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## THE LEGISLATIVE VETO: IS IT LEGISLATION?

The complexity of the law-making process and the need for legislative efficiency have compelled legislatures to delegate authority to administrative agencies and departments.<sup>1</sup> The delegation of the legislative power has raised important constitutional issues.<sup>2</sup> The United States Constitution divides the federal government into three branches.<sup>3</sup> Each branch has specific powers and responsibilities.<sup>4</sup> The doctrine of separation of powers demands that each branch carry out only those functions designated by the Constitution.<sup>5</sup> The delegation of the legislative authority to executive administrative agencies, therefore, may constitute a violation of the separation of powers doctrine.<sup>6</sup> For the most part, however, the Supreme Court has sanctioned such delegation.<sup>7</sup>

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<sup>1</sup> See Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513, 518-19 (1964). Stone has expressed the belief that the growth of administrative law is a response to legislative shortfalls. *Id.* Stone classified the shortfalls into time limitations, lack of specialized knowledge necessary for legislating in new areas, and limitations on organizational aptness for supervision of legal development in areas of the law which depend upon experience for expertise. *Id.* at 519. See also Melville, *Legislative Control Over Administrative Rule Making*, 32 U. CINN. L. REV. 33, 33 (1963) [hereinafter cited as Melville].

<sup>2</sup> See text accompanying notes 3-24 *infra*.

<sup>3</sup> U.S. CONST. art. I, II, III. In the first three articles, the Constitution creates the legislative, executive, and judicial branches of government. *Id.*

<sup>4</sup> *Id.* In the articles creating the three branches of government, the Constitution enumerates the duties and powers of the respective branches. *Id.*

<sup>5</sup> See Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285, 288 n.13 [hereinafter cited as *Probable Response*]. The separation of powers doctrine does not arise from an express constitutional mandate, but is implied from the system of checks and balances the Constitution provides. *Id.*

<sup>6</sup> See note 7 *infra*; Melville, *supra* note 1, at 33-34.

<sup>7</sup> See *FPC v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring opinion) (Congress validly delegated power to levy assessments to administrative agency under the Natural Gas Act). In *Field v. Clark*, 143 U.S. 649, 692 (1892), the Supreme Court made clear that it considered any attempt to delegate the legislative power a violation of the separation of powers doctrine. See *id.* at 697 (Lamar, J., concurring opinion). Later, the court softened its position, holding that Congress could delegate the legislative power so long as Congress laid down standards to guide the agencies in the execution of the power. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397-98 (1940) (valid delegation of power to fix minimum and maximum coal prices under Bituminous Coal Act). Today, the Supreme Court accepts the constitutionality of the delegation of legislative power, even in the absence of constraining standards. 415 U.S. at 352-53.

State courts have not granted broad discretion in allowing legislatures to delegate the legislative power. In *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, 352 S.W.2d 203 (Ky. 1961), the Kentucky Supreme Court emphasized the need for safeguards when it upheld the legislature's delegation of the power to private institutions to authorize public aid for the education of "exceptional children." *Id.* at 207-08. In *City of Chicago v. Pa. R.R. Co.*, 41 Ill.2d 245, 242 N.E.2d 152 (1968), the Illinois Supreme Court held that a statute was unconstitutional which conferred to the governing highway authority the power to permit

The delegation of legislative authority to administrative agencies also raises the question whether Congress may exercise control over executive agencies' rule-making authority.<sup>8</sup> Rather than controlling an agency's rule-making authority through the traditional channel of the formal bill-passing procedure,<sup>9</sup> Congress often has utilized the legislative veto as a method of accomplishing control.<sup>10</sup> A legislative veto is a statutory mechanism which allows a legislature to disapprove proposed agency rules and regulations by legislative resolution.<sup>11</sup> The legislative veto is non-traditional because the veto does not employ formal bill-passing procedures.<sup>12</sup> Instead, the legislative veto utilizes a legislature

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exceptions to a general prohibition against certain roadside advertising because the statute delegated "unfettered" legislative power. *Id.* at \_\_\_\_, 242 N.E.2d at 157.

<sup>8</sup> See text accompanying notes 9-31 *infra*.

<sup>9</sup> See 1 MEZINES, STEIN & GRUFF, ADMINISTRATIVE LAW § 3.02 at 61-63 (1977) [hereinafter cited as MEZINES]. Congress has traditionally controlled agency rule-making authority by formal legislation that denies appropriations, sets up oversight or watchdog committees, or abolishes an agency altogether. *Id.*

The fundamental legislative power allows legislatures to control and supervise administrative action. Neely, *Rights and Responsibilities in Administrative Rule Making in West Virginia*, 79 W. VA. L. REV. 513, 548 (1977) [hereinafter cited as Neely]. Neely proposed that since the legislature delegates the legislative power to the agencies initially, the legislature should be able to revoke or amend the power by repeal or amendment of statutory law. *Id.*; see Kinnane, *Administrative Law: Some Observations on Separation of Powers*, 38 A.B.A.J. 19, 22 (1952).

<sup>10</sup> See MEZINES, *supra* note 9, at 63. The legislative veto has been defined as a statutory mechanism which subjects the implementation of executive proposals, advanced in pursuance of statute, to a further form of legislative consideration and control. Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 467 (1962) [hereinafter cited as Cooper]. In effect, the legislative veto imposes a condition of legislative approval upon the operation of executive proposals or administrative rules. See *id.* at 475-76.

Congress has used the legislative veto to approve executive action (Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414 (1933)), terminate a statute or a portion thereof (Defense Production Act of 1950, ch. 932, § 716(c), 64 Stat. 822 (1950)), and disapprove executive action (Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013(D) (1970)). See Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1089-92 (1975) (Appendix A) [hereinafter cited as Watson]. Since the inception of the modern legislative veto in 1932, over 125 federal statutes have provided for direct legislative review of executive activity. Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEG. 593, 594 (1976) [hereinafter cited as Stewart]. Furthermore, 85% of the legislative review provisions enacted between 1973 and 1975 included legislative vetoes. *Id.* at 595. For a history of the legislative veto, see Ginanne, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 572-92 (1953) [hereinafter cited as Ginnane].

<sup>11</sup> See MEZINES, *supra* note 9, at 63-64.

<sup>12</sup> See note 13 *infra*. Types of non-traditional legislative control include the legislative veto, the "laying on the table" system, removal of certain members of an agency, and congressional control of certain expenditures. See MEZINES, *supra* note 9, at 63-70. See generally Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L. REV. 1031 (1955) (discussion of "laying on the table" system of legislative control).

resolution to supervise the agencies.<sup>13</sup>

The non-traditional nature of the legislative veto has led commentators to question the constitutionality of the federal legislative veto.<sup>14</sup> The United States Constitution limits Congress to certain enumerated legislative powers.<sup>15</sup> Congress' powers do not include the right to execute a law that it has already passed.<sup>16</sup> The right to execute law is expressly reserved to the president.<sup>17</sup> By allowing a legislature to disapprove proposed rules by a concurrent resolution, the legislative veto enables a legislature to execute its delegation of legislative authority to the agencies.<sup>18</sup> Thus, the legislative veto may violate the separation of powers doctrine, since the power to execute law is not within the constitutional power of Congress.<sup>19</sup>

Arguably, the federal legislative veto also conflicts with the presidential veto power described in article 1, section 7 of the Constitution.<sup>20</sup> Article 1, section 7 provides that the president shall have the opportunity to veto bills and every order, resolution, or vote for which the concurrence of the two houses of Congress is necessary.<sup>21</sup> Critics have argued that the legislative veto's resolution process is an exercise of legislative power requiring the concurrence of the houses of Congress.<sup>22</sup> Congress, therefore, should present the legislative veto's resolution to the president for his approval. In apparent conflict with the presidential veto power, however, the legislative veto does not require Congress to submit the resolution for presidential scrutiny.<sup>23</sup> The Supreme Court to

<sup>13</sup> See MEZINES, *supra* note 9, at 63-64. The resolution usually is simple (one-house) or concurrent (majority of both houses). *Id.*

<sup>14</sup> See text accompanying notes 15-23 *infra*.

<sup>15</sup> U.S. CONST. art. I. Article I vests all legislative power in the Congress. *Id.* at § 1. The remainder of the article describes the manner in which Congress may exercise the legislative power, particularly section 7, which describes the procedure for passing bills and resolutions. *Id.* at § 7.

<sup>16</sup> See *Probable Response*, *supra* note 5, at 287-88.

<sup>17</sup> U.S. CONST. art. II, § 1.

<sup>18</sup> See *Probable Response*, *supra* note 5, at 287-88.

<sup>19</sup> *Id.* But see Stewart, *supra* note 10, at 597-98; Cooper, *supra* note 10, at 501-14. In a recent Ninth Circuit case, the Court of Appeals held a unicameral legislative veto unconstitutional because it violated the separation of powers doctrine. *Chadha v. Immigration and Naturalization Serv.*, 49 U.S.L.W. 2417, 2417 (9th Cir. 1980). The legislative veto in question allowed one house of Congress to override by means of legislative resolution the Attorney General's decision concerning the deportation of an alien. 8 U.S.C. § 1254(c)(2) (1970). The court held that the statute allowed Congress to interfere with the executive's administration of the law and was therefore unconstitutional. 49 U.S.L.W. at 2418.

<sup>20</sup> See Ginnane, *supra* note 10, at 593-94; Scalia, *The Legislative Veto: A False Remedy For System Overload*, 3 REG. - J. GOV. & SOC., Nov./Dec. 1979 at 20-21 (1977) [hereinafter cited as Scalia]; Stewart, *supra* note 10, at 597. But see Cooper, *supra* note 10, at 479-514; Melville, *supra* note 1, at 48.

<sup>21</sup> U.S. CONST. art. I, § 7, cl. 2 & 3.

<sup>22</sup> See Ginnane, *supra* note 10, at 593-95; Melville, *supra* note 1, at 48; Stewart, *supra* note 10, at 609-15.

<sup>23</sup> See Ginnane, *supra* note 10, at 570 n.1. Ginnane has opined that the avoidance of executive scrutiny is the primary purpose of the legislative veto. *Id.* at 595.

date has not decided the constitutionality of the federal legislative veto.<sup>24</sup>

The arguments advanced against federal legislative veto provisions also apply by analogy to state legislative vetoes.<sup>25</sup> All state constitutions provide for separation for powers between the legislative and executive branches of government.<sup>26</sup> Critics contend that by using the legislative veto a legislature is acting outside its sphere of power in violation of the separation of powers doctrine.<sup>27</sup> Also, most state constitutions provide that the governor has the right to veto any act of legislation passed by the legislature.<sup>28</sup> If the legislative veto constitutes an act of legislation and the legislature does not present the concurrent resolution to the governor for his approval, the legislative veto conflicts with the gubernatorial veto power.<sup>29</sup> In addition to the gubernatorial veto, state constitutions require the legislature to comply with specific bill enactment procedures to pass law.<sup>30</sup> As an act of legislation, the legislative veto may not meet the legislative enactment procedural requirements and therefore may violate the respective state constitution.<sup>31</sup>

In *State v. A.L.I.V.E. Voluntary*,<sup>32</sup> the Alaska Supreme Court recently examined the constitutionality of Alaska's legislative veto provision.

<sup>24</sup> In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court specifically avoided the issue of the constitutionality of a legislative veto provision that allowed regulations promulgated by the Federal Elections Commission to become effective within thirty days of filing if neither house of Congress disapproved the provisions. *Id.* at 140 n.176. Justice White, however, supported the constitutionality of the veto in a concurring opinion. *Id.* at 284-85. White argued that the power to disapprove proposed regulations did not constitute legislation and therefore was not subject to the presidential veto power. *Id.*; see text accompanying notes 46-80 *infra*.

One commentator has suggested that standing problems might prevent courts from ruling on the issue of whether the legislative veto is constitutional. Ginnane, *supra* note 10, at 609-11. The standing problem exists because the legislative veto does not give rise to an "identifiable injury," but rather produces a distinct shift of power from one branch of the government to another. See Watson, *supra* note 10, at 989. Watson also has suggested that courts might be reluctant to deal with the problem of legislative veto constitutionality because the legislative veto presents a political question beyond the jurisdiction of the courts. *Id.* at 989-90; see McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1134 (1977).

<sup>25</sup> See text accompanying notes 26-31 *infra*.

<sup>26</sup> See 1 STATE CONSTITUTION—NATIONAL MUNICIPAL LEAGUE SERIES 42, 65 (1963) [hereinafter cited as STATE CONSTITUTIONS].

<sup>27</sup> See text accompanying notes 15-19 *supra*.

<sup>28</sup> STATE CONSTITUTIONS, *supra* note 26, at 61-62.

<sup>29</sup> See text accompanying notes 20-23 *supra*.

<sup>30</sup> STATE CONSTITUTIONS, *supra* note 26, at 60-61.

<sup>31</sup> See text accompanying note 30 *supra*.

<sup>32</sup> 606 P.2d 769 (Alaska 1980). *A.L.I.V.E. Voluntary (A.L.I.V.E.)* conducted fund-raising lotteries under a permit issued by the Department of Revenue. *Id.* at 771. In 1977, the department denied A.L.I.V.E. a permit on the grounds that A.L.I.V.E. had violated an amended regulation limiting lottery prize money. A.L.I.V.E. brought suit against the state, urging that the denial of the permit was wrongful. In response to the A.L.I.V.E. litigation, the Alaska legislature annulled the regulation in question using a concurrent resolution

The court determined that the pivotal issue in *A.L.I.V.E.* was whether the legislative veto met the procedural requirements necessary for the enactment of legislation.<sup>33</sup> The legislative veto provision at issue in *A.L.I.V.E.* provided: "The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department."<sup>34</sup> Article II of the Alaska Constitution sets forth the requirements with which the legislature must comply before enacting law.<sup>35</sup> Article II requires that the legislature confine bills to one subject,<sup>36</sup> use a standard enactment clause,<sup>37</sup> give bills three readings,<sup>38</sup> and make affirmative majority final votes on a bill.<sup>39</sup> Furthermore, article II of the Alaska Constitution provides a gubernatorial veto allowing the governor to review all bills.<sup>40</sup> The court found that the legislative veto in *A.L.I.V.E.* violated the legislative enactment requirements.<sup>41</sup> The legislative veto process did not require the legislature to present the concurrent resolution of the legislative veto to the governor for his examination. Nor did the veto process require that the legislature give the legislative veto a descriptive title or employ the standard enactment clause. Since the legislative veto process did not conform to the mandatory requirements for enacting law, the legislative veto was unconstitutional.<sup>42</sup>

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under an Alaska legislative veto statute. *A.L.I.V.E.* amended its complaint to assert that the Department of Revenue could not deny a permit based upon a void regulation. The state contended that the regulation actually had not been annulled because the legislature could not annul an administrative action by concurrent resolution. The trial court granted partial summary judgment, holding that the annulment was valid and rendered the regulation void *ab initio*. The state then appealed the decision to the Alaska Supreme Court. *Id.*

<sup>33</sup> *Id.* at 770; see text accompanying notes 35-42 *infra*.

<sup>34</sup> ALASKA STAT. § 44.62.320(a) (Michie 1976).

<sup>35</sup> ALASKA CONST. art. II, §§ 13-14.

<sup>36</sup> *Id.* at § 13.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at § 14.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at §§ 15-17.

<sup>41</sup> 606 P.2d at 772.

<sup>42</sup> *Id.* at 770. To support the holding of unconstitutionality, the *A.L.I.V.E.* court discussed three cases in which courts have addressed the issue of the constitutionality of legislative veto statutes. *Id.* at 775-77. See generally *Atkins v. United States*, 556 F.2d 1028, (Ct. Cl. 1977) (*per curiam*), *cert. denied*, 434 U.S. 1009 (1978); *Reith v. South Carolina State Housing Authority* (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847 (1976); *ad Opinion of the Justices*, 97 N.H. 517, 83 A.2d 738 (1950).

In *Atkins*, the Court of Claims examined a federal legislative veto statute allowing Congress to disapprove presidential recommendations for judicial salary increases. 556 F.2d at 1034. In a four-three decision, the court declared the veto constitutional. *Id.* at 1070. The *Atkins* court carefully limited its holding to the facts of the case, noting that judicial salaries were peculiarly within the scope of legislative review. *Id.* at 1058-60. The *A.L.I.V.E.* court found that the *Atkins* decision was limited to the facts of the case and did not constitute strong authority for the proposition that generally the legislative veto is constitutional. 606 P.2d at 776-77.

The *A.L.I.V.E.* court determined that both *Opinion of the Justices* and *Reith* sup-

By focusing on the compliance with the procedural requirements, the *A.L.I.V.E.* court assumed that the legislative veto procedure was an exercise of legislative power within the purview of the legislative enactment provisions of the constitution. By making this assumption, the *A.L.I.V.E.* court failed to reach the underlying issue whether the legislative veto was sufficiently legislative in character to invoke the application of the article II requirements.<sup>43</sup> A court's determination that the legislative veto is an act of legislation is essential to, and must necessarily precede, any application of the enactment requirements to the legislative veto process.<sup>44</sup> If the legislative veto is not an act of legislation, the inquiry concerning article II requirements is moot. Of course, a determination that a legislative veto does not constitute an act of legislation raises the question whether a legislature exercising the veto is acting within the scope of its constitutional powers.<sup>45</sup> The remainder of this article will examine whether the legislative veto constitutes an act of legislation.

One proponent of the legislative veto has distinguished the legislative veto from acts of legislation by emphasizing that the legislative veto is effectuated through a resolution process that lacks the force of law.<sup>46</sup> The legislative veto derives its power from the statute creating the veto which expressly allows the legislature to act by resolu-

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ported the position that the legislative veto was unconstitutional. *See* 606 P.2d at 776. *Reith* concerned an affirmative veto provision that required the South Carolina General Assembly to approve a regulation by concurrent resolution before the regulation became effective. 267 S.C. at 4, 225 S.E.2d at 848. The Court of Common Pleas ruled that the provision was unconstitutional because it violated legislative enactment provisions and the separation of powers doctrine. *Id.*, 225 S.E.2d at 848. In *Opinion of the Justices*, the New Hampshire Supreme Court opined that a legislative veto authorized by a reorganizational statute violated a constitutional provision requiring bi-cameral action to create legislation. 97 N.H. at \_\_\_\_, 83 A.2d at 741.

<sup>43</sup> *See* Ginnane, *supra* note 10, at 593. Ginnane, in particular, has recognized that a process must be classified as legislative for constitutional provisions governing law-making to apply. *Id.*

<sup>44</sup> *See* S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897). The Federal Senate Committee on the Judiciary, in discussing the application of the executive veto to concurrent resolutions, recognized that the preliminary inquiry was whether the concurrent resolution constituted an act of legislation. *Id.*; *see* Ginnane, *supra* note 10, at 574.

<sup>45</sup> The Congress and state legislatures, with very few exceptions, can act only in a law-making manner. *See* Ginnane, *supra* note 10, at 593. The legislative veto, therefore, is either an act of legislation which must comply with legislative procedural requirements, or a non-legislative act outside the scope of the legislature. *Id.* at 593 n.108; *see* *Chadha v. Immigration and Naturalization Serv.*, 49 U.S.L.W. at 2417-18; text accompanying note 19 *supra*.

Proponents of the legislative veto have urged that a legislature can act in a legislative capacity that is at the same time not law-making. *See* Cooper, *supra* note 10, at 473-74. In utilizing the legislative veto, the legislature is acting in a legislative capacity that is not law-making. *Id.* Since legislative procedural requirements only apply to law-making acts or acts of legislation, proponents have argued that the legislative veto is not constitutionally invalid on procedural grounds. *Id.*

<sup>46</sup> *See* Cooper, *supra* note 10, at 474.

tion.<sup>47</sup> Thus, the resolution itself has no power.<sup>48</sup> Arguably, the lack of inherent power on the part of the legislative veto distinguishes it from acts of legislation.<sup>49</sup> Advocates of the veto also differentiate between the legislative veto and acts of legislation on the basis that the legislative veto does not create new policy.<sup>50</sup> The legislative veto merely puts into effect the policy embodied in the statute creating the veto.<sup>51</sup> Since the primary feature of a legislative act is that it creates policy, the legislative veto does not constitute an act of legislation.<sup>52</sup>

Courts that have defined "acts of legislation" lend support to the notion that generally the legislative veto does not constitute a legislative act.<sup>53</sup> In *City of Newport v. Gugel*,<sup>54</sup> the Kentucky Court of Appeals formulated a test for determining whether a particular procedure is administrative or legislative. Under the *Gugel* test, a legislative procedure prescribes new policy, while an administrative procedure merely implements policy.<sup>55</sup> Since the legislative veto is arguably policy implementing,<sup>56</sup> the legislative veto would not constitute a legislative act under the *Gugel* test.<sup>57</sup>

In *Opinion of the Justices*,<sup>58</sup> the Massachusetts Supreme Court applied a strictly literal definition of "legislation" to the procedure in question. The court defined legislation as the "enactment of laws in that thoroughly settled sense," referring to the traditional bill-passing procedure.<sup>59</sup> Under this definition the legislative veto provision would not

<sup>47</sup> *Id.* A resolution passed by Congress in the absence of a legislative veto statute authorizing action by resolution would be void. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 476.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; see text accompanying note 55 *infra*.

<sup>53</sup> See notes 54-59 *infra*.

<sup>54</sup> 342 S.W.2d 517 (Ky. 1960). *Gugel* concerned the validity of an ordinance regulating the salaries of policemen and firemen. *Id.* at 518. The court considered whether the ordinance which was passed by an initiative voting procedure applicable to acts of the city council "legislative" in nature was the proper subject of the initiative procedure. The Kentucky Court of Appeals held that the act of regulating the salaries of public servants did not describe a "new policy or plan," and therefore was administrative. *Id.* at 520. The court held that the ordinance was invalid because it was not the proper subject of the initiative voting procedure. *Id.*

<sup>55</sup> *Id.* at 519.

<sup>56</sup> See text accompanying notes 50-52 *supra*.

<sup>57</sup> See text accompanying note 45 *supra*.

<sup>58</sup> 239 Mass. 606, 133 N.E. 453 (1921). In response to questions posed by the senate, the Massachusetts Supreme Court held that a state law was an invalid delegation of power to Congress because the senate attempted to implement the eighteenth amendment of the Federal Constitution through incorporation by reference of Congress' laws. *Id.* at \_\_\_\_, 133 N.E. at 454. The court further stated that incorporation did not constitute "appropriate legislation" required by the eighteenth amendment. *Id.*

<sup>59</sup> 239 Mass. at \_\_\_\_, 133 N.E. at 454.



constitute an act of legislation because the veto utilizes a legislative resolution rather than following the traditional bill-passing procedure.

An opponent of the legislative veto, Ginnane, has contended that the legislative veto constitutes an act of legislation.<sup>60</sup> Ginnane has argued that legislatures have adopted the veto as a means of enacting law while avoiding compliance with the constitutional requirements governing the passage of legislation.<sup>61</sup> To support the conclusion that the legislative veto constitutes an act of legislation, Ginnane concentrates on the practical effect of the legislative veto.<sup>62</sup> Ginnane has argued that the legal consequences of a legislative veto statute are indistinguishable from the consequences of traditional legislation.<sup>63</sup> Ginnane has noted that legislative vetoes produce results usually accomplished by formal bills, such as executing statutes and disapproving governmental reorganization plans.<sup>64</sup> Since the veto produces the same effect on the law as the formal bill-passing process, Ginnane has argued that the veto provisions should meet the same constitutional procedural requirements as traditional legislation.<sup>65</sup>

In *Atkins v. United States*,<sup>66</sup> the Federal Court of Claims adopted an "effect" analysis in deciding whether a legislative veto constituted a legislative act. The *Atkins* court examined a veto allowing a single house of Congress to annul a presidentially proposed payscale for judges.<sup>67</sup> The plaintiffs defined legislation as any act that repealed, modified, or amended the law, and contended that the veto attempted to make law.<sup>68</sup> Under the plaintiffs' definition, the one-house veto was legislative in nature and required affirmative bi-cameral action to be constitutionally valid.<sup>69</sup> The court rejected the plaintiffs' characterization of the effect of the veto and found that congressional exercise of the veto did not alter the law.<sup>70</sup> The court stressed that the result of the veto merely was to annul an executive recommendation attempting to change existing law.<sup>71</sup> By exercising the veto the legislature ensured that the law would remain unchanged. Thus, the *Atkins* court focused on the effect the veto

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<sup>60</sup> See Ginnane, *supra* note 10, at 593-94; text accompanying notes 61-65 *infra*.

<sup>61</sup> Ginnane, *supra* note 10, at 595. Ginnane indicated that Congress' primary purpose in utilizing the legislative veto is to exclude the president from the law-making process and to avoid constitutional procedural restrictions. *Id.*; see note 81 *infra* (purpose of Alaska procedural safeguards).

<sup>62</sup> See Ginnane, *supra* note 10, at 593.

<sup>63</sup> *Id.* at 593-94; Scalia, *supra* note 20, at 20.

<sup>64</sup> See Ginnane, *supra* note 10, at 593-94; note 10 *supra*.

<sup>65</sup> See Ginnane, *supra* note 10, at 593-94.

<sup>66</sup> 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); see note 42 *supra*.

<sup>67</sup> 556 F.2d at 1063.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* The court noted that a similar result is reached when a single house of Congress votes down a proposal for new legislation. *Id.*

had on the existing law to determine whether the one-house veto was an act of legislation.<sup>72</sup>

State courts have also engaged in an "effect" analysis when deciding whether a resolution procedure is an act of legislation.<sup>73</sup> In *Kelley v. Secretary of State*,<sup>74</sup> the Michigan Supreme Court examined a concurrent resolution calling for an election and noted that the legislature's exercise of the resolution would produce the same effect on the law as if the legislature had passed a bill or a joint resolution.<sup>75</sup> Since the concurrent resolution had the effect of changing existing law, the resolution had to meet the requirements of the state constitutional legislative enactment provisions to be valid.<sup>76</sup> In *State v. Atterbury*,<sup>77</sup> the Missouri Supreme Court examined a concurrent resolution establishing an investigatory committee.<sup>78</sup> The court looked to the substance and effect of the resolution on the existing law to determine whether the resolution constituted an act of legislation within the purview of the gubernatorial veto provision of the Missouri Constitution.<sup>79</sup> Finding that the resolution effected no change in existing law, the court held that the resolution did not have the effect of law, and therefore was outside the scope of the gubernatorial veto.<sup>80</sup>

Courts that apply the effect analysis properly balance the function of the procedural safeguards against the need for legislatures to control agency rule-making. The purpose of the legislative enactment provisions is to confine the process through which a legislature may change the law.<sup>81</sup> The effect analysis subjects any process that changes the law to

<sup>72</sup> *Id.*

<sup>73</sup> See text accompanying notes 74-80 *infra*.

<sup>74</sup> 149 Mich. 343, 112 N.W. 978 (1907). In *Kelley*, the Michigan Supreme Court considered whether a resolution calling for an election constituted a bill or a joint resolution within the meaning of a constitutional provision requiring a concurrence of a majority of both legislative houses for bills and joint resolutions to be valid. *Id.* at \_\_\_\_, 112 N.W. at 979. The court held that the resolution had the same effect as a bill or joint resolution, the traditional law-making devices. *Id.* The resolution, therefore, required the concurrence of a majority of both houses to be valid. *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 300 S.W.2d 806 (Mo. 1957). In *Atterbury* the Missouri Supreme Court held that the legislature, by concurrent resolution, could authorize the formation of a joint investigatory committee after the legislature had adjourned *sine die*, even though the governor had not examined the resolution as required by article III, section 31 of the Missouri Constitution. *Id.* at 817. The court reached this result by finding initially that the joint resolution did not have the force or the effect of law. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* The *Atterbury* court stressed that the effect was temporary and the resolution did not establish a permanent rule of government. *Id.*

<sup>81</sup> See 606 P.2d at 772. The one subject and descriptive title requirements of the Alaska Constitution were designed to prevent fraud in the passage of laws. The use of a specific enactment clause emphasizes that the legislature is speaking with the force of law. The requirement that the bill be read three times insures legislative deliberation and allows time for expression of public opinion. The executive veto prevents the passage of unwise legislation and further serves as a check on the legislative branch of government. *Id.*

the enactment requirements.<sup>82</sup> If the legislative veto changes existing law, it has the same effect on the law as a traditionally passed bill. A legislative veto that changes law, therefore, should be subject to the same legislative enactment requirements as a bill. Thus, the effect-oriented reasoning prevents the type of legislative abuse where a legislature uses the veto to enact legislation without complying with constitutional restraints.<sup>83</sup>

The Alaska Supreme Court should have employed the *Atkins* effect analysis to determine whether the Alaska legislative veto is subject to the article II requirements of the Alaska Constitution. Had the court applied the *Atkins* analysis to the *A.L.I.V.E.* case, it would have found that the legislative veto constituted an act of legislation.<sup>84</sup> In *A.L.I.V.E.*, the Department of Revenue regulation had achieved the force of law.<sup>85</sup> The legislature then repealed the regulation by a concurrent resolution resulting in a change in the substantive law.<sup>86</sup> Applying the *Atkins* test, the Alaska legislative veto constituted an act of legislation since the veto had the same effect on the law as a properly enacted bill. Thus, the Alaska Supreme Court was correct in applying the article II enactment requirements to the veto and holding the legislative veto process violative of the Alaska Constitution.<sup>87</sup>

The conclusion that the legislative veto in *A.L.I.V.E.* constituted an act of legislation is due to the absence of any temporal restraint upon the Alaska legislative veto process.<sup>88</sup> The Alaska statute allowed the legislature to exercise the veto even after the regulation had become effective and achieved the force of law.<sup>89</sup> Conversely, most state pro-

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<sup>82</sup> See text accompanying note 62 *supra*.

<sup>83</sup> See text accompanying note 61 *supra*.

<sup>84</sup> See text accompanying notes 66-71 *supra*.

<sup>85</sup> See 606 P.2d at 771.

<sup>86</sup> *Id.*

<sup>87</sup> See text accompanying note 43 *supra*.

<sup>88</sup> The Alaska statute is unique in its lack of temporal restraints. Many state veto statutes require some kind of legislative action before the rule becomes effective. For example, Oklahoma requires that proposed rules be submitted to the legislature. OKLA. STAT. ANN. tit. 75, § 308(b) (West 1978). If the legislature does not act on the rule within thirty days, the rule is considered to be approved and achieves the force of law. *Id.* at § 308(e). Thus, the legislature must exercise the legislative veto within this time period or resort to more traditional modes of legislation to effect control over administrative actions.

West Virginia, although it uses the legislative veto under a different set of circumstances, also confines the time period in which the legislature can exercise the veto. W. VA. CODE § 29A-3-12 (Michie 1980). First, agencies submit proposed rules to a legislative rulemaking review committee. *Id.* at 29A-3-11. The committee then approves or disapproves the proposed rule. *Id.* Subsequently, the legislature reviews the committee's action and either sustains or reverses the action by concurrent resolution. *Id.* at § 29A-3-12. The legislature must exercise the legislative veto before the end of the legislative term or the rule becomes effective. *Id.*

<sup>89</sup> See 606 P.2d at 775. The *A.L.I.V.E.* court stated that unlike the veto in *Atkins*, the Alaska provision allowed disruption of ongoing executive programs. *Id.*; see text accompanying notes 68-73 *supra*.

cedures confine the legislature's exercise of the veto to the formative stage of administrative rule-making.<sup>90</sup> The statutes creating the legislative veto require the legislature to scrutinize the proposed regulation before it achieves the force of law.<sup>91</sup> If the legislature vetoes a proposed rule before it has the force of law, the legislature's exercise of the veto does not alter the existing law, and therefore does not constitute an act of legislation.<sup>92</sup>

In considering the question whether a legislative veto constitutes legislation, courts should examine the veto process under the *Atkins* effect analysis.<sup>93</sup> Under the effect analysis courts should find that a state legislative veto permitting the legislature to review administrative rules before the rules obtain the force of law does not constitute legislation.<sup>94</sup> A temporally confined legislative veto, therefore, would not have to meet state constitutional requirements controlling the enactment of legislation to be valid.<sup>95</sup> If a legislative veto does not constitute an act of legislation, however, the veto may violate the doctrine of separation of powers since the legislature might be "administrating," an executive function.<sup>96</sup> Thus, a court must further analyze the legislative veto under the separation of powers doctrine to determine the constitutionality of the veto.

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<sup>90</sup> See note 82 *supra*.

<sup>91</sup> See note 88 *supra*.

<sup>92</sup> See text accompanying note 71 *supra*.

<sup>93</sup> See text accompanying notes 61-71 *supra* (discussion of *Atkins*).

<sup>94</sup> See text accompanying notes 90 *supra*.

<sup>95</sup> See text accompanying notes 43-44 *supra*.

<sup>96</sup> See text accompanying note 45 *supra*.