went on to declare: "In other words, administrative power, as distinguished from legislative power, constitutionally may be delegated by the general assembly."²⁹² Rulemaking is an administrative power.²⁹³ It remains administrative even though it requires an "exercise of discretion."²⁹⁴ But discretion is not unbridled because rules must spring from within the structures of the statute and must relate to it.²⁹⁵ The legislature sets the overall policy and limits the scope and purpose of the rulemaking power.²⁹⁶ By doing so, it does not give away its lawmaking power because it has narrowed the scope of executive action to constitutionally acceptable limits.²⁹⁷

Rulemaking, therefore, becomes an adjunct to law enforcement and execution, clearly executive functions.²⁹⁸ In *Rhodes v. Bell*,²⁹⁹ the

286. *Id.* at art. III, §§ 21-33. See also *supra* note 259 and accompanying text.

287. MO. CONST. art. IV, § 2 (emphasis added).

288. *State Tax Comm'n*, 641 S.W.2d at 75.

289. *Id.* (quoting *Liechty v. Kansas City Bridge Co.*, 162 S.W.2d 275, 279 (Mo. 1942)).

290. 451 S.W.2d 17 (Mo. 1970).

291. *Id.* at 20.

292. *Id.*

293. *Id.*

294. *State ex rel. Priest v. Gunn*, 326 S.W.2d 314, 320 (Mo. 1959) (en banc).

295. *Id.*

296. See, e.g., *Noss v. Abrams*, 787 S.W.2d 834, 838 (Mo. Ct. App. 1990).

297. The boundaries of those limits are wide. In *Cushman* the guidelines for the power granted were "reasonable standards and specifications." *State v. Cushman*, 451 S.W.2d 17, 18 (Mo. 1970).

298. MO. CONST. art. IV, § 2.

299. 130 S.W. 465 (Mo. 1910).

Missouri Supreme Court stated: "It is still more difficult to discriminate in particular cases between what is properly legislative, and what are properly executive duties. The authority that makes the laws has large discretion in determining the means through which they shall be executed."³⁰⁰ However, the court went on to note that while the legislature's ability "to prescribe a rule of action [i.e. law] properly belongs to the lawmaking power," it was "within the realm of the branch implementing the law to supplement the legislation."³⁰¹ Once the legislature has acted by setting policy guidelines and parameters, filling in the details through rulemaking is an executive function and not a function of the legislative branch.³⁰² It is constitutionally impermissible interference for the legislature as a whole to thwart executive rulemaking without going through the bill enactment process. It is even more repugnant to allow a small group of legislators to become "super-administrators."

Other courts have determined that rulemaking is an executive function and the legislative veto too much of an encroachment.³⁰³ Notably *Bowsher* defined execution of the law as "interpreting a law enacted by Congress to implement the legislative mandate."³⁰⁴ Another writer discussing Missouri's JCAR declared that *Bowsher's* "conclusion [was] logically consistent with the Missouri Constitution."³⁰⁵

c. *Encroachment on Judicial Functions*

It is also been asserted that the legislative veto is an invalid usurpation of judicial power.³⁰⁶ This argument is particularly compelling where the

300. *Id.* at 468 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 138 (4th ed.)).

301. *Id.* at 469. While this case involved legislative encroachment on the powers of the judiciary, its reasoning is equally applicable to encroachment on executive powers.

302. *State v. Cushman*, 451 S.W.2d 17, 21 (Mo. 1970).

303. *See supra* text accompanying notes 76-184.

304. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

305. Scott Welman, Comment, *Joint Committee on Administrative Rules: The Missouri Legislature's Disregard for the Missouri Constitution*, 58 UMKC L. REV. 113, 120 (1989).

306. *Id.* at 117. *See also supra* notes 76-184 for cases discussing this assertion. It could be argued that the MO. CONST. art. V § 18 (art. V, § 22 of the 1945 Constitution was amended in 1976 and is now art. V, § 18) implies that only the courts have review power over rules:

Section 18. All final decisions, findings, *rules* and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record. Unless otherwise provided by law, administrative decisions, findings, *rules* and orders subject to review under this section or which are otherwise subject to direct judicial review, shall be reviewed in such manner and by such court as the supreme court by rule shall direct and the court so designated shall, in addition to its other jurisdiction, have jurisdiction to hear and determine any such review

statute provides that a rule may be suspended if the JCAR "finds that such rule or portion of the rule is *beyond or contrary to the statutory authority of the agency* which promulgated the rule or is *inconsistent with the legislative intent* of the authorizing statute."³⁰⁷ Traditionally, courts have performed the function of interpreting law and determining legislative intent. In *State Tax Commission*, the court said: "The declaration of the validity or invalidity of statutes and *administrative rules* thus is *purely a judicial function*."³⁰⁸ However, this case involved a grant of judicial power to the executive. Can the legislature itself exercise judicial or quasi-judicial functions?

There are cases hold that an act of the General Assembly granting a divorce is unconstitutional,³⁰⁹ as are acts directing courts to vacate a contract.³¹⁰ These acts unconstitutionally encroach on judicial power. Nor can the General Assembly construe the constitution³¹¹ or declare by bill the meaning of a prior statute giving it retroactive effect.³¹² Nonetheless, the General Assembly clearly has a right to "interpret" law because it has lawmaking power and power to change the law. These powers issue from the people *via* the Constitution. But the constitutionally approved method of interpretation requires a change in the law to be made by passage of a bill modifying the offending rule or statute.³¹³ In this sense the legislature is an "interpreter" of law.³¹⁴ However, when a small group of legislators is charged with interpreting whether an agency rule exceeds the scope of

proceeding.
(emphasis added).

However, the language seems to suggest some other meaning for the word "rules" than that normally given. Additionally, the word "rules" is modified by the phrase "which are judicial or quasi-judicial and affect private rights." The definition of rule in MO. REV. STAT. § 536.010(4)(b), (d) (1986), also suggests a different meaning although there is an assertion to the contrary in at least one case. See *State ex rel. State Highway Comm'n v. Weinstein*, 322 S.W.2d 778, 784 (Mo. 1959) (en banc) ("[t]he debates in the Constitutional Convention on the adoption of Sec. 22, Art. V, [note: this is now § 18 of art V] show that it was intended to apply . . . to quasi-legislative functions of other agencies In fact, by its very terms Sec. 22, Art. V, includes 'rules' which could only be *legislative*." (emphasis added).

307. MO REV. STAT. § 36.070 (1986) (emphasis added). See Appendix A, Version IIB.

308. *State Tax Comm'n*, 641 S.W.2d at 75 (emphasis added).

309. *Rickeson v. Simmons*, 47 Mo. 20, 26 (1870); *Bryson v. Bryson*, 44 Mo. 232, 233 (1869).

310. *Butler v. Chariton County Court*, 13 Mo. 112, 116-17 (1850).

311. *State ex rel. Dawson v. Falkenhainer*, 15 S.W.2d 342, 343 (Mo. 1929) (en banc); *Householder v. City of Kansas*, 84 Mo. 488, 496 (1884).

312. *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457, 471 (1881).

313. MO. CONST. art. III, §§ 21-33.

314. See, e.g., *Bader Realty & Investment Co. v. St. Louis Housing Authority*, 217 S.W.2d 489, 493 (Mo. 1949) (en banc) (The court observed: "What is for public good and what are public purposes and uses . . . are matters for legislative determination. Those legislative bodies *within their constitutional and statutory powers* may experiment. Courts determine questions of power not policy." (emphasis added).

statutory authorization, or violates the intent of the legislature, that group has taken on the traditional trappings of a court.³¹⁵

While the U.S. Supreme Court's role in ascertaining legislative intent has been criticized by some justices, notably Justice Scalia, and has also been criticized by scholars and other judges, on the grounds that such intent is virtually undiscoverable,³¹⁶ Missouri courts have traditionally assumed the task of determining legislative intent when interpreting statutes.³¹⁷ In fact, the role is implied in the statutes.³¹⁸ To accomplish this task, courts may look at other laws in order to determine the intent of the statute.³¹⁹ However, a legislator's statement of the legislative intent may not be proper evidence to consider and can be denied admissibility.³²⁰ The fact that the judiciary determines legislative intent does not prevent the legislature from also making that determination. Clearly one reason the legislature might amend or repeal legislation, or amend or repeal administrative rules, is that in its collective wisdom, the laws or rules violate the intent of the legislative body. However it is a *current* legislature determining what a *prior* legislature, often composed of different individuals, meant.³²¹ It is unrealistic to assume

315. *State Tax Comm'n*, 641 S.W.2d at 75. See also Frickey, *supra* note 59, at 1251-52 n.68.

316. See, e.g., Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1984) (analyzing the arguments against legislative intent and concluding that the search for legislative intent is a valid role for the courts.).

317. See, e.g., *In re Estate of Tompkins v. Carpenter*, 341 S.W.2d 866, 871 (Mo. 1960) That rule is exercised, however, only when the words of the statute are not clear on their face. *Commerce Bank v. Missouri Div. of Fin.*, 762 S.W.2d 431, 433-34 (Mo. Ct. App. 1988).

318. See, e.g., MO. REV. STAT. § 1.020 (1986) (sets forth certain definitions and provides that these definitions shall be used unless "plainly repugnant to the *intent* of the legislature") (emphasis added).

319. *Weber v. Missouri State Highway Comm'n*, 639 S.W.2d 825, 829 (Mo. 1982).

320. *Pipe Fabricators, Inc. v. Director of Revenue*, 654 S.W.2d 74, 76 (Mo. 1983) (en banc). There are cases allowing affidavits of legislators and according them some weight where the statute is ambiguous. See *Commerce Bank*, 762 S.W.2d at 435.

321. See Bruff & Gellhorn, *supra* note 9, at 1419.

One other factor affected the political accountability of the veto process. In all the cases studied except that of the FEA, Congressmen characterized their role as limited to reviewing the legality of the agency's rule, that is, its conformity with statutory purpose. Nevertheless, *in all cases congressional review was primarily based on policy*. The reason is not hard to divine: the traditional and constitutional role of a Congress is the formulation and alternation of policy. Moreover, a major reason for imposition of veto authority has been the indecision of Congress on policy issues, and a desire to check the agency's later resolution of them. Members of Congress are unaccustomed, and the institution is ill-equipped, to make a restrained and judicious examination of a rule's subservience to statutory purpose. Yet Congress' profession, despite these institutional realities, to review rules only for conformity with statutory intent has serious implications for the political accountability of the veto process. Review on the putative basis of legality implies that Congress is forming no new policy but is merely making sure that the conditions of the original delegation are met. The result is that veto resolutions receive less public

that *current* political considerations do not play a primary role in that determination.³²² Legislators are *supposed* to make *political* decisions. They live in a political world that involves negotiation and compromise, and acute awareness of constituent demands. They are not in a better position to determine intent than the judiciary. The problem is exacerbated when the legislature delegates intent-determining power to a group of ten of its members.³²³ When the legislature acts as a whole body it is at least reflective of a majority of all the people. When it acts as a group of ten (or even of four since a majority (six) constitutes a quorum)³²⁴ it puts those members in the role of judges. They are not representative of all the people, and are more likely to be subject to the political pressures of their individual constituents.³²⁵ They lack the judicial insulation necessary for dispassionate decisions. Granting the JCAR power to determine whether rules conform with statutory authority and legislative intent is a significant encroachment on the powers of the judiciary.

Perhaps out of concern over problems of constitutional encroachment, changes were made in later versions of the "virus," removing *any* standards for the JCAR to follow when nullifying rules³²⁶ primarily based on policy. Ironically, the new variations may be on more solid constitutional footing, precisely because there are no standards for JCAR action.³²⁷ This remarkable discretionary power probably would not be tolerated if an executive agency was exercising it,³²⁸ and the JCAR should not be permitted to exercise it. The Missouri Supreme Court has asserted that only it has the

visibility and less attention from members of Congress outside the oversight committees than, as policy decisions, they deserve.

Id. (emphasis added) (footnotes omitted).

322. *Id.*

323. See, e.g., MO. REV. STAT. § 536.037 (1986); BONFIELD, *supra* note 18, at 508; Appendix A, Versions II-V.

324. MO. REV. STAT. § 536.037(2) (1986).

325. This point is forcefully made by Frickey, *supra* note 59, at 1262. See also Carl Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 233 (1979):

A major problem with legislative committee veto or suspension of rules is that it lends itself to undemocratic political decision. Only six legislators in Minnesota need to be persuaded and a rule will be suspended. Groups that unsuccessfully opposed the policies embodied in the basic legislation may, therefore, be encouraged to try to turn their defeat into victory by exerting pressure on the legislative review committee to suspend agency rules implementing the legislation.

326. See Appendix A, Versions IIA, IVA-C. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69 (Mo. 1982), was decided in 1982; significant changes were made in the wording when the "legislative intent" and "statutory authority" standards were deleted in 1983.

327. See Appendix A, Version IVB. See Levinson, *supra* note 19, at 101-02. Levinson notes that when a committee is given *temporary* suspension power with specific guidelines for action, it may be more constitutionally sound. *Id.* Missouri however, uses temporary, not permanent, suspension.

328. See MO. REV. STAT. § 536.021 (1986); NEELY & SHINN, *supra* note 16, § 7.23.

power to *declare* the validity of an administrative rule.³²⁹ But this power is assigned to the JCAR in virtually all the Versions. Thus, the changes in legislative veto powers may result in a finding of undue encroachment on judicial functions.³³⁰

When the JCAR nullifies a rule, it may do so because the rule exceeds the scope of authority given to an administrative agency, or the rule is contrary to legislative intent, or the JCAR does not like the rule, or because of constituent concerns.³³¹ There may be other reasons too. There is no recourse for individuals or groups who benefitted from a rule that is subsequently rejected by the JCAR.³³² In contrast, when an administrative agency amends or repeals a rule, statutory procedures have to be followed and judicial review is available.³³³ By *declaring* rules and regulations with the "force and effect of law" invalid, the JCAR acts as a court, whether it works with or without defined standards.

d. Bicameralism and Presentment

The actions of the JCAR also violate the requirements of bicameralism and presentment to the governor.³³⁴ These requirements are designed to allow representatives of *all the people* to participate in the lawmaking process. The requirement that bills be passed through both houses ensures deliberation. The gubernatorial veto provides a check on actions of the legislature. It can only be overridden if two-thirds of the members of the legislature believe the bill should be law.³³⁵ With the JCAR, there is no such joint action. When a rule is nullified, it is nullified by a group of ten. The JCAR's actions, practically speaking, are unchecked by the general assembly and are not subjected to the scrutiny of the governor. Not only are the representatives of the people bypassed, but the veto power of the governor is degraded.³³⁶

Because the original bills granting nullification power to the JCAR were passed by both houses and presented to the governor, it could be argued that

329. See *State Tax Comm'n*, 641 S.W.2d at 75.

330. See Appendix A, Version IIIA. This is the only apparent exception because it contains no provisions for rule- suspension.

331. In a specific instance, it may be possible to discover why action was taken by looking at the transcript of the testimony and the statements of members. But the JCAR is not required by statute (except perhaps in Version IIB) to explain why it acted as it did.

332. Some versions, notably IVC, say: "Any person seeking judicial review of any such rule shall be deemed to have exhausted all administrative review procedures." This clause does not appear to give judicial review to a person aggrieved by JCAR action. Instead it seems to relate to the preceding sentence which refers to rules previously promulgated by the agency and subsequently suspended by the JCAR. This sentence is confusing and ambiguous.

333. MO. REV. STAT. §§ 536.100-.150 (1986).

334. MO. CONST. art. III, §§ 21-33.

335. *Id.* art. III, § 32. See also Isadore Loeb, *Constitutions and Constitutional Conventions in Missouri*, 1 J. MO. CONST. CONVENTION OF 1875, 27-28 (1920). The 1875 Constitution changed the number of votes necessary to overcome a governor's veto from a majority to two-thirds of the legislature. This evinces a distrust of the legislature.

336. See, e.g., *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984).

therefore, the procedures are constitutionally sound. This is a facile argument and simply does not stand up to close scrutiny. Just because the legislature can constitutionally grant "quasi legislative" authority to an agency to make rules under certain conditions,³³⁷ this does not mean it can reserve that same power to itself. As the Alaska court said, "While the legislature can delegate the power to make laws conditionally, *the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by the constitution.*"³³⁸

When another co-equal branch of government is granted power to make rules under certain defined conditions, and to implement a policy of the whole legislature, several protections are in place and the doctrine of separation of powers or checks and balances is not eroded. Power is diffused, not concentrated.³³⁹ The legislature shares its powers with another branch to accomplish societal goals and to respond to complex issues that may require the expertise and time of others besides legislators. Second, the exercise of power is subject to judicial review to ensure that rules conform to statutes and to legislative intent, and are not arbitrary or capricious.³⁴⁰ Third, rules are made or repealed by following procedures designed to involve all those affected. Such procedures are not mandated by the constitution when the legislature acts³⁴¹ or by the statutes granting power to the JCAR when it takes action.³⁴²

337. See *State v. Cushman*, 451 S.W.2d 17, 20 (Mo. 1970). Indeed, Missouri courts seem to recognize that some conditional grants of authority to the executive branch may be unconstitutional. In *State ex rel. Harvey v. Wright*, 158 S.W. 823, 826 (Mo. 1913), the court declared:

In conferring this power of appointment on the Governor, the Legislature had the power to attach such conditions to it and to require such qualifications in those appointed by the Governor as it saw fit, so long as those conditions were not shared by others with the Governor, or thrown upon others, wholly or in part for their determination, and *so long as the qualifications were not so drastically restrictive of the executive volition as to become* for one of these three reasons in conflict with the constitutional provisions requiring the separation and the retaining separate of the three co-ordinate branches of government.

(emphasis added).

338. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 (Alaska 1980) (emphasis added). See also Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1959-60).

339. See *Watson*, *supra* note 9, at 1053-57, 1067.

340. See MO. REV. STAT. §§ 536.100-.150 (1986); see also NEELY & SHINN, *supra* note 16, § 7.23.

341. The only checks on legislative power are set out in the Missouri Constitution (see especially art III, §§ 21-33).

342. All versions appear to give the JCAR discretion to hold hearings when prior approval is required (see III and IV). Some versions (Versions IIB and IVC) may require a hearing when the JCAR acts to suspend a rule while others leave it discretionary (IVB).

Granting power to a subgroup of the legislature to make³⁴³ rules that have the force and effect of law and to repeal them violates the concept of lawful conditions and allows the legislative branch to function in violation of constitutional principles. First, the power given by the legislature to the JCAR is not a diffusion but a concentration of power. Clearly the legislature cannot delegate to a committee the power to pass a bill or to invalidate a prior statute.³⁴⁴ It should not be able to delegate to a legislative committee the power to create or undo rules that have the force of law. To do this would encourage broader and broader grants of rulemaking power to agencies. The legislature, through the JCAR, would exercise more control over executive discretion. The legislature would be able to fill in details in legislation at a later time, under unchecked conditions, instead of specifying these details in the original legislation which would be subject to a gubernatorial veto. Second, as a result of this delegation of power to the JCAR, there is no effective judicial review and, third, there are no procedural protections or methods to ensure public participation.³⁴⁵

Professor Frickey asserted in his analysis of the Minnesota legislative review committee that "when stripped of its veneer, any argument for sustaining a state legislative committee's authority to suspend administrative rules probably must be based on the premise that a strict approach to separation of powers is fundamentally at odds with good public policy."³⁴⁶

An examination of other public policies that favor or disfavor a legislative veto is therefore necessary before any final conclusions can be made about the powers of the JCAR.

B. Policy Arguments For and Against the Legislative Veto

Policy considerations affecting the legislative veto have been hotly debated for years.³⁴⁷ No one seriously disputes the fact that the legislature is the proper lawmaking body. Moreover, the framers of the United States Constitution and most state constitutions did not foresee the growth of administrative agencies and the bureaucratic state.³⁴⁸ Most observers agree that oversight of administrative agencies should be shared by the legislature

343. The JCAR "makes" rules in the sense that it tells agencies what versions of a rule it will or will not accept. If the agency doesn't conform to the committee wishes, the rule may not become effective. See *supra* notes 71-72.

344. MO. CONST. art. III, §§ 21-33.

345. See, e.g., Appendix A, Version IVC.

346. Frickey, *supra* note 59, at 1254.

347. Levinson, *supra* note 9, at 96. See generally articles cited *supra* note 9; see also BONFIELD, *supra* note 18, § 8.3.2.(d), (f); DAVIS, *supra* note 10, §§ 2, 6; SCHWARTZ, *supra* note 18, § 4.19.

348. See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 781 (Alaska 1990) (Boochever, J., dissenting); JCAR REPORT, *supra* note 63, at 1; sources cited *supra* note 347.

and the executive, with assistance from the judiciary.³⁴⁹ How that control is exercised, though, provokes disagreement.

1. Arguments for the Veto

Some of the policies favoring the legislative veto have already been discussed above.³⁵⁰ However, it is useful to summarize the policies and examine their status in Missouri.³⁵¹ The legislative veto:

1. promotes governmental efficiency by not bogging the legislature down in the bill-passage process;
2. assures greater political accountability of the bureaucracy. Elected representatives exercise a check on unelected, overzealous bureaucrats;
3. provides for mediation and compromise between the regulated and regulators;
4. guards against rules being passed that are inconsistent with legislative intent or statutory authorization;
5. provides a faster and more efficient review of rules than the more cumbersome judicial review procedures;
6. ensures greater coordination of policy and rulemaking since all rules are reviewed by the same body; and
7. forces administrators to work in close contact with the legislature to ensure that difficult issues of policy are resolved.

a. Efficiency

One cannot deny that the JCAR protects the legislative process from dealing with most issues of rulemaking. The General Assembly does not have to take any action unless it wishes to overturn its own committee. It is undoubtedly a faster process than the bill-passage process. However, there may also be inefficiencies for government generally. The JCAR may slow down the rulemaking process and may duplicate hearings held by agencies. In that sense, it is not efficient and duplicates other governmental functions even though the General Assembly itself may save time.³⁵² But efficiency is not a hallmark of democracy.³⁵³ A government with separate powers, checks and balances and constitutionally mandated procedures³⁵⁴ that ensure slow deliberative decisionmaking, is not always, or even usually, efficient. Too much efficiency may lead to undemocratic results, concentration of power and tyranny.

349. See sources cited *supra* note 347; see also *Martinez v. Department of Indus. Labor & Human Relations*, 478 N.W.2d 582, 585 (Wis. 1992).

350. See *supra* text accompanying notes 22-27, 212, 313-14, 320-22.

351. This list borrows heavily from BONFIELD, *supra* note 18, §§ 8.1, 8.3. See generally *Restoring the Balance*, *supra* note 20.

352. See, e.g., Appendix A, Version IVB.

353. *Chadha*, 462 U.S. at 944, 959.

354. MO. CONST. art. III, §§ 21-33.

b. Political Accountability

While the promise of political accountability is held forth, in reality it is not achieved. The JCAR consists of ten members of the legislature who do not represent the state as a whole, but only their own individual constituencies. Administrators are responsive, not to the entire elected body, but only to some members of it. Far more political accountability already exists for most agencies because they must report to the governor, who is accountable to the people. The current system mocks the concept of political accountability. Moreover, the assertion, propounded nationally³⁵⁵ and in Missouri,³⁵⁶ that the legislative veto protects citizens from an overzealous bureaucracy is overstated and inaccurate. To the extent that there is tighter control and supervision by the governor over agencies, and there is effective judicial remedies against agency abuse as well as initial legislative control by "tightly written enabling statutes," the risk of abuse by agencies is lowered.³⁵⁷

c. Mediation

It is probably accurate that the JCAR provides a mediative role and makes administrators more responsive to the regulated constituency.³⁵⁸ However, that goal can be accomplished through the original legislation creating the JCAR and giving it "review and recommend authority."³⁵⁹ That authority is probably sufficient since state agencies are likely respond to the legislature because it has the power of the purse.³⁶⁰ Those who serve on the JCAR also tend to be leaders in the appropriations process.³⁶¹ The JCAR has the authority to hold hearings and has done so: It has encouraged executive representatives and regulated constituencies to appear before the committee to work out difference over rules. This procedure is useful and ought to be used when the legislature believes that constituents are not being heard. The JCAR can mediate in this way without exercising veto powers that violate the constitution.³⁶²

355. See, e.g., *Restoring the Balance*, *supra* note 20.

356. JCAR REPORT, *supra* note 63, at 1.

357. Levinson, *supra* note 19, at 131 n.92.

358. JCAR REPORT, *supra* note 63, at 3 ("Compromises were usually worked out, either by pressure or persuasion.").

359. MO. REV. STAT. § 536.037 (1986).

360. JCAR REPORT, *supra* note 63, at 5.

361. Interview with Mary Estes, *supra* note 61. She notes that this has not been the case in recent years.

362. See, e.g., Rhyme, *supra* note 8, at 5-22 (listing a variety of methods used in other states); see also Levinson, *supra* note 19, at 96-112.

d. Determination of Legislative Intent and Statutory Authorization

The JCAR is allowed to decide, as are the courts, whether rules exceed statutory authority or legislative intent.³⁶³ It is also allowed to decide, as no other branch can, whether rules are unwise or should not exist for *any* reason.³⁶⁴ The JCAR can probably effect this task more quickly and inexpensively than the courts. However, the JCAR may not be able to make decisions as dispassionately or as accurately as the judiciary.³⁶⁵ The cost of such encroachment on the functions of the judiciary is an unacceptable and unnecessary disruption in the balance of power. Moreover, implementing a legislative veto without going through the full bill-enacting process allows the JCAR to change *lawful* rules and possibly to change the *original* legislation and violate the *original* legislative intent.³⁶⁶ One author has argued that a legislative committee's use of the legislative veto may result in "a significant *skewing of the original legislative intent* toward the interests of [the Congressmen] on the overseeing committee or subcommittee and the groups and people most responsible for their re-election."³⁶⁷

e. Centralized Review

The JCAR also holds out the structural promise of being the single body to review all administrative rules and to ensure coordination of policies between agencies. In fact, the JCAR has not operated in that fashion. It tends to respond primarily to the complaints of constituents or of regulated groups.³⁶⁸ It can review administrative rules and coordinate policies only if it has a larger staff and has more formalized and regular proceedings. It can also exercise its oversight role under the original legislation³⁶⁹ without exercising rule-nullification powers.

f. Closer Legislative Contact

Legislative veto provisions do encourage closer contact between *some* legislators and administrators. It is certainly possible that administrators gain a better perspective on policy-implementation strategies and that they can resolve complex issues more in accord with legislative intent.³⁷⁰ These are important goals, but they are goals which can be achieved within the existing constitutional framework and under the original legislation creating the JCAR.

363. See Appendix A, Version III.

364. See Appendix A, Versions IVB, C.

365. See also *supra* notes 322, 325.

366. Frickey, *supra* note 59, at 1262-63.

367. Brubaker, *supra* note 9, at 92. See also Auerbach, *supra* note 325.

368. Interview with Mary Estes, *supra* note 61. She indicates that hearings are held only when concerns or complaints arise, regardless of the source.

369. MO. REV. STAT. § 536.037(2) (1986) ("The committee *shall* review all rules promulgated by any agency") (emphasis added).

370. See, e.g., Bruff & Gellhorn, *supra* note 9, at 1409-13.

More time may be consumed, but the constitutions were not designed with efficiency in mind.³⁷¹ The fact that legislative control of the bureaucracy is desirable is simply not enough to justify a departure from existing methods that are constitutionally permissible.³⁷²

2. Arguments Against the Veto

Moreover, there are significant additional policy reasons that support rejection of a legislative veto, particularly where the power is concentrated in a committee of the general assembly. These reasons include:³⁷³ (1) Participation in the agency rulemaking process by regulated groups may *decrease* because those regulated may feel their efforts should concentrate on the legislative body; (2) Agencies may become confused because they are not given guidance from the legislative committee and the result may be that no policy is formed; (3) Over time the legislature would tend to give overbroad delegations of power to an agency because of reliance on the legislative veto to reject rules believed undesirable (with the net effect that less and less guidance would be given to agencies); (4) There would be some effect on judicial review of agency rules because a presumption of validity would be created where the legislature had failed to reject a challenged rule; (5) Rules might be based on information provided by or contacts with legislators, rather than on information from the usual notice and comment process; (6) The small number of legislators on the committee may be able to subvert the will of the whole legislature by rejecting lawful rules; (7) The legislature as a whole may give less oversight to agency rulemaking by depending too much on the review committee; (8) Stalemates may develop between legislatures and agencies; (9) Agencies would be forced to consider ad hoc adjudication rather than rulemaking to escape legislative review of their actions. Virtually all scholars believe that rulemaking is preferable to adjudication as it is more likely to provide guidance to affected parties.³⁷⁴

These policy arguments have usually been addressed more by scholars than by the courts, but they are factors that should be weighed in the overall process of deciding whether the reasons for the legislative veto outweigh even liberal constitutional interpretation.³⁷⁵ Moreover, some scholars have argued that administrative agencies "[m]ay be the only institutions capable of fulfilling the civic republican ideal of deliberative decisionmaking."³⁷⁶

371. *Chadha*, 462 U.S. at 944.

372. *See, e.g., Frickey, supra* note 59, at 1254.

373. This list borrows heavily from BONFIELD, *supra* note 18, §§ 8.1 & 8.3. *See also* Bruff & Gellhorn, *supra* note 9, at 1378-81.

374. DAVIS, *supra* note 10, at § 6.1.

375. *See* Frickey, *supra* note 59, at 1254.

376. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1541 (1992). He notes that administrators "fall between the extremes of the politically over-responsive Congress and the over-insulated courts." *Id.* at 1542. *See also* Jerry L. Mashaw, *Pro Delegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 99 (1985).

Perhaps agencies are in a better position to make reasoned decisions about implementation than legislatures.

There is, however, another consideration explored below, that makes Missouri somewhat unique among the states, and provides an additional reason to find the legislative veto—in whatever version it exists—unconstitutional.

C. *Voter Rejection of Constitutional Amendments Allowing Legislative Veto*

In his excellent review of the various state models for legislative vetoes, Professor Levinson posed the following hypothetical:

Assume that after the electorate of a state has rejected a proposed constitutional amendment that [would have] authorized a one-house or a two-house veto, the legislature enacts a statute creating the very type of system that would have been rejected in the referendum. Assume further that the state has no judicial precedent on point. In litigation challenging the statute, should the state courts hold it unconstitutional on the grounds that it is contrary to the outcome of the referendum?³⁷⁷

He suggests that because courts are bound by an amendment adopted by the people, equal deference should be given to a vote which rejects a proposed constitutional amendment.³⁷⁸ He notes three objections which might be raised to the use of public opinion to interpret the constitution and he concludes that the only relevant objection is that ascertaining public opinion is difficult.³⁷⁹ Where a vote is negative, it may be difficult to determine *why* the constitutional amendment was defeated. Possibly, people may have believed that the constitutional amendment was unnecessary because the legislature already had the power involved in the amendment, or people may have wanted to retain flexibility in the constitution.³⁸⁰ Even if the court doesn't consider itself bound by the results, the vote would seem to be a persuasive factor to be considered because it reflects a "significant statement of public policy."³⁸¹ At the time of Levinson's writing, Missouri and three other states had rejected constitutional amendments allowing the legislative veto.³⁸² In his view, these referenda have "strong persuasive effect."³⁸³

377. Levinson, *supra* note 19, at 116. See also J.E. Macy, Annotation, *Power of Legislative Body To Amend, Repeal, or Abrogate Initiative or Referendum Measure, or to Enact Measure Defeated on Referendum*, 33 A.L.R. 2D 1118 (1954).

378. Levinson, *supra* note 19, at 116.

379. *Id.* at 116-17. The other objections are (1) that the majority may be affecting the rights of a minority, and (2) that the voters may be reflecting their own self-interest rather than their philosophy of government. *Id.* He asserts that neither of these are usually present when a legislative veto is involved. *Id.*

380. *Id.* at 118.

381. *Id.*

382. *Id.* at 90 (Alaska, Florida, Texas).

383. *Id.* at 118.

Missourians have twice rejected proposals for legislative vetoes.³⁸⁴

384. The 1976 amendment provided as follows:

Section 1. Section 8, article IV, constitution of Missouri, is repealed and one new section adopted in lieu thereof, to be known as section 8, to read as follows:

Section 8. Administrative rules and regulations other than those which affect only the internal operation of the agency adopting them and other than those promulgated under authority granted by the constitution may be rescinded by concurrent resolution of both houses which shall be effective immediately upon the adoption of such resolution without presentation to the governor. Every other resolution to which the concurrence of the senate and house of representatives may be necessary, except on questions of adjournment, going into joint session, and of amending this constitution, shall be presented to the governor, and before the same shall take effect, shall be proceeded upon in the same manner as in the case of a bill; provided, that no resolution shall have the effect to repeal, extend, or amend any law except as otherwise authorized under the provisions of this section.

The 1982 amendment provided as follows:

Section 1. Article IV, Constitution of Missouri, is amended by adding the following sections, to read as follows:

Section 54. The general assembly may, by a separate resolution of either house, concurred in by the other, invalidate any state agency regulation. Such resolutions shall not be submitted to the governor. Any regulation invalidated by the general assembly shall ten days thereafter have no force or effect, nor shall any regulation having the same general effect be thereafter promulgated unless legislative authority to promulgate such rules is delegated by future statutes. When the general assembly invalidates a state agency regulation, it shall immediately file a notice of such action with the state agency which promulgated the regulation and with the office of the secretary of state.

Section 55. As used in this article, the term "state agency" shall include every state office, officer, department, division, bureau, board, and commission, whether created by constitution, statute, or initiative, but shall not include the courts, any agency in the judicial or legislative branch of state government, the Missouri national guard, the state bar, the University of Missouri system, and the Missouri state university and college systems.

As used in this article, the term "regulation" includes every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency. "Regulation" does not mean or include any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to applicable law when one is needed to implement the law under which the form is issued.

Section 56. No member of the public shall be denied a legal right or privilege by any state agency order, opinion, statement of policy, or staff manual or instruction unless the same was duly promulgated as a regulation in accordance with applicable law. Nothing in this subdivision shall be construed to require a state agency to promulgate regulations in order to implement a decision reached as a result of an administrative adjudicatory proceeding.

While it may not be possible to know why the voters rejected each amendment, we do know what they were told by the press.

In 1976, both major papers in St. Louis, the now defunct *St. Louis Globe-Democrat* (generally considered a conservative newspaper) and the *St. Louis Post-Dispatch* (generally considered more liberal) urged rejection of the proposed amendment. The *Post* declared that "the legislature already possesse[d] an adequate check on the rulemaking power," referring to the bill passage process.³⁸⁵ The *Globe* used even stronger language, declaring that the proposed amendment was "a transparent power grab by state legislators seeking to undermine legitimate powers of the executive branch."³⁸⁶ The *Globe* noted that the bill would bypass the governor because it allowed a two-house concurrent resolution without presentment to the chief executive.³⁸⁷ The editorial asserted that administrative agencies "would be easy prey for meddlesome legislators who wanted to rewrite rules and regulations to please some interested party."³⁸⁸ Therefore, the people, at least in some areas of the state, were exposed to political philosophy and the constitutional issues of separation of power.

After the defeat of the 1976 constitutional amendment, the legislature assigned greater powers to the JCAR in some bills.³⁸⁹ In 1978, then Governor Joseph P. Teasdale vetoed a measure that would have given the JCAR power to rescind rules without further legislative action.³⁹⁰ However,

The power of a court to invalidate a regulation shall not be altered or barred by a refusal of the general assembly to invalidate that regulation.

The procedure adopted by this article allowing the general assembly to invalidate regulations shall not be considered an exhaustible administrative remedy.

Section 58. The provisions of section 54, 55, 56, and the second paragraph of section 57 of this article shall apply to regulations in effect at the time this article become effective.

The popular vote in 1976 was 318,567 for, 690,114 against. The vote in 1982 was 497,341 for, 792,329 against.

385. *Poor Amendment*, ST. LOUIS POST-DISPATCH, July 11, 1976, at F2.

386. *Reject State Power Grab*, ST. LOUIS GLOBE-DEMOCRAT, July 29, 1976, at 16A.

387. *Id.*

388. *Id.* This fear of the legislature has been a continuing theme in Missouri politics. For example, there were attempts in the 1875 constitutional convention to change the rule of interpretation of the powers of the general assembly from one of limitation to only those granted to it. See Loeb, *supra* note 335, at 28. Professor Loeb notes that the history of most amendments to the Missouri constitution reveals a tendency to limit the power of the legislature. *Id.* at 27-37.

389. See Appendix A, Version I.

390. The 79th General Assembly passed HCSHB No. 939 and No. 1350 which were vetoed. In his veto message of April 4, 1978, the governor outlined a detailed list of objections to the bill. The bill would: (1) place excessive power in the JCAR; (2) provide no standards for JCAR rule-suspension; (3) engender potential conflict because the JCAR could thwart *legislative* intent; (4) delay or deny essential information to the public; (5) duplicate hearings held under chapter 536 and (6) give the committee rulemaking authority in violation of article IV § 16. Further, the governor argued that (7) adequate safeguards already existed to protect the public and that (8) other bills giving judicial review to the AHC were more appropriate. He concluded by

the legislature, thwarted in its attempts to grant power directly to the JCAR as a part of its enabling legislation, began assigning powers to the JCAR by incorporating these powers in other legislation.³⁹¹ These actions by the General Assembly reflected the rising national interest of many state legislatures in the legislative veto.³⁹²

In 1982, the legislature once again proposed another constitutional amendment.³⁹³ This amendment also provided for veto by a concurrent resolution passed by both houses, but not for presentment to the governor.³⁹⁴ It did exempt certain agencies from rule review, including the courts, the state university system, the national guard and the Missouri Bar.³⁹⁵ These exemptions were apparently inserted to make the proposal more palatable to certain groups that had previously opposed it. An organization that supported the proposal, People Against Rules and Regulations Without Representation (PARR), declared that the amendment would make state government more responsive and that no one, including the governor, had control over some agencies.³⁹⁶ Then Governor Christopher "Kit" Bond, various agency heads, and a few citizen commission members countered with arguments that the legislature had the power to overturn any rule or regulation by using the lawmaking process, and that the amendment would "upset the fundamental separation and balance of power which had existed in Missouri since [its] admission to the Union."³⁹⁷ Editorials called for rejection of the amendment.³⁹⁸ The Missouri Conservation Commission, several wildlife groups, and Common Cause in Missouri filed suit opposing the amendment.³⁹⁹

Thus, for both amendments, some voters were at least apprised of arguments relating to constitutional separation of powers issues and excessive legislative involvement in the executive function of rulemaking. The votes were decisively negative.⁴⁰⁰ Moreover, the vote indicates more than just general "anti-anything" attitudes of the populace, because several other amendments on the ballot passed each time.⁴⁰¹

saying that "separation of powers . . . must be respected." HOUSE J., GENERAL ASSEMBLY OF 1978, Vol. II, 1523-25 (1978). It is interesting to note that the last procedure noted [(8) above] has been declared unconstitutional. See *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. 1982).

391. See Appendix A, Version II.

392. See, e.g., *Restoring the Balance*, *supra* note 20; Falk, *supra* note 20, at 292.

393. See *supra* note 384.

394. See *supra* note 384.

395. See *supra* note 384.

396. Robert Goodrich, *Amendment 2: Legislators vs. Bureaucrats*, ST. LOUIS POST-DISPATCH, Oct. 20, 1982, at 15A.

397. *Id.*

398. See, e.g., *And 13 Missouri Ballot Issues*, ST. LOUIS POST-DISPATCH, Nov. 1, 1982, at 14A; *And No On Amendment 2*, ST. LOUIS POST-DISPATCH, Oct. 12, 1982, at 8A.

399. Terry Ganey, *Amendment 2 Called Threat to State Agencies*, ST. LOUIS POST-DISPATCH, Oct. 20, 1982, § 1, at 42.

400. See *supra* note 384.

401. In 1976 four of seven amendments passed. In 1982 eight of thirteen amendments

No Missouri case specifically addresses the weight to be accorded to a *negative* vote by the people on a constitutional amendment. There are cases that suggest that the legislature has the power to repeal a law adopted by voters in an initiative proceeding.⁴⁰² But these cases simply recognize that the people and the general assembly appear to be constitutional equals in the law-making process.⁴⁰³ They do not provide support for the view that the legislature can amend the constitution without a vote of the people.⁴⁰⁴

Missouri courts have attached importance to the intent of voters when interpreting the constitution and amendments to it.⁴⁰⁵ In *Barnes v. Bailey*,⁴⁰⁶ the court declared that "[t]he fundamental rule of constitutional construction is that courts must give effect to the intent of the people in adopting the amendment."⁴⁰⁷ The intent is primarily gleaned from the plain meaning of the words in the statute and "[s]tatements and representations made before a vote on a proposition are not conclusive upon the courts."⁴⁰⁸ However, the courts will not construe the "constitutional provision in such a way as to thwart the voters' purpose."⁴⁰⁹ These cases suggest intent is important and should be accorded some weight.

Therefore, intent should be equally important when the voters reject an amendment. First, by examining the plain meaning of the words in the rejected amendments, it is clear the voters did not want the general assembly, acting as a whole through the mechanism of a concurrent resolution not presented to the governor, to reject administrative rules. The constitutional invalidity of JCAR powers becomes more compelling if one accepts the premise that because the voters did not intend for the *whole* legislature to exercise a veto by concurrent resolution, they certainly did not intend for a *committee* of the legislature to exercise the veto. Second, significant weight should be given to voter-intent when the general assembly, shortly after voters have rejected its proposed constitutional amendment, acts to implement a statutory scheme that achieves a result that has been rejected by its constituents. The general assembly, by presenting both amendments to the people for a vote seemed to recognize that it was necessary to receive voter approval before it could use a two-house concurrent resolution veto system. Twice the

passed.

402. See *City of St. Louis v. Cavanaugh*, 207 S.W.2d 449, 454 (Mo. 1948) (same as between a city and its citizens); *State ex rel. Halliburton v. Roach*, 130 S.W. 689, 694 (Mo. 1910).

403. *Halliburton*, 130 S.W. at 694.

404. Indeed the constitution provides the only methods of amendment. MO. CONST. art. III, §§ 49-50, art. XII, §§ 1-3. See also *Halliburton*, 130 S.W. at 694.

405. See, e.g., *Tichenor v. Missouri State Lottery Comm'n*, 742 S.W.2d 170, 173 (Mo. 1988); *Household Fin. Corp. v. Shaffner*, 203 S.W.2d 734, 737 (Mo. 1947).

406. 706 S.W.2d 25 (Mo. 1986).

407. *Id.* at 28.

408. *Missourians For Honest Elections v. Missouri Elections Comm'n*, 536 S.W.2d 766, 775 (Mo. Ct. App. 1976).

409. *Tichenor*, 742 S.W.2d at 173.

voters rejected those proposals.⁴¹⁰ The fact that amendments were submitted to the people demonstrates some recognition by the general assembly that absent constitutional change it had no power to reject agency rules and regulations except through the bill enactment process.⁴¹¹ As Professor Levinson noted, "In rejecting the proposed constitutional amendments, the people of these states express their disagreement with the respective legislatures that had recommended adopting the amendments."⁴¹²

Levinson also suggests that passage of time is a significant factor to consider in the weight to be given to voter action.⁴¹³ The more distant in time the vote, the less weight to be accorded to it. The time factor is unimportant in Missouri, as both rejections are recent. Moreover, any importance to be attached to the time factor should be outweighed by the legislative disregard for public sentiment. Missouri courts should recognize that the people have spoken decisively, not once, but twice, on the legislative veto.

Apparently unwilling to accept a vote of the people denying the veto power, and perhaps with a careful eye on the *Chadha* decision, the general assembly, at the behest of the JCAR,⁴¹⁴ "mutated" the "virus" again. A requirement that rules receive prior approval⁴¹⁵ was coupled with the removal of any standards for JCAR approval or rejection of rules; and a non-severability "poison pill" provision was added.⁴¹⁶ The latter change raised the stakes for contesting the powers of the JCAR. For even if the court should find the grants of power to the JCAR unconstitutional, it faces a formidable problem with the non-severability clause.

D. *Overcoming the Problem of Non-severability*

Two variations of the non-severability clause have been used. The first variation states that

the provisions of this [act, section, chapter] are nonseverable and the grant of rulemaking authority is essentially dependent on the review power vested with the joint committee on administrative rules. If the review power is held unconstitutional or invalid, the grant of rulemaking shall also be invalid or void.⁴¹⁷

The second variation is even more insidious for it provides that

410. *See supra* note 384.

411. *See infra* note 446.

412. Levinson, *supra* note 19, at 90.

413. *Id.* at 118.

414. JCAR REPORT, *supra* note 63, app. 1 at 5 (the JCAR met on October 31, 1983, *less than a year after voter rejection*, to propose new wording to be added to legislation).

415. *See* Appendix A, Version IVB.

416. Appendix A, Version IVB.

417. Appendix A, Version IVB.

*notwithstanding the provisions of section 1.140, RSMo, the provisions of this [act, section, chapter] are non-severable and the grant of rulemaking authority is essentially dependent on the review power vested with the committee. If the review power is held unconstitutional or invalid, the grant of rulemaking authority and any rule promulgated under any such rulemaking authority shall also be invalid or void.*⁴¹⁸

The second provision differs from the first only where the language has been italicized. A successful challenge to JCAR power could possibly mean that literally dozens of rules would be in jeopardy if the non-severability clause were upheld.

Professor Frickey notes that, at the federal level, the problem has been to determine whether the legislative veto provisions in a statute can be severed in such a way that the remaining portions of the statutes could be upheld.⁴¹⁹ Federal courts have had to determine, first, whether the portion of the statute that remains can stand by itself absent the veto, and second, whether Congress would have enacted the legislation without the legislative veto provisions.⁴²⁰ A very different situation exists in Missouri. Statutes specifically provide for a general presumption of severability.⁴²¹ However, the more recent variation of the non-severability clause specifically refers to the general statutory presumption and indicates that it is to be ignored.⁴²²

In a series of cases, the court has provided that the test for severability requires the following inquiry: When the invalid portions of a statute are excised, are the remaining provisions capable of constitutional enforcement *and* would the legislature have effected the statute in the same way had it known that the excised part would be held invalid?⁴²³ Accordingly, if the court declared the legislative veto powers of the JCAR invalid, and upheld the non-severability clause, then the Court would have to analyze each statute's particular grant of rulemaking power to an agency to determine how far the

418. Appendix A, Version IVC (emphasis added).

419. Frickey, *supra* note 59, at 1261.

420. *Id.*

421. MO. REV. STAT. § 1.140 (1986) states:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions standing alone are incomplete and are incapable of being executed in accordance with the legislative intent.

422. See Appendix A, Version IVC ("notwithstanding the provisions of 1.140 MO. REV. STAT. the provisions of [this act, section, chapter] are nonseverable . . .").

423. See *State ex rel. Bunker Resource Recycling & Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 389 (Mo. 1990) (en banc); *Labor's Educ. & Political Club-Indep. v. Danforth*, 561 S.W. 2d 339, 350 (Mo. 1977) (en banc); *State ex rel. Enright v. Connett*, 475 S.W.2d 78, 81 (Mo. 1972) (en banc); *State ex rel. Audrain County v. Hackmann*, 205 S.W. 12, 14 (Mo. 1918) (en banc); *State ex rel. Harvey v. Wright*, 158 S.W. 823, 826 (Mo. 1913).

remainder of the statute could be enforced. However, some statutes seem to indicate that not just the rulemaking power, but all the substantive provisions of the act, are tied to the validity of the non-severability clause.⁴²⁴ Such a statute by statute analysis is ultimately unsatisfactory. First, the non-severability clause should not be enforced due to constitutional and statutory infirmities.⁴²⁵ Second, its enforcement creates uncertainty as to the validity of prior rules under Version IVB,⁴²⁶ and could have dire consequences if all rules were voided under Version IVC,⁴²⁷ and could be even more destructive if entire acts had to be voided.

The court should not uphold the non-severability clauses in either form. First, the court should adopt the reasoning of the Kentucky Supreme Court in *Brown*. There, the court declared that "the adoption and use of administrative regulations are important tools in the operation of modern government at all levels. The purpose is to enable a governor to successfully carry out the constitutionally-mandated executive and administrative duties bestowed upon that office."⁴²⁸

In Kentucky, the executive is charged by the constitution to see that the "laws be faithfully executed."⁴²⁹ The *Brown* court noted that the non-severability clause

not only impliedly reorganizes the executive duties of the Governor, but also attempts to usurp these powers. Having failed at the first part, it further attempts to restrict the ability of the Governor to carry out his sworn duties The restriction placed on the executive by [the statute] effectively and unconstitutionally limits and interferes with the governor's mandated duties.⁴³⁰

If the Missouri court determines that the legislative veto power of the JCAR is unconstitutional, it could easily sever that grant of power from the remainder of the statute. *All* of the statutes containing grants of power to the JCAR are capable of standing alone because the excised non-severability clause would not affect the substance or the operation of the act in any way. The remaining valid provisions are not "incomplete and . . . incapable of being executed in accordance with the legislative intent."⁴³¹

However, there are additional reasons to excise the non-severability clause. Part of a court's determination focuses on whether the general assembly would have passed the remaining portion of the statute had it

424. See, e.g., MO. REV. STAT. § 444.380(2) (Supp. 1991).

425. See *infra* text accompanying notes 428-31.

426. But see *Gary v. United States*, 499 A.2d 815, 830-33 (D.C. 1985) (the court allowed congressional actions taken before the veto was found unconstitutional to stand).

427. See *infra* text accompanying notes 447-50.

428. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984).

429. *Id.* The Missouri provision is MO CONST. art IV, § 2. ("The governor shall take care that the laws are distributed and faithfully executed . . .").

430. *Brown*, 664 S.W.2d at 920.

431. MO. REV. STAT. § 1.140 (1986).

"known that the excised portions [would be held] invalid."⁴³² To contend that the general assembly did not intend its grant of rulemaking authority to be conditioned on the power of the JCAR to review those rules would contradict the meaning of the words in the statute, although there is some indication that the veto provisions are now "boilerplate" additions to virtually every bill granting rulemaking authority.⁴³³ But the court should not be inexorably bound by that intent *when it is unconstitutional*. The legislature has the power to grant or not to grant rulemaking authority to the executive branch, but it should not be allowed to condition that grant on an unconstitutional condition.⁴³⁴ The legislature should not be permitted to do indirectly what it may not do directly.⁴³⁵ If the court finds the grant of veto power to the JCAR unconstitutional, then it should also find the non-severability clause unconstitutional, because this clause is a condition based on an unconstitutional grant of power. Moreover, declaring the non-severability clause unconstitutional frustrates only the legislature's *subsidiary* policy of controlling the executive—constitutionally improper policy.⁴³⁶

There are other, more technical, arguments that might be made to overcome the non-severability clause. There are ambiguities in the non-severability language. One sentence says that the grant of rulemaking authority is *essentially* dependent on the review power, but the second sentence declares that if the review power is "held unconstitutional or invalid" the rulemaking authority "shall also be invalid or void."⁴³⁷ There is some conflict between those two sentences. Missouri courts, in interpreting statutory language where "substantially" is used, have said that word is synonymous with "practically," "nearly," "almost," "*essentially*" and "virtually."⁴³⁸ Thus by "*essentially*" the general assembly may have meant that the rulemaking power is "substantially" but not *totally* or *completely* dependent on JCAR review. In fact, the legislature has in one instance adopted language where the word "essentially" has been replaced by the word "totally," declaring that "the grant of rulemaking authority is *totally* dependent on the power vested with the [JCAR]."⁴³⁹ The use of *essentially* creates an

432. *Millsap v. Quinn*, 785 S.W.2d 82, 85 (Mo. 1990) (en banc); *State ex rel. Audrain Co. v. Hackmann*, 205 S.W. 12, 14 (Mo. 1918) (en banc).

433. See, e.g., Appendix A, Version IVC (disclaiming the presumption of severability); see JCAR REPORT, *supra* note 63, at 5 (concerning use of "boilerplate" language).

434. See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 (Alaska 1980); *Synder & Ireland*, *supra* note 73, at 225 n.310; Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1959-60); see also *supra* note 337.

435. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986); *INS v. Chadha*, 462 U.S. 919, 958 (1983).

436. See, e.g., Note, *Severability of Legislative Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182, 1196 (1984).

437. See Appendix A, Versions IVB, IVC.

438. *St. Louis-Southwestern Ry. v. Cooper*, 496 S.W.2d 836, 842 (Mo. 1973); *Continental Tel. Co. v. Bouse*, 580 S.W.2d 759, 762 (Mo. Ct. App. 1979).

439. MO. REV. STAT. § 444.380 (Supp. 1991) (enacted in 1989) (emphasis added). See also Appendix A, Version VC.

opportunity for the court to find that reasons may exist for not enforcing the clause—such as the unconstitutionality of the veto powers. However, the use of the word "shall" in the next sentence removes most doubts raised by the word "essentially."⁴⁴⁰ The cases clearly indicate that "shall" is mandatory and not directory.⁴⁴¹ Nonetheless, an ambiguity is created that requires the court to look closely at the language to determine the intent of the legislature.⁴⁴²

Another more blatant ambiguity is created by the words "dependent on the review power vested with the [JCAR]"⁴⁴³ While it may be logical to assume that the words "review power" relate to the powers (i.e., prior approval, suspension) granted to the JCAR in the sentences immediately preceding, the word "review" is *never used* in those prior sentences. The only place where "review" is used in the statutes with reference to the JCAR is in § 536.037, the original grant of "review" authority to the JCAR.⁴⁴⁴ Therefore, that clause is susceptible to the interpretation that if the veto powers of the JCAR are unconstitutional and excised from the statute, but the non-severability clause is held valid, the rulemaking authority granted to the agency also remains valid since the "review power" makes reference to § 536.037 and not the veto powers set out in the specific statute. This interpretation would allow the court to uphold the non-severability clause but blunt its devastating effect. The interpretation is not so strained as it might seem. First, it allows the court to adhere to doctrines of statutory interpretation that favor a finding of constitutionality when the legislature acts.⁴⁴⁵ Second, it interprets the *intent* of the legislature in a manner that makes it constitutional. Third, this interpretation gives effect to the plain words of the statute, in light of its ambiguous and conflicting wording. Finally, it avoids the skepticism engendered by the fact that a reasonable legislature could hardly view the constitutionally dubious legislative veto and non-severability clause provisions as the *sine qua non* of the act, or the grant of rulemaking power.⁴⁴⁶

440. See Appendix A, Version IVB, C.

441. See, e.g., *State ex rel. Dreer v. Public Sch. Retirement Sys.*, 519 S.W.2d 290, 296 (Mo. 1975); *State ex rel. Hopkins v. Stemmons*, 302 S.W.2d 51, 54 (Mo. Ct. App. 1957).

442. See, e.g., *Kieffer v. Kieffer*, 590 S.W.2d 915, 918 (Mo. 1979) (en banc) ("it is proper to consider the 'words' used in their plain and ordinary meaning in an effort to ascertain the true intent of the General Assembly.").

443. Appendix A, Versions IVB, IVC (emphasis added).

444. MO. REV. STAT. § 536.037(3), (4) (1986).

445. *Danforth ex rel. Farmer's Elec. Coop., Inc. v. State Envtl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. 1975) (en banc) ("An act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision.").

446. Voters have rejected two proposed constitutional amendments by the general assembly. The governor has also vetoed at least one bill granting powers directly to the JCAR. Moreover, the general assembly is aware of the constitutional problems, and of court decisions both at the national level and in several states, virtually all uniformly against the veto. Further, the general assembly's own *JCAR Report* in 1986 recommended that the general assembly give "serious consideration to one or more of the following:" (1) constitutional amendment; (2) veto by statute,

There are very real practical problems if the non-severability clause is not invalidated or blunted. The following scenario is likely to unfold. First, dozens of agencies suddenly without rulemaking power would lobby for that power and the legislature could find it necessary to review each piece of legislation to redetermine if rulemaking power really was intended for that agency. This would be a time-consuming and onerous task. In some cases, failure of the current legislature to act might gut an agency's ability to handle a problem assigned to it by a former legislature, one that might have intended rulemaking power. Second, while the problem would be minimized in those instances where rulemaking authority was granted, but where the agency believed no rules were necessary for implementation, other agencies issuing rules under some versions could face sudden invalidation of their rules.⁴⁴⁷ The prospect of rules becoming instantly void would wreak havoc on the bureaucratic regulatory system. Individuals, groups, and businesses are likely to have expended substantial time and money to implement or comply with those rules. In other situations, where rules are mandated by federal law for various aid programs, there would be the potential loss of millions of dollars. In some cases, not just rulemaking but entire pieces of legislation would be at risk.⁴⁴⁸ While arguments of equitable estoppel⁴⁴⁹ and fundamental fair play might not carry the day, they are considerations that should not be overlooked. At a minimum, if the court believes it is bound to uphold the non-severability clause, it should fashion its remedy to allow all existing rules to stand and allow its ruling to be effected only prospectively.⁴⁵⁰

V. CONCLUSION

Missouri is unique and stands alone among the states in so far as it grants breathtaking powers to the JCAR. These powers are more extensive than those allowed legislative committees and even entire legislatures in other jurisdictions.⁴⁵¹ JCAR power has broadened from simple "review and recommend" authority to standardless, unchecked control over most existing and proposed administrative rules. The various "mutations" of this constitutional "virus" have so infected the statutes and strained the constitutional balance of power that they must be judicially eradicated. With the *Mead* exception, every jurisdiction called upon to determine the constitutionality of the legislative veto has found it to be a violation of (1) the bicameralism and presentment clauses of the respective constitutions; (2) the separation of

and (3) an executive rule-making agency to oversee all rule making. JCAR REPORT, *supra* note 63, at 6.

447. See Appendix A, Version IVC.

448. See *supra* note 447.

449. See generally Kenneth D. Dean, *Equitable Estoppel Against the Government: The Missouri Experience—Time to Rethink the Concept*, 37 ST. LOUIS U. L.J. 63 (1992).

450. See, e.g., Gary v. United States, 499 A.2d 815, 832 (D.C. 1985); Commonwealth v. Kuphal, 500 A.2d 1205, 1219-20 (Pa. Super. Ct. 1985) (Spaeth, J., dissenting).

451. Connecticut is a rare exception, but its committee is *constitutionally* authorized. See *supra* note 178; see also Levinson, *supra* note 19, at 86-105, 122; Rhyme, *supra* note 8, at 6.

powers doctrine (because the legislative veto unduly encroaches on the powers of the executive, the judiciary, or both, regardless of whether the separation of powers doctrine is explicitly or implicitly stated in the constitution); (3) the nondelegation doctrine, (because the legislative veto provision represents improper delegation of legislative power to a legislative body); or (4) some combination of the above. Constitutional history and constitutional interpretation in Missouri is not substantially different from constitutional doctrine in other jurisdictions. The experiences of other states and the analyses applied in legislative veto cases in other states are relevant for Missouri. Most cases in other states have dealt with powers exercised by one house or by the whole legislature. Missouri's legislative veto provisions are especially likely to be declared unconstitutional because they involve powers exercised by a committee. The provisions fail under one or more of the constitutional analyses enumerated above, and additionally flaunt the will of the voters.

The Missouri General Assembly is not without mechanisms to help it achieve most of the policy goals of supervising a growing bureaucracy. The original powers granted to the JCAR, giving it "review and recommend" authority, are adequate to make the bureaucracy more responsive, and when agencies are uncooperative, the legislature can pass bills to control actions or rules it believes to be unwise.

At some point the right case will arise challenging the powers of the JCAR. It should come as no surprise to anyone when those powers are ruled unconstitutional.

Appendix A

VERSIONS OF THE POWERS OF THE COMMITTEE ON ADMINISTRATIVE RULES (JCAR)

Several different versions of legislative veto powers granted to the JCAR are set out below. For each version, or variation of the version, the typical language of the version is given. This is followed by a list of statutes in which the language or analogous language can be found. On occasion, commentary follows, explaining how one version or variation differs from another.

I. VERSION I - COMPLAINT WITH THE ADMINISTRATIVE HEARING COMMISSION

A. Typical Language:

The Committee on Administrative Rules may file a complaint before the Administrative Hearing Commission contesting the validity of any rule purportedly promulgated. The Administrative Hearing Commission shall immediately suspend that portion of the rule which is challenged until the Commission has determined the matter. The Commission shall hold a hearing within 10 days of the filing to determine the matter.

Section containing this language:

§ 344.070 - (enacted 1969; amended 1979) (Nursing Home Administrators).

B. Typical Language:

The Committee on Administrative Rules may file a complaint before the Administrative Hearing Commission contesting the validity of any rule purportedly promulgated. The Administrative Hearing Commission shall immediately suspend that portion of the rule which is challenged until the Commission has determined the matter *unless the issuing Authority, within 3 working days after the receipt of the complaint, files an affidavit with the Commission stating that the suspension of the rule would terminate entitlement to Federal funds being received by the state or any political subdivision thereof at the time the rule was published.*

*The author wishes particularly to thank Beverly Baughman, class of 1992, for her research assistance on this Appendix.

Sections containing this language:

§ 198.009 - (enacted 1979) (Convalescent, Nursing and Boarding Homes).

§ 630.050 - (enacted 1980) (Department of Mental Health).

Commentary

This Version differs from Version IA as shown by the italicized language. Both Versions appear to be invalidated by State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo. 1982) (en banc).

II. VERSION II - SUSPENSION

A. Typical Language:

Any rule or portion of a rule promulgated may be suspended by the committee on administrative rules until such time as the general assembly may by concurrent resolution reinstate such rule.

Sections containing this language:

§ 173.612 - (enacted 1983; amended 1991) (Department of Higher Education).

§ 191.315 - (enacted 1985) (Health and Welfare).

§ 196.540 - (enacted 1981) (Food and Drugs).

§ 266.091 - (enacted 1951; amended 1957, 1978, 1979) (Seeds, Fertilizers and Feeds).

§ 301.064 - (enacted 1979; amended 1986) (Registration and Licensing of Motor Vehicles).

§ 660.130 - (enacted 1979; amended 1980) (Department of Social Services).

B. Typical Language:

Any rule or portion of a rule promulgated pursuant to this chapter may be suspended by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor.

Sections containing this language:

- § 8.710 - (enacted 1981) (State Buildings and Lands).
- § 36.070 - (enacted 1945; amended 1979) (State Personnel Law (Merit System)).
- § 115.011 - (enacted 1977; amended 1981) (Election Authorities and Conduct of Elections).
- § 116.130 - (enacted 1980; amended 1988) (Initiative and Referendum).
- § 135.150 - (enacted 1980; amended 1986, 1991) (Tax Relief).
- § 135.250 - (enacted 1982; amended 1985, 1986, 1989, 1991) (Tax Relief).
- § 143.787 - (enacted 1982) (Income Tax Credits and Refunds).
- § 144.010 - (enacted 1939; amended 1941, 1943, 1945, 1947, 1974, 1975, 1977, 1978, 1979, 1981, 1985, 1988) (Sales And Use Tax).
- § 147.120 - (enacted 1943; amended 1945, 1969, 1979, 1982, 1983, 1987) (Corporation Franchise Tax).
- § 148.700 - (enacted 1982) (Taxation of Financial Institutions).
- § 162.730 - (enacted 1973; amended 1977, 1981) (School Districts).
- § 170.225 - (enacted 1977; amended 1981) (Instruction—Materials and Subjects).
- § 173.105 - (enacted 1978; amended 1981) (Department of Higher Education).
- § 178.895 - (enacted 1988; amended 1990) (Special Schools and Instruction and Special Districts).
- § 192.650 - (enacted 1983) (Department of Health).
- § 196.872 - (enacted 1980) (Food and Drugs).
- § 197.320 - (enacted 1979) (Medical Treatment Facility Licenses).
- § 207.020 - (enacted 1945; amended 1961, 1965, 1977, 1981, 1982, 1986) (Division of Family Services).
- § 207.021 - (enacted 1981) (Division of Family Services).

- § 208.162 - (enacted 1981) (Old Age Assistance, Aid to Dependent Children and General Relief).
- § 208.164 - (enacted 1982) (Old Age Assistance, Aid to Dependent Children and General Relief).
- § 210.107 - (enacted 1983) (Child Protection And Reformation).
- § 210.506 - (enacted 1982) (Child Protection and Reformation).
- § 217.040 - (enacted 1982; amended 1989) (Department of Corrections).
- § 217.777 - (enacted 1983; amended 1989) (Department of Corrections).
- § 236.415 - (enacted 1979) (Dams, Mills and Electric Power).
- § 259.240 - (enacted 1983) (Oil and Gas Production).
- § 260.035 - (enacted 1972; amended 1980, 1982, 1983, 1985) (Environmental Control).
- § 260.437 - (enacted 1983) (Environmental Control).
- § 263.275 - (enacted 1982) (Insect Pests and Weeds).
- § 278.080 - (enacted 1943; amended 1961, 1980, 1986) (Soil Conservation).
- § 281.030 - (enacted 1974; amended 1977, 1981, 1988) (Pesticides).
- § 286.060 - (enacted 1945; amended 1947, 1980) (Department of Labor and Industrial Relations).
- § 287.280 - (enacted 1939; amended 1957, 1965, 1974, 1980, 1981) (Workers' Compensation Law).
- § 287.650 - (enacted 1939; amended 1949, 1961, 1980) (Workers' Compensation Law).
- § 288.090 - (enacted 1951; amended 1965, 1967, 1972, 1975, 1977, 1980, 1984, 1991) (Employment Security).
- § 288.102 - (enacted 1977; amended 1981) (Employment Security).
- § 301.001 - (enacted 1983) (Registration and Licensing of Motor Vehicles).
- § 301.130 - (enacted 1939; amended 1947, 1949, 1951, 1969, 1977, 1981, 1983, 1986, 1987) (Registration and Licensing of Motor Vehicles).

§ 304.200 - (enacted 1939; amended 1943, 1949, 1972, 1979, 1983, 1985, 1988, 1989) (Traffic Regulations).

§ 307.366 - (enacted 1983; amended 1984, 1988) (Vehicle Equipment Regulations).

§ 307.395 - (enacted 1979) (Vehicle Equipment Regulations).

§ 313.065 - (enacted 1981) (Bingo—Lottery—Horse Racing).

§ 321.690 - (enacted 1977; amended 1981, 1986, 1991) (Fire Protection Districts).

§ 331.030 - (enacted 1939; amended 1945, 1947, 1949, 1969, 1981, 1988) (Chiropractors).

§ 333.265 - (enacted 1977; amended 1981) (Embalmers and Funeral Directors).

§ 334.706 - (enacted 1983) (Physicians and Surgeons—Therapists—Athletic Trainers—Health Care Providers).

§ 337.050 - (enacted 1977; amended 1981, 1989) (Psychologists—Professional Counselors—Social Workers).

§ 348.075 - (enacted 1981) (Authorities and Corporations for Economic and Technological Development).

§ 361.095 - (enacted 1955; amended 1967, 1980) (Division of Finance and Powers of Director of Finance).

§ 364.155 - (enacted 1984) (Credit Financing Institutions).

§ 369.367 - (enacted 1982) (Savings and Loan Associations).

§ 374.710 - (enacted 1983) (Department of Insurance).

§ 376.423 - (enacted 1990) (Life and Accident Insurance).

§ 376.380 - (enacted 1939; amended 1943, 1947, 1959, 1961, 1965, 1971, 1975, 1979, 1982) (Life and Accident Insurance).

§ 376.442 - (enacted 1985) (Life and Accident Insurance).

§ 376.779 - (enacted 1977; amended 1980, 1985) (Life and Accident Insurance).

§ 376.781 - (enacted 1984) (Life and Accident Insurance).

- § 385.045 - (enacted 1977; amended 1981) (Credit Life and Accident Insurance).
- § 386.250 - (enacted 1939; amended 1963, 1967, 1977, 1980, 1987, 1988, 1991) (Public Service Commission).
- § 392.330 - (enacted 1939; amended 1980, 1987) (Telephone and Telegraph Companies).
- § 407.145 - (enacted 1986) (Merchandising Practices).
- § 408.580 - (enacted 1979) (Legal Tender and Interest).
- § 409.419 - (enacted 1977; amended 1981) (Regulation of Securities).
- § 411.070 - (enacted 1941; amended 1955, 1965, 1977, 1980, 1986) (Missouri Grain Warehouse Law).
- § 411.765 - (enacted 1977; amended 1981) (Missouri Grain Warehouse Law).
- § 414.142 - (enacted 1987) (Inspection of Oils).
- § 416.490 - (enacted 1959; amended 1963, 1982) (Monopolies, Discriminations and Conspiracies).
- § 444.530 - (enacted 1971; amended 1983, 1990) (Rights and Duties of Miners and Mine Owners).
- § 444.800 - (enacted 1979; amended 1987) (Rights and Duties of Miners and Mine Owners).
- § 454.405 - (enacted 1982; amended 1984, 1986, 1990) (Enforcement of Support Law).
- § 577.051 - (enacted 1982) (Public Safety Offenses).
- § 595.060 - (enacted 1981) (Victims of Crimes, Compensation and Services).
- § 620.125 - (enacted 1981) (Department of Economic Development).
- § 620.990 - (enacted 1983) (Department of Economic Development).
- § 630.210 - (enacted 1980; amended 1981, 1982) (Department of Mental Health).
- § 640.100 - (enacted 1939; amended 1978, 1981, 1982, 1988, 1989) (Department of Natural Resources).

§ 643.055 - (enacted 1979) (Air Conservation).

§ 660.200 - (enacted 1979; amended 1981) (Department of Social Services).

§ 660.418 - (enacted 1984) (Department of Social Services).

§ 700.115 - (enacted 1976; amended 1978, 1982, 1984) (Manufactured Homes (Mobile Homes)).

Bills passed by the 86th General Assembly 2d Regular Session 1992:

HB 899 - Medicaid Drug Prior Authorization

SB 465 - Missouri Vehicle Safety Inspection

SB 544 - Air Conservation

SB 626 - Unemployment Compensation Fund

SB 698 - Certain Health Insurance Policies

Commentary

Version IIB above differs from Version IIA in that a hearing is required before a rule may be suspended. It also appears that in order for the suspension of a rule to occur it must be "beyond or contrary to the statutory authority of the agency" or "inconsistent with the legislative intent of the authorizing statute." As will be seen in the later versions of the legislative veto, the requirement that suspension occur only if the conditions mentioned above are met is eliminated.

III. VERSION III - PURE PRIOR APPROVAL

A. Typical Language:

No rule or part of a rule promulgated pursuant to this act shall become effective until approved by the Joint Committee on Administrative Rules.

Sections containing this language:

§ 197.445 - (enacted 1983) (Medical Treatment Facility Licenses).

§ 253.035 - (enacted 1961; amended 1967, 1983) (State Parks and Historic Preservation).

§§ 260.500 & 260.520 - (enacted 1983) (Environmental Control).

§ 266.355 - (enacted 1983) (Seeds, Fertilizers and Feeds).

§ 301.144 - (enacted 1977; amended 1979, 1983, 1984, 1989)
(Registration and Licensing of Motor Vehicles).

Bills passed by the 86th General Assembly 2d Regular Session 1992:

SB 607 - Registration of Motor Vehicles.

Commentary

This language requires prior approval only. It does not contain a non-severability clause or any other conditions. In some instances language that was pure prior approval has been amended by recent legislation changing it to Version IVB or IVC. For example, in SB 496 passed by the 86th General Assembly in 1992, § 197.445 was amended. In the newer version, a non-severability clause was added to the prior approval language.

IV. VERSION IV - PRIOR APPROVAL WITH OTHER REQUIREMENTS

A. Typical language:

Any rule or portion of a rule promulgated and approved under any authority in this section may be suspended by the Joint Committee on Administrative Rules at any time. No rule or portion of a rule promulgated under any authority granted in this section shall become effective until it has been approved by the Joint Committee on Administrative Rules. If the Joint Committee on Administrative Rules neither approves nor disapproves a rule within thirty days after the notice of proposed rulemaking has been published in the Missouri Register, the rule shall stand approved. In the event that the Joint Committee on Administrative Rules disapproves or suspends a rule, the Joint Committee shall notify both the department or agency proposing the rule and the Secretary of State. The Secretary of State shall publish in the Missouri Register as soon as practicable an order withdrawing the rule.

Sections containing this language:

§ 277.160 - (enacted 1989) (Missouri Livestock Marketing Law).

§ 622.027 - (enacted 1985) (Division of Transportation).

Commentary

This appears to be the only remaining section in which such language is found. It does not contain the non-severability clause that is found in all other versions of IV. This language was originally found in the lottery statute (§ 313.220), but was amended in 1988, thus changing it to Version IVC.

B. Typical Language:

Any rule or portion of a rule promulgated and approved under any authority of [this act, section, chapter] may be suspended by the Joint Committee on Administrative Rules at any time. No rule or portion of a rule promulgated under any authority granted in this [act, section, chapter] shall become effective until it has been approved by the Joint Committee on Administrative Rules. If the Joint Committee on Administrative Rules neither approves nor disapproves a rule within thirty days after the notice of proposed rulemaking has been published in the Missouri Register, the rule shall stand approved. In the event the Joint Committee on Administrative Rules disapproves or suspends a rule, the Joint Committee shall notify both the department or agency proposing the rule and Secretary of State. The Secretary of State shall publish in the Missouri Register as soon as practicable an order withdrawing the rule. *The provisions of this chapter are non-severable and the grant of rulemaking authority is essentially dependent on the review power vested with the Joint Committee on Administrative Rules. If the review power is held unconstitutional or invalid, the grant of rulemaking authority shall also be invalid or void.*

Sections containing this language:

§ 135.285 - (enacted 1986) (Tax Relief).

§ 135.339 - (enacted 1987) (Tax Relief).

§ 160.272 - (enacted 1985) (Schools—General Provisions).

§ 178.673 - (enacted 1984) (Special Schools and Instruction and Special Districts).

§ 190.249 - (enacted 1987) (Emergency Services).

§ 193.325 - (enacted 1984) (Vital Statistics).

§ 197.221 - (enacted 1978; amended 1986) (Medical Treatment Facility Licenses).

§ 210.545 - (enacted 1987) (Child Protection and Reformation).

§ 213.106 - (enacted 1986) (Human Rights).

§ 256.640 - (enacted 1985) (Geology, Water Resources and Geodetic Survey).

§ 263.150 - (enacted 1939; amended 1984) (Insect Pests and Weeds).

§ 264.095 - (enacted 1985) (Apiaries).

§ 266.341 - (enacted 1953; amended 1959, 1985) (Seeds, Fertilizers and Feeds).

- § 276.626 - (enacted 1987) (Stockyards, Grain and Produce Exchanges).
- § 301.002 - (enacted 1986) (Registration and Licensing of Motor Vehicles).
- § 302.765 - (enacted 1989) (Drivers' and Commercial Drivers' Licenses).
- § 306.465 - (enacted 1987) (Watercraft Regulations and Licensing—State Water Patrol).
- § 307.173 - (enacted 1985; amended 1987) (Vehicle Equipment Regulations).
- § 307.400 - (enacted 1984; amended 1986, 1988, 1991) (Vehicle Equipment Regulations).
- § 319.137 - (enacted 1989) (General Safety Requirements).
- § 326.110 - (enacted 1943; amended 1977, 1981, 1984) (Accountants).
- § 327.609 - (enacted 1989) (Architects, Professional Engineers and Land Surveyors).
- § 329.210 - (enacted 1939; amended 1945, 1949, 1981, 1987) (Cosmetologists, Hairdressers and Manicurists).
- § 334.743 - (enacted 1989) (Physicians and Surgeons—Therapists—Athletic Trainers—Health Care Providers).
- § 335.259 - (enacted 1990) (Nurses).
- § 336.220 - (enacted 1981; amended 1986) (Optometrists).
- § 337.520 - (enacted 1985; amended 1989) (Psychologists—Professional Counselors—Social Workers).
- § 337.627 - (enacted 1989) (Psychologists—Professional Counselors—Social Workers).
- § 361.727 - (enacted 1984) (Director of Finance and Powers of Director of Finance).
- § 379.893 - (enacted 1987) (Insurance Other Than Life).
- § 389.005 - (enacted 1988) (Regulation of Railroad Corporations).
- § 409.806 - (enacted 1985) (Regulation of Securities).
- § 454.400 - (enacted 1982; amended 1985, 1986, 1990) (Enforcement of Support Law).

§ 454.465 - (enacted 1982; amended 1984, 1986) (Enforcement of Support Law).

§ 536.073 - (enacted 1957; amended 1985, 1989) (Administrative Procedure and Review).

§ 558.041 - (enacted 1983; amended 1986, 1990) (Imprisonment).

§ 577.530 - (enacted 1987) (Public Safety Offenses).

§ 650.215 - (enacted 1984; amended 1990) (Department of Public Safety).

§ 660.070 - (enacted 1987) (Department of Social Services).

§ 701.033 - (enacted 1986) (State Standards).

Bills passed by the 86th General Assembly 2d Regular Session 1992:

HB 878 - Disposition of Animal Carcasses

HB 1376 - Licensing of Land Surveys

C. Typical Language:

No rule or portion of a rule promulgated under the authority of this [act, section, chapter] shall become effective until it has been approved by the joint committee on administrative rules. Upon filing any proposed rule with the secretary of state, the department shall concurrently submit such proposed rule to the committee which may hold hearings upon any proposed rule or portion thereof at any time. In the event the committee disapproves any proposed rule or portion thereof, the committee shall notify the department and the secretary of state. If any proposed rule or portion thereof is disapproved by the committee, the secretary of the state shall publish in the Missouri Register, as soon as practicable, an order that such rule or portion thereof has been disapproved.

The department shall not file any final order of rulemaking with the secretary of state until twenty days after such final order of rulemaking has been received by the committee. The committee may hold one or more hearings upon such final order of rulemaking during the twenty-day period. If the committee neither approves nor disapproves any order of rulemaking within the twenty-day period, the department may file such order of rulemaking with the secretary of state and the order of rulemaking shall be deemed approved, subject to subsequent suspension by the committee. In the event the committee disapproves any order of rulemaking or portion thereof, the committee shall notify the department and the secretary of state.

Any rule or portion of a rule promulgated under the authority of this [act, section, chapter] may be suspended by the committee at any time *after a hearing conducted thereon*. If any rule is suspended by the committee,

the secretary of state shall publish in the Missouri Register, as soon as practicable, an order withdrawing the rule.

Any person seeking judicial review of any such rule shall be deemed to have exhausted all administrative review procedures. Notwithstanding the provisions of section 1.140, RSMo, the provisions of this [act, section, chapter] are nonseverable and the grant of rulemaking authority is essentially dependent on the review power vested with the committee. If the review power is held unconstitutional or invalid, the grant of rulemaking authority and *any rule promulgated under such rulemaking authority* shall also be invalid or void.

Sections containing this language include:

- § 32.125 - (enacted 1977; amended 1981, 1990) (State Department of Revenue).
- § 109.221 - (enacted 1989; amended 1990) (Public and Business Records).
- § 135.359 - (enacted 1990; amended 1991) (Tax Relief).
- § 173.619 - (enacted 1991) (Department of Higher Education).
- § 191.695 - (enacted 1988) (Health and Welfare).
- § 199.029 - (enacted 1991) (Missouri Rehabilitation Center (Formerly Chest Hospital)).
- § 210.145 - (enacted 1975; amended 1980, 1982, 1986, 1990) (Child Protection and Reformation).
- § 210.196 - (enacted 1991) (Child Protection and Reformation).
- § 260.225 - (enacted 1972; amended 1975, 1986, 1988, 1990) (Environmental Control).
- § 260.370 - (enacted 1977; amended 1980, 1988) (Environmental Control).
- § 313.220 - (enacted 1985; amended 1988) (Public Safety and Morals).
- § 335.209 - (enacted 1990) (Nurses).
- § 338.035 - (enacted 1990) (Pharmacists and Pharmacies).
- § 339.543 - (enacted 1990) (Real Estate Agents, Brokers and Appraisers).
- § 374.515 - (enacted 1991) (Department of Insurance).
- § 376.814 - (enacted 1991) (Life and Accident Insurance).

§ 376.982 - (enacted 1990) (Life and Accident Insurance).

§ 444.767 - (enacted 1971; amended 1990) (Rights and Duties of Miners and Mine Owners).

§ 590.120 - (enacted 1978; amended 1988) (Selection and Training of Peace Officers).

§ 620.010 - (enacted 1973; amended 1981, 1983, 1986, 1989, 1990) (Department of Economic Development).

§ 660.512 - (enacted 1989) (Department of Social Services).

§ 660.534 - (enacted: 1990) (Department of Social Services).

Bills passed by the 86th General Assembly 2d Regular Session 1992:

HB 878 - Disposition of Animal Carcasses

HB 1434 & 1490 - Regaining Possession of Property

HB 1574 - State Employee Health Care Plan

HB 1736 - Election Procedures

SB 449 - Nutrition and Hunger

SB 494 - Motorcycle Education and Licensing

SB 496 - Discrimination Against Practitioners

SB 544 - Air Conservation

SB 573 & 634 - Abuse of the Elderly

SB 611 - Immunization of Pupils

SB 636 - Animal Health Care Standards

Commentary

The primary differences between Versions IVB and IVC above is the invalidation of both rulemaking and rules in IVC, and the addition of a required hearing before suspension of an existing rule. There are in fact several other differences and variations in both IVB and IVC. However, these differences relate primarily to the procedures that must be followed when submitting rules to the JCAR.

For example, the following statutory sections have no provision that the rules be concurrently submitted to the JCAR, and they also allow the JCAR

in its discretion to hold one or more hearings on the proposed rule: §§ 208.151, 292.613, 301.575, 338.350, 643.210.

In addition, several bills enacted in 1992 provide that an agency promulgating any rule, or amendment of a rule, or final order of rulemaking shall file such notice of proposed rulemaking with the JCAR. These bills include HB 995, HB 1199, HB 1574, HB 1736, HB 1744 and HB 1393.

The more recent grants of the legislative veto power seem to be designed to insure that the JCAR has time to reject any final order of rulemaking before it is published. The requirement of a hearing before suspension in IVC is not always found in the language.

V. VERSION V - OTHER VARIATIONS

A. Typical Language

The following language is included in a bill passed in 1992 (SB 796 - Health Care Coverage). Interestingly enough, this bill contained *two sets* of language setting forth the more detailed version of IVC above in addition to the less detailed language set out below:

Any rule or portion of a rule promulgated pursuant to section 1 to 13 of this act may be suspended by the committee on administrative rules if, after hearing thereon, the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the director or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the Governor.

Any person seeking judicial review of any such rule shall be deemed to have exhausted all administrative review procedures. Notwithstanding the provisions of section 1.140, RSMo, the provisions of this section are nonseverable and the grant of rulemaking authority is essentially dependent on the review power vested with the committee on administrative rules. If the review power is held unconstitutional or invalid, the grant of rulemaking authority, and any rule promulgated under such rulemaking authority, shall also be invalid or void.

Commentary

This first paragraph harkens back to the earlier suspension language (Version IIB) which provided standards for JCAR action and which was not incorporated in later statutes. However, this Version adds in the second paragraph the newer language relating to non-severability.

B. Typical Language

Recent legislation creating the Missouri Ethics Commission (SB 262 (1991), MO. REV. STAT. § 105.955 (1991 Supp.)) contains unusual language at § 105.955.16(1) which provides that an advisory opinion issued by the commission:

shall be withdrawn by the commission if, after hearing thereon, the joint committee on administrative rules finds that such advisory opinion is beyond or contrary to the statutory authority of the commission or is inconsistent with the legislative intent of any laws enacted by the general assembly, and after the general assembly, by concurrent resolution, votes to adopt the findings and conclusions of the joint committee on administrative rules.

Commentary

This unusual grant of power to the JCAR appears to be only a slight enhancement of its original § 536.037 "review and recommend" authority. The JCAR recommendation must be adopted by the General Assembly by concurrent resolution.

C. Typical Language

Another unusual provision appears in HB 321 passed in 1989 and codified at MO. REV. STAT. § 444.380 (1991 Supp.), concerning rules and regulations that the Director of the Department of Natural Resources may adopt under the Metallic Minerals Waste Management Act. The provisions of the act are "nonseverable for purposes of this section and the grant of rulemaking authority is *totally* dependent on the power vested with the joint committee on administrative rules."

Commentary

The use of the word "totally" in place of "essentially" appears only in this section.

D. Typical Language

A definition of the "cost of education index" set out in "State Aid Definitions," MO. REV. STAT. § 163.011(3) (1991 Supp.), declares that "[a]ny rule proposed pursuant to this section shall be submitted to the [JCAR] which shall review and report on the rule as provided in section 536.037, RSMo."

Commentary

This appears to be the only section that refers only to § 536.037 JCAR powers.

