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# The Legislative Veto in Illinois: Why JCAR Review of Agency Rulemaking Is Unconstitutional

Marc D. Falkoff\*

*This Article argues that legislative vetoes of administrative agency rulemaking in Illinois are unlawful under the state's constitution. It focuses on the Joint Committee on Administrative Rules ("JCAR"), a bipartisan legislative committee that is authorized to review rules promulgated by administrative agencies in the executive branch. Since 2004, JCAR has possessed veto power over agency rulemaking, meaning that the committee may permanently stop implementation of new rules upon the vote of three-fifths of its twelve members. For even longer, the Illinois General Assembly has been authorized to block implementation of agency rules through passage of joint resolutions, which do not require presentment to the Governor for a potential executive veto. The Illinois courts have not yet ruled on the constitutionality of the legislative veto, though it has been part of the state's legal landscape since 1981. Legislative veto schemes have been challenged in the federal system and in more than a dozen states. In every instance except one, the schemes have been deemed unconstitutional violations of separation-of-powers principles, or else have been struck down for failing to comply with constitutional bicameralism or presentment requirements, or both. No scheme that grants veto power to a committee of the legislature has ever been upheld as constitutional in any jurisdiction in the United States.*

*The lack of judicial resolution of the lawfulness of the legislative veto in Illinois should not be taken to mean the scheme is uncontroversial in the state. Indeed, it is little appreciated that Illinois recently experienced a constitutional crisis related to JCAR vetoes. One of the*

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\* Acting Associate Dean and Associate Professor, Northern Illinois University College of Law. This piece is better for my conversations with Jon Connolly, David Gaebler, Robert Knowles, Michael Oswald, Alix Reid, David Taylor, and Amy Widman. I received excellent research assistance from Helen Mellas, Cora Moy, and Patricia Donahue. Finally, I would like to acknowledge the sage advice I always received on all of my projects from my colleague Lawrence Schlam, who passed away before this piece came into print.

*articles of impeachment against former Governor Rod Blagojevich alleged that he violated separation-of-powers principles by ordering one of his administrative agencies to refuse to comply with a JCAR veto of its rules. Blagojevich was removed from office in part because of his refusal to accept the constitutionality of the legislative veto. This Article argues that in fact the provisions of the Illinois Administrative Procedure Act that authorize JCAR and the General Assembly to veto agency rulemaking are inconsistent with the separation-of-powers and enactment provisions of the Illinois Constitution. As such, the General Assembly should consider alternatives to the legislative veto now, before the Illinois courts rule the current system unconstitutional and throw the state's rulemaking process into disarray.*

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## INTRODUCTION

This Article argues that legislative vetoes of administrative agency rulemaking in Illinois are unlawful under the state's constitution. Since 2004, a small committee of twelve legislators—the Joint Committee on Administrative Rules (“JCAR”)—has exercised statutory authority to

kill rules and regulations promulgated by executive branch agencies. For even longer, the General Assembly has held the same powers.<sup>1</sup> Although legislative vetoes were long ago held unconstitutional in the federal system,<sup>2</sup> and have likewise been ruled unlawful in nearly every state in which they have been challenged in court,<sup>3</sup> the Illinois courts have not yet ruled on their constitutionality under Illinois law.

When the day of reckoning comes, the Illinois Supreme Court will have to decide whether JCAR and General Assembly vetoes accord with separation-of-powers principles<sup>4</sup> and whether they comply with the state constitution's bicameralism and presentment requirements.<sup>5</sup> The time for judicial resolution of these important questions is long overdue. The state of Illinois has already experienced something of a constitutional crisis because the courts have offered no guidance on the lawfulness of legislative vetoes. In 2009, Governor Rod Blagojevich was impeached, convicted, and removed from office in part because the General Assembly found that *he* had violated separation-of-powers principles by ordering one of his administrative agencies to disregard a JCAR veto of its rules.<sup>6</sup> The Governor's rationale for his order was, of course, that legislative vetoes like those issued by JCAR were themselves unconstitutional on the same grounds.

When JCAR was created in an overhaul of the Illinois Administrative Procedures Act ("IAPA") in 1977, it was designed as an oversight committee with only modest powers.<sup>7</sup> Broadly speaking, the function of JCAR was to oversee the activities of the state's burgeoning administrative agencies, which the General Assembly had increasingly tasked with promulgating rules to effectuate the legislature's laws. As was happening in the federal government and in states across the nation, the Illinois legislature was seeking a way to retain some kind of meaningful control over rulemaking authority that, in the interests of efficiency, it had delegated to executive agencies.

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1. Since 1981, the General Assembly has been authorized by statute to block the implementation of agency rules by passing a joint resolution to make permanent JCAR rule suspensions. See Act of Jan. 1, 1981, Pub. Act 81-1514, 1977 Ill. Laws 3898, discussed *infra* Part I.C.

2. See *INS v. Chadha*, 462 U.S. 919, 953–54 (1983), discussed *infra* Part II.A.

3. See *infra* Part II.B.

4. See *infra* Part III.A.

5. See *infra* Part III.B.

6. The Blagojevich impeachment is discussed more fully below. See *infra* notes 15–32 and accompanying text.

7. See Illinois Administrative Procedure Act, Pub. Act 79-1083, 1975 Ill. Laws 3312.

As discussed in more detail in Part I below, JCAR was at first authorized to do little more than keep tabs on agency rulemaking. The committee was to review newly proposed rules, consult with the promulgating agencies when it had concerns about the rules, and recommend legislative action to the General Assembly if informal discussion with the agencies failed to allay its concerns. Though JCAR could register its discontent with rules and regulations proposed by agencies, neither the General Assembly nor JCAR had authority to unilaterally keep those rules from going into effect.

By its own account, JCAR's "inform-and-advise" authority was initially effective, and had a substantial impact on agency rulemaking.<sup>8</sup> But almost immediately JCAR sought more power over agency rulemaking for both itself and the General Assembly. In 1980, the General Assembly passed into law (over a gubernatorial veto) a statute that authorized JCAR to suspend operation of new agency rules by a three-fifths vote of the committee, and for the General Assembly to make the suspension permanent by passage of a joint resolution.<sup>9</sup>

Thereafter, anytime JCAR expressed unease about a new rule, the administrative agency that promulgated it would endeavor to allay JCAR's concerns in order to lessen the likelihood of a General Assembly veto. According to JCAR's Annual Report for 1981, during the first year in which the veto was available to the General Assembly, "virtually all" of the rules that JCAR reviewed were modified by the promulgating agencies in response to JCAR comments.<sup>10</sup>

In 2004, JCAR was granted statutory authority to issue its own veto.<sup>11</sup> Pursuant to amendments to the IAPA, a JCAR objection and suspension of a proposed rule would no longer expire if the General Assembly failed to pass a joint resolution making the suspension permanent.<sup>12</sup> Instead, a JCAR suspension would become permanent

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8. JOINT COMM. ON ADMIN. RULES, 1978 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 17–18 (1979) [hereinafter 1978 JCAR REPORT] (noting that in its first functioning year, JCAR reviewed nearly five hundred proposed agency rules, found "serious problems" with more than one-third of them, but informal discussion and the threat of corrective legislation had led to the resolution of most of the committee's concerns). All of JCAR annual reports are now accessible online at INTERNET ARCHIVE, <https://archive.org/> (search in search bar for "Illinois Joint Committee on Administrative Rules Annual Report") (last visited Apr. 14, 2016).

9. Act of Jan. 1, 1981, Pub. Act 81-1514, 1977 Ill. Laws 3898.

10. JOINT COMM. ON ADMIN. RULES, 1981 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 110 (1982) [hereinafter 1981 JCAR REPORT].

11. 100 ILL. COMP. STAT. 5/115(c) (2016).

12. *Id.*

*unless* the General Assembly passed a joint resolution overriding it.<sup>13</sup> The effect was to turn a General Assembly veto (which at least had the virtues of requiring bicameral majority support) into a legislative committee veto that could be exercised by a group of just eight legislators (three-fifths of the twelve-member body).<sup>14</sup>

Both forms of legislative veto—the one possessed solely by the General Assembly until 2004 and the one possessed by JCAR since then—raise serious questions about whether separation-of-powers principles are being respected in the state and about whether the exercise of such vetoes is in accord with Illinois constitutional requirements for the enactment of laws. The constitutional concerns raised by the veto power, although long simmering without resolution, are of deep importance to the state and have in fact already resulted in a largely unnoticed constitutional crisis.

It is widely known that in 2009 Governor Rod Blagojevich was impeached, convicted, and removed from office by the General Assembly following allegations he had, in the words of the House of Representatives' Article of Impeachment, sought "to obtain a personal benefit in exchange for his appointment to fill [Barack Obama's] vacant seat in the United States Senate."<sup>15</sup> Less appreciated is that one of the particular articles against Blagojevich included the charge he had "abused the power of his office" by his "refusal to recognize the authority of the Joint Committee on Administrative Rules to suspend or prohibit rules, [and] his utter disregard of the doctrine of separation of powers."<sup>16</sup> Given the doubtful constitutionality of the state's legislative veto scheme, the accusation was ironic in the extreme.

The contretemps arose after the Illinois Department of Health and

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13. *Id.*

14. A JCAR suspension of a rule still requires a three-fifths vote of the committee. *Id.*

15. H.R. Res. 5, 96th Gen. Assemb., Reg. Sess., at art. I(1) (Ill. 2008). Governor Blagojevich was also tried in federal court on charges related to wire fraud, attempted extortion, conspiracy to commit extortion, soliciting bribes, and conspiracy to solicit and accept bribes. Summary of Charges at 72, *United States v. Blagojevich*, No. 08-CR-888 (N.D. Ill. June 27, 2011). He was initially convicted on one count in August 2010, with the jury deadlocked on the remaining twenty-four. Bob Secter et al., *Blagojevich Convicted on 1 of 24 Counts*, CHI. TRIB. (Aug. 17, 2010), [http://articles.chicagotribune.com/2010-08-18/news/ct-met-bлагоjevich-verdict-201008171\\_attorney-reid-schar-lone-conviction-sam-adam](http://articles.chicagotribune.com/2010-08-18/news/ct-met-bлагоjevich-verdict-201008171_attorney-reid-schar-lone-conviction-sam-adam). Upon retrial, he was convicted of another seventeen counts. Monica Davey & Emma G. Fitzsimmons, *Jury Finds Blagojevich Guilty of Corruption*, N.Y. TIMES, June 27, 2011, at A1. In July 2015, the U.S. Court of Appeals for the Seventh Circuit vacated the convictions on five counts and affirmed the remaining convictions. *United States v. Blagojevich*, 794 F.3d 729, 743 (7th Cir. 2015).

16. Ill. Res. 5, at art. I(9).

Family Services (“Family Services”) issued a set of emergency rules raising the cut-off rate for Medicaid eligibility in the state to 400% of the federal poverty level.<sup>17</sup> The agency, relying on the Illinois Public Aid Code,<sup>18</sup> had promulgated the rules in part because of concern that a generous federal reimbursement program for a different state insurance program—the Children’s Health Insurance Protection Act<sup>19</sup>—would soon be discontinued.

The IAPA required that the rules from Family Services be submitted to JCAR for review.<sup>20</sup> JCAR objected to the rules, and suspended their implementation, on the grounds that there was no pending emergency and that the rules were contrary to the public interest.<sup>21</sup> The Secretary of State accordingly refused to publish them.<sup>22</sup>

With the consent of Governor Blagojevich, Family Services ignored JCAR suspension, sued the Secretary of State to force him to publish the rules, and put the rules into effect.<sup>23</sup> A taxpayer suit soon followed, in which the plaintiffs sought an injunction to prevent implementation of the agency’s rule and a cessation of the enrollment of adults into Medicaid under the new eligibility standard.<sup>24</sup>

Neither the trial court nor the intermediate appellate court reached the question of whether a General Assembly veto would have been constitutional had it been issued, nor did they determine whether the temporary suspension of the Medicaid rules that resulted from JCAR’s objection raised constitutional concerns. Instead, the courts concluded that Family Services had misconstrued the Illinois Public Aid Code and did not have the statutory authority to promulgate rules expanding insurance coverage to the degree that it had attempted.<sup>25</sup> It is impossible to know whether the Illinois Supreme Court would have reached the “legislative veto” questions that hovered in this matter,

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17. The facts of the dispute are taken from *Caro ex rel. State v. Blagojevich*, 895 N.E.2d 1091, 1094–95 (Ill. App. Ct. 2008).

18. 305 ILL. COMP. STAT. 5/5-2(2)(b) (2016).

19. State Children’s Health Insurance Program, 42 U.S.C. §§ 1397aa–1397jj (2012).

20. Illinois Administrative Procedure Act, 5 ILL. COMP. STAT. 100/1-1 to 110/15-10 (2016).

21. *Caro*, 895 N.E.2d at 1095.

22. *Id.*

23. See Associated Press, *Blagojevich Ups Ante in Dispute with Lawmakers*, ST. LOUIS POST-DISPATCH, Apr. 3, 2008, at C4 (“The governor’s Department of Healthcare and Family Services has filed a suit to force Secretary of State Jesse White, a fellow Democrat, to publish rules allowing the expansion of the state’s Family Care program for Illinoisans who can’t afford private insurance.”).

24. *Caro*, 895 N.E.2d at 1095.

25. *Id.* at 1095–96 (discussing the trial court’s rulings).

because the case was settled by then-Governor Patrick Quinn soon after Blagojevich was removed from office.<sup>26</sup>

The ultimate fate of the rules on Medicaid eligibility is of less concern for purposes of this Article than the fact that impeachment charges were filed against Blagojevich because of the dispute, which was arguably more about the political advisability of expanding Medicaid coverage than about the authority of Family Services to issue the rules in the first place.<sup>27</sup> Hidden in plain sight, the General Assembly and the Governor were engaged in a battle royale over whether legislative vetoes of executive agency activity were lawful.

Governor Blagojevich addressed the charge that he had disregarded separation-of-powers principles during his trial before the Senate. He noted that nine other states had committees like JCAR that were ruled unconstitutional.<sup>28</sup> He stated that he had “respected” JCAR since he had been Governor, but that he understood JCAR to be constitutionally limited to providing advice to the executive branch:

But I’ve been given legal advice by lawyers and I believe they’re right, and other courts have agreed that those lawyers were right, that JCAR is an advisory committee, that it cannot dictate to the executive branch. That if the executive branch seeks to do something, that committee can advise you and suggest whether it’s right or wrong, or they agree with you or not, but they can’t stop you.<sup>29</sup>

Governor Blagojevich then explained how he viewed the separation-of-powers equation playing out:

If you want to stop the executive branch under our Constitution and the ideas of separation of powers, then you all know how it works. The House passes a bill, you in the Senate pass a bill. I may not like it. You send it to me, I veto that bill, it goes back to you, and then you override my veto.

That’s how you stop the executive branch and a governor. But 12 lawmakers, however—however intelligent and honest and impressive and schooled as you may be, 12 lawmakers picked by a—by

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26. See John O’Connor, *Quinn, Businessmen Settle Suit on Health Care*, MY WEB TIMES (June 22, 2009), [http://www.mywebtimes.com/news/illinois\\_ap/quinn-businessmen-settle-suit-on-health-care/article\\_189bcd7f-fbc8-53ba-ab38-00ed93d7fe6e.html](http://www.mywebtimes.com/news/illinois_ap/quinn-businessmen-settle-suit-on-health-care/article_189bcd7f-fbc8-53ba-ab38-00ed93d7fe6e.html).

27. The position of the House of Representatives on the lawfulness of Governor Blagojevich’s refusal to respect JCAR objections to his agency’s rules can be found in the final report of the House’s special investigative committee concerning the Blagojevich impeachment. See ILL. H.R., FINAL REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE 29–36 (2009).

28. See 4 S., Impeachment Tribunal Transcripts of Governor Rod R. Blagojevich, 96th Gen. Assemb., at 597 (Ill. Jan. 29, 2009) (statement of Governor Rod R. Blagojevich).

29. *Id.* at 596.

legislative leaders cannot constitutionally thwart the executive branch. Nine states have challenged this case, and in all nine states the right of the executive branch to do what it sought to do without the consent of JCAR was upheld.<sup>30</sup>

Notwithstanding his arguments, Governor Blagojevich was in fact convicted of this charge (among others) by the Senate and removed from office.<sup>31</sup> It may be that the Illinois Supreme Court will ultimately rule that the legislative veto is unconstitutional in the state, but in the meantime the General Assembly has done more than shoot across the bow at the executive branch.<sup>32</sup> It has already scored a direct hit and taken its first victim.

In this Article, I argue that the current JCAR rules-review scheme, which allows the small committee to veto agency regulations, is almost surely going to be deemed unconstitutional by the Illinois Supreme Court when the issue is squarely presented in an appropriate case. There is no way to predict *when* the issue will present itself to the high court. Political considerations, for example, may persuade a sitting Governor against challenging JCAR's authority, as the impeachment proceedings against Governor Blagojevich suggest. And standing issues may impede access to the courts for persons or corporations who believe they have been harmed by the failure of an agency to follow through with proposed regulations. But eventually the issue will be before the court, and an academic treatment of the legislative veto's legitimacy in Illinois, one of its last redoubts, is long overdue.<sup>33</sup>

The Article proceeds as follows. Part I describes the origins and evolving powers of JCAR since its creation by statute in 1977. Over the course of several decades, JCAR has grown from an inform-and-advise body to a committee that can kill agency regulations by a vote of eight of its twelve members. Part II surveys legal challenges to legislative veto schemes in the federal and state governments. With one exception,

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30. *Id.* at 596–97.

31. S., Judgment of Conviction and Disqualification, In the Matter of the Impeachment of Rod R. Blagojevich, Governor of the State of Illinois, 96th Gen. Assemb. (Ill. Jan. 29, 2009).

32. Although the public may not have focused on the article of impeachment relating to JCAR and the legislative veto, the legislators did. *See, e.g.*, H.R., Transcript of Debates, 96th Gen. Assemb., 7th Sess., at 9 (Ill. Feb. 4, 2009) (statement of Rep. Black) (“You just removed a Governor because he said, I don’t care what the rules are. I don’t care what JCAR says, I’m not going to do that.”).

33. The constitutionality of legislative vetoes in other states have been the subject of much scholarly attention. *See* Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 MO. L. REV. 1157, 1157 n.9 (1992) (listing academic articles).

every court to have reviewed the constitutionality of legislative vetoes over rules promulgated by administrative agencies has concluded that the legislative veto is unlawful. Most often the problem is a failure to comply with bicameralism or presentment requirements, though sometimes the courts find that legislatures violated separation-of-powers principles by infringing on the authority of the executive or judicial departments. Part III draws on the legal opinions canvassed in the previous Part to assess the constitutionality of JCAR and General Assembly vetoes in Illinois. It concludes that in time the Illinois Supreme Court will almost surely rule that the legislative veto is unlawful. Part IV offers some thoughts on alternatives to the current JCAR system that would be more likely to withstand constitutional scrutiny. The Article concludes with a recommendation that the General Assembly modify the current statutory scheme before the Illinois Supreme Court is compelled to rule on its constitutionality.

### I. ORIGINS AND STRUCTURE OF JCAR

The rise of the administrative state and the establishment of a “fourth branch” of government is a defining feature of our modern republic. Since the New Deal, both Congress and state legislatures have created myriad administrative agencies in the executive branch, delegating to these agencies authority to promulgate rules and regulations to effectuate their legislative goals. To be sure, legislatures have the authority to create their own rules through their lawmaking powers. But it is universally acknowledged that the legislative process is too cumbersome, and that legislators’ expertise is too uneven, to expect legislative bodies to pass laws with the “requisite specificity to cover endless special circumstances across the entire policy landscape.”<sup>34</sup> Agencies, in contrast, are in theory staffed with experts who can craft rules appropriate to make the legislative vision a practical reality. And agency rulemaking is a more nimble and efficient process than legislation. Finally, federal and state courts have uniformly held that the legislative delegation of rulemaking power to administrative agencies may be done without violating separation-of-powers principles.

But the legislative delegation of rulemaking authority for purposes of expertise and efficiency comes at a price. Once executive agencies are

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34. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1183 (1999).

authorized to promulgate rules, the legislature can effectively be frozen out of the rulemaking process.<sup>35</sup> Like Apollo handing his chariot's reins to Phaethon, the legislature may find itself powerless to corral agency action it deems misguided, counterproductive, or *ultra vires*.

Unsurprisingly, state and federal legislatures want to keep the benefits that attend the delegation of rulemaking authority to agencies, but also want to retain as much control over the promulgated rules as possible. Lawsuits seeking injunctions against the implementation of agency rules are always possible, as is the tool of corrective legislation. But such measures are time consuming and expensive. Moreover, their success is uncertain, as a judge may find no merit to the legislature's claims of agency overreach, or the chief executive may choose to veto the legislature's attempts at corrective action.

Illinois, like the other states in the union, has experimented with a variety of ways to bring meaningful oversight to agency rulemaking. Over the course of four decades, such oversight has evolved from establishing JCAR as an inform-and-advise committee for the review of agency rulemaking, to the authorization of veto powers for the General Assembly, and finally to the granting of veto powers to JCAR itself.

#### A. The JCAR "Inform-and-Advise" Era, 1975–1980

By the mid-1970s, Illinois had sixty-five major administrative agencies and nearly 250 smaller boards and commissions.<sup>36</sup> To manage the "complex, duplicative and chaotic" sprawl,<sup>37</sup> the General Assembly passed the IAPA in 1975.<sup>38</sup> Like the federal Administrative Procedure Act,<sup>39</sup> the IAPA established procedures for the conduct of administrative proceedings, for the promulgation of rules and regulations,<sup>40</sup> for administrative adjudication, and for licensing and rate-

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35. L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 86–87 (1982).

36. JOINT COMM. ON ADMIN. RULES, 1985 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 447 (1986); *see also id.* ("Indeed, [by the mid-1970s], no single source could produce a complete organization chart or even a listing of all Illinois agencies, boards and commissions").

37. *Id.*

38. Illinois Administrative Procedure Act, Pub. Act 79-1083, 1975 Ill. Laws 3312 (codified as amended at 5 ILL. COMP. STAT. 100/1-1 to 15-10).

39. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706 (2012)).

40. Under the IAPA, a "rule" is "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." 5 ILL. COMP. STAT. 100/1-70 (2016) Unless otherwise noted in the text, the terms "rules" and "regulations" will be used interchangeably in this article. *Cf.* S. 51 Dev. Corp. v. Vega, 781 N.E.2d 528, 538 (Ill. App. Ct.

making.<sup>41</sup>

Two years later, as part of an overhaul of the IAPA, the General Assembly created JCAR.<sup>42</sup> As JCAR itself explained in its first annual report to the General Assembly, the committee was established in response to the state's "increasing reliance on and power of administrative agencies to fulfill vital functions of the state," and out of concern that agencies "have obscured the traditional notion of separation of powers."<sup>43</sup> Although the need for agency rulemaking remained unquestioned, the sheer volume of rules—matching or exceeding the number of statutory laws in Illinois—was perceived as a threat to the General Assembly's ability to ensure that the limits of the statutory authority it had provided to agencies were respected.<sup>44</sup>

The composition of JCAR was to be twelve members of the General Assembly, with three each chosen by the majority and minority leaders of the House and Senate.<sup>45</sup> Broadly speaking, its functions were two-fold: to promote "adequate and proper" rulemaking by agencies, and to promote "understanding on the part of the public respecting such rules."<sup>46</sup> JCAR was thus best understood as a watchdog committee designed in large part to assure that rulemaking was accomplished in a transparent and politically accountable fashion.

Most importantly, JCAR was responsible for reviewing all new rules proposed by administrative agencies.<sup>47</sup> This review had to take place promptly after promulgation of a proposed rule.<sup>48</sup> JCAR was required to assess whether the agency had acted within its statutory authority when promulgating the rule, whether the rule was in proper form, and whether sufficient notice had been given to the public prior to the rule's

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2002) (stating that "rules . . . are synonymous with regulations" (citing *United Consumers Club, Inc. v. Attorney Gen.*, 456 N.E.2d 856, 864 (Ill. App. Ct. 1983))); *Granite City Div. of Nat'l Steel Co. v. Ill. Pollution Control Bd.*, 613 N.E.2d 719, 729 (Ill. 1993) (holding that the agency had "rulemaking authority to promulgate these regulations").

41. The IAPA was amended in 1977 to make all agencies subject to its rulemaking requirements. Until its amendment, section 2 of the IAPA exempted agencies from compliance with the Act unless the law that created the agency expressly stated that it was to conform to the Act. Act of Sept. 27, 1977, Pub. Act 80-1035, 1977 Ill. Laws 3040.

42. *Id.*

43. 1978 JCAR REPORT, *supra* note 8, at 10.

44. *Id.* at 11.

45. Act of Sept. 27, 1977, Pub. Act 80-1035, 1977 Ill. Laws 3045.

46. *Id.* at 3046.

47. *Id.*

48. *Id.* at 3047.

adoption.<sup>49</sup> If JCAR had any concerns, it was initially to inform the agency, which would then have to respond to JCAR indicating whether it had elected to modify the proposed rule, withdraw it altogether, or leave it unchanged.<sup>50</sup> If the agency refused to amend or withdraw the rule—or if it refused to respond to JCAR at all, which apparently would happen on occasion<sup>51</sup>—JCAR was authorized to propose corrective legislation to the General Assembly.<sup>52</sup>

JCAR had other duties as well—all designed to be part and parcel of its role as a body to gather information and make recommendations to the full legislature. Among its other significant responsibilities, the committee was to engage in a “systematic and continuing study of the rules and rule-making processes of all state agencies . . . for the purpose of improving the rule-making process” and eliminating redundancies in the rules.<sup>53</sup> JCAR was tasked with establishing a review program to study the impact of legislative changes, court rulings, and administrative action on agency rules and rulemaking.<sup>54</sup> JCAR was also expected to engage in a periodic review, at least every five years, of the rules of each agency, examining the economic and budgetary effects of the rules and ways they might be made more efficient.<sup>55</sup>

As originally conceived, JCAR had no coercive authority over administrative agencies, and possessed “*advisory* powers only relating to its function.”<sup>56</sup> Neither JCAR nor the General Assembly could modify, delay, or stop the implementation of rules that either body

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49. *Id.* JCAR further interpreted this statutory provision to authorize review of (1) the agency’s legal authority to promulgate its rule; (2) the agency’s compliance with legislative intent; (3) the agency’s compliance with state and federal constitutional requirements and other law; (4) the agency’s statement of justification and rationale for the proposed rulemaking; (5) anticipated economic effects of the proposed rulemaking; (6) clarity of the language of the proposed rulemaking; (7) sufficient completeness and clarity to insure meaningful guidelines and standards in the exercise of agency discretion; (8) redundancies, grammatical deficiencies, and technical errors in the proposed rulemaking; and (9) compliance of the agency with the requirements of the IAPA. JOINT COMM. ON ADMIN. RULES, 1979 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 344 (1980) [hereinafter 1979 JCAR REPORT].

50. Act of Sept. 27, 1977, Pub. Act 80-1035, 1977 Ill. Laws 3047.

51. See 1979 JCAR REPORT, *supra* note 49, at 149 (noting the “lack of responsiveness of agencies to the objections issued by the Committee,” and that an “increased number of agencies were refusing to withdraw or modify proposed rulemakings in response to objections issued by the Joint Committee”).

52. Act of Sept. 27, 1977, Pub. Act 80-1035, 1977 Ill. Laws 3047–48.

53. *Id.* at 3046–47.

54. *Id.* at 3047.

55. *Id.* at 3049.

56. *Id.* at 3046 (emphasis added).

deemed unlawful or unauthorized by statute, except through the ordinary legislative process.

Nonetheless, in the first years of its existence, the JCAR scheme showed promising signs it was improving administrative agency rulemaking. As already noted, JCAR reviewed hundreds of new rules from administrative agencies in its first year of operation, found “serious problems” with more than one-third of them, but was able to resolve its concerns in most instances through informal interaction with the agencies.<sup>57</sup> Only 15% of the proposed rules it reviewed required formal action from JCAR.<sup>58</sup> The committee reported there was a “desire of agencies to change rules to correct serious problems and also the extent of those issues where serious problems were unresolved without formal Joint Committee action.”<sup>59</sup>

In 1979, JCAR reviewed over five hundred more new rules, resolving many of their concerns through cooperation with the agencies and objecting in only sixty-five instances.<sup>60</sup> Among other activities, JCAR initiated a five-year comprehensive review of rules of all agencies, worked with the Secretary of State to develop a uniform system for the codification of all state agency rules in Illinois, and saw most of its twenty recommendations for new legislation passed by the General Assembly.<sup>61</sup> In its self-assessment, JCAR concluded that its activities had made “a significant impact on agency-made law in Illinois,” and that it had “fulfill[ed] an important systematic substantive oversight function for the Illinois General Assembly.”<sup>62</sup>

JCAR initially praised the wisdom of the General Assembly in granting it only inform-and-advise powers, explaining that the review scheme “was designed to insure the integrity of both the administrative rulemaking process and the proper legislative process of lawmaking.”<sup>63</sup>

### *B. The General Assembly Veto Era, 1981–2004*

But notwithstanding public claims to its efficacy, even early in its

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57. See 1978 JCAR REPORT, *supra* note 8, at 17–18. JCAR *Annual Reports* are a useful resource for the public. Other states lack the transparency that such reporting provides. See, e.g., Dean, *supra* note 38, at 1165 (noting the lack of transparency that attends the work of a similar legislative review committee in Missouri).

58. 1978 JCAR REPORT, *supra* note 8, at 18.

59. *Id.*

60. 1979 JCAR REPORT, *supra* note 49, at 3.

61. *Id.*

62. *Id.*

63. 1978 JCAR REPORT, *supra* note 8, at 11.

tenure JCAR began to bristle at the statutory constraints that had been imposed on it. Although the committee had gotten traction with some agencies, others “refused to modify the rulemaking in response to the Joint Committee’s objections.”<sup>64</sup> Without some kind of coercive power over the agencies, JCAR’s comments on proposed rules could be ignored with impunity. The perception among some legislators, staffers, and legislative observers at the time was that JCAR had, in reality, “little control” over administrative agencies.<sup>65</sup>

During its second year of existence, JCAR prepared a staff paper, titled *Alternatives for Strengthening Legislative Review of Administrative Rules in Illinois*, suggesting various ways in which its supervisory powers, along with those of the General Assembly, could be enhanced.<sup>66</sup> The report included a review of systems in other states, noting that many had lodged limited veto powers in legislative review committees like JCAR.<sup>67</sup>

Enhanced powers were desirable, according to JCAR, because the current inform-and-advise process was not sufficiently nimble to bring about timely modification of objectionable rules from recalcitrant agencies. Amendment by legislation was a lengthy process, and the contested rules would remain in effect pending the successful completion of the legislative process.<sup>68</sup> In addition, rule modification through legislation was inadvisable where specific areas of regulation were “too technical or complex” or where JCAR’s objections were “of such a nature that corrective changes in statutory language” might be “extremely complex and could result in harmful overspecificity in the statutory language.”<sup>69</sup>

In its 1979 staff paper, JCAR proposed nine alternatives to the current regime—changes ranging from the constitutionally unobjectionable, like enhancing the committee’s authority to comment on proposed rules’ economic impact,<sup>70</sup> to the constitutionally implausible, like authorizing JCAR to compel an agency to promulgate

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64. 1979 JCAR REPORT, *supra* note 49, at 121.

65. CHRISTOPHER Z. MOONEY & TIM STOREY, THE ILLINOIS GENERAL ASSEMBLY, 1992–2003: LEADERSHIP CONTROL, CONTINUITY, AND PARTNERSHIP 38 (2004).

66. 1979 JCAR REPORT, *supra* note 49, at 389–96 (“JCAR Staff Paper: Alternatives for Strengthening Legislative Review of Administrative Rules in Illinois”).

67. *Id.* at 389–91.

68. *Id.* at 392.

69. *Id.*

70. *Id.* at 394.

a rule.<sup>71</sup> The full set of suggestions from the staff paper will be discussed later in this Article.<sup>72</sup>

In the end, JCAR sought General Assembly approval for a pair of alternatives to the extant inform-and-advise approach. The first would have removed the presumption of validity accorded to administrative rules in court challenges if JCAR formally objected to a rule and the agency failed to modify or withdraw it.<sup>73</sup> The status quo was that a rule promulgated by an agency would be presumed to be a lawful exercise of the agency's statutory powers.<sup>74</sup> The threat of reversing the presumption would, it was thought, provide incentive for the agency to be responsive to JCAR comments rather than risk judicial disapproval of the rule.<sup>75</sup> The proposal was passed by both Houses of the General Assembly in 1979, but was vetoed by the Governor—on the ground that it violated separation-of-powers principles—and did not become law.<sup>76</sup>

The second proposal was far more ambitious. At JCAR's urging, the General Assembly considered authorizing JCAR to veto agency rules that it determined constituted a serious threat to the public interest, safety, or welfare.<sup>77</sup> The veto would be permanent unless the General Assembly passed a joint resolution overturning it.<sup>78</sup>

In its staff paper, JCAR acknowledged that a proposal of this type “would result in the most serious legal issues,” including “whether passage of a resolution can affect law, since it eliminates the approval of the Governor required under normal legislative lawmaking.”<sup>79</sup> Admitting that the proposal “could raise constitutional questions about separation of powers,”<sup>80</sup> JCAR staff nonetheless concluded the approach was defensible because the legislature was “merely

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71. *Id.* at 396 (“Very serious constitutional questions could be raised about this alternative.”).

72. *See infra* Part IV.

73. 1979 JCAR REPORT, *supra* note 49, at 393–94.

74. *Id.*

75. *Id.* The Model State Administrative Procedure Act includes a similar burden-reversing provision. *See* MODEL STATE ADMIN. PROCEDURE ACT § 3-204 (UNIF. LAW COMM'N 1981); *see also* David S. Neslin, Comment, *Quis Custodiet Ipsos Custodes? Gubernatorial and Legislative Review of Agency Rulemaking Under the 1981 Model Act*, 57 WASH. L. REV. 669, 686 (1982) (discussing “reversed burden of persuasion” schemes).

76. The Senate subsequently overrode the veto, but the measure did not receive the three-fifth vote needed for an override in the House. *See* 1979 JCAR REPORT, *supra* note 49, at 122.

77. The veto could be issued either before a rule became effective or within sixty days of its implementation. *See id.* at 159 (“Recommended Bill Two”).

78. *Id.*

79. *Id.* at 396.

80. *Id.* at 395.

conditioning” its delegation of rulemaking authority to the agencies.<sup>81</sup> “Of course,” the paper languidly concluded, “a court may view the issue differently.”<sup>82</sup>

This JCAR veto provision was considered by the General Assembly in 1979 but was never brought to a vote.<sup>83</sup> As discussed below, however, it would become law nearly a quarter century later.<sup>84</sup>

In 1980, the General Assembly did pass a reform measure, authorizing for the first time a legislative veto over agency rulemaking. Described by JCAR as a “cooling off” provision for “improper agency rules,”<sup>85</sup> the statute allowed JCAR to “prohibit” and thereby delay the implementation of new rules (or to “suspend” the effect of emergency rules) for up to 180 days. JCAR prohibitions and suspensions were authorized upon a finding, by a three-fifths vote of the committee, that the rules were “objectionable” under standards laid out elsewhere in the IAPA,<sup>86</sup> and that they “constitute[d] a serious threat to the public interest, safety or welfare.”<sup>87</sup> Although the prohibition or suspension was temporary, the General Assembly could make either permanent through passage of a joint resolution.<sup>88</sup>

In its 1980 Annual Report, JCAR denied that the new statute authorized a “legislative veto” over agency rulemaking.<sup>89</sup> But that claim was misleading, if not disingenuous. Under the new law, the General Assembly possessed the power to permanently prevent implementation of administrative agency rules through the passage of a joint resolution that did not need to proceed through the usual constitutional requirements for passage of a bill, and that did not need to be presented to the Governor for a possible veto.<sup>90</sup> In other words, the

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81. *Id.* at 394.

82. *Id.* The *Staff Paper* also noted that one effect of this proposal might be that agencies would evade JCAR altogether by simply not filing its rules and thereby pushing rulemaking underground. *Id.* Under these circumstances, the public would have difficulty determining whether to hold the agency or JCAR responsible for the substance of the rule. In addition, the staff noted that JCAR could “continue to disclaim actual responsibility for the substance of rule [sic], . . . but it is problematic [sic] whether the general public would actually distinguish between this veto power and an actual approval power.” *Id.* at 395.

83. H.R. 1503, 81st Gen. Assemb., Reg. Sess. (Ill. 1979).

84. *See infra* Part I.C.

85. 1980 JCAR REPORT, *supra* note 49, at 1.

86. Act of Jan. 1, 1981, Pub. Act 81-1514, 1977 Ill. Laws 3898 (modifying sections 7.04, 7.05, 7.07, and 7.08 of the IAPA).

87. *Id.*

88. *Id.*

89. 1980 JCAR REPORT, *supra* note 49, at 109.

90. In order for a bill to become law in Illinois, it must among other things be presented to the

General Assembly now indisputably possessed a legislative veto.

Unsurprisingly, the Governor vetoed the bill after it was presented to him by the General Assembly. He argued that it “constitute[d] a serious and unwarranted intrusion by the General Assembly and one of its committees into areas properly reserved to the executive and judicial branches of government,” that it “would violate the separation and delegation of powers provision in the Illinois Constitution, and would seriously jeopardize the fair and orderly processes of government in Illinois.”<sup>91</sup> This time, though, the General Assembly overrode the Governor’s veto.

In its Annual Report for 1980, JCAR assured the public that the new powers shared by it and the General Assembly were “entirely proper,” even though “legal arguments about the constitutionality of these provisions is likely to continue for some time.”<sup>92</sup> Strangely, though, constitutional arguments about the lawfulness of the General Assembly veto have *not* often been raised in the courts. In fact, the Illinois courts have not yet ruled on the constitutionality of either the General Assembly veto or of the pure JCAR veto (its successor, which will be discussed in the next Section).

By its own account, JCAR was not shy about flexing its new muscle. JCAR’s objections to new rules were now backed by the threat of a permanent suspension by the General Assembly if its concerns were not remedied by the promulgating agency. Unsurprisingly, agencies grew more responsive to the committee, though a superficial glance at the numbers might hide this fact.

In 1981, JCAR reviewed more than six hundred proposed rules,<sup>93</sup> and formally objected to only thirty of them. This ratio of objections to rules might seem low, at least compared with the prior few years. But JCAR noted that “virtually all of the rules” it looked at “were changed in some way by the Committee’s review.”<sup>94</sup> Agencies, it seemed, were more responsive to JCAR comments after passage of the amendatory statute, because any residual JCAR discontent with the agency’s rulemaking could now, with some ease, lead to the permanent quashing of the new rule. JCAR, of course, was satisfied that this new power

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Governor for a possible executive veto. ILL. CONST. art. 4, § 9. For a full discussion of the state constitutional requirements for lawmaking, see *infra* Part III.B.

91. 1980 JCAR REPORT, *supra* note 49, at 110 (quoting Governor James R. Thompson).

92. *Id.* at 111.

93. 1981 JCAR REPORT, *supra* note 10, at 28.

94. 1981 JCAR REPORT, *supra* note 10, at 6 (emphasis added).

“significantly strengthened” the impact of its review process and would enhance its effectiveness moving forward.<sup>95</sup>

JCAR’s first use of its prohibition powers came swiftly in 1981, when it blocked implementation of a proposed set of rules from the Illinois Health Finance Authority (“IHFA”) that would have regulated the financial management of hospitals.<sup>96</sup> The status quo that the IHFA sought to change had hospitals determining the rates for their services retrospectively, after they had delivered services to patients and computed costs. The IHFA rules would instead have mandated prospective rate-setting, pursuant to which the IHFA would approve in advance the amount of revenue a hospital could generate each year.

JCAR filed a prohibition on implementation of the rule, finding that the IHFA had adopted an “improper definition” of the term “hospital services” that would result in a discontinuation of services and a “threat to the welfare of Illinois citizens”; that forcing hospitals to fill out the required reports would “pose a serious threat to the interests of consumers of health care”; that the IHFA’s promulgation of the rules at the same time it was negotiating payer differentials “pose[d] a serious threat to the interest of Illinois citizens by raising private insurance premium rates”; and that the IHFA’s promulgation of the rules while negotiating with the federal government over grants of contingent liability “will cause increased costs and/or decreased quality of care and pose a serious threat to Illinois Citizens.”<sup>97</sup>

The justifications offered by JCAR for its first act of prohibition are laid out here to make a couple of points. First, the fact that JCAR used its power to prohibit the immediate implementation of a set of rules within months of receiving statutory authority to do so was a signal to agencies that the weapon would not sit unused. Second, JCAR swiftly adopted a broad understanding of its authority to prohibit or suspend new rules, which by statute could only be used where the proposed rules “would constitute a serious threat to the public interest, safety, or welfare.”<sup>98</sup> There is no definition in the statute of what would constitute a “serious” threat, including whether economic impact of some sort alone can meet that standard. But at least three and perhaps all four of the justifications that JCAR offered for prohibiting the

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95. *Id.* at 28.

96. 1981 JCAR REPORT, *supra* note 10, at 31–32.

97. *Id.*

98. 5 ILL. COMP. STAT. 100/5-115(a) (2016).

IHFA's rules were fundamentally economic in nature.

Unsurprisingly, the IHFA revised its proposed rules following JCAR prohibition rather than face the prospect of passage of a General Assembly joint resolution that would have made the suspension permanent. The IHFA and other agencies were learning, in short, that JCAR was now a force and that its objections had to be addressed.

Over the course of the roughly two decades during which JCAR had the authority to prohibit or suspend the implementation of rules subject to the prohibition or suspension becoming permanent by a General Assembly joint resolution, JCAR found it necessary to exercise this power just a few dozen times. Between 1981 and the end of 2003, JCAR was responsible for reviewing fully 12,395 proposed general rules from state agencies<sup>99</sup> and 1867 emergency rules.<sup>100</sup> During this period, the committee filed only thirty-nine prohibitions or suspensions from among these 14,262 proposed agency rules.<sup>101</sup>

The small number of prohibitions and suspensions may be evidence that administrative agencies took the threat of a JCAR suspension and subsequent General Assembly joint resolution seriously. Most rules were modified or withdrawn after JCAR comment, before JCAR had to issue a suspension. When the committee did suspend a rule, the *in terrorem* value of a looming joint resolution almost always led to agency capitulation.

In the fifteen years between 1981 and 1995, every one of the nineteen JCAR suspensions led to the promulgating agency either modifying its rule in accord with JCAR's wishes or else withdrawing its rule altogether.<sup>102</sup> During the following nine years, between 1996 and 2004, JCAR suspended proposed rules nineteen times, with the promulgating agencies "voluntarily" modifying or withdrawing their rules in ten of those instances. Of the remaining nine suspended rules—where the

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99. These numbers can be reconstructed by from statistical tables in JOINT COMM. ON ADMIN. RULES, 2013 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 69 (2014) [hereinafter 2013 JCAR REPORT] (showing 13,940 proposed general rules between 1978 and 2003); 1980 JCAR REPORT, *supra* note 10, at 24 (showing 563 proposed general rules in 1980); 1979 JCAR REPORT, *supra* note 49, at 21 (showing 475 proposed general rules in 1979); and 1978 JCAR REPORT, *supra* note 8, at 21 (showing 507 proposed general rules in 1978).

100. These numbers can be reconstructed from statistical tables in 2013 JCAR REPORT, *supra* note 99, at 73 (showing 2079 proposed emergency rules between 1978 and 2003); 1980 JCAR REPORT, *supra* note 49, at 24 (showing ninety-seven proposed emergency rules in 1980); 1979 JCAR REPORT, *supra* note 49, at 21 (showing 102 proposed emergency rules in 1979); and 1978 JCAR REPORT, *supra* note 8, at 21 (showing 133 proposed emergency rules in 1978).

101. 2013 JCAR REPORT, *supra* note 99, at 58–60.

102. *Id.* at 58–59.

agencies girded themselves for a confrontation with the General Assembly—JCAR withdrew its objections in six instances (though all involved a single set of rules by a single agency) and the General Assembly refused to pass a joint resolution making JCAR suspensions permanent in three instances.

In short, agency pushback against JCAR was successful only a handful of times between 1981 and 2004, when JCAR suspensions could be enforced by a General Assembly veto. Rational agency actors clearly understood that their proposed rules would survive JCAR review only if they modified them to JCAR's satisfaction.<sup>103</sup>

### C. *The JCAR Veto Era, 2004–Present*

JCAR's powers grew even stronger in the summer of 2004, when the General Assembly again revised the IAPA. For more than two decades, JCAR's suspension authority had assured the committee possessed a powerful, coercive tool to wield against administrative agencies. But the suspension still required General Assembly approval within 180 days in order to become permanent.

The 2004 statutory amendment inaugurated a sea change. Moving forward, a JCAR prohibition or suspension of an agency's rule would become permanent *unless* the General Assembly voted by joint resolution (within six months) to reverse it.<sup>104</sup> In other words, JCAR could now presumptively veto any new agency rule. The General Assembly was voting to hand over its legislative veto power to JCAR, "empowering the Members of JCAR who are appointed to serve on that body, to act on their behalf, as their representatives."<sup>105</sup> The floor debate in the House on the measure indicated that at least some members understood that this legislation would be a "fundamental change in the relationship between the Executive and the Legislative branches,"<sup>106</sup> although to be fair the "fundamental change" really had

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103. See Neslin, *supra* note 75, at 690 n.128 (noting that "[a]gencies usually withdraw or modify rules to meet committee objections," and citing sources).

104. 100 ILL. COMP. STAT. 5/115(c)(2016) (stating that after JCAR objects to a proposed rule, "any member of the General Assembly may introduce in the General Assembly a joint resolution stating that the General Assembly desires to discontinue the prohibition against the proposed rule, amendment, or repealer or the portion thereof to which the statement was issued being filed and taking effect," and "[i]f the joint resolution is not passed by both houses of the General Assembly within 180 days . . . the agency shall be prohibited from filing the proposed rule . . . and [it] shall not take effect").

105. H.R., Transcript of Debates, 93rd Gen. Assemb., 166th Sess., at 34 (Ill. July 24, 2004).

106. *Id.* at 32.

come in 1980, when the General Assembly had authorized the legislative veto in the first place.

The measure was proposed and passed in haste, at a time when then-Governor Rod Blagojevich's relationship with the General Assembly was already in steep decline.<sup>107</sup> As one lawmaker remarked, this "was one of those significant Bills that actually never went through the legislative process, so we haven't had a chance to debate it. I understand it surfaced yesterday for the first time."<sup>108</sup> He also observed that "[w]e are so caught up in the personalities of the Governor and the Legislature that we're not even seeing straight about the relationship between these two branches."<sup>109</sup>

This change was momentous. The twelve-member JCAR now had legislative veto powers unprecedented in the state's history. To the degree administrative agencies could, during the last twenty-five years, at least consider the prospect of standing up to JCAR and getting their rules implemented, any realistic prospect of getting past JCAR had just evaporated. Overnight, JCAR had become one of the most powerful government entities in the state—virtually a branch unto itself.

Strangely, JCAR barely acknowledged this development in its 2004 *Annual Report*, failing to mention it altogether in the introductory or overview materials, and burying the news in the middle of a paragraph thirty-eight pages into the report.<sup>110</sup>

But this was in fact no small change. During the twenty-three years that a JCAR veto would become permanent only if backed by a General Assembly joint resolution (between 1981 and 2003), JCAR delayed or suspended rules only thirty-nine times. During the ten years when a JCAR veto became permanent unless it was overturned by a joint resolution (between 2004 and 2013), the committee issued fifty-four vetoes. In other words, since the JCAR veto went into effect in 2004, the rate of JCAR suspensions and objections had more than tripled, from 1.7 per year to 5.4 per year.<sup>111</sup>

The most recent chapter of JCAR story was written in 2009, when the

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107. *See id.* (discussing the relationship between the Governor and the legislature).

108. *Id.* at 31.

109. *Id.* at 32. The provision passed the House 110–4, and passed the Senate 49–5.

110. JOINT COMM. ON ADMIN. RULES, 2004 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 41 (2005).

111. It is for this reason that JCAR's powers prior to 2004 have occasionally been described as anemic. *See* CHRISTOPHER Z. MOONEY & TIM STOREY, THE ILLINOIS GENERAL ASSEMBLY, 1992–2003: LEADERSHIP CONTROL, CONTINUITY, AND PARTNERSHIP 39 (2005) (discussing the belief that JCAR had little control over agencies).

General Assembly passed House Bill 398, which states that “[a]ll rulemaking authority exercised on or after [the law’s effective date] is conditioned on the rules being adopted in accordance with all provisions of this Act and all rules and procedures of the Joint Committee on Administrative Rules (JCAR).”<sup>112</sup> This language was presumably intended to buttress the JCAR veto against judicial challenge. Indeed, further language in House Bill 398 makes this conclusion seem inevitable: “[A]ny purported rule not so adopted, for whatever reason, including without limitation a decision of a court of competent jurisdiction holding any part of this Act or the rules or procedures of JCAR invalid, is unauthorized.”<sup>113</sup>

This remarkable provision suggests the General Assembly’s intent that even if the courts decide that a JCAR veto violates separation-of-powers principles, the vetoed rule *still* cannot take effect.<sup>114</sup> As discussed below, there is every reason to believe that this statute represents legislative overreach, compounding rather than resolving the serious constitutional issues that JCAR and General Assembly legislative veto provisions raise.

## II. LAWFULNESS OF LEGISLATIVE VETOS OVER AGENCY RULEMAKING NATIONWIDE

With rare exceptions, legislative veto schemes have been ruled unconstitutional in jurisdictions across the nation. To be sure, there is something compelling about the logic of the legislative veto. The authority to delegate rulemaking powers to an administrative body also plausibly entails the authority to delegate a lesser power—the power to promulgate rules subject to preapproval by the legislature. And legislative review of proposed rules seems consonant with values of democratic participation, because the final decision about whether rules go into effect will be made by the elected representatives of the people rather than by executive branch appointees. The availability of a legislative veto also relieves the legislature of having to make the

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112. 5 ILL. COMP. STAT. 100/5-6 (2016).

113. *Id.*

114. During floor debate, a state senator asked what would happen if “rules are promulgated and a court finds . . . the Administrative Code or the Joint Committee invalid—help me understand the logic how this statute could still have those rules continue to have the force of law.” S., Transcript of Debates, 96th Gen. Assemb., 13th Sess., at 12 (Ill. Feb. 11, 2009) (statement of Sen. Rutherford). The puzzling response was that if an agency chose to promulgate rules, then it necessarily would be consenting to the JCAR scheme. *Id.* (statement of Sen. Clayborne).

difficult choice of deciding whether to delegate rulemaking authority to an agency (and thus lose effective control over the process) or to reserve rulemaking authority for itself and consequently have to draft detailed rules by politicians with little or no expertise on the subject matter.

Yet, the chief problem, as identified by federal and state courts, is that legislative vetoes allow legislatures to act outside of the constraints of constitutionally mandated lawmaking procedures, wielding power through an “extra-legislative control device.”<sup>115</sup> Statutes that allow agency rules to be nullified by passage of a joint resolution of both houses of a legislature, for example, do not comply with constitutional provisions for the presentment of bills to the executive for a potential veto. Statutes that allow for rule nullification by the majority vote of a single house of the legislature—so-called one-house vetoes—possess not only a presentment but also a constitutional bicameralism problem. And schemes that allow smaller legislative committees to act unilaterally to kill agency rules arguably present not only bicameralism and presentment problems, but also potentially raise a delegation issue.

In 1983, the U.S. Supreme Court held in *INS v. Chadha* that legislative vetoes cannot be squared with the bicameralism and presentment requirements of the United States Constitution.<sup>116</sup> Several states had previously come to the same conclusion under state constitutional law, and following the release of *Chadha* many more states likewise ruled legislative vetoes unconstitutional. As I discuss in the next Part, the pertinent constitutional provisions in the Illinois Constitution are fundamentally indistinguishable from those relied on in these other federal and state cases, which suggests that legislative vetoes are unlikely to survive future judicial scrutiny in Illinois.

This Part will first describe the Supreme Court’s discussion of congressional vetoes in the *Chadha* case. Discussion will then shift to an overview of the status of state schemes for legislative vetoes of agency rulemaking in each state in which a judicial or attorney general opinion has been issued. In only one state has such a legislative veto scheme been deemed constitutional.

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115. H. Lee Watson, *Congress Steps Out; A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 990–91 (1975) (critiquing legislative vetoes as extra-legislative control devices that unconstitutionally allow “the creation of power . . . to be wielded by the hand creating it”).

116. *INS v. Chadha*, 462 U.S. 919, 953–54 (1983).

*A. The Legislative Veto in the Federal System*

The doctrine of separation of powers is, of course, fundamental to our federal and state systems of government. Baron Charles de Montesquieu, whose *The Spirit of Laws* served as a primer for the Framers of the federal Constitution, observed that the admixture of legislative, executive, and judicial powers would tend toward oppression and the loss of liberty.<sup>117</sup> James Madison echoed these cautions in *Federalist No. 47*, writing that the “accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>118</sup>

But neither Montesquieu nor Madison believed that a perfect separation of powers among the departments of government was advisable or even possible. What chiefly needed to be guarded against, according to Madison, was the undermining of freedom that would occur when “the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department.”<sup>119</sup> Montesquieu, according to Madison, “did not mean that these departments ought to have no partial agency or no control over the acts of each other.”<sup>120</sup> He illustrated the utility of imperfect separation with examples from the several states.<sup>121</sup> For instance, Massachusetts authorized executive vetoes of legislative action as a “qualified negative” on the body; provided for impeachment of members of the executive and judicial branches by the senate; and allowed for appointment of judges by the executive branch, with removal power in the hands of the executive and legislative branches working in tandem.<sup>122</sup>

Still, it was clear to Madison that the arrogation of power to the

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117. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989).

118. *THE FEDERALIST NO. 47*, at 244 (James Madison) (Buccaneer Books ed., 1992). Likewise, George Washington warned in his Farewell Address that the “spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.” George Washington, Farewell Address, in 13 *WRITINGS OF GEORGE WASHINGTON* 306 (Worthington Chauncey Ford ed., 1892).

119. *THE FEDERALIST NO. 47*, *supra* note 118, at 245.

120. *Id.* at 248; *see also THE FEDERALIST NO. 48*, *supra* note 118, at 253 (James Madison) (stating it was unnecessary that “the legislative, executive, and judiciary departments should be wholly unconnected with each other”).

121. *THE FEDERALIST NO. 47*, *supra* note 118, at 246–49 (James Madison).

122. *Id.* at 246–47.

legislative branch was the chief evil to be avoided, as it “is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.”<sup>123</sup> The legislature was a body that deemed itself most in touch with the will of the people, possessed the most influence over them, and was “sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions.”<sup>124</sup> Its constitutional powers were “at once more extensive, and less susceptible of precise limits” than those of the other branches, and it could “with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.”<sup>125</sup> These sentiments have echoed through American jurisprudence.<sup>126</sup>

The insight was that although there was wisdom in granting the executive conditional veto power over the legislature, the obverse was not true. As Montesquieu explained, the legislature should have the right and the power “to *examine* the manner in which the laws it has made have been executed” so as to hold the executive accountable.<sup>127</sup> But it should not have the “reciprocal faculty of *checking* the executive power,”<sup>128</sup> because there would then be no limit to the powers the legislature could arrogate to itself.

It is against this historical background that the U.S. Supreme Court addressed for the first time the constitutionality of legislative vetoes in *Chadha*.<sup>129</sup> At issue in the case was a federal statute that authorized the Attorney General of the United States to suspend an alien’s deportation order, subject to disapproval of the Attorney General’s action by either

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123. THE FEDERALIST NO. 48, *supra* note 118, at 251 (James Madison).

124. *Id.*

125. *Id.*

126. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (“[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”); *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) (noting that a “motivating factor” that led to the Kentucky Constitution was “a strong desire on the part of the people to curb the power of the General Assembly”). *See also* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 214 (1784) (“[T]he powers of government should be so divided and balanced among several bodies . . . that no one could transcend their legal limits, without being effectually checked and restrained by the others.”).

127. MONTESQUIEU, *supra* note 117, at 162 (emphasis added).

128. *Id.*

129. Prior to its decision in *Chadha*, the Supreme Court in *Buckley v. Valeo* decided it was unnecessary to pass on the validity of legislative veto. 424 U.S. at 140 n.176 (1976). In concurrence, Justice White stated that he thought the legislative veto was not unconstitutional. *Id.* at 284–85 (White, J., concurring).

the Senate or House of Representatives by means of a resolution.<sup>130</sup> In short, the question was whether a “one-House veto” over executive action was constitutional.<sup>131</sup>

The Court acknowledged that legislative vetoes had proliferated in the states since the 1930s, in part because such schemes seemed to offer a convenient and efficient way to police executive compliance with legislation.<sup>132</sup> It likewise nodded toward the robust scholarly debate about the policy benefits of legislative vetoes.<sup>133</sup> But the wisdom of the legislation, according to the Court, had no bearing on the constitutional questions before it.<sup>134</sup> Instead, the problem with the legislative veto was that it was incompatible with separation-of-powers principles in the broad sense, and that it violated the Constitution’s presentment and bicameralism requirements in particular.<sup>135</sup>

With respect to presentment, the Constitution requires that “[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States” for a potential veto.<sup>136</sup> The presentment requirement was “so imperative that the draftsmen took special pains” to assure it could not be avoided, for example by calling a proposed law a “resolution” or a “vote” rather than a “bill.”<sup>137</sup> The need to give the President a qualified power to nullify legislation through a veto “was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.”<sup>138</sup> The executive veto was an effort to “check whatever

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130. *INS v. Chadha*, 462 U.S. 919, 926–27 (1983) (discussing 8 U.S.C. § 244(c)(2) (2012)).

131. *Id.* at 927 n.2 (noting that the Court would refer to the “resolution” power as a “one-House veto” of the Attorney General’s decision).

132. Legislative veto provisions were included in federal legislation at least eighty-three times in 126 different acts of Congress between 1933 and 1976. See H.R. Rep. No. 1014, at 14 (1976).

133. *Chadha*, 462 U.S. at 945.

134. *Id.*

135. Unlike in the constitutions of most states (including Illinois), there is no specific “separation of powers” provision in the federal Constitution. The Court in *Chadha* noted, though, that the principle of “was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted.” 462 U.S. at 946 (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)).

136. U.S. CONST. art I, § 7, cl. 2; see also *id.* art I, § 7, cl. 3 (“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . 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.”).

137. *Chadha*, 462 U.S. at 947.

138. *Id.*

propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures.”<sup>139</sup>

As for bicameralism, the Court noted that the Constitution required presentment of a bill to the President only after it “shall have passed the House of Representatives *and* the Senate.”<sup>140</sup> The Court then quoted widely from the Framers about the wisdom of dividing the legislature into two houses and requiring bicameral agreement before presentation of a bill to the President.<sup>141</sup>

The Court did *not* hold in *Chadha* that the legislative veto exercised by Congress was constitutionally invalid because Congress had exercised executive powers. After acknowledging that the functions of government were not “hermetically sealed” from one another, the Court observed that the powers of the three branches were nonetheless “functionally identifiable” and that Congress had here in fact exercised legislative powers.<sup>142</sup> First, the Court presumed that when a branch of government acts it is “exercising the power the Constitution has delegated to it.”<sup>143</sup> And here the Constitution had delegated to Congress the power to “establish a uniform Rule of Naturalization.”<sup>144</sup> According to the Court, Congress was attempting to exercise that power when it tried—through the use of the legislative veto—to overrule the Attorney General’s exercise of his statutory authority to suspend Chadha’s deportation.<sup>145</sup>

The problem with Congress’s veto was instead simply that it represented an attempt to exercise the body’s legitimate legislative power in a manner that failed to comply with the constitutional requirements of bicameralism and presentment.<sup>146</sup>

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139. *Id.* at 947–48.

140. U.S. CONST. art I, § 7 (emphasis added).

141. The Court quotes Madison, for example, expressing his view that, because the legislature dominates in a republican government, it is necessary “to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.” *Chadha*, 462 U.S. at 950 (quoting THE FEDERALIST NO. 51, at 324 (James Madison) (H. Lodge ed. 1888)).

142. *Chadha*, 462 U.S. at 951 (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)).

143. *Id.* at 951.

144. *Id.* at 952 (quoting U.S. CONST. art. I, § 8, cl. 4).

145. *Id.* at 952 (“Examination of the action taken here by one House . . . reveals that it was essentially legislative in purpose and effect.”).

146. *Id.* at 953–54; *see also* *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) (“If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7. In short,

Justice White dissented, offering a functionalist defense of the legislative veto against what he took to be the majority's formalist approach. He noted (correctly) that *Chadha's* holding would immediately invalidate nearly two hundred other "legislative veto" provisions, which had been Congress's attempt to assure that the executive and its independent agencies acted with some accountability.<sup>147</sup> Without the legislative veto, he observed, Congress was now left with an unappealing choice—"either to refrain from delegating the necessary authority, leaving itself with the hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies."<sup>148</sup>

Justice White's dissent was an impassioned plea to acknowledge that we are living in a new age, in which we have willingly made concessions to the purer vision of the separation-of-powers doctrine that was envisioned by the Framers.<sup>149</sup> After all, legislative authority is already

routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups. "The rise of administrative bodies probably has been the most significant legal trend of the last century. . . . They have become a veritable fourth

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when Congress '[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch,' it must take that action by the procedures authorized in the Constitution." (quoting *Chadha*, 462 U.S. at 952–55) (alterations in original); *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 476 (D.C. Cir. 1982) ("The fundamental problem of the one-house veto, then, is that it represents an attempt by Congress to retain direct control over delegated administrative power. Congress may provide detailed rules of conduct to be administered without discretion by administrative officers, or it may provide broad policy guidance and leave the details to be filled in by administrative officers exercising substantial discretion. It may not, however, insert one of its houses as an effective administrative decisionmaker.").

147. *Chadha*, 462 U.S. at 968 (White, J., dissenting).

148. *Id.*

149. See 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 HASTINGS L.J. 1, 28–29 (1984) (agreeing with the conclusion in *Chadha*, but suggesting the majority failed to recognize that not every "legislative" act is a law-making act); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 29–30 (1994) (observing that while the majority accurately described the roles of each department and the importance of the separation of powers, it did not state why this particular veto violated those roles or separation-of-powers principles).

branch of the Government, which has deranged our three-branch legal theories.”<sup>150</sup>

In short, Justice White suggested that the history of the separation-of-powers doctrine in the United States had been one of “accommodation and practicality,” and that the *Chadha* disapproval of the legislative veto was unfaithful to this approach.<sup>151</sup>

### B. *The Legislative Veto in the States*

Like Congress, state legislatures have sought to gain control over administrative agencies by passing statutes that authorize legislative vetoes to permanently block implementation of proposed rules.<sup>152</sup> In some states, the legislature must pass a joint resolution of both houses to kill agency rules, while in others a majority vote of just one house will be adequate. In yet other states, a joint legislative committee can by majority vote singlehandedly keep regulations from being enforced.

What these legislative veto schemes have in common is that, with a single exception, they have been deemed unlawful when their constitutionality has been challenged. In at least twelve states, the

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150. *Chadha*, 462 U.S. at 984 (White, J., dissenting) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)).

151. *Id.* at 999. A number of scholars agree with Justice White that the majority’s approach in *Chadha* simply ignored the evolution of lawmaking traditions, and that in fact the best way to protect separation-of-powers principles is to allow some legislative oversight of delegations to the other branches. See, e.g., Glicksman, *supra* note 149, at 27; Misty Ventura, *The Legislative Veto: A Move Away From Separation of Powers or a Tool to Ensure Nondelegation?*, 49 SMU L. REV. 401, 431 (1996); William J. Wagner, *Balancing as Art: Justice White and the Separation of Powers*, 52 CATH. U. L. REV. 957, 963 (2003). For a collection of articles critiquing the majority’s reasoning in *Chadha*, see Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1250 n.63 (1986).

152. As of 1982, the year before *Chadha* was decided, eleven states had no system of legislative supervision, fifteen had advisory committees to review executive rulemaking and make recommendations to the full legislature to modify the rules by statute, one had a one-House veto, eleven had a two-House veto, and nine authorized a legislative committee to suspend the rule for a limited period of time pending final legislative action. Levinson, *supra* note 35, at 81–83; see also Neslin, *supra* note 75, at 674 nn. 28–29 (counting eighteen states that had authorized a legislative veto by one or both houses, but including in his list states where the authorization had already been deemed unconstitutional by the time of the *Chadha* decision); David Pascal Zambito, Comment, *An “Irrc-some” Issue: Does Pennsylvania’s Regulatory Review Act Violate Separation of Powers?*, 101 DICK. L. REV. 643, 643 n.4 (counting, as of 1982, forty-two states had some provision for legislative review of state regulations (citing Iver Peterson, *Court’s Outlawing of Congress’s Veto Casts Shadows on State Legislatures*, N.Y. TIMES, July 22, 1983, at A8)). Each year, the Council of State Governments includes in its *Book of the States* tables identifying the powers and procedures of legislatures for reviewing executive agency rulemaking. See COUNCIL OF STATE GOVT’S, THE BOOK OF THE STATES 2014, at 118–24 (2014), <http://knowledgecenter.csg.org/kc/category/content-type/content-type/book-states>.

legislative veto has been deemed unconstitutional either by court decision or in an attorney general opinion. Five of these states had by statute authorized joint-resolution vetoes: Alaska,<sup>153</sup> West Virginia,<sup>154</sup> New Jersey,<sup>155</sup> Kansas,<sup>156</sup> and Missouri.<sup>157</sup> Two of the states in which the legislative veto was deemed unlawful had authorized one-house vetoes by statute: Oklahoma<sup>158</sup> and Pennsylvania.<sup>159</sup> A one-house veto was also ruled unlawful in a third state, Massachusetts, though in the context of pending rather than enacted legislation.<sup>160</sup> And five states had authorized legislative committee vetoes: New Hampshire,<sup>161</sup> Kentucky,<sup>162</sup> Oregon,<sup>163</sup> Michigan,<sup>164</sup> and West Virginia (which also allowed a veto of agency rulemaking by joint resolution).<sup>165</sup> The only legislative veto scheme that has affirmatively withstood judicial or attorney general scrutiny is Idaho's, which authorizes a joint resolution veto of agency rulemaking.<sup>166</sup> Moreover, no scheme authorizing a *committee* to exercise veto powers over agency rulemaking has ever

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153. ALASKA STAT. § 44.62.320(a), *repealed* by 2004 Alaska Sess. Laws, ch. 164, § 7.

154. W. VA. CODE § 29A-3-12(b) (2016). This statutory provision authorized the legislature to exercise a kind of "pocket veto" if it failed to authorize agency rules by joint resolution. *W. Va. Bd. of Educ. v. Hechler*, 376 S.E.2d 839, 841 (W. Va. 1988).

155. N.J. STAT. ANN. § 52:14B-4.4 (West 1981) (*repealed* 2001).

156. KAN. STAT. ANN. § 77-426 (West 2015); *see also* *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622 (1984) (finding previous version of statute unconstitutional without presentment to the governor).

157. There was no single statute in Missouri that authorized these procedures. Constitutional amendments that would have established such procedures were twice defeated. Nonetheless, these requirements were included individually in a series of statutes. *See* Mo. Coal. for the Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 130 (Mo. 1997) (en banc); *see also* Dean, *supra* note 33, at 1223-24 n.5 (listing statutes where these review provisions had been inserted).

158. OKLA. STAT. ANN. tit. 75, § 308 (*repealed* 1995).

159. 71 PA. CONS. ST. § 745.7 (2016); *see also* *Commonwealth v. Jubelirer*, 567 A.2d 741, 749 (Pa. Comm. Ct. 1989), *vacated on grounds of mootness* 614 A.2d 204, 211 (Pa. 1992) (holding the constitutionality issue moot in light of the legislature's subsequent statutory elimination of the one-House veto).

160. S., 1763, § 29, 1986 Leg. (Mass. 1986); *Op. of the Justices*, 493 N.E.2d 859 (Mass. 1986) (rendering an advisory opinion, at the request of the Senate, concerning the legislative certification provisions of section 29 of 1986 Senate Bill 1763).

161. N.H. REV. STAT. ANN. § 541-A:2 (2016); *see also* *Op. of the Justices*, 431 A.2d 783, 788 (N.H. 1981) (finding previous version of statute unconstitutional).

162. KY. REV. STAT. ANN. § 13.087 (*repealed* 1984).

163. OR. REV. STAT. § 459-298 (*repealed* 1995).

164. MICH. COMP. LAWS § 24.245 to 24.246 (2016); *see also* *Blank v. Dep't of Corr.*, 611 N.W.2d 530 (Mich. 2000) (finding provisions of previous version of the statute to be unconstitutional for lack of compliance with the enactment and presentment requirements of the Michigan Constitution).

165. W. VA. CODE § 29A-3-11.

166. IDAHO CODE § 67-5291 (2015); *see also* MICH. COMP. LAWS § 24.245 to 24.246.

been upheld as constitutional in any jurisdiction, federal or state.

In each of the states in which the legislative veto has been deemed unconstitutional, “separation of powers” problems, broadly speaking, are implicated. Although the constitutional analysis tends to be consistent from state to state, there is some nonuniformity in reasoning that bears remark.

The chief problem that the courts (and attorneys general) perceive with legislative veto schemes is that the legislature has authorized itself to take action in a manner that need not comply with constitutional requirements for enacting laws. Legislatures may only act pursuant to their legislative powers,<sup>167</sup> which they must exercise in accord with constitutional provisions that require passage by a majority of both houses of the legislature and presentment of the bill to the governor for approval or executive veto.<sup>168</sup>

In the states that authorize either a single house of the legislature or a legislative committee to kill agency rules, bicameralism failures have been fatal to the legislative veto scheme.<sup>169</sup> The courts have observed that action by a single house undermines much of the point of the bicameral system, which was designed to ascertain the legislative will

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167. “A resolution is essentially legislative where it affects the legal rights, duties and regulations of persons outside the legislative branch and therefore must comply with the enactment provisions of the constitution.” *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622, 638 (Kan. 1984).

168. *See, e.g., Gen. Assembly of State of N.J. v. Byrne*, 448 A.2d 438, 444 (N.J. 1982) (“A veto which effectively amends or repeals existing law offends the Constitution because it is tantamount to passage of a new law without the approval of the Governor.”).

169. *See Op. of the Justices*, 431 A.2d 783, 788 (N.H. 1981) (noting that the “wholesale shifting” of legislative authority to small committees violates constitutional provisions requiring the House and Senate to act pursuant to a quorum of both bodies, and that the system failed to comply with bicameralism requirements); *Gilliam Cty. v. Dep’t of Env’tl. Quality of State of Or.*, 849 P.2d 500, 502, 505 (Or. 1993), *rev’d sub nom. Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.*, 511 U.S. 93 (1994) (finding scheme that required a joint legislative committee to approve agency rules before they became effective was unconstitutional because the veto “was a legislative act, and a legislative act by less than a majority of each chamber is unconstitutional”); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 632 (W. Va. 1981); Letter from Michael C. Turpen, Attorney Gen. of Okla., to Marvin York, State Sen., Okl. A.G. Opin. No. 86-17, 1986 WL 235082, at \*1–2 (Feb. 24, 1986) (explaining his “relatively simple analysis” was that because the only power possessed by the Oklahoma legislature was the legislative power, “which may only be exercised bicamerally and with presentment,” Oklahoma’s constitutional system did not allow a resolution adopted by a single house “to have the force and effect of law beyond the bounds of that house”); *cf. Martinez v. Dep’t of Indus., Labor & Human Relations*, 478 N.W.2d 582, 586 (Wis. 1992) (finding no constitutional problem with a legislative review scheme in which a joint committee was authorized only to *recommend* that the legislature pass legislation through the usual enactment process in order to prevent agency rules from being implemented).

by empowering each house with a negative upon the other.<sup>170</sup> And action by a legislative committee is even more problematic, as it places governmental decisions in the hands of such a small portion of the legislative body.<sup>171</sup>

Statutes that allow a legislative veto only by a joint resolution do not face a bicameralism problem, but typically fail because of a failure to comply with presentment requirements. State constitutions require all bills to be presented to the governor before becoming enforceable as law in order to provide the governor an executive veto that might act as a counterweight to the powers of the legislature.<sup>172</sup> Because legislative veto schemes of all stripes—legislative committee, one-house, or joint resolution—are designed precisely to freeze the governor out of the process, they have been found not to withstand constitutional scrutiny in many states.<sup>173</sup>

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170. *Op. of the Justices*, 431 A.2d at 788.

171. *See, e.g., Barker*, 279 S.E.2d at 635 (noting that veto power in the hands of a legislative committee “plac[es] the final control over governmental actions in the hands of only a few individuals who are answerable only to local electorates”).

172. *See, e.g., State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (explaining that the presentment requirement is meant “to preserve the integrity of . . . [the executive] branch of government . . . and thus maintain an equilibrium of governmental powers . . . [and] to act as a check upon corrupt or hasty and ill-considered legislation” (citations and internal quotation marks omitted); other modifications in original)).

173. *See Stephan*, 687 P. 2d at 638 (agreeing with the New Jersey Supreme Court’s conclusion that “[f]oreclosing the Governor from the law-making process offends the separation of powers and the Presentment Clause” and is an “exercise of legislative power that the Constitution forbids” (quoting *Byrne*, 448 A.2d at 449 (internal quotation marks omitted))); *Op. of the Justices to the Senate*, 493 N.E.2d 859, 863–64 (Mass. 1986) (observing that the “consensus of both Houses of the Legislature as ‘an open-ended means of regulating the conduct of members of the executive branch’ would violate the constitutional provision concerning the executive veto” (quoting *Op. of the Justices*, 376 N.E.2d 1217, 1223 (Mass. 1978))); *Mo. Coal. for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997) (en banc) (“The legislature may not unilaterally control execution of rulemaking authority after its delegation of rulemaking power,” but it “may, of course, attempt to control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for signature or veto, or by the power of appropriation.”); *Blank v. Dep’t of Corr.*, 611 N.W.2d 530, 536 (Mich. 2000) (holding the veto power of JCAR and the legislature to be “inherently legislative” and therefore “subject to the enactment and presentment requirements of the Michigan Constitution”); *Op. of the Justices*, 431 A.2d at 788 (holding proposed statute would violate New Hampshire Constitution part II, article 45, requiring presentment to executive for potential veto, because there was “no provision in the proposed bill for laying the rule before the chief executive for his approval”); *Gilliam*, 849 P.2d at 505–06 (noting that a veto is a legislative act, and as such must comply with constitutional enactment requirements including presentation to the Governor for signing or for return to the legislature with written objections); *Commonwealth v. Jubelirer*, 567 A.2d 741, 749 (Pa. Commw. Ct. 1989) (noting that “[n]othing less than legislation may suffice to override the rule-making power of . . . [any] executive

Occasionally, plaintiffs have challenged legislative review schemes as unconstitutional “legislative vetoes” even where by statute the “veto” requires passage by majorities of both houses of the legislature and presentment to the governor for a potential executive veto. Unsurprisingly, the courts have rightly concluded that such schemes are not unconstitutional, because the legislatures are authorized to do no more than act in conformance with pre-existing constitutional enactment requirements.<sup>174</sup>

In addition, courts across the nation have rejected arguments that legislative veto schemes *do* in fact comport with bicameralism and presentment requirements because the statutes that created the legislative vetoes were themselves passed by both houses of the legislature and presented to the governor for a veto. Such an argument, if accepted, would allow a legislature by a single piece of legislation to relieve itself of the burden of complying with constitutional enactment rules.<sup>175</sup> As the Alaska Supreme Court observed, such a law “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.”<sup>176</sup> And as the New Jersey Supreme Court stated, “the Legislature cannot circumvent the constitutional requirement of presentment to the Governor merely by passing a statute which allows such a procedure.”<sup>177</sup>

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agency,” and observing “serious questions of constitutionality” under state constitutional provisions requiring, among other things, “gubernatorial presentment”), *vacated on grounds of mootness* 614 A.2d 204, 211 (Pa. 1992) (holding the issue moot in light of the legislature’s subsequent statutory elimination of the one-House veto); *Barker*, 279 S.E.2d at 632 (noting that the legislature could give “the binding effect of law” to its actions “only by following the formal enactment process”); *Martinez*, 478 N.W.2d at 583 (upholding a legislative review scheme in which legislative action to kill an agency rule required presentment to the executive before taking effect, thus proving the statute was “carefully drawn to avoid a separation of powers challenge and meets presentment and bicameral requirements”); *cf.* *Carmel Valley Fire Prot. Dist. v. State of Cal.*, 20 P.3d 533, 542 (Cal. 2001) (noting that the legislative review scheme at issue was constitutional but that it “would be unconstitutional if it permitted a single house of the Legislature to suspend a departmental mandate without . . . presentment to the Governor”).

174. *See, e.g., Martinez*, 478 N.W.2d at 587 (“The full involvement of both houses of the legislature and the governor are critical elements of [the legislative review provisions at issue] and these elements distinguish Wisconsin from the statutory schemes found to violate separation of powers doctrines in other states.”); *Carmel Valley*, 20 P.3d at 542 (holding that a legislative review scheme was constitutional because it required bicameralism and presentment).

175. *See, e.g., A.L.I.V.E.*, 606 P.2d at 779 (“In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise govern its actions.”).

176. *Id.*

177. *Byrne*, 448 A.2d at 446; *see also Stephan*, 687 P.2d at 638 (“The legislature cannot pass

Thus far, this Section has discussed bicameralism and presentment problems as implicating the separation-of-powers doctrine broadly. And to be sure, the presentment requirement in particular is integral to state constitutional schemes as a way of assuring proper checks and balances between the political branches. When a statute authorizes legislative action without allowing the governor a chance to veto the action, it is fair to say that separation-of-powers principles have been undermined.

But there is another way in which separation-of-powers concerns might lead a court to view legislative veto schemes with suspicion. Where one branch of government exercises authority over a function belonging to another branch—including authority explicitly delegated by the constitution—there may be a stand-alone separation-of-powers violation. With respect to legislative vetoes, the argument would be that legislative interference with agency rulemaking intrudes on the powers of the executive branch and therefore violates state constitutional separation-of-powers principles, whether they are explicitly written into the state constitution or not.

This stand-alone separation-of-powers argument is a difficult one. First, it is far from clear that legislative interference with agency rulemaking can be characterized as interference with *executive* powers, as the power to promulgate rules that will have the force of law belongs initially with the legislature and can only be exercised by an administrative agency if the power is delegated to them. As such, the rulemaking power is probably best characterized as legislative or quasi-legislative in nature.<sup>178</sup> Second, even if the agency's rulemaking power is assumed to be executive in nature,<sup>179</sup> separation-of-powers provisions do not and could not require absolute segregation of functions between the branches.<sup>180</sup> Only where one branch seeks to exercise power over a

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an act that allows it to violate the constitution.” (citing *Byrne*, 448 A.2d at 438)).

178. “It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.” THE FEDERALIST NO. 48, *supra* note 118, at 255 (James Madison).

179. See, e.g., *Stephan*, 687 P.2d at 635; see also *Byrne*, 448 A.2d at 443 (demurring over the question of whether agency rules are legislative or executive in nature, noting that in “their effects on private conduct, the types of commands embodied in executive rules may not differ greatly from those in many statutes”).

180. See, e.g., *Byrne*, 448 A.2d at 439 (“[L]egislative cooperation with the Executive does not always unduly intrude upon the Executive’s power to enforce the law. In many situations ‘responsibility is joint and governmental powers must be shared and exercised by the branches on a complementary basis if the ultimate governmental objective is to be achieved.’” (quoting *Knight v. Margate*, 431 A.2d 833, 840–41 (N.J. 1981))).

core function of another branch, or over a function that has been explicitly delegated to another branch by the state constitution, will there be a significant separation-of-powers issue. Legislative vetoes of agency rulemaking, therefore, are not likely candidates for stand-alone separation-of-powers violations.<sup>181</sup>

But occasionally courts have found that the adoption of regulations is an executive function,<sup>182</sup> and they have sometimes concluded that legislative review of regulations would constitute “a legislative encroachment into the power of the executive branch.”<sup>183</sup> In the end, these courts have concluded that the legislative veto is unconstitutional, though for reasons that are not as compelling as in those cases in which bicameralism and presentment were identified as the chief constitutional problems.

As mentioned earlier, in just a single state has a high court embraced the constitutionality of legislative vetoes of agency rulemaking. In *Mead v. Arnell*, the Supreme Court of Idaho upheld a statutory scheme whereby agency rules—whether already in effect or just proposed—could be nullified by means of a concurrent resolution adopted by both the House and Senate of the Idaho Legislature.<sup>184</sup> The court, divided three to two, premised its conclusion that the legislative veto entailed no

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181. See, e.g., *Op. of the Justices*, 431 A.2d 783, 788 (N.H. 1981) (noting, on the way toward holding the particular legislative veto scheme at issue in the case to be unconstitutional, that because the rulemaking authority of agencies “derives solely from that power which the legislature delegates to them, . . . the creation of a legislative veto is not *per se* unconstitutional”); *Carmel Valley Fire Prot. Dist. v. State of Cal.*, 20 P.3d 533, 541 (Cal. 2001) (“[W]e believe that a legislative enactment that limits the mandate of an administrative agency or withdraws certain of its powers is not necessarily suspect under the doctrine of separation of powers.”).

182. See, e.g., *Stephan*, 687 P.2d at 635 (“[T]he power to adopt rules and regulations is essentially executive or administrative in nature, not legislative.”); *Commonwealth v. Jubelirer*, 567 A.2d 741, 749 (Pa. Commw. Ct. 1989), *vacated on grounds of mootness* 614 A.2d 204 (Pa. 1992) (holding the legislative veto interfered with the executive’s responsibility to administer the law, and stating that “[n]othing less than legislation may suffice to override the rule-making power of . . . [any] executive agency”).

183. *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984); *Mo. Coal. for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 133 (Mo. 1997) (en banc) (finding that the legislative veto scheme “goes well beyond any incidental overlap of powers” and “violates constitutional principles concerning the separation of executive and legislative functions” by allowing the legislature to unconstitutionally interfere with executive action). The Kentucky Supreme Court also concluded that the legislature encroached on *judicial* functions by exercising a legislative veto, since the legislative review of the rules was to determine whether they comported with statutory authority and carried out legislative intent. “It requires no citation of authority to state unequivocally that such a determination is a judicial matter and is within the purview of the judiciary . . . .” *Legislative Research Comm’n*, 664 S.W.2d at 919.

184. *Mead v. Arnell*, 791 P.2d 410, 412 (Idaho 1990) (discussing IDAHO CODE § 67-5218).

separation-of-powers problem on the fact that an administrative agency's power to issue rules and regulations was a delegation of power to the executive rather than an inherent constitutional power.<sup>185</sup> Thus, for example, there might be a separation-of-powers issue if the legislature by concurrent resolution had instead attempted "to prevent the Attorney General from taking legal action for some violation of a statute," because "enforcing the law of this state is a constitutionally mandated executive department function resting in the office of the Attorney General."<sup>186</sup> In contrast, the legislative veto of agency rules is an exercise of power over "a legislative delegation of power [that] is neither the legal nor functional equivalent of constitutional power."<sup>187</sup>

Thus far the court's opinion is unobjectionable (though as discussed above, not all state high courts would agree with either its premises or conclusions). More problematic is that the majority in *Mead* never forthrightly explained why it believed the legislature could kill agency rules through a joint resolution rather than through the ordinary lawmaking enactment process. As Justice Bistline explained in dissent, the issue was "whether the Idaho Legislature may, *by resolution*, rescind the rules promulgated by an executive department or agency . . . . If the issue were whether the legislature could do so by *enactment*, there would be no need to take pen in hand."<sup>188</sup>

The conclusion to be reached from this survey of federal and state law is that the chief objection of the courts and attorneys general to the legislative veto is that it allows the legislature to exercise power over the executive branch without complying with constitutional restrictions on the manner in which it may act. While stand-alone separation-of-powers violations are sometimes discerned by jurists, far more

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185. *Id.* at 415 ("[W]e have consistently found the origin of this rule making capacity in a delegation from the legislature not a constitutional grant of power to the executive and have consistently held such rules or regulations promulgated hereunder to be less than the equivalent of statutory law.").

186. *Id.* at 417.

187. *Id.* Of course, in such a situation the legislature would presumably be acting in violation of separation-of-powers principles even if it were to pass a statute, consistent with constitutional bicameralism and presentment requirements, that purported to prevent the Attorney General from taking legal action for the violation of a statute.

188. *Id.* at 427 (Bistline, J., dissenting); *see also id.* at 428 (reciting history of joint and concurrent resolution in the state and noting earlier court holding that "the force and effect of joint resolutions or concurrent resolutions is just that much, advisory or recommendatory, but nothing more"); *id.* at 422–23 (Johnson, J., concurring in part and dissenting in part) (arguing that if the legislature believes an agency is misusing authority, it should act by amending the statute to redefine the agency's authority or else rescind it altogether by following the procedures for legislation set forth in the state constitution).

problematic is the legislature's attempt to short-circuit executive oversight of its powers to kill agency rulemaking.<sup>189</sup>

### III. JCAR AND THE LEGISLATIVE VETO IN ILLINOIS

The lawfulness of legislative vetoes of agency rulemaking has not yet been addressed in Illinois.<sup>190</sup> But when a proper case is ready for adjudication by the courts, there is every reason to believe that such vetoes will be deemed unlawful under the Illinois Constitution, just as they have been in the federal and most other state systems.

To be sure, decisions from federal and state courts concerning the constitutionality of legislative vetoes in their own jurisdictions are in no way binding on the Illinois courts, which alone are responsible for interpreting the requirements of the Illinois Constitution.<sup>191</sup> But decisions from other jurisdictions have persuasive value, and are unlikely to be discounted altogether by the Illinois courts when a case properly raising the legislative veto question is before them.<sup>192</sup>

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189. Most academic commentators likewise believe legislative vetoes, unless specifically authorized by a state's constitution, are unlawful. *See, e.g.*, ARTHUR EARL BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* 498 (1986) ("In the absence of a constitutional provision expressly authorizing such action, nonstatutory legislative vetoes or suspensions of particular agency rules are probably impermissible under most state constitutions."); Dean, *supra* note 33, at 1157 (calling the legislative veto a "constitutional virus").

190. In cases where JCAR review of agency rulemaking was challenged, the legislative veto was never properly before the court. *See, e.g.*, *Quinn v. Donnewald*, 483 N.E.2d 216, 222 (Ill. 1985) (noting that the issue of an "illegal legislative veto of an executive action . . . is not before us"); *Reece v. Bd. of Educ. of City of Chi.*, 767 N.E.2d 395, 403 (Ill. App. Ct. 2002) (noting that "the issue of whether [a contested] action would constitute a legislative veto is not before us").

191. "[W]here Federal questions are not involved, as where State constitutions and statutes are to be construed, State courts are not required to follow Federal court decisions although they may be persuasive." *Ray Sch.-Chi., Inc. v. Cummins*, 146 N.E.2d 42, 45 (Ill. 1957) (citations omitted); *see also* *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 613 (1937) ("[A] judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere."); *Relsolelo v. Fisk*, 760 N.E.2d 963, 967 (Ill. 2001) ("[W]e are not bound to interpret our own constitutional provisions lockstep with the Supreme Court's interpretation of the federal constitution."). Jim Rossi has noted generally that "[a]lthough many describe state courts as adopting a deferential position towards, and rarely deviating from, federal constitutional doctrine, in the separation of powers context the approach of many state courts, echoing Antifederalist ideals, contrasts starkly with the approach of federal courts." Rossi, *supra* note 34, at 1189 (footnote omitted).

192. In addition, a court analyzing the lawfulness of JCAR and General Assembly provisions for review of agency rulemaking will begin with the proposition that the General Assembly's statutes are presumed to be constitutional. *People v. La Pointe*, 431 N.E.2d 344, 352 (Ill. 1981). The burden would be on the party challenging the validity of the statute to "demonstrate clearly a constitutional violation." *People v. Wilson*, 827 N.E.2d 416, 419–20 (Ill. 2005); *see also* *Chicagoland Chamber of Commerce v. Pappas*, 880 N.E.2d 1105, 1117 (Ill. App. Ct. 2007)

This Part will analyze the constitutionality of JCAR and General Assembly scheme for reviewing agency rulemaking. It will focus primarily on the text of the Illinois Constitution and its separation-of-powers, bicameralism, and presentment requirements.<sup>193</sup> In doing so, it will take account of the unique history of the Illinois Constitution, judicial precedent that might bear on the legitimacy of legislative vetoes in the state, and persuasive precedent from other jurisdictions. The first Section will assess whether legislative vetoes of agency rulemaking represent a stand-alone violation of the separation-of-powers clause. It will focus primarily on whether such a scheme encroaches on the executive branch's powers, with a conclusion that it does not. The Section will also entertain the argument that JCAR and General Assembly vetoes encroach on judicial powers, and will conclude that there is some merit to this contention. The second Section will address the enactment provisions of the Illinois Constitution—including most particularly the bicameralism and presentment requirements—and will conclude, in accord with almost all other jurisdictions, that the legislative veto is incompatible with such provisions. This Section will also assess and reject the argument that because the legislation that created JCAR and General Assembly veto provisions were themselves passed in accord with constitutional enactment requirements, legislative vetoes are constitutional. A final Section will assess the importance of House Bill 398, which by its terms would seem to require the cessation of all future rulemaking by agencies if the courts invalidate the state's legislative veto review schemes.

### *A. Separation-of-Powers Issues*

The Illinois Constitution is not a minor league version of the U.S. Constitution. Although it is similar in structure to the federal Constitution and to many state constitutions, it has its own history and its own operative language. To take an example, the U.S. Constitution has no “separation-of-powers” clause, while the first section of Article II of the Illinois Constitution states: “The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”<sup>194</sup>

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(“Moreover, courts will construe statutes, if possible, to be constitutional.”).

193. In doing so, it is worth noting preliminarily that in Illinois the courts must construe a statute so as to “affirm the statute’s constitutionality and validity, if reasonably possible.” *People v. Hammond*, 2011 IL 110044, ¶ 55.

194. ILL. CONST. art. II § 1. The modern language was first adopted in 1941, but reflects in

There have been four constitutions since Illinois became a state in 1818, and the trend over time in the documents has been to weaken the powers of the legislative branch. Broadly speaking, the original 1818 constitution was drafted and adopted in a time of distrust of the executive branch and popular apprehension about powers wielded by colonial and, later, territorial governors. The document was designed to reflect that the legislature, as the true and most direct embodiment of the popular will, was the chief repository of government power.<sup>195</sup> The Governor was thus granted limited powers by this first constitution. Rather than possessing a veto over bills passed by the legislature, for example, the constitution provided that the Governor and the members of the Illinois Supreme Court would sit as a “council of revision,” indicating whether or not they approved or disapproved of legislation that was about to take effect as law. Any disapproved legislation would be returned to the General Assembly, which could then pass it into law by a simple majority vote.<sup>196</sup>

At the time of the formation of the second Illinois Constitution of 1848, however, legislative excesses in the state and a new Jacksonian faith in strong executive leadership led to a modified constitutional scheme. Legislative powers were somewhat restricted in the new constitution, and the “council of revision” scheme was replaced with a straight-up gubernatorial veto, though this veto could still be overridden by a simple majority vote of the General Assembly.<sup>197</sup> In the third Illinois Constitution of 1870, however, this gubernatorial veto was

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substance the original provision from the original constitution in 1818. See ILL. CONST. of 1818, art. I (“The powers of the government of the State of Illinois, shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another. No person, or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”).

195. See JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818–1970, at 12 (1972). In the federal system, the government is limited in its powers to only those granted by the Constitution. See Robert Knowles & Marc D. Falkoff, *Toward a Limited Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 642–45 (2007) (discussing limited government and collecting major scholarship on the doctrine). In Illinois, by contrast, the legislature is presumed to already possess all governmental powers, and the state constitution works to limit its powers. See, e.g., Paul G. Kauper, *The State Constitution: Its Nature and Purpose*, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 3, at 13 (Victoria Ranney ed., 1970).

196. WALTER F. DODD & DUE HUTCHISON DODD, GOVERNMENT IN ILLINOIS 56–57 (1923); Kauper, *supra* note 195 at 13; ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION 4 (2011).

197. CORNELIUS, *supra* note 195, at 35; DODD & DODD, *supra* note 196, at 56; LOUSIN, *supra* note 196, at 9.

strengthened by requiring a two-thirds vote of the General Assembly for an override.<sup>198</sup>

The gubernatorial veto requirement remains the constitutional scheme today, under the fourth and current Illinois Constitution of 1970, though now the General Assembly may override the veto by vote of three-fifths of each house.<sup>199</sup> In addition, the current constitution gives the governor a variety of types of vetoes to exercise, including a veto over an entire bill, a line-item veto, the ability to reduce the amount of an item, and the ability to propose revisions to bills already passed that the legislature can accept or reject.<sup>200</sup> In sum, one central dynamic of the Illinois Constitution since 1819 has been its transformation from a document recognizing the primacy of the legislative branch to one that has increasingly sought to restrain the General Assembly by strengthening the veto power of the Governor.<sup>201</sup>

The separation-of-powers provision of the Illinois Constitution—both in its original form and in its current incarnation—has never been understood to require absolute segregation of powers among the three branches of government. In 1839, Chief Justice Wilson explained that while the separation-of-powers language was “a declaration of a fundamental principle,” it was nonetheless “to be understood in a limited and qualified sense.”<sup>202</sup> It fundamentally meant that all of one branch’s powers cannot be subsumed by another branch. The provision does not mean that the legislative, executive, and judicial power should be kept so entirely separate and distinct as to have no connection or dependence, the one upon the other; but its true meaning, both in theory and practice, is, that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many.<sup>203</sup>

These sentiments have been confirmed repeatedly in Illinois case law up to the present era.<sup>204</sup>

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198. ILL. CONST. of 1870, art. 5, § 16; *see also* LOUSIN, *supra* note 196, at 13.

199. ILL. CONST. art. 4, § 9.

200. LOUSIN, *supra* note 196, at 33.

201. *See, e.g.*, FRANK KOPECKY & MARY SHERMAN HARRIS, UNDERSTANDING THE ILLINOIS CONSTITUTION 2 (2000).

202. *Field v. People*, 3 Ill. (2 Scam.) 79, 83–84 (1839) (Wilson, C.J.) (construing same provision but with earlier constitutional language).

203. *Id.*

204. *See Pucinski v. Cty. of Cook*, 737 N.E.2d 225, 229 (Ill. 2000) (separation-of-powers clause “does not create rigid boundaries prohibiting every exercise of functions by one branch of government which ordinarily are exercised by another”); *Kunkel v. Walton*, 689 N.E.2d 1047, 1051 (Ill. 1997) (purpose is not to “achieve a complete divorce between the branches of

As far back as 1910, the Illinois Supreme Court noted that administrative officers “are frequently charged with duties that partake of the character of all three of the departments, but which cannot be classed as belonging essentially to either.”<sup>205</sup> For example, administrative officers “are frequently called upon, in the performance of their duties, to exercise judgment and discretion, to investigate, deliberate, and decide, and yet it has been held that they do not exercise judicial power, within the meaning of the constitutional provision.”<sup>206</sup> Nonetheless, each branch of government holds powers that substantially belong to that branch and that cannot be exercised by a coordinate branch without implicating the separation-of-powers provision of the Illinois Constitution. Even though complete separation is neither expected nor desired, “[e]ach branch of government has its own unique sphere of authority that cannot be exercised by another branch.”<sup>207</sup>

While the Illinois Constitution itself does not define the powers of the three branches,<sup>208</sup> the Illinois Supreme Court has broadly defined the

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government”); *Illinois v. Ill. Cent. R.R. Co.*, 92 N.E. 814, 833 (Ill. 1910) (branches cannot “be kept so entirely separate and distinct as to have no connection or interdependence.”); *Field*, 3 Ill. (2 Scam.) at 84 (provisions on separation of powers should only be read as a “broad theoretical line of demarcation, between the great departments of government”); see also DAVID R. MILLER, 1970 ILLINOIS CONSTITUTION: ANNOTATED FOR LEGISLATORS 19 (4th ed. 2005) (giving examples of power overlaps, including General Assembly holding witnesses in contempt and impeaching state officers).

205. *Ill. Cent. R.R. Co.*, 92 N.E. at 833. For a description of the variety of ways in which the Illinois Constitution explicitly authorizes individual branches to exercise powers that would conventionally be thought to belong to coordinate branches, see DODD & DODD, *supra* note 196, at 102–04 (discussing impeachment proceedings of a “purely judicial” character designated by the constitution to the House); see also SAMUEL K. GOVE ET AL., *THE ILLINOIS LEGISLATURE: STRUCTURE AND PROCESS 2* (1976) (“Although the lines separating each of the three branches of state government have never been completely clear, the essential responsibility of the General Assembly has always been that of enacting statute law.” (citation omitted)).

206. *Ill. Cent. R.R. Co.*, 92 N.E. at 833.

207. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1078 (Ill. 1997) (citing *Burleigh v. Gainer*, 685 N.E.2d 1357 (Ill. 1997)) (holding invalid an attempted delegation of an executive or administrative function to the judicial branch); *Fields Jeep-Eagle, Inc. v. Chrysler Corp.*, 645 N.E.2d 946 (Ill. 1994) (holding invalid attempted delegation of legislative decision making to the judiciary); *Wright v. Cent. Du Page Hosp. Ass’n*, 347 N.E.2d 736, 744 (Ill. 1976) (holding invalid an attempted delegation of judicial power to nonjudicial member of medical malpractice review board); *Agran v. Checker Taxi Co.*, 105 N.E.2d 713, 715 (Ill. 1952) (“If the power is judicial in its nature, it necessarily follows that the legislature is expressly prohibited from exercising it.”).

208. *Best*, 689 N.E.2d at 1078 (noting that “our state constitution does not define legislative, executive, and judicial power” (citing *People v. Walker*, 519 N.E.2d 890, 892 (Ill. 1988))); *People v. Hammond*, 959 N.E.2d 29, 44 (Ill. 2011) (citing *Walker*, 519 N.E. at 893); *Witter v. Cook Cty. Comm’rs*, 100 N.E. 148, 149 (Ill. 1912) (“[O]ur constitution does not attempt to define legislative, executive and judicial power, as it is neither practicable nor possible to enumerate the

legislative power as “the power to enact laws or declare what the laws shall be”;<sup>209</sup> the executive power as “that power which compels obedience to the laws and executes them”;<sup>210</sup> and the judicial power as “the power which adjudicates upon the rights of citizens, and to that end construes and applies the law.”<sup>211</sup> Notwithstanding these superficially clear categories, determining precisely when one branch exercises power that intrudes on the prerogatives of another branch can be a difficult undertaking. In fact, there have been very few Illinois court decisions addressing separation-of-powers challenges.<sup>212</sup>

In sum, the history and structure of the Illinois Constitution indicates that over time the dominant powers of the legislative branch have been scaled back significantly, and that the current constitution’s provision for broad executive veto powers indicates the citizenry’s desire for balanced powers between the political branches and among all branches of the government. It is this constitutional fine balancing that the legislative veto threatens to throw out of whack.

### 1. No Encroachment on Executive Powers.

The Illinois courts are unlikely to deem legislative interference with agency rulemaking to be a stand-alone violation of the separation-of-powers language of section one of Article II of the Illinois Constitution. The chief reason is that rulemaking powers have never been characterized by the state courts as purely “executive” in nature, nor is there anything in the state constitution that specifically delegates rulemaking powers to the executive branch. Moreover, there is no reason to believe that historically the rulemaking power has been a core executive function either in Illinois or in other jurisdictions. To the contrary, rulemaking power has been described by the Illinois courts as “quasi-legislative” in nature, because the authority to make rules has been delegated by the legislature and the rules themselves have the

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myriad powers of government and to declare that a given power belongs exclusively to one branch for all time.”); *see also id.* (“[A]rticle 3 of the Illinois Constitution does not mean that the legislative, executive and judicial powers shall be kept so entirely dependent upon each other.”).

209. *People v. Hawkinson*, 155 N.E. 318, 319 (Ill. 1927).

210. *Witter*, 100 N.E. at 149.

211. *Hawkinson*, 155 N.E. at 319.

212. *See* LOUSIN, *supra* note 196, at 81 (cases “involving alleged encroachments by the legislative branch upon the executive branch or vice versa are especially rare”); *see also id.* (noting that such challenges frequently involve allegations that the legislature improperly delegated legislative authority to the executive).

force of law.<sup>213</sup>

In addition, administrative agencies possess the authority to create rules only because the legislature has delegated that power to them. While administrative agencies are part of the executive branch, they are creatures of statute and have no power beyond their enabling statutes. “It is fundamental that an administrative body has only such powers as are granted in the statute creating it.”<sup>214</sup> Although the *enforcement* of rules is inherently an executive function,<sup>215</sup> there is nothing inherently executive about the promulgation of rules. Indeed, the typical complaint of parties aggrieved by agency rules is that the *agency* violated separation-of-powers principles by exercising *legislative* power.<sup>216</sup>

The suggestion that JCAR or General Assembly interference with agency rulemaking—whether through a legislative veto or (equally

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213. *Radaszewski v. Garner*, 805 N.E.2d 620, 626 (Ill. App. Ct. 2004); *see also Monsanto Co. v. Pollution Control Bd.*, 367 N.E.2d 684, 690 (Ill. 1977) (referring to an agency’s “quasi-legislative power to make prospective regulations and orders”); *Horsehead Res. Dev. Co. v. Ill. Pollution Control Bd.*, 684 N.E.2d 837, 840–41 (Ill. App. Ct. 1997) (“When an administrative agency such as the [Illinois Pollution Control] Board exercises its rulemaking powers, it is performing a quasi-legislative function” (citing *Ill. State Chamber of Commerce v. Pollution Control Bd.*, 532 N.E.2d 987 (Ill. App. Ct. 1988))); *Cent. Ill. Pub. Serv. Co. v. Ill. Commerce Comm’n*, 644 N.E.2d 817, 821 (Ill. App. Ct. 1994) (“[T]he administrative rules and regulations [the Illinois Commerce Commission] promulgates, acting in its quasi-legislative capacity, enjoy a presumption of validity.”). As Chief Justice Roberts observed recently about administrative agencies generally, they fit “most comfortably within the Executive Branch,” but “as a practical matter they exercise legislative power, by promulgating regulations with the force of law.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting). The Chief Justice’s point was that administrative agencies exercise an amalgam of powers, and he went on to explain that the agencies also exercise “executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.” *Id.*

214. *People ex rel. Thompson v. Prop. Tax Appeal Bd.*, 317 N.E.2d 121, 126 (Ill. App. Ct. 1974).

215. *S. 51 Dev. Corp. v. Vega*, 781 N.E.2d 528, 535 (Ill. App. Ct. 2002).

216. It is “well settled” that the General Assembly may delegate rulemaking authority to an administrative agency, so long as it “establishes standards under which the agency’s discretion may be exercised.” *S. 51 Development Corp.*, 781 N.E.2d at 535 (citing *Sch. Dist. No. 79 v. Cty. Bd. of Sch. Trs. of Lake Cty.*, 123 N.E.2d 475, 476 (Ill. 1954)); *see also Hoogasian v. Reg’l Transp. Agency*, 317 N.E.2d 534, 541 (Ill. 1974) (“It is well settled that notwithstanding the rule that the General Assembly cannot delegate its general legislative power to others, it may authorize others to do things which it might properly do but cannot do as understandingly or as advantageously itself, if the authority thus granted is delimited by intelligible standards.”); *Dep’t of Pub. Works & Bldgs. v. Chi. Title & Trust Co.*, 95 N.E.2d 903, 906 (Ill. 1950) (stating it is “well settled” that the General Assembly may “delegate its powers to an administrative agency, as long as it does not invest such agency with arbitrary powers, or delegate its general legislative authority.”).

plausibly) through legislation passed pursuant to ordinary constitutional enactment provisions—is an encroachment on executive powers that represents a stand-alone separation-of-powers violation would seem to be a nonstarter. Of course, it is a different question whether the legislature interfered with an agency’s rulemaking authority in a constitutionally proper manner. That is a question to be addressed in Part III.B, below.

## 2. Probable Encroachment on Judicial Powers.

Although it seems clear that legislative interference with agency rulemaking does not encroach on executive powers, it is a more difficult question whether the legislative veto scheme currently in place in Illinois encroaches on *judicial* powers. That is because JCAR and the General Assembly are authorized to block implementation of agency rules upon concluding, among other possibilities, that the agency has acted beyond its authority in promulgating its rules,<sup>217</sup> which is a determination that would seem to be inherently judicial in nature.

Broadly speaking, in the “context of the interplay between the legislature and the judiciary,” the separation-of-powers provision “has been interpreted to mean that it is the legislature’s role to make the law, and the judiciary’s role to interpret the law.”<sup>218</sup> Although there have been few Illinois cases addressing separation-of-powers issues between the legislative and executive branches, there are many instances where the courts have concluded that the legislature had sought to exercise judicial power in violation of the separation-of-powers provision of the Illinois Constitution.<sup>219</sup> For example, the courts have found legislative encroachment when the General Assembly passed legislation that

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217. 5 ILL. COMP. STAT. 100/5-110(a) (2016) (“The Joint Committee shall examine any proposed rule . . . to determine whether the proposed rule . . . is within the statutory authority upon which it is based.”).

218. *Bates v. Bd. of Educ.*, 555 N.E.2d 1, 4 (Ill. 1990) (citing *Roth v. Yackley*, 396 N.E.2d 520 (Ill. 1979)).

219. *See Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1078 (Ill. 1997) (“In furtherance of the authority of the judiciary to carry out its constitutional obligations, the legislature is prohibited from enacting laws that unduly infringe upon the inherent powers of judges.” (citations omitted)); *see also* *People v. Davis*, 442 N.E.2d 855, 857–58 (Ill. 1982) (“The General Assembly has the power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary.” (citing *Strukoff v. Strukoff*, 389 N.E.2d 1170 (Ill. 1979))); *id.* at 858 (“Furthermore, it is the undisputed duty of the court to protect its judicial powers from encroachment by legislative enactments, and thus preserve an independent judicial department.” (citing *Agran v. Checker Taxi Co.*, 105 N.E.2d 713 (Ill. 1952))); *People v. Callopy*, 192 N.E. 634 (Ill. 1934)).

allowed the prosecution and defense in criminal trials to question prospective jurors,<sup>220</sup> that created a special panel of circuit judges to decide election contests,<sup>221</sup> and that set the conditions under which a convict could go free on bail during appellate proceedings.<sup>222</sup>

It is, of course, the archetype of the judicial function to declare what the law is and to apply the law to disputes in front of the court.<sup>223</sup> Determining whether or not an agency has acted beyond its authority in promulgating a rule is certainly part of the judicial power, and it is one that has been exercised by the Illinois courts on many occasions.<sup>224</sup> But it does not follow from these observations that the General Assembly (or a committee of the legislature) necessarily encroaches on the judicial powers when it exercises its statutory authority to review the lawfulness of agency regulations.<sup>225</sup>

Consider that the General Assembly may disapprove of the manner in which an administrative agency is engaged in its rulemaking, perhaps because the legislative body believes the agency has misunderstood the authority granted to it by its enabling legislation. If the General Assembly, consistent with the enactment provisions of the Illinois Constitution, passes a statute clarifying, modifying, or eliminating altogether the agency's authority to pass such rules, there can be no doubt that it is properly exercising its legislative authority, even if what motivated the statutory enactment was the legislature's conclusion that the agency had acted unlawfully.

Nonetheless, legislative vetoes of agency rulemaking are not comparable to legislation that amends or corrects statutory grants of rulemaking authority to administrative agencies. To be lawful, statutory modifications must be prospective in effect, and may not be used to overrule a court's interpretation of the agency's authority under the

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220. *People v. Jackson*, 371 N.E.2d 602, 603–04 (Ill. 1977).

221. *In re Contest of Election for Offices of Governor & Lieutenant Governor*, 444 N.E.2d 170, 172 (Ill. 1983).

222. *People v. Williams*, 577 N.E.2d 762, 764–65 (Ill. 1991).

223. *Dodge v. Cole*, 97 Ill. 338, 356 (1917) (“The province of courts is to declare what the law is, and apply it to the controversy before them.”).

224. *See, e.g., People v. Roos*, 514 N.E.2d 993, 998 (Ill. 1987) (holding that a Department of Registration and Education rule prohibiting licenses to acupuncturists was void); *Cent. Ill. Pub. Serv. v. Commerce Comm’n*, 644 N.E.2d 817, 821–23 (Ill. App. Ct. 1994); *Granite City Div. of Nat’l Steel Co. v. Ill. Pollution Control Bd.*, 613 N.E.2d 719, 724–25 (Ill. 1993).

225. Though when confronted with this question, the Kentucky Supreme Court thought the answer was obvious: “It requires no citation of authority to state unequivocally that such a determination is a judicial matter and is within the purview of the judiciary.” *Legis. Research Comm’n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984).

original statute.<sup>226</sup> As the Illinois Supreme Court has explained, although “the General Assembly can pass legislation to prospectively change a judicial construction of a statute if it believes that the judicial interpretation was at odds with legislative intent, it cannot effect a change in that construction by a later declaration of what it had originally intended.”<sup>227</sup> In other words, the General Assembly may not, after the courts have interpreted a statute, on its own declare what the correct interpretation of the statute is.

The JCAR or General Assembly veto arguably invites the legislature to intrude on the judicial power in a similar manner. It is true that a legislative veto is unlikely to be issued on the ground that an agency has acted beyond its statutory authority if a state court has already determined that the agency’s interpretation of its statutory authority is correct. But whenever a legislative body issues a veto it will nonetheless be supplanting the court in the first instance by determining the proper construction of the enabling statute. The legislature will, in short, be sitting in judgment on the agency’s interpretation of the statutory authority granted to it by the legislature.

Determining whether agency action was authorized by statute is the essence of what judges do. Challenges to agency rules and regulations are decided by the courts in the same manner as challenges to statutes; they “must be construed under the same standards which govern construction of statutes” and they “enjoy a presumption of validity,” just as statutes do.<sup>228</sup> Legislatures, in contrast, pass laws rather than pass judgment on whether those laws are being interpreted and executed properly.

It should be of no consequence that members of JCAR or of the General Assembly believe themselves to have more insight into the intent of the drafters of a statute that delegated rulemaking authority to an agency. Neither the General Assembly as a whole, nor a small subset of its members, stands in a more authoritative position than the courts to determine the legislative intent behind a statute, particularly where the statute that is being examined was passed by a prior assembly of the legislature.<sup>229</sup>

In addition, allowing JCAR or the General Assembly to supplant the

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226. *Bates v. Bd. of Educ.*, 555 N.E.2d 1, 4 (Ill. 1990).

227. *Id.* (citing *Roth v. Yackley*, 396 N.E.2d 520 (Ill. 1979)).

228. *N. Ill. Auto Wreckers & Rebuilders Ass’n v. Dixon*, 387 N.E.2d 320, 323 (Ill. 1979).

229. *Cf. Legislative Research Comm’n*, 664 S.W.2d at 919.

judiciary in determining whether agencies are properly exercising statutory authority would grant the legislature a windfall of power. The General Assembly would be in a position to make broad and nonspecific grants of authority to agencies, secure in knowing that it could at a later date lessen its delegation of authority to the executive branch through a narrowing interpretation of the statute. In contrast, the courts show great deference to agency interpretations of their enabling statutes,<sup>230</sup> exercising what in the federal system is called “*Chevron* deference,”<sup>231</sup> and deferring to the agency staff’s expertise and experience.<sup>232</sup> Thus, “administrative action taken under statutory authority will not be set aside [by the courts] unless it has been clearly arbitrary, unreasonable or capricious.”<sup>233</sup>

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230. The mobius-like question of whether the courts in Illinois should, consistent with separation-of-powers principles, show deference to the determination *by* a state agency that the General Assembly has delegated particular powers *to* that agency is beyond the scope of this Article. A similar debate is simmering in the federal system now over whether the federal courts owe *Chevron* deference to agency conclusions about the scope of delegations to the agency by congressional statutes. *See* *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (characterizing the issue in the case as “whether the authority of administrative agencies should be augmented . . . to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power”). The Illinois courts, in contrast, are clear at present that it is the role of the judiciary rather than an agency to determine the legitimate scope of the agency’s statutory authority. *See* *People v. Roos*, 514 N.E.2d 993, 997 (Ill. 1987) (“Although courts give substantial weight and deference to an interpretation of a statute by the agency charged with the administration and enforcement of the statute, such interpretations are not binding on the courts.”); *People ex rel. Thompson v. Prop. Tax Appeal Bd.*, 317 N.E.2d 121, 125 (Ill. App. Ct. 1974) (“Where the authority of an administrative body is in question the determination of the scope of its power and authority is a judicial function; not a question to be finally determined by the administrative agency itself.”).

231. *Chevron U.S.A. Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837, 843–45 (1984).

232. The courts give agency interpretations of rulemaking authority deference because they have been “appointed by law and informed by experience.” *Monarch Gas Co. v. Ill. Commerce Comm’n*, 366 N.E.2d 945, 947 (Ill. App. Ct. 1977).

233. *Ill. Coal Operators Ass’n v. Pollution Control Bd.*, 319 N.E.2d 782, 785 (Ill. 1974) (upholding the Pollution Control Board’s sound-emission regulations where the court could not conclude they were clearly arbitrary, unreasonable, or capricious); *see also* *Monsanto Co. v. Pollution Control Bd.*, 367 N.E.2d 684, 690 (Ill. 1977) (“When a regulation is promulgated by an agency pursuant to a grant of legislative power, a reviewing court should not substitute its judgment as to the content of the regulation, because the legislature has placed the power to create such regulations in the agency and not in the court.” (citation omitted)); *Midwest Petroleum Marketers Ass’n v. City of Chi.*, 402 N.E.2d 709, 715 (Ill. 1980) (“A reviewing court may set aside administrative regulations only if they are clearly arbitrary, capricious or unreasonable.”); *Rend Lake Coll. Fed’n of Teachers v. Bd. of Cmty. Coll.*, 405 N.E.2d 364, 368 (Ill. 1980) (“Reviewing courts may interfere with the construction and application of regulations only where administrative interpretation is plainly erroneous.”); *Bio-Medical Labs, Inc. v. Trainor*, 370 N.E.2d 223, 233 (Ill. 1977). The IAPA includes a provision for judicial review of agency adjudications. 735 ILL. COMP. STAT. 5/3-110 (2016) (“The findings and conclusions of the

It should likewise be of no consequence that judicial powers can in certain circumstances be exercised by the executive and legislative branches. Certainly, administrative agencies not only exercise “quasi-legislative” power when promulgating rules, but also “quasi-judicial” power when adjudicating enforcement actions for those who are alleged to have violated their rules.<sup>234</sup> The General Assembly likewise exercises power that is judicial in nature, such as when it hosts impeachment proceedings. But the exercise of the impeachment and trial power is constitutionally delegated to the legislature,<sup>235</sup> and therefore represents no separation-of-powers problem. In contrast, sitting in judgment of agency interpretations of statutory grants would seem to encroach on core judicial functions and therefore would be unconstitutional.

### B. Enactment Issues

The conclusion thus far is that the Illinois legislative veto scheme is unlikely to be deemed by the courts to represent an encroachment on executive branch powers as a stand-alone separation-of-powers violation, but that the scheme may allow unconstitutional legislative encroachment on the judiciary’s powers. To be sure, the latter issue is in particular a difficult one. But it is unlikely that the Illinois courts would need to consider either of the stand-alone separation-of-powers arguments, because it is abundantly clear that JCAR and General Assembly vetoes are unlawful due to their failure to comply with Illinois constitutional enactment provisions.

Legislative vetoes of agency rulemaking by either a three-fifths vote of JCAR or a joint resolution of the General Assembly should be

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administrative agency on questions of fact shall be held to be prima facie true and correct.”); *see* *Winakor v. Annunzio*, 99 N.E.2d 191, 197 (Ill. 1951) (“[I]t is fundamental that an erroneous construction of a statute by an administrative agency is not binding upon the courts.”). But it does not include a provision for the review of agency rules, leaving the courts to apply common-law rules. Robert Burns, *Judicial Enforcement of the Illinois Administrative Procedure Act’s Rulemaking Provisions*, 55 CHI.-KENT L. REV. 383, 404 (1979).

234. *See, e.g., Monsanto*, 367 N.E.2d at 689 (finding that a decision of Pollution Control Board about whether to grant a variance under the Illinois Equal Protection Act was “essentially quasi-judicial”); *Kalisz v. Ill. Educ. Ass’n*, 510 N.E.2d 1103, 1105–06 (Ill. 1987) (“Whether any given proceeding by an administrative or executive body is quasi-judicial depends upon the powers and duties of the body conducting the proceeding and upon the nature of the proceedings themselves.”); *cf. City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) (noting that administrative agencies can be said to exercise “judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules”).

235. ILL. CONST. art. IV, § 14.

deemed unconstitutional under Illinois law because they are legislative acts (that is, acts that have the “purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch”<sup>236</sup>) that fail to comply with the enactment requirements of the Illinois Constitution.<sup>237</sup>

The General Assembly does its work through the passage of resolutions and bills. As new members are advised upon taking office, resolutions are “ways of expressing opinions or doing a variety of things except enacting laws,” while bills are used to enact laws.<sup>238</sup> Resolutions do no more than express the mood of the legislature. Whether adopted by a single house or jointly by both houses, they can have no binding legal effect on the rights of any person or body. Resolutions are *not* laws, cannot become laws, and do not have the effect of law. As the Illinois Supreme Court has explained,

nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.<sup>239</sup>

The General Assembly may make laws only by passing bills,<sup>240</sup> and to be lawful those bills must comply with the enactment requirements set forth in sections eight and nine of article four of the constitution. Chief among these are the bicameralism and presentment requirements: “No bill shall become a law without the concurrence of a majority of the members elected to each House,”<sup>241</sup> and “[e]very bill passed by the General Assembly shall be presented to the Governor within 30

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236. *INS v. Chadha*, 462 U.S. 919, 952 (1983); *see also* BONFIELD, *supra* note 189, at 505–06 (noting that all legislative veto schemes that do not require presentment to the executive “alter existing legal rights or duties by means less than statutory” and are therefore “likely to violate most state constitutions because they amount to the enactment of legislation by improper means”).

237. *Cf. Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (holding that once Congress delegates rulemaking to an executive agency, the legislature may only control the promulgation of rules “indirectly” through the passage of new laws).

238. LEGISLATIVE RESEARCH UNIT, PREFACE TO LAWMAKING: LEGISLATORS’ INTRODUCTION TO THE GENERAL ASSEMBLY, chs. 1, 3 (2010). The houses of the General Assembly may also pass motions, which are used to control the internal operations of the House and Senate. *Id.*

239. *People ex rel. Burritt v. Comm’rs of State Contracts*, 11 N.E. 180, 185 (Ill. 1887).

240. ILL. CONST. art. IV, § 8, cl. 2; *see also* LEGISLATIVE RESEARCH UNIT, *supra* note 238, at chs. 2, 7 (“Laws can be enacted only by bills—not by resolutions or other measures.”).

241. ILL. CONST. art. IV, § 8, cl. 3.

calendar days after its passage.”<sup>242</sup>

The legislative review scheme currently in place allows the General Assembly to exercise legislative power that does not comply with these enactment provisions. Whenever the General Assembly votes by joint resolution to permanently suspend an agency rule to which JCAR has objected, the legislative body is altering the legal rights and duties of those entities that would have been governed by the agency’s rules. Because the General Assembly veto would be accomplished by resolution rather than by passage of a bill that was presented to the Governor for a potential executive veto, the legislative act cannot have the force of law.<sup>243</sup> Similarly, if JCAR were to object to an agency rule and prohibit its implementation, and the General Assembly were subsequently to fail to lift JCAR prohibition (thereby making it permanent), not only would the legislature have failed to comply with the presentment requirement, but it also would have failed to meet the bicameralism requirement of the constitution.<sup>244</sup>

In addition to failing to comply with the bicameralism and presentment requirements, JCAR or General Assembly vetoes of agency rulemaking do not satisfy a host of other requirements specified in the Illinois Constitution for passage of bills by the legislature. Some of these other requirements include that laws contain an enacting clause,<sup>245</sup> that the final passage of a bill be done by record vote,<sup>246</sup> that the bill be read by title on three different days in each house, and that it be reproduced and placed on the desk of each member.<sup>247</sup>

An argument that has been offered against the foregoing analysis is that the enactment requirements of the Illinois Constitution are nonetheless satisfied because the statutes that created JCAR and General Assembly legislative veto regime<sup>248</sup> were duly passed by the legislature as ordinary bills, with bicameralism, presentment, and all other constitutional enactment provisions respected.<sup>249</sup> With good

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242. *Id.* art. IV, § 9.

243. *See, e.g.*, *Gen. Assembly of State of N.J. v. Byrne*, 448 A.2d 438, 444 (N.J. 1982); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980).

244. ILL. CONST. art. IV, § 8, cl. 3.

245. “Be it enacted by the People of the State of Illinois, represented in the General Assembly.” *Id.* art. IV, § 8, cl. 1.

246. *Id.* art. IV, § 8, cl. 3.

247. *Id.* art. IV, § 8, cl. 4.

248. *See supra* Part I (discussing the General Assembly veto era).

249. *See* Brief for Defendants-Appellants at 40, *Caro ex rel. State v. Blagojevich*, 895 N.E.2d 1091 (Ill. App. Ct. 2008) (No. 08-1061). In this brief, which grew out of the same JCAR veto

reason, this argument has been roundly rejected when raised in other states.<sup>250</sup> A legislature should not be allowed to delegate powers to itself by statute that it is not constitutionally authorized to possess, even with the acquiescence of the governor.<sup>251</sup> In Illinois, legislative acts must be accomplished through laws that have complied with constitutional enactment requirements, and no statute can exempt the legislature from these constitutional requirements.<sup>252</sup>

Although there are no judicial opinions in Illinois that have addressed the constitutionality of JCAR or General Assembly vetoes of agency rulemaking,<sup>253</sup> the Illinois Supreme Court case of *Quinn v. Donnewald* merits some attention in the context of this discussion.<sup>254</sup> At issue in

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that led in part to Governor Blagojevich's impeachment, the Illinois Attorney General argued that the legality of legislative vetoes had already been decided by the Illinois Supreme Court in *Quinn v. Donnewald*, 483 N.E.2d 216, 222 (Ill. 1985).

250. See, e.g., *Blank v. Dep't of Corr.*, 611 N.W.2d 530 (Mich. 2000); *Mo. Coal. for the Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. 1997) (en banc); *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622 (Kan. 1984); *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980).

251. In the last analysis, it should be for the courts rather than the political branches to determine whether there has been a violation of separation-of-powers principles. Cf. *NLRB v. Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring). Indeed, the vitality of separation of powers "does not depend [on] whether the encroached-upon branch approves the encroachment." *Free Enter. Fund v. Pub. Com. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (internal quotation marks and citations omitted). As Justice Scalia opined about the *Chadha* case recently in a concurring opinion in *NLRB v. Canning*, it is no support to the argument that the legislative veto is lawful to point out that the executive signed legislation authorizing Congress to utilize it. "Just the opposite: We said the other branches' enthusiasm for the legislative veto 'sharpened rather than blunted' our review." *Canning*, 134 S. Ct. at 2594.

252. *A.L.I.V.E.*, 606 P.2d at 777 ("[W]hile 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.").

253. There are Illinois court decisions in which a JCAR objection to an agency's proposed regulations is addressed, but those cases do not involve a JCAR or General Assembly veto. Rather, the cases involve challenges to rules on the grounds that JCAR objections did *not*, either directly or through General Assembly passage of a joint resolution, lead to the permanent suspension of the rules. See *Cent. Ill. Pub. Serv. Co. v. Ill. Commerce Comm'n*, 644 N.E.2d 817, 824–25 (Ill. 1994) (rejecting the plaintiff's argument that JCAR, once it challenged Illinois Commerce Commission regulations, was not allowed to retract its objection before the General Assembly could vote to pass a joint resolution making JCAR's suspension of the regulation permanent); *S. 51 Dev. Corp. v. Vega*, 781 N.E.2d 528, 535 (Ill. App. Ct. 2002) (same, in the context of short-term lending rules promulgated by the Illinois Department of Financial Institutions); cf. *Reece v. Bd. of Educ. of the City of Chi.*, 767 N.E.2d 395, 398–403 (Ill. App. Ct. 2002) (rejecting the plaintiff's argument that a statutory scheme allowing the General Assembly to accept or reject by joint resolution recommendations from the State Board of Education about physical education waivers for schools was an unconstitutional variation on a legislative veto, because the General Assembly accepted the board's recommendations and therefore there was no legislative veto for the court to consider).

254. 483 N.E.2d 216, 222 (Ill. 1985).

*Donnewald* were salary recommendations made by the Compensation Review Board (“CRB”), a body created by the state’s Compensation Review Act, for judges, constitutional officers, and members of the General Assembly.<sup>255</sup> The twelve members of the CRB—private citizens appointed in equal numbers by the majority and minority leaders of the House and Senate—were required by statute to make their salary recommendations in a report. The recommendations would then go into effect unless a majority of each house of the General Assembly voted to disapprove the report.

In *Donnewald*, the General Assembly failed to pass such a joint resolution, and the salaries the CRB recommended went into effect. Citing *INS v. Chadha*, the plaintiffs challenged the salary recommendation scheme, arguing it set up a variation of an unconstitutional legislative veto. The Illinois Supreme Court refused to address this argument on the ground that the constitutionality of legislative vetoes was not properly before it, noting that because the General Assembly did not pass a joint resolution disapproving of the report, there had been no legislative veto.<sup>256</sup>

Nonetheless, there are two reasons the *Donnewald* decision should give pause to anyone who presumes to know how the Illinois Supreme Court will rule on the constitutionality of legislative vetoes in the state. The first reason for caution concerns another of the plaintiffs’ challenges—that the General Assembly had improperly delegated legislative power to the CRB by authorizing the board to set salaries for government officials.<sup>257</sup> The Illinois Supreme Court rejected this argument too, in part on the ground that the General Assembly had never intended to delegate to the CRB the power to establish salaries in the first place.<sup>258</sup> Evidence for this conclusion was that the legislature had retained for itself the power to reject the CRB’s recommendations through possible passage of a joint resolution. The implication of the court’s observation was that a General Assembly joint resolution veto of CRB salary recommendations would have legal effect. This implication sits uncomfortably with the prospect that such legislative vetoes are nonetheless unconstitutional.

The other aspect of *Donnewald* that should give pause is the Illinois

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255. 25 ILL. COMP. STAT. 120/1-6.3 (2016).

256. *Donnewald*, 483 N.E.2d at 222.

257. *Id.* at 221.

258. *Id.* at 220.

Supreme Court's response to the plaintiffs' argument that the whole CRB scheme was unconstitutional because it allowed salaries to be set in a manner that did not accord with the state constitution's bicameralism and presentment requirements.<sup>259</sup> The court rejected this argument as well, observing that the Compensation Review Act *itself* was passed in conformance with bicameralism and presentment requirements. This rationale superficially lends support to the suggestion that the exercise of legislative vetoes is permissible so long as the statute that created the legislative veto schemes was itself passed in accord with constitutional enactment requirements. In fact, the Illinois Attorney General cited *Donnewald* as precedent for precisely this point in briefing for the *Caro v. Blagojevich* case, in which it initially appeared that the Illinois courts would have to decide whether the Governor could lawfully order his administrative agencies to ignore suspension orders from JCAR and the General Assembly.<sup>260</sup>

The reasoning in *Donnewald*, however, does not bear the weight the Attorney General placed on it in her briefing in *Caro*. As noted above, the Illinois Supreme Court explicitly stated in its opinion that it was not reaching the legislative veto question.<sup>261</sup> This is important, because the court's reasoning about constitutional enactment issues was not addressed to activity by the General Assembly or one of its legislative committees. The activity the court considered was the issuance of the salary report by the CRB. As a committee of private citizens, the CRB may be delegated quasi-legislative powers, but—just like an administrative agency—need not itself act in conformance with constitutional lawmaking requirements because the committee is not comprised of legislators. The only other activity that was properly before the court was the conduct of the General Assembly in passing the legislation that created the CRB (which, as the court noted, was done in accord with bicameralism and presentment requirements) and in failing to pass a joint resolution to kill the CRB's salary recommendations (which, as the court again noted, was a *failure* to act rather than an act). In short, the *Donnewald* decision tells us vanishingly little about how the Illinois Supreme Court will rule on the question of the constitutionality of legislative vetoes in the state.

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259. *Id.* at 222.

260. See Brief for Intervenor the State of Illinois at 9, *Caro ex rel. State v. Blagojevich*, 895 N.E.2d 1091 (Ill. App. Ct. 2008) (No. 08-1061).

261. *Donnewald*, 483 N.E.2d at 222.

### C. *The Importance of House Bill 398*

As noted above, the first real test of the legitimacy of JCAR and General Assembly vetoes came after Governor Rod Blagojevich characterized JCAR activity as advisory only, and directed his Department of Health and Family Services to ignore a JCAR prohibition of its proposed rules about Medicaid eligibility—which led to lawsuits, articles of impeachment, and eventual removal of the Governor from office in 2009.<sup>262</sup> Although the courts did not rule on the constitutionality of the legislative veto, the General Assembly surely understood that the aftermath of the Governor’s removal was a propitious time for shoring up its legislative veto scheme.

The body did so by passing House Bill 398 in February 2009, just one month after Blagojevich was removed from office. The bill, which was signed into law by the new Governor, Patrick Quinn, states that “[a]ll rulemaking authority” exercised after the IAPA’s effective date “is conditioned on the rules being adopted in accordance with all provisions of this Act and all rules and procedures of the Joint Committee on Administrative Rules (JCAR).”<sup>263</sup> In case the import of this first part is unclear, the IAPA goes on to state that “any purported rule not so adopted, for whatever reason, including without limitation a decision of a court of competent jurisdiction holding any part of this Act or the rules or procedures of JCAR invalid, is unauthorized.”<sup>264</sup>

It is understandable that the General Assembly wanted desperately to maintain supervisory powers over administrative agency rulemaking.<sup>265</sup> But House Bill 398 was a risky bit of legislation. By its plain terms, it declared all agency rules to be of no effect if they were not subjected to review and a potential veto by JCAR or the General Assembly, even if the courts had ruled those procedures to be unlawful.<sup>266</sup> By passing this

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262. Act of Feb. 26, 2009, Pub. Act. 96-002.

263. 5 ILL. COMP. STAT. 100/5-6 (2016).

264. *Id.*

265. During the House debate, Representative Hannig said that House Bill 398 was “one of the most important Bills that we’ll deal with in this Legislative Session. This deal[s] with the very essence of the Legislative Branch.” H.R., Transcript of Debates, 96th Gen. Assemb., 8th Sess., at 20 (Ill. Feb. 5, 2009) (statement of Rep. Hannig); *see also id.* at 20 (statement of Rep. Leitch) (“Whether you recognize it or not, . . . this is one of the most important Bills that we will ever have come before us.”).

266. Senator Clayborne described the measure as an act “to require an administrative agency seeking to promulgate rules to adhere to the rules and procedures of JCAR even if a court finds, for example, JCAR’s power to suspend rules is unconstitutional.” S., Transcript of Debates, 96th Gen. Assemb., 13th Sess., at 11 (Ill. Feb. 11, 2009) (statement of Sen. Clayborne). When asked whether this provision meant that if rules were promulgated that had not gone “before the Joint

legislation, the members of the General Assembly seem to have been betting that the courts would be dissuaded from doing so, because the consequences of such a ruling might be cataclysmic. In a word, the combined effect of House Bill 398 and a ruling that the JCAR veto scheme was unconstitutional would be to bring to a complete stop *all* future agency rulemaking, because no rule could ever comply with all of JCAR procedures if those procedures are disallowed by the courts. House Bill 398 is, in a word, a species of doomsday legislation.

It is certainly possible that legislators in the General Assembly did not understand the effect that House Bill 398 might have on the prospects of agency rulemaking if the Illinois courts were to rule that legislative vetoes are unconstitutional. The floor debates about the measure do not evidence a nuanced understanding of the constitutional issues raised by JCAR and General Assembly vetoes, and instead suggest that the legislators were under the impression that House Bill 398 would do no more than clarify that the General Assembly wanted JCAR review of agency rulemaking to be mandatory rather than merely advisory.<sup>267</sup> For example, Representative Leitch stated that the measure simply

clarifies a long-standing issue . . . [of tension between the Executive and Legislative Branches] and establishes without any question or confusion the rights of this Legislative Body to prohibit rulemaking by the Executive Branch that does not comport with the legislative intent of measures that have been passed here in this General Assembly.<sup>268</sup>

The impression left from the debate was that the legislature, incensed by Governor Blagojevich's allegedly willful misunderstanding of JCAR's statutory authority, passed House Bill 398 simply to make it clear that JCAR had statutorily sanctioned coercive powers over administrative agencies.<sup>269</sup>

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Committee, that they would be determined to be illegal or inappropriate and not applicable," *id.* at 12 (statement of Sen. Rutherford), his answer was that the observation was correct, *id.* at 12 (statement of Sen. Clayborne).

267. See H.R., Transcript of Debates, 96th Gen. Assemb., 8th Sess., at 13 (Ill. Feb. 5, 2009) (statement of Rep. Hannig) ("The former Governor filed a lawsuit and he argues in the courts that JCAR is advisory."); *id.* (statement of Rep. Bost) ("I think it's a shame that we've had to go down this path where there was no question before by any statewide elected official or any Member of this chamber or the other chambers in all the years that JCAR has been in existence of what their importance is.").

268. *Id.* at 18 (statement of Rep. Leitch).

269. How, some senators wanted to know, was this legislation supposed to function? "I read," said Senator Rutherford, "that if rules are promulgated and a court finds that the Administrative Code or the Joint Committee [is] invalid—help me understand the logic how this statute could

Nonetheless, the text of House Bill 398 does more than clarify the General Assembly's intent to give JCAR review some teeth. It is fashioned in the manner of nonseverability legislation, so that agency rulemaking will be brought to a halt if the legislative veto provisions of the IAPA are eventually ruled unconstitutional. Even so, the Illinois courts should not let legislative threats of self-harm affect their analysis of the constitutionality of legislative vetoes over agency rulemaking. House Bill 398 adds nothing to the calculus of whether, for example, the exercise of legislative vetoes is an unconstitutional attempt to wield legislative power without meeting the constitutional bicameralism and presentment requirements. Nor, for that matter, does House Bill 398 make it less likely that the JCAR legislative veto scheme represents an unconstitutional encroachment on the judicial power to declare what the law is.<sup>270</sup>

The suspension of a system that allows the legislature to delegate rulemaking authority to agencies would be a self-inflicted wound that the General Assembly could easily cure by the statutory repeal of House Bill 398.

#### V. POLICY CONSIDERATIONS AND CONSTITUTIONAL ALTERNATIVES

This Article has argued that in time the Illinois courts will strike down as unconstitutional JCAR and General Assembly veto provisions of the Illinois Administrative Procedures Act. When and if that happens, the state will be left with the question of what, if anything, should replace the current system of legislative review of agency rulemaking. This Part will briefly canvas some alternatives to the legislative veto that would survive constitutional scrutiny.

There are compelling reasons to assure that the General Assembly has meaningful oversight of administrative agency rulemaking. Agencies do in fact sometimes act beyond their statutory authority when promulgating rules, and they sometimes issue unwise rules that are

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still have those rules continue to have the force of law." S., Transcript of Debates, 96th Gen. Assemb., 13th Sess., at 12 (Ill. Feb. 11, 2009) (statement of Sen. Rutherford). Senator Clayborne's response was, "I assume that because this is voluntary, that maybe the court will view this a little differently and say that the agency had the ability either not to promulgate rules or to promulgate rules, and when they decide to promulgate rules, then they decide to abide by our existing rules." *Id.* at 12 (statement of Sen. Clayborne); *see also id.* ("[T]his is voluntary. I mean, they can volunteer not to promulgate rules, but if they decide to promulgate rules, then they'll abide by the rules of JCAR.").

270. Indeed, if anything, it would have the effect of making it *more* likely that the legislative veto scheme is a separation-of-powers problem. *See infra* Part II.A.

arguably contrary to the public health, welfare, and safety. Although in an ideal world the solution to agency overreach and insipience would be to keep the rulemaking business in the hands of our democratically elected representatives in the legislature, the reality of the modern administrative states makes this option untenable. There are too many subjects requiring too much expertise to make it feasible for legislators to draft rules with sufficient specificity and in sufficient numbers to effectuate the underlying purposes of their legislation.<sup>271</sup>

There is no real possibility that the General Assembly will leave unused its power to delegate rulemaking authority to administrative agencies.<sup>272</sup> The question then remains—what kind of legislative oversight of the agencies' rulemaking activities would both comport with constitutional requirements and represent good policy?

A first option is very straightforward. If the legislative veto—as exercised either by the General Assembly or by JCAR—is unconstitutional, then simply amend the Illinois Constitution to allow for legislative vetoes of agency rulemaking. Such a course of action may or may not be wise, but there is a procedure for amending the Illinois Constitution, and an amendment would provide a clean resolution to the kinds of constitutional questions raised in this Article.<sup>273</sup> A similar amendment strategy has been used elsewhere, including in Iowa,<sup>274</sup> Connecticut,<sup>275</sup> Nevada,<sup>276</sup> South Carolina,<sup>277</sup> and New Jersey.<sup>278</sup>

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271. Each year administrative agencies in Illinois produce about 20,000 pages of rules. H.R., Transcript of Debates, 95th Gen. Assemb., 299th Sess. (Ill. Jan. 8, 2009) (statement of Andrew P. Morriss, Professor, Univ. of Ill. at Urbana-Champaign), <http://www.ilga.gov/house/committees/95Documents/Committee%20Exhibit%2050.pdf>.

272. 5 ILL. COMP. STAT. 100/1-5 (2016).

273. There are three ways to amend the Illinois Constitution. The first is through a constitutional convention, ILL. CONST. art. XIV, § 1, the second is through a legislatively referred constitutional amendment, *id.* art. XIV, § 2, and the last (for amendments to article IV of the constitution only, relating to structural and procedural subjects concerning the General Assembly) is through an initiated constitutional amendment, *id.* art. XIV, § 3.

274. IOWA CONST. art. III, § 40 (allowing legislature to stop implementation of agency rule by joint resolution).

275. CONN. CONST. art. 2 (allowing agency rules to be blocked by legislature or a committee of the legislature as prescribed by law); *see also* CONN. GEN. STAT. ANN. §§ 4-170, 4-171 (2015).

276. NEV. CONST. art. 3, § 1 (allowing the legislature to nullify agency rules by majority vote of both houses).

277. S.C. CONST. art. III, § 18 (allowing joint resolutions to have the effect of law); Letter from Edwin E. Evans, Deputy Attorney Gen. of S.C., to Edwin E. Bowen, Jr., 1986 S.C. Op. Atty. Gen. No. 86-76, 1986 WL 192034 (July 8, 1986) (concluding that the legislative veto process of agency rulemaking was constitutional due to the passage of section 18 of article III).

278. N.J. CONST. art. 5, § 4, ¶ 6 (allowing the legislature to stop implementation of agency

Whether amending the constitution to allow a legislative veto of agency rulemaking would be a good idea is a different question. There are strong arguments in support of legislative vetoes, not least Justice White's observation in his dissent in *Chadha* that it is the only practical way for a legislature to oversee the important power that it must entrust to the executive branch.<sup>279</sup> Arguments have also been advanced that agency oversight via legislative veto retains democratic legitimacy (by allowing the General Assembly to have the final word on rulemaking powers that are essentially legislative in nature), promotes political accountability (by leaving final responsibility for rules in the hands of elected legislators), and leaves policy decisions where they belong, with elected representatives of the people rather than unelected appointees of the governor.<sup>280</sup> Legislatures are accountable to the public, arguably know best the nature of the authority they delegated to the agencies, and are able to efficiently give feedback to the agencies if they are authorized to wield veto power.<sup>281</sup>

On the other side of the ledger, schemes allowing for legislative vetoes of agency rulemaking have been widely critiqued, including most comprehensively by Arthur Earl Bonfield in his classic *State Administrative Rule Making*.<sup>282</sup> Among the objections that Bonfield notes (and that have not already been discussed in this Article) are the following: Legislative vetoes might unduly strengthen the legislature's authority over the executive by removing the governor's constitutional veto power and weakening his bargaining position.<sup>283</sup> Special interest

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rules through passage of a joint resolution).

279. See *INS v. Chadha*, 462 U.S. 919, 999 (1983) (White, J., dissenting).

280. H.R., Transcript of Debates, 95th Gen. Assemb., 299th Sess. (Ill. Jan. 8, 2009) (statement of Andrew P. Morriss, Professor, Univ. of Ill. at Urbana-Champaign), <http://www.ilga.gov/house/committees/95Documents/Committee%20Exhibit%2050.pdf>.

281. See Jerry L. Anderson & Christopher Poyner, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 *DRAKE L. REV.* 1, 27 (2012). There is a voluminous literature on policy issues surrounding the legislative veto. See Frickey, *supra* note 151, at 1259 n.93.

282. BONFIELD, *supra* note 189; see also Arthur Earl Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 *FLA. ST. U. L. REV.* 617 (1991) (offering similar arguments and observations).

283. BONFIELD, *supra* note 189, at 507; see also Gen. Assembly of State of N.J. v. Byrne, 448 A.2d 438, 444 (N.J. 1982) ("Broad legislative veto power deters executive agencies in the performance of their constitutional duty to enforce existing laws. Its vice lies not only in its exercise but in its very existence. Faced with potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities. They will resort to compromises with legislative committees aimed at drafting rules that the current Legislature will find acceptable.").

groups will be more likely to exercise undue influence over legislative committees that have veto power over agency rulemaking.<sup>284</sup> Agencies that draft rules in the shadow of legislative vetoes may end up more influenced by legislators than by the public rulemaking process.<sup>285</sup> The public might be misled about who is ultimately responsible for rules that are promulgated by agencies but that require legislative approval.<sup>286</sup> Allowing a small committee to exercise a veto creates the likelihood that a small number of legislators will “effectively subvert” the will of the entire legislative body.<sup>287</sup> Legislators may be lulled into making overly broad delegations of rulemaking authority to agencies out of a “false sense of security” that the legislature will be able to adequately oversee the rules that are actually promulgated.<sup>288</sup> The failure to veto a rule might have the unanticipated consequence of convincing the courts (“consciously or unconsciously”) that the legislature deemed the agency rule to be lawfully promulgated.<sup>289</sup> And finally, too many “hurdles” to rulemaking might encourage agencies to eschew rulemaking altogether “in favor of law making by ad hoc adjudication.”<sup>290</sup>

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284. A committee or legislative veto of rules “may be more susceptible to undue influence by special interest groups seeking action inconsistent with the political will of the entire body politic and contrary to the public interest, than is a veto . . . by the usual statutory enactment process involving both houses and the governor.” BONFIELD, *supra* note 189, at 508. A pre-*Chadha* study conducted in the 1980s by Marcus E. Ethridge found that states with legislative review schemes over agency action led to “probable changes in the substance of public policies” adopted by the agencies because of the legislative oversight, and that “potential political influence is an important determinant of committee action.” Marcus E. Ethridge, *Consequences of Legislative Review of Agency Regulations in Three U.S. States*, 9 LEGIS. STUD. Q. 161, 175 (1984).

285. The legislative veto may have the unintended consequence of “inducing administrators to develop rules primarily or exclusively on the basis of contacts with legislators rather than on the basis of public rule-making proceedings.” BONFIELD, *supra* note 189, at 509.

286. Vesting a veto over agency rules in the legislative branch may create a false impression with the public that the legislature is responsible for the “legality and desirability of *all* rules of *all* agencies.” *Id.* at 510.

287. *Id.* at 510–11. This is a concern that is somewhat mitigated by the availability in Illinois of a General Assembly joint resolution override of the JCAR veto. But even so, the committee or full legislative veto would in at least some instances potentially be overriding the will of an *earlier* General Assembly that had passed the original authorizing legislation.

288. *Id.* at 512.

289. *Id.* at 513. In Illinois, the courts typically do not find probative the failure of the General Assembly to pass legislation. See *S. 51 Dev. Corp. v. Vega*, 781 N.E.2d 528, 556 (Ill. App. Ct. 2002) (“[L]egislative inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.” (internal quotation marks omitted)); *id.* at 540 (“The legislature can not express its will by a *failure* to legislate. The act of refusing to enact a law . . . has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.” (internal quotation marks and citation omitted)). Whether the courts would view the failure of the General Assembly to pass a veto by joint resolution remains a matter of speculation.

290. BONFIELD, *supra* note 189, at 513.

Bonfield's observations about potential drawbacks to legislative veto schemes merit serious reflection, and might on their own reasonably dissuade a legislature from seeking to establish the legislative veto if none had previously existed in law. Illinois, though, has more than three decades' worth of experience with various types of legislative vetoes of agency rulemaking. Therefore, empirical and qualitative analysis of the manner in which the state's legislative veto scheme has or has not been successful—with special attention to the problems that Bonfield suggests might come about—would be of value before a constitutional amendment is pursued.<sup>291</sup> Of particular interest is whether JCAR vetoes have historically been issued because of policy disagreements with agencies or because the agencies truly appear to have acted beyond their statutory authority.<sup>292</sup>

Of course, there are other ways that JCAR could perform an important oversight function without being given veto power or requiring amendment to the constitution. Many of these alternatives were in fact offered for consideration by JCAR itself in its early years, when the committee pondered ways to supplement its initial inform-and-advise powers.<sup>293</sup> Among the least controversial was JCAR's suggestion that agencies should be required to consider the economic impact of their proposed rules, and that JCAR review could be expanded to include economic considerations.<sup>294</sup> An expansion of review authority along these lines would of course raise no constitutional issues.

Another promising proposal that would probably survive constitutional scrutiny would be to shift the burden of proof to the agency in any court challenge of a rule to which JCAR had objected.<sup>295</sup> Although it might be challenged as an unconstitutional encroachment on the powers of the judicial branch, the constitutionality of such burden shifting has been upheld in other states<sup>296</sup> and is recommended by the

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291. For a study addressing some of these issues, see generally Marc D. Falkoff, *An Empirical Critique of JCAR and the Legislative Veto in Illinois*, 65 DEPAUL L. REV. (forthcoming spring 2016).

292. See Carl A. Auerbach, *Bonfield on State Administrative Rulemaking: A Critique*, 71 MINN. L. REV. 543, 568 (1987) (chief critic of Bonfield nonetheless agreeing "that the committee should not be given authority to object to an agency rule on policy grounds").

293. 1979 JCAR REPORT, *supra* note 49, at 393–96.

294. *Id.* at 393.

295. *Id.* at 393–94.

296. See, e.g., *Iowa Dealers Ass'n v. Iowa Dep't of Revenue*, 301 N.W.2d 760 (Iowa 1981).

drafters of the Model State Administrative Procedures Act.<sup>297</sup> One benefit of such a proposal would be that the view of the current legislature (or at least of a legislative committee) would be known to the court and might have some marginal effect on its determination of whether an agency is or is not acting beyond its authority. Likewise, there might be some deterrent effect on agencies, though an agency's certainty that it is acting within its authority would presumably prevent it from being dissuaded from placing the regulation into effect.<sup>298</sup>

#### CONCLUSION

Eventually, the Illinois Supreme Court will rule on the constitutionality of JCAR and legislative vetoes of agency rulemaking. When that day arrives, the court will almost surely conclude, in accord with the courts in nearly every jurisdiction to have addressed the same question, that the legislative veto violates the bicameralism and presentment requirements of the state constitution. In the meantime, to avoid the chaos that might follow such a ruling, the General Assembly should consider alternatives to the legislative veto that will be more likely to survive constitutional scrutiny while still providing meaningful legislative oversight of agency rulemaking.

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297. See MODEL STATE ADMIN. PROCEDURE ACT § 3-204 (UNIF. LAW COMM'N 1981).

298. Some of the other proposals from the 1979 report would, like the legislative veto provision that has been discussed in this Article, also be of dubious lawfulness. For example, the proposal to allow JCAR to *require* agency rulemaking would, as JCAR itself acknowledged, raises “[v]ery serious constitutional questions.” 1979 JCAR REPORT, *supra* note 49, at 396. Because JCAR could force the agency to adopt whatever rules JCAR wanted, the agency and any statutory delegation of rulemaking authority to the agency would be illusory and political lines of accountability would be entirely obscured. Other problematic proposals include those that would allow for non-permanent action by JCAR, such as the temporary suspension of existing rules, the suspension of emergency rules, and a pre-approval requirement for new permanent and emergency rules before they could become effective. Finally, a related proposal would give JCAR some coercive power beyond merely recommending to the General Assembly the passage of corrective legislation would be to authorize JCAR to initiate lawsuits against agencies deemed to have acted beyond their statutory authority. *Id.*