

# An Empirical Critique of JCAR and the Legislative Veto in Illinois

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## Recommended Citation

Marc D. Falkoff, *An Empirical Critique of JCAR and the Legislative Veto in Illinois*, 65 DePaul L. Rev. (2016)  
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# AN EMPIRICAL CRITIQUE OF JCAR AND THE LEGISLATIVE VETO IN ILLINOIS

Marc D. Falkoff\*

## TABLE OF CONTENTS

INTRODUCTION .....	949
II. JCAR AND RULEMAKING IN ILLINOIS .....	957
A. <i>JCAR's Creation</i> .....	957
B. <i>JCAR's Role in the Illinois Rulemaking Process</i> ....	959
C. <i>JCAR's Dubious Constitutionality</i> .....	964
III. AN EMPIRICAL PERSPECTIVE ON JCAR ACTIVITY SINCE 1978.....	969
IV. QUALITATIVE ASSESSMENT OF JCAR PROHIBITIONS AND SUSPENSIONS.....	981
A. <i>No Showing of a "Serious Threat"</i> .....	983
B. <i>Prohibiting and Suspending for Policy Reasons</i> ....	990
C. <i>Prohibiting To Avoid the Limitations Period</i> .....	992
D. <i>Failure To Accord Any Deference to Agencies</i> .....	995
V. CONCLUSION .....	998

## INTRODUCTION

This Article assesses the work of the Joint Committee on Administrative Rules (JCAR), a bipartisan legislative committee that reviews—and, since 2005, sometimes vetoes—rules and regulations proposed by administrative agencies in Illinois. JCAR is a busy committee, having reviewed nearly all of the more than 20,000 rules proposed by state agencies since it was created in 1978.<sup>1</sup> JCAR has recommended improvements to thousands of these rules, and agencies have typically been responsive to the committee's suggestions. But JCAR is also a controversial body. Since September 2004, it has been authorized by the Illinois General Assembly to veto agency rulemak-

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\* Acting Associate Dean and Professor, Northern Illinois University College of Law. I would like to thank Robert Knowles, Heidi Kuehl, Daniel McConkie, Jeffrey Parness, Laurel Rigertas, and Amy Widman for their insights and advice. I received excellent research assistance from Nicholas Atwood, Patricia Donahue, Jacqueline Hollis, and Cora Moy.

1. See *infra* Figure 2.

ing,<sup>2</sup> a power of dubious constitutionality, which, as will be discussed below, JCAR has used to kill rules with increasing frequency.

A companion piece to this Article argues that JCAR's veto powers are incompatible with the Illinois constitution.<sup>3</sup> The chief problem is that the Illinois General Assembly has authorized JCAR, a legislative body made up of twelve of its members, to engage in lawmaking without complying with the state constitutional requirements of bicameralism (which requires statutes to be approved by majorities of both houses of the General Assembly) or of presentment (which requires statutes to be sent to the Governor for a possible executive veto). Although the Illinois courts have not yet addressed the constitutionality of the JCAR legislative veto—or of the General Assembly's veto powers, which predated the JCAR veto<sup>4</sup>—similar legislative veto schemes have been ruled unconstitutional in at least a dozen other states<sup>5</sup> and in the federal system.<sup>6</sup> In contrast, the constitutionality of a legislative veto scheme has been affirmed in only one state that had not previously amended its constitution specifically to allow such vetoes.<sup>7</sup> In addition, no state court has upheld the constitutionality of a scheme like that in Illinois, in which a legislative committee can kill agency rulemaking of its own accord.

Inevitably the Illinois courts will be forced to decide on the constitutionality of legislative vetoes. The moment seemed ripe as recently as 2008, when a taxpayer sued the Illinois Department of Healthcare and Family Services after it sought to implement a rule expanding Medicaid eligibility even though JCAR had vetoed the rule.<sup>8</sup> Then-Governor Rod Blagojevich had ordered the Department to ignore JCAR's veto, asserting on separation-of-powers grounds that it was

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2. See Illinois Administrative Procedure Act, 2004 Ill. Laws 4328, 4334; 5 ILL. COMP. STAT. 100/115-a(c) (2014).

3. Marc D. Falkoff, *The Legislative Veto in Illinois: Why JCAR Review of Agency Rulemaking Is Unconstitutional*, 47 LOY. U. CHI. L.J. 1055 (2016).

4. From 1981 to 2004, JCAR could ask the General Assembly to permanently block implementation of an agency's rules, which the legislature could then accomplish by passing a joint resolution that did not require presentment to the governor. See 1980 Ill. Laws 3898, 3900–02.

5. See Falkoff, *supra* note 3, at 1083–91 (discussing the state court decisions and attorney general opinions that held that legislative vetoes of agency rulemaking were unlawful under state constitutions).

6. See *INS v. Chadha*, 462 U.S. 919, 953–54 (1983) (holding that a congressional legislative veto violated the bicameralism and presentment requirements of the U.S. Constitution).

7. In a much-criticized opinion, the Idaho Supreme Court affirmed the constitutionality of a procedure that allowed the state's legislature to veto executive agency rulemaking through passage of a joint resolution, which was not required to be presented to the governor for a potential veto. See *Mead v. Arnell*, 791 P.2d 410, 412 (Idaho 1990).

8. See *Caro v. Blagojevich*, 895 N.E.2d 1091, 1094–96 (Ill. App. Ct. 2008).

unlawful.<sup>9</sup> Although the question of the constitutionality of the legislative veto was teed up for the courts, the case ended up being settled by Governor Patrick Quinn before the courts could resolve the issue.<sup>10</sup>

Quinn was in a position to settle the case because Blagojevich had by then been impeached by the House of Representatives, convicted by the Senate, and removed from office.<sup>11</sup> One of the (ironic) articles of impeachment against Mr. Blagojevich was that he had violated separation-of-powers principles by failing to respect the JCAR veto that he alleged was issued in violation of separation-of-powers principles.<sup>12</sup> Blagojevich indeed was convicted and removed from office in part on this ground. Thus, while much of the public's attention was focused on Blagojevich's "sale" of the U.S. Senate seat that had formerly been occupied by President Barack Obama (who was also once a member of JCAR), a constitutional crisis was playing out in plain sight, although few noticed.

This Article addresses the distinct question of whether JCAR's exercise of its veto power has benefitted the citizens of Illinois. Such a focus may seem odd, given the just-stated assertion that legislative vetoes should be declared unlawful under the state constitution. But it is necessary to address the effectiveness and utility of legislative commit-

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9. Blagojevich explained his reasoning in a statement to the Illinois Senate after he was impeached by the Illinois House of Representatives:

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

That's how you stop the Executive Branch and a governor. But 12 lawmakers, however, however intelligent and honest and impressive and schooled as you may be, 12 lawmakers picked by a legislative—by legislative leaders cannot constitutionally thwart the Executive Branch. Nine states, nine states have challenged this case, and in all nine states, the right of the Executive Branch to do what it sought to do without the consent of JCAR was upheld.

4 Impeachment of Governor Rod R. Blagojevich: Hearing Before the Hon. C.J. Thomas Fitzgerald, S. 96th Gen. Assemb. 596–97 (Ill. 2009) (statement of Governor Rod R. Blagojevich).

10. See John O'Connor, *Quinn, Businessmen Settle Suit on Health Care*, PANTAGRAPH (June 23, 2009), [http://www.pantagraph.com/news/quinn-businessmen-settle-suit-on-health-care/article\\_85d950d0-02ee-5555-ba1e-d8f435b6b22a.html](http://www.pantagraph.com/news/quinn-businessmen-settle-suit-on-health-care/article_85d950d0-02ee-5555-ba1e-d8f435b6b22a.html).

11. Judgment of Conviction & Disqualification, *In re* Impeachment of Rod R. Blagojevich, Governor of the State of Illinois, S. 96th Gen. Assemb. (Ill. Jan. 29, 2009), <http://www.ilga.gov/senate/impeachment/documents/Judgment%20of%20Conviction%20and%20Disqualification.pdf>.

12. The separation-of-powers argument advanced by the House of Representatives can be found in the report of the special investigative committee for the Blagojevich impeachment. FINAL REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE 29–36 (Jan. 8, 2009), <http://www.ilga.gov/house/committees/95Documents/Final%20Report%20of%20the%20Special%20Investigative%20Committee.pdf>.

tee vetoes for several reasons. First, the Illinois courts have not yet decided whether the JCAR veto is constitutional.<sup>13</sup> It would be foolish to presume to know for sure how the courts will rule on the question of the legislative veto scheme in Illinois, particularly given its longevity and the powerful legislative interests that have sustained it thus far. Second, even if the courts do conclude that the JCAR veto is unlawful, the state constitution can be amended to reinstate it.<sup>14</sup> Other states have followed such a course after adverse judicial rulings.<sup>15</sup> Finally, analysis of the unique and lengthy history of the deployment of the legislative veto in Illinois may hold lessons for other states that either retain a similar system or are contemplating the adoption of one in the future.

This Article does not seek to condemn JCAR *per se*. Indeed, as originally conceived, the Committee's admirable purpose was to be a cooperative body that reviewed all agency rules and offered guidance about how to assure they conformed with the intentions of the General Assembly.<sup>16</sup> Any fair assessment of JCAR's work over its more than three-and-a-half decades must acknowledge the great number of recommendations for improving rules that JCAR has offered and that agencies have accepted. To the degree JCAR continues to play that role, it provides tremendous value to the state. Nor should this Article be understood as an indictment of the JCAR staff, a group of employees whom agency representatives routinely describe as hardworking and professional. JCAR's public outreach has also, by and large, redounded much to the benefit of the public by providing lucid summaries of key rulemaking activity in its frequently issued *Flinn Reports*, which summarize JCAR and agency activity, as well as in the publication of its annual reports.<sup>17</sup>

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13. See *infra* notes 21–29 and accompanying text (discussing the constitutional challenges).

14. Amending the Illinois constitution to allow a legislative veto scheme could be accomplished in one of two ways. The first is by a constitutional convention. See ILL. CONST. art. XIV, § 1. The second is through a legislatively referred, constitutional amendment. See *id.* § 2.

15. See, e.g., CONN. CONST. art. 2 (allowing agency rules to be blocked by the legislature or a committee of the legislature as prescribed by law); IOWA CONST. art. III, § 40 (allowing the legislature to stop the implementation of agency rule by joint resolution); NEV. CONST. art. 3, § 1 (allowing the legislature to nullify agency rules by majority vote of both houses); N.J. CONST. art. 4, § 4, ¶ 6 (allowing the legislature to stop the implementation of agency rules through the passage of a joint resolution); S.C. CONST. art. III, § 18 (allowing joint resolutions to have the effect of law); Opinion No. 86-39, 1986 S.C. OP. ATT'Y GEN. 120 (concluding that the legislative veto process of agency rulemaking was constitutional due to the passage of Section 18 of Article III).

16. See discussion *infra* notes 119–20 and accompanying text (discussing the purpose behind JCAR).

17. See *infra* notes 142–50, 158–63, 168–75, and accompanying text (providing summaries of JCAR decisions on agency rulemaking).

But the fact remains that for just over a decade, JCAR—a body whose membership consists of twelve legislators, six from the House and six from the Senate, equally divided between political parties—has held and exercised the contentious power of the legislative veto, an authority that can alter the institutional balance of power in Illinois in fundamental ways. The JCAR veto power in particular has realigned power among the legislative, executive and judicial branches in ways that should be acknowledged.

To be sure, there is a good deal of intuitive appeal to legislative veto schemes. The legislative veto is the most direct and practical way for legislatures to police agencies and ensure that they exercise only the rulemaking authority delegated to them, and to make certain that agencies do not cross the (fuzzy) line into lawmaking.<sup>18</sup> Legislative veto schemes may also be thought to enhance democratic legitimacy (because the legislature will determine whether the rulemaking will go into effect), promote political accountability (by leaving final responsibility for rules in the hands of elected legislators), and ensure that the power to make policy remains with the elected representatives of the people rather than with unelected appointees of the governor.<sup>19</sup> In addition, legislative vetoes may keep legislators accountable to the public in a way that agency representatives cannot.<sup>20</sup>

That said, legislative veto schemes have been subject to wide critique, including most comprehensively by Professor Arthur Earl Bonfield in his seminal book, *State Administrative Rule Making*.<sup>21</sup> For example, legislative veto systems have the potential to unduly strengthen the legislature's authority over the executive branch by removing the Governor's constitutional veto power and weakening her bargaining position.<sup>22</sup> Special interest groups may be more likely to

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18. Cf. *INS v. Chadha*, 462 U.S. 919, 999 (1983) (White, J., dissenting) (observing that legislative vetoes are the only practical way for Congress to ensure that executive agencies restrict themselves to rulemaking).

19. See Andrew P. Morriss, Professor, Univ. of Ill. at Urbana-Champaign, Testimony to Gen. Assemb.—Principles of Administrative Law Overview (Dec. 18, 2008), <http://www.ilga.gov/house/committees/95Documents/Committee%20Exhibit%2050.pdf> (articulating these arguments in testimony before the Illinois General Assembly).

20. See Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 *DRAKE L. REV.* 1, 27 (2012). There is voluminous literature on policy issues surrounding the legislative veto. See Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 *MINN. L. REV.* 1237, 1259 n.93 (1986) (listing sources).

21. See ARTHUR EARL BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* (1986); see also Arthur Earl Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 *FLA. ST. U. L. REV.* 617 (1991) (offering similar arguments and observations).

22. *State Gen. Assembly v. Byrne*, 448 A.2d 438, 444 (N.J. 1982) (“Broad legislative veto power deters executive agencies in the performance of their constitutional duty to enforce ex-

exercise undue influence over legislative committees that have veto power over agency rulemaking.<sup>23</sup> Agencies that draft rules in the shadow of legislative vetoes may be more influenced by legislators than by the public rulemaking process.<sup>24</sup> The public might be misled about who is ultimately responsible for rules that are promulgated by agencies but that require legislative approval.<sup>25</sup> Allowing a small committee to exercise a veto “creates the likelihood that a small number of legislators will . . . effectively subvert the will of the entire legislative body.”<sup>26</sup> Legislators may be lulled into making overly broad delegations of rulemaking authority to agencies out of a “false sense of security” that the legislature will be able to adequately oversee the rules that are actually produced.<sup>27</sup>

Academics have assessed the constitutionality of legislative veto schemes for a variety of state systems.<sup>28</sup> But there has been relatively little inquiry into the real-world functioning of extant legislative veto systems—notwithstanding Professor Bonfield’s observation in 1986

isting laws. Its vice lies not only in its exercise but in its very existence. Faced with potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities. They will resort to compromises with legislative committees aimed at drafting rules that the current Legislature will find acceptable.”); BONFIELD, *supra* note 21, § 8.3.2(d), at 507.

23. A committee or legislative veto of rules “may be more susceptible to undue influence by special interest groups seeking action inconsistent with the political will of the entire body politic and contrary to the public interest, than is a veto . . . by the usual statutory enactment process involving both houses and the governor.” BONFIELD, *supra* note 21, § 8.3.2, at 508. Marcus E. Ethridge conducted a pre-*Chadha* study that found that states with legislative review schemes over agency action led to “probable changes in the substance of public policies” adopted by the agencies because of the legislative oversight, and that “potential political influence is an important determinant of committee action.” Marcus E. Ethridge, *Consequences of Legislative Review of Agency Regulations in Three U.S. States*, 9 LEGIS. STUD. Q. 161, 174–75 (1984).

24. The legislative veto may have the unintended consequence of “inducing administrators to develop rules primarily or exclusively on the basis of contacts with legislators rather than on the basis of public rule-making proceedings.” BONFIELD, *supra* note 21, § 8.3.2, at 509.

25. Vesting a veto over agency rules in the legislative branch may create a false impression with the public that the legislature is responsible for the “legality and desirability of *all* rules of *all* agencies.” *Id.* § 8.3.2, at 510.

26. *Id.* § 8.3.2, at 510–11. This concern is somewhat mitigated in Illinois by the availability of a General Assembly joint resolution override of the JCAR veto. But even so, the committee or full legislative veto would in at least some instances potentially be overriding the will of an earlier General Assembly that had passed the original authorizing legislation.

27. *Id.*

28. Ethridge, *supra* note 23, *passim*; L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982); David S. Neslin, Comment, *Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking Under the 1981 Model Act*, 57 WASH. L. REV. 669, 682–86 (1982); Misty Ventura, Comment, *The Legislative Veto: A Move away from Separation of Powers or a Tool to Ensure Nondelegation?*, 49 SMU L. REV. 401, 415–17, 421–27 (1996); David Pascal Zambito, Comment, *An “Irrc-some” Issue: Does Pennsylvania’s Regulatory Review Act Violate the Separation of Powers?*, 101 DICKINSON L. REV. 643, 650–60 (1997).

that “[m]uch more systematic empirical work needs to be done to study the actual operation and effect of institutions like the administrative rules review committee.”<sup>29</sup> This Article seeks to fill some of that void.

This Article collects and reviews data covering Illinois agency rulemaking and JCAR activity for thirty-seven years, beginning from the time of JCAR’s creation in 1978 through 2014, the most recent year for which JCAR has published an annual report.<sup>30</sup> Its purpose is severalfold. First, this Article seeks to ascertain the changing volume of agency rulemaking during JCAR’s tenure. If the annual number of rules proposed (or implemented on an emergency basis) has tended to decrease since JCAR began to engage in systematic review, one might hypothesize that JCAR has enhanced the efficiency of agency rulemaking. Of course the efficiency hypothesis is just that—a conjecture that, first, JCAR is responsible for the decrease in volume and, second, that the production of fewer rules represents movement toward a more optimal volume of rulemaking. These assumptions are debatable but are probably more defensible in the context of agencies’ “emergency” rulemaking, because emergency rules are created and implemented without the ordinary public notice-and-comment procedures.

A second purpose of this Article is to determine whether the increasing powers that the General Assembly has periodically given to JCAR have affected the manner by which JCAR interacts with agencies. JCAR was created as a body designed to inform and advise the General Assembly about agency rulemaking and to work collaboratively with agencies to assure that their rules aligned with legislative intent. But JCAR, early in its tenure, was given some coercive power by the General Assembly, authorizing JCAR to keep rules from going into effect for up to 180 days and establishing a procedure by which JCAR could seek a joint resolution from the General Assembly that would permanently kill an agency’s rulemaking. In addition, since September 2004, JCAR has possessed the ultimate coercive power in the form of veto power over agency rules. The data show that JCAR has largely abandoned collaborative procedures and instead has come to rely largely on its coercive tools.

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29. BONFIELD, *supra* note 21, § 8.3.1(f), at 492. *But see* Anderson & Poynor, *supra* note 20, at 27 (noting the inconsistencies in Bonfield’s support for agency decision making models with, more or less, insulation from political pressures); Ethridge, *supra* note 23, at 174–75 (concluding that legislative veto schemes in several states led to “probable changes in the substance of public policies” adopted by the agencies, and that “potential political influence is an important determinant of committee action”).

30. *See infra* notes 114–17 and accompanying text.



The data can be instructive, but in the end raw numbers can tell us only so much about whether the JCAR review scheme has benefitted Illinois. For example, while a decreased volume of rulemaking may indicate that the threat of a General Assembly or JCAR veto discouraged unnecessary rulemaking, the same data might reasonably reflect that the hovering veto power has dissuaded agencies from proposing rules or implementing emergency rules that *should* have gone into effect. The final part of this Article begins to address this concern by investigating whether JCAR has confined itself to working within the statutory limits of its authority or, instead, whether its deployment of its veto powers has been *ultra vires*.<sup>31</sup> Among the chief problems this Article reveals is that JCAR routinely disregards the General Assembly's statutory limit on the exercise of its prohibition and suspension powers, which may be used to prevent implementation of an agency rule that "would constitute a serious threat to the public interest, safety, or welfare."<sup>32</sup>

The Article proceeds as follows. Part II provides a brief history of the formation and functioning of JCAR, gives an overview of JCAR's role in the rulemaking process in Illinois, and briefly explains why JCAR's legislative veto powers are unlikely to be constitutional.<sup>33</sup> Part III gathers and presents data about agency rulemaking and JCAR activity since the Committee began operation in 1978.<sup>34</sup> The data reveal several interesting things, including that the overall volume of rulemaking as well as the volume of emergency rulemaking have declined over time. It also shows that JCAR's interaction with agencies has shifted from being fundamentally advisory and cooperative to coercive in nature. This shift is apparently due to a combination of Committee funding cutbacks and the enhanced prohibition, suspension and veto powers given to JCAR by the General Assembly. Part IV looks more particularly at the fifty-seven prohibitions of proposed rules and suspensions of emergency rules issued by JCAR since September 2004, which was when JCAR was first authorized to kill agency rules by itself.<sup>35</sup> Review of JCAR's minutes and other public documents makes clear that JCAR has used its prohibition and suspension powers without regard to the statutory provisions that authorize their use only when implementation of the rules would pose a serious threat to the health, safety, or welfare of the public. Part V

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31. See *infra* Part IV.

32. See 5 ILL. COMP. STAT. 100/5-115(a) (2014).

33. See *infra* notes 37–113 and accompanying text.

34. See *infra* Part III.

35. See *infra* notes 118–90 and accompanying text.

recommends against amending the Illinois constitution in a way that would reinstitute a legislative veto system in the state.<sup>36</sup>

## II. JCAR AND RULEMAKING IN ILLINOIS

This Part provides a brief overview of JCAR's creation and the gradual expansion of its powers from 1978 until today. It also provides an overview of the Illinois Administrative Procedure Act (Illinois APA)<sup>37</sup> as well as the rulemaking process in Illinois and JCAR's role in it. Finally, it briefly explains why JCAR's veto powers likely violate the Illinois constitution.

### A. JCAR's Creation

The Illinois General Assembly created JCAR in 1977 as a small, bipartisan committee with modest powers to oversee agency rulemaking.<sup>38</sup> At the time, there was already a sprawling bureaucracy in Illinois, including sixty-five major agencies and a variety of smaller boards and commissions.<sup>39</sup> Out of concern that the state was increasingly relying on these agencies and that the "traditional notion of separation of powers" was being lost,<sup>40</sup> JCAR was designed to restore the General Assembly's control over agency regulation.

JCAR's initial role was simply to oversee the agency rulemaking process in an inform-and-advise capacity,<sup>41</sup> assuring that all proposed rules were in proper form, that the promulgating agency had given sufficient notice to the public prior to adoption of any proposed rule, and that the agency was at all times acting within its statutory authority.<sup>42</sup> If JCAR had concerns about the propriety of a proposed rule, or about a rule that had been enacted outside of the usual procedures in an emergency situation, it was authorized to convey its concerns to the agency proposing the rule in an effort to seek a modification or withdrawal of the rule.<sup>43</sup> If these efforts were unsuccessful, JCAR

36. See *infra* Part V.

37. Illinois Administrative Procedure Act, 5 ILL. COMP. STAT. 100/1-1 to 100/15-10 (2014).

38. See 1977 Ill. Laws 3040, 3045 (currently codified at 5 ILL. COMP. STAT. 100/5-90(a) (2014)). The composition of JCAR was to be twelve members of the General Assembly, with three each chosen by the majority and minority leaders of the House and Senate. *Id.* See Falkoff, *supra* note 3, at 1063–76, for a detailed history of the creation and development of JCAR.

39. JOINT COMM. ON ADMIN. RULES, 1985 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 447 (1986).

40. JOINT COMM. ON ADMIN. RULES, 1978 ANNUAL REPORT 10 (1979) [hereinafter 1978 JCAR REPORT].

41. 1977 Ill. Laws at 3046 (stating that JCAR is to possess "advisory powers only relating to its function").

42. *Id.* at 3047.

43. *Id.*

could propose corrective legislation to the General Assembly.<sup>44</sup> Therefore, JCAR initially had no authority to delay in any way the implementation of an agency's rules.

JCAR itself believed that its noncoercive oversight powers were effective. In its first year of operation, the committee reported that although it had reviewed nearly five hundred proposed rules and found "serious problems" with more than one-third of them, informal discussions with the agencies and the threat of legislation had brought about a resolution to most of its concerns.<sup>45</sup> The committee therefore seemed to possess adequate powers to accomplish its primary purpose of promoting both "adequate and proper rules by agencies and an understanding on the part of the public respecting such rules."<sup>46</sup>

Nonetheless, the Committee almost immediately lobbied for more power over agency rulemaking, and in 1980 the General Assembly gave JCAR authority to temporarily prohibit implementation of proposed rules (or suspend the effect of newly implemented emergency rules) by a vote of three-fifths of the committee.<sup>47</sup> JCAR's prohibition or suspension was temporary—it could only last 180 days—though the General Assembly could by joint resolution make the prohibition or suspension permanent.<sup>48</sup> Whether constitutional or not, the statute therefore provided the General Assembly with a legislative veto, since joint resolutions required no presentment to the Governor. During the first year in which the veto was available to the General Assembly, "virtually all" of the rules that JCAR reviewed were modified by the promulgating agencies in response to JCAR comments.<sup>49</sup>

In the early years of the twenty-first century, JCAR's powers were significantly enhanced when the General Assembly amended the Illinois APA to grant JCAR authority to issue its own veto.<sup>50</sup> The measure had been proposed and hastily passed, at a time when Blagojevich's relationship with the General Assembly was in steep de-

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44. *Id.* at 3048.

45. 1978 JCAR REPORT, *supra* note 40, at 17–18, 22. See generally <https://archive.org/search.php?query=joint%20committee%20on%20administrative%20rules%20annual%20report%20AND%20mediatype%3Atexts&sort=-date> (accessed by a search for annual reports in the internet archive index) (listing all of the JCAR annual reports).

46. See 1977 Ill. Laws at 3046.

47. See 1980 Ill. Laws 3898, 3900 (codified as amended at 5 ILL. COMP. STAT. 100/5-115 (2014)). The law was passed over a gubernatorial veto.

48. *Id.*

49. JOINT COMM. ON ADMIN. RULES, 1981 ANNUAL REPORT TO THE ILLINOIS GENERAL ASSEMBLY 28 (1982) [hereinafter 1981 JCAR REPORT].

50. See 2004 Ill. Laws 4328, 4328–29 (codified at 5 ILL. COMP. STAT. 100/5-115(c)).

cline.<sup>51</sup> As one lawmaker remarked, this “was one of those significant Bills that actually never went through the legislative process, so we haven’t had a chance to debate it. I understand it surfaced yesterday for the first time.”<sup>52</sup> The lawmaker also observed that “[w]e are so caught up in the personalities of the Governor and the Legislature that we’re not even seeing straight about the relationship between these two branches.”<sup>53</sup>

Moving forward, JCAR could respond in one of a variety of ways to proposed rulemaking from an agency (or to an emergency rule that had already gone into effect). JCAR could: (1) issue a letter of no objection; (2) make recommendations to the agency for modifications of its rule; (3) object to the rule (which would allow the agency to move ahead with the rule, but which would result in a notice being published in the Illinois Register stating JCAR’s objection); or (4) prohibit publication of the rule (or suspend implementation of an emergency rule), which would permanently kill the rule *unless* the General Assembly passed a Joint Resolution overriding the JCAR action.<sup>54</sup> The effect was to turn a General Assembly veto into a legislative committee veto that could be exercised by a group of just eight legislators.<sup>55</sup>

### B. JCAR’s Role in the Illinois Rulemaking Process

JCAR is only one part of the rulemaking apparatus in Illinois. The state currently has eighty-eight state agencies,<sup>56</sup> and, with some exceptions, each of these agencies may produce rules and regulations when authorized to do so by the General Assembly. When creating rules, the agencies must comply with the procedures described in the Illinois APA, which include multiple points of interaction with JCAR.

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51. See generally S. Transcript at 31, S.B. 73, 93rd Gen Assem., Reg. Sess. (Ill. 2004) (adopting the amendments to Ill. S.B. 73, which amended the Illinois APA).

52. H.R. REP. NO. 93-166, at 31 (Ill. 2004) (quoting Rep. Julie Hamos).

53. *Id.* at 32 (quoting Rep. Julie Hamos).

54. See generally *infra* notes 56–84 and accompanying text (describing JCAR’s powers in more detail).

55. A JCAR prohibition or suspension of a rule still requires a three-fifths vote of the entire committee, meaning at least eight members. 5 ILL. COMP. STAT.100/5-115(a). The JCAR veto went into effect on September 10, 2004. See 2004 Ill. Laws 4328 (codified at 5 ILL. COMP. STAT. 100/5-115).

56. For the complete list, see *State Agencies*, ST. ILL. HOME, <https://www2.illinois.gov/pages/agencies.aspx> (last visited Feb. 25, 2016).

The default procedures for creating rules—the “general rulemaking” requirements<sup>57</sup>—can be time consuming, in large part because the Illinois APA provides significant opportunity for public comment and legislative review of the proposed rules. Proposed rules must go through a two-step process that takes at least ninety days to complete and may take as much as a year. First, the agency must give forty-five days notice of its intended action to the public.<sup>58</sup> During this period, the agency must take oral and written comments from the public and hold a public hearing if the agency deems it necessary—or if there has been a request by the Governor, JCAR, an association representing more than one-hundred persons, twenty-five individuals, or a local government.<sup>59</sup> Also during this time, the Illinois Department of Commerce and Economic Opportunity reviews each proposed rule to determine its possible impact on small businesses.<sup>60</sup>

Following the first notice period, the agency must then give a “second notice” to JCAR, initiating legislative review by the JCAR staff and then by members of the committee.<sup>61</sup> By statute, JCAR is to review each proposed rule to determine whether it is within the statutory authority upon which it is based, whether it is in proper form, and whether adequate notice was given of the purpose and effect of the rule.<sup>62</sup> In addition, JCAR “may consider whether the agency has considered alternatives to the rule” that would “minimize the economic impact on small businesses.”<sup>63</sup>

The second notice period expires after forty-five days unless JCAR and the agency agree to extend the notice period.<sup>64</sup> With the conclusion of the second notice period, JCAR is to act in one of a handful of ways. It may issue a “certificate of no objection,” which authorizes the agency to file a copy of the rule with the Illinois Secretary of State

57. The procedure is sometimes referred to as “regular rulemaking” or “permanent rulemaking.” JOINT COMM. ON ADMIN. RULES, 2014 ANNUAL REPORT 5 (2015) [hereinafter 2014 JCAR REPORT].

58. 5 ILL. COMP. STAT. 100/5-40(b). The agency must make available: (1) the text of the proposed rule or amendment; (2) a citation to the statute that authorized the agency to promulgate the rule; (3) a description of the rule’s subjects and the issues it addresses; (4) a description of the studies or reports on which the agency relied; (5) a regulatory flexibility analysis; (6) and the time, place, and manner in which interested persons may offer comments on the rule. *Id.*

59. *Id.*

60. 2014 JCAR REPORT, *supra* note 57, at 6.

61. 5 ILL. COMP. STAT. 100/5-40(c).

62. *Id.* at 100/5-110(a).

63. *Id.* The Illinois APA requires agencies to engage in an economic and regulatory impact analysis of any rules that might have an effect on small businesses, nonprofit corporations, or small municipalities to demonstrate that they have considered less stringent or costly alternatives. *Id.* at 100/5-30(a).

64. *Id.* at 100/5-40(c).

for publication in the Illinois Register. The rule will then go into effect unless a later effective date was specified in the rule.<sup>65</sup> JCAR might also issue a “[r]ecommendation” along with its certificate of no objection, in which case the agency should respond to the recommendation within ninety days, though it can also modify or withdraw the rule.<sup>66</sup> Whether or not JCAR issues a recommendation along with its certificate of no objection, the agency may proceed to file the rule with the Secretary of State without making any modifications.

JCAR may, however, decide to certify an objection to the agency’s proposed rule.<sup>67</sup> The Illinois APA does not explicitly provide relevant grounds for an objection, though scattered provisions of the Act authorize JCAR to: (1) evaluate a proposed rule’s “propriety, legal adequacy, relation to statutory authorization, economic and budgetary effects, and public policy”;<sup>68</sup> (2) “review the statutory authority on which any administrative rule is based” and to “suggest rulemaking” when it “determines that the agency’s rules are incomplete, inconsistent, or otherwise deficient”;<sup>69</sup> and (3) determine whether the rule is “within the statutory authority upon which it is based,” whether it is in the “proper form,” whether “notice was given . . . sufficient to give adequate notice of the purpose and effect of the rule,” and whether the agency “considered alternatives . . . designed to minimize economic impact on small businesses.”<sup>70</sup>

If JCAR objects to a proposed rule, the agency must respond in writing to JCAR’s objection within ninety days, explaining whether it will modify the proposed rule, withdraw it in its entirety, or refuse to modify or withdraw the rule.<sup>71</sup> If the agency refuses to modify or withdraw the proposed rule, it can proceed to publish it with the Secretary of State, but it must also submit a notice of its refusal for publi-

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65. *Id.* at 100/5-40(d).

66. See 2014 JCAR REPORT, *supra* note 57, at 7. Modification or withdrawal by the agency during the second notice period cannot be done unilaterally without this JCAR recommendation. *Id.*

67. 5 ILL. COMP. STAT. 100/5-110(b).

68. *Id.* at 100/5-100(c).

69. *Id.* at 100/5-105(b), (d).

70. *Id.* at 100/5-110(a). Not included in the statutory cross-reference, but frequently considered by JCAR in its review of proposed rules, is the statutory requirement that each rule that “implements a discretionary power to be exercised by an agency” include the standards the agency must use when exercising the power. *Id.* at 100/5-20. In addition, the “standards shall be stated as precisely and clearly as practicable under the conditions to inform fully those persons affected.” *Id.*

71. *Id.* at 100/5-110(c). No rule may go into effect until the agency has responded to JCAR’s objection. *Id.* at 100/5-110(h). Failure of the agency to respond altogether “shall constitute withdrawal of the proposed rule.” *Id.* at 100/5-110(f).

cation in the Illinois Register.<sup>72</sup> JCAR may then decide whether to recommend legislative action to the General Assembly in response to an agency refusal.<sup>73</sup>

In each of these instances, the agency may have its proposed rule take effect notwithstanding JCAR's misgivings. But in some circumstances the Illinois APA allows JCAR to prohibit entirely the implementation of a proposed rule. To do so, JCAR must, by a three-fifths vote of its members, determine two things: first, that the proposed rule "would be objectionable" under certain statutorily enumerated standards;<sup>74</sup> and second, that the proposed rule "would constitute a serious threat to the public interest, safety, or welfare."<sup>75</sup> Left unexplained in the statute is what would constitute such a serious threat, an issue to be discussed *infra*.<sup>76</sup>

If JCAR issues a statement of prohibition of a proposed rule, it may not be published by the Secretary of State or enforced by the agency unless either the statement is withdrawn or the General Assembly passes a joint resolution to discontinue the prohibition within 180 days.<sup>77</sup> In effect, therefore, JCAR has a veto over administrative agency rulemaking, subject only to override by the full General Assembly. Prior to September 2004, JCAR's authority to prohibit implementation of a rule was only temporary; it would remain in effect for 180 days and become permanent only upon passage of joint resolution by the General Assembly.<sup>78</sup>

The Illinois APA allows agencies in some circumstances to avoid the two-step notice provisions required for ordinary rulemaking. For example, agencies need not use the general rulemaking procedures to pass "required" rules, which are mandated by the Illinois APA and include descriptive information about the agency.<sup>79</sup> Likewise, peremptory" rules—which include any rules that are: (1) 'required as a

72. *Id.* at 100/5-110(g).

73. 5 ILL. COMP. STAT. 100/5-110(g).

74. *Id.* at 100/5-115(a) (referencing the standards for general rulemaking, which are specified in Sections 100/5-100, 100/5-105, and 100/5-110 of Title 5 of the Illinois Compiled Statutes); see *supra* notes 68–70 and accompanying text (encapsulating these standards).

75. 5 ILL. COMP. STAT. 100/5-115(a).

76. See *infra* notes 125–54 and accompanying text.

77. 5 ILL. COMP. STAT. 100/5-115(b).

78. 1980 Ill. Laws 3898, 3900.

79. See 5 ILL. COMP. STAT. 100/5-15(b). More particularly, the Illinois APA requires agencies to maintain as rules a current description of its organization; charts depicting the organization; current procedures by which the public can obtain information or make submissions or requests on subjects, programs, and activities of the agency; tables of contents, indices, reference tables and other materials to aid users in finding and using the agency's collection of rules currently in force; and a current description of the agency's rulemaking procedures with necessary flow charts depicting those procedures. *Id.* at 100/5-15(a).

result of federal law, federal rules and regulations, an order of a court, or a collective bargaining agreement;” (2) that must be promulgated under conditions that “preclude compliance with the general rulemaking requirements;” and (3) that “preclude the exercise of discretion by the agency as to the content of the rule”—need not navigate the ordinary rulemaking procedures.<sup>80</sup>

The final category of rulemaking is for “emergency” rules. As defined by the Illinois APA, an “[e]mergency” means the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.”<sup>81</sup> Emergency rulemaking is far more common than the other types of rulemaking that are exempted from the default first and second notice procedures set forth in the Illinois APA. An agency may adopt a rule without following the notice procedures when it finds an emergency that requires passage in less time than is required by the general rulemaking procedures.<sup>82</sup> Emergency rules may become effective immediately upon being filed with the Secretary of State, but generally cannot be in effect for more than 150 days.<sup>83</sup>

Although the general rulemaking procedures need not be followed for required, preemptory, exempt, or emergency rules before they take effect, all of those rules remain subject to review by JCAR after taking effect, under the same standards used for review of proposed general rulemaking. Thus, JCAR may offer no objections, it may make recommendations, it may object, or it may suspend operation of the rules that were put into effect outside of the ordinary procedures by the agency.<sup>84</sup>

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80. *Id.* at 100/5-50. Pursuant to the Illinois Emergency Management Act, another small category of rules—those promulgated by the Pollution Control Board and the Illinois Emergency Management Agency—may be adopted without following the usual procedures, because these rules are identical in substance to federal regulations that the state is already required to adopt and enforce. See 2014 JCAR REPORT, *supra* note 57, at 5. See generally Illinois Emergency Management Act, 20 ILL. COMP. STAT. 3005/1–/22 (2014).

81. 5 ILL. COMP. STAT. 100/5-45(a).

82. *Id.* at 100/5-45(b). To utilize the emergency rulemaking procedure, the agency must file a notice of emergency rulemaking with the Secretary of State and must “take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.” *Id.* The rule becomes effective “immediately upon filing . . . or at a stated date less than 10 days thereafter.” *Id.*

83. *Id.* at 100/5-45(b)–(c). There are, however, many provisions passed by the General Assembly authorizing temporary emergency rulemaking and extending times. See *id.* at 100/5-45(c).

84. *Id.* at 100/5-120.



### C. JCAR's Dubious Constitutionality

Before proceeding to an analysis of JCAR and agency activity, it is worthwhile to acknowledge that there is good reason to question the constitutionality of the legislative veto that JCAR has possessed since late 2004.<sup>85</sup> A comprehensive analysis of the constitutionality of the legislative veto has been presented elsewhere,<sup>86</sup> but this Section provides an overview of the argument.

The Illinois courts have never directly ruled on the constitutionality of the legislative veto.<sup>87</sup> But in the federal system, legislative vetoes have been deemed to violate the U.S. Constitution,<sup>88</sup> and with only one exception legislative veto schemes have likewise been deemed unconstitutional under state constitutions.<sup>89</sup> Although opinions from

85. When the JCAR staff originally proposed amending the Illinois APA to provide JCAR with a veto, it acknowledged that this legislation “could raise constitutional questions about separation of powers” and “would result in the most serious legal issues[,]” including “whether passage of a resolution can affect law, [because] it eliminates the approval of the Governor required under normal legislative lawmaking.” JOINT COMM. ON ADMIN. RULES, 1979 ANNUAL REPORT 395–96 (1980).

86. See, e.g., Falkoff, *supra* note 3, at 1063–76.

87. Although the constitutionality of JCAR’s review of agency rulemaking has on occasion been challenged, the legislative veto has never properly been before the court. See, e.g., Quinn v. Donnewald, 483 N.E.2d 216, 222 (Ill. 1985) (explaining that the issue of an “illegal legislative veto of an executive action . . . is not before us”); Reece v. Bd. of Educ., 767 N.E.2d 395, 402–03 (Ill. App. Ct. 2002) (“[T]he issue of whether [a contested] action would constitute a legislative veto is not before us.”); see also Falkoff, *supra* note 3, at 1105–07 (discussing the consequences of Quinn on the constitutionality of legislative veto schemes in Illinois).

88. See, e.g., Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991) (holding that Congress may exercise legislative power only in conformity with the bicameralism and presentment requirements of Section 7 of Article I of the U.S. Constitution); INS v. Chadha, 462 U.S. 919, 954–55 (1983) (holding that a one-House legislative veto violated the bicameralism and presentment requirements of the U.S. Constitution); see also Falkoff, *supra* note 3, at 1076–91 (discussing at length the legislative veto in the constitutional context).

89. In states that allow a legislative committee or one House to exercise veto power, bicameralism failures have doomed the schemes. See, e.g., Op. of the Justices, 431 A.2d 783, 788 (N.H. 1981); Gillam Cty. v. Dep’t of Env’tl Quality, 849 P.2d 500, 505 (Or. 1993) (en banc), *rev’d on other grounds*, Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality, 876 P.2d 749, 750 (Or. 1994); State ex rel. Barker v. Manchin, 279 S.E.2d 622, 632 (W. Va. 1981); cf. Martinez v. Dep’t of Indus., Labor & Human Relations, 478 N.W.2d 582, 586 (Wis. 1992); Honorable Marvin York, Okl. A.G. Opin. No. 86-17, 1986 WL 235082, at \*1, \*2 (Feb. 24, 1986). In states where joint resolutions are required for legislative vetoes, the constitutional problem includes a failure to comply with the requirement of presentment to the governor for a potential executive veto. See, e.g., State ex rel. Stephan v. Kan. House of Representatives, 687 P.2d 622, 638 (Kan. 1984); Op. of the Justices to the Senate, 493 N.E.2d 859, 863–64 (Mass. 1986); Blank v. Dep’t of Corr., 611 N.W.2d 530, 536 (Mich. 2000); Mo. Coal. for the Env’t v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 133 (Mo. 1997) (en banc); Op. of the Justices, 431 A.2d, at 788; Gilliam Cty., 849 P.2d at 505–06; Commonwealth v. Jubelirer, 567 A.2d 741, 749 (Pa. Comm. Ct. 1989), *vacated as moot* by 614 A.2d 204, 211 (Pa. 1992); Barker, 279 S.E.2d at 632; Martinez, 478 N.W.2d at 583; cf. Carmel Valley Fire Prot. Dist. v. California, 20 P.3d 533, 542 (Cal. 2001) (noting that a legislative review

federal and state courts and from attorneys general nationwide are of course not binding on the Illinois courts,<sup>90</sup> both the compelling nature of their reasoning and their near unanimity bode ill for the Illinois legislative veto scheme if it is ever properly challenged in the courts.

There are two sets of potential constitutional difficulties with the legislative veto scheme in Illinois. The first is that JCAR vetoes of agency rulemaking may violate the stand-alone separation of powers provisions of the Illinois constitution, with the General Assembly encroaching on the powers properly belonging to either the executive or judicial branches (or both). The second is that JCAR vetoes fail to comply with the enactment provisions of the state constitution, including the requirements that legislation be passed by both houses of the General Assembly and be presented to the Governor for a potential executive veto before taking effect. This Section briefly addresses each set of issues.

### 1. Separation-of-Powers Issues

Article II of the Illinois constitution states that “[t]he legislative, executive and judicial branches are separate,” and that “[n]o branch shall exercise powers properly belonging to another.”<sup>91</sup> To be sure, the state constitution does not envision an absolute segregation of powers among the three branches of government.<sup>92</sup> But the core

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scheme “would be unconstitutional if it permitted a single house of the Legislature to suspend a departmental mandate without . . . presentment to the Governor”). Idaho is the only state in which a legislative veto scheme was upheld by the courts as constitutional. *See Mead v. Arnell*, 791 P.2d 410, 412 n.2 (Idaho 1990) (quoting *State Gen. Assemb. v. Byrne*, 448 A.2d 438, 448 (N.J. 1982)). For a comprehensive review of these nationwide decisions, see Falkoff, *supra* note 3, at 1083–91.

90. *Relsolelo v. Fisk*, 760 N.E.2d 963, 967 (Ill. 2001) (“[W]e are not bound to interpret our own constitutional provisions lockstep with the Supreme Court’s interpretation of the federal constitution.”); *Ray Schools-Chicago, Inc. v. Cummins*, 146 N.E.2d 42, 45 (Ill. 1957) (“[W]here Federal questions are not involved, as where State constitutions and statutes are to be construed, State courts are not required to follow Federal court decisions although they may be persuasive.”).

91. ILL. CONST. art. II, § 1. The modern language was first adopted in 1941, but reflects in substance the original provision from the original Illinois Constitution in 1818. *See ILL. CONST. OF 1818*, art. I (“The powers of the government of the State of Illinois, shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another. No person, or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”).

92. *Pucinski v. Cty. of Cook*, 737 N.E.2d 225, 229 (Ill. 2000) (noting that the provision “does not create rigid boundaries prohibiting every exercise of functions by one branch of government which ordinarily are exercised by another”); *Kunkel v. Walton*, 689 N.E.2d 1047, 1051 (Ill. 1997) (noting that the purpose is not to “achieve a complete divorce between the branches of government”); *Illinois v. Ill. Cent. R.R. Co.*, 92 N.E. 814, 833 (Ill. 1910) (noting that branches cannot

functions of one department cannot be exercised by one of the others because “[e]ach branch of government has its own unique sphere of authority that cannot be exercised by another branch.”<sup>93</sup>

Although the state constitution does not define the powers of the three branches,<sup>94</sup> the courts have described the *legislative* power as “the power to enact laws or declare what laws shall be”;<sup>95</sup> the *executive* power as “the power which compels obedience to the laws and executes them”;<sup>96</sup> and the *judicial* power as “the power which adjudicates upon the rights of citizens, and to that end construes and applies the law.”<sup>97</sup>

There are two ways in which the JCAR veto power over agency rulemaking might contravene state separation-of-powers principles. First, since JCAR is given veto power over executive agency action, the committee’s interference with agency rulemaking arguably intrudes on the executive branch’s power to enforce laws. This argument has occasionally been successful in challenges to legislative veto schemes in other states.<sup>98</sup> But the argument depends on a characterization of rulemaking as fundamentally “executive” in nature, a doubtful proposition given that the power to create rules is inherent in the legislature and resides in an executive agency only if the legislature chooses to delegate it.<sup>99</sup> Although the enforcement of rules is inher-

“be kept so entirely separate and distinct as to have no connection or interdependence”); *Field v. People ex rel. McClermand*, 3 Ill. 79, 83–84 (1839) (explaining that the separation-of-powers provision is “a declaration of a fundamental principle” but must “be understood in a limited and qualified sense”).

93. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1078 (Ill. 1997) (holding as unconstitutional the attempted delegation of an executive or administrative function to the judicial branch).

94. *People v. Hammond*, 959 N.E.2d 29, 44 (Ill. 2011) (“Our constitution does not attempt to define legislative, executive and judicial power, as it is neither practicable nor possible to enumerate the myriad powers of government and to declare that a given power belongs exclusively to one branch for all time.”); *Best*, 689 N.E.2d at 1078 (“[O]ur state constitution does not define legislative, executive, and judicial power” (citing *People v. Walker*, 519 N.E.2d 890, 892 (Ill. 1988))).

95. *See, e.g., People v. Hawkinson*, 155 N.E. 318, 319 (Ill. 1927).

96. *See, e.g., Witter v. Cook Cty. Comm’rs*, 100 N.E. 148, 149 (Ill. 1912).

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

98. *See, e.g., State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622, 635 (Kan. 1984) (“[T]he power to adopt rules and regulations is essentially executive or administrative in nature, not legislative.”); *Commonwealth v. Jubelirer*, 567 A.2d 741, 749 (Pa. Comm. Ct. 1989) (holding that a legislative veto interfered with the executive’s responsibility to administer the law, and “[n]othing less than legislation may suffice to override the rule-making power of . . . [any] executive agency”), *vacated as moot* by 614 A.2d 204, 211 (Pa. 1992).

99. *Monsanto Co. v. Pollution Control Bd.*, 367 N.E.2d 684, 690 (Ill. 1977) (characterizing rulemaking as “quasi-legislative” in nature); *Radaszewski v. Garner*, 805 N.E.2d 620, 626 (Ill. App. Ct. 2004); *Horsehead Res. Dev. Co. v. Ill. Pollution Control Bd.*, 684 N.E.2d 837, 840–41 (Ill. App. Ct. 1997); *Cent. Ill. Pub. Serv. Co. v. Commerce Comm’n*, 644 N.E.2d 817, 821 (Ill. App. Ct. 1994).

ently an executive function,<sup>100</sup> it is not immediately clear why the promulgation of rules would likewise be.

A more difficult question is raised by the possibility that legislative vetoes of agency rulemaking interfere with the judicial powers to construe the law. After all, JCAR's authority to veto proposed rules is premised on its legal determination that the agency acted beyond its statutory authority.<sup>101</sup> But that activity overlaps, at the very least, with the work of judging, and the Illinois courts have indeed often been called on to determine whether or not an agency has acted in conformity with statute.<sup>102</sup> If "the legislature's role [is] to make the law" and "the judiciary's role [is] to interpret the law,"<sup>103</sup> then it is difficult to ignore that a legislative committee sitting in judgment on the lawfulness of an agency's rules at least raises serious questions about legislative encroachment on the judicial powers.

## 2. *Enactment Issues*

While there may be more or less merit to separation-of-powers arguments against the constitutionality of the JCAR veto, it is difficult to see how legislative vetoes can survive challenges based on the General Assembly's failure to respect the enactment provisions of the Illinois constitution. Killing an agency's rules through a legislative veto raises two distinct constitutional problems. First, if the General Assembly effectuated the veto by joint resolution (as was allowed until September 2004), the action could be deemed a violation of the requirement that legislation be presented to the Governor for a potential veto before it could take effect. Second, if the veto was brought about by JCAR alone (as is currently allowed), there is in addition a failure to comply with the bicameralism requirement of the constitution.

Resolutions, of course, are not laws. Instead, they are "ways of expressing opinions or doing a variety of things *except* enacting laws."<sup>104</sup> Whether passed jointly or by a single house of the General Assembly,

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

101. See 5 ILL. COMP. STAT. 100/5-110(a) (2014) ("The Joint Committee shall examine any proposed rule . . . to determine whether the proposed rule . . . is within the statutory authority upon which it is based.").

102. See, e.g., Granite City Div. of Nat'l Steel Co. v. Ill. Pollution Control Bd., 613 N.E.2d 719, 724 (Ill. 1993); People v. Roos, 514 N.E.2d 993, 998 (Ill. 1987); *Cent. Ill. Pub. Serv.*, 644 N.E.2d 817.

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

104. LEGISLATIVE RESEARCH UNIT, PREFACE TO LAWMAKING, ch. 3, at 1 (2010) (emphasis added).

resolutions can have no binding legal effect. As the Illinois Supreme Court has explained,

nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.<sup>105</sup>

Instead, the General Assembly may make laws only by passing bills,<sup>106</sup> and to be lawful those bills must comply with the enactment requirements set forth in Sections 8 and 9 of Article 4 of the Illinois constitution. Chief among these are the bicameralism and presentment requirements: “No bill shall become a law without the concurrence of a majority of the members elected to each house,”<sup>107</sup> and “[e]very bill passed by the General Assembly shall be presented to the Governor within 30 calendar days after its passage.”<sup>108</sup>

The legislative review schemes that have been in place since 1981 are incompatible with these provisions. When the General Assembly was authorized to vote by joint resolution to permanently suspend an agency rule to which JCAR objected, the legislative body was given license to alter the legal rights and duties of those entities that would have been governed by the agency’s rules. Because the General Assembly veto could be accomplished by resolution (rather than by passage of a bill that was presented to the governor of the state for a potential executive veto), the legislative act could not—*should* not—have had the force of law.<sup>109</sup>

Similarly, if JCAR were to object to an agency rule and suspend its implementation and the General Assembly subsequently failed to lift the JCAR suspension (thereby making the suspension permanent), not only would the legislature have failed to comply with the presentment requirement, but it would have also failed to meet the bicameralism requirement of the Illinois constitution.<sup>110</sup>

In addition, General Assembly or JCAR vetoes of agency rulemaking do not comply with a host of other requirements specified in the

105. *People ex rel. Burrill v. Comm’rs of State Contracts*, 11 N.E. 180, 188 (Ill. 1887) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 156 (5th ed. 1883)).

106. ILL. CONST. art. 4, § 8(b); LEGISLATIVE RESEARCH UNIT, *supra* note 104, ch. 2, at 7 (“Laws can be enacted only by bills—not by resolutions or other measures.”).

107. ILL. CONST. art. 4, § 8(c).

108. *Id.* at art. 4, § 9(a).

109. *See State Gen. Assembly v. Byrne*, 448 A.2d 438, 444 (N.J. 1982); *see also State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (holding that the legislature must follow the enactment provisions, or else they would serve no purpose).

110. *See* ILL. CONST. art. 4, § 8(c).

Illinois constitution for the passage of bills by the legislature, including the requirement that laws contain an enacting clause,<sup>111</sup> that the final passage of a bill be done by record vote,<sup>112</sup> that the bill be read by title on three different days in each house, and that it “be reproduced and placed on the desk of each member.”<sup>113</sup>

### III. AN EMPIRICAL PERSPECTIVE ON JCAR ACTIVITY SINCE 1978

As the foregoing overview of the Illinois APA and its rulemaking procedures makes clear, JCAR has been authorized to play an increasingly intrusive role in the oversight of rulemaking in Illinois. This Part gathers and presents data to shed some light on the nature of JCAR’s interventions in agency rulemaking over the years. In particular, the data show that both total agency rulemaking and “emergency” rulemaking (for which agencies do not follow the usual notice-and-comment requirements) have decreased over time, which may possibly be a result of JCAR’s oversight of the process. More importantly, the data reveal a profound shift in the manner in which JCAR interacts with agencies, with the body increasingly relying on coercive rather than collaborative methods to modify agency rulemaking.

At the outset, it should be noted that the data presented below describe the number of individual rulemaking “filings” made by agencies. In the charts and figures, no effort is made to distinguish filings that are lengthy and complex from those that are short and direct. As JCAR explained in its first annual report, “each rulemaking is viewed as a unit, although they differ widely in length, complexity, nature and importance. A rulemaking may vary from a simple amendment

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111. *Id.* at art. 4, § 8(a) (“Be it enacted by the People of the State of Illinois, represented in the General Assembly.”).

112. *Id.* at art. 4, § 8(c).

113. *Id.* at art. 4, § 8(d). An argument that has been offered against the foregoing analysis is that the enactment requirements of the Illinois constitution are nonetheless satisfied, because the statutes that created the General Assembly and JCAR legislative veto regime were duly passed by the legislature as ordinary bills with bicameralism, presentment and all other constitutional enactment provisions respected. *See, e.g.*, Brief of Defendants-Appellants at 40, *Caro ex rel. State v. Blagojevich*, 895 N.E.2d 1091 (Ill. App. Ct. 2008) (No. 08-1061), 2008 WL 8201149. Courts in other states have rejected this argument on the grounds that a legislature should not be allowed to use a statute to delegate to itself powers that it is not constitutionally authorized to possess, even with the acquiescence of the governor. *See, e.g.*, *A.L.I.V.E. Voluntary*, 606 P.2d at 777; *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622, 637 (Kan. 1984); *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 915 (Ky. 1984); *Blank v. Dep’t of Corr.*, 611 N.W.2d 530, 560 (Mich. 2000); *Mo. Coal. for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997) (en banc).

changing a few words in an agency's rules to hundreds of pages of new regulations."<sup>114</sup>

Since 1978, JCAR has published annual reports summarizing agency rulemaking activity and JCAR's responses.<sup>115</sup> By aggregating the data found in the reports, trends can be discerned both in the volume of agency rulemaking and in the manner in which JCAR has endeavored to influence agency action. Several findings emerge from the data. First, the volume of agency rulemaking has decreased, albeit intermittently, during JCAR's tenure. While it is impossible to know how much (if at all) JCAR is responsible for the decreasing number of "ordinary" and "emergency" rules over the past several decades (or whether such a decrease has been good or bad for the public), it is reasonable to hypothesize that the legislative committee's scrutiny of agency rulemaking has contributed to a more efficient rulemaking regime.

The data also reveal that JCAR has grown increasingly interventionist in its interaction with agencies. As discussed *supra*, JCAR was originally created as an advisory committee that was expected to make recommendations to agencies for improving their rules, and in exceptional cases to inform the General Assembly about outlier rulemaking in order to initiate corrective legislation.<sup>116</sup> But the data reveals, perhaps not surprisingly, that as JCAR was granted increasingly coercive powers by the General Assembly, it largely eschewed the cooperative formal processes at its disposal. JCAR instead now chiefly operates by wielding its prohibition and suspension powers. These observations are striking in light of the doubtful constitutionality of JCAR's legislative veto powers.

As can be seen in the following figures, agencies in Illinois are responsible for the production of a tremendous volume of rules. Between 1978 and 2014, approximately 130 agencies proposed (or, in putative emergencies, implemented) a total of 21,289 rules. Figure 1 reflects the annual output of general, emergency, peremptory, exempt, and required rulemaking by all agencies, and shows that while the number of rules promulgated by agencies rose gradually until reaching its peak in 1986, since then, the volume has decreased significantly.

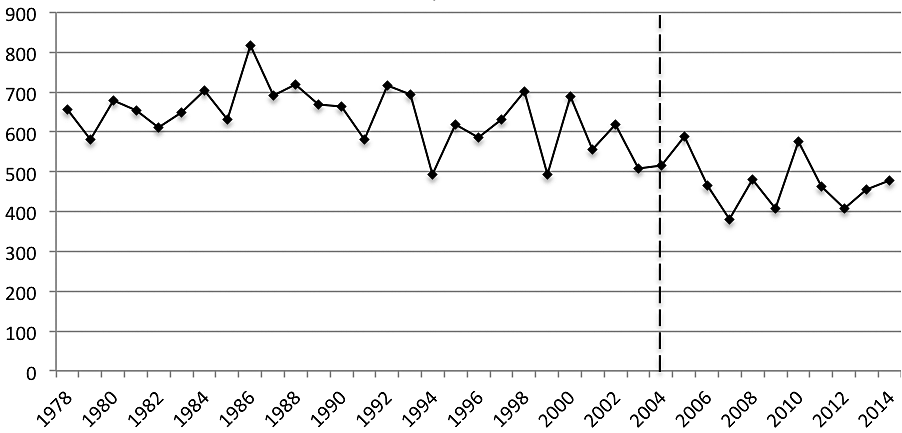
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114. 1978 JCAR REPORT, *supra* note 40, at 17. All of the numbers presented in the following figures were gathered from the JCAR annual reports from 1978 to 2014. They were tabulated directly from the reports' detailed discussions rather than from its summary tables, since the summary tables do not break down information annually between 1978 and 1990, and were sometimes inaccurate.

115. See 5 ILL. COMP. STAT. 100/5-140 (2014) (mandating the filing of annual reports with the General Assembly).

116. *Infra* notes 136-42 and accompanying text.

FIGURE 1. RULES OF ALL KINDS PROPOSED BY AGENCIES ANNUALLY, 1978 TO 2014



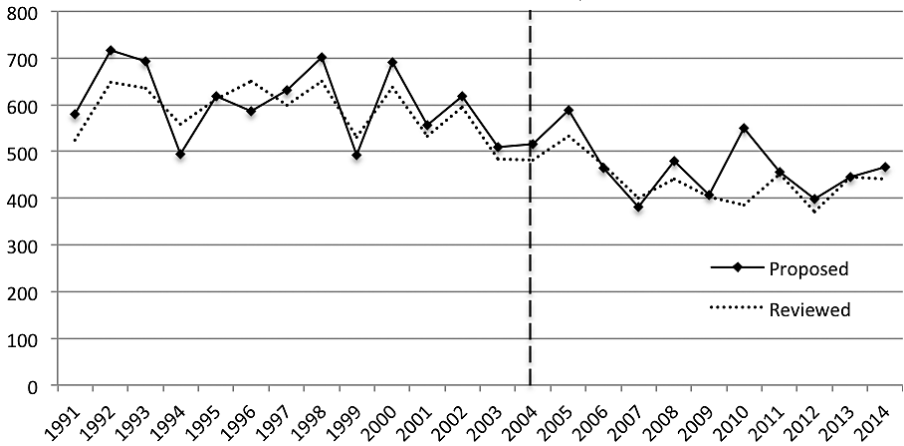
Note: Figure 1 depicts *all* rules proposed or implemented by all Illinois agencies annually between 1978 and 2014. The data have been collected from JCAR’s annual reports. There is a noticeable decline in rulemaking volume that becomes especially marked after 2004 (indicated by the scored vertical line), which is when JCAR was given veto powers by the General Assembly.

Broadly speaking, Figure 1 shows a trend over time toward less total rulemaking. Agencies consistently produced 600 or more rules annually from 1978 to 2004, approaching or exceeding 700 rules per year eleven times. While the average volume of rulemaking trended somewhat downward during that period, the steepest drops began in 2005, with closer to 400 to 500 rules produced annually during the ten years from 2005 to 2014. This latter period corresponds with the JCAR veto era, during which the committee has held veto power over agency rulemaking.

Most of the rules produced by agencies have been of the “ordinary” or “general” type, meaning that the agencies that created the rules used the ordinary notice-and-comment rulemaking procedures required by the Illinois APA. Of the 21,289 rules produced by agencies between 1978 and 2014, fully 18,009, or 84.6%, were “ordinary” rules. Whether ordinary or emergency, JCAR has reviewed nearly all of these rules during its tenure, as can be seen in Figure 2.



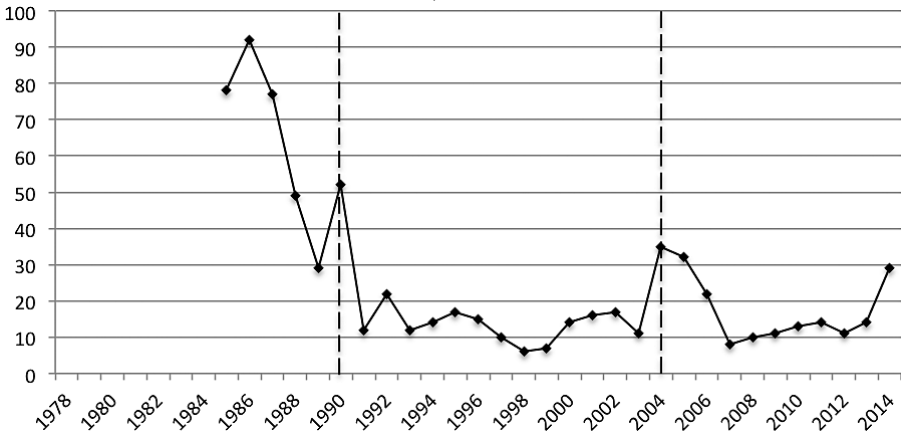
FIGURE 2. RULES OF ALL KINDS PROPOSED BY AGENCIES VERSUS REVIEWED BY JCAR ANNUALLY, 1991 TO 2014



Note: Figure 2 shows that JCAR has been diligent in its responsibility for reviewing agency rulemaking. The figure does not report data back to 1978 because JCAR did not begin reporting on the number of rules it reviewed until its 1992 annual report. The number of rules JCAR reviews in a given year will never match the number of rules produced by agencies because rules produced late in the calendar year will not be reviewed by the committee in time to be noted in the annual report.

Beyond providing context for the volume of agency rulemaking and JCAR review from 1978 to 2014, data collected from JCAR’s annual reports also sheds light on the type of activity in which JCAR has engaged over the years. As noted earlier, JCAR was initially conceived as a body whose purpose was to work collaboratively with agencies, even though JCAR early in its existence was granted coercive delay powers by the General Assembly. As the following figures show, through roughly 1990 JCAR largely relied on its noncoercive powers to influence agency rulemaking, typically deploying recommendations (which an agency could ignore without penalty) or objections (for which the only consequence of ignoring would be a publication of a notice of JCAR’s discontent in the Illinois Register).

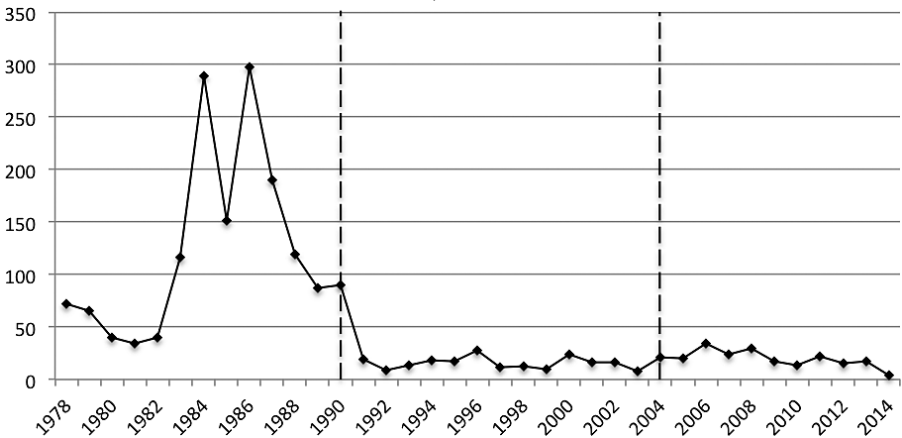
FIGURE 3. JCAR RECOMMENDATIONS FOR RULES OF ALL KINDS ANNUALLY, 1978 TO 2014



Note: Figure 3 shows the number of recommendations JCAR annually issued for rules of all kinds. Recommendations are noncoercive because agencies may choose to publish the rules without modification and suffer no penalty. There is no data indicated prior to 1985 because JCAR first gathered numbers on recommendations in its 1986 annual report. The left-most scored vertical line at 1990 marks the year that JCAR reported a sharp decline in the committee's operating budget, which may account for the subsequent drop in JCAR recommendations.

Although it does not include data on the number of recommendations issued by JCAR until 1985, Figure 3 shows that JCAR issued a high number of noncoercive recommendations annually through 1990, twice hitting nearly eighty per year and topping out at ninety-two in 1986. In contrast, the volume of recommendations from 1991 to 2014 typically remained below twenty per year, averaging 15.5 annually during this span. Figure 4 similarly shows that JCAR used its objection powers far more often in its early years than it would after 1990, averaging 69.2 objections per year between 1978 and 1990, and just 17.6 objections per year from 1990 to 2014.

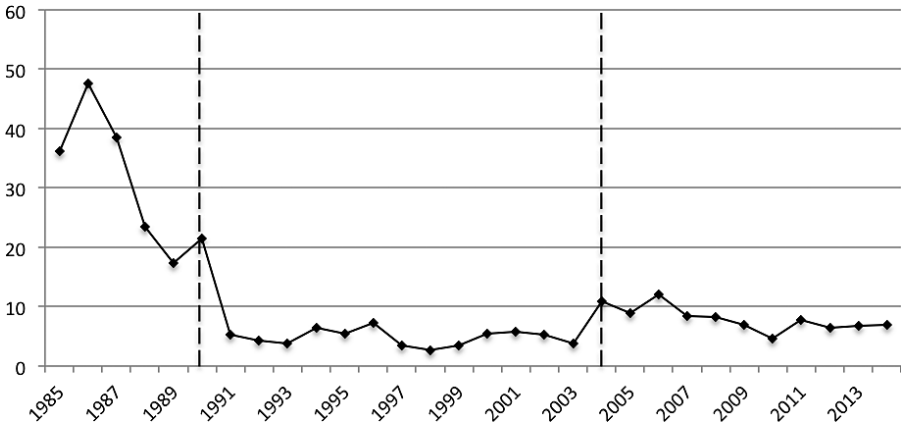
FIGURE 4. JCAR OBJECTIONS FOR RULES OF ALL KINDS ANNUALLY, 1978 TO 2014



Note: Figure 4 shows the number of objections JCAR annually issued for rules of all kinds. As with the number of recommendations, the volume of objections declined to very low numbers after 1990. Objections can also be considered noncoercive (or at most minimally coercive) since agencies may implement their rules without modification, with the only consequence being that notice of JCAR’s objections will be published in the Illinois Register.

Taken together, Figures 3 and 4 reveal that for a little more than a decade after its formation, JCAR made extensive use of its formal recommendation and objection powers, but that beginning in 1991 the number of recommendations and objections issued by JCAR dropped off to nominal levels. Lest the decline be thought an artifact of a reduction in rulemaking by the agencies, Figure 5 combines the data and shows that from 1985 to 1990, JCAR either issued recommendations or objected to rules fully 30.8% of the time on average, while from 1991 to 2014, that rate dropped to only 6.3%.

FIGURE 5. PERCENTAGE OF RULES WITH JCAR RECOMMENDATIONS OR OBJECTIONS ANNUALLY, 1985 TO 2014



Note: Figure 5 shows the annual percentage of rules by all Illinois agencies for which JCAR either made a formal recommendation or entered an objection between 1985 and 2014. From 1991 to 2014, the average combined rate of recommendations and objections was five times lower than the average rate from 1985 to 1990.

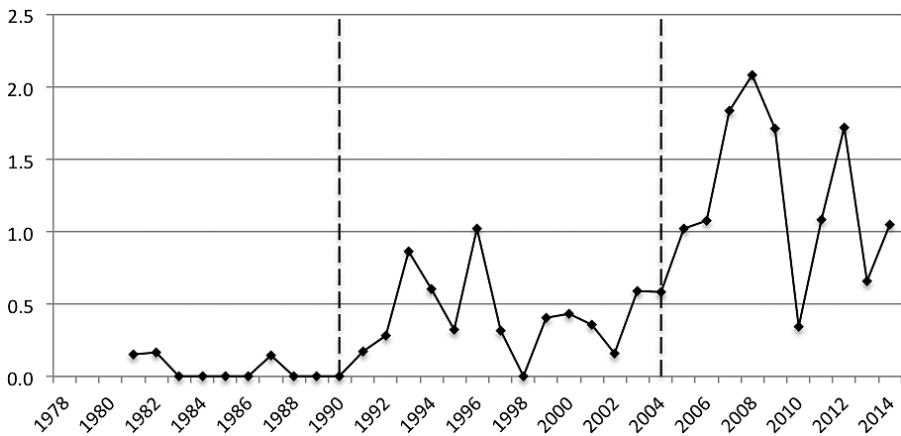
The sharp turn in JCAR recommendation and objection activity around 1991 initially seems puzzling because the General Assembly did not modify the statutory grant of power to JCAR in any manner around that time. But a clue to what was happening can be found in JCAR’s annual report for 1991—which itself was not issued until 1996—in which the committee explained that the “fiscal restraints under which the State has operated for the past few years have resulted in a reduction in JCAR staffing.”<sup>117</sup> One might hypothesize that reduced staffing at JCAR translated rather significantly into reduced activity with respect to some aspects of JCAR’s consideration of rules. While there is no indication that JCAR failed to review newly proposed rules at its usual pace beginning in the early 1990s (see Figure 2), the presumably more time-consuming process of issuing recommendations and objections was largely abandoned when the JCAR budget cuts hit. Indeed, the rate of recommendation and objection activity dropped five-fold in 1991, and remained at that depressed level at least through 2014.

If budget and staffing constraints did, in fact, lead JCAR to radically reduce the time-consuming process attending recommendation and objection activity, then one might expect to see evidence that JCAR sought more efficient ways to influence agency rulemaking. In-

117. JOINT COMM. ON ADMIN. RULES, 1991–1996 ANNUAL REPORTS 2 (1998).

deed, this expectation would appear to be borne out by the data. Figure 6 shows that just as JCAR’s rate of issuing recommendations and objections declined, the percentage of prohibitions or suspensions began to rise. Recall that unlike recommendations or objections, JCAR’s prohibition and suspension powers do have an immediate adverse impact on agency rulemaking. That effect was more muted prior to 2004, but a prohibition on the implementation of ordinary rulemaking (or a suspension of emergency rulemaking) would suspend operation of the rule for at least 180 days and might lead JCAR to ask the General Assembly to permanently block the rule by a joint resolution. After 2004, JCAR prohibitions or suspensions were permanent absent General Assembly action.

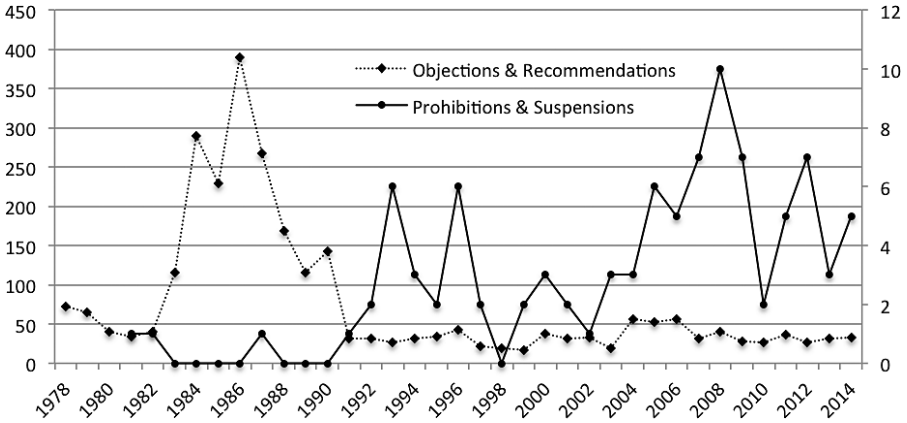
FIGURE 6. PERCENTAGE OF RULES OF ALL KINDS PROHIBITED OR SUSPENDED BY JCAR ANNUALLY, 1978 TO 2014



Note: Figure 6 shows the percentage of all rules that JCAR either prohibited or suspended in a given year. There are two large increases in this type of activity—in 1991 (coinciding with budget cuts that reduced JCAR’s staff) and in 2005 (coinciding with the General Assembly’s grant to JCAR of veto power over agency rulemaking).

In 1991, JCAR began using its coercive powers in earnest, perhaps deeming it more expedient to influence agency rulemaking through the *in terrorem* effect of frequent prohibitions and suspensions rather than through the gradual and less-confrontational process of offering recommendations and objections. In any event, Figure 7 shows an inverse relationship between the volume of JCAR’s recommendations and objections as well as its prohibitions and suspensions.

FIGURE 7. JCAR RECOMMENDATIONS AND OBJECTIONS VERSUS PROHIBITIONS AND SUSPENSIONS FOR RULES OF ALL KINDS ANNUALLY, 1978 TO 2014

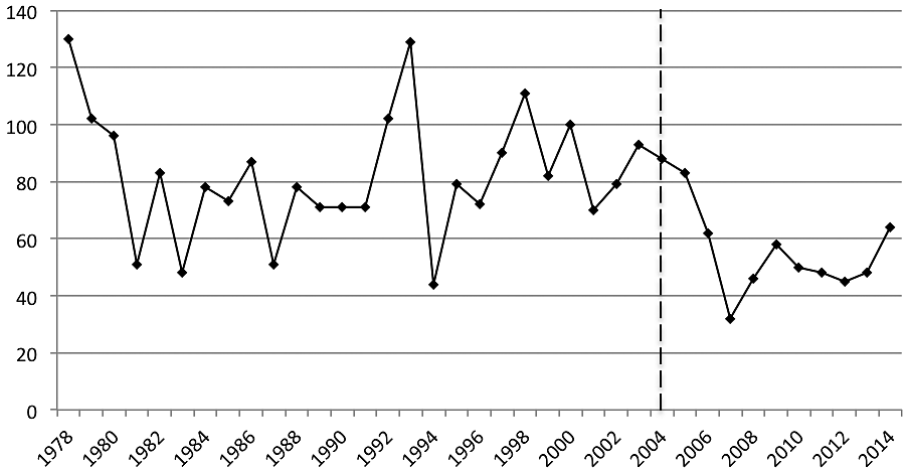


Note: Figure 7 plots JCAR’s recommendations and objections (the dotted line corresponding with the left y-axis) against its prohibitions and suspensions (the solid line corresponding with the right y-axis) to capture the inverse relationship between the committee’s noncoercive and coercive activity. The steeper rise in prohibitions and suspensions beginning in 2005 correlates with the grant to JCAR of veto power over agency rulemaking.

As a group, these figures show that as JCAR has decreased its reliance on recommendations and objections, it has increased its use of prohibitions and suspensions. From 1981 to 1991, JCAR issued just four prohibitions or suspensions. In contrast, from 1992 to 2004 it issued thirty-five, and from 2005 to 2014 it issued fifty-seven prohibitions or suspensions. To all appearance, the committee determined around 1991 that it could influence agency rulemaking more efficiently through use of its coercive tools.

The data tells a similar story when the focus shifts to agencies’ emergency rulemaking since 1978. All things considered, it is probably a sign of a healthy system when emergency rulemaking happens infrequently. While the necessity of having a system flexible enough to implement rules quickly in crisis situations is beyond dispute, there is always a cost to the public in circumventing the usual notice-and-comment period. There is also a danger that agencies will overuse the emergency power to avoid scrutiny of their rulemaking, skirting the ordinary processes when no true emergency exists. The trend toward less emergency rulemaking, which is exhibited by Figure 8, might therefore reasonably be considered a positive development.

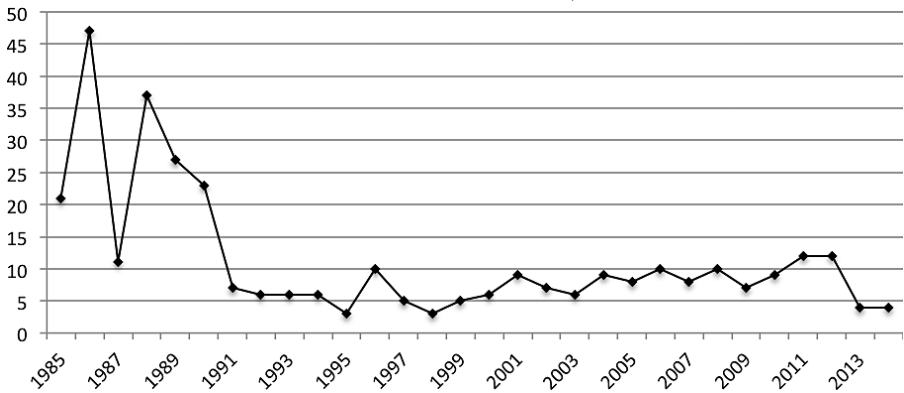
FIGURE 8. EMERGENCY RULES ADOPTED BY AGENCIES ANNUALLY, 1978 TO 2014



Note: Figure 8 shows the number of rules produced by agencies annually from 1978 to 2014. There is a steep decline after 1980 (corresponding with JCAR first gaining some coercive review powers from the General Assembly), an unexplained spike in 1993, which is offset the next year by a drop of similar magnitude, and a clear decline after 2004 (when JCAR was granted its veto powers).

That said, it is difficult to ascertain what an optimal level of emergency rulemaking would be. A decline in the rate of emergency rulemaking by agencies might signal that agencies have grown too hesitant in implementing rules that would be of immediate benefit to the public health and welfare. Figure 8 therefore tells an ambiguous story. On the positive side, there was an initial drop in emergency rulemaking from 109.3 rules per year on average from 1978 to 1980 (when JCAR had only advisory powers), to 79.2 rules per year on average from 1981 to 2004 (when JCAR could suspend the operation of emergency rules for up to 180 days). It would be reasonable to posit that JCAR had a tempering influence on agencies during this period, nudging them toward compliance with the ordinary Illinois APA rulemaking processes. It may be that JCAR's recommendation and objection activity during this time, which is presented in Figure 9, was modulated to achieve an appropriate amount of emergency rulemaking activity by the agencies.

FIGURE 9. JCAR RECOMMENDATIONS AND OBJECTIONS FOR EMERGENCY RULES ANNUALLY, 1985 TO 2014



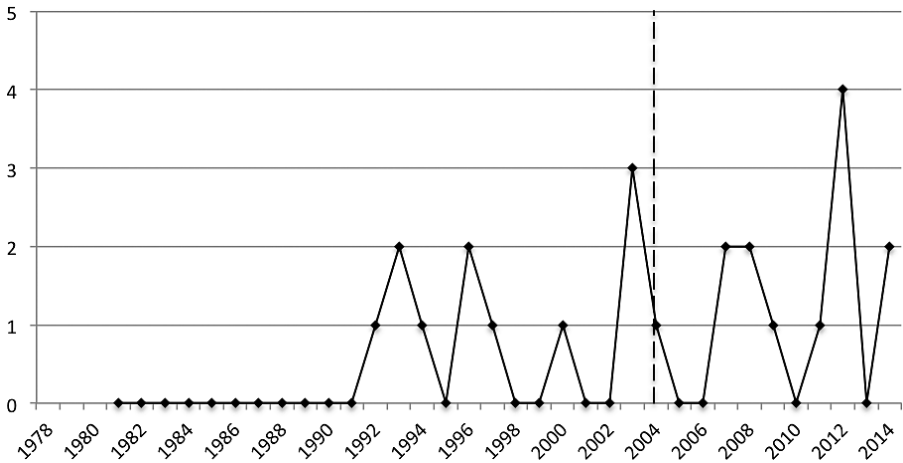
Note: Figure 9 shows the annual number of JCAR recommendations and objections for emergency rules from 1985 to 2014. Prior to 1985, JCAR did not collect data on the number recommendations it issued.

But Figure 8 also shows another significant drop in emergency rulemaking—from 79.2 rules per year on average from 1981 to 2004 to just 56.7 rules on average per year from 2005 to 2014 (which is the period during which JCAR possessed its veto power). These numbers should give some pause. If agencies were in fact over-relying on their emergency rulemaking powers when they were producing on average 109 rules per year, and were approaching a more appropriate emergency rulemaking level of about fifty-seven rules per year from 1981 to 2004, then it might be that JCAR intervention from 2005 onward made agencies *too* hesitant to use their emergency rulemaking powers.

In fact, JCAR did use its suspension powers more frequently from 2005 to 2014. Figure 10 shows that the committee suspended emergency rules twelve times during those ten years, equaling the total number of suspensions it issued for emergency rules during the previous twenty-four years combined.



FIGURE 10. JCAR SUSPENSIONS OF EMERGENCY RULES ANNUALLY, 1978 TO 2014



Note: Figure 10 shows the annual number of JCAR suspensions of emergency rules from 1978 to 2014, though JCAR did not have suspension authority until 1981. From 2005 to 2014, the period during which JCAR’s suspension power was presumptively permanent, the committee issued as many suspensions as it had during the previous twenty-four years combined.

Of course, it is impossible to know from the raw numbers alone what level of emergency rulemaking would have been optimal for Illinois agencies over the years. It may be that agencies egregiously overused their emergency powers from 1978 to 1981, were still too reliant on emergency procedures through the 1980s and 1990s, and only reached an optimal level when JCAR began deploying its suspension power in earnest beginning in 2005. Or it could also be that the agencies found the optimal rate of emergency rulemaking back in 1978, and that JCAR’s interference since then actually has worked to disadvantage the public welfare.

One should therefore be cautious in drawing conclusions from the data presented thus far. To be sure, the numbers give some perspective on agency activity involving both ordinary and emergency agency rulemaking, and it is certainly instructive to see the manner in which JCAR has increasingly used coercive tools over the years to modify agency rulemaking. All things considered, the mere existence of JCAR review may have led to a modest reduction in the agency rulemaking overall and of emergency rulemaking in particular. But the steep declines in rulemaking since 2004, coupled with JCAR’s deployment of prohibition and suspension powers that have the effect of (probably unconstitutional) legislative vetoes warrants closer inspection. The next Part will therefore look more closely at the fifty-seven instances of JCAR prohibitions and suspensions in the JCAR veto

era, to begin to assess qualitatively whether JCAR's activity seems appropriate.

#### IV. QUALITATIVE REVIEW OF JCAR PROHIBITIONS AND SUSPENSIONS

As discussed in Part I, there is intuitive appeal to legislative veto systems as a way to police agency activity.<sup>118</sup> But among other possible drawbacks, these schemes have the potential to obscure political accountability for new rules, aggrandize power in the legislature at the expense of the governor, and potentially subvert the will of the entire legislature by a small legislative body. These dangers are particularly pronounced when a legislative committee is free to kill rules solely for policy reasons, thereby relegating to the executive agency the role of factotum for the legislature. That said, to some degree these harms might be mitigated—albeit not eliminated—by limiting the authority of the legislative committee to veto rules only in clearly defined and extraordinary circumstances.

The Illinois General Assembly, although arguably misguided about the constitutionality of legislative vetoes in the state, at least recognized the need to cabin its grant of veto power to JCAR by authorizing its exercise only in emergency situations. Since September 2004, JCAR has been empowered to issue a prohibition or suspension only after a supermajority of the body concludes both that the rule is objectionable on statutory grounds<sup>119</sup> and that implementation of the rule

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118. *Supra* notes 18–21 and accompanying text.

119. 5 ILL. COMP. STAT. 100/5-115(a) (2014) (referencing the standards for general rulemaking specified in Sections 100/5-100, 100/5-105, and 100/5-110 of Title 5 of the Illinois Compiled Statutes). The grounds referenced in these Sections are reprinted in this Article. *See supra* notes 68–70 and accompanying text. To operationalize these provisions, JCAR devised its own set of rules and identified three categories of criteria for objections. The first category concerned substantive problems, leading JCAR to ask:

- A) Does the agency have legal authority for the proposed rulemaking?
- B) Does the proposed rulemaking comply with the statutory authority and legislative intent on which it is based or that it is implementing or interpreting?
- C) Does the proposed rulemaking comply with State and federal constitutions, State and federal law, federal rules and regulations, and case law?
- D) Does the proposed rulemaking include standards for the exercise of discretionary authority?
- E) Are the standards defined as clearly as practicable under the conditions?
- F) Does the agency have rulemaking authority?

1 ILL. ADM. CODE tit 1, § 220.900 (2014). The second category concerned problems with propriety, for which JCAR asked:

- A) Is there an adequate justification and rationale for the proposed rulemaking and for any regulation of the public embodied in the rules?

“would constitute a serious threat to the public interest, safety, or welfare.”<sup>120</sup> As long as JCAR respects these preconditions on the exercise of its veto power and resists the lure of vetoing rules solely on the basis of policy preferences, at least some of the potential drawbacks of the legislative veto system can be minimized.

But the following analysis of the fifty-seven prohibitions and suspensions of agency rulemaking issued by JCAR from 2005 to 2014 reveals that JCAR has rarely respected the General Assembly’s restrictions on its veto activity. Four interrelated issues repeatedly arise. First, JCAR has made little effort to explain why implementation of the rulemakings it prohibits or suspends would pose a “serious threat” to the public welfare.<sup>121</sup> In fact, in most instances the blocked rules—even if arguably contrary to statute or procedurally defective in some way—seem innocuous at worst, and in many cases seem as if they would be beneficial to the public.

Second, public documents—like the *Flinn Reports* on Illinois agency rulemaking and JCAR’s meeting minutes—frequently leave the impression that JCAR’s prohibitions and suspensions are motivated more by policy disagreements with the rulemaking agencies

B) Has the agency considered the economic effects of the rulemaking upon those regulated, including small businesses, not for profit corporations, units of local government, school districts and community college districts?

C) Has the agency considered less costly alternatives to this proposed rulemaking?

D) Has the agency considered the budgetary effects of the proposed rulemaking upon itself, other State agencies, and State revenue in general?

E) Is the language of the rules simple and clear, so that the rules can be understood by the persons and groups they will affect?

F) Are the rules free of serious technical errors, redundancies and grammatical or typographical errors that could affect the meaning of the rules?

*Id.* The third category concerned procedural problems, for which JCAR asked:

A) Does the proposed rulemaking comply with Section 5-40 of the Act?

B) Does the proposed rulemaking comply with the requirements of the Administrative Code Division?

C) Does the proposed rulemaking comply with any additional requirements imposed on the agency by State or federal law?

D) Does the proposed rulemaking comply with the agency’s own rules for the promulgation of rules?

E) Was the agency responsive to public comments concerning the rulemaking?

F) Did the agency comply with Section 5-30 of the Act, if applicable, in connection with the rulemaking?

*Id.* (citation omitted).

120. 5 ILL. COMP. STAT. 100/5-115(a).

121. See *infra* notes 125–54 and accompanying text (discussing examples of JCAR’s rejection of agency rules that failed to demonstrate a “serious threat”).

rather than by any substantive or procedural defect in the rule.<sup>122</sup> While policy disagreements might be adequate justifications for issuing a nonbinding objection to a rule, allowing legislative vetoes solely on these grounds threatens to significantly disrupt the balance of power among the legislative, executive, and judicial branches.

Third, statements by JCAR representatives in the Committee's minutes make clear that many of the Committee's prohibitions and suspensions from 2005 to 2014 were issued primarily to skirt the Illinois APA's one-year statute of limitations on agency rulemaking. JCAR vetoed the rules, in other words, to buy time for the agencies to modify their proposed rules to JCAR's liking, after which the veto might be lifted.<sup>123</sup> This behavior may be an unavoidable consequence of the way in which the Illinois APA is structured, but JCAR's use of prohibitions and suspensions to toll the limitations period is neither authorized by the Illinois APA nor consistent with its purpose.

Fourth, JCAR frequently substitutes its own interpretation of the meaning of statutory provisions for that of the rulemaking agency, even if the agency's interpretation is a reasonable one.<sup>124</sup> In doing so, JCAR arrogates to itself power that ultimately belongs with the judiciary, undermining the notions of deference that the judiciary ordinarily grants to agency interpretations of statutory provisions. At the very least, JCAR's refusal to show deference to reasonable agency interpretations of statutes introduces inconsistency between the legislative and judicial branches in the analysis of agency action.

These four problems are in many discrete instances interrelated. For example, when JCAR vetoes a rule based solely on a policy dispute with an agency, it invariably fails to explain why the proposed rule would have posed a serious threat to the public. Further, JCAR does not typically explain why an agency's understanding of its statutory authority to create and implement a challenged rule is unreasonable.

#### A. *No Showing of a "Serious Threat"*

JCAR cannot prohibit or suspend a rule unless, in addition to finding something in the rule that would statutorily justify the issuance of a formal "objection," it concludes that implementation of the rule

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122. See *infra* notes 155–63 and accompanying text (discussing examples of JCAR's rejection of agency rules for policy reasons).

123. See *infra* notes 164–75 and accompanying text (discussing examples of JCAR rejecting agency rules to extend the rulemaking limitations period).

124. See *infra* notes 176–90 and accompanying text (discussing examples of JCAR rejecting agency rules without affording the agencies any deference).

would constitute a “serious threat to the public interest, safety, or welfare.”<sup>125</sup> The term “threat” is left undefined in the statute. But it should go without saying that the requirement that JCAR must find a “threat” must have content, limiting in some meaningful way those circumstances in which JCAR may take the extraordinary step of prohibiting or suspending an agency’s rules. If the requirement had no substance, JCAR could veto agency rules whenever the committee found the rules to be statutorily objectionable. If this had been the General Assembly’s intent, there would have been no need to include the “threat” language at all, and it is a fundamental tenet of statutory interpretation that a legislature intends all of the words in its statutes to have effect.<sup>126</sup>

Moreover, not just any threat will suffice. It is not enough for JCAR to perceive that implementation of a rule might threaten some harm to the public health, welfare, or safety. To exercise the extraordinary power of legislatively overriding executive agency action, this perceived threat must be serious in nature. Again, there is no statutory definition of the term “serious,” but the term must have some delimiting meaning otherwise it is a riddle why the General Assembly would have included it in the Illinois APA in the first place.

Notwithstanding these observations, review of JCAR’s fifty-seven prohibitions and suspensions from 2005 to 2014 reveals that—with only a few arguable exceptions—the committee utterly failed to provide reasonable explanations for its conclusions that its actions were necessary to prevent agency rules from going into effect and posing serious threats to the public. To be clear, the main problem is not simply that JCAR typically made no effort to explain why it perceived these rules to represent “serious threats.” Rather, the issue is that in nearly all instances the agencies’ proposed rules appeared likely to enhance the public health, welfare, and safety rather than threaten it.

Before turning to examples, two things should be noted. First, the following analysis looks only at whether JCAR made a facially plausible case for its conclusions that each of the fifty-seven rulemakings that were prohibited or suspended from 2005 to 2014 represented a potentially serious threat to the public. Second, it is not unreasonable to hold JCAR to at least this relatively low standard, both because the

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125. See *infra* notes 176–90 and accompanying text.

126. See, e.g., *Crozer v. People*, 69 N.E. 489, 491 (Ill. 1903) (“It is a cardinal rule of construction that a statute should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant, but that it shall be so construed, if possible, that every sentence and word shall be given its ordinary meaning and acceptance.”), *overruled in part on other grounds by People ex rel. Warning v. St. Louis Bridge Co.*, 118 N.E. 22, 25 (Ill. 1917).

Illinois APA demands it and because JCAR is not the last line of defense against implementation of impolitic, improperly drafted, or even “threatening” agency rules. Indeed, JCAR’s permanent prohibition and suspension powers are designed to be extraordinary interventions with petitions to the courts remaining the ordinary way for blocking or suspending the operation of problematic agency rules.<sup>127</sup>

One example of a JCAR intervention that took place without a reasonable showing of a potentially serious threat to the public occurred in March 2008, when JCAR suspended operation of an emergency Illinois State Board of Education rule that would have prevented the state from placing disabled students in out-of-state educational facilities that use “behavioral interventions that intentionally inflict pain as a means of control.”<sup>128</sup> The Board of Education had learned that a facility housing an Illinois student sometimes used “techniques such as the administration of electrical shock as methods of behavioral control,”<sup>129</sup> and the Board believed the situation presented an emergency that needed to be addressed by rule “immediately.”<sup>130</sup> JCAR nonetheless suspended the emergency rule because, according to a member whose comments were summarized in the JCAR meeting minutes, the Board of Education “has not shown the existence of any emergency situation that warrants by-passing the public notice and opportunity to comment afforded by the regular rulemaking process.”<sup>131</sup>

JCAR’s conclusion that there was no real emergency and that the Board of Education should have used ordinary rulemaking procedures may or may not be reasonable. According to the Illinois APA, an emergency is defined as “the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.”<sup>132</sup> That question need not concern us here. What is puzzling is why JCAR concluded that a rule designed to prevent electrical shock from being used against an Illinois student was *itself* a “serious threat” to the public health, safety, and welfare. Nothing in

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127. See, e.g., *Cty. of Du Page v. ILRB.*, 830 N.E.2d 709, 714–15 (Ill. App. Ct. 2005) (suspending operation of an Illinois Labor Relations Board rule because there was no emergency and discussing similar precedents).

128. JOINT COMM. ON ADMIN. RULES, MINUTES (June 17, 2008) [hereinafter JCAR MINUTES, June 2008] (suspension published at 32 Ill. Reg. at 9764, 9764 (July 7, 2008)). See Special Education Facilities Under Section 14-7.02 of the School Code, 32 Ill. Reg. 4843, 4843 (proposed Apr. 4, 2008).

129. 32 Ill. Reg. at 4844.

130. *Id.*

131. JCAR MINUTES, June 2008, *supra* note 128 (summarizing the statement of Rep. Lou Lang).

132. 5 ILL. COMP. STAT. 100/5-45(a) (2014).

the public record sheds any light on the committee's reasoning.<sup>133</sup> Three months later, after the Board of Education promulgated the same rule using the ordinary rulemaking procedures prescribed by the Illinois APA, JCAR once more blocked the rule, prohibiting it again without explaining the nature of the rule's potential "serious threat" to the public.<sup>134</sup>

In another instance, JCAR prohibited the implementation of Illinois Department of Labor rules designed to enforce a statutory mandate that hotel room attendants be provided with two fifteen-minute paid breaks during each workday.<sup>135</sup> The Department of Labor's proposed rule would have required the breaks to be taken nonconsecutively.<sup>136</sup> Members of JCAR prohibited the rule's implementation because they saw no value in restricting employees from "voluntarily exercising flexibility in a manner that could be to the employee's benefit."<sup>137</sup>

Again, it is unnecessary here to decide whether JCAR or the Department of Labor had superior policy arguments, or to figure out which body better understood the legislative intent behind the General Assembly's two-break rule. It may well be that the Department of Labor's reading of its statutory authority was an unreasonable one that would not stand up in court even under a deferential standard of review. It is nonetheless worth noting that the Department of Labor in fact articulated a coherent explanation for the substance of its rule, noting its belief that the "general legislative intent" behind the statutorily mandated breaks was "to prevent repetitive motion injuries," and that taking breaks at the beginning or end of the day is not going to alleviate the injury factor.<sup>138</sup>

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133. JCAR was necessarily concluding both that the Board of Education was wrong to believe that the threat of use of electrical shock against an Illinois student represented a threat to the public health, safety or welfare, and that the Board's rule itself posed a serious threat to the public health, safety, or welfare. These are not logically irreconcilable positions, but some explanation for the conclusions would seem warranted. Cf. 32 Ill. Reg. 18908, 18908 (Dec. 5, 2008) (suspending a peremptory rule that raised Food Stamp benefit amounts without explaining why the rule might constitute a serious threat to the public); see also JOINT COMM. ON ADMIN. RULES, THE FLINN REPORT 4-5 (Nov. 21, 2008) (discussing the suspension).

134. See 32 Ill. Reg. 16275, 16275 (Dec. 1, 2006).

135. See 30 Ill. Reg. 18793, 18793-94 (Dec. 1, 2006); JOINT COMM. ON ADMIN. RULES, MINUTES (Nov. 14, 2006) [hereinafter JCAR MINUTES, Nov. 2006]. The statute itself requires that "every hotel room attendant shall receive a minimum of 2 15-minute paid rest breaks and one 30-minute meal period in each workday on which the hotel room attendant works at least 7 hours." 820 ILL. COMP. STAT. 140/3.1(c) (2014).

136. See 29 Ill. Reg. 19106, 19114 (Nov. 28, 2005).

137. 30 Ill. Reg. at 18793; see also JCAR MINUTES, Nov. 2006, *supra* note 135.

138. JCAR MINUTES, Nov. 2006, *supra* note 135.

Even provisionally accepting that JCAR was correct about the substance of the Department of Labor's rule as a matter of both sound public policy and statutory construction,<sup>139</sup> it is difficult to fathom how mandating nonconsecutive fifteen-minute work breaks could constitute a real threat to the public welfare, never mind a *serious* threat to the public welfare. Such a rule may be paternalistic, inadvisable, unauthorized by statute, reversible by the courts, and even a "threat" in the sense that a worker might lose the opportunity to curry favor with an employer by agreeing to take her breaks in one half-hour time span. But to conclude that implementation of such a rule would pose a "serious threat" to the public welfare empties this statutory requirement of meaning.

Something similar occurred with respect to a JCAR prohibition of an Illinois Department of Human Services rule that would have established application procedures and grant-issuance guidelines for autism research funding. JCAR prohibited the rules, explaining during its meeting that "JCAR has taken a firm position that grant rules should be very clear and specific because they involve the awarding of public funds," and that *even though* "JCAR understands that this particular program involves a relatively small amount of money that was generated from an income tax check-off that is not likely to be repeated," the Committee would find the rule a threat to the public interest.<sup>140</sup> Again, JCAR failed entirely to articulate why these rules constituted a potential serious threat to the public.<sup>141</sup>

Other examples from among the fifty-seven prohibitions and suspensions from 2005 to 2014 are discussed below. Unless otherwise indicated, JCAR offered no explanation in public documents for its conclusion that a veto was necessary to protect the public against a serious threat if the contested rule were implemented.

- JCAR prohibited the Illinois Department of Financial and Professional Regulation (DFPR) rules that would have helped protect borrowers from deceptive "payday" loans by, among other things, prohibiting oppressive arbitration agreements and collection procedures. JCAR stated at its meeting that it was "concerned that the rulemaking may exceed the Department's statutory authority and questions whether the proposal actually gets at the problem DFPR is attempting to address,"<sup>142</sup> but it

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139. Senator Steve Rauschenberger informed the Department of Labor representatives at the JCAR meeting that "it is JCAR's responsibility to interpret statute [sic]." *Id.*

140. JOINT COMM. ON ADMIN. RULES, MINUTES (Sept. 15, 2009).

141. See 33 Ill. Reg. 13945, 13945 (Oct. 2, 2009) (prohibiting the rule).

142. JOINT COMM. ON ADMIN. RULES, MINUTES (July 11, 2006) [hereinafter JCAR MINUTES, JULY 2006].



did not explain why the rules if implemented would pose a serious threat to the public welfare.<sup>143</sup>

- JCAR prohibited the Illinois Secretary of State's proposed rule that would have narrowed the circumstances in which a motor vehicle driver may be exempted from having to use a Breath Alcohol Ignition Installation Device.<sup>144</sup>
- JCAR suspended an Illinois Department of Healthcare and Family Services (HFS) emergency rulemaking that added antibiotics to the list of medication types that do not need prior approval from the agency for reimbursement when the prescription would put a patient above the Save Medicaid Access and Resources Together (SMART) Act limit of four prescriptions per month.<sup>145</sup>
- JCAR suspended an HFS emergency rulemaking that eliminated the need for patients to get prior approval from the agency before being transferred from one hospital to another when they must do so in order to obtain services not available at the discharging hospital.<sup>146</sup>
- JCAR prohibited the Illinois Department of Agriculture's first ever regulation of "doggy day care" businesses because the agency "inadequately describes the need for the new regulatory activity" and to adopt this rulemaking "without a clear understanding of its purpose could pose a threat to the public interest."<sup>147</sup>
- JCAR prohibited an Elevator Safety Review Board rule that would have required elevator mechanics to work under the direct supervision of a licensed contractor because the failure to allow the public adequate time to comment on the provision "would constitute a serious threat to the public interest."<sup>148</sup>
- JCAR suspended an emergency rulemaking from the HFS that expanded health insurance coverage for low-income adults because the "inclusion of policy within this emergency rule that

143. See 30 Ill. Reg. 13029, 13029 (July 28, 2006).

144. JOINT COMM. ON ADMIN. RULES, THE FLINN REPORT 3 (Jan. 13, 2012).

145. JOINT COMM. ON ADMIN. RULES, THE FLINN REPORT 5-6 (Aug. 17, 2012) (suspension published at 36 Ill. Reg. 13736, 13736 (Aug. 31, 2012)).

146. *Id.*

147. JOINT COMM. ON ADMIN. RULES, MINUTES (Feb. 6, 2007) (prohibition published at 31 Ill. Reg. 3207, 3207 (Feb. 23, 2007)).

148. JOINT COMM. ON ADMIN. RULES, THE FLINN REPORT 3 (Mar. 16, 2007) (prohibition published at 31 Ill. Reg. 5169, 5169 (Mar. 30, 2007)).

does not address a valid emergency is not in the public interest.”<sup>149</sup>

- JCAR suspended an HFS rulemaking that would have required prescriptions to be written on tamper-resistant prescription pads because the agency’s “unauthorized use of peremptory rulemaking presents a threat to the public interest.”<sup>150</sup>

The “serious threat” standard is not impossible to meet. In at least a few instances, JCAR’s prohibitions and suspensions were for rules that on their face might be understood to pose a serious threat to the public health, safety, or welfare. Among these instances was an HFS emergency rulemaking that denied payment for hospital admissions when a patient suffered from a “Medicare-defined hospital acquired condition,” because the rulemaking was contrary to federal regulations, was more “punitive” than required by state or federal law, and would be “likely to impede access to care,” thereby constituting “a threat to the public interest, safety and welfare.”<sup>151</sup> Another HFS rule that JCAR suspended would have eliminated enhanced payment rates for hospital-based physical therapy.<sup>152</sup> A third involved a rule that would have reduced reimbursements for ventilator care in nursing homes because the HFS rule “will cause financial hardship for nursing homes that agree to take ventilator dependent residents and it could threaten the health, safety and welfare of nursing home residents.”<sup>153</sup>

That said, for most of the other prohibitions and suspensions of agency rulemaking from this period, JCAR failed to articulate a reasonable argument for why it perceived the rules to present a serious threat to the public.<sup>154</sup> The conclusion to be drawn is that JCAR, at

149. JOINT COMM. ON ADMIN. RULES, THE FLINN REPORT 3 (Nov. 16, 2007) [hereinafter FLINN REPORT, Nov. 2007] (suspension published at 31 Ill. Reg. 16060, 16060 (Nov. 30, 2007)).

150. *Id.* at 5–6.

151. JOINT COMM. ON ADMIN. RULES, MINUTES (Aug. 14, 2012) (suspension published at 36 Ill. Reg. 13737, 13737 (Aug. 31, 2012)).

152. *Id.* (suspension published at 36 Ill. Reg. 13739, 13739 (Aug. 31, 2012)).

153. JOINT COMM. ON ADMIN. RULES, MINUTES (Jan. 14, 2014) (suspension published at 38 Ill. Reg. 3385, 3385 (Jan. 31, 2014)).

154. *See, e.g.*, JOINT COMM. ON ADMIN. RULES, MINUTES (June 16, 2009) (suspension published at 33 Ill. Reg. 9520, 9520 (July 6, 2009)) (voting to suspend a Department of Health and Human Services rule that would have authorized payment of enhanced rates for health insurance costs to qualified in-home provider agencies “because the agency offered no satisfactory rationale for its use of emergency rulemaking”); JOINT COMM. ON ADMIN. RULES, MINUTES (Apr. 12, 2011) (prohibition published at 35 Ill. Reg. 7228, 7228 (Apr. 29, 2011)) (voting to prohibit a Board of Education proposed rule that would have required candidates entering principal training programs to have four years of teaching experience because the enabling statute “requires that candidates complete 4 years of teaching before receiving principal certification, not before beginning the education and training that will qualify them for that certification”); *id.* (prohibition published at 35 Ill. Reg. 7230, 7230 (Apr. 29, 2011)) (voting to prohibit a proposed rule by the Board of Education that would have allowed two persons who live and work outside

least since 2005, has interfered with executive agency activity and acted beyond its statutory authority in scores of instances.

### B. *Prohibiting and Suspending for Policy Reasons*

One result of JCAR's failure to respect the "serious threat" limit on the use of its prohibition and suspension powers is to increase the likelihood that JCAR will block agency rules primarily on the basis of policy disagreements. It was not unreasonable for the General Assembly to authorize JCAR to *object* to agency rules on policy grounds, since objections alone cannot block the implementation of those rules if the agency opts not to withdraw or modify them. But permanently blocking rules on the basis of no more than a policy dispute is to effectuate an institutional power grab, disrupting the balance of power among the legislative, executive and judicial branches.

One example of a JCAR veto that seems to have been motivated solely by a policy disagreement occurred in 2006, when JCAR prohibited implementation of a set of Board of Education rules that would have prohibited the sale of junk food in elementary schools anywhere on school grounds, instead of just in food service areas, as had previously been the requirement.<sup>155</sup> JCAR's problem with the new rules was not that they were inconsistent with the enabling statute's legislative intent, or that the Board of Education was unauthorized to issue them, or that the Board had failed to follow the procedural require-

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of Illinois to be members of the Principal Preparation Review Panel, because "[i]nclusion of these persons does not provide the Illinois experience necessary to determine whether a principal preparation program adequately serves Illinois principals and trainees"); JOINT COMM. ON ADMIN. RULES, MINUTES (July 12, 2011) (suspension published at 35 Ill. Reg. 12832, 12832 (July 29, 2011)) (voting to suspend, without explaining the nature of the emergency rule's presumed "serious threat," an Office of the State Treasurer's emergency rule that would have stopped the practice of notifying participants in an investment pool that there has been a decrease in the amount of administrative fees the investor will be charged because the cost of providing notice of the fee reduction to investors would itself raise their administrative fees, making the whole process irrational); JOINT COMM. ON ADMIN. RULES, MINUTES (Oct. 22, 2013) (prohibition published at 37 Ill. Reg. 17996, 17996 (Nov. 8, 2013)) (voting to prohibit a Department of Natural Resources' proposed rule that would have established a nonrefundable fee for entities that applied for agency grants); JOINT COMM. ON ADMIN. RULES, MINUTES 2-3 (Sept. 18, 2007) (prohibition published at 31 Ill. Reg. 14119, 14119 (Oct. 5, 2007)) (voting to prohibit an Illinois Department of Finance and Professional Regulation rule that would have required insurance companies to provide one-page monthly reports stating how much they collected in premiums and paid out in claims, leading the agency representative to remind the Committee "that JCAR rules authorize the Committee to suspend an emergency rule *only* if that rule poses a serious, immediate threat to the public interest, safety and welfare" (emphasis added)); JOINT COMM. ON ADMIN. RULES, MINUTES (Feb. 13, 2008) (suspension published at 32 Ill. Reg. 3114, 3114 (Feb. 29, 2008) (voting to suspend HFS emergency rules increasing reimbursements for nursing services for geriatric facilities because there was no real emergency)).

155. See *School Food Service*, 30 Ill. Reg. 86 (proposed Jan. 6, 2006).

ments laid out in the Illinois APA. Rather, JCAR thought the junk food rules were not bold enough; the rules, according to one of the JCAR members, were “problematic in not providing a total approach to child nutrition education, diet and exercise.”<sup>156</sup> The agency’s approach was, in a word, too “narrow.”<sup>157</sup>

To be sure, there may be much to recommend JCAR’s approach to school nutrition, and the Board of Education’s junk-food rulemaking may well have been far too cautious. But without identifying any substantive or procedural flaws in the rulemaking—and without providing any indication that this innocuous junk-food rule would pose a serious threat to the public if implemented—JCAR arrogated to itself the remarkable power to dictate executive agency activity for no reason beyond its differing policy preferences. Allowing such action to stand perverts separation of powers principles in the state.

Many of the rules that JCAR prohibited or suspended from 2005 to 2014 similarly seem to have been premised primarily if not solely on policy disagreements with the promulgating agencies rather than by asserted violations of statutory authority, incompatibility with legislative intent, or procedural problems. Among them are the following:

- JCAR prohibited a proposed rule from the Board of Education that would have allowed persons who live and work outside of Illinois to be members of the Principal Preparation Review Panel, because “[i]nclusion of these persons does not provide the Illinois experience necessary to determine whether a principal preparation program adequately serves Illinois principals and trainees.”<sup>158</sup>
- JCAR prohibited Board of Education rules concerning special education, explaining obliquely that it did so “because its adoption of policies, not mandated by the U.S. Department of Education, poses a serious threat to the interests of children with disabilities and of special education teachers.”<sup>159</sup>
- JCAR prohibited a Department of Financial and Professional Regulation rule that would have protected borrowers from payday loans in part because JCAR was “concerned that the rulemaking may exceed the Department’s statutory authority,” but chiefly because members “question[ed] whether the propo-

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156. JOINT COMM. ON ADMIN. RULES, MINUTES (Apr. 11, 2006) (summarizing statement of Rep. Larry McKeon).

157. *Id.*

158. JOINT COMM. ON ADMIN. RULES, MINUTES (Apr. 12, 2011) (prohibition published at 35 Ill. Reg. 7230, 7230 (Apr. 29, 2011)).

159. 31 Ill. Reg. 2036, 2036 (Jan. 26, 2007); JOINT COMM. ON ADMIN. RULES, MINUTES (Jan. 9, 2007).

sal actually gets at the problem DFPR is attempting to address.”<sup>160</sup>

- JCAR prohibited an HFS rule that would have authorized the agency to reimburse primary care physicians for preventive treatment, contending simply that it was too expensive.<sup>161</sup>
- JCAR prohibited another HFS rule that would have expanded Medicare coverage, with one JCAR member explaining that “while I feel [the agency] probably had the authority to go ahead with this, the problem I have is still the budget part of it.”<sup>162</sup>
- JCAR prohibited the implementation of rules from DHS that addressed “Partner Abuse Intervention” because “the rulemakings contain language that makes assumptions and generalities that may be unfounded and thus would not be appropriate for State administrative law.”<sup>163</sup>

For obvious reasons, the Illinois APA does not authorize JCAR to prohibit or suspend rules solely on the basis of policy disagreements with rulemaking agencies. If JCAR could micromanage agency output and veto rules even when there was no substantive or procedural defect and no serious threat to the public from the rules, the executive agencies would effectively be puppets of the legislative committee. Neither the Illinois constitution nor the General Assembly’s statutory grant of power to JCAR allows for such a subversion of separation of powers principles.

### C. *Prohibiting To Avoid the Limitations Period*

In an unexpected number of instances between 2005 and 2014, JCAR forthrightly explained that it was prohibiting rules in order to extend the rulemaking limitations period. In effect, JCAR openly acknowledged that its prohibitions were often tactical, designed simply to buy time for the agencies to modify their rules in accord with JCAR’s demands. There is nothing in the Illinois APA that authorizes this use of the Committee’s prohibition powers. Unsurprisingly, in these situations JCAR typically neglects to explain why its prohibitions are necessary to protect the public against a serious threat.

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160. JCAR MINUTES, July 2006, *supra* note 142 (prohibition published at 30 Ill. Reg. 13029, 13029 (July 28, 2006)).

161. JOINT COMM. ON ADMIN. RULES, MINUTES (Jan. 9, 2008) (prohibition published at 32 Ill. Reg. 1168, 1168 (Jan. 25, 2008)).

162. JOINT COMM. ON ADMIN. RULES, MINUTES (Feb. 26, 2008) (prohibition published at 32 Ill. Reg. 4110, 4110 (Mar. 14, 2008)).

163. JOINT COMM. ON ADMIN. RULES, THE FLINN REPORT 4 (June 20, 2014).

JCAR's use of its prohibition power as a tolling device was in evidence in the very first prohibitions of the JCAR veto era, when JCAR blocked a package of five Illinois Department of Public Health (IDPH) rulemakings in January 2005.<sup>164</sup> The proposed rules would have revamped requirements concerning "the design, construction and operation of manufactured" housing.<sup>165</sup> JCAR felt that the DPH had been only partly responsive to critiques made by commentators and wanted to give affected parties more opportunity to convince the agency to modify its proposed rules.<sup>166</sup> The one-year Illinois APA limitations period on rulemaking was running out, however. Accordingly, in order to "afford DPH and the affected parties more time to resolve the remaining issues with this package of rulemakings," JCAR explained that it would "object to the rulemakings and prohibit their filing in the current form," with the result that the action "will stop the tolling of the 1-year rulemaking process."<sup>167</sup>

Some of the other instances of tolling-by-prohibition include:

- JCAR prohibited an HFS rule that limited the size of weekly psychotherapy group sessions because, according to one JCAR member, although "considerable progress" had been made among parties interested in the rulemaking, he believed that with "a little more time, . . . more issues can be resolved," and that the "only way to get that time at this point is with a Filing Prohibition."<sup>168</sup>
- JCAR prohibited Department of Financial and Professional Regulation rules that would have protected borrowers from payday loans in part to "allow more time for work on [disputed] issues."<sup>169</sup>
- JCAR prohibited Illinois Department of Children and Family Services rules concerning agency licensure requirements for day care homes because lack of clarity in the rules would take time to resolve, and "the only way to now delay action on the rulemaking is to issue a Filing Prohibition."<sup>170</sup>

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164. See JOINT COMM. ON ADMIN. RULES, THE FLINN REPORT 2 (Jan. 14, 2005) [hereinafter FLINN REPORT, Jan. 2005].

165. 28 Ill. Reg. 1652 (proposed Jan. 30, 2004).

166. FLINN REPORT, Jan. 2005, *supra* note 164, at 2.

167. *Id.* (prohibition published at 29 Ill. Reg. 1588, 1588 (Jan. 28, 2005)).

168. JOINT COMM. ON ADMIN. RULES, MINUTES (June 16, 2009) (prohibition published at 33 Ill. Reg. 9519, 9519 (July 6, 2009)).

169. JCAR MINUTES, July 2006, *supra* note 142 (prohibition published at 30 Ill. Reg. 13029, 13029 (July 28, 2006)).

170. *Id.* (prohibitions published at 30 Ill. Reg. 13030, 13030 (July 28, 2006); and 30 Ill. Reg. 13031, 13031 (July 28, 2006)).

- JCAR prohibited Department of Public Health rules for the purpose of “giving the affected parties time to draft compromise language” on the rules.<sup>171</sup>
- JCAR prohibited the Illinois Department of Agriculture’s “doggy day care” rules because JCAR wanted more information about the industry, and there was no way for the agency to get an extension of the deadline for the rulemaking without JCAR filing a prohibition.<sup>172</sup>
- JCAR prohibited an Illinois Department of Natural Resources rule that would have created an exclusion zone around some state dams because “JCAR still has some issues with this rulemaking” and the only way to gain time for resolving the issues was for the agency either to start over or for JCAR to “prohibit filing of this rulemaking until issues are resolved.”<sup>173</sup>
- JCAR characterized its prohibition of a Department of Public Health proposed rulemaking concerning staffing requirements for nursing homes as “a procedural motion not meant as a judgment on the content of the rule” that was “intended simply to give DPH more time to address concerns about how the rules were drafted.”<sup>174</sup>
- JCAR prohibited a Department of Natural Resources proposed rule establishing a nonrefundable fee to entities applying for grants because “lack of time has become an issue” and filing a prohibition “would be the only option remaining that would provide DNR with adequate time to address the rulemaking’s deficiencies.”<sup>175</sup>

These time-buying prohibitions are not authorized by statute. JCAR members often suggest during meetings with agency representatives that their willingness to use the prohibition power to toll the limitations period of the Illinois APA is really a collegial maneuver designed to give the agency some temporal breathing room and an opportunity to collaborate with JCAR and its staff. Nonetheless, the reason the limitations period needs to be tolled in the first place is JCAR’s discontent with the rules that the agencies have proposed.

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171. JOINT COMM. ON ADMIN. RULES, MINUTES (Jan. 11, 2005) (prohibition published at 29 Ill. Reg. 1588, 1588 (Jan. 28, 2005)).

172. JOINT COMM. ON ADMIN. RULES, MINUTES (Feb. 6, 2007) (prohibition published at 31 Ill. Reg. 3207, 3207 (Feb. 23, 2007)).

173. JOINT COMM. ON ADMIN. RULES, MINUTES (July 14, 2009) (prohibition published at 33 Ill. Reg. 11359 (July 31, 2009)).

174. JOINT COMM. ON ADMIN. RULES, MINUTES (Mar. 6, 2012) (prohibition published at 36 Ill. Reg. 4460, 4460 (Mar. 23, 2012)).

175. JOINT COMM. ON ADMIN. RULES, MINUTES (Oct. 22, 2013) (prohibition published at 37 Ill. Reg. 17996, 17996 (Nov. 8, 2012)).

Delay-by-prohibition should therefore be understood as just another tool in JCAR's arsenal, allowing it to pressure agencies to conform their rulemaking to JCAR's pleasure. Such prohibitions are emblematic of the new dynamic in rulemaking in Illinois in the JCAR veto era, where executive agencies are occasionally forced to act like drafting agents for the JCAR legislative committee.

#### D. Failure To Accord Any Deference to Agencies

As noted *supra*, most states no longer allow their legislatures or legislative committees to prohibit the enforcement of administrative agency rules except through the ordinary lawmaking process.<sup>176</sup> If agencies are alleged to have acted beyond their statutory authority or to have failed to follow the procedures required by state equivalents of the federal Administrative Procedure Act, it falls to the courts to determine whether the contested rules can be implemented or remain in effect. When there are judicial challenges in Illinois, just as in the federal system and in other states, the courts will assess whether the enabling statute is ambiguous about the nature and extent of the rulemaking powers in which the agency has been authorized to engage. If the statute is found to be ambiguous, the courts will defer to agency interpretations of the statute so long as they are not arbitrary, unreasonable or capricious.<sup>177</sup>

This deferential standard serves several purposes. First, it pays due respect to the (hypothesized) legislative decision to leave statutory language ambiguous in order to allow agency experts the freedom to interpret the legislative grant of power in a reasonable fashion.<sup>178</sup> Second, the deferential standard is a gesture of institutional modesty, with the courts acknowledging that personnel in the agencies, rather than in the courts, possess the requisite expertise to produce effective

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176. *Supra* note 87 and accompanying text.

177. See, e.g., *Midwest Petroleum Marketers Ass'n v. City of Chicago*, 402 N.E.2d 709, 715 (Ill. 1980) ("A reviewing court may set aside administrative regulations only if they are clearly arbitrary, capricious or unreasonable."); *Rend Lake Coll. Fed'n of Teachers, Local 3708 v. Bd. of Cmty. Coll.*, 405 N.E.2d 364, 368 (Ill. 1980) ("Reviewing courts may interfere with the construction and application of regulations only where administrative interpretation is plainly erroneous."); *Ill. Coal Operators Ass'n v. Pollution Cont. Bd.*, 319 N.E.2d 782, 785 (Ill. 1974) (upholding the Pollution Control Board's sound-emission regulations when the court could not conclude that they were clearly arbitrary, unreasonable, or capricious). The Illinois courts exercise what in the federal system is called "*Chevron* deference," deferring to the agency staff's expertise and experience. See *Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 843-45 (1984).

178. *Monsanto Co. v. Pollution Control Bd.*, 367 N.E.2d 684, 690 (Ill. 1977) ("When a regulation is promulgated by an agency pursuant to a grant of legislative power, a reviewing court should not substitute its judgment as to the content of the regulation, because the legislature has placed the power to create such regulations in the agency and not in the court.").



and efficient rules to carry out the purposes of the enabling statutes.<sup>179</sup> Finally, the deferential standard has the effect of forcing legislators to draft more precise statutes—and to accept political responsibility for their choices—if they want to be sure to restrain agency behavior.

Legislative veto schemes—whether the veto is held by the entire legislature, by one house, or by a legislative committee as in Illinois—by their nature threaten to disrupt the balance among the three branches that is instantiated by the deferential judicial standard for reviewing agency rulemaking activity. Indeed, as a practical matter, legislative veto systems cut the judiciary out of the rulemaking process in a large number of instances, since it is difficult for a potential plaintiff to challenge a rule on the grounds that it would have been different in a particular way but for legislative committee interference.

These problems are heightened when, as in Illinois, the body holding the legislative veto makes no effort to defer to agency interpretations of a statute, and instead relegates to itself final authority for determining the meaning of statutory language and of the legislative intent that motivated its passage. To take one example, JCAR prohibited the implementation of a proposed Department of Financial and Professional Regulation rule that would have required insurance companies to provide the agency with one-page information sheets providing insurance-plan enrollment data, amounts the insurance companies collected from customers in premiums, how much they paid out in claims, and similar information.<sup>180</sup> During its meeting with JCAR, the Department's representative explained to the members that it deemed this information necessary due to the "acute information deficit" about insurers in Illinois, which "harms our ability to regulate" and "impairs legislators' ability to understand what is happening in this State and to evaluate whether the information they get from the insur-

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179. The courts give agency interpretations of rulemaking authority deference because they have been "appointed by law and informed by experience." *Monarch Gas Co. v. Ill. Commerce Comm'n.*, 366 N.E.2d 945, 947 (Ill. App. Ct. 1977). The Illinois courts nonetheless retain ultimate authority with respect to the construction of statutes. *People v. Roos*, 514 N.E.2d 993, 998 (Ill. 1987) ("Although courts give substantial weight and deference to an interpretation of a statute by the agency charged with the administration and enforcement of the statute, such interpretations are not binding on the courts."); *People ex rel. Thompson v. Prop. Tax Appeal Bd.*, 317 N.E.2d 121, 125 (Ill. App. Ct. 1974) ("[W]here the authority of an administrative body is in question the determination of the scope of its power and authority is a judicial function; not a question to be finally determined by the administrative agency itself.").

180. See JOINT COMM. ON ADMIN. RULES, MINUTES (Oct. 10, 2007) [hereinafter JCAR MINUTES, Oct. 2007]; see also 31 Ill. Reg. 10546 (proposed July 27, 2007).

ance industry and consumer groups is accurate.”<sup>181</sup> When JCAR members questioned whether the Department had statutory authority to demand such information from insurers, the representative responded with thirty citations to statutory authority.<sup>182</sup>

To be sure, simply because an agency’s advocate claims to have overwhelming statutory support for the agency’s action, this does not settle the question of whether the agency was in fact authorized to engage in the challenged rulemaking. If the question of authority were before the courts, we would ask whether the statutory provisions were at least ambiguous, and if so then we would determine whether the agency’s interpretation of its statutory authority was reasonable, nonarbitrary, and noncapricious. But the question was instead in front of JCAR, and the legislative committee was keen on assuring that the Department could not “exploit” any ambiguity in the statute.

JCAR members suggested that the executive branch was using ambiguous statutory provisions to implement insurance-regulation policies that had not been explicitly authorized by the General Assembly, stating that the agency was “going to be held to a very strict construction of what is statutorily authorized.”<sup>183</sup> In other words, JCAR would show no deference to agency interpretations of statutory provisions that the General Assembly had left ambiguous. As the same JCAR member explained, although the statute “clearly gives the Department the authority to require information designed to determine the solvency of health insurance companies, . . . *there is a question* as to whether that authority is as broad as [the Department] would like to depict it.”<sup>184</sup> Another member stated that “it comes down to whether [the] statute currently authorizes data collection to determine solvency or whether it authorizes a broader range of data collection,” and when a “*statute creates a gray area like this*, the statute needs to be clarified.”<sup>185</sup> Yet a third member explained that “*the issue here is vagueness in the statute* that is resulting in legislating by rule,” and the member warned that “JCAR is stating that in this instance, and perhaps in others to come, these matters should be clarified by the General Assembly.”<sup>186</sup>

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181. JCAR MINUTES, Oct. 2007, *supra* note 180 (summarizing statements of Michael McRaith, Dir., Illinois Department of Financial and Professional Regulation’s Division of Insurance).

182. *See id.*

183. *Id.*

184. *Id.* (emphasis added) (summarizing the statement of Rep. John Fritchey).

185. *Id.* (emphasis added) (summarizing the statement of Rep. Rosemary Mulligan).

186. *Id.* (emphasis added) (summarizing the statement of Rep. David Leitch).

There are a number of other instances of JCAR prohibitions and suspensions in which JCAR exhibited no interest in deferring to agency interpretations of ambiguous statutes, typically by indicating that the agency had no specific statutory authority to regulate as it had done. For example, JCAR prohibited a Central Management Services rule that would have created alternative methods to sealed bidding, stating that the agency lacked “*clear* statutory authority to vary from the requirements of the Procurement Code . . . .”<sup>187</sup> In another instance, JCAR prohibited a pair of Department of Human Services rules that would have eliminated asset limits for recipients of Temporary Assistance for Needy Families and General Assistance funds because the agency “lack[ed] *specific* statutory authority to expand TANF and GA in a way that will subject the State to unknown additional costs.”<sup>188</sup> Likewise, JCAR prohibited a Department of Financial and Professional Regulation rule that would have established minimum fees charged for real estate purchase “closing protection letters” on the ground that the Department lacked “*specific* statutory authority.”<sup>189</sup> And the same rationale was used by JCAR when it suspended emergency rulemaking from the Illinois Gaming Board because the agency did “not have *specific* statutory authority to create the Video Gaming Exclusion List.”<sup>190</sup>

JCAR’s refusal to show any deference to agency statutory interpretations is of a piece with its treatment of executive agencies as workhorses under the legislative committee’s supervision. Few would dispute that JCAR staffers and members work in good faith to assure that only effective, beneficial, and efficient rules are implemented in the state. But, the legislative committee’s readiness to deploy its veto powers in circumstances beyond its statutory authority shows that JCAR is far from respecting executive agencies as representatives of a coequal branch of government.

## V. CONCLUSION

The Illinois General Assembly’s creation of JCAR nearly four decades ago was motivated by a sound purpose—to assure that agencies

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187. JOINT COMM. ON ADMIN. RULES, MINUTES (June 13, 2007) (emphasis added) (summarizing the statement of Sen. Bradley Burzynski) (prohibition published at 31 Ill. Reg. 9532, 9532 (July 6, 2007)).

188. JOINT COMM. ON ADMIN. RULES, MINUTES (Sept. 15, 2009) (emphasis added) (prohibition published at 33 Ill. Reg. 13947, 13947 (Oct. 2, 2009)).

189. JOINT COMM. ON ADMIN. RULES, MINUTES (May 10, 2011) (emphasis added) (prohibition published at 35 Ill. Reg. 8250, 8250 (May 27, 2011)).

190. 38 Ill. Reg. 3384, 3384 (Jan. 31, 2014) (emphasis added); see also JOINT COMM. ON ADMIN. RULES, MINUTES (Jan. 14, 2014).

in the burgeoning administrative state did not exceed their statutory rulemaking authority and begin sliding into unwarranted lawmaking. As initially conceived, JCAR's work would be achieved primarily through cooperation with agencies. In extreme cases, the legislative committee might seek corrective legislation from the General Assembly, but the object was to inform and persuade agency rulemakers about the proper ambit of their function. Notwithstanding JCAR's self-reported success at this task, the General Assembly soon granted itself veto powers over agency rulemaking and, in late 2004, delegated the veto power to JCAR's twelve members.

The JCAR veto scheme is likely unconstitutional, but this Article has shown some of the ways in which it is also unwise. To be sure, there has been a decline in both the overall volume of agency rulemaking and in the number of emergency rules passed by agencies since JCAR came into being, and it is plausible to speculate that JCAR has had a hand in bringing about a more optimal amount of rulemaking. But even assuming that the volume of agency rulemaking is closer to ideal than it previously was, the data presented in this Article reveal that these results are largely due to coercion on JCAR's part rather than cooperation with the agencies.

More distressing is that since JCAR was granted veto powers it has not restricted itself to prohibiting and suspending rules only in statutorily authorized situations. JCAR rarely deploys its veto power to protect the public health, safety, and welfare from a "serious threat," instead frequently opting to block the implementation of rules primarily on policy grounds. This type of behavior is, perhaps, a predictable result of placing such tremendous power in the hands of a small committee, but it is not one that the citizenry of Illinois should countenance.

There is little likelihood that the General Assembly will vote to roll back the legislative veto powers it has granted to itself and to JCAR. But should the Illinois Supreme Court find, at some time in the future, that the JCAR veto scheme is unconstitutional, the people of Illinois should think long and hard before amending the state's constitution to reinstitute the legislative veto.

