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LEGISLATIVE AND EXECUTIVE VETO OF RULES OF ADMINISTRATIVE AGENCIES: MODELS AND ALTERNATIVES*

L. HAROLD LEVINSON**

I. INTRODUCTION

The legislature and the executive, using their combined power to enact a statute, always have been able to control the rulemaking of administrative agencies. The current debate is whether the legislature alone should be able to nullify an agency's rule by means of a "legislative veto" consisting of a resolution of a legislative committee, one house or both houses, which is not submitted to the executive for approval. The converse possibility also is emerging as a serious issue — whether the executive alone should be able to nullify an agency's rule by means of an "executive veto" which is not submitted to the legislature.

On March 24, 1982 the United States Senate passed a bill authorizing a "two-house veto," by which both houses of Congress may veto the proposed rules of any agency by means of a concurrent resolution not submitted to the President for approval.¹ A similar bill is pending in the House.² Numerous existing federal

* This article is adapted from a report submitted by the author as a consultant to the Administrative Conference of the United States. The report has not been reviewed or approved by the Administrative Conference. Portions of this article will be incorporated in the author's forthcoming book entitled *STATE ADMINISTRATIVE LAW*.

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1. S. 1080, 97th Cong., 2d Sess. § 13 (1982), adding §§ 801-803 to Title 5, U.S.C. On the distinction between joint resolutions and concurrent resolutions of Congress, see *infra* Appendix A. That appendix also examines the various meanings of the term "joint resolution" in the states where it is pertinent to legislative control over agency rulemaking.

The Senate debate preceding adoption of S. 1080 included numerous references to the experience of the states. See, e.g., 128 CONG. REC. S2582 (daily ed. March 23, 1982) (remarks of Sen. Levin); *id.* at S2585 (remarks of Sen. Grassley); *id.* at S2592-93, 2601 (remarks of Sen. Schmitt). The state experience was also mentioned in the congressional hearings and reports cited *infra* notes 74 & 89. Neither the Senate debate nor the congressional hearings and reports provide complete or systematic coverage of state law.

2. H.R. 746, 97th Cong., 1st Sess. (1981), reported by the House Judiciary Committee,

statutes authorize one-house or two-house vetoes of the rules or other actions of designated agencies.³ In *Atkins v. United States*⁴ the Court of Claims, in a four to three decision, sustained a one-house veto provision. More recently, the Ninth Circuit in *Chadha v. Immigration and Naturalization Service*⁵ and the District of Columbia Circuit in *Consumer Energy Council of America v. Federal Energy Regulatory Commission*⁶ held that one-house vetoes are unconstitutional. Supreme Court review of the latter two cases is pending.⁷

Meanwhile, the White House is asserting increasing control over the rulemaking of agencies, moving in a direction that could lead to an executive veto of rules. Prominent examples of this trend are the January 29, 1981 Presidential Memorandum postponing pending rules⁸ and the February 17, 1981 Executive Order imposing procedural controls and White House clearance on rules of executive agencies with a request that the independent agencies volunta-

and H.R. 1, 97th Cong., 1st Sess. (1981) both provide for the joint resolution as the vehicle for congressional disapproval of agencies' rules. H.R. 4838, 97th Cong., 1st Sess. (1981) provides for the joint resolution in some situations and the concurrent resolution in others; one of the distinguishing factors is whether the agency is an executive agency or an independent agency. H.R. 1776, 97th Cong., 1st Sess. (1981) provides for legislative disapproval of an agency's rules, either by a concurrent resolution, or by a one-house resolution that is not rejected by the other house within a designated time.

3. The most comprehensive discussions are in SUBCOMM. ON RULES OF THE HOUSE, HOUSE COMM. ON RULES, 97TH CONG., 1ST SESS., BACKGROUND INFORMATION ON REGULATORY REFORM AND CONGRESSIONAL REVIEW OF AGENCY RULES WITH A SUMMARY OF H.R. 1 [as introduced] (Subcomm. Print 1981) and HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO (Comm. Print 1980). Additional coverage is included in L. FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 92-108 (1981); L. FISHER, THE CONSTITUTION BETWEEN FRIENDS: CONGRESS, THE PRESIDENT AND THE LAW 99-108 (1978); and the sources cited *infra* notes 36-40.

4. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

5. 634 F.2d 408 (9th Cir. 1980), *consideration of juris. postponed until hearing on merits*, 102 S. Ct. 87 (1981), *argued before the Supreme Court* Feb. 22, 1982, 50 U.S.L.W. 3687, 3694 (Mar. 2, 1982).

6. 673 F.2d 425 (D.C. Cir. 1982), *appeal filed sub nom. Interstate Natural Gas Ass'n of Amer. v. Consumer Energy Council of Amer.*, No. 81-2020 (U.S. May 1, 1982), 50 U.S.L.W. 3896 (May 11, 1982).

7. *Supra* notes 5 & 6.

8. Memorandum of Jan. 29, 1981, *Postponement of Pending Regulations*, 46 Fed. Reg. 11,227 (1981). The memorandum was addressed by President Reagan to the heads of the executive departments, and did not purport to affect the independent agencies. On the distinction between executive departments and independent agencies, see *infra* notes 107-09 and accompanying text.

rily comply.⁹

The states have been even more active than the federal government with regard to both legislative and executive vetoes and other forms of supervision of agency rulemaking. State approaches toward legislative control fall into the following categories. Eleven states have not adopted any system of legislative supervision; they continue to rely on the general power of the legislature to enact statutes whenever needed.¹⁰ Fifteen states have established advisory committees to perform systematic review of agency rules and to make recommendations for legislative action which must be done by statute.¹¹ One state has a one-house veto of agency rules.¹²

9. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). See *infra* text accompanying notes 107-09.

10. See *infra* notes 61-67 and accompanying text. The states that have not adopted an across-the-board system of legislative review of administrative agencies' rules are Arizona, California, Delaware, Indiana, Massachusetts, Mississippi, New Hampshire, New Mexico, Pennsylvania, Rhode Island, and Utah.

Some of these states have adopted systems pertaining to designated types of rules of designated agencies. See, e.g., ARIZ. REV. STAT. ANN. § 41-511.05 (1974 & Supp. 1982); PA. STAT. ANN. tit. 35, § 1224.2 (Purdon 1980) (amended by Act No. 1981-83).

A bill creating a two-house veto system was held invalid before it went into effect in New Hampshire. See *infra* note 18.

Some of the states without a system of legislative review have adopted a system of executive review. See *infra* notes 25-28 and accompanying text.

11. See *infra* note 67 and accompanying text. The statutes that establish advisory committee systems subject to final legislative action by statute are ARK. STAT. ANN. § 4-617, 6-608 to -612 (1976); COLO. REV. STAT. §§ 24-4-103(8)(d), -108 (Supp. 1981); FLA. STAT. ANN. §§ 11.60, 120.545 (West Supp. 1981-1982); GA. CODE ANN. § 3A-104(e), (f) (Supp. 1981); HAWAII REV. STAT. § 91-4.1 (Supp. 1981); ME. REV. STAT. ANN. tit. 5, §§ 11111 to 11116 (Supp. 1981-1982); MD. ANN. CODE art. 40, § 40A (1978 & Supp. 1981); MO. ANN. STAT. §§ 536.022, .037 (Vernon Supp. 1982); N.Y. LEGIS. LAW §§ 86-88 (Consol. Supp. 1981-1982); OR. REV. STAT. §§ 183.710 to .725 (1982); S.C. CODE ANN. §§ 1-23-120 to -130 (Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(g) (Vernon 1980); WASH. REV. CODE ch. 34.04 (amended by ch. 324, 1981 Wash. Laws); W. VA. CODE § 29A-3-11 (1980) (West Virginia currently has an advisory committee system because its former two-house veto system was held unconstitutional, see *infra* note 19); WYO. STAT. §§ 28-8-102, 28-9-101 to -108 (1977).

The Maryland system is classified here as an advisory committee system because it functions like one with regard to nonemergency rules. The Maryland committee exercises suspensive powers over emergency rules.

Some of the states that are classified here as having advisory committee systems provide that two houses or a legislative committee may suspend or nullify designated types of rules of designated agencies. See, e.g., MD. ANN. CODE art. 41, § 15B(c-1)(4) (Supp. 1981); 1981 MO. LAWS, SB 200; TEX. REV. CIV. STAT. ANN. art. 41a-1, § 6(b) (Vernon 1980).

The Georgia system is classified here as an advisory committee system subject to final legislative action by statute, although the format of final legislative action in Georgia has a

Eleven states have a two-house veto of agency rules;¹³ additional states had this type of system until it was declared unconstitutional.¹⁴ Nine states provide for final legislative action only by statute and authorize a legislative committee to suspend the effectiveness of a rule for a limited time pending final legislative action.¹⁵

special feature. If the legislature adopts a disapproval resolution by a two-thirds majority of each house, the resolution need not be submitted to the governor. If a simple majority of less than two-thirds adopts the resolution, it must be submitted to the governor, who may veto the resolution. For classification purposes here, this system is regarded as one in which the legislature, by a two-thirds majority, can override in advance any potential veto by the governor. While this may not provide the same mechanisms for further deliberation and the expression of public opinion that would accompany the mandatory submission of the measure to the governor followed by a possible veto and a new round of legislative activity to override the veto, the Georgia system seems more like a statute than a two-house veto without submission to the governor at all.

The systems of some states provide for final legislative action on agency rules by "joint resolution." The meaning of this term varies from state to state. With regard to states where a joint resolution must be submitted to the governor for approval or veto, a joint resolution is classified here as if it were a statute. Where, on the other hand, a joint resolution need not be submitted to the governor, a state system providing for final legislative action by joint resolution is classified here as a two-house veto system. See *infra* Appendix A listing the type of legislative action taken in connection with review of agency rules.

12. OKLA. STAT. ANN. tit. 75, § 308 (West Supp. 1981). See *infra* notes 29-58 and accompanying text.

13. CONN. GEN. STAT. ANN. § 4-168(b) (West Supp. 1981); IDAHO CODE §§ 67-454, -5217, -5218 (Supp. 1981); ILL. ANN. STAT. ch. 127, §§ 1007.01-.10 (SMITH-HURD 1981); KAN. STAT. ANN. §§ 77-426, -427 (1977 & Supp. 1981); LA. REV. STAT. ANN. § 49:969 (West. Supp. 1982); MICH. COMP. LAWS ANN. §§ 24.235, .245, .250-.252 (Supp. 1981); MONT. CODE ANN. §§ 2-4-401 to -412, 5-14-101 (1981); NEV. REV. STAT. §§ 233B.067, .068 (1981) (amended by 1981 NEV. STAT. ch. 264); N.J. STAT. ANN. §§ 52:14B-4.1 to .9 (amended by 1981 N.J. Sess. Law Serv. ch. 27 (West)); OHIO REV. CODE ANN. §§ 119.03(H), (I), (Page Supp. 1981), 1982 Ohio Legis. Bull. at 36 (Anderson); VA. CODE § 9-6.14:9 (Supp. 1981).

Two-house veto systems are also on the statute books of Alaska and West Virginia but have been held unconstitutional by the respective state supreme courts. See *infra* notes 17 & 19. On the basis of the remaining portions of the statutes, Alaska is classified here as a state with a committee suspension system, see *infra* note 15, and West Virginia as a state with an advisory committee system, see *supra* note 11.

A bill establishing a two-house veto system was held invalid before it went into effect in New Hampshire. See *infra* note 18. Vermont repealed its two-house veto system in 1981. The current system is classified *infra* note 16. See also *infra* notes 29-58.2 and accompanying text.

14. See *infra* notes 17-19 and accompanying text.

15. ALA. CODE §§ 41-22-22 to -24 (Supp. 1981); ALASKA STAT. §§ 44.62.320, 24.20.400-.460 (1962) (Alaska's two-house veto system was held unconstitutional, *infra* note 17, and the remaining portion of the Alaska statute is classified here as a committee suspension system); KY. REV. STAT. § 13.087 (1980); MINN. STAT. ANN. § 3.965 (West Supp. 1982); NEB. REV. STAT. §§ 84-901.01 to .02, -902(1) to (5), -904, -908 (Supp. 1981); N.C. GEN. STAT. §§ 120-

Three states and the 1981 revision of the Model State Administrative Procedure Act provide for final legislative action only by statute pursuant to recommendations from an advisory committee; if the committee finds a rule objectionable, the committee's objection is published with the rule, and the agency has the burden of persuading the court that the rule is valid in any subsequent litigation challenging the rule's validity.¹⁶

The two-house veto has been held unconstitutional in recent years by state supreme courts in Alaska,¹⁷ New Hampshire,¹⁸ and West Virginia.¹⁹ A lower court in Connecticut also held the two-house veto unconstitutional, but the state supreme court disposed of the case on other grounds and vacated the lower court's judgment on the constitutional issue.²⁰ A lower court in Montana recently invalidated a statute that authorized a two-house resolution of the legislature, without submission to the governor, to direct an agency to change an existing rule or to adopt a new rule.²¹ The court declined to decide the validity of another portion of the same

30.24 to .35, 150A-2(2a) (Supp. 1981); S.D. CODIFIED LAWS ANN. §§ 1-26-1(1) to (3), 1-26-38, -38.1 (Supp. 1981); TENN. CODE ANN. §§ 4-5-104, -129 (Supp. 1981); WIS. STAT. ANN. §§ 13.56 to .565, 227.018 (West Supp. 1981). See *infra* notes 74-88 and accompanying text.

The North Carolina system, classified here as a committee suspension system, also involves the governor or the council of state performing an executive review function after the committee of the legislature has determined that a rule is objectionable. See *infra* notes 115 & 116 and accompanying text.

16. IOWA CODE ANN. §§ 17A.4, .8 (West 1978 & Supp. 1981); N.D. CENT. CODE § 29-32-03.03 (Supp. 1981); VT. STAT. ANN. tit. 3, § 842 (added by 1981 Vt. Acts No. 82, § 6. 1981 Vt. Acts. No. 82 § 7 repealed the two-house veto system); MODEL STATE ADMIN. PROCEDURE ACT § 3-204(d) (National Conference of Commissioners on Uniform State Laws) (revised 1981) [hereinafter cited as 1981 MSAPA].

The Montana system also provides for a shift in the burden of persuasion after the committee has objected, but the Montana statute also establishes a two-house veto system and is classified here with other two-house veto systems. See *supra* note 13.

The North Carolina system also provides for a shift in the burden of persuasion after the committee has objected, but that statute also confers suspensive powers upon the committee; consequently, North Carolina is classified here as having a committee suspension system. See *supra* note 15.

For a discussion of systems in which the committee's objection shifts the burden of persuasion, see *infra* notes 89-94 and accompanying text.

17. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

18. Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).

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

20. Maloney v. Pac, 439 A.2d 349 (Conn. 1981).

21. Montana Taxpayers Ass'n v. Dep't of Revenue, No. 47126, (Mont., Lewis & Clark Co., March 18, 1982).

statute that provides for a two-house veto of existing rules, but the court's decision casts serious doubt upon the continued validity of that provision.

The electorates of Alaska, Florida, Missouri, and Texas have rejected proposed state constitutional amendments that would have authorized the two-house veto.²² Referenda on similar proposals are pending in Connecticut and Missouri.²³ No state has adopted a constitutional provision authorizing the two-house veto. The electorates of Michigan and South Dakota have adopted constitutional amendments authorizing temporary suspension of agencies' rules by a legislative committee pending final action by the legislature.²⁴

Executive oversight is more highly developed in some states than in the federal government. In three states, rules cannot become effective unless signed by the governor.²⁵ In other states and in the

22. The Alaska proposal would have added art. II, § 22 to the Alaska Constitution. The proposed amendment, Legislative Resolve No. 5, SLA 1980, is in Alaska Stat. Const. art. II, § 22 (Supp. Oct. 1980). The defeat of this proposal at the November, 1980 referendum is reported in Sturm, *State Constitutional Developments During 1980*, 70 NAT'L CIVIC REV. 22, 26 (1981).

The Florida proposal, Committee Substitute for Senate Joint Resolutions Nos. 619 and 1398 (1976), would have amended Fla. Const. art. I, § 18, 1976 Fla. Laws 933-34. Its defeat at the November 1976 referendum is reported in Sturm, *State Constitutional Developments During 1976*, 66 NAT'L CIVIC REV. 78, 83 (1977).

The Missouri proposal, S.J. Res. 23 (1976), would have amended Mo. Const. art. IV, § 8. 1976 Mo. Legis. Serv. 69 (Vernon). Its defeat at the August 1976 referendum is reported in Sturm, *State Constitutional Developments During 1976*, 66 NAT'L CIVIC REV. 78, 86 (1977).

The Texas proposal, H.R.J. Res. 133 (1979), would have added art. III, § 66 to the Texas Constitution. 1979 Tex. Gen. Laws 3232. Its defeat at the November, 1979 referendum is reported in Sturm, *State Constitutional Developments During 1979 and the 1970's*, 69 NAT'L CIVIC REV. 33, 56 (1980).

23. The Connecticut proposal is Substitute H.R.J. Res. 64 adopted May 14, 1981, proposing an amendment to Conn. Const. art. II. This proposal is to be voted upon at the general election on November 2, 1982 or to be continued to the next session of the legislature elected at that time. 1981 Conn. Legis. Serv. 806-07 (West).

The Missouri proposal is H.R.J. Res. 36 (1981), proposing the addition of art. IV, §§ 54-58 to Mo. Const., to be voted on in the general election in November, 1982, or a special election to be called by the governor. 1981 Mo. Legis. Serv. 549-50 (Vernon).

24. Mich. Const. art. 4, § 37 (adopted in 1963); S.D. Const. art. III, § 30 (adopted in 1980).

25. HAWAII REV. STAT. § 91-3(c) (1976 & Supp. 1981); NEB. REV. STAT. § 84-908 (1976 & Supp. 1980); WYO. STAT. § 28-9-106 (1977). In addition, the governor of Arizona has issued an executive order which could be viewed as his assertion of the right to give informal approval to all rules before they become effective. See *infra* note 106 and accompanying text. Governors in many other states undoubtedly exercise significant informal influence before certain agencies adopt certain rules.

1981 Model Act, rules become effective without the governor's signature, but the governor may veto any rule.²⁶ California has a variation of this system; the Office of Administrative Law reviews all rules and can suspend those it finds objectionable, subject to final action by the governor.²⁷ In still other states, rules can be vetoed by the combined action of the governor and a legislative committee.²⁸

This Article begins with a discussion of the constitutional and policy problems arising from the one-house or two-house veto. The conclusion of this part of the Article is that these systems are neither clearly constitutional nor clearly unconstitutional, except in those jurisdictions where they have been expressly rejected by the courts. The concept may be justifiable in jurisdictions where it has not been expressly rejected only if effective supervision of the agencies is needed and no other mechanism can provide that supervision. Justification of the one-house or two-house veto depends, therefore, on the availability of alternative means of supervising the agencies that are reasonably effective and free from the serious constitutional and policy problems that accompany the one-house or two-house veto.

Next, this Article examines other models of legislative and executive control over agencies. The great majority of the states have adopted systems that do not include the one-house or two-house veto, and most activities of the federal government are conducted without the availability of this veto. The widespread use and apparent acceptability of systems other than the one-house or two-

In Connecticut, the governor must approve an emergency rule before it is eligible for expedited processing by the legislative rules review committee. CONN. GEN. STAT. ANN. § 4-168(b) (West Supp. 1981).

On the general requirement that a governor sign rules before they become effective, see *infra* note 105 and accompanying text.

26. IND. CODE ANN. § 4-22-2-5 (Burns Supp. 1980); IOWA CODE ANN. § 17A.4(6) (Supp. 1980); LA. REV. STAT. ANN. § 49:970 (West Supp. 1982); MO. ANN. STAT. § 536.022 (Vernon Supp. 1982); NEV. REV. STAT. § 416.060 (1979); 1981 MSAPA, *supra* note 16, at § 3-302. See also *infra* notes 27 & 28 and accompanying text.

On the gubernatorial veto of rules, see generally *infra* notes 111-14 and accompanying text.

27. CAL. GOV'T CODE §§ 11349-11349.9 (West 1980). See *infra* notes 112-14 and accompanying text.

28. N.C. GEN. STAT. §§ 120-30.24 to .35, 150A-2(2a) (1978 & Supp. 1981); WYO. STAT. § 28-9-106 (1977). See *infra* notes 115 & 116 and accompanying text.

house veto lead to the conclusion that the veto is generally unnecessary and undesirable at the present time.

II. ONE-HOUSE OR TWO-HOUSE VETO

Serious questions of constitutional law and public policy arise from the one-house or two-house veto. Almost all courts and all state constitutional referenda that have addressed the issue have rejected the veto. Some legislators vigorously advocate it, yet only a small number of states have established the veto by statute. Scholarly commentary is mixed. Each of the major components of the debate will be reviewed.

A. *Separation of Powers*

The courts that recently have rejected the one-house or two-house veto show remarkable consistency in their reasoning.²⁹ All the decisions are based on the separation of powers. The underlying theory is that once the legislature has enacted a statute delegating authority to an administrative agency, no legislative action except another statute may nullify or amend the enabling statute or the agency's action.

This result rests on two premises. First, when an agency takes action pursuant to an enabling statute, the agency is engaged in the execution of the laws and is therefore carrying out an executive function. Although statutorily created administrative agencies are allowed to perform executive functions, neither the legislature nor any sub-unit of the legislature may perform such functions. Thus, any legislative intervention in the execution of the laws by means other than a statute is an encroachment on the domain of the executive branch and violates the separation of powers. The second premise is that, for purposes of this discussion, neither a one-house nor a two-house resolution of the legislature qualifies as a statute, because neither is presented to the chief executive for approval or

29. The cases synthesized here are *Chadha v. Immigration and Naturalization Serv.*, *supra* note 5; *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, *supra* note 6; *State v. A.L.I.V.E. Voluntary*, *supra* note 17; *Opinion of the Justices*, *supra* note 18; and *State ex rel. Barker v. Manchin*, *supra* note 19. The position of the Montana trial court, *supra* note 21, is fully consistent with these cases, although directed to a slightly different issue.

veto; additionally, a one-house resolution violates the principle of bicameralism.

The only recent case that upholds a one-house veto against a separation of powers challenge is the four to three decision of the Court of Claims in *Atkins v. United States*.³⁰ The statute at issue provided that the President's recommendations regarding the salaries of certain government officials would become effective unless either house of Congress adopted a resolution of disapproval within thirty days. Limiting itself to this statute, the court held that the one-house veto system was valid. The effect of a one-house resolution of disapproval in this context simply would preserve the status quo because the statute would remain in effect and the President's recommendation would fail to take effect. Thus, the one-house resolution would not change the law. Further, because setting salaries is clearly a legislative function, the one-house resolution of disapproval would not interfere with any essential executive function.

Atkins is significant as an expression of the view that the one-house or two-house veto is not inherently unconstitutional. But beyond this proposition, the significance of the decision may be quite limited in view of the court's insistence that it was considering only the statute at issue in the case. This statute clearly involved a less serious assault on the principle of separation of powers than the statutes that recently have been invalidated by the state supreme courts of Alaska,³¹ New Hampshire,³² and West Virginia.³³ In each of these state cases, the challenged statute established an across-the-board system for the two-house veto of the rules of all agencies in the state. The statute at issue in *Atkins*, however, is not so easily distinguishable from those statutes which were invalidated by two other recent federal cases. In *Consumer Energy Council v. Federal Energy Regulatory Commission*,³⁴ the District of Columbia Circuit invalidated a statute that authorized either house of Congress to veto the rule of a specific agency regarding natural gas pricing. In *Chadha v. Immigration and Natu-*

30. *Supra* note 4.

31. *Supra* note 17.

32. *Supra* note 18.

33. *Supra* note 19.

34. *Supra* note 6.

ralization Service,³⁵ the Ninth Circuit invalidated a statute that authorized either house of Congress to veto a stay of deportation granted by the Attorney General. One possible distinction is that *Atkins* sustained a one-house disapproval of the President's recommendation before it became effective, while *Consumer Energy Council* and *Chadha* invalidated systems under which one house could annul agency action that had already taken effect. This distinction indicates that the one-house or two-house veto is on stronger constitutional ground when applied to proposed agency action in "report-and-wait" systems³⁶ than when applied to agency action already in effect. Another distinction between the decisions in *Atkins* and the two other federal cases, however, may result from a conflict of judicial opinion regarding the underlying issue of separation of powers.

Some scholars assert that the one-house or two-house veto is inherently unconstitutional,³⁷ others that it is clearly constitutional,³⁸ others that it is of questionable validity,³⁹ and others that

35. *Supra* note 5.

36. See *infra* notes 50-53 and accompanying text.

37. An influential early statement was Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953). More recently, a similar view was taken in Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 66 CALIF. L. REV. 983 (1975). See also Taylor, *Legislative Vetoes and the Massachusetts Separation of Powers Doctrine*, 13 SUFFOLK U.L. REV. 1 (1979).

Not surprisingly, Presidents of the United States consistently have argued that the one-house or two-house veto is unconstitutional. A recent congressional study reports:

Since the enactment of the first legislative veto provision in 1933, the Executive Branch has opposed this method of congressional oversight. Every President from Franklin D. Roosevelt to Jimmy Carter has strongly argued that the veto is an unconstitutional infringement upon the duty and obligation of the Chief Executive to enforce the law. It is interesting to note that the Reagan Administration on several occasions during the 97th Congress has opposed the legislative veto on constitutional grounds, notwithstanding the President's support of the device during the campaign and the endorsement of the veto by the Republican National Convention.

SUBCOMM. ON RULES OF THE HOUSE, HOUSE COMM. ON RULES, 97TH CONG., 1ST SESS., BACKGROUND INFORMATION ON REGULATORY REFORM AND CONGRESSIONAL REVIEW OF AGENCY RULES WITH A SUMMARY OF H.R. 1 [as introduced] 15 (Subcomm. Print 1981) (footnote omitted).

38. Schwartz, *The Legislative Veto and the Constitution: A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978). Two members of the U.S. Senate have published scholarly arguments in favor of the validity of the legislative veto. Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Con-*

it may be acceptable in some circumstances but not in others.⁴⁰ Still other scholars assert that although the separation of powers issue may be a useful means of approaching a general examination of political philosophy, the issue should not be regarded as a source of solutions for resolving the constitutionality of the one-house or two-house veto.⁴¹

This article will withhold any opinion on separation of powers or any other doctrinal issue. Instead, this article will offer an overall evaluation of the constitutional and policy issues on the basis of the cumulative examination of all major issues, including the impact of the state constitutional referenda.

B. *Delegation*

The major argument in favor of the one-house or two-house veto rests on the theory of delegation.⁴² According to this approach, when the legislature delegates authority to an administrative agency, the legislature should be able to attach conditions to control the manner in which the delegated authority will be exercised. Some types of conditions would be unconstitutional, such as conditions that required the agency to engage in invidious discrimination or to violate due process when implementing the statute. The provision for a one-house or two-house veto, however, is asserted to be a valid condition within the "reasonable and proper" range of

stitutional Analysis, 52 N.Y.U. L. REV. 455 (1977).

39. K. C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.6 (1982 Supp. to 2d. ed.); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064 (1981).

40. Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. REV. 423 (1978); Note, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U.L. REV. 1018 (1977); Note, *The Constitutionality of the Legislative Veto*, 23 WM. & MARY L. REV. 123 (1981); Fisher, *Congress Can't Lose on Its Veto Power*, Washington Post, Feb. 21, 1982, inserted in 128 CONG. REC. S2587-88 (daily ed. March 23, 1982) (in remarks of Sen. Schmitt).

41. Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977).

42. The delegation argument is urged in the sources cited *supra* note 37 and was made repeatedly during the debate in the U.S. Senate preceding the vote in favor of the two-house veto system cited *supra* note 1. See 128 CONG. REC. S2571-2604 (daily ed. March 23, 1982).

legislative action.

Some legislators argue that the one-house or two-house veto is the only way to make sure that the will of the legislature, as expressed in the enabling statute, is not thwarted by the actions of the agencies.⁴³ According to this argument, the one-house or two-house veto is needed as a protection against the violation of the separation of powers that would otherwise be perpetrated by the agencies. This approach uses the separation of powers principle to support the one-house or two-house veto, in contrast to the approach discussed under the previous heading, which relies on separation of powers as the basis for rejecting the veto.

C. *Rejection of Proposed State Constitutional Amendments*

Alaska, Florida, Missouri, and Texas recently have given their citizens an opportunity to vote on proposed state constitutional amendments dealing with the one-house or two-house veto. In all four states, the people rejected proposed amendments that would have authorized the veto as a system applicable across-the-board to the rules of all administrative agencies.⁴⁴ In rejecting the proposed constitutional amendments, the people of these states expressed their disagreement with the respective legislatures that had recommended adopting the amendments. The results of these referenda merit serious attention, not only in the states where the votes took place, but in all states as well as the federal government.⁴⁵

D. *Practical Effects*

The debate on the one-house or two-house veto has included a discussion of the effects this system is likely to produce in government practices. One objection is that a veto system would increase the legislative workload if the legislature had to review all rules or

43. In addition to sources cited *supra* notes 37 & 41, see LEGISLATIVE IMPROVEMENT AND MODERNIZATION COMMITTEE, NATIONAL CONFERENCE OF STATE LEGISLATURES, RESTORING THE BALANCE: LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS 7-10 (1978) [hereinafter cited as RESTORING THE BALANCE]. This source was recently updated. See *infra* note 46.1.

44. *Supra* note 22. See also *infra* Appendix B which suggests that referenda rejecting proposed state constitutional amendments are significant statements of constitutional law and public policy.

45. See Appendix B.

all proposed rules in order to decide whether to exercise the veto.⁴⁶ A response to this objection is that if the legislature wishes to maintain effective supervision over the agencies by means of exercising the traditional legislative power to enact a statute, the legislature still must review all rules or proposed rules and also must undertake the relatively cumbersome process of enacting a statute. This process requires even more legislative effort than would be needed for a one-house or two-house veto. A related question is whether a one-house or two-house veto system would require a large legislative support staff. Preliminary data on number of staff personnel and annual cost shows wide variations among states but does not indicate that the one-house or two-house veto system requires more staff or funds than other types of legislative oversight systems.^{46.1}

Another issue is whether the availability of a one-house or two-house veto will encourage the legislature to delegate power to the executive in broader terms or on a broader range of subjects.⁴⁷ This feature of the veto is viewed as an advantage by some and as a danger by others.

A third question is whether the availability of a one-house or two-house veto will discourage the agencies from promulgating rules at all. The consequence would be that agencies would develop new policy on an *ad hoc* basis in the context of adjudicating individual cases. Such *ad hoc* policy decisions may be beyond the practical reach of the legislative veto system.⁴⁸ The prospect of a de-

46. See, e.g., 128 CONG. REC. S2592-93 (daily ed. March 23, 1982) (remarks of Sens. Byrd and Schmitt).

46.1 Jones, *Legislative Review of Administrative Rules: An Update*, NATIONAL CONFERENCE OF STATE LEGISLATURES: STATE LEGISLATIVE REPORT, Vol. 7, No. 4 (1982). The state showing the highest annual cost is Illinois (\$600,000), classified here as a two-house veto system state. *Supra* note 13. The next highest annual cost is New York (\$585,000), classified here as an advisory system state, *supra* note 11, and the third highest is Florida (\$350,000), also an advisory system state, *supra* note 11. Many states, including some with two-house veto systems, show no cost at all, evidently because the cost of staffing the rule review process is not accounted for separately.

47. See, e.g., 128 CONG. REC. S2595-97 (daily ed. March 23, 1982) (remarks of Sen. Danforth).

48. On the general preferability of rulemaking rather than adjudication as a means of developing policy, see, e.g., 1 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.38 (2d ed. 1978); B. SCHWARTZ, ADMINISTRATIVE LAW 189-90 (1976); 1981 MSAPA, *supra* note 16, at § 2-104(4) and Comments.

crease in agency rulemaking is welcome to some people, but others fear that a shift from rulemaking to adjudication as the means of developing policy may make the agencies' policies more difficult for the citizen to ascertain or for the courts to monitor effectively. The one-house or two-house veto, however, may not deter agency rulemaking any more than would a vigorous program of legislative review based on the legislature's power to enact statutes.

A fourth area of concern is that a one-house or two-house veto system could have a destabilizing effect on governmental policy.⁴⁹ Assume, for example, that a controversial new policy has been embodied in a statute after extensive bargaining and compromising among the two houses of the legislature and the chief executive. Pursuant to the statute, an agency adopts rules which are in turn submitted to the legislature for review under a one-house veto system. By the time these rules are submitted, either house may conclude that a different policy is preferable to the one that was embodied in the statute. Either house may therefore wish to veto a rule that conforms to the enabling statute as a means of asserting the new policy preference of that house. The possibility of this type of action by either house will, of course, attract the attention of lobbyists, who will not hesitate to importune the legislators during the rule review process.

This concern may be answered, to some extent, by the observation that the legislature always retains the option of repealing or amending the enabling statute; thus, governmental policy always is tentative. Furthermore, the legislature always is subject to lobbying by persons wishing to have the policy changed. Of course, a change in policy by the action of a single house of the legislature may be easier to accomplish than if a statute is required; however, the statute establishing the one-house or two-house veto system could place limits on the reasons why a veto could be exercised. For example, the statute could authorize a veto only if the agency's action is contrary to the intent of the enabling statute or otherwise beyond the authority delegated to the agency.

49. In the Consumer Energy Council case, *supra* note 6, the court pointed out that the House of Representatives, when adopting the one-house veto resolution that was at issue in that case, knowingly departed from the policy that had been incorporated in the underlying statute. 673 F.2d at 467-68.

A final question is whether the one-house or two-house veto will prevent effective administration. This question requires consideration under each of two possible forms that the system may incorporate. One option is the "report and wait" mechanism. This mechanism delays the effective date of all rules for a designated number of days, during which one or both houses of the legislature have the opportunity to exercise their veto, and after which the veto is no longer available.⁵⁰ The practical difficulty with this system is that the public interest may require adopting rules more quickly than this system permits. This difficulty is especially significant in states where the legislature meets for relatively short and widely separated sessions. A familiar solution is to authorize agencies to adopt emergency rules that can take effect immediately without having to wait for the expiration of the normal period of time.⁵¹ To prevent the agencies from abusing the privilege of adopting emergency rules, some states have imposed special con-

50. The bill adopted by the U.S. Senate on March 24, 1982, *supra* note 1, establishes a "report and wait" system. With some exceptions, the bill provides a 45-day waiting period before rules can become effective. This period is extended if, within the 45 days, the appropriate committee of either house reports a resolution of disapproval or is discharged from further consideration of such a resolution. From the date that a committee reports or is discharged, either house has 30 days in which to adopt a resolution of disapproval, and the other house then has an additional 30 days thereafter, the rule remaining ineffective unless either house defeats a resolution of disapproval. If Congress adjourns *sine die* before expiration of the waiting period, the rule remains ineffective and the waiting period starts to run when Congress reconvenes.

All the states that have adopted across-the-board systems of the two-house veto, *supra* note 13, provide a waiting period during which the legislature may adopt a resolution to prevent a proposed rule from becoming effective (with exceptions for emergency rules in some states). In Kansas, Montana, Nevada, and Virginia, the two-house veto can be exercised only upon proposed rules during the waiting period before their effectiveness. In the other two-house veto states (Connecticut, Idaho, Illinois, Louisiana, Michigan, New Jersey, and Ohio), the two-house veto can be exercised either upon proposed rules during the waiting period before their effectiveness or after the rules have become effective (subject to limitations in some of these states). The Oklahoma one-house veto system applies to existing rules. See *supra* note 12.

51. The bill adopted by the U.S. Senate on March 24, 1982, *supra* notes 1 & 50, permits emergency rules to take effect immediately. Connecticut provides an expedited "report and wait" system for emergency rules and requires the governor to approve the agency's finding of an emergency. Michigan, Ohio, Oklahoma, and Virginia permit emergency rules to take immediate effect. Nevada authorizes the legislative committee to expedite or waive review when necessary. New Jersey permits emergency rules to take effect, with the governor's approval, but only for 60 days, unless a concurrent resolution extends their effectiveness for one more 60-day period. *Supra* notes 12 & 13.

trols such as requiring the written approval of the governor before any agency may adopt an emergency rule.⁵²

Another optional form of the one-house or two-house veto is to permit the rules to go into effect before the legislature reviews them and to authorize one or both houses to nullify existing rules.⁵³ This form of the veto, while permitting agencies to take immediate action, adds an air of tentativeness to agency action until legislative review has been completed.

E. *Necessity and the Least Burdensome Means*

The cumulative effect of the above discussion leads to the conclusion that the one-house or two-house veto is neither clearly constitutional nor clearly unconstitutional, except in those jurisdictions where it has been expressly rejected by the courts. In the remaining jurisdictions, the veto occupies a constitutional twilight zone, and the validity of the veto is seriously suspect because of the persuasive force of the determinations in some jurisdictions that the system violates basic notions of separation of powers.

In jurisdictions where the question is still open, the one-house or two-house veto may be justified if it is demonstrated to be necessary and if it is the least burdensome means of meeting that necessity. The doctrine of necessity does not permit the government to engage in conduct that clearly violates the constitution, but necessity may be taken into account in deciding borderline questions of constitutionality.⁵⁴ The doctrine of necessity calls for a showing that there is a need for some type of remedy and that the particular remedy under examination is appropriate under the circumstances. One measure of appropriateness is whether the remedy is the least burdensome means of solving the problem. The concept of the least burdensome means is familiar in many of the balancing

52. Connecticut and New Jersey. *Supra* note 51.

53. Connecticut, Idaho, Illinois, Louisiana, Michigan, New Jersey, Ohio, and Oklahoma. *Supra* note 50.

54. See *infra* notes 55-57. See also 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 444 (1974). For a related discussion of the "constitutional reason of state" which may exist even when a war or other extreme emergency does not, and which may encourage the *de facto* expansion of governmental powers, see A.S. MILLER, PRESIDENTIAL POWER 200-28 (West Nutshell Series 1977).

tests employed by the courts.⁵⁵ The most frequent contexts in which courts use the concept are those involving free speech or other individual rights.⁵⁶ It is also used in the more abstract context that considers the burden on interstate commerce.⁵⁷

By analogy, the concept of the least burdensome means also should indicate that where a governmental need can be met by various alternative systems, preference should be given to the system that imposes the least "burden" on the prevailing notions of constitutional government. In other words, a court should not rely on the doctrine of necessity to validate a system that is seriously suspect under general standards of constitutional analysis if the asserted need can be satisfied by another system that is clearly constitutional or is at least on stronger constitutional ground than the system under challenge.⁵⁸

The preceding examination of some practical effects of the one-house or two-house veto is not an adequate basis for determining whether this system satisfies the asserted need to supervise the agencies in a manner that renders the use of this system essential. Alternative methods of satisfying the need must be examined before the need for the veto can be appraised. Although this article does not reflect empirical studies of the functioning of systems in the federal and the several state governments, one indisputable fact is that most states have not established the one-house or two-house veto at all. Furthermore, the federal government has established the veto only for designated types of rules, and not as an across-the-board system. These facts suggest that the one-house or

55. See, e.g., Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 999, n.17 (1978). The Florida Supreme Court has developed the concept in various settings, e.g., *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) (impairment of the obligation of contracts); *Kluger v. White*, 281 So.2d 1 (Fla. 1973) (access to courts); *State v. Leone*, 118 So. 2d 781 (Fla. 1960) (exercise of the police power).

56. See, e.g., L. TRIBE, *supra* note 55, at 410, 586, 684-87, 695, 722-24, 766-67, 771-72, 780-81, 791-92, 808-09, 846-59, 952, 961-62.

57. See, e.g., L. TRIBE, *supra* note 55, at 335, 342.

58. This is somewhat analogous to the doctrine that when a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, a court will apply the constitutional interpretation, thereby avoiding the need to hold the statute invalid. See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *Kent v. Dulles*, 357 U.S. 116 (1958).

two-house veto may not be an indispensable feature of contemporary state or federal government.

F. *Policy Arguments*

The desirability of the one-house or two-house veto, as a matter of policy, has been contested vigorously. Policy preferences blend with arguments of constitutionality, practicality, and necessity. The recent debate in the United States Senate preceding adoption of the bill providing a two-house veto system provides an assortment of policy statements generally favoring the system.^{58.1} Numerous institutions, however, have expressed vigorous objections. These institutions include the Administrative Conference of the United States, the American Bar Association (ABA), and the ABA Commission on Law and the Economy. Additionally, the referenda rejecting the one-house or two-house veto in proposed state constitutional amendments are significant statements of public policy as well as constitutional law.^{58.2}

III. OTHER MODELS OF LEGISLATIVE CONTROL

In those jurisdictions that have not adopted the one-house or two-house veto, the mechanisms for legislative control over agency action can be classified into a few models. The basic features of each model are sketched in this part of the paper. Hybrid systems, incorporating elements from more than one of the models, will be discussed under a later heading.⁵⁹

A. *Nonsystematic Oversight*

The federal government and eleven states have not adopted any across-the-board system of legislative control over the agencies,⁶⁰ but a few states,⁶¹ as well as the federal government,⁶² have established one-house or two-house veto systems with regard to the rules of designated agencies, and the United States Senate has

58.1 See *supra* notes 1, 42, 46 & 47.

58.2 See *infra* note 118. See also *supra* notes 22 & 24 and *infra* Appendix B.

59. See *infra* notes 115 & 116 and accompanying text.

60. *Supra* note 10.

61. *Id.*

62. *Supra* note 3.

passed a bill to establish an across-the-board two-house veto of agency rules.⁶³ The dominant model in the federal government and the eleven states is, at least for the time being, a model of nonsystematic oversight.

In these jurisdictions, the legislature can veto the rule of any agency by enacting a statute that either amends the enabling statute so as to repeal or adjust the agency's authority or directly nullifies the agency's rule. The legislature also has other traditional powers. It may minimize the amount of agency discretion by enacting tightly-written enabling statutes. It may suspend or withdraw an agency's rulemaking authority. Finally, the legislature may exert influence on agencies through such techniques as the appropriations process, legislative investigations, participation in the appointment of agency personnel, and the handling of constituents' casework arising from their dealings with the agencies.

This traditional approach poses no constitutional problems.⁶⁴ It is often viewed as inadequate because it fails to provide a systematic method for bringing agency rules to the attention of the legislature.⁶⁵ This criticism may not always be justified. For example, during the recent debate in the United States Senate, before the adoption of the bill establishing the across-the-board two-house veto, a proponent of the measure observed that it would not cause a significant increase in the workload of Congress, because the standing committees already engage in comprehensive review of the agencies' rules pursuant to the traditional power of Congress to enact a statute as a means of controlling an agency's rulemaking.⁶⁶

63. *Supra* note 1.

64. An exception might arise if the legislature attempted to veto the rule of an agency that derives its existence and powers directly from the constitution. *See, e.g., Whitehead v. Rogers*, 223 So. 2d 330 (Fla. 1969). Along similar lines, *see* 1981 MSAPA, *supra* note 16, which explains that, for purposes of this Act, the term "agency . . . does not include the governor in the exercise of powers derived directly and exclusively from the constitution of this State."

The recent Montana trial court decision, *supra* note 21, implies that the constitutional outcome may be different between a two-house veto of existing agency rules and a two-house directive that requires an agency to adopt or amend a rule. The court held the latter procedure unconstitutional, but expressly withheld deciding the validity of the former. Arguably, the separation of powers issues are virtually identical in each type of situation.

65. *See, e.g., RESTORING THE BALANCE*, *supra* note 43, at 8; 128 CONG. REC. § 2584 (daily ed. March 23, 1982) (remarks of Sen. Grassley).

66. *Supra* note 46.

Furthermore, if an agency proposes or adopts a rule that is seriously questionable on either legal or policy grounds, the rule is likely to attract the attention of affected parties or their lobbyists, who will not hesitate to bring the matter to the attention of the legislature. Affected parties thus can serve a screening function in aid of legislative review of agency rulemaking.

B. *Advisory Committee Systems*

Fifteen states have established systems in which a special rules review committee or an appropriate legislative standing committee systematically reviews proposed or existing rules, or both, and makes recommendations to the legislature which, in these systems, may act only by statute.⁶⁷ The only difference between this system and the nonsystematic method of legislative oversight is that the advisory committee system is truly a system in that it provides a mechanism for the methodical performance of the rule review function. The advisory committee system is clearly constitutional, because final legislative action is only by statute and the role of the committee is purely advisory.

Variations of the advisory committee model are found in some of the fifteen states. In some states, the agency must respond to the committee's comments on the rule.⁶⁸ Some states require any objection by the committee to be published with the rule.⁶⁹ In "report and wait" systems, the effectiveness of all agency rules, except emergency rules, is delayed for a designated period after the agency has promulgated the rules. This allows time for the advisory committee to perform its review and for the legislature to enact a statute before the rules take effect.⁷⁰ Under "sunset" provisions, rules have a limited duration, and they automatically

67. *Supra* note 11.

68. Florida (agency's failure to respond to committee's objection is deemed to be agency decision to withdraw the proposed rule); Washington (after receipt of objection from committee, agency must conduct public hearing and then report back to committee). Statutes are cited *supra* note 11.

69. Florida and Washington, cited *supra* note 11.

70. Advisory committees can review proposed rules in Florida, Georgia, Hawaii, Maine, Maryland, Missouri, Oregon, South Carolina, Texas, Washington, West Virginia, and Wyoming. Statutes are cited *supra* note 11. Availability of advisory committee review of proposed rules is the basis for classifying these states as having "report and wait" systems.

terminate after the specified time unless the legislature enacts a statute to prolong the life of selected rules or to exempt them from the "sunset" timetable.⁷¹ Another variation of the advisory committee system is found in jurisdictions where the committee has standing to bring suit to challenge the validity of any rule.⁷²

In some of the states with advisory committee systems, legislators appear to be satisfied that the system gives them adequate control over agency rulemaking; but, in other states with similar systems, legislators experience frustration in attempting to control the agencies.⁷³ The distinction between the satisfactory and unsatisfactory evaluations of the advisory committee system may relate to such factors as the size and quality of the committee's staff, the ability of this staff to communicate informally with the staff of the rulemaking agency, the extent to which the governor and the legislature support the committee, and the leadership ability of key individuals, especially during the formative period of the system. The likelihood of success also is increased if the enabling statutes and the agencies' rules are well written.

C. *Suspension by Committee*

Nine states authorize temporary suspension of a rule by a committee, subject to final legislative action by statute.⁷⁴ In some of these states, suspension occurs before the effective date of the rule;⁷⁵ in other states, the legislature may suspend rules that al-

71. Colorado pioneered the "sunset" concept. Maine adopted a "sunset" system but repealed it in 1981. Statutes are cited *supra* note 11.

72. Florida, cited *supra* note 11.

73. See, e.g., SUBCOMM. ON RULES OF THE HOUSE, HOUSE COMM. ON RULES, 96TH CONG., 1ST SESS., REGULATORY REFORM AND CONGRESSIONAL REVIEW OF AGENCY RULES: HEARINGS ON H.R. 1776, THE ADMINISTRATIVE RULE MAKING REFORM ACT, AND RELATED MEASURES (Comm. Print 1980), which includes relatively favorable comments on advisory committee systems by legislators from Florida (Part I, at 646, statement by Rep. Kiser) and Maryland (Part III at 5, statement by Rep. Riley), and relatively unfavorable comments based on the ineffectiveness of the advisory committee system by a legislator from Texas (Part II at 106, statement by Sen. Semos). The present author, in conversations with legislators and their staffs, has heard widely varying appraisals of advisory committee systems from people in states that have such systems.

74. *Supra* note 15.

75. Committees can review and suspend proposed rules before effectiveness in Alabama, Alaska, Kentucky, North Carolina, South Dakota, Tennessee, and Wisconsin. Statutes are cited *supra* note 15. In some of these states, committees also can review and suspend ex-

ready have become effective.⁷⁶

No state court has decided a case on the sole basis of the validity of a committee suspension system. In each of the state supreme court decisions that recently invalidated a two-house veto — Alaska, New Hampshire, and West Virginia — the challenged statute combined a committee suspension feature with a two-house veto. The holding of each case was that the two-house veto was unconstitutional. The Alaska court disclaimed any opinion on the validity of the committee suspension feature of the statute.⁷⁷ In dictum, the New Hampshire court implied that the committee suspension feature of the statute was not objectionable.⁷⁸ The West Virginia court in dictum, however, expressed disapproval of the committee suspension concept.⁷⁹ Committee suspension was not an issue in the Montana trial court decision.⁸⁰

The voters of Michigan and South Dakota have adopted state constitutional amendments that authorize a legislative committee to suspend rules that agencies have adopted during the interim between legislative sessions; the legislature thus has an opportunity to act before the rules become effective.⁸¹

In states where a constitutional amendment or a holding of a court have not determined the validity of the committee suspension system, the system poses a constitutional question that falls between the clear constitutionality of the advisory committee system and the serious question regarding the validity of the one-

isting rules. *See infra* note 76. The North Carolina committee is subject to executive as well as legislative review. *See infra* notes 115 & 116 and accompanying text.

76. Committees can review and suspend existing rules in Alabama (only if adopted before Oct. 1, 1982), Alaska, Minnesota, Nebraska (with a "sunset" system), North Carolina (subject to executive as well as legislative review, *see infra* notes 115 & 116 and accompanying text), South Dakota, Tennessee, and Wisconsin. Statutes are cited *supra* note 15. In some of these states, committees also can review and suspend proposed rules before effectiveness. *See supra* note 75.

77. *Supra* note 17.

78. *Supra* note 18.

79. *Supra* note 19.

80. *Supra* note 21.

81. *Supra* note 24. The Michigan system is classified here as a two-house veto system, *supra* note 13, because the statute includes that mechanism, although the constitutional amendment does not expressly or even impliedly authorize a two-house veto. South Dakota is classified here as a committee suspension system subject to final legislative action by statute. *Supra* notes 15, 75 & 76.

house or two-house veto. The committee suspension system resembles the advisory committee system to the extent that each requires the final action of the legislature to be by statute. On the other hand, the committee suspension system resembles the one-house or two-house veto system to the extent that each permits the legislature, by taking action other than by statute, to interfere with the effectiveness of a rule. The difference is that the committee suspension system permits the committee to interfere with the rule only temporarily pending final legislative action by statute, in contrast to the veto system which permits the last word of the legislative process to be the one-house or two-house resolution.

As illustrated by the conflicting dicta of the New Hampshire and West Virginia courts,⁸² a tribunal that rejects the one-house or two-house veto as a violation of separation of powers may or may not accept the committee suspension system. One interpretation of separation of powers would reject the committee suspension system because it provides an opportunity for the legislature, without enacting a statute, to interfere with the agency's execution of the laws. A contrary interpretation is that the committee suspension system provides only a temporary interference that is ancillary to the conceded power of the legislature to take final action by statute.

The latter approach appears to be especially persuasive if the committee suspension system is designed to meet a demonstrated need in a manner that minimizes the constitutional problem. The need can be demonstrated, for example, if the committee suspension system applies only to rules that were adopted during the interim between legislative sessions, because the legislature obviously is unable to enact a statute during the interim. Significantly, the constitutional amendments adopted in Michigan and South Dakota authorize committee suspension only for rules adopted during the interim between legislative sessions.⁸³

The constitutional problem attending a committee suspension system may be minimized if the statute that creates this system requires the committee to base its decision on criteria clearly expressed in the statute. For example, the statute might authorize

82. *Supra* notes 18, 19, 78 & 79 and accompanying text.

83. *Supra* note 81.

the committee to suspend an agency rule only if the rule is contrary to the intent of the enabling statute or otherwise beyond the authority delegated to the agency.⁸⁴ The system also should require the committee to follow appropriate procedures before reaching its decision. These procedures might include holding a public hearing after notice to the agency and to affected parties.⁸⁵ Further, the system should permit the committee to suspend a rule for only a limited time and should require the legislature to act within a short time after the committee's action.⁸⁶ Allowing the committee to exercise its suspensive powers only during the interim between legislative sessions may provide further protection to the system against constitutional challenge.⁸⁷ With these limitations, a committee suspension system should stand a good chance of passing constitutional muster as a temporary mechanism that is ancillary to the legislature's exercise of its power to enact a statute.

Reports by states with committee suspension systems indicate that the suspension power has been exercised with commendable restraint; additionally, the availability of this power has given the legislative committee considerable bargaining power in its informal dealings with the agencies.⁸⁸

84. Alaska, Minnesota, and Tennessee give no criterion for restricting the committee's suspensive power. Kentucky permits committee suspension if the agency's rule is contrary to legislative intent or beyond statutory authority. North Carolina lists only the lack of statutory authority as the basis for the committee to suspend a rule. The other committee suspension statutes confer considerable amounts of subjective judgment on the committees to suspend rules on "any other" grounds (Alabama), based on the "needs of the people" (Nebraska), if the rules are not "necessary" (South Dakota), or are "arbitrary, capricious," or the cause of "undue hardship" (Wisconsin). Statutes are cited *supra* note 15.

85. Nebraska, South Dakota, Tennessee, and Wisconsin require the committee to hold a hearing. Alaska requires an opportunity for a hearing. The other committee suspension states are either silent or permissive with regard to a hearing. Statutes are cited *supra* note 15.

86. All the committee suspension statutes impose limits on the duration of the suspension that may be imposed by the committee expressed either as a number of days or as terminating if the legislature has failed to take final action nullifying the rule by the end of the current or the next legislative session. Statutes are cited *supra* note 15.

87. This factor goes to the seriousness of the need for committee suspension. On the question of need, see *supra* text accompanying notes 54-58.

88. See, e.g., Regulatory Reform and Congressional Review of Agency Rules, *supra* note 73, statement by Rep. Davis, Tennessee (Part I at 905). Similar statements were made about the exercise of committee suspensive powers in states that have two-house veto systems and are therefore classified elsewhere in this article. *Supra* note 13. See, e.g., REGULATORY REFORM AND CONGRESSIONAL REVIEW OF AGENCY RULES, *supra* note 73, statements by Prof.

D. *Committee Objection Shifts Burden in Litigation*

Three states and the 1981 revision of the Model State Administrative Procedure Act provide for final legislative action only by statute pursuant to guidance from an advisory committee. If the committee objects to a rule and the agency does not change the rule to the committee's satisfaction, the committee's objection is published with the rule.⁸⁹ In any litigation in which the validity of the rule is at issue, the burden of persuasion is shifted, and the agency has the burden of convincing the court that the rule is valid. Two of these states offer an incentive to litigants seeking to challenge rules by providing for the award of reasonable costs and attorney's fees to a party who successfully challenges a rule after the committee has objected.⁹⁰

The systems that empower a legislative committee to shift the burden in litigation are subject to the theoretical criticism that the statutes do not provide a systematic mechanism for any action by the legislature to review the committee's action. Hence, the committee's action is the final action of the legislature, unless the legislature chooses to enact a statute to override the committee, a procedure not described in the statutes but presumably available as an exercise of the inherent authority of the legislature to control its own committees. Even if the committee's action is the final ac-

Neely, West Virginia (Part I at 883), Rep. Osiecki, Connecticut (Part I at 1070), Mr. Sanders (special counsel), Michigan (Part I at 1104).

89. *Supra* note 16. Montana also provides for a shift of the burden, but Montana's system is classified here as a two-house veto system because it incorporates the two-house veto system. *Supra* note 13.

The Montana burden-shifting mechanism includes some unique features. If the legislature is not in session, the committee may poll the members of the legislature, and shall poll them if at least 20 members of the legislature object to the proposed rule. If a poll of the members of the legislature shows that a majority of each house finds the proposed rule is contrary to legislative intent, the rule shall be presumed conclusively to be contrary to legislative intent in any court proceedings on the validity of the rule. When the members of the legislature are not polled, an objection by the Montana committee shifts the burden to the agency, in any litigation, to persuade the court that the rule is valid. The Montana statute also confers standing upon the rules review committee to litigate regarding the validity of a rule.

90. The states providing costs and attorney's fees are Iowa and North Dakota. Statutes are cited *supra* note 16. The 1981 MSAPA, *supra* note 16, does not provide for attorney's fees, but permits them if another statute does. The Vermont statute is silent regarding attorney's fees.

tion of the legislature, however, this action is neither the attempted enactment of a statute nor an interference in the agency's execution of the law; the committee's action is merely an allocation of the burden of persuasion in litigation, a matter that traditionally has been regarded as being within the domain of the legislature.⁹¹ Delegation of this power to a legislative committee, subject to the possibility of action by statute but without a systematic mechanism for action by statute, is on the strongest constitutional ground if the statute creating the system establishes clear grounds on which the committee may object and requires the committee to conduct satisfactory procedures before making its objection.⁹² The Iowa Supreme Court implied that Iowa's system, providing for a shift of the burden if the legislative committee objects, was constitutional; the court, however, did not explore the issue of delegation from the legislature to its committee.⁹³

The system that shifts the burden in litigation if the legislative committee objects to a rule is not beyond constitutional challenge.⁹⁴ This system, however, appears to pose less serious constitutional problems than either the one-house or two-house veto or the committee suspension system. This system offers a middle ground, with minimal constitutional risk, between the advisory committee system and the one-house or two-house veto or the committee suspension system.

E. *Applicability*

The systems discussed above generally are applicable across-the-board to all or virtually all rules of all agencies in the jurisdiction. In addition, or as an alternative, some jurisdictions have adopted one or more systems of legislative control applicable only to limited categories of rules adopted by designated agencies. The fed-

91. See, e.g., 1981 MSAPA, *supra* note 16, (Comment to § 3-204); Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 Iowa L. Rev. 731, 921 (1975).

92. See sources cited *supra* note 91 and the discussion of analogous issues arising from committee suspension systems. *Supra* notes 84-87 and accompanying text.

93. *Schmitt v. Iowa Dep't of Social Services*, 263 N.W.2d 739 (Iowa 1978). The statute was applied in *Iowa Auto Dealers Ass'n v. Iowa Dep't of Revenue*, 301 N.W.2d 760 (Iowa 1981).

94. See *supra* note 91 and accompanying text.

eral statutes that were invalidated in *Chadha*⁹⁵ and *Consumer Energy Council*⁹⁶ provided for a one-house veto of limited categories of rules. Limited systems of a one-house or two-house veto also exist in a few states.⁹⁷

Even in across-the-board systems, some types of rulemaking receive special treatment or exemption. Examples of special treatment include emergency rules,⁹⁸ rules adopted during the interim between legislative sessions,⁹⁹ and rules required by federal statute.¹⁰⁰ In addition, a number of jurisdictions distinguish between the review of proposed rules and existing rules.¹⁰¹

The varied patterns of applicability have a bearing on the question of whether any one or more types of legislative control are essential components of government. The existence of numerous models of systems and the varying applicability of any particular model suggest that no model and no method of applicability is essential.

IV. MODELS OF EXECUTIVE CONTROL

Executive control over the rulemaking and other actions of administrative agencies is emerging as a topic of serious concern. If agencies are perceived to be exceeding their authority, the possibility of supervision by the chief executive requires consideration as an alternative or as a supplement to supervision by the legislature. The existing systems of executive control can be classified into a few models and are discussed next. Hybrid systems will be discussed under a later heading.

95. *Supra* note 5.

96. *Supra* note 6.

97. Arizona and Pennsylvania (*supra* note 10); Maryland, Missouri, and Texas (*supra* note 11).

98. Maryland, South Carolina, and West Virginia (*supra* note 11); Oklahoma (*supra* note 12); Connecticut, Michigan, New Jersey, Ohio, and Virginia (*supra* note 13); Alaska and Tennessee (*supra* note 15).

99. Michigan and Ohio (*supra* note 13); Alaska (*supra* note 15).

100. South Carolina (*supra* note 11); New Jersey and Ohio (*supra* note 13).

101. Arkansas, Georgia, Hawaii, Nevada, South Carolina, Texas, and West Virginia (*supra* note 11); Oklahoma (*supra* note 12); Idaho, Kansas, Louisiana, Montana, Nevada, and Virginia (*supra* note 13); Kentucky (*supra* note 15); North Dakota (*supra* note 16).

A. *Nonsystematic Executive Control*

The most widespread model is one in which there is no systematic means by which the chief executive controls the rulemaking or other activities of administrative agencies. Most states fall into this category and, until recently, so did the federal government. The chief executive is not, however, without influence even in jurisdictions that have no systematic mechanisms for executive review of agency action. Traditional powers of the chief executive include the power to initiate requests for appropriations and other legislation pertaining to the agencies, the power to veto any statute, the power to appoint agency heads and other senior personnel, the power to control criminal prosecution and to grant clemency, and the general power of persuasion that inheres in the office of chief executive.

In those states where the constitution creates some administrative agencies, such as public utilities commissions or boards of education, the constitution may limit the supervisory power of the governor with regard to these agencies.¹⁰² Even where a statute rather than the constitution establishes an agency, the legislature may, to some extent, restrict the scope of gubernatorial control by conferring upon the agency head a relatively wide range of independence from the governor. Similarly, Congress has chosen to confer more autonomy upon the "independent" federal agencies than upon the "executive" departments, although Congress created each category of agency.¹⁰³

A basic difficulty with the nonsystematic model is that it can lead to uneven and erratic instances of executive control. A chief executive may ignore completely rulemaking and other agency activities most of the time, but periodically he may intervene in agency actions that raise issues of high political significance. A related difficulty is that the precise scope of the chief executive's influence over the agencies is seldom clear; consequently, each attempted use of the chief executive's power may raise a unique set

102. See *supra* note 64 for the analogous question of the limits of legislative control over agencies that derive their existence and powers from the constitution.

103. See generally 1 K. C. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 2:7-2:9 (2d ed. 1978); B. SCHWARTZ, *ADMINISTRATIVE LAW* 13-16 (1976).

of jurisdictional problems.¹⁰⁴

B. Executive Approval or Clearance as Condition of Effectiveness of Rules

In three states, rules do not become effective until signed by the governor.¹⁰⁵ These systems have been established by statute in the respective states. They raise no constitutional problems if rulemaking is regarded as part of the executive function of executing the laws. This view of the executive nature of rulemaking is consistent with the recent approach taken by the state and federal courts invoking the separation of powers principle as the basis for invalidating statutes that created the one-house or two-house veto system. These courts held that, although the legislature always retains the power to change the law by enacting a new statute, the legislature may not interfere with the executive function of adopting rules to implement the law. In conformity with this reasoning, these statutes can be justified as legislative choices to delegate rulemaking power to the agencies subject to the lawful condition of prior approval of each rule by the chief executive.

A constitutional issue would arise if an executive order rather than a statute imposed the requirement of prior approval of the chief executive. The question then would be whether the chief executive has inherent power to impose this type of control over the rulemaking of all agencies under the general constitutional duty to ensure that the laws are faithfully executed, or whether the chief executive can impose this type of control over the agencies only if the legislature incorporates prior executive approval as part of the legislative delegation of authority to the agencies.

Arizona has a requirement, imposed by executive order, that the chief executive approve all rules before they take effect.¹⁰⁶ President Reagan took a significant step in this direction in issuing Executive Order 12,291 on February 17, 1981.¹⁰⁷ This Executive Or-

104. The problems may be especially difficult if the chief executive relies on inherent constitutional power without statutory authority. See *infra* notes 106-09.

105. *Supra* note 25.

106. Exec. Order No. 81-3 (May 8, 1981), 1981 Ariz. Legis. Serv. A-215, - 216 (West).

107. *Supra* note 9. A Pennsylvania Executive Order takes a similar approach. Exec. Order No. 1981-2 (Jan. 29, 1981), 11 Pa. Admin. Bull. 1379 (Apr. 25, 1981). For a critical comment, see Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency*

der requires all agencies, except the independent regulatory agencies,¹⁰⁸ to submit all proposed and final rules for review to the Director of the Office of Management and Budget (OMB) who is subject to the direction of a special task force consisting mainly of cabinet members under the direction of the Vice President. Technically, neither the OMB nor the task force may suspend or nullify a proposed or existing rule. As a practical matter, however, the OMB and the task force provide a highly influential system of prior clearance of rules, and the President could influence directly the OMB and the task force in performing this clearance function.

The validity of this Executive Order is likely to depend on the outcome of three inquiries. The first is whether the OMB controls agency rulemaking, or whether OMB's relationship to the agencies is purely advisory. The second question is whether Congress, in creating and maintaining the agencies of the executive department, has implied its consent to the agencies being tightly controlled by the President in a manner that is, to a considerable extent, left to the discretion of the President from time to time. This implication may be drawn from the distinction that Congress has made between the independent agencies, which receive certain congressional protection from presidential control, and the executive agencies, which do not. This distinction could be interpreted as implying that Congress intends to leave the executive agencies under the substantial control of the President.

The third question involves separation of powers. If this Executive Order does indeed result in OMB control over the rulemaking of the executive agencies, and if Congress has not given its implied consent, does the President's constitutional power to ensure that the laws are faithfully executed authorize him, without statutory support, to require the agencies to submit their rules for his ap-

Rulemaking Under Executive Order 12,291, 80 MICH. L. REV. 193 (1981). See generally *Symposium: Presidential Intervention in Administrative Rulemaking*, 56 TUL. L. REV. 811 (1982).

108. The Executive Order lists 17 "independent regulatory agencies" by name and states that it is not applicable to them or to "any other similar agency designated by statute as a Federal independent regulatory agency or commission." The President has asked all independent agencies to comply voluntarily with the procedures contained in the Executive Order. Professor Kenneth C. Davis reported recently that all but one of the independent agencies had declined. K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:40 (Supp. 1982).

proval as a condition of the effectiveness of the rules? A tentative answer to this question may resemble the tentative answer to the question raised earlier in this paper regarding the constitutionality of a statute creating a one-house or two-house veto of agencies' rules: the constitution may be unclear on the subject, and the outcome of a challenge may be influenced by the seriousness of the need and the availability of alternative methods of meeting the need that pose less serious constitutional questions.¹⁰⁹

A less controversial model of executive approval or clearance as a precondition to the effectiveness of rules is found in the numerous states in which agencies must submit all rules to the attorney general for approval as to legality before they become effective.¹¹⁰ This requirement apparently rests on the attorney general's role as legal advisor to government. In some states, the attorney general also serves as staff counsel for some or all agencies, and in these situations, the assistant attorney general who is assigned as agency counsel may draft the rules for the agency; drafting and approval of the rules may then be a single function of the attorney general's office.

C. *Executive Veto of Existing Rules*

In some states and under the 1981 revision of the Model State Administrative Procedure Act, rules can become effective without prior submission to the governor, but they are subject to subsequent veto by the governor.¹¹¹ These systems are created by statute and can be justified to the same extent as the model discussed above that provides for executive approval or clearance of rules before their adoption. If, without a statute, a governor asserted the power to veto an existing rule, constitutional issues would arise similar to those discussed above in connection with Executive Order 12,291.

California has statutorily adopted a variation of the executive

109. See, by analogy, the discussion of the least burdensome means and the question of necessity, *supra* text accompanying notes 54-58.

110. See, e.g., Comm. on the Office of Attorney Gen., National Ass'n of Attorneys Gen., REPORT ON THE OFFICE OF ATTORNEY GENERAL 340-43 (1971); 1 F. COOPER, STATE ADMINISTRATIVE LAW 220-21 (1965); Bonfield, *supra* note 91, at 899 n.662.

111. *Supra* note 26.

veto of agency rules.¹¹² The Office of Administrative Law systematically reviews all rules to determine whether the rules satisfy standards contained in the statute.¹¹³ The Office has power to suspend rules subject to final review by the governor. If the governor's power to veto rules is acknowledged, the power of the Office of Administrative Law to suspend rules subject to review by the governor can be analogized to the power of a legislative committee under a committee suspension system to suspend rules temporarily pending final action by enactment of a statute.¹¹⁴ The functions of the Office of Administrative Law, like those of a legislative suspension committee, could be viewed as temporary and as ancillary to the powers of the final decision-maker. These ancillary functions might well withstand constitutional challenge if supported by a demonstrable need and if accompanied by clear statutory standards, appropriate procedures, and a reasonably tight timetable for final action by the ultimate authority.

D. *Executive Participation in Legislative Oversight Systems*

A few states have established hybrid systems in which the governor participates with a legislative committee in the review of rules.¹¹⁵ In North Carolina, for example, if the legislative rule review committee finds that a rule is outside the agency's statutory authority, the committee can object and thereby delay the effectiveness of the rule pending final action by the governor or the council of state.¹¹⁶ If the governor (or council) takes no action within a designated time, the rule is automatically repealed. If, during the time limit, the governor (or council) rejects the committee's position, the rule becomes effective, but the committee must

112. *Supra* note 27.

113. The statutory standards are, in summary: necessity, authority, clarity, consistency, reference, and approval of the State Building Standards Commission. *See generally* Starr, *California's New Office of Administrative Law and Other Amendments to the California APA: A Bureau to Curb Bureaucracy and Judicial Review, Too*, 32 AD. L. REV. 713 (1980); OFFICE OF ADMINISTRATIVE LAW [Cal.], FIRST ANNUAL REPORT 1980-81, SLASHING GOVERNMENT RED TAPE (1981).

114. *See*, by analogy, *supra* text accompanying notes 84-88.

115. *Supra* note 28.

116. The North Carolina council of state consists of ten executive officers, in addition to the governor, whose offices are established by the constitution. N.C. Const. art. III, § 8. A quorum is five members in addition to the governor. N.C. GEN. STAT. § 147-13 (1978).

prepare a bill for submission to the legislature to nullify the rule. The committee also may seek a judicial determination that the rule is invalid. In this or any other litigation in which the validity of a rule is tested, the committee's objection shifts the burden to the agency to persuade the court that the rule is valid.

The constitutional justification for the North Carolina system is that a statute may empower the governor to veto rules, the governor may exercise this power by tacitly declining to intervene for the designated time after the committee has objected, and a legislative committee may properly be given an ancillary role in aid of the governor's exercise of the rule review function. If any link in this chain of justification is viewed as inadequate — and the last-mentioned link is questionable — the system loses its constitutional basis.

E. Administrative Determination of Invalidity of Rule

In Florida, upon complaint of a party adversely affected by a rule, a hearing officer of the Division of Administrative Hearings must conduct a declaratory proceeding to determine whether the rule is invalid.¹¹⁷ A hearing officer's determination in this proceeding is not reviewable by the agency which promulgated the rule, but is subject to judicial review. The Missouri Administrative Hearing Commission exercises similar jurisdiction to invalidate agencies' rules.¹¹⁸

V. CONCLUSION

Some systematic means of rule review seems desirable in view of current popular demands for the accountability of administrative agencies. The system should not burden the agencies so much that they attempt to proceed without adopting rules at all; neither should the system burden the legislature or the executive with the need to constantly reconsider the same matter.

The one-house or two-house veto is questionable on constitutional and policy grounds.¹¹⁹ It is also unnecessary as evidenced by

117. FLA. STAT. ANN. §§ 120-.54(4), 120.56 (West Supp. 1981-1982).

118. MO. ANN. STAT. §§ 161.333 to .338, 536.050 (Vernon Supp. 1982).

119. In addition to other sources cited in this Article, see the strong policy objections made against the one-house or two-house veto by the Administrative Conference of the

the numerous alternatives that have worked with apparent success in various jurisdictions.

Each of the other types of legislative or executive rule review has its advantages and disadvantages. Some jurisdictions have adopted multiple types of rule review.¹²⁰ Various types of systems or multiple systems are apparently workable, and success may depend more upon the effectiveness of the personnel than upon the official structure of the system.

United States. Legislative Veto of Administrative Regulations (Recommendation 77-1), 1 C.F.R. § 305.77-1 (1982). See also *Federal Regulation: Roads to Reform*, 1979 ABA COMMISSION ON LAW AND THE ECONOMY 88-91. The continuing opposition of the ABA to the concept of the one-house or two-house veto is demonstrated in the brief filed by the ABA as amicus curiae in the *Chadha* case in the Supreme Court. *Supra* note 5. The ABA brief was inserted into the Congressional Record by Senator Bumpers. 128 CONG. REC. S2205 (daily ed. Mar. 16, 1982).

On the general topic of alternatives to the one-house or two-house veto, see Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667 (1980).

120. The United States will be in this category if the Senate Bill, *supra* note 1, becomes law. See discussion of executive review, *supra* note 9. States that have multiple systems of review include: Florida (*supra* notes 11 & 117); Hawaii (*supra* notes 11 & 25); Iowa (*supra* notes 16 & 26); Louisiana (*supra* notes 13 & 26); Missouri (*supra* notes 11, 26 & 118); Nebraska (*supra* notes 15 & 25); Nevada (*supra* notes 13 & 26); North Carolina (*supra* notes 15 & 28); Wyoming (*supra* notes 11, 25 & 28); and the 1981 MSAPA (*supra* notes 16 & 26).

APPENDIX A

*Type of Final Legislative Action that Can
Invalidate Agencies' Rules*

The federal government and eleven states have no across-the-board system of legislative oversight of agencies' rules. *Supra* note 10. Some of these jurisdictions have adopted one-house or two-house veto systems for designated types of rules, but in general, these jurisdictions rely on the general power of the legislature to enact a statute as the sole mechanism by which the legislature can invalidate the rules of agencies.

The thirty-nine other states have adopted various types of across-the-board mechanisms for legislative oversight of agencies' rules. *Supra* notes 11 & 16. The following tabulation lists, for each of these thirty-nine states, the type of final legislative action that can invalidate the rules of agencies.

A crucial issue, for purposes of the analysis throughout this Article, is whether the legislative action that invalidates a rule must be submitted to the chief executive for approval or veto. Most of the terms that are used to describe legislative action have uniform meanings regarding whether a particular type of legislative action must be submitted to the chief executive. Thus, in the following table, based on the apparently uniform meaning of the respective terms, legislative action by "statute," "law," "bill," "legislation," or "appropriate legislative action" must be submitted to the governor, but legislative action by "concurrent resolution" need not.

The term "joint resolution," however, does not have a uniform meaning. Federal law makes a distinction between joint resolutions (submitted to the President) and concurrent resolutions (not submitted). Congressional Quarterly Service, *GUIDE TO CONGRESS* 105-06 (1971); 1A J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 29.03, .04 (C. Sands 4th ed. 1972); Gibson, *Congressional Concurrent Resolutions: An Aid to Statutory Interpretation?* 37 A.B.A.J. 421 (1951); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953). Some states use the term "joint resolution" as it is used in the federal context, requiring submission to the chief executive. In other states, however, joint resolutions are not submitted to the governor.

In this tabulation, an explanation is added to the states that provide for final legislative action by "joint resolution," to indicate whether submission to the governor is required. Also, the "legislative order" of the Wyoming statute is explained. Statutory citations to the statutes on rule review are found *supra* notes 11-16.

Alabama — joint resolution — submitted to governor, Ala. Const. art. IV, § 66, art. V, § 125.

Alaska — concurrent resolution (held unconstitutional because not submitted to governor. *See supra* note 17).

Arkansas — legislation.

Colorado — legislation.

Connecticut — concurrent resolution.

Florida — legislation.

Georgia — concurrent resolution — submitted to governor unless passed by two-thirds of each house — classified here as a statute (*see* discussion *supra* note 11).

Hawaii — appropriate legislative action.

Idaho — concurrent resolution.

Illinois — joint resolution — not submitted to governor, Ill. Const. art. 4, § 9; letter to author from David R. Miller, Staff Attorney, Research Department, Illinois Legislative Council (May 4, 1982).

Iowa — joint resolution that, according to the statute creating the system, must be submitted to the governor.

Kansas — concurrent resolution.

Kentucky — bill or joint resolution — submitted to governor, Ky. Const. § 89; letter to author from Courtenay J. Walker, Deputy Director, Kentucky Legislative Research Commission (May 6, 1982).

Louisiana — concurrent resolution.

Maine — amendment of law.

Maryland — appropriate legislative action.

Michigan — concurrent resolution in some situations, bill in others.

Minnesota — bill.

Missouri — (implies that statute is required — proposed constitutional amendment is pending that would empower legislature, by concurrent resolution, to nullify agencies' rules. *See supra* note 23).

Montana — joint resolution — not submitted to governor, Mont. Const. art. VI, § 10 (a Montana trial court recently held part of this statute invalid because it provides for rule control by joint resolution which, in Montana, is not submitted to the governor. *See supra* note 21).

Nebraska — bill.

Nevada — concurrent resolution.

New Jersey — concurrent resolution.

New York — (implies that statute is required).

North Carolina — bill.

North Dakota — (implies that statute is required).

Ohio — concurrent resolution.

Oklahoma — resolution by either house.

Oregon — legislation.

South Carolina — joint resolution — submitted to governor, S.C. Const. art. IV, § 21; Legislative Manual of the South Carolina General Assembly 155 (1982).

South Dakota — (implies that statute is required).

Tennessee — joint resolution — submitted to governor, Tenn. Const. art. 3, § 18.

Texas — (implies that statute is required).

Vermont — statute.

Virginia — joint resolution — not submitted to governor, Va. Const. art. V, § 6; letter to author from John A. Banks, Jr., Director, Virginia Division of Legislative Services (May 5, 1982).

Washington — legislation.

West Virginia — concurrent resolution (held unconstitutional because not submitted to governor. *See supra* note 19).

Wisconsin — bill.

Wyoming — legislative order — submitted to governor, Wyo. Const. art. 3, § 41; letter to author from Ralph E. Thomas, Director, Wyoming Legislative Service Office (May 4, 1982) (indicating that the governor's authority to veto joint resolutions has been established by practice, although the issue has not been litigated).

APPENDIX B

Significance of Referenda that Reject Proposed State Constitutional Amendments

The people of four states have rejected proposed state constitutional amendments that would have authorized the one-house or two-house veto. *Supra* notes 22 & 44. These referenda may be viewed from two perspectives — as statements of constitutional law and as statements of public policy.

Constitutional Law

Assume that after the electorate of a state has rejected a proposed constitutional amendment that would have authorized a one-house or two-house veto, the legislature enacts a statute creating the very type of system that had been rejected in the referendum. Assume further that the state has no judicial precedent on point. In litigation challenging the statute, should the state courts hold it unconstitutional on the grounds that it is contrary to the outcome of the referendum? For purposes of this hypothetical, let us disregard other grounds that may motivate the court to hold the statute invalid.

One approach is to argue that, because a popular vote binds the courts when the people have adopted a constitutional amendment, *see, e.g.*, T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 55 (repub. Da Capo 1972) (1st ed. Boston 1868); 16 AM. JUR. 2d, *Constitutional Law* § 92 (1979), the courts should give equal deference to the will of the people as expressed or clearly implied in a popular vote which rejects a proposed constitutional amendment.

This is not to say that public expressions of opinion always should be taken into account when a court engages in constitutional interpretation. To the contrary, many objections can be raised against the use of public opinion for these purposes. First, public opinion is often difficult to ascertain. This objection does not, however, pose a serious obstacle in the present context, because the state constitutional referenda furnish perhaps the most reliable vehicle for ascertaining the views of the public on an issue of governmental concern.

A second objection to the use of a referendum as a vehicle of constitutional interpretation is that some constitutional provisions

are designed to protect the minority against the risk of tyranny by the majority. The majority ultimately may be able to amend the constitution in a manner that would injure the minority. Until the majority can procure a constitutional amendment, however, the courts should defend the rights of minorities as guaranteed by the existing constitution, even if the protection of minorities' rights offends the majority. This objection, however, also does not appear to be pertinent to the present discussion. While some of the state constitutional referenda may have been affected by secret agendas or by the personal prestige of prominent individuals, there is no indication that any of these referenda were, in effect, referenda on the rights of minorities.

A third objection is that a referendum may appeal to the self-interest of the electors, and thus may reflect their combined self-interest rather than their philosophical view of government. This objection could be raised, for example, if a referendum concerned tax rates. In the present context, however, there is no indication that tax minimization or any other form of self-interest was a controlling hidden agenda in the four state referenda.

In summary, these state constitutional referenda offer a reliable reading of the will of the people in the four states on the question whether the one-house or two-house veto is a desirable feature of state government. The majority in each state has answered in the negative, thereby rejecting the proposals of their own legislators.

The argument in favor of giving binding effect to the negative vote of the people finds some support in two analogous situations. First, in the interpretation of statutes, the prevailing view is that a court will take into account the negative implications arising from the legislature's rejection of a proposed amendment. 73 AM. JUR. 2d, *Statutes* § 171 (1979); 2A J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 48.18 (C. Sands 4th ed. 1973). Second, in the interpretation of constitutions as well as statutes, the maxim "*expressio unius est exclusio alterius*" leads to the negative implication that if one item has been expressed, other alternative possibilities are excluded. SUTHERLAND, *supra* at § 47.23, .24; COOLEY, *supra* at 64. If the people's silence can have a negative effect by implication, the people's vote that expressly rejects a proposed constitutional amendment should be given even greater effect, because their vote is an express rather than an implied indication of

the will of the people.

Arguments can be asserted against giving binding effect to the people's negative vote. The prevailing view of the people may have been that the subject matter should be omitted from the constitution to leave flexibility for the near future, or that the proposed constitutional amendment was unnecessary because the legislature already appeared to have the authority to establish the one-house or two-house veto system. Further, even if the people rejected the proposed amendment because they wanted to prevent the creation of a one-house or two-house veto system, negative implications arguably should not be drawn from referenda that reject proposed state constitutional amendments. Under the latter view, the only way that the people assuredly can prevent the creation of a one-house or two-house veto is by adopting a constitutional amendment that contains language clearly prohibiting such a system. Finally, the lapse of time after the referendum is likely to progressively weaken the judicial inclination to give binding effect to any negative implications of the referendum.

Whether a state court considers itself bound by a referendum that rejects a proposed constitutional amendment, the court is likely to take the referendum into account as a significant statement of public policy.

Public Policy

As statements of public policy, the referenda in the four states have strong persuasive effect, which is at its maximum in those states, but which also merits serious attention in other states and in the federal government.

As regards the federal government, an additional factor requires consideration. The people of these four states expressed their view about the one-house or two-house veto as regards their respective state governments. Conceivably, a voter in any of these four states, while rejecting the one-house or two-house veto for that state's government, may have been willing to see this veto adopted for the federal government. Such willingness, however, seems unlikely in view of the similar governmental structures and the shared traditions of the federal and state governments. Even if the impact of the four state constitutional referenda is less persuasive on the federal government than on the other states, the state referenda merit

serious consideration at the federal level, especially because the federal constitutional issue regarding the validity of the one-house or two-house veto is unresolved, and the federal government has not conducted its own referendum on the issue.