THE | C. BOYDEN | GRAY | CENTER

Unpacking State Legislative Vetoes

Derek Clinger
Miriam Seifter

CSAS Working Paper 23-33
October 24, 2023

Antonin Scalia Law School
C. BOYDEN GRAY CENTER
FOR THE STUDY OF THE
ADMINISTRATIVE STATE
George Mason University

Unpacking State Legislative Vetoes

Derek Clinger
Senior Staff Attorney, State Democracy Research Initiative
University of Wisconsin Law School

Miriam Seifter
Professor of Law
Faculty Co-Director, State Democracy Research Initiative
University of Wisconsin Law School

Last Updated: November 8, 2023

Acknowledgments

The authors thank the C. Boyden Gray Center for the Study of the Administrative State for support of this paper, the participants of the Gray Center's roundtable on Lessons Learned from the States for helpful feedback, Skye Xollo for excellent work on graphics, and Mitchell Muller and Maddie Pollack for valuable research assistance. Any remaining errors are our own.

Contents

Introduction 1

I. Models of State Legislative Oversight of Agency Rulemaking 6

A. The Strong-Form Legislative Veto 9

1. Two-House Vetoes 10

2. Committee Vetoes 12

B. Temporary Suspension Authority 14

C. Legislative Rule Ratification 17

1. Sunset Laws 18

2. REINS Act-Inspired Laws 19

3. No Agency Rulemaking 20

D. Objection Requires Executive Action 21

E. Objection Shifts Burden of Proof to Agency in Legal Actions 23

F. Advisory-Only 23

G. No Formal Oversight 24

II. The Constitutionality and Durability of Legislative Vetoes 25

A. Legislative Vetoes in the Courts 25

1. Strong-Form Legislative Vetoes 26

2. Temporary Suspension Authority 29

B. The Persistence of Legislative Vetoes 30

1. Overriding Adverse Judicial Decisions Through Constitutional Amendments 31

2. No Court Decisions on Legislative Vetoes 32

3. Ignoring or Stretching Adverse Judicial Decisions 33

III. Trending: Pandemic Vetoes 38

Conclusion 42

Appendix A 43

Appendix B 44

Appendix C 45

Appendix D 47

Appendix E 48

Introduction

State-level administrative agencies, like their federal counterparts, play a significant role in governance across the nation. Their responsibilities run the gamut—from elections to education; from public waterways to public health; from property to prisons; from taxis to taxes. Many state legislatures, for their part, have sought to retain checks on agencies' regulatory authority beyond the ordinary legislative and oversight processes. In at least 24 states, statutes (and sometimes state constitutions) establish a "legislative veto" system in which the state legislature—or a subset of the legislature—can halt agency rulemaking outside of the conventional lawmaking process, while 11 more states utilize models of legislative involvement that are close cousins.[1]

Yet state legislative vetoes also raise substantial constitutional questions. The U.S. Supreme Court declared a strong form variant of the tool unconstitutional at the federal

1 For further elaboration of this report's terminology distinguishing legislative vetoes from other oversight mechanisms, see *infra* Part I.

level 40 years ago in *INS v. Chadha*,[2] and most state courts to consider the question have rejected legislative vetoes under state constitutions. Despite this adverse precedent, the prevalence of legislative vetoes has increased over time[3] and surged recently, both as a response to the COVID-19 pandemic[4] and as the fruition of more longstanding and trans-substantive deregulatory efforts.[5]

Today, legislative vetoes play a range of roles in shaping state governance, sometimes operating as a forceful limit on regulatory activity, and other times serving as a softer but important influence on whether and how regulations advance.[6] Some of these processes operate in the weeds of the administrative state, deciding issues like food safety[7] or hunting regulations,[8] while others decide the fate of hot-button issues

2 462 U.S. 919 (1983).

3 The number and variety of legislative oversight mechanism increased over the past 40 years. The number of strong-form legislative vetoes grew modestly from 12 to 15 states as some states abandoned such devices—often in response to state court decisions—while several more embraced them. There were more pronounced increases in other mechanisms: the number of state legislatures with suspension power grew from nine to 15 states, and the number with burden-shifting objection powers rose from three to six states. Other innovations developed over this time period, too, such as the use of strong-form legislative vetoes wielded by committees rather than the full chamber, which rose from zero to eight. To see these trends, compare Part I *infra* with L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 Wm. & Mary L. Rev. 79, 81-83 (1982).

4 Several states added new, subject-specific legislative veto powers in response to the pandemic, see *infra* Part III. *See also* Davis *infra* note 10, at 24-25.

5 The American Legislative Exchange Council (ALEC) has been active in this effort. *See, e.g.*, American Legis. Exch. Council, *Expedited Suspension and Legislative Repeal of Harmful Rules Act*, ALEC, https://perma.cc/E5EV-TXJR (model policy finalized Aug 9. 2020). For the organization's discussion of this model act and other related efforts, see American Legis. Exch. Council, *ALEC Leads on Regulatory Reform*, ALEC (July 17, 2020), https://perma.cc/NAL7-CMMW, and Gretchen Baldau & Jakob Haws, *States Removing Regulatory Roadblocks*, ALEC (Aug. 18, 2022), https://perma.cc/4LV2-AQAS.

6 For instance, in some states, like North Carolina, the legislative veto is frequently used; the state's rule review committee vetoed nearly 200 rules in a recent two-year period. *See* Gary D. Robertson, *Cooper Sues to Alter Powerful NC Government Rules Panel*, Associated Press (Aug. 28, 2020), https://perma.cc/L52S-QKZQ. In other states, like New Jersey and Ohio, the power has been used much more sparingly—just once in each state over a recent 25-year period. *See* Communications Workers of America, AFL-CIO v. New Jersey Civil Service Commission, 234 N.J. 483, 493, 191 A.3d 643 (2018) (describing the legislature's first legislative veto of an agency rule since the power was enshrined in the state constitution in 1992); Laura Hancock, *Lawmakers Stop Rule Change that Would Have Allowed Schools to Eliminate Foreign Languages, Home Ec*, Plain Dealer (Oct. 20, 2021) (describing the state's first legislative veto in 25 years), https://perma.cc/4GSX-NQE8.

7 *See* Connecticut General Assembly, Regulation – 2021-007B, https://perma.cc/HZ48-7ERG (concerning standards for honey and maple syrup producers).

8 *See* Lisa Kaczke, *Legislators Reject Habitat and Predator Bounty Rules, Question Process*, Argus Leader (May 6, 2019), https://perma.cc/WM8C-34VZ (concerning the legislature's rejection of proposed rules to regulate a hunting bounty program); Lisa Kaczke, *Legislators Approve Habitat Program, Question Nest Predator Bounty Program*, Argus Leader (June 3, 2019), https://perma.cc/9RKG-VLX8 (concerning the legislature's subsequent approval and rejection of revised rules related to the hunting bounty program).

related to voting,[9] public health,[10] and LGBTQ rights.[11] In some states, these processes may serve as a mechanism of democratic accountability for an administrative agency. In others, the processes may align with antidemocratic tactics used to reject popular majority preferences in favor of an entrenched—and often gerrymandered—legislative leadership.[12]

This report unpacks state legislative vetoes and aims to prompt renewed conversation on this largely overlooked state governance tool.[13] Evaluating the significance, legality, and desirability of legislative vetoes must start with an understanding of the existing legal landscape, including the wide array of state law provisions and court decisions across the country. The report focuses primarily on state legislative vetoes in the regular administrative rulemaking process, where these mechanisms are most commonly found, though it also discusses the recent COVID-related uptick in the enactment and use of these devices to curb gubernatorial emergency declarations.[14]

---

9 *See, e.g.,* Beth Leblanc, *Benson's Bid to Make Permanent Absentee Voter Rules Draws Opposition*, Detroit News (Nov. 28, 2021), https://perma.cc/JDR2-WSZ8; Mid-Michigan NOW Newsroom, *Benson Rejects Lawmakers' Requested Changes to Absentee Signature Rule*, Up North Live ABC (March 4, 2022), https://perma.cc/YN46-VMRR.

10 *See, e.g.,* Andrew Adams, *Mask Mandate for Illinois Schools Rejected by State Legislative Oversight Committee*, State Journal-Register (Feb. 15, 2022), https://perma.cc/BU6S-4B5H; *see also* Maggie Davis et al, *Emergency Powers and the Pandemic: Reflecting on State Legislative Reforms and the Future of Public Health Response*, 21 J. Emergency Mgmt. 19, 2425 (2023).

11 *See, e.g.,* Nate Wegehaupt, *State Rules Committee Overturns Conversion Therapy Ban*, WORT FM (Jan. 12, 2023), https://perma.cc/BF7X-XSAH; Christina Lieffring, *From LGBTQ 'Conversion Therapy' to Protecting Polluters, GOP Uses a Rules Committee to Bypass Lawmaking*, Up North News (Mar. 17, 2021), https://perma.cc/Q8N3-CBAL.

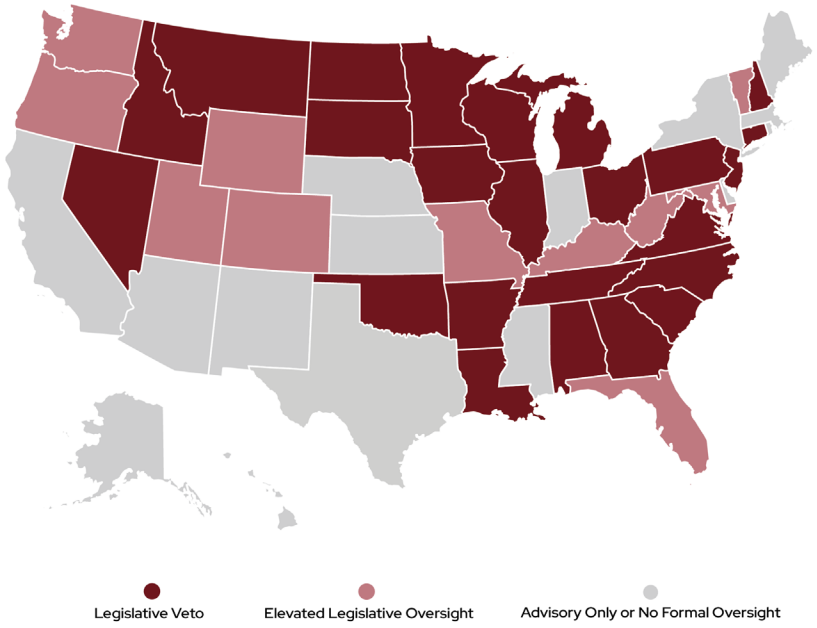
12 On antidemocratic action in state legislatures, see, for example, Michael Wines, *If Tennessee's Legislatures Looks Broken, It's Not Alone*, N.Y. Times (Apr. 14, 2023), https://perma.cc/J28P-XN5M; Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733 (2021); Jacob Grumbach, Laboratories Against Democracy (2022).

13 Although the volume of scholarship on legislative vetoes declined after *Chadha*, several scholars have attended to them over the years, and read together, these works provide a valuable understanding of how veto mechanisms have evolved. *See* Levinson, *supra* note 3; Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1216 (1999); Jason A. Schwartz, *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemaking*, Institute for Policy Integrity, New York University School of Law (2010); Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 Cornell L. Rev. 1133 (2014); Michael J. Berry, The Modern Legislative Veto: Macropolitical Conflict and the Legacy of Chadha (2016); Lyke Thompson & Marjorie Sarbaugh-Thompson, *Checks and Balances in Action: Legislative Oversight Across the States*, Levin Center at Wayne Law (2019); The Council of State Governments, *The Book of the States*, Volume 53 at *95-102 (2021). Scholars have also provided insightful and in-depth analyses of particular states' legislative veto mechanisms. *See, e.g.*, Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 Drake L. Rev. 1, 16-25 (2012) (discussing Iowa); Marc D. Falkoff, *The Legislative Veto in Illinois: Why JCAR Review of Agency Rulemaking is Unconstitutional*, 47 Loy. U. Chi. L.J. 1055, 1084-091 (2016) (discussing Illinois).

14 The report does not discuss legislative vetoes in the context of temporary or emergency administrative rulemaking, where the procedures and corresponding oversight tend to differ from the ordinary administrative rulemaking process, nor does it seek to catalog each state's legislative veto mechanisms that are limited in application to just one or a few state agencies. For examples of the latter, see Ga. Code Ann.§ 31-6-21.1 (providing for a legislative veto of rules promulgated by the state department of community health); Neb. Rev. St. § 69-912 (delaying the effect of proposed rules and regulations related to Medicaid premiums, copayments, and

The report offers two primary findings. *First*, state legislative veto systems are widespread but varied. This report broadly classifies 24 states as having a legislative veto over administrative rulemaking. And among the other 26 states, 11 have a system of legislative involvement in the rulemaking process that goes beyond ordinary lawmaking but does not qualify as a legislative veto. Within these broad classifications, there are several types of legislative oversight, ranging from a strong-form legislative veto resembling the model rejected by the U.S. Supreme Court in *Chadha* to an approach in which a legislative body's objection halts the rulemaking process until the executive branch responds. Even within these categories, significant differences exist, both in design and in practice: For example, North Dakota provides for a strong-form two-house veto, but mandates tight timelines for its use, whereas a Wisconsin legislative committee blocks rules for years through repeated impositions of "temporary" suspensions. There are likewise various models in states that lack strong-form legislative vetoes. And adding further to the variety, legislatures often augment their powers through adoption of multiple oversight models. The end result of all these choices is that virtually no two state legislatures have the exact same system of oversight over agency rulemaking. Thus, the common instinct to discuss "the" legislative veto is inapt in the states.

Mechanisms of Legislative Oversight of Agency Rulemaking



Second, legislative vetoes' prevalence nationwide belies a more complicated legal story: Most state courts to consider legislative vetoes have reached the same bottom line as federal courts, deeming them unconstitutional. In reaching these rulings, states courts have based their holdings on a wide array of provisions of their state constitutions. Some of these rulings have been superseded by constitutional amendment or statutory

deductibles "until the conclusion of the earliest regular session of the Legislature in which there has been a reasonable opportunity for legislative consideration of such rules and regulations.").

adjustment. In other states, direct litigation over the mechanism seems not to have occurred. As an added twist, in a handful of states, current legislative practice seems to disregard key features of state judicial holdings, raising questions about the law's stability—and calling into question the force that state constitutional holdings have in the absence of significant attention from the legal community.[15]

This report proceeds in three parts. Part I provides a 50-state survey of which states have various types of legislative vetoes and other mechanisms of legislative oversight. Because these mechanisms share both similarities and differences, the report organizes states into a broad taxonomy while also highlighting key design choices within each category. Part II addresses the constitutionality and durability of legislative vetoes in the states, charting their journey through the courts and examining how the mechanisms continue to persist despite a large body of case law declaring them unconstitutional. And Part III analyzes a more recent trend in legislative vetoes fueled by the COVID-19 pandemic: their use to curb gubernatorial emergency declarations.

15 *See* Miriam Seifter, *In Search of State Constitutional Communities*, in Amending America's Unwritten Constitution 105 (Cambridge Univ. Press 2022).

I. Models of State Legislative Oversight of Agency Rulemaking

A central finding of this report is that state legislative oversight mechanisms share important similarities as well as key differences. This Part describes both. To capture similarities, this Part organizes the state mechanisms into broad categories that track the strength of the brake the legislative oversight applies, ranging from the strong-form legislative veto to more temporary delays or objections.[16] The table below and Appendix A summarize this taxonomy, and the discussion that follows defines the categories.

The report uses the term *legislative veto* when legislators can halt executive branch action through a process lacking bicameralism, presentment to the governor, or both. A mechanism satisfies this definition if an otherwise-final executive branch action is not final as a result of the veto.

The report further divides legislative vetoes into two types. Under the *strong-form legislative veto*, a legislative entity can fully reject a rule that the executive branch had approved. (This is the type most similar to the veto disapproved by the U.S. Supreme Court in *Chadha*.) Under *temporary suspension*, legislatures can temporarily delay or suspend the rulemaking process or a rule itself while considering legislation to block or amend the rule—though as explained below, suspensions can sometimes be deployed to function as full rejections.[17] The report classifies 24 states as having at least one these types of legislative veto, and several with both:[18] Fifteen states have a strong-form veto, fifteen states and the most recent Model State Administrative Procedure Act (2010) establish temporary suspension power, and six states authorize both.

Many of the states with legislative vetoes, plus 11 additional states, also have one or more mechanisms that are close cousins of legislative vetoes. Six states require *legislative ratification* of a proposed rule (without a veto) through sunsetting or similar regulatory limits. In 15 states, legislators can raise an *objection requiring executive action*, meaning that they can object to a proposed rule and thereby halt the rulemaking process until the executive branch responds to the objection. And in six states, legislators can raise an *objection shifting the burden of persuasion*, meaning that a legislative objection shifts the burden of persuasion to the agency in a subsequent legal challenge to the rule.

---

16 This report omits agency reporting requirements unless they are also paired with an explicit power to halt the regulatory action. However, burdensome reporting requirements—requiring agencies to present the relevant legislative entity with information on a rule's economic impact, small-business impact, or similar—can be functional substitutes for a legislative veto in the sense that they may likewise delay a rule or make its preparation infeasible.

17 *See* discussion *infra* Part I.B.

18 Not all state's mechanisms fit neatly into a single category. A small number of states have legislative oversight powers that appear more like hybrids of the categories used by this report, and these are noted throughout.

Finally, 15 states lack a legislative veto or any other binding methods of legislative oversight. In eight of these states, statutes prescribe ongoing legislative review of agency rules but limit legislatures to an *advisory-only* capacity outside the ordinary legislative process.[19] In the seven other states, the legislatures have *no formal oversight* role in the rulemaking process, though they could of course pass legislation to address a rule.[20]

Mechanisms of Legislative Oversight of Agency Rulemaking

Strong-Form Legislative Veto	Temporary Suspension Authority	Legislative Rule Ratification	Objection Requiring Executive Action	Objection Shifting Burden of Persuasion	Advisory Only	No Formal Legislative Oversight
Arkansas	Alabama	Colorado	Alabama	Iowa	Alaska	California
Connecticut	Georgia	Florida	Florida	Minnesota	Arizona	Hawaii
Georgia	Iowa	Tennessee	Georgia	Montana	Delaware	Indiana
Idaho	Michigan	Utah	Illinois	New Hampshire	Kansas	Massachusetts
Illinois	Minnesota	West Virginia	Kentucky	North Dakota	Maine	Mississippi
Iowa	Montana	Wisconsin	Louisiana	Vermont	Nebraska	New Mexico
Louisiana	New Hampshire		Maryland		New York	Rhode Island
Montana	North Carolina		Michigan		Texas	
Nevada	Oklahoma		Missouri			
New Jersey	Pennsylvania		Oklahoma			
North Carolina	South Carolina		Oregon			
North Dakota	South Dakota		South Carolina			
Ohio	Tennessee		Virginia			
South Dakota	Virginia		Washington			
Wisconsin	Wisconsin		Wyoming			

This taxonomy showcases the broad similarities in legislative oversight of rulemaking across states. But these mechanisms also vary in important ways, and this Part tracks five such distinctions.

First, the composition of the veto holder is an especially important design choice. In 18 of the 24 veto states, a committee wields some or all of the state's veto powers.[21] Even in the states where legislative committees do not wield the state's veto powers, committees still play a significant role, often taking the closest look at the administrative rules and making important recommendations to the full chamber.

Within these committees, states have several choices that involve tradeoffs between competing values that may affect the veto's effects. One choice is the partisan composition of the committees. Three states require an evenly divided partisan makeup

19 See discussion *infra* Part I.F.

20 See discussion *infra* Part 1.G.

21 See *infra*. The 18 states in which a committee wields some of or all the state's veto powers are Alabama, Arkansas, Connecticut, Georgia, Illinois, Iowa, Michigan, Minnesota, Montana, Nevada, New Hampshire, North Carolina (subject to the caveat in note 44), North Dakota, Pennsylvania, South Carolina, South Dakota, Virginia, and Wisconsin.

regardless of the size of the party's caucuses,[22] while several others take an opposing approach and assign a disproportionately large number of seats to the majority party.[23] Another choice is the size of the committee; three states have committees where the total size or quorum requirements allow as few as four legislators to exercise the legislative veto power.[24] A final choice is whether to give the veto power to subject-matter experts or generalists, and most states opt for joint committees that specialize in the administrative rulemaking process rather than standing committees with more specific subject-matter expertise to the rule at issue.[25]

Second, states vary as to the legal basis for the veto, and thus its durability. In most states, the veto authority is established by statute; in six, the state constitution itself establishes or otherwise authorizes a strong-form veto,[26] and in two, the state constitution authorizes the legislature to temporarily suspend the rulemaking process when rules are adopted in between regular legislative sessions.[27]

Third, there is variety as to the standard for vetoing a rule—but all confer significant

---

22 These states are Connecticut, Illinois, and Montana. Conn. Gen. Stat. § 4-170; 25 Ill. Comp. Stat. 130/1-5(a); Mont. Code Ann. § 5-5-211.
Among the states that lack a legislative veto but otherwise have an elevated form of legislative oversight of rulemaking, Washington has a similar bipartisan requirement for its rule review committee. Wash. Rev. Code § 34.05.610.

23 In Alabama, for instance, only four of the 21 members that make up the rule review committee are statutorily reserved for the legislative minority party. Ala. Code §§ 41-22-3(2), 29-6-1.
This dynamic also occurs in states with oversight mechanisms other than legislative vetoes. In Wyoming, for instance, only two of the 10 seats on the state's rule review committee are reserved for the legislative minority party. Wyo. Stat. Ann. § 28-8-102; *see also* 2021 Wyo. Sess. Laws, Ch. 157, § 1 (reducing the rule review committee's membership from 13 members to 10 members and eliminating three seats that had been reserved for the legislative minority party). And in Kentucky, the rule review committee consists of eight members—four from each chamber—and state law provides that the majority party in each chamber gets three of the four seats, with the result being that a party in the minority of both legislative chambers would have only two of eight seats on the committees. Ky. Rev. Stat. Ann. § 13A.020(1).

24 In Iowa and South Dakota, the rule review committees consist of only six members, such that only four legislators can constitute a majority and exercise the committees' powers. Iowa Code § 17A.8; S.D. Codified Laws § 1-26-1.1. (For comparison, the overwhelming majority of similar rulemaking-focused committees have 10 or more members.) And in Alabama, the rule review committee consists of 21 members, but state law provides that only six members are needed to constitute a quorum and exercise the committee's strong objection power. Ala. Code § 41-22-22 (1975).

25 Among the veto states that use joint rule review committees, only one has a provision designed to involve relevant subject matter experts in the rule review process. In North Dakota, state law provides that the joint committee authorized to veto proposed rules must have at least one member from each of the legislature's standing committees from the prior legislative session. N.D. Cent. Code § 54-35-02.5.
Similarly, among the states that lack a legislative veto but otherwise have an elevated form of legislative oversight of rulemaking, only one state that uses a joint rule review committee addresses involving subject matter experts. This is in Utah, where state law expressly authorizes the rulemaking-focused joint committee to involve members from the other legislative standing committees with particularly relevant subject matter expertise. Utah Code Ann. § 63G-3-501(4).

26 *See infra*. These states with constitutional provisions that authorize strong-form legislative vetoes are Arkansas, Connecticut, Idaho, Iowa, Nevada, and New Jersey.

27 *See infra*. The states with constitutional provisions that authorize the legislature to temporarily suspend the rulemaking process when rules are adopted in between regular legislative sessions are Michigan and South Dakota.

discretion on the veto holder.[28] In seven states, there is no limitation at all on the grounds for vetoing a rule.[29]

Fourth, although most state legislative vetoes apply only to proposed regulations or executive actions that have not yet been implemented, a third of the veto states—eight in total—allow their veto-holders to rescind (or suspend or object to) regulations that are already in effect.[30]

Fifth, and finally, states prescribe different timing requirements for the exercise of oversight. In the abstract, detailed timing requirements tend to correlate with more predictable legislative involvement; either a veto process (or suspension or objection) is completed in time or it is forfeited. That said, as the report describes, there is some evidence of strategic behavior around timing requirements that evade such constraints.

The remainder of this Part describes each category in the taxonomy in turn, explaining the features that states in the category share while also highlighting the key variations within each.

A. The Strong-Form Legislative Veto

Fifteen states currently authorize legislative entities to reject or invalidate proposed or existing rules that have been approved by the executive branch—a strong-form legislative veto. These states are Arkansas, Connecticut, Georgia, Idaho, Illinois, Iowa, Louisiana, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, South Dakota, and Wisconsin.[31] About half of these states use a *two-house veto*, requiring the agreement of both legislative chambers to veto a rule, and the other half use a *committee veto*, allowing a joint legislative committee to veto a rule. No state currently authorizes a *one-house veto* in which one legislative chamber can block or invalidate a rule—the type of mechanism at issue in *Chadha*—but at least two states previously authorized this type of veto,[32] and another recently saw legislation introduced to create one.[33]

---

28 *See infra*.

29 *See infra*. The strong-form veto states that do not set forth any limitation on the grounds for vetoing a rule are Connecticut, Georgia, Louisiana, and Iowa. The temporary suspension states that do not set forth any limitation on the grounds for suspending the rulemaking process are Minnesota, Oklahoma, and South Carolina.

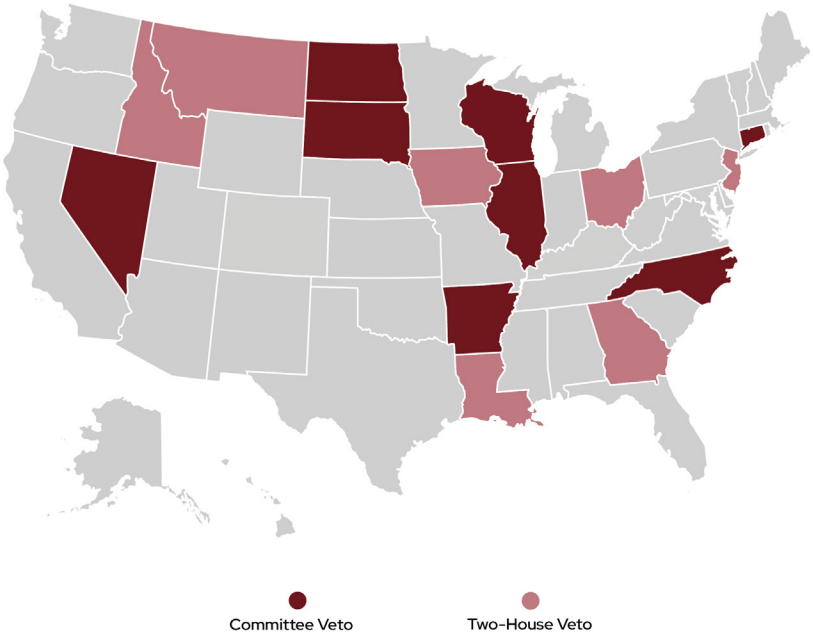
30 *See infra*. The strong-form veto states that allow the rescission of existing rules are Illinois, Iowa, Idaho, Louisiana, Montana, New Jersey, and Ohio. The one state that allows its legislature to temporarily suspend the effect of an existing rule is Wisconsin.

31 Ark. Const. art. 5, § 42; Ark. Code Ann. § 10-3-309; Conn. Const. art. 2; Ga. Code § 50-13-4(f); Idaho Const. art. III, § 29; Idaho Code § 67-5291; 5 Ill. Comp. Stat. CH 100/5-115; Iowa Const. art. III, § 40; Iowa Code § 17A.8(9); La. Stat. Ann. § 49:969; Mont. Code Ann. § 2-4-412(1)(b); Nev. Const. art. 3, § 1(2); Nev. Rev. Stat. § 233B.060(2), 233B.067; N.J. Const. art V, § 4, par. 6; N.C. Gen. Stat. §§ 143B-30.1; N.D. Cent. Code § 28-32-18; Ohio Rev. Code Ann. § 106.02; S.D. Codified Laws §§ 1-26-4.9, 1-26-4.7 (reversion procedure), 1-26-4.3; Wis. Stat. § 227.19(5)(dm).

32 *See* Falkoff, *supra* note 13, at 1084 (identifying prior one-house vetoes in Oklahoma and Pennsylvania).

33 An Act Relating to Administrative Rules, H.B. 197, 67th Leg., 1st Sess. (Idaho 2023); *see also* Clark Corbin, *GOP Legislators Pushing New Bill to Change Idaho Legislature's Administrative Rulemaking Process*, Idaho Capital Sun (Feb. 15, 2023), https://perma.cc/568H-2KBD.

States with Strong-Form Legislative Vetoes



1. Two-House Vetoes

The seven states that authorize two-house vetoes are Georgia, Idaho, Iowa, Louisiana, Montana, New Jersey, and Ohio.[34]

These states largely follow a similar blueprint. Typically, the review begins with either a joint legislative committee that focuses on administrative rulemaking or with each chamber's standing committee that has subject-matter expertise most relevant to the rule under review; the former is slightly more common. These committees can provide feedback to the requesting agency, and if dissatisfied with the agency's response, can formally recommend that the whole legislature reject or modify the rule.[35] Such a recommendation typically requires a joint or concurrent resolution, which usually requires majority approval in each chamber.[36] If the resolution passes both chambers and thus rejects or modifies the rule, the affected agency is generally free to try to promulgate the rule or an amended version of it again.[37]

34 *See supra* note 31.

35 *See, e.g.*, Ohio Rev. Code Ann. § 106.021 (authorizing the legislature's Joint Committee on Agency Rule Review to review proposed and existing rules and recommend that the legislature adopt a concurrent resolution to invalidate a rule); *see also* Idaho Code § 67-5201(11) (requiring legislative approval to finalize any rule); Idaho Code § 67-5291 (authorizing the legislature's standing committees to review temporary, pending, and final rules to determine if the rules are consistent with legislative intent, and to report their findings to the legislature, which can then adopt a concurrent resolution to approve or reject a rule, in whole or in part).

36 *See, e.g.*, Iowa Const. art. III, § 40 (authorizing the legislature to nullify an adopted administrative rule by passage of a resolution by a majority of all of the members of each house of the legislature). An exception to the typical majority vote requirement is Georgia, where a two-thirds majority of each chamber is required to sustain a veto. Ga. Code Ann. § 50-13-4(f). If the resolution to veto a rule garners a majority, but less than two-thirds, then the resolution to invalidate a rule must be presented to the Governor for approval or disapproval. *Id.*

37 An exception to this is Ohio, where the agency must wait for the next legislative session before trying to promulgate a substantively similar rule again. Ohio Rev. Code Ann. § 106.042.

Although the two-house vetoes all follow this general approach, they vary along the dimensions mentioned earlier in this report. These differences include the permissible grounds for the veto;[38] whether the veto applies only to proposed rules or also extends to existing rules;[39] timing requirements that determine how long a proposed rule can be left in limbo while the legislature reviews it;[40] and whether the legal authority for the veto comes from state statutes or the state constitution.[41]

---

38 On the more constrained end of the spectrum, rules in Idaho and New Jersey can be vetoed only if the legislature finds them to be contrary to legislative intent—a standard that still appears to give the legislature broad discretion. Idaho Const. art. III, § 29; Idaho Code § 67-5291; N.J. Const. art. V, § 4, par. 6; *see also* Mead v. Arnell, 791 P.2d 410, 420 (Idaho 1990) (holding that the Idaho legislature failed to properly invoke its legislative veto authority due to the legislature's failure to explain in the resolution how the rule failed to comply with legislative intent); Commc'ns Workers of Am. v. N.J. Civil Serv. Comm'n., 191 A.3d 643 (N.J. 2018) (holding that the legislature's determination that a rule or proposed rule is contrary to legislative intent is judicially reviewable).

In Ohio, proposed or existing rules can be vetoed for any of seven statutory criteria, including findings that a rule is contrary to legislative intent, exceeds the scope of the agency's statutory authority, or conflicts with another rule, or that the agency failed to demonstrate that "the regulatory intent of the rule justifies its adverse impact on businesses." Ohio Rev. Code Ann. § 106.021.

In Montana, the only substantive limitation on the legislative veto authority is that the legislature can only reject rules adopted during the "interim" period between regular legislative sessions. Mont. Code Ann. § 2-4-412(1)(b). This would have more significance in states where legislative sessions run throughout much of the year, but the Montana legislature is *usually* in the interim period—the state's legislature ordinarily meets for just one 90-day regular session every two years. *See* Mont. Const. art. V, § 6.

On the least constrained end of the spectrum, there are no express standards that guide the Georgia, Iowa, and Louisiana legislatures' decisions to veto a rule.

39 The two-house veto states that allow for the rescission of existing rules are Idaho, Iowa, Louisiana, Montana, New Jersey, and Ohio.

40 In Ohio, the legislature and its agency-rule-focused committee can review a rule and veto it before it takes effect, and they ordinarily have a combined 65 days to do so. Ohio Rev. Code Ann. §§ 106.02, 106.023.

In Georgia and Iowa, legislative committees have a more limited amount of time to review proposed rules before they automatically take effect—typically, at least 30 days in Georgia and 21 days in Iowa. *See* Ga. Code § 50-13-4(e)-(f); Iowa Code § 17A.8. (For a comprehensive analysis of Iowa's Administrative Rules Reviews Committee procedure, see Anderson & Poynor, *supra* note 13.) But, in both states, if a reviewing committee objects to a proposed rule during this time period, the effective date of the rule can be stayed for a much longer period of time while the legislature considers rejecting the rule. In Iowa, the rule's effective date can ordinarily be stayed until the end of the current legislative session, which typically falls in mid-to-late April each year. Iowa Code §§ 17A.8, 2.10 (ending legislators' eligibility for a per diem for expenses on the 100th calendar day in an even-numbered year and the 110th calendar day in an odd-numbered year). In Georgia, a rule's effective date can potentially be stayed until the 30th day after the beginning of the next legislative session, though the process is a bit more complicated than Iowa's. *See* Ga. Code § 50-13-4(e)-(f) (staying a rule's effective date when *both* legislative chambers' reviewing committees object to a proposed rule but not when only one committee objects to the rule).

New Jersey does not set a time period during which a proposed rule's effective date is stayed; the legislature is authorized to invalidate a proposed (or existing) rule at any time. N.J. Const. art V, § 4, par. 6; *see also* N.J. Stat. Ann. § 52:14B-4.3.

Finally, the legislatures in Louisiana and Montana are not authorized to veto proposed rules—only existing rules—and there are no applicable timing limitations. *See* La. Stat. Ann. § 49:969; Mont. Code Ann. § 2-3-412(1)(b).

41 In Idaho, Iowa, and New Jersey, authority for legislative vetoes is found in the state constitutions, whereas the legislative vetoes in Georgia, Louisiana, Montana, and Ohio are authorized only by statute. *See supra* note 31; *but see* David Alexander Peterson, *Louisiana's Legislative Suspension Power: Valid Method for Override of Environmental Laws and Agency Regulations?,* 53 La. L. Rev. 247, 255-56 (1992) (arguing that Louisiana's legislative veto is an extension of the legislature's power under the state constitution's suspension clause).

In 2021, the Ohio General Assembly, upon the recommendation of its Joint Committee on Administrative Rule Review (JCARR), vetoed a proposed rule from the Ohio Department of Education that would have allowed schools to stop offering foreign languages, technology, family and consumer sciences, and business education. A member of JCARR timely introduced a resolution setting forth the basis of JCARR's recommendations, and within a week, both legislative chambers unanimously approved the resolution. This invalidated the rule and prevented the Department from pursuing the rule for the remainder of the legislative term.[42]

2. Committee Vetoes

The eight states that authorize a legislative committee to exercise a strong-form legislative veto are Arkansas, Connecticut, Illinois, Nevada, North Carolina, North Dakota, South Dakota, and Wisconsin,[43] though the rule review committee in North Carolina is more of a hybrid entity than a legislative one.[44]

The committee veto mechanisms begin with a similar process to the two-house vetoes in that reviewing legislators first attempt to resolve any concerns with the requesting agency before resorting to the veto mechanism. The key distinction, of course, is that in the committee veto states, both the reviewing responsibility *and* the veto power rest with a single, joint legislative committee or subcommittee whose focus is on administrative rulemaking.[45] (No state authorizes a committee from a single legislative chamber to exercise a strong-form legislative veto.) If the reviewing committee feels that the agency did not adequately respond to its concerns, then the committee, typically by majority vote, can reject or modify the rule or otherwise block the agency from promulgating it. With some exceptions for rules adopted through emergency or other expedited rulemaking processes, none of these provisions authorize a committee to rescind an existing rule.[46]

Beyond this general process, the committee veto mechanisms, again, have several important differences. These include requirements for who can serve on the veto

42 *See* H.R. Con. Res. 35, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (enrolled); *see also* Hancock, *supra* note 6.

43 *See supra* note 31.

44 The rule review committee in North Carolina is the Rules Review Commission. It is technically organized under the executive branch, but its members are all appointed by the legislature without the executive's approval (though legislators cannot serve on the Commission). *See* N.C. Gen. Stat. §§ 143B-30.1, 120-123. Given this design, it has been described as "not quite executive, not quite legislative, not quite independent, and of debatable constitutionality." Schwartz, *supra* note 13, at 317. With this caveat, we include the Rules Review Commission in the legislative veto analysis. *But see* Schwartz, *supra* note 13, at 317 (labeling the Rules Review Commission as an independent review body instead of a legislative body).

45 These committees consist of Arkansas's Administrative Rules Subcommittee of the Arkansas Legislative Council, Connecticut's Legislative Regulation Review Committee, Illinois's Joint Committee on Administrative Rules, Nevada's Legislative Commission and its Subcommittee to Review Regulations, North Carolina's Rules Review Commission, North Dakota's Administrative Rules Committee, and South Dakota's Interim Rules Review Committee.

46 In Illinois, for instance, the rule review committee can rescind existing rules that were adopted either as an emergency or as a "peremptory" rule but cannot rescind an existing rule that was promulgated through the ordinary rulemaking process. 5 Ill. Comp. Stat. 100/5-115(a), 5-120, 5-130.

committee, including subject matter expertise and partisanship;[47] the standards, if any, that guide the committee's decision to veto a rule;[48] whether the committee veto can be reviewed and overturned by other legislators;[49] whether the legal authority for the veto is statutory or constitutional;[50] and timing requirements that determine how long a proposed rule can be left in limbo while the legislature reviews it.[51]

---

47 As to subject matter expertise requirements, Arkansas and North Dakota have provisions intended to involve legislators with a particular knowledge base in the committee veto process. In Arkansas, the veto-wielding committee is authorized—and sometimes required—to first refer a proposed rule to a specific subject matter committee for consideration before the veto committee undertakes its review to approve or not approve the rule. *See* Rules of Administrative Rules Subcommittee of the Legislative Council, Section 1(g)-(h), https://perma.cc/CUS3-9FTM. And in North Dakota, state law requires the veto committee to include at least one member who served during the most recently completed legislative session from each of the standing committees from either legislative chamber. N.D. Cent. Code § 54-35-02.5.

48 Arkansas's Legislative Council and its Administrative Rules Subcommittee are ostensibly the most constrained, in that they can disapprove a rule only if the rule is inconsistent with legislative intent or with state or federal law. Ark. Code Ann. § 10-3-309(f)(1). In Illinois, Nevada, North Carolina, North Dakota, South Dakota, and Wisconsin, the respective state laws set forth numerous reasons for vetoing rules, including any inconsistencies with state law or legislative intent, failure to follow various procedural or formatting requirements, unsatisfactory explanations as to the impact of or the need for the rule, and the impact of the rule on certain segments of the public, including on small businesses or school districts, among other reasons. *See* 5 Ill. Comp. Stat. 100/5-110(a); N.C. Gen. Stat. § 150B-21.9; Nev. Rev. Stat. § 233B.067(5); N.D. Cent. Code § 28-32-18(1); S.D. Codified Laws § 1-26-4.7; Wis. Stat. § 227.19(5)(dm), (4)(d). And in Connecticut, there are no express constraints on the reasons why the Legislative Regulation Review Committee can veto a proposed rule.

49 Committee vetoes can be reviewed and overturned by other legislators in five of the committee veto states. In Arkansas and North Dakota, certain committees consisting of legislative leaders can overrule a committee veto. Ark. Code Ann. §§ 25-15-204(f), 10-3-309(c); N.D. Cent. Code § 28-32-18. And in Connecticut, Illinois, and Wisconsin, majorities from both legislative chambers are needed to overturn a committee veto. 5 Ill. Comp. Stat. 100/5-115(c); Conn. Gen. Stat. §§ 4-170, 4-171; Wis. Stat. § 227.19(5)(em), (fm).

50 In Arkansas, Connecticut, and Nevada, the strong-form vetoes are authorized by the respective state constitutions, whereas in Illinois, North Carolina, North Dakota, South Dakota, and Wisconsin, the strong-form vetoes are authorized only by statute. *See supra* note 31.

Interestingly, in North Dakota, the legislature recognized that there are questions about the constitutionality of its statute, and it enacted contingency legislation that would go into effect if the veto mechanism is declared unconstitutional. This contingency plan would authorize a legislative committee to temporarily suspend rules instead of vetoing them. *See* 2001 N.D. Laws, Ch. 293, § 36 ("Section 13 of this Act is suspended from operation and becomes effective retroactive to August 1, 2001, upon a ruling by the North Dakota supreme court that any portion of subsection 1 of section 28–32–18 as created by section 12 of this Act is unconstitutional."); *see also* North Dakota Legis. Council, *Administrative Rules Committee – Background Memorandum*, at *4 (Sep. 2021) https://perma.cc/3MNY-QUJ9 (describing the history of the legislature's contingency plan).

51 Most states impose relatively short timelines for the committee's action, while a smaller number allow the committees to substantially slow the rulemaking process. On the speedier side, Arkansas and Nevada allow the promulgating agency to place a proposed rule directly on the veto committees' agendas for consideration with sufficient notice. *See* Rules of the Administrative Rules Subcommittee of the Arkansas Legislative Council, Section 1(c), available at https://perma.cc/G447-T2XB; Ark. Code Ann. § 10-3-309(c)(3)(B); Nev. Rev. Stat. § 233B.067(3)(a). Illinois and Connecticut have 45- and 65-day review periods, respectively, after which a proposed rule can take effect if the veto committee otherwise failed to reject the rules, though these review periods can effectively be extended if the committees timely object to aspects of a rule. 5 Ill. Comp. Stat. 100/5-40(c)-(d); Conn. Gen. Stat. Ann. § 4-170(c). Similarly, in North Dakota, the veto committee can void all or part of a proposed rule only if the rule is considered by the committee by the middle of the month before the rule change would otherwise be published in the administrative code supplement; even then, the veto committee generally can void a proposed rule only at the meeting at which the rule is initially considered or at the next meeting. N.D. Cent. Code § 28-32-18(1)-(2).

In 2019, the South Dakota Legislature's Interim Rules Review Committee (IRRC) used its veto authority to compel changes to a few high-profile hunting regulations proposed by the state's Games, Fish & Parks Department, including allowing people to have traps and snares on public lands later in the year and creating a hunting license raffle to raise funds for habitat programs.[52] The IRRC initially rejected the rules, questioning the Department's rulemaking authority and raising cost concerns, but approved revised versions a month later.[53]

B. Temporary Suspension Authority

Fifteen states, including six with a strong-form legislative veto, authorize their legislatures to temporarily delay or suspend the promulgation or effect of a rule. These states are Alabama, Georgia, Iowa, Michigan, Minnesota, Montana, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin.[54] In addition, the most recent version of the Model State Administrative Procedure Act (2010) recommends authorizing state legislatures to temporarily suspend or delay rules.[55] (North Dakota also has a contingency plan in place that will authorize the legislature to temporarily suspend rules if the state supreme court strikes down the state's strong-form legislative veto.[56])

The timelines are less clear in North Carolina, South Dakota, and Wisconsin. In North Carolina, the veto committee is directed to review all rules in accordance with a statutory timetable that contemplates a review period of no longer than about 70 days, but the committee is also authorized to effectively extend its review period by at least an additional 140 days. N.C. Gen. Stat. §§ 150B-21.9(b), 150B-21.13, 150B-21.14. In South Dakota, state law provides that a proposed rule must be approved by its veto committee before it can take effect but does not establish a timeline for completion of this review process, suggesting that the committee could indefinitely hold up a proposed rule. *See* S.D. Codified Laws § 1-26-4.3. (South Dakota law used to provide that if the veto committee failed to meet on a proposed rule during a 75-day review period, then the rule could go into effect; however, this was repealed in 2016. *See* 2016 S.D. Sess. Laws, Ch. 12, § 1.) And in Wisconsin, state law provides a number of ways through which the rule review committee can delay or suspend the rulemaking process—for years, in some instances—before the committee can then impose an "indefinite objection" on a rule, thereby preventing its promulgation unless subsequently authorized by legislation. Some of these suspension powers are discussed in more detail in Parts I.B. and II.B.3.

52 *See* Kaczke, *supra* note 8.

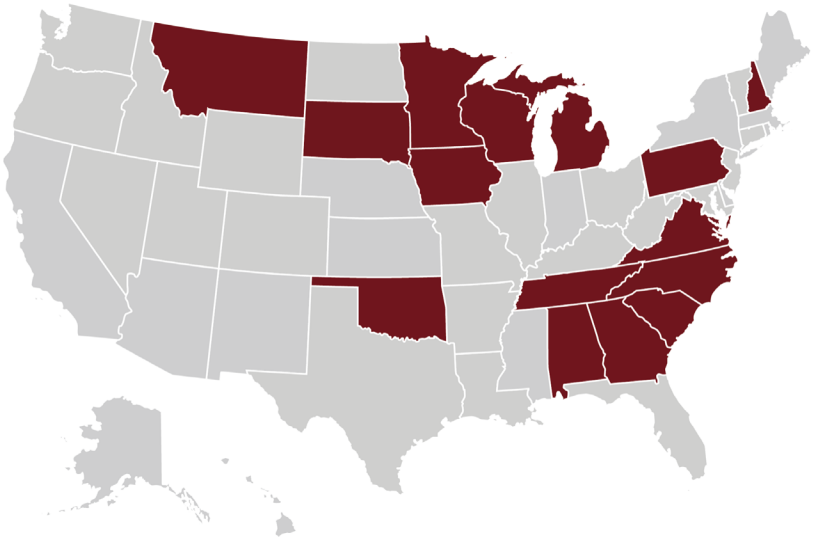
53 *See id.*

54 Ala. Code § 41-22-23(a)(4); Ga. Code § 50-13-4(f)(2); Iowa Code §§ 17A.4(8), 17A.8(9); Mich. Comp. Laws § 24.245a(7); Minn. Stat. § 14.126; Mont. Code Ann. § 2-4-305(9); N.H. Rev. Stat. Ann. § 541-A:13(VII)(b)-(c); N.C. Gen. Stat. § 150B-21.3(b1)-(b2); Okla. St. tit. 75 § 308(A); 71 Pa. Cons. Stat. § 745.7; S.C. Code Ann. § 1-23-120(D); S.D. Const. art. 3, § 30; S.D. Codified Laws § 1-26-38; Tenn. Code Ann. § 4-5-215; Va. Code Ann. §§ 2.2-4014, 2.2-4015; Wis. Stat. § 227.19.
The delays in Alabama and Virginia arise from legislative objections that also require a response by the executive branch; these objection provisions are discussed *infra* in Part I.D.

55 Model State Administrative Procedure Act (2010), § 703.

56 2001 N.D. Laws, Ch. 293, §§ 13, 36 ("Section 13 of this Act is suspended from operation and becomes effective retroactive to August 1, 2001, upon a ruling by the North Dakota supreme court that any portion of subsection 1 of section 28–32–18 as created by section 12 of this Act is unconstitutional.")

States with Temporary Suspension Provisions



Temporary Suspension Authority

Typically, the temporary suspension powers are authorized by statute and involve both a legislative committee and the entire legislature.[57] If the reviewing committee opposes a proposed rule—the states differ on the reasons why the committee can oppose a rule[58]—the committee can introduce legislation to block or amend it.[59] Once that legislation is introduced, the rule is put on hold until the legislation passes or fails or a set time period expires. The maximum length of the suspension, and therefore how long a rule can be

57 Only two states have constitutional provisions that expressly authorize the legislature to temporarily suspend agency rules, Michigan and South Dakota, and both are limited to rules that are adopted in between legislative sessions. S.D. Const. art. III, § 30; Mich. Const. art. IV, § 37. For Michigan, this is a significant limitation , as the legislature typically meets throughout the year and is rarely in between legislative sessions. This is less of a limitation for South Dakota's legislature, however, because legislative sessions last only 40 working days in odd-numbered years and 35 working days in even-numbered years. *See* S.D. Const., art. III, § 6.

58 The Model State Administrative Procedure Act (2010) sets forth five criteria that a reviewing legislative entity looks for: the rule is not a valid exercise of delegated legislative authority; authority for the rule expired or was repealed; the rule is inconsistent with legislative intent; the rule is not a reasonable implementation of the law as it applies to an affected class of persons; and the agency did not satisfactorily comply with any regulatory analysis requirements. Model State Administrative Procedure Act (2010), § 702(b). Legislative entities in Michigan, New Hampshire, Pennsylvania, and Wisconsin review for all or most of these factors and a few other criteria, such as concerns about economic impact or the public interest. *Cf.* Mich. Comp. Laws § 24.245a(2); N.H. Rev. Stat. Ann. § 541-A:13; 71 Pa. Stat. Ann. § 745.5b; Wis. Stat. § 227.19(d). In contrast, legislative entities in North Carolina, Oklahoma, and South Carolina are not limited to a specified set of factors. *Cf.* N.C. Gen. Stat. § 150B-21.3; Okla. Stat. tit. 75 §§ 307.1, 308; S.C. Code Ann. § 1-23-120.

59 An exception to this general practice is Georgia, which imposes a supermajority vote requirement to suspend a rule: a vote to suspend a rule requires the reviewing standing committees from each legislative chamber to approve the suspension by two-thirds votes of the committees' members. Ga. Code § 50-13-4(f)(2).
Another notable exception is North Carolina where, instead of a legislative committee, 10 or more people, including members of the public, can submit written objections to a rule approved by rule-reviewing executive entity, thereby requiring the legislature to consider introducing legislation to disapprove the rule. N.C. Gen. Stat. § 150B-21.3(b1)-(b2).

left in limbo, varies considerably across the states, ranging from as few as 21 days to adjournment of the next regular legislative session, which could be more than a year away depending on the length of the state's legislative session.[60]

Wisconsin stands as a notable exception to the typically short delay period across the states. Wisconsin's rule review process is lengthy and complicated, and multiple provisions in state law authorize the legislature's Joint Committee for Review of Administrative Rules (JCRAR) to delay and suspend rules for a seemingly indefinite period of time.[61] In a recent instance discussed further in Part II.B.3, JCRAR's use of its delay and suspension powers made a rulemaking process that typically takes to 13 months to complete take over three years—and once the rule finally took effect, JCRAR used another suspension power to promptly suspend it again through at least the end of 2024.

---

60 *Cf.* Ala. Code § 41-22-23(a)(4) (providing that the rule review committee's objection can delay a rule's effective date until adjournment of the next regular legislative session that commences after the lieutenant governor approves a rule over the committee's objection); Iowa Code § 17A.8(8)-(9) (authorizing the rule review committee to delay the effective date of a rule until the adjournment of the next regular legislative session); Iowa Code § 17A.4(8) (providing that the legislature can suspend a rule for a 70-day period to give the legislature more time to study the rule); Mich. Comp. Laws § 245a(7)-(8) (270 days after the responsive legislation was introduced); Minn. Stat. § 14.126 (until adjournment of the next legislative session that begins after the legislative committees vote to advise the agency not to adopt the rule as proposed); Mont. Code Ann. § 2-4-305(9) (upon publication of the last issue of the state's rules register that can be published before expiration of a six-month during which a notice of the rule adoption must be published); N.H. Rev. Stat. Ann. § 541-A:13(VII)(b)-(c) (upon passage of 90 consecutive calendar days when the legislature was in session, though it can extend into the next legislative session under certain circumstances); N.C. Gen. Stat. § 150B-21.3(b1)-(b2) (ordinarily until the final legislative session day if the legislature adjourns without enacting responsive legislation, though it can extend into the next session under certain circumstances); Okla. Stat. tit. 75 § 308(A) (same); 71 Pa. Cons. Stat. § 745.7(d) (providing a rule review committee with 14 days to consider introducing legislation to block or amend a proposed rule and the legislature with the longer of 30 calendar days or 10 session days to consider the rule review committee's legislation, if introduced); S.C. Code Ann. § 1-23-120 (until a negative vote on the legislation, at which point a 90 to 120-day period begins to toll before the rule takes effect); S.D. Codified Laws § 1-26-38 (until July 1 of the year following the year in which the rule became or would have become effective); Tenn. Code Ann. § 4-5-215 (authorizing the joint government operations committee to suspend the rulemaking process for a period up to 90 days); Va. Code Ann. §§ 2.2-4014, 2.2-4015 (authorizing standing committees and a joint rule review committee to suspend the rulemaking process for no more than 21 days; these committees can also seek the governor's consent to suspend a proposed rule until the end of the next legislative session); Model State Administrative Procedure Act (2010), § 703(d) (recommending that the rule review committee can delay the effective date of a rule until the adjournment of the next regular legislative session).

61 While a proposed rule is still pending, JCRAR can "object" to it, which has the effect of delaying the rule's effective date for the remainder of the current legislative session, and potentially until the end of the next legislative session, while the legislature considers legislation to block or amend the rule. Wis. Stat. § 227.19(c)-(g). Then, once a rule has been finalized and takes effect, JCRAR is authorized to again suspend the rule for the remainder of the current legislative session while the legislature (again) considers legislation to block or amend the rule. Wis. Stat. § 227.26(2)(h). Then, even if JCRAR's members are unsuccessful in convincing the legislature to block or amend the rule and the rule takes effect at the end of the session, state law allows JCRAR, at the next legislative session, to again suspend the rule for the remainder of that session, and to engage in this suspension process "multiple" times. Wis. Stat. § 227.26(2)(im).

In 2022, the Pennsylvania General Assembly used its temporary suspension authority to effectively delay the implementation of charter school regulations from March to June, while legislators considered, and ultimately adopted, a concurrent resolution disapproving the regulation.[62] The governor vetoed the resolution, though he also argued that the resolution was procedurally deficient, contending that the legislature did not approve the resolution in the timeline contemplated by state law.[63] The next month, however, the governor agreed to pull the regulations as part of budget negotiations with the legislature.[64]

C. Legislative Rule Ratification

Six states, including a strong-form legislative veto state, adopt a strong-form mechanism for a legislative entity to reject regulations but flip the default: rather than halting regulation through legislative action, these states halt regulation unless the full legislature acts through bicameralism and presentment. There are several styles of this ratification approach. One is a sunset approach in which rules expire after a set time period unless extended by legislation.[65] Another approach is inspired by the proposed federal Regulations from the Executive in Need of Scrutiny Act (the "REINS Act"), which requires legislative approval of administrative rules that are deemed to have a significant economic impact.[66] And in the final approach, *all* proposed rules must be adopted as legislation unless the legislature provides otherwise.

62 *See* Marley Parish, *In a Victory for the Wolf Administration, Pa. Review Board Approves Charter School Regulations*, Pennsylvania Capital Star (Mar. 21, 2022), https://perma.cc/AD8L-2TMA; Jan Murphy, *Charter School Rule Changes Hit Last-Minute Snag, Delaying Their Effective Date*, Patriot-News (June 15, 2022), https://perma.cc/K9UD-UW2J.

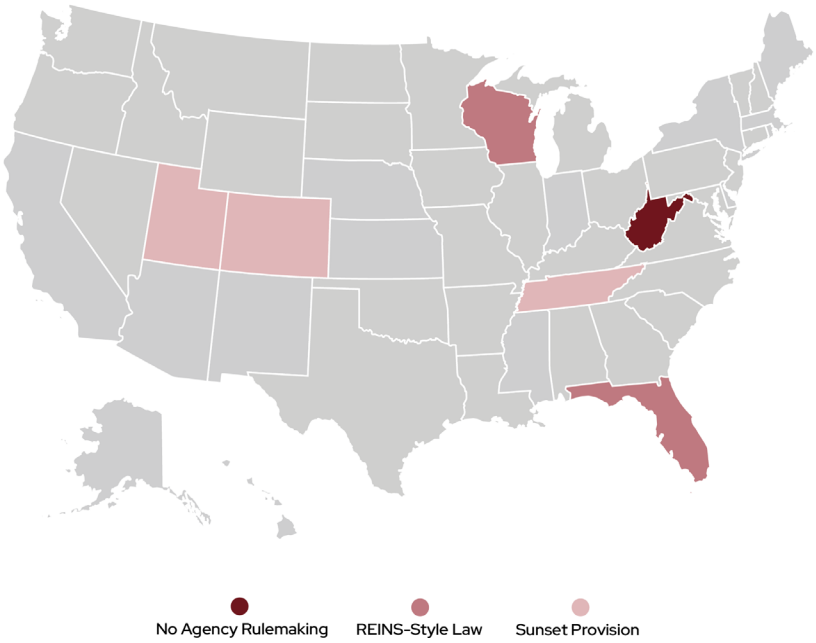
63 *See Governor Disapproves Deficient Charter Resolution*, The Daily Herald (June 25, 2022), https://perma.cc/D8U7-QUTT.

64 *See* Mark Scolforo, *Budget Would Leave Billions Unspent, Boost Education Funding*, Associated Press (July 8, 2022), https://perma.cc/9UL5-72TT.

65 *See generally* Robert Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. Legal Stud. 873, 882 (2000) ("A sunset provision requires the automatic expiration of a law or regulation after a designated amount of time."); *cf*. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931, 1962 (2020) (discussing sunset provisions and related time-limited authorizations of statutory delegations, agencies, and regulatory codes).

66 *See, e.g.*, H.R. 277, 118th Congress (2023).

States with Legislative Rule Ratification Provisions



1. Sunset Laws

Colorado, Tennessee, and Utah use the sunset approach.[67] (Idaho and Oklahoma had similar sunset provisions until 2023 and 2021, respectively.[68]) In these states, rules typically expire after a set period of time unless extended by legislation, and, with the exception of Utah,[69] the executive branch lacks any mechanism to veto or undo the legislature's decision to not extend a rule.[70] The key difference between the sunset states is when the rules expire. In Colorado and Utah, rules typically go through this sunset-and-renewal process every year, while in Tennessee, rules typically go through this sunset-and-renewal process just once before the legislature typically extends them for a longer

67 Colo. Rev. Stat. §§ 24-4-103(8)(c)(I), 24-4-103.3; Tenn. Code Ann. §§ 4-5-215, 4-5-226; Utah Code Ann. § 63G-3-502(2).

68 *See* 2023 Idaho Sess. Laws, Ch. 314 (H.B. 206); 2021 Okla. Sess. Laws, Ch. 11 (S.B. 913).

69 In Utah, when the legislature declines to reauthorize a rule, the affected agency can seek a declaration from the governor to extend the rule beyond the expiration date. Utah Code Ann. § 63G-3-502(6).

70 In this regard, the sunset mechanisms in Colorado, Tennessee, and Utah differ from other forms of sunset mechanisms that are more prevalent in the states. For instance, many states require agencies to review their rules after a set number of years—typically, in the five to ten-year range—and provide that the rules will expire unless the agencies opt to readopt or amend the rule. *See* Ind. Code §§ 4-22-2.5-2, 4-22-2.5-3; Ky. Rev. Stat. Ann. §§ 13A.3102, 13A.3104; N.H. Rev. Stat. Ann. §§ 541-A:16(III), 541-A:14-a; N.J. Stat. Ann. § 52:14B-5.1; N.C. Gen. Stat. § 150B-21.3A; Ohio Rev. Code Ann. §§ 119.04(A)(1)(b), 106.03, 106.031; R.I. Gen. Laws § 42-35-4.2; Tex. Gov't Code Ann. § 2001.039; W. Va. Code § 29A-3-19. But in these states, the decision to readopt, amend, or allow a rule to expire lies with the executive branch instead of the legislative branch, though the readoption processes are generally subject to the same forms of legislative oversight as the rulemaking process in the first instance (and the legislatures retain their ability to act through the ordinary lawmaking process). The mechanisms in Colorado and Tennessee also differ from the wider sunset movement in which state laws require reauthorization of entire agencies after a set number of years. *See* Brian Baugus & Feler Bose, *Sunset Legislation in the States: Balancing the Legislature and the Executive*, Mercatus Research, Mercatus Center at George Mason University (2015).

duration.[71]

In 2019, when Idaho utilized a sunset approach in which rules typically expired every year unless renewed by legislation, the Idaho Legislature notably failed to pass a bill to reauthorize the state's existing agency rules. This resulted in the state's entire administrative code expiring at once.[72] Under Idaho law, the governor could approve rules of his choice on a temporary basis, but this episode effectively forced state agencies to justify *every* rule they wanted to continue in the future.[73] By the end of the year, the Idaho Governor claimed that 75% of all agency rules had either been cut or simplified, boasting that Idaho was the "least-regulated state in the country."[74]

2. REINS Act-Inspired Laws

While many states task their legislatures and administrative agencies with considering the economic impact of proposed rules, Florida and Wisconsin have gone a step further and adopted equivalents of the proposed federal REINS Act. These laws require legislative approval of administrative rules that are deemed to have a significant economic impact.[75] In Florida, the $1 million impact (over five years) threshold[76] has meant that only a small fraction of the state's rules are subject to legislative approval,[77] but the process has caused consequential rules to be jettisoned, as discussed in the accompanying example. Wisconsin sets a higher, $10 million threshold for legislative rule ratification,[78] though, as discussed in Part I.A., the legislature's rule review committee can effectively require legislative approval of a rule, regardless of its financial impact, through its committee veto power.[79]

---

71 *See supra* note 67.

72 *See* Keith Ridler, *Idaho Governor has Unfettered Chance to Cut State Rules*, Associated Press (Apr. 17, 2019), https://perma.cc/YZ32-2LH4.

73 *See* Keith Ridler, *Idaho Agencies Race to Reauthorize Administrative Rules*, Associated Press (May 8, 2019), https://perma.cc/BS55-P7VP.

74 Office of the Idaho Governor, Press Release, *Idaho cuts and simplifies 75 percent of rules in one year, becomes least-regulated state in country*, (Dec. 4, 2019), https://perma.cc/F8EE-GR2G.

75 Florida enacted its REINS-style provision over a gubernatorial veto in 2010, and Wisconsin enacted its provision in 2017. *See* 2010 Fla. Sess. Law Serv. Ch. 2010-279; 2017 Wis. Act 57.
Kentucky enacted what its legislature named the "Kentucky REINS Act" in 2022, but none of its provisions require legislative approval of agency rules, and this report therefore excludes it from the list of REINS-style laws. *See* 2022 Ky. Acts 1810 (HB 594) (requiring agencies to *consider* whether a proposed rule would have a "major economic impact," but not requiring rules that would have such an impact to be approved by the legislature).
Also of note, Minnesota has a provision, enacted in 2005, that resembles a narrowly focused REINS-style law. When the cost of complying with a rule in the first year will exceed $25,000 for a small business or small municipality, the business or municipality can file a written statement with the agency claiming a temporary exemption from the rule, and the rule will not apply to that business or municipality until the rule is either approved by legislation or if an administrative judge disapproves the exemption. Minn. Stat. § 14.127.

76 Fla Stat. §§ 120.541(2)(a), (3) (establishing the trigger as an impact in excess of $1 million in the aggregate within the first five years of implementation of the rule).

77 Eric H. Miller & Donald J. Rubottom, *Legislative Rule Ratification: Lessons from the First Four Years*, Fla. Bar J. (Feb. 2015), https://perma.cc/8SC6-Q9BY (providing an empirical analysis of the first four years of state agency rulemaking with Florida's legislative rule ratification provision).

78 Wis. Stat. § 227.139.

79 Wis. Stat. § 227.19(5)(dm), (4)(d). The rule review committee can invoke the indefinite objection for a

In 2021, the Florida Department of Agriculture and Consumer Services proposed an agency rule that would have banned foam packaging in grocery and convenience stores, citing environmental and health concerns.[80] However, the department determined that the estimated costs of the rule would exceed $1 million over the first five years, triggering the state's REINS Act-inspired provision and requiring that the Florida Legislature ratify the rule before going into effect. The proposed rule was never heard or considered by any legislative committee, effectively defeating the proposal.[81]

3. No Agency Rulemaking

Finally, West Virginia has the broadest legislative rule ratification process of all. There, after the state courts rejected multiple legislative veto mechanisms under the state constitution, the state legislature shifted to a scheme in which the legislature must approve *all* proposed rules unless the legislature provided otherwise.[82] State agencies propose rules to the legislature, and following review by a 12-member joint legislative committee called the Legislative Rule-Making Review Committee, the legislature can consider enacting specific legislation to authorize the rule.[83] The rule cannot take effect unless the legislature enacts this legislation, thereby giving the legislature enormous control over the rulemaking process.[84]

---

number of reasons, including a determination that the rule fails to comply with legislative intent, the existing of an emergency relating to public health, safety, or welfare, or that the rule would impose an undue hardship.

80 *See, e.g.*, Mitch Perry, *As Nikki Fried Works to Phase Out Polystyrene, Some Florida Restaurants Already Have*, Bay News 9 (Oct. 15, 2021), https://perma.cc/33R4-UNCL; Scott Powers, *Nikki Fried Pursuing Rule to Phase Out Foam Packaging*, Fla. Pol. (Nov. 15, 2021), https://perma.cc/3QWK-H7FB.

81 Florida Retail Foundation, *2022 Legislative Session Report*, at *6 (2022), https://perma.cc/Z5GK-ZHS5.

82 This system is the product of a "lengthy pas-de-deux" between the state legislature and state supreme court. Anderson & Poynor, *supra* note 13, at 18. In 1981, the state supreme court invalidated a statute that allowed the Legislative Rule-Making Review Committee to veto proposed rules unless the full legislature reversed the committee's disapproval. State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981). The legislature then amended its rule review provision to require all regulations to be submitted to the legislature for approval, including a provision that a proposal would be considered rejected if the legislature failed to enact authorizing legislation. *See* Anderson & Poynor, *supra* note 13, at 19. This system, too, was invalidated by the state supreme court, which held that the legislative veto "impermissibly encroache[d] upon the executive branch's obligation to enforce the law" in violation of the state constitution's separation of powers requirement. State ex rel. Meadows v. Hechler, 462 S.E. 586 (W. Va.1995). The legislature's response to this decision was to create the current system in which the executive branch has no independence to promulgate rules. *See* Anderson & Poynor, *supra* note 13, at 19.

83 W. Va. Code § 29A-3-9; *see also* § 29A-3-10 (creating the Legislative Rule-Making Review Committee).

84 In addition, since 2016, there has been a requirement to include a sunset provision in all new or amended rules that terminates the rule on August 1 of the fifth year following its promulgation but allows rules to be re-enacted by the legislature through the same process as new proposals. W. Va. Code § 29A-3-19.

In 2019, West Virginia's Legislative Rule-Making Review Committee (LRMRC) used its broad powers not only to deny a request from the state's Department of Health and Human Resources to add protections for LGBTQ children and prospective parents in the state's foster and adoptive system, but to also propose that the West Virginia Legislature remove existing protections for LGBTQ children and biological parents.[85] While the LRMRC's modified rule was awaiting legislative approval, the Department withdrew its rulemaking request altogether to allow the existing protections to stand.[86]

D. Objection Requires Executive Action

In fifteen states—Alabama, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Michigan, Missouri, Oklahoma, Oregon, South Carolina, Virginia, Washington, and Wyoming—a legislative entity wields an objection power that requires the executive branch to take additional steps to avoid the rule's invalidation.[87] In these states, a joint legislative committee typically reviews a proposed rule using specific criteria,[88] and can object to the rule if the committee and the agency are unable to resolve disagreements. In a smaller number of states, an objection requires a majority of the legislative chambers.[89] In 10 states, an objection sends the rule to the governor or lieutenant governor, either automatically or by appeal of the affected agency, and the governor or lieutenant governor then typically makes a final decision as to whether to approve or disapprove the rule.[90] In four states, an objection effectively sends the rule back to the agency, which must at least respond to the objection—though not necessarily amend or withdraw the proposal—or the rule is considered withdrawn or void.[91] And one state

85 *See* Erin Beck, *Lawmakers Vote to Let Foster Care Agencies Turn Away LGBTQ Youth, Parents*, Register-Herald (Dec. 19, 2019), https://perma.cc/8Z95-8LJP.

86 Erin Beck, *DHHR Clarifies Protections for LGBTQ Foster Children*, Register-Herald (Jan. 28, 2020), https://perma.cc/ZJ3C-6QYF.

87 Ala. Code § 41-22-23; Fla. Stat. § 120.545; Ga. Code § 50-13-4(f)(1) (requiring executive approval if a majority but less than two-thirds of legislators approve a resolution to veto a rule); 5 Ill. Comp. Stat. 100/5-110; Ky. Rev. Stat. §§ 13A.030, 13A.330; La. Rev. Stat. § 49:966; Md. Code Ann., State Gov't § 10-111.1; Mich. Comp. Laws §§ 24.245a(1)(b), 24.245c; Mo. Rev. Stat. § 536.028(7); Okla. Stat. tit. 75 § 308(B)-(C); Or. Rev. Stat. §§ 183.720, 183.722; S.C. Code Ann. § 1-23-120(D); Va. Code Ann. § 2.2-4014(A)-(B); Wash. Rev. Code § 34.05.640; Wyo. Stat. Ann. § 28-9-106.

88 *Cf.* Ala. Code § 41-22-22.1(a)-(b); Fla. Stat. § 120.545(1); 5 Ill. Comp. Stat. 100/5-110(a); Ky Rev. Stat. § 13A.030(2); La. Rev. Stat. § 49:966(D)(3); Md. Code Ann., State Gov't § 10-111.1(b); Mich. Comp. Laws §§ 24.245a(1)(b), 24.245c; Or. Rev. Stat. § 183.720(3) (providing standards for review by a nonpartisan legislative service); Va. Code Ann. § 30-73.3(A)(1)-(2); Wash. Rev. Code §§ 34.05.620 (for proposed rules), 34.05.630(3) (for existing rules); Wyo. Stat. Ann. § 28-9-104(c).

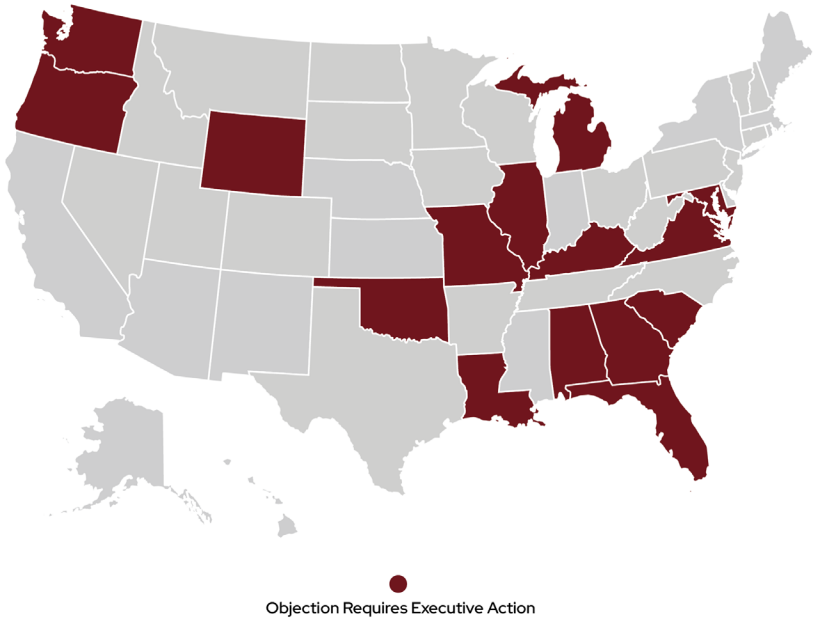
89 Three states authorize their legislatures, rather than a committee, to disapprove a rule through adoption of a resolution by both legislative chambers, though require the resolution to be presented to the governor for approval or disapproval. *See* Mo. Rev. Stat. Ann. § 536.028(7); Okla. Stat. tit. 75 § 308(C)-(E); S.C. Code Ann. § 1-23-120(D); S.C. Const. art. IV, § 21 (requiring gubernatorial approval of all joint resolutions).

90 These 10 states are Alabama, Kentucky, Louisiana, Maryland, Missouri, Oklahoma, South Carolina, Virginia, Washington, and Wyoming. *See* provisions cited *supra* note 87.
In Washington, the governor's decision is *not* whether to approve or disapprove the rule but whether to agree to suspend the rule until 90 days after the expiration of the next regular legislation, presumably to allow for consideration of legislation to block or amend the rule. Wash. Rev. Code § 34.05.640.

91 These three states are Florida, Illinois, Michigan, and Oregon, *see* provisions cited *supra* note 87. Oregon law does not specify the consequence of the agency's refusal to respond to the objections, but instead provides that the agency must make a written response and potentially appear at one or more committee meetings to explain the agency's position, *see* Or. Rev. Stat. § 183.722.

provides for both options.[92] These objections can slow down the rulemaking process, though typically not to the same degree as the temporary suspension power.[93]

States where Legislative Objection Requires Executive Action



In late 2022, the Virginia General Assembly's Joint Commission on Administrative Rules (JCAR) objected to the Virginia State Air Pollution Control Board's proposed repeal of a regulation governing the state's participation in a regional carbon market, contending that the Control Board lacked statutory authority to withdraw the state's participation.[94] The objection was published in the *Virginia Register*,[95] and it triggered a requirement for the Control Board to file a response to the objection within 21 days, during which the Control Board could not finalize the rule.[96] Despite the objection, the Control Board was able to complete the rulemaking process in 2023,[97] though the move faces litigation.[98]

92 Va. Code Ann. § 2.2-4014(A)-(B).
In Virginia, similar to Washington, when an objection is sent to the governor, the governor's decision is whether to agree to suspend the rule until adjournment of the next regular legislative session to allow for consideration of legislation to block or amend the rule, or to modify the statutory authority for the rule. Va. Code Ann. § 2.2-4014(B).

93 A notable exception is Alabama, which effectively bootstraps a temporary—and relatively lengthy—suspension power to the legislature's objection power. There, if the lieutenant governor approves a rule that had been objected to by the rule review committee, the rule's effective date is delayed until adjournment of the next regular legislative session that commences after the lieutenant governor's approval. Ala. Code § 41-22-23(a)(4). During this time, the legislature can attempt to override the lieutenant governor's approval through adoption of a joint resolution. *See id*. This joint resolution, in turn, requires the governor's approval, but any gubernatorial veto can be overridden by a majority vote of the legislature. Ala. Const. art. V, § 125.

94 *See* 39:12 VA. R. 1436-1465 January 30, 2023; Charlie Paullin, *Legislative Commission Objects to Withdrawal from Regional Carbon Market*, Virginia Mercury (Dec. 20, 2022), https://perma.cc/D36T-7Q88.

95 *See* 39:12 VA. R. 1436 January 30, 2023.

96 Va. Code Ann. § 2.2-4014(A).

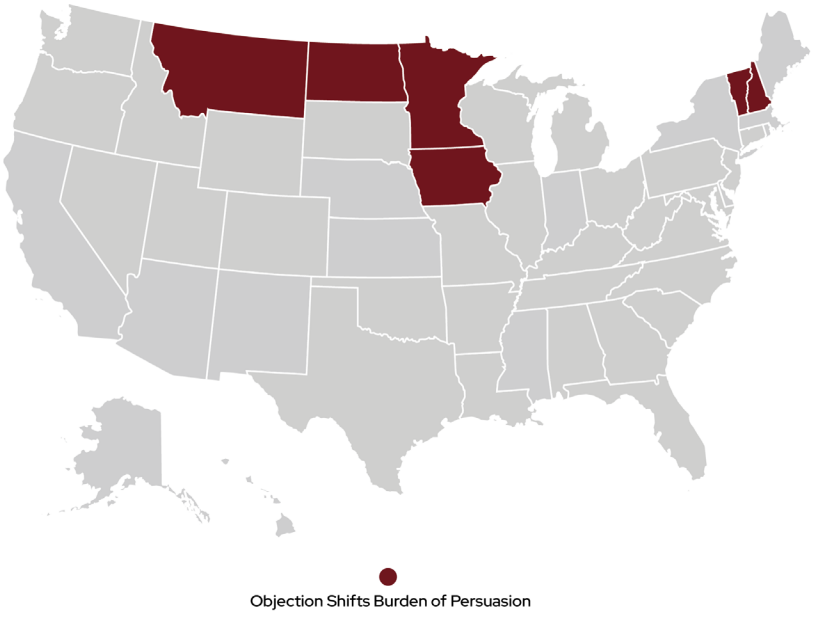
97 *See* 39:25 VA. R. 2813 July 31, 2023; Jeffrey Kluger, *Virginia is Part of Successful Climate Alliance. Now Republicans Want to Abandon It.*, Time (July 13, 2023), https://perma.cc/5PFW-P2BD.

98 *See* Charlie Paullin, *Virginia Enviro Groups File Notice They Will Challenge Youngkin's RGGI Withdrawal,*

E. Objection Shifts Burden of Proof to Agency in Legal Actions

In six states, including one (Vermont) in which it is the most potent form of legislative oversight of rulemaking, a legislative entity wields a different objection power that shifts the burden of persuasion to the agency in any subsequent enforcement action or legal challenge to the rule. In other words, the objection eliminates the presumption that government actions are lawful and valid.[99] These states are Iowa, Minnesota, Montana, New Hampshire, North Dakota, and Vermont.[100] Two states go further and have fee-shifting provisions for prevailing litigants in these actions.[101]

States where Legislative Objection Shifts Burden of Persuasion in Challenge or Enforcement Action



F. Advisory-Only

Most state legislatures, at a minimum, play an advisory role in the rulemaking process in which they regularly review proposed and existing rules and make recommendations to the full legislature and the executive branch. For eight states, the legislatures are

---

Virginia Mercury (July 31, 2023), https://perma.cc/QN8Q-S76R.

99 *See, e.g.,* U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies.").

100 Iowa Code §§ 17A.4(6), 17A.8(8); Minn. Stat. § 3.842(4a)(e); Mont. Code Ann. § 2-4-406(4); N.H. Rev. Stat. Ann. § 541-A:13(VI); N.D. Cent. Code § 28-32-17; Vt. Stat. Ann. tit. 3 § 842.

The 1981 Model State Administrative Procedure Act also provided for this type of objection procedure as its most powerful form of legislative oversight of the agency rulemaking process, but it was omitted from the next version of the Model State Administrative Procedure Act in 2010. *Compare* 1981 Model State Administrative Procedure Act, § 3-204(d) *with* 2010 Model State Administrative Procedure Act, Article 7.

101 Iowa authorizes the recovery of attorney's fees for any successful litigant, and Montana authorizes the recovery attorney's fees if the court finds that "the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute." Iowa Code § 17A.4(6)(b); Mont. Code Ann. § 2-4-406(4).

currently limited to such an advisory-only role and must take any final actions through the ordinary legislative process. These states are Alaska, Arizona, Delaware, Kansas, Maine, Nebraska, New York, and Texas.[102]

These states' advisory roles all function in about the same manner. A legislative committee will review a rule, sometimes using standard criteria, such as whether the rule is authorized by statute or complies with legislative intent.[103] The committee can raise any objections directly to the agency, and if the rule is not amended to the committee's satisfaction, the committee can then report to the full legislature and introduce legislation that would resolve the objection.[104] None of this stops the rulemaking process, however, and the agency may decline to change its rule. Despite the seeming lack of teeth, these nonbinding processes have demonstrated some effect on agencies.[105]

G. No Formal Oversight

In seven states, the legislatures do not currently have a formal oversight role in the rulemaking process. These seven states are California, Hawaii, Indiana, Massachusetts, Mississippi, New Mexico, and Rhode Island. The legislatures in these states could pass legislation addressing a rule or the subject matter of a rule, but there are no formal procedures through which a legislative entity regularly reviews proposed or existing rules. Instead, the rulemaking is left entirely to the executive branch.

---

102 Alaska Stat. § 24.05.182; Ariz. Rev. Stat. §§ 41-1047, § 41-1048; Del. Code. Ann. tit. 29 § 10212; Kan. Stat. Ann. § 77-436(c)-(d); Me. stat. tit. 5, § 8072; Neb. Rev. Stat. §§ 84-907.10, 84-948; N.Y. Legis. Law §§ 87-88; Tex.Gov't Code Ann. § 2001.032.

103 *See, e.g.*, N.Y. Legis. Law § 87(1).

104 *See, e.g.*, N.Y. Legis. Law §§ 87(3)-(4), 88.

105 Falkoff, *supra*, note 13, at 1058 & n.8 (citing report by Illinois JCAR when its power was merely advisory tallying that the committee objected to roughly one third of the rules proposed in its first year, and that the relevant agencies addressed most of the committee's concerns).

II. The Constitutionality and Durability of Legislative Vetoes

This Part analyzes the constitutionality and durability of legislative vetoes in the states. Since 1980, legislative vetoes have accumulated an overwhelmingly losing record in state (and federal) courts. Most state courts that have considered legislative vetoes have found them to violate their state constitutions, relying on several different theories. Yet legislative vetoes persist and are authorized in nearly half of all states. As described below, this persistence appears to be a function of constitutional amendment, an absence of litigation in some states, and occasional evasion of judicial rulings.

Part II.A. begins by describing how state courts have largely invalidated legislative vetoes. Part II.B. then explains how legislative vetoes have persisted in the states despite the large body of case law declaring them unconstitutional.

A. Legislative Vetoes in the Courts

The state courts that have considered the constitutionality of statutes that authorize legislative vetoes of agency rules have overwhelmingly found the provisions unconstitutional, as summarized in Appendix B. The highest courts of at least nine states have directly reached such a conclusion,[106] while seven others and a state trial court have invalidated legislative vetoes in contexts other than agency rulemaking or implied that a legislative veto of agency rules might violate their state constitutions without directly ruling on the question.[107] In contrast, only one state court has upheld the constitutionality

106 These states are Alaska, Kansas, Kentucky, Michigan, Missouri, New Hampshire, New Jersey, Oregon, and West Virginia. *See* State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); State ex rel. Stephan v. House of Representatives, 687 P.2d 622 (Kan. 1984); Legi. Rsch. Comm. v. Brown, 664 S.W.2d 907 (Ky. 1984); Blank v. Dep't of Corrs., 611 N.W.2d 530 (Mich. 2000); Mo. Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997); Op. of the Justices, 431 A.2d 783 (N.H. 1981); Gen. Assembly v. Byrne, 448 A.2d 438(N.J. 1982); Gilliam Cty. v. Dep't of Env't Quality of State of Or., 849 P.2d 500 (Or. 1993), *rev'd on other grounds sub nom.*, Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or., 511 U.S. 93 (1994), *reaffirmed on remand*, 876 P.2d 749 (Or. 1994); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va.1981); State ex rel. Meadows v. Hechler, 462 S.E. 586 (W. Va.1995).
These decisions and several other state court decisions related to legislative vetoes are identified in Appendix C.

107 These states are Alabama, California, Massachusetts, Montana (state trial court), North Dakota, Pennsylvania, Utah, and Wisconsin. *See* Op. of the Justices, 892 So.2d 332 (Ala. 2004) (advising that a proposal to allow a one-house veto to reject contracts entered into by the executive branch would violate the state constitution's separation of powers principle); Carmel Valley Fire Prot. Dist. v. State of Cal., 25 Cal.4th 287, 304-08, 20 P.3d 533, 542-545 (2001) (stating, in dicta, that a challenged law would have been unconstitutional if it permitted a single house of the state legislature to "suspend a departmental mandate without concurrence of both houses and presentment to the Governor."); Op. of the Justices to the Senate, 493 N.E.2d 859 (Mass. 1986) (advising that a proposal to authorize a one-house legislative veto to block the construction and operation of a low-level radiation waste facility would violate the state constitution's separation of powers principle); Mont. Taxpayers Ass'n v. Dep't of Revenue, No. 47126 (Mont. Lewis and Clark Co. Mar. 18, 1982); N.D. Legis. Assembly v. Burgum, 916 N.W.2d 83, 105 (N.D. 2018) (describing *Chadha*'s holding as "consistent with the sep-

of a statute that authorized an across-the-board strong-form legislative veto of agency rules,[108] and one other has upheld a strong-form veto applicable to only one agency's rules.[109] (A few other courts and jurists have signaled likely approval of strong-form vetoes to various degrees.[110])

1. Strong-Form Legislative Vetoes

Most state court decisions involving legislative vetoes over administrative rulemaking have concerned strong-form vetoes. The first was the Alaska Supreme Court's 1980 decision in *State v. A.L.I.V.E. Voluntary*.[111] Declaring a two-house veto unconstitutional, the court emphasized, like *Chadha* later would, the importance of the state constitution's

---

aration of powers decisions interpreting the North Dakota Constitution," and stating that "[i]n its exercise of legislative power, [the legislature] must follow the constitutionally mandated procedures, including a recorded vote of a majority of the members elected to each house followed by presentment to the governor for signature."); Commonwealth v. Sessoms, 532 A.2d 775 (Pa. 1987) (invalidating a statute that authorized a legislative veto of a judicial commission's sentencing guidelines); Wolf v. Scarnati, 233 A.3d 679 (Pa. 2020) (declaring the legislature's attempt to overturn the governor's proclamation of an emergency through a concurrent resolution as a "legal nullity" on the basis that it amounted to an unconstitutional legislative veto); Stewart v. Utah Pub. Serv. Com'n., 885 P.2d 759, 775 (Utah 1994) (invalidating a statute that allowed a public utility, as a private party, to veto an incentive rate regulation plan adopted for the utility by an administrative agency as an unconstitutional veto); SEIU, Local 1 v. Vos, 946 N.W.2d 35, 58-59 (Wis. 2020) (implying that an indefinite suspension of an agency rule would violate the state constitution's bicameralism and presentment requirements).

In addition, the attorneys general of at least six more states have advised or suggested that a statute authorizing a legislative veto of agency rules would violate their state constitutions. *See* 83-5 Me. Op. Atty. Gen. (1983); 107 Md. Op. Atty. Gen. 3, 5 (2022); 99 Md. Op. Atty. Gen. 171, 180 (2014); 85 Md. Op. Atty. Gen. 190, 203 (2000); 21-1 Neb. Op. Atty. Gen. (2021); 77-53 Neb. Op. Atty. Gen. (1977); 86-17 Ok. Op. Atty. Gen. (1986); 08-131 Tenn. Op. Atty. Gen. (2008); 16-01329 Va. Op. Atty. Gen. (2016); 1981-82 Va. Op. Atty. Gen. 93 (1982); *see also* 77-62 Cal. Op. Att'y Gen. (1977); 2020-6 Kan. Op. Atty. Gen. Op. (2020); 97-18 Kan. Op. Atty. Gen. Op. (1997). State attorney general opinions addressing legal questions related to legislative vetoes are identified in Appendix D.

108 Mead v. Arnell, 791 P.2d 410 (Idaho 1990) (upholding a statute that allowed the legislature to veto agency rules contrary to legislative intent with a concurrent resolution but finding that the legislature failed to properly invoke its legislative veto authority by failing to state that the rule was contrary to legislative intent).

109 Albany Surgical, P.C. v. Ga. Dept' of Cmty. Health, 602 S.E.2d 648 (Ga. 2004) (upholding the validity of a two-house veto process specific to a single agency, citing the Idaho Supreme Court's reasoning in *Mead*).

110 *See* In re Black Fork Wind Energy, LLC, 124 N.E.3d 787, 799-800 (Ohio 2018) (Kennedy, J. concurring) (contending that under the dissenting opinion's rationale, the legislature's veto authority over agency rulemaking would be "lost"). In the distinct context of appropriations, see Watrous v. Golden Chamber of Commerce, 218 P.2d 498 (Colo. 1950) (approving of a joint resolution in the appropriations context).

111 A.L.I.V.E. Voluntary, 606 P.2d 769. Although this was the first state supreme court opinion to address legislative vetoes in the context of administrative rulemaking, there were a few preceding state court decisions involving legislative vetoes in different contexts or that were decided on other grounds. *See id.* at 773-77 (citing Op. of the Justices, 83 A.2d 738 (N.H. 1950) (addressing a legislative veto of a governor's executive order to reorganize the executive branch), Reith v. South Carolina State Housing Authority, (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds*, 225 S.E.2d 847, 848 (S.C. 1976) (holding concurrent resolution approval of rules unconstitutional because it interferes with the executive's obligation to enforce the law), Watrous v. Golden Chamber of Commerce, P.2d 498 (Colo. 1950) (upholding a statute that allowed certain tax proceeds to be pledged as security for bonds to pay for construction of state turnpikes under the condition that any such pledge first be approved by joint resolution of the legislature)). As to *Watrous*, the Alaska Supreme Court cited a scholar's analysis of the Colorado Supreme Court's reasoning as "so unsatisfactory as to destroy its value as a precedent." *Id.* at 773 n.16 (quoting Bernard Schwartz, *Legislative Control of Administrative Rules & Regulations*, 30 N.Y.U.L. Rev. 1031, 1043 n.56 (1955)).

legislative enactment procedures.[112] The court also found further textual support for its decision: the state constitution expressly authorized legislative vetoes in two other contexts—one related to the governor's ability to reorganize the executive branch by executive order, and the other related to a state commission's ability to change municipal boundaries—but did not authorize a legislative veto for agency rules.[113] The court concluded that this counseled against finding an implied legislative power to veto agency rules.[114]

Following *A.L.I.V.E. Voluntary*, the highest courts in West Virginia, New Hampshire, and New Jersey weighed in on the constitutionality of legislative vetoes, showing varying degrees of skepticism. In *Barker v. Manchin*, the West Virginia Supreme Court of Appeals held that a two-house veto is unconstitutional not only on the ground that the veto must comply with the state constitution's legislative enactment procedures, but also on the ground that the veto had the character of executive action.[115] The court noted that the unbounded veto power was "comparable to the authority vested in the Governor, as head of the Executive Department"[116] and that the legislature was trying to "step into the role of the executive."[117] This seemingly shut the door for a strong-form legislative veto in the state, with the court affirming *Barker* in a 1995 decision.[118] The court's decisions ultimately fueled the state legislature's adoption of the current administrative rulemaking process, in which agencies effectively have no independence to promulgate rules.[119]

The New Hampshire Supreme Court showed a similar degree of skepticism of strong-form legislative vetoes in a 1981 advisory opinion, *Opinion of the Justices*, suggesting a "fix" that would render the legislature's oversight power advisory-only. The court advised that a strong-form legislative veto is "not per unconstitutional," rejecting the notion that such a power would constitute the exercise of executive power and explaining that it can be beneficial to restrict the unilateral executive branch rulemaking.[120] But the court also advised that the proposal at issue, which was structured as a one-house veto, gave too much legislative power to too few people and impermissibly skirted the state constitution's presentment requirement.[121] Offering advice on a possible legislative fix, the court suggested that the veto power should require "a majority of a quorum of both houses, possibly acting pursuant to the recommendations of significantly representative

112 A.L.I.V.E. Voluntary, 606 P.2d at 772.

113 *Id.* at 774-75. The court also addressed a few policy arguments. It rejected an argument that a legislative veto would allow the legislature to operate more efficiently. *Id.* at 778-79 ("[T]he question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers"). And it cited an academic study that had concluded that legislative vetoes encourage "secretive, poorly informed, and politically unaccountable legislative action," explaining that the constitution's legislative enactment provisions are designed to guard against these problems. *Id.*

114 *Id.*

115 Barker, 279 S.E.2d at 632.

116 *Id.* (adding that the dynamic "reverse[d] the constitutional concept of government whereby the Legislature enacts the law subject to the approval or veto of the Governor.").

117 *Id.* at 633.

118 State ex rel. Meadows v. Hechler, 462 S.E.2d 586 (W. Va. 1995).

119 *See supra* note 82.

120 Op. of the Justices, 431 A.2d 783, 787-88 (N.H. 1981)

121 *Id.* at 788-89.

committees, and then presented to the Governor for his approval."[122] The court also seemed to endorse a temporary suspension power as an alternative, as discussed below.

The New Jersey Supreme Court showed a bit less skepticism of legislative vetoes than its sibling courts in a pair of decisions issued on the same day in 1982. In *General Assembly v. Byrne*, the court rejected a two-house veto primarily because it "excessively interfere[ed] with the functions of the executive branch," though the court also cited the skirting of the constitution's presentment requirement.[123] However, the court emphasized a flexible framework, noting that not every legislative veto would "unduly intrude" upon executive power."[124] Indeed, in a separate opinion announced on the same day, *Enourato v. Building Authority*, the court upheld a narrower appropriations-related legislative veto.[125]

The next major legislative veto decision was the U.S. Supreme Court's in *Chadha* in 1983. In the 40 years since *Chadha*, state supreme courts mostly continued to invalidate strong-form legislative vetoes, though the rationales for doing so have continued to vary.

A few state supreme courts have expressed concerns that strong-form legislative vetoes encroached too far into the prerogatives of the executive branch. For instance, in 1984, the Kansas Supreme Court held in *State ex rel. Stephan v. House of Representatives* that a legislative veto violated the state constitution's presentment requirement for legislation, but that it also violated the state constitution's four-factor functionalist test for interbranch interference, such that the veto was an "unconstitutional usurpation" of executive power.[126] The Missouri Supreme Court, in 1997, similarly struck down a legislative veto in *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, citing the state constitution's legislative enactment requirements as well as the separation of powers principle that the legislature's power is confined to enacting laws and does not include executing laws already enacted.[127]

A few other state supreme courts relied upon their constitution's bicameralism and presentment requirements for legislation. Striking down a committee veto, the Oregon Supreme Court held in *Gilliam County v. Department of Environmental Quality of State of Oregon* (1993) that the mechanism violated the state constitution's requirements for legislative actions to be taken by a majority vote of each chamber and be presented to the governor for approval.[128] The Michigan Supreme Court similarly struck down a committee veto in *Blank v. Department of Corrections* (2000), expressly adopting *Chadha*'s reasoning and holding that the mechanism impermissibly flouted the state

122 *Id.* at 789.
123 Byrne, 448 A.2d at 443-47.
124 *Id.* at 448 ("Where legislative action is necessary to further a statutory scheme requiring cooperation between the two branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes, legislative veto power can pass constitutional muster.").
125 Enourato v. Bldg. Auth., 448 A.2d 449, 451-52 (N.J. 1982) (reasoning that a process that allowed a legislative veto of leases entered into by the executive branch that required continuing budget appropriations was limited in scope and did not empower the legislature to disrupt exclusive executive branch functions).
126 Stephan, 687 P.2d at 634-39.
127 Mo. Coal. for the Env't, 948 S.W.2d 125.
128 Gilliam County, 849 P.2d at 505-06.

constitution's bicameralism and presentment requirements.[129] The court also drew a negative inference from the state constitution's authorization of more limited legislative suspensions of agency rules adopted between legislative sessions as further evidence that the people of Michigan intended to restrict the legislature's power over agency rulemaking.[130]

Providing one of two counters to these state court decisions is the Idaho Supreme Court's 1990 decision in *Mead v. Arnell*, which upheld the constitutionality of a statute that authorized a two-house veto of agency rules. The court, echoing Justice White's *Chadha* dissent, reasoned that agency rulemaking, unlike other (constitutionally protected) forms of executive power, is always subordinate to legislative direction.[131] The court also noted differences in the text and structure of the relevant provisions of the federal and Idaho constitutions. In so holding, the court became the first and still only state supreme court to uphold a statutorily authorized strong-form legislative veto that applies across the board to most agencies' rules.[132]

The only other state supreme court to have upheld the constitutionality of a legislative veto is the Georgia Supreme Court. In its 2004 decision, *Albany Surgical, P.C. v. Georgia Department of Community Health*, the court rejected a constitutional challenge to a statute that authorized a strong-form veto to rules adopted specifically by the state department of community health.[133] Citing the Idaho Supreme Court's decision in *Mead*, the court concluded that agency rules are not laws and, therefore, do not have to comply with the state constitution's procedural requirements for legislation.[134] While the legislative veto at issue in the case applied to only one agency's rules, the design of the veto mechanism is virtually the same as the state's two-house veto applicable to most other state agencies' rules discussed in Part I.A., suggesting that the court would likely approve of the broader legislative veto, too.

2. Temporary Suspension Authority

Four state supreme courts—Kentucky, Missouri, New Hampshire, and Wisconsin—have addressed the constitutionality of the legislative power to temporarily delay or suspend agency rules.[135] Each court, while agreeing that a strong-form legislative veto would

129 Blank, 611 N.W.2d at 535-37.
130 *Id.* at 538-39.
131 *Mead*, 791 P.2d at 417-19.
132 *Id.*
133 602 S.E.2 648 (Ga. 2004).
134 *Id.* at 651; *see also* David E. Shipley, *The Status of Administrative Agencies Under the Georgia Constitution*, 40 Georgia L. Rev. 1109, 1129-33 (2006) (discussing *Albany Surgical*).
135 *See* Legis. Rsch. Comm. v. Brown, 664 S.W.2d 907, 918 (Ky. 1984); Mo. Coal. for the Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997); In Op. of the Justices, 431 A.2d 783, 788-89 (N.H. 1981); Martinez v. DILHR, 478 N.W.2d 582 (Wis. 1992); SEIU, Local 1 v. Vos, 946 N.W.2d 35 (Wis. 2020). At least two state attorneys general have advised on such mechanisms, too. *See* 86-6-A Me. Op. Atty. Gen. (1986) (advising that legislation authorizing the legislature to temporarily delay the effective date of a proposed rule by 90 days to give the legislature time to consider responsive legislation did not violate the state constitution); 21-1 Neb. Op. Atty. Gen. (2021) (advising that a statute authorizing the legislature to temporarily delay the rulemaking process to allow the legislature time to enact responsive legislation would not violate the state constitution so long as the legislature passed a bill in accordance with the state constitution's enactment requirements for

violate their state constitution, reached a somewhat different conclusion about the temporary suspension power.

The Kentucky Supreme Court, in *Legislative Research Committee v. Brown* (1984), struck down a statute that authorized a temporary suspension of up to 21 months.[136] Echoing the theory of Justice Powell's concurrence in *Chadha* that the mechanism violated the separation of powers because it was *judicial* in nature, the court focused on the open-ended legal question the legislative committee was supposed to consider—whether a regulation complied with the authority and intent of relevant legislation.[137] The Missouri Supreme Court, in its 1997 decision in *Missouri Coalition for the Environment* that struck down a strong-form legislative veto, also struck down a much more limited suspension provision that allowed suspensions of only 20 days, finding the provision to encroach too far into the *executive* branch's powers.[138]

In contrast to the Kentucky and Missouri Supreme Courts, the New Hampshire and Wisconsin Supreme Court have generally approved of a limited temporary suspension power. The New Hampshire Supreme Court, in its previously discussed 1981 advisory opinion in *Opinion of the Justices*, praised the temporary suspension concept in the course of offering potentially constitutional alternatives to a strong-form legislative veto.[139] The court stated that a temporary suspension power "gives proper deference to the full legislative body as well as to the Governor."[140] The court did not, however, weigh in how long such a suspension could or should be. And the Wisconsin Supreme Court, in two opinions—*Martinez v. DILHR* (1992) and *SEIU, Local 1 v. Vos* (2020)—generally upheld the legislature's ability to temporarily suspend agency rules for a period of at least six months but also explained that an indefinite suspension would violate the state constitution's separation of powers principles.[141]

B. The Persistence of Legislative Vetoes

Despite legislative vetoes' losing record in the courts, the number of states that authorize a version of the mechanism has steadily increased over time.[142] Several factors have contributed to this. First, several states responded to adverse judicial decisions by amending their state constitutions to expressly authorize a legislative veto. Next, in several other states, there has not been any litigation challenging the legislative veto,

---

legislation).

136 *Compare* Legis. Rsch. Comm., 664 S.W.2d at 917-20 *with* Chadha, 462 U.S. at 959-67 (Powell, J. concurring).

137 Legis. Rsch. Comm., 664 S.W.2d at 917-20.

138 Mo. Coal. for the Env't, 948 S.W.2d at 133-34.

139 In Op. of the Justices, 431 A.2d at 789.

140 *Id*.

141 Martinez, 478 N.W.2d 582 (Wis. 1992) (generally upholding a prior version of the temporary suspension power); SEIU, Local 1, 946 N.W.2d at 59 ("Under *Martinez*, an endless suspension of rules could not stand; there exists at least some required end point after which bicameral passage and presentment to the governor must occur.").

142 *See supra* note 3 (noting that the number of states with strong-form legislative vetoes has increased from 12 to 15 since 1982 and the number of states with the temporary suspension power has increased from nine to 15).

leaving the mechanism in place. And finally, a few states appear to be stretching or outright ignoring adverse precedent.

1. Overriding Adverse Judicial Decisions Through Constitutional Amendments

One contributing factor to the durability of legislative vetoes in the states has been the use of amendments to state constitutions. Several state legislatures have responded to adverse court decisions by proposing amendments to their respective state constitutions to expressly authorize strong-form legislative vetoes. These proposals have had mixed results at the ballot box—indeed, a majority have been rejected—but enough of them have been approved to contribute to the persistence of legislative vetoes in the states.

The most vivid example comes from New Jersey. On the very day of the state supreme court's 1982 decision in *General Assembly of New Jersey v. Byrne*, holding that a statutory legislative veto violated the state constitution, the state legislature approved a resolution proposing a constitutional amendment to override the decision and authorize a one-house veto of any rule.[143] This measure was not submitted to the voters until 1985, and when it was, the voters rejected it.[144] Several years later, in 1992, the legislature proposed a "far more limited" two-house veto for rules that are contrary to legislative intent; the voters approved this, and it remains in effect today.[145]

There are other examples, too. In Arkansas, voters approved a constitutional amendment in 2014 that effectively abrogated a 1988 state supreme court decision that struck down the legislature's advisory role over state contracts as an effective—and unconstitutional—legislative veto.[146] Voters in Connecticut, Iowa, and Nevada all approved constitutional amendments to authorize strong-form legislative vetoes in 1982, 1984, and 1996, respectively, amidst the nationwide wave of court losses for legislative vetoes.[147] Even in Idaho, where the state supreme court *upheld* the constitutionality of a statutory strong-form legislative veto, the legislature, nervous that the court might change its mind, sought and obtained voter authorization for a legislative veto in 2016.[148] (The voters of Idaho had first rejected a similar proposal in 2014, however).[149]

The voters have rejected several more legislative attempts to override adverse court

143 *See* Commc'ns Workers of America, AFL-CIO v. N.J. Civ. Serv. Comm., 191 A.3d 642, 659-61 (N.J. 2018) (summarizing the history of New Jersey's legislative veto).

144 *Id*. at 660.

145 I*d.* at 660-61.

146 *See* Berry, *supra* note 13, at 222, Figure 6.2; Chaffin v. Ark. Game and Fish Comm., 757 S.W.2d 950, 956 (Ark. 1988).

147 *See* Berry, *supra* note 13, at 222, Figure 6.2.

148 One of the official arguments for the proposal explained: "The legislature's current ability to review agency rules is in the law. Idaho's Supreme Court previously held that statute valid, a future supreme court could potentially declare it invalid, because Idaho's Constitution does not expressly recognize the ability of the legislature to review agency rules. The proposed constitutional amendment would protect the legislature's authority to ensure that agency rules conform with legislative intent." *See* Idaho Secretary of State, 2016 General Election Proposed Constitutional Amendments, H.J.R. 5 (2016), https://perma.cc/5SJT-K9GJ.

149 *See* Idaho Secretary of State 2014 General Election Results, Constitutional Amendment H.J.R. 2, https://perma.cc/535E-FLP2.

decisions through constitutional amendments. Most recently, in 2022, voters in Kansas narrowly rejected such a proposal meant to override the Kansas Supreme Court's 1984 decision in *State ex rel. Stephan v. House of Representatives* that struck down a legislative veto.[150] Voters in Alaska, Kentucky, and Oregon have also rejected similar measures that would have overridden adverse court decisions,[151] while voters in Oklahoma rejected a similar proposal shortly after the state attorney general advised that the state's one-house veto was likely unconstitutional.[152] And although not in direct response to court decisions, voters in Florida, Michigan, Missouri, and Texas have also rejected proposals to enshrine strong-form legislative vetoes in their state constitutions.[153] The rejected proposals in Michigan and Missouri predated the state supreme court decisions that later declared statutory legislative vetoes unconstitutional—electoral defeats that some of the courts' justices relied upon as further proof that the state constitutions did not authorize legislative vetoes.[154]

2. No Court Decisions on Legislative Vetoes

Another contributing factor to the persistence of legislative vetoes in the states has been an apparent lack of litigation in the states where the mechanisms are authorized only by statute. Despite the several legal challenges described in Part II.A., a significant number of states with statutorily authorized legislative vetoes have not had court decisions addressing the constitutionality of these devices. This list includes Georgia, Illinois, Louisiana, North Carolina, North Dakota, Ohio, and South Dakota, each of which has a statutorily authorized strong-form legislative veto.

In some states, legal challenges have been filed but did not result in a decision on the constitutionality of the legislative veto at issue. In North Carolina, for instance, there have been multiple lawsuits filed that challenged the constitutionality of the rule review commission's powers, but in each case, the plaintiffs withdrew their challenges before a decision was announced.[155] In Illinois, there was a legal fight in the late-2000s between

150 *See* Kansas Secretary of State, 2022 General Election Official Vote Totals, *18, https://perma.cc/ZXL9-ZWN3; Jason Alatidd, *Legislative Veto of Regulations Amendment Fails in Closest Vote of Kansas 2022 Election*, Topeka Capital-Journal (Nov. 16, 2022), https://perma.cc/6DXJ-76TR.

151 Alaska voters rejected three proposals to enshrine a strong-form legislative veto in the state constitution in 1980, 1984, and 1986. *See* Berry, *supra* note 13, at 222, Figure 6.2. Voters in Kentucky rejected a similar proposal in 1990. Id. And voters in Oregon rejected a strong-form legislative veto in 1996. *See, e.g.,* City of Club of Portland, *Oregon State Ballot Measure 27: Legislative Approval of All State Administrative Rules* (Sept. 20, 1996), https://perma.cc/M5VK-37QK.

152 The Oklahoma Attorney General issued this opinion in 1986, 86-17 Ok. Op. Atty. Gen., and voters rejected a constitutional amendment proposing a strong form legislative veto in 1988. *See* Berry, *supra* note 13, at 222, Figure 6.2.

153 *See* Berry, *supra* note 13, at 222, Figure 6.2.

154 Blank, 611 N.W.2d at 543 (Markman, J. concurring); Mo. Coal. for Env't, 948 S.W.2d at 129.

155 In 2020, North Carolina Governor Roy Cooper filed a lawsuit that challenged the legislature's authority to appoint the Rules Review Commission members and argued that the Commission had unconstitutional veto authority, but he subsequently withdrew the lawsuit in 2022. *See* Victor Skinner, *North Carolina's Cooper Withdraws Lawsuit Against State's Rules Review Commission*, The Center Square (Oct. 31, 2022), https://perma.cc/XT8B-GPHZ. A few months after Governor Cooper withdrew his challenge, the North Carolina Environmental Management Commission filed a challenge to the Commission's rejection of a rule that would have set new standards for a likely carcinogen found in water but then dropped the case two weeks later. *See Environmen-*

then-Governor Rod Blagojevich and the legislature over the validity of a legislative veto of a rule proposed by the state department of health and family services.[156] While this challenge was underway, Blagojevich was impeached and removed from office, and the lawsuit settled out of court without a ruling.[157] (Much of the impeachment centered on allegations that Blagojevich sought to sell the U.S. Senate seat vacated upon Barack Obama's election as U.S. President. But a lesser-known article of impeachment against Blagojevich concerned his alleged abuse of power by his "refusal to recognize the authority of the Joint Committee on Administrative Rules to suspend or prohibit rules."[158])

In other states, it may be that the legislative veto has not, in the executive branch's eyes, been used or abused in a manner to warrant a lawsuit. [159] This could reflect the executive branch's lack of a desire to press an issue in the face of legislative opposition, but it may also reflect a sparing use of the veto power by the legislature. In Georgia, for instance, Jason Schwartz's 2010 study noted that although the state's strong-form legislative veto is a "powerful tool," it is used "so infrequently and inconsistently," if at all, that it is "like a sledgehammer collecting cobwebs."[160] Still, the threat of a legislative veto looms over the rulemaking process in these states, and the constitutionality of these mechanisms may one day be decided by a court.

3. Ignoring or Stretching Adverse Judicial Decisions

One last notable cause of the persistence of legislative vetoes is that, in at least a handful of states, adverse or skeptical judicial rulings have not halted the legislative veto process. To some extent, this dynamic resembles one that Lou Fisher documented at the federal level: Congress continued to include legislative vetoes in statutes after *Chadha* rejected them in 1983, and agencies' responsiveness to congressional committees' funding prerogatives means that "[t]he legislative veto continues to thrive…as a practical accommodation between executive agencies and congressional committees."[161] But in some states, examples seem to indicate more outright flouting or stretching of judicial rulings than voluntary accommodation or lack of litigation.

Start first with the subtlest forms of law-stretching. In Montana, a state trial court ruled in a 1982 decision, *Montana Taxpayers Ass'n. v. Department of Revenue*, that the state legislature violated the state constitution when it gave itself the authority to repeal

---

tal Commission Drops Lawsuit Against Rules Review Group, Carolina Journal (Mar. 21, 2023), https://perma.cc/2NYG-F3PU. *See also* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1216 (1999) (discussing earlier litigation challenging North Carolina's legislative veto that ended in settlement).

156 *See* Falkoff, *supra* note 13, at 1059-62

157 *Id*. at 1059.

158 *Id.*

159 Rossi, *supra* note 155, at 1216 (1999) (observing that state separation of powers limits on legislative vetoes may go underenforced or unchallenged due to "informal micropolitical factors").

160 Schwartz, *supra* note 13, at 205.

161 Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 Law & Contemp. Probs. 273, 273 (Autumn 1993); *see also id.* ("The meaning of constitutional law in this area is evidently determined more by pragmatic agreements hammered out between the elected branches than by doctrines announced by the Supreme Court.").

and amend an existing rule through adoption of a joint resolution that directed an agency to amend the rule.[162] The court relied upon a separation of powers analysis that foreshadowed the U.S. Supreme Court's rationale in *Chadha*, finding that the provision amounted to a legislative usurpation of both executive and judicial power and that it attempted to bypass the state constitution's requirement to present legislation to the governor for approval.[163]

The statute at issue in *Montana Taxpayers Ass'n* contained another legislative veto provision that authorized the legislature to repeal (but not amend) any agency rule by joint resolution. The court expressed skepticism of this provision but declined to rule on its constitutionality because it had not been challenged in the lawsuit.[164] Perhaps seeing the writing on the wall, the Montana Legislature repealed this other legislative veto mechanism along with the one declared unconstitutional after the trial court's decision. However, in 2021, the Montana Legislature effectively restored this legislative mechanism with one caveat: enacting a law allowing it to repeal existing agency rules by joint resolution if the rule was adopted between the current regular legislative session and the prior legislative session.[165] To date, this mechanism has not been challenged in court.

Wisconsin has exceeded further the limits described in judicial precedent. In *Martinez v. Department of Industry, Labor, and Human Relations*,[166] the state supreme court upheld a legislative suspension power, reasoning that its temporary nature avoided the constitutional violation that would otherwise result from the legislature's attempt to make law outside the channels of bicameralism and presentment.[167] In the 2018 lame duck session, the state legislature added to its veto power (while also enhancing the legislature's power vis-à-vis the executive in several other ways) by conferring upon itself the power to suspend rules "multiple times" without any limit.[168] In *SEIU v. Vos*, the state's high court upheld that 2018 expansion.[169] The court reasoned that because it had held in *Martinez* that "one three-month suspension passes constitutional muster," then "two three-month suspensions surely does as well."[170] The court cautioned, however, that although the statute does not prescribe a limit on the number of times a rule can be suspended, "there exists at least some required end point after which bicameral passage and presentment to the governor must occur" and that "an endless suspension of rules could not stand."[171] In other words, the state supreme court directly cautioned that an indefinite suspension would violate the state constitution's separation of powers principle.

Wisconsin's legislative veto process today looks nothing like the 6-month pause that

162 Mont. Taxpayers Ass'n v. Dep't of Revenue, No. 47126 (Mont. Lewis and Clark Co. Mar. 18, 1982).
163 *Id.* at *6-7.
164 *Id.* at *10-11.
165 See Mont. Code Ann. § 2-4-412.
166 Martinez v. DILHR, 478 N.W.2d 582 (Wis. 1992).
167 *Id.* at 586-87.
168 2017 Wis. Act 369, § 64; *see also* Wis. Stat. § 227.26(im).
169 SEIU v. Vos, 946 N.W.2d 35, 58-59 (Wis. 2020).
170 *Id.* at 42
171 *Id.* at 59.

the state supreme court seemed to have in mind in *SEIU*. For one, the legislature's Joint Committee for the Review of Administrative Rules (JCRAR) has a strong-form committee veto that allows JCRAR to impose an "indefinite objection" to a proposed rule that blocks its promulgation until and unless the legislature passes legislation to approve the proposed rule and overcome JCRAR's objection.[172] The legislature gave JCRAR this power in 2017 despite concerns about its constitutionality, though it was not challenged in *SEIU* or any other lawsuits.[173]

JCRAR also uses its multiple-suspension power, as well as a pairing of its pre- and post-promulgation suspension powers, to create an effective "endless suspension of rules" even without invoking its "indefinite objection" authority. A recent example (still ongoing at the time of this report's publication) involves an agency's rule updating K-12 vaccination requirements.[174] After the governor gave final approval to the rule in late 2019, JCRAR used its suspension powers in combination to effectuate a nearly three-and-a-half-year suspension.[175] The rule eventually took effect in February 2023, but the next month, JCRAR used another suspension power to again suspend the rule for the remainder of the legislative session, through 2024, while the legislature again considers legislation to disapprove the rule.[176] On paper, JCRAR could suspend the rule again in January 2025 through the end of 2026, and so on. (JCRAR has appeared to indefinitely suspend other proposed rules, too, including one intended to ban therapists, social workers, and counselors from trying to change LGBTQ clients' gender identities and sexual orientations through a practice known as "conversion therapy."[177]) At present, JCRAR's role in rulemaking has become so robust that it is common for the committee simply to announce that a rule will be blocked,[178] even though the committee's formal power is only to suspend temporarily.

---

172 Wis. Stat. § 227.19(5)(dm), (em), (fm).

173 *See* Wisconsin Legislative Council, January 29, 2016 Memo to Rep. Jocasta Zamparripa (on file with the State Democracy Research Initiative) (analyzing an earlier version of the state's REINS-style law, and concluding that "it seems possible, and is arguably likely, that a court would hold that JCRAR's ability to effectively stop a rule promulgation under the bill is contrary to the constitutional bicameralism and presentment requirements.").

174 The rule would require seventh graders to receive a meningitis vaccine and would require parents seeking a waiver from the state's chickenpox vaccine to show proof that their children had previously been infected with chickenpox. *See* Scott Bauer, *Wisconsin Republicans Block Meningitis Vaccine Requirement for Students*, Associated Press (June 7, 2023), https://perma.cc/XA6M-SK9C.

175 *See* Wisconsin State Legislature, Clearinghouse Rule CR 19-079, https://perma.cc/AL9P-4A67; Wisconsin Legislative Council, Wisconsin Legislator Briefing Book 2019-2020, *Chapter 4 - Administrative Rulemaking*, at 15 (November 2018), https://perma.cc/2PQC-WH23 (indicating that the rulemaking process ordinarily takes seven to 13 months).

176 *See* Bauer, *supra* note 174; *see also* Molly Beck, *Republicans Blocked a Meningitis Vaccine Requirement for 7th Graders. What's Behind the Decision and What it Means for Parents*, Milwaukee Journal Sentinel (Mar. 13, 2023), https://perma.cc/WUS8-RH4K.

177 JCRAR has, on multiple occasions, delayed and suspended a rule that would ban conversion therapy, preventing it from going into effect despite the legislature's repeated unwillingness or inability to enact legislation to otherwise block the rule. *See* Wisconsin State Legislature, Clearinghouse Rule CR 19-166, https://perma.cc/CG5L-5AH4; *see also* Wegehaupt, *supra* note 11; Lieffring, *supra* note 11.

178 *See, e.g.*, Associated Press, *Republicans Moving to Block University of Wisconsin Virus Testing, Vaccination Rules*, Milwaukee Journal-Sentinel (July 31, 2021), https://perma.cc/L4BU-EUS2.

Michigan provides a third example of stretching legal boundaries. As discussed above, the Michigan Supreme Court previously ruled in its 2000 decision *Blank v. Department of Corrections* that a statute authorizing a strong-form legislative veto violated the state constitution's separation of powers principle. One of the arguments in defense of the legislative veto was that it was allegedly authorized by a state constitutional provision that provides that the legislature "may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session."[179] But the state supreme court squarely rejected this argument, interpreting the constitutional provision as a "limited" grant of authority that "serves merely as a stopgap measure" to "prevent[] a proposed rule promulgated between legislative sessions from taking effect before the Legislature has had the opportunity to respond by enacting legislation."[180] Continuing, the state supreme court "infer[red]" from this limited constitutional grant that "the people of Michigan intended to restrict the Legislature's power over agency rulemaking"[181] In other words, the state supreme court ruled that the Legislature could not exercise a legislative veto power unless it was expressly authorized by the state constitution.

Despite *Blank*, the Michigan Legislature enacted a statute in 2016 that authorized its Joint Committee on Administrative Rules (JCAR) to suspend the rulemaking process beyond what the state constitution expressly authorizes. Under the law, JCAR can effectively suspend the promulgation process for nearly a year for *any* rule—not just those promulgated in between legislative sessions. JCAR has multiple review periods of up to 15 legislative session days each (about five weeks),[182] and at the end of these reviews, JCAR can then suspend the rulemaking process for an additional 270 calendar days ostensibly to give the legislature time to consider legislation to block or amend the rule.[183] And JCAR has indeed wielded these multiple review periods and 270-day suspension period to leave proposed rules in limbo for nearly a year. In the summer of 2021, the Michigan Secretary of State, the state's chief elections official, proposed three election-related rules intended to be in effect for the 2022 election cycle; the proposals concerned filing requirements for candidates, signature matching standards for absentee ballot applications and envelopes, and online absentee ballot requests.[184] The Secretary

179 Mich Const. art. IV, § 37; Blank, 462 Mich. at 118-22; *see also* Taxpayers of Michigan Against Casinos v. State, 471 Mich. 306, 330, 685 N.W.2d 221 (2004) (discussing the constitutional provision's authorization of "temporary legislative vetoes of agency regulations between legislative sessions").

180 Blank, 611 N.W.2d at 538-39; *see also id.* at 548-53 (Markman, J. concurring) (discussing the history of the Michigan Legislature's "limited" grant of authority to temporarily suspend rules that were promulgated in between legislative sessions).

181 *Id.* at 538.

182 Mich. Comp. Laws §§ 24.245a(1)(b), 24.245c(1)(b), (6).

183 Mich. Comp. Laws § 24.245a(1)(c), (5)-(10).

184 *See* Disqualification from Ballot Based Upon Contents of Affidavit of Identity, Mich. Off. of Admin. Hearings and Rules Rule Set No. 2021-60 ST (codified at Mich. Admin. Code r. 168.1-168.9); Signature Matching Standards for Absent Voter Ballot Applications and Absent Voter Ballot Envelopes, Mich. Off. of Admin. Hearings and Rules Rule Set No. 2021-61 ST (codified at Mich. Admin. Code r. 168.21-168.29); Online Absent Voter Ballot Application, Mich. Off. of Admin. Hearings and Rules Rule Set No. 2021-62 ST (codified at Mich. Admin. Code r. 168.31-168.69).

completed the required public hearings and submitted the rules to JCAR by December 2021, but JCAR, in party-line votes, was able to use its suspension powers to prevent the rules from going into effect until December 2022.[185]

185 The rules became effective on December 19, 2022. *See, e.g.*, Mich. Admin. Code r. 168.1-168.9, 168.21-168.29, 168.31-168.69; *see also* Michigan Joint Committee on Administrative Rules, February 23, 2022 Committee Meeting Minutes, https://perma.cc/BY5H-BDDX (approving motions to request changes to JCAR Rules 21-72, 21-73, and 21-74, thereby reserving the ability to review the rules for an additional period up to 15 legislative session days); Michigan Joint Committee on Administrative Rules, March 22, 2022 Committee Meeting Minutes, https://perma.cc/UE52-MBXX (approving motions to introduce legislation to enact JCAR's proposed versions of JCAR Rules 21-72, 21-73, and 21-74, thereby suspending the effective dates of the rules by 270 days).

III. Trending: Pandemic Vetoes

Although this report focuses on legislative vetoes that apply in the context of state administrative rulemaking, state legislatures have also deployed—or attempted to deploy—the mechanisms in other areas of state government. These other areas include appropriations and state contracts,[186] gubernatorial authority to reorganize the executive branch,[187] criminal sentencing guidelines,[188] and settlements of lawsuits against the state,[189] among others. But one area warrants special attention due to a recent surge in interest fueled by the COVID-19 pandemic: gubernatorial emergency declarations.

At the start of the pandemic in 2020, 29 states appeared to authorize their legislatures to veto gubernatorial declarations. Most of these pre-pandemic laws authorize the legislature to terminate an emergency declaration at any time (or after a set number of days) through adoption of a resolution by both legislative chambers—a two-house veto (except in Nebraska's unicameral legislature).[190] A small number of them require the legislature's consent to extend an emergency declaration after a set number of

186 *See* Op. of the Justices, 892 So.2d 332 (Ala. 2004) (concerning a legislative veto over contracts entered into by the executive branch); Watrous, 218 P.2d 498 (concerning a legislative veto over the use of tax proceeds as security for bonds to pay for construction costs); *see also* Op. of the Justices to the Senate, 493 N.E.2d 859 (Mass. 1986) (concerning a proposed legislative veto over the construction of a nuclear waste facility).

187 *See* Op. of the Justices, 83 A.2d 738 (N.H. 1950).

188 *See* Sessoms, 532 A.2d 775 (concerning a legislative veto over a judicial commission's criminal sentencing guidelines).

189 *See* Wis. Stat. § 165.08 (creating a legislative committee veto over any proposed settlement that "concedes the unconstitutionality or other invalidity of a statute, facially or as applied."); *see also* Josh Kaul v. Wis. State Legis., No. 2021CV1314, (Dane Cty. Cir. Ct. May 5, 2022) (finding Wis. Stat. § 165.08 unconstitutional as applied to civil actions prosecuted by the state attorney general to enforce state laws, including environmental laws, consumer protection laws, financial regulatory laws, Medical Assistance laws, and others, but staying the order pending appeal, which is ongoing as of publication of this report).

190 The states that, pre-pandemic, authorized their legislatures to terminate an emergency at any time or after a set a number of days were: Arizona (Ariz. Rev. Stat. Ann. § 36-787); California (Cal. Gov't Code § 8629); Colorado (Colo. Rev. Stat. § 24-33.5-704(4)); Georgia (Ga. Code Ann. § 38-3-51); Idaho (Idaho Code § 46-1008(2)); Indiana (Ind. Code § 10-14-3-12); Iowa (Iowa Code § 29C.6); Kansas (Kan. Stat. Ann. § 48-924(b)(6)); Louisiana (La. Rev. Stat. Ann. § 29:724) (emergency declarations are terminated by a petition signed by legislators rather than a resolution); Maine (Me. Rev. Stat. tit. 37-B, § 743); Maryland (Md. Code Ann., Pub. Safety, § 14-107(a)(4)); Minnesota (Minn. Stat. § 12.31 Subd. 2(b)) (providing that the legislature may terminate an emergency after 30 days); Missouri (Mo. Rev. Stat. Ann. § 44.100); Nebraska (Neb. Rev. Stat. § 81-829.40); Nevada (Nev. Rev. Stat. § 414.070)); New Hampshire (N.H. Rev. Stat. Ann. § 4:45(II)(c)); North Dakota (N.D. Cent. Code § 37-17.1-05); Oklahoma (Okla. Stat. tit. 63, § 6405); Oregon (Or. Rev. Stat. § 401.204(2)); Pennsylvania (35 PA. Cons. Stat. § 7301(c)); Rhode Island (R.I. Gen. Laws § 30-15-90); Texas (Tex. Gov't Code Ann. § 418.014(c)); West Virginia (W. Va. Code, § 15-5-6(b)); and Wisconsin (Wis. Stat. § 323.10).
Although these laws facially authorize legislative action that fits our definition of a legislative veto, at least one court has construed the state constitution to prohibit such a veto and require gubernatorial approval of a joint resolution. For an example of that approach, see the Pennsylvania Supreme Court's decision in *Wolf v. Scarnati*, discussed *infra*.

days, effectively empowering each legislative chamber to decide whether to extend the emergency.[191] And two states, Connecticut and Iowa, authorize forms of committee vetoes of gubernatorial emergency declarations.[192]

Once the pandemic started and tensions over emergency executive orders grew, an additional eight state legislatures attempted to pass laws to authorize legislative vetoes over gubernatorial emergency declarations, though two of these were blocked by gubernatorial vetoes,[193] while the legislatures overrode gubernatorial vetoes of two others.[194] In addition, several states bolstered existing legislative vetoes,[195] including Pennsylvania, where, as discussed further below, voters amended the state constitution to give more oversight powers to the legislature after a court construed those powers narrowly. The current landscape of legislative vetoes over gubernatorial emergency declarations is summarized in Appendix E.

---

191 The states that, pre-pandemic, required legislative approval to extend an emergency declaration after a set number of days were: Alaska (Alaska Stat. § 26.20.040(b)); Kansas (Kan. Stat. Ann. § 48-924(b)(3)-(4)); Michigan (Mich. Comp. Laws § 30.403(4)); South Carolina (S.C. Code Ann. § 25-1-440(a)(2)); and Washington (Wash. Rev. Code § 43.06.220(4)).

192 In Connecticut, a state of emergency can be terminated by a majority vote of a six-member committee consisting of majority and minority legislative leaders so long as one of the minority leaders votes for such disapproval. Conn. Gen. Stat. § 28-9.

In Iowa, when the governor proclaims a state of emergency while the legislature is not in session, the proclamation can be rescinded by a majority vote of the legislature's steering committee (the Legislative Council). Iowa Code § 29C.6.

193 Following the start of the pandemic in 2020, Florida, Kentucky, Montana, and New York enacted laws that authorize the legislature to terminate gubernatorial emergency declarations at any time. 2021 Fla. Sess. Law Serv. Ch. 2021-8 (C.S.C.S.S.B. 2006) (amending 252.36(3)(a)); Act of Feb. 2, 2021, Ch. 6, 2021 Ky. Acts 18 (amending Ky. Rev. Stat. § 39A.090(4)); 2021 Mont. Laws Ch. 504 (H.B. 230) (amending Mont. Code Ann. § 10-3-303); 2021 N.Y. Sess. Laws Ch. 71 (S. 5357) (McKinney) (amending NY Executive Law § 28(5)). Ohio enacted a law that authorizes the legislature to terminate a gubernatorial emergency declaration after 30 days and requires legislative approval to extend an emergency after 90 days. 2021 Ohio Laws File 3 (Sub. S.B. 22) (West) (enacting Ohio Rev. Code Ann. § 107.42). Similarly, Utah enacted a law that authorizes the legislature to terminate a gubernatorial emergency declaration after 30 days and requires legislative approval to extend an emergency after 30 days. 2021 Utah Laws Ch. 437 (S.B. 195).

Similar legislative veto mechanisms were approved by the Hawaii and Louisiana legislatures after the start of the pandemic but were vetoed by the states' respective governors. *See* Merrilee Gasser, *Ige Vetoes Bill that Would Have Limited the Governor's Emergency Powers*, The Center Square (Jul. 13, 2022), https://perma.cc/J9ZK-8M6G; JC Canicosa & Wesley Muller, *Louisiana Gov. John Bel Edwards Vetoes Bills Related to Vaccines, Emergency Powers and Elections*, Louisiana Illuminator (July 2, 2021), https://perma.cc/WKT3-C25L (noting that the Louisiana Governor had vetoed two attempts to give the legislature more oversight authority over emergency declarations).

194 *See* Act of Feb. 2, 2021, Ch. 6, 2021 Ky. Acts 18; 2021 Ohio Laws File 3 (Sub. S.B. 22) (West).

195 In Arizona, for example, state law at the start of the pandemic authorized the legislature to terminate a state of emergency by concurrent resolution. This law was amended to also limit the initial length of a public health emergency to 30 days and provide that the governor can extend the emergency in 30-day increments, for a total length of no more than 120 days, unless the legislature passes a concurrent resolution to extend the emergency beyond 120 days. *See* 2022 Ariz. Legis. Serv. Ch. 220 (S.B. 1009) (amending Ariz. Rev. Stat. Ann. § 36-787). Similar changes were enacted in North Dakota and Rhode Island. *See* 2021 N.D. Laws Ch. 191 (H.B. 1118) (amending N.D. Cent. Code § 37-17.1-05) (authorizing a legislative committee to request the governor to call a special legislative session for purposes of considering the terms of a gubernatorial emergency declaration); 2021 R.I. Pub. Laws, Ch. 162, Art. 3, § 3 (amending R.I. Gen. Laws § 30-15-9).

Despite the proliferation of legislative veto mechanisms over gubernatorial emergency declarations, few state legislatures attempted to veto their governors' emergency declarations during the pandemic. And those that made such an attempt had mixed results.

In South Carolina, for instance, at the beginning of the COVID-19 pandemic, state law provided that a declared state of emergency shall not continue for a period of more than 15 days without the consent of the legislature.[196] But rather than seeking an extension of the declared state of emergency from the legislature, the governor instead issued a new declaration of emergency *every 15 days*. After over a year of this, the state senate adopted a resolution objecting to the governor's practice and declining to consent to an extension or renewal of the particular state of emergency that was in effect at the time.[197] Still, the governor pressed on for another month before declining to declare another state of emergency—what would have been his 31st declaration—in June 2021.[198]

More contentious legal fights occurred in Michigan and Pennsylvania, where different political parties controlled the legislatures and governorships.[199] In Michigan, a statute required the governor to seek the legislature's approval to extend a state of emergency after 28 days, and similar to the governor in South Carolina, the Michigan governor issued a new emergency declaration every 28 days instead of seeking legislative approval to extend her initial emergency declaration.[200] The Michigan Supreme Court rejected the legality of this maneuver in *In re Certified Questions from the United States District Court for the Western District of Michigan*, unanimously holding that the maneuver was contrary to the legislature's intent to require the governor to seek legislative approval to extend a state of emergency beyond 28 days.[201] In so holding, the Court also expressly rejected an argument that the 28-day limitation amounted to an (unconstitutional) legislative veto; citing *Chadha*, the lead opinion reasoned that the legislature does not negate or "veto" any executive action in declining to extend the emergency.[202] The decision effectively ended Michigan's state of emergency in October 2020.[203]

An even more contentious constitutional fight played out in Pennsylvania. At the start of the pandemic, a statute provided that the legislature could terminate a state of

196 S.C. Code Ann. § 25-1-440(a)(2).
197 S. Res. 802, 124th S.C. Leg. (2021).
198 *See* Meg Kinnard, *South Carolina Gov Ends COVID-19-Related State of Emergency*, Associated Press (June 7, 2021), https://perma.cc/J22G-TYQ2.
199 *See also* Kelly v. Legislative Coordinating Council, 460 P.3d 832 (Kan. 2020) (holding that a legislative committee failed to properly invoke its statutory authority to revoke a gubernatorial emergency declaration).
200 In re Certified Questions from the U.S. Dist. Court, W.D. Mich., 958 N.W. 2d 1, 9 (Mich. 2020) (quoting M.C.L. 30.403).
201 *Id.* Although the justices all agreed that the governor was required to seek legislative approval to extend the state of emergency beyond 28 days, the justices were more closely divided over a separate issue of whether the law authorizing the governor to exercise emergency powers was an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. A majority declared the law an unconstitutional delegation of legislative power. *Id*. at 357-74.
202 *Id.* at 10-11.
203 *See, e.g.*, Dave Alsup and Susannah Cullinane, *Michigan Supreme Court Strikes Down Governor's Emergency Covid Powers*, CNN (Oct. 2, 2020), https://perma.cc/Y7GF-RGBJ.

disaster emergency at any time by concurrent resolution.[204] About three months into the governor's state of emergency, the legislature adopted a concurrent resolution ordering the governor to terminate the emergency pursuant to its statutory authority.[205] The governor challenged the concurrent resolution in court, citing a provision in the state constitution he interpreted as requiring the resolution to be presented to him for approval or disapproval—something the legislature had not done. In a divided decision, the Pennsylvania Supreme Court sided with the governor and held that the state constitution required the resolution to be presented to the governor for approval or disapproval.[206] Among other reasons, the majority explained that allowing the legislature to terminate a gubernatorial emergency declaration by concurrent resolution without presentment to the governor would amount to "authoriz[ing] a legislative veto," which the Court had previously held violates the state constitution.[207]

Undeterred, the Pennsylvania General Assembly responded to the ruling in *Wolf* by proposing amendments to the state constitution to expressly authorize a legislative veto of gubernatorial emergency declarations. One proposal was to authorize the legislature to terminate the declaration by concurrent resolution without presentment to the governor, and the other was to limit the duration of states of emergency to 21 days, absent an affirmative extension by concurrent resolution of the legislature.[208] The voters approved these amendments at an election in May 2021,[209] and the next month, the legislature terminated Pennsylvania's state of emergency by concurrent resolution.[210]

204 *See* Wolf v. Scarnati, 233 A.3d 679, 684-85 (Pa. 2020).
205 *Id.* at 685-86.
206 *Id.* at 687-99.
207 *Id.* at 687 (citing Commonwealth v. Sessoms, 532 A.2d 775 (Pa. 1987)).
208 *See* Sarah Anne Hughes, *Voters Back Curtailing Wolf's Emergency Powers in Win for GOP Lawmakers*, Spotlight PA (May 19, 2021), https://perma.cc/P8GG-YJN2.
209 *See id*; *see also* Pa. Const. art. III, § 9; art. IV, § 20.
210 *See* Corman v. Acting Secretary of Pennsylvania Department of Health, 266 A.3d 452, 455-58(Pa. 2021) (describing the voters' abrogation of the Court's earlier decision in *Scarnati*).

Conclusion

The states did not abandon legislative vetoes when the U.S. Supreme Court ordered Congress to do the same 40 years ago. In the decades since, state legislative vetoes and related mechanisms have remained the subject of legislative experimentation, despite judicial disapproval by most of the state courts to have considered their validity.

Identifying and describing these systems and the jurisprudence interpreting them is just the start. The conversation about legislative veto systems in the states will benefit from further research that empirically analyzes the impact of these tools in the states, as well as work that explores the normative and constitutional implications of the design choices of different systems.

Appendix A

Mechanisms of Legislative Oversight of Agency Rulemaking

	Strong-Form Legislative Veto	Temporary Suspension Authority	Legislative Rule Ratification	Objection Requiring Executive Action	Objection Shifting Burden of Persuasion	Advisory Only	No Formal Legislative Oversight
Alabama		●		●			
Alaska						●	
Arizona						●	
Arkansas	●						
California							●
Colorado			●				
Connecticut	●						
Delaware						●	
Florida			●	●			
Georgia	●	●		●			
Hawaii							●
Idaho	●						
Illinois	●			●			
Indiana							●
Iowa	●	●			●		
Kansas						●	
Kentucky				●			
Louisiana	●			●			
Maine						●	
Maryland				●			
Massachusetts							●
Michigan		●		●			
Minnesota		●			●		
Mississippi							●
Missouri				●			
Montana	●	●			●		
Nebraska						●	
Nevada	●						
New Hampshire		●			●		
New Jersey	●						
New Mexico							●
New York						●	
North Carolina	●	●					
North Dakota	●				●		
Ohio	●						
Oklahoma		●		●			
Oregon				●			
Pennsylvania		●					
Rhode Island							●
South Carolina		●		●			
South Dakota	●	●					
Tennessee		●	●				
Texas						●	
Utah			●				
Vermont					●		
Virginia		●		●			
Washington				●			
West Virginia			●				
Wisconsin	●	●	●				
Wyoming				●			

Appendix B

State Court Decisions Regarding Legislative Veto Power

	No Judicial Precedent	Held Unconstitutional	Questioned Constitutionality	Constitutionality Implied	Held Constitutional
Alabama			Strong Form		
Alaska		Strong Form			
Arizona	●				
Arkansas			Advisory Only*		
California			Strong Form		
Colorado				Strong Form	
Connecticut	●				
Delaware	●				
Florida	●				
Georgia					Strong Form
Hawaii	●				
Idaho					Strong Form
Illinois	●				
Indiana	●				
Iowa	●				
Kansas		Strong Form			
Kentucky		Strong Form			
Louisiana	●				
Maine	●				
Maryland	●				
Massachusetts			Strong Form		
Michigan		Strong Form		Legislative Ratification	
Minnesota	●				
Mississipi	●				
Missouri		Strong Form			
Montana			Strong Form**		
Nebraska	●				
Nevada	●				
New Hampshire		Strong Form		Temporary Suspension Authority	
New Jersey		Strong Form*			
New Mexico	●				
New York	●				
North Carolina	●				
North Dakota			Strong Form		
Ohio	●				
Oklahoma	●				
Oregon		Strong Form			
Pennsylvania		Strong Form			
Rhode Island	●				
South Carolina	●				
South Dakota	●				
Tennessee	●				
Texas	●				
Utah			Strong Form		
Vermont	●				
Virginia	●				
Washington	●				
West Virginia		Strong Form			
Wisconsin			Strong Form	Temporary Suspension Authority	
Wyoming	●				

* Court decision was superseded by constitutional amendment.
** Court decision was from a state trial court

Appendix C

State Court Decisions Relevant to Legislative Vetoes

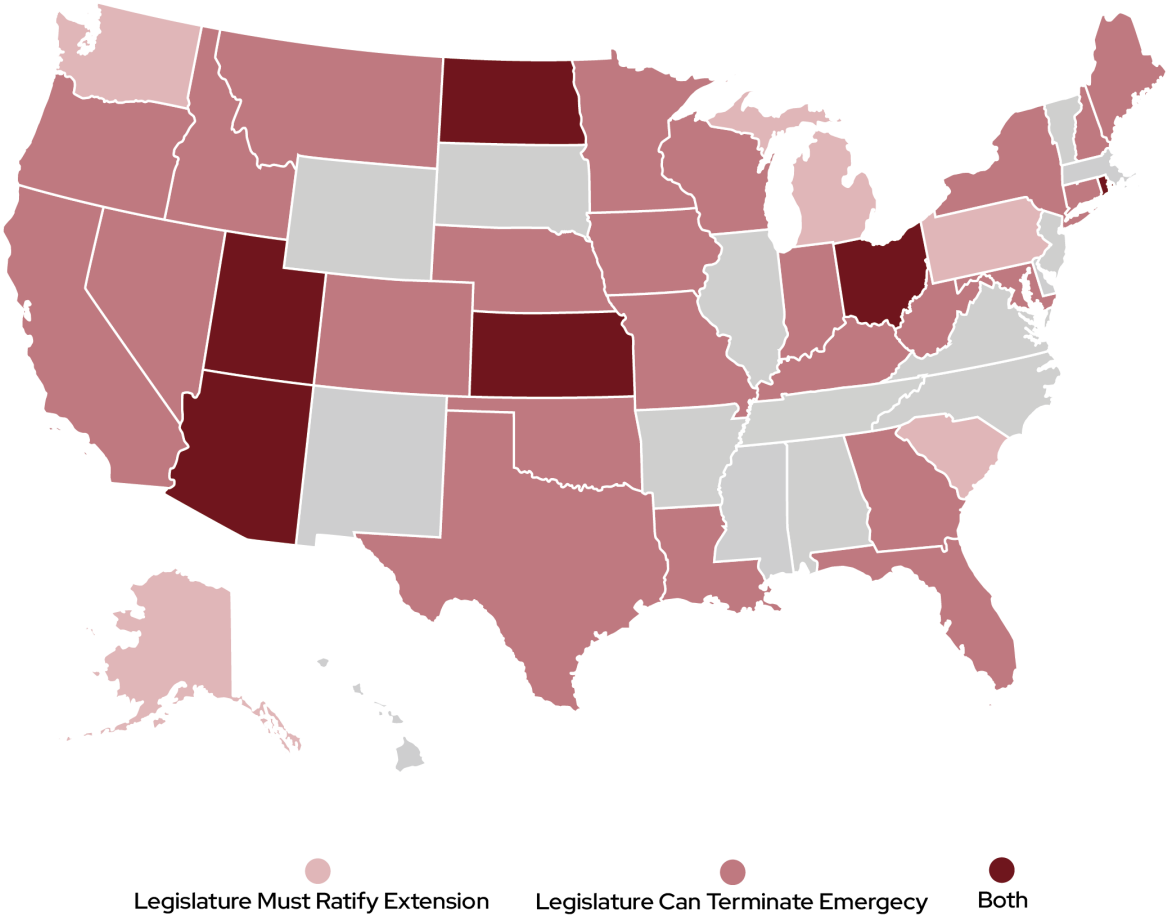
Alabama	*Opinion of the Justices*, 892 So.2d 332 (Ala. 2004).
Alaska	*State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980)
Arkansas	*Chaffin v. Arkansas Game and Fish Comm.*, 757 S.W.2d 950 (Ark. 1988)
California	*Carmel Valley Fire Prot. Dist. v. State of Cal.*, 20 P.3d 533 (Cal. 2001)
Colorado	*Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950)
Connecticut	*Maloney v. Pac*, 183 Conn. 313, 439 A.2d 349 (1981)
Georgia	*Albany Surgical, P.C. v. Georgia Dept. of Community Health*, 278 Ga. 366 (2004)
Idaho	*Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983)
	Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990)
Iowa	*Iowa Fed'n of Labor v. Iowa Dep't of Job Serv.*, 427 N.W.2d 443 (Iowa 1988)
Kansas	*State ex rel. Stephan v. House of Representatives*, 687 P.2d 622 (Kan. 1984)
	Kelly v. Legislative Coordinating Council, 311 Kan. 339, 460 P.3d 832 (2020)
Kentucky	*Legislative Research Comm. v. Brown*, 664 S.W.2d 907 (Ky., 1984)
	Cameron v. Beshear, 628 S.W.3d 61 (Ky 2021)
Massachusetts	*Opinion of the Justices to the Senate*, 397 Mass. 1201 (1986)
Michigan	*Blank v. Dep't of Corrections*, 462 Mich. 103 (2000)
	In re Certified Questions from United States District Court, Western District of Michigan, 506 Mich. 332, 958 N.W.2d 1 (2020)
Missouri	*Missouri Coalition for Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (1997)
Montana	*Montana Taxpayer's Ass'n v. Department of Revenue*, No. 47126 (Mont. Lewis and Clark Co. Mar. 18, 1982)
New Hampshire	*Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950)
	Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981)
New Jersey	*General Assembly v. Byrne*, 90 N.J. 376 (1982).
	Enourato v. Bldg. Auth., 90 N.J. 396, 448 A.2d 449 (1982)
	Communications Workers of America v. N.J. Civil Serv. Comm'n., 234 N.J. 483 (2018)

Oregon	*Gilliam Cty. v. Dep't of Environmental Quality of State of Or.*, 849 P.2d 500 (1993)
Pennsylvania	*Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775 (1987)
	MCT Transp. Inc. v. Phila. Parking Auth., 60 A.3d 899 (Pa. Cmwlth. 2013)
	Wolf v. Scarnati, 660 Pa. 19, 233 A.3d 679 (2020)
South Carolina	*Reith v. South Carolina State Housing Authority*, 267 S.C. 1, 225 S.E.2d 847 (1976)
Utah	*Stewart v. Utah Public Service Com'n.*, 885 P.2d 759, 775 (Utah 1994)
West Virginia	*State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981)
	State ex rel. Meadows v. Hechler, 195 W.Va. 11, 462 S.E. 586 (1995)
Wisconsin	*Martinez v. DILHR*, 165 Wis.2d 687, 478 N.W.2d 582 (1992)
	SEIU, Local 1 v. Vos, 393 Wis.2d 38, 946 N.W.2d 35 (2020)
	Josh Kaul v. Wisconsin State Legislature, No. 2021CV1314, (Dane Cty. Cir. Ct. May 5, 2022)

Appendix D

State Attorney General Opinions Addressing Legislative Vetoes

Arkansas	Ark. Op. Atty. Gen. No. 2001-033 (2001)
	Ark. Op. Atty. Gen. No. 2014-115 (2014)
California	Cal. Op. Atty. Gen. No. 77-62 (1977)
Connecticut	Conn. Op. Atty. Gen. No. 2002-021 (2002)
Kansas	Kan. Op. Atty. Gen. No. 97-18 (1997)
	Kan. Op. Atty. Gen. No. 2020-6 (2020)
Maine	Me. Op. Atty. Gen. No. 76-125 (1976)
	Me. Op. Atty. Gen. No. 83-5 (1983)
	Me. Op. Atty. Gen. No. 86-6-A (1986)
Maryland	85 Md. Op. Atty. Gen. No. 190 (2000)
	99 Md. Op. Atty. Gen. No. 171 (2014)
	107 Md. Op. Atty. Gen. No. 3 (2022)
Nebraska	Neb. Op. Atty. Gen. No. 77-53 (1977)
	Neb. Op. Atty. Gen. No. 1 (2021)
Oklahoma	Ok. Op. Atty. Gen. 86-17 (1986)
South Carolina	T. Travis Medlock's March 19, 1986 Letter to Charles L. Powell
Tennessee	Tenn. Op. Atty. Gen. 82-115 (1982)
	Tenn. Op. Atty. Gen. 01-086 (2001)
	Tenn. Op. Atty. Gen. 08-131 (2008)
Virginia	1981-82 Va. Op. Atty. Gen. 93 (1982)
	Va. Op. Atty. Gen. 16-01329 (2016)
Wisconsin	May 20, 1974 Opinion to the State Assembly

Appendix E

States with Legislative Vetoes Over Gubernatorial Emergency Declarations