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# SONG IN A CRABBED KEY IN MISSOURI, CIRCA 1994: THE JUDICIAL/LEGISLATIVE PARTNERSHIP IN ADMINISTRATIVE LAW

Alfred S. Neely\*

## I. A STORY OF STATUTES

This story is of statutes. Its setting is administrative law in the State of Missouri. It concerns the Missouri General Assembly's reaction and response in 1994 to two recent decisions of Missouri courts interpreting and applying the legislature's own creation, the Missouri Administrative Procedure Act.<sup>1</sup> The result was to undo what the courts had done. Specifically, it excluded public higher education from MAPA's reach, and also declared a conditional moratorium on MAPA's requirements for fiscal notes in administrative rulemaking.

The focus of this article is the wisdom, not the legitimacy, of these legislative actions. Any arguments concerning the constitutionality of the General Assembly's actions lie at the margin, not at the center.<sup>2</sup> This is customary. The soundness of legis-

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1. MO. REV. STAT. §§ 536.010-536.215 (1986 & Supp. 1993), amended by 1994 Mo. Laws S.B. 558 & H.B. 1099 [hereinafter MAPA].

2. In origin, both Senate Bill 558 and House Bill 1099 were modest in title and topic. Both were advertised as "[a]n Act to amend chapter 536 RSMo, by adding thereto one new section relating to administrative procedure and review" and confined their object to takings analyses in rulemaking. 1994 Mo. Laws H.B. 1099, S.B. 558 (as initially introduced).

As "truly agreed to and finally passed" and approved by the Governor, House Bill 1099 retained its initial title with only the slight modification to reflect the addition of, as indicated, the exclusion for higher education and an expiration date as to takings analyses. At the same stage Senate Bill 558 had taken quite a new title, "An Act to repeal sections 536.015, 536.037, and 536.205, RSMo 1986, and sections 536.021 and 536.200, RSMo Supp. 1993, relating to administrative and judicial review, and to enact in lieu thereof nine new sections relating to the same subject, with an emergency clause and a termination date for a certain section." 1994 Mo. Laws S.B. 558. It too had taken aboard the higher education exclusion, as well as the provisions on effective date of final rules, legislative review, and fiscal notes. By this time Senate Bill 558 was no longer modest in either title or topic.

These aspects of the bills are suspect in light of the provisions in the Missouri Constitution that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title," MO. CONST. art. III, § 23, and that "no bill shall be so amended in its passage through either house as to change its original purpose." *Id.* art. III, § 21. These provisions serve important public purposes, including prevention of surprise, disorder, and "logrolling" in the legislative process, the assurance of public knowledge of the subjects of legislation, and the protection of the efficacy of the governor's veto power over general legislation. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101-02 (Mo. 1994) (en banc). Missouri courts have long taken these constitutional requirements and purposes quite seriously. The single subject requirement in Article III, section 23, for example, is considered "mandatory, not directory" and enforced under the longstanding test that requires that matters treated in a single bill be "germane, connected and congruous." *Id.* at 102 (quoting *State v. Mathews*, 44 Mo. 523,

lative judgment is normally not a function of constitutional constraint. Ill-conceived, ill-founded and ill-advised statutes often are, nonetheless, perfectly constitutional.

The purpose here is to consider the wisdom of these developments in Missouri against the backdrop of a common assumption underlying the origins and functioning of the modern administrative state in this country—the proposition that administrative agencies and their actions are too important to do without, and too important to leave uncontrolled. Comprehensive administrative procedure acts, such as MAPA, reflect this assumption carried into practice and represent one important means of realizing control. Typically and sensibly, legislatures usually recognize that procedural commands and a hope of voluntary compliance may not prove adequate. Sometimes enforcement and sanction may be necessary to bring inattentive or recalcitrant agencies into line. Ordinarily, legislatures enlist the aid of the judiciary in this effort, whether or not constitutional principles compel a role for the courts in reviewing agency action. When this happens, the result is akin to partnership—the working, in tandem, of independent co-equal branches of government with the shared object of control of administrative action. Most often this takes the form of courts seeing to it that the will of the legislature is carried out, and that agencies stay within prescribed boundaries and procedural pathways.

Ultimately, the overall purpose here is an assessment of how the health of such partnerships is best maintained so that administrative action is not left inadequately controlled, or even uncontrolled. The recent Missouri experience suggests some solutions.

## II. THE 1994 AMENDMENTS TO THE MISSOURI ADMINISTRATIVE PROCEDURE ACT

On January 5, 1994, Senate Bill 558<sup>3</sup> and House Bill 1099<sup>4</sup> were introduced at the outset of the Second Regular Session of the 87th Missouri General Assembly. Both proposed to amend MAPA. The object of each was to require a “takings analysis” in conjunction with proposed rulemaking by state agencies. This concept was new to the rulemaking process in Missouri. The expectation of both bills was that a proposed rule “which limits or affects the use of real property” would be preceded by a legal judgment “evaluat[ing] whether the proposed rule or regulation on its face constitutes a taking of real property under relevant state or federal law.”<sup>5</sup> The prospect was an additional mandatory step in the rulemaking process. The expectation was buttressed by the command that “[n]o department or agency shall transmit a proposed rule or regulation which limits or affects the use of real property to the Secretary of State until a takings analysis has occurred.”<sup>6</sup>

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527 (1869)).

These matters are beyond the scope of this article; however, they highlight the extent to which the bills did indeed accumulate considerable baggage from the time of introduction until the time of passage. See also note 89 *infra* concerning the potential issue of constitutionality of retroactive effect given the conditional moratorium on MAPA’s requirements for fiscal notes in administrative rulemaking.

3. Mo. S.B. 558, 87th Mo. Gen. Assembly, 2d Sess. (1994).

4. Mo. H.B. 1099, 87th Mo. Gen. Assembly, 2d Sess. (1994).

5. Mo. S.B. 558 & H.B. 1099, 87th Mo. Gen. Assembly, 2d Sess. (1994) [hereinafter S.B. 558 & H.B. 1099].

6. *Id.* An agency would be required to certify in its letter transmitting its notice of proposed rulemaking “to the Secretary of State that a takings analysis has occurred.” *Id.*

Both bills' evident purpose was to force state agencies, at least, to give serious thought to the impact of their rulemaking decisions on real property held in private hands.<sup>7</sup> In this they shared concerns and sentiments reflected in recent years in other circles, state and federal.<sup>8</sup> These Missouri bills, however, were modest in their de-

A takings analysis would not be required under all circumstances. First, "[a] takings analysis shall not be necessary where the rule or regulation is being promulgated on an emergency basis . . ." *Id.* This seems sensible enough. The circumstances justifying emergency rulemaking by nature would make compliance with this requirement extremely difficult, if not impossible. *See generally* ALFRED S. NEELY, *MISSOURI ADMINISTRATIVE PRACTICE AND PROCEDURE* §§ 6.60-6.61 (1995). However, as with other aspects of emergency rulemaking, the reprieve would only be temporary. *See id.* §§ 6.62-6.63.

Furthermore, no takings analysis would be required "where the rule or regulation is federally mandated . . ." S.B. 558 & H.B. 1099, *supra* note 5. Unlike the case with emergency rules, this reprieve would be permanent. The relief would also be permanent when a takings analysis was not "necessary [because] the rule or regulation substantially codifies existing federal or state law." *Id.*

7. Both bills supplemented and illuminated the basic requirement for takings analyses in their evaluation criteria:

For purposes of this section, "taking of private property" shall mean an activity wherein private property is taken such that compensation to the owner of the property is required by the fifth and fourteenth amendments to the Constitution of the United States or any other similar or applicable law of this state.

*Id.* This brought provisions of both federal and state constitutions into play. *See* U.S. CONST. amend. V, § 1 ("[N]or shall private property be taken for public use, without just compensation"); MO. CONST. art. I, § 26 ("That private property shall not be taken or damaged for public use without just compensation"). *See also id.* §§ 27-28 (acquisition of excess property by eminent domain and limitations on taking of private property for private use).

Occasionally, although not often in an administrative rulemaking context, one of these provisions might find the mark. *Cf.* Missouri Highway & Transp. Comm'n v. Eilers, 729 S.W.2d 471 (Mo. Ct. App. 1987) (precondemnation soil survey without owner's consent was unconstitutional taking). However, even quite intrusive and disruptive regulation has not been viewed as rising to the level of compensable taking without a further finding of no discernible public purpose. Ordinarily, the latter has not been obvious. Public purposes traditionally have been deemed apparent. *See* PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 49 (1989). In recent years, however, there has been a shift from "[t]he standard assumption . . . that the mere imposition of government regulations had absolutely nothing to do with an unconstitutional 'taking' of private property" to one under which regulatory interference with the enjoyment of private property by itself might be considered a compensable taking. *See* WILLIAM F. FOX, JR., *UNDERSTANDING ADMINISTRATIVE LAW* 127-29 (2d ed. 1992) (shift illustrated in takings case of *Lucas v. South Carolina Coastal Council*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

8. *See, e.g.,* Miss. S.B. 2487, 162d Leg., Reg. Sess. (1994) (imposes standards for impact of statutes and rules on private property and creates private action for loss of value thereby); Neb. Legis. Bill 1100, 93d Leg., 2d Sess. (1994) (Attorney General to review rules for takings without compensation and advise of potential liability); Me. Senate Paper No. 383, 116th Leg., 1st Reg. Sess. (1993) (Attorney General to review proposed rules for potential takings of private property); Minn. Senate File No. 2677, 78th Leg., Reg. Sess. (1993-94) (Statutory Property Rights Preservation Act requiring compensation for takings as a result of regulation and assessment by state agencies in advance of rulemaking); N.H. H.B. 1486, 153d Leg., Reg. Sess. (1993) (Attorney General to establish guidelines for governmental acts that are potentially protected takings of private property, and to assist agencies in evaluating such takings); S.C. S.B. 816, Statewide Sess. (1993) (S.C. Private Property Protection Act requiring compensation for takings as a result of regulation and assessment by state agencies in advance of rulemaking); Wash. H.B. 1843, 53d Leg., Reg. Sess. (1993) (compensation for takings of private property by regulation); W. Va. S.B. 249, 71st Leg., Reg. Sess. (1993-94) (requires assessment of constitutional takings implications of agency action); Wis. A.B. 1185, 91st Leg., Reg. Sess. (1993-94) (reports by state agencies when their actions may result in taking of private property).

For reflections of similar interests at the federal level, *see* S. 2006, 103d Cong., 2d Sess. (1994) (federal agencies to prepare private property takings impact analyses); H.R. 4418, 103d Cong., 1st

mands. They proposed only that a takings analysis be done, and that the fact of it be communicated to the Secretary of State in the letter of transmittal for the notice of proposed rulemaking. There was not even a requirement that the analysis itself be included for publication with the notice of proposed rulemaking, or otherwise be made available for wider scrutiny.

When these bills were adopted by both houses of the General Assembly, and approved by the Governor on June 3, 1994, they included a new MAPA provision, section 536.017, which in substantive terms was identical with the bills as introduced five months before.<sup>9</sup> In one respect this was significant; the statutory experiment in takings analyses was a new element in Missouri administrative procedure. In another sense, however, it was quite ordinary, for the amendment of MAPA has been a rather common occurrence. This was the twelfth legislative session in which this 1945 statute has been revisited and amended.<sup>10</sup>

Along the path from introduction to adoption, Senate Bill 558 and House Bill 1099 accumulated legislative baggage far removed from takings analysis. Some of this baggage represented little more than a continuing process of refinement and revision of MAPA that had been underway for some time. For years, the important matter of the effective date for a final rule has been a subject of considerable legislative experimentation in Missouri.<sup>11</sup> Senate Bill 558's amendment of MAPA's section 536.021.7 was merely the most recent installment. Today, and at least until the Missouri General Assembly next gathers, MAPA provides that rules, other than emergency rules, cannot go into effect sooner than thirty days after publication in the *Missouri Code of State Regulations*.<sup>12</sup> Under its immediate predecessor, the limit was ten days which was

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Sess. (1994) (same); Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), *reprinted in* 5 U.S.C. § 601 ("Government Actions and Interference with Constitutionally Protected Property Rights").

9. 1994 Mo. Laws S.B. 558, H.B. 1099 (amending MO. REV. STAT. §§ 536.010.1215 (1986 & Supp. 1993)), § 536.017.1. The legislative process did, however, produce one significant new limitation. In an apparent display of uncertainty concerning what it was doing and where it was going with its taking analysis requirement, the Missouri General Assembly built in an incentive for it to reexamine its handiwork. It added that "[t]he provisions of this section shall expire on September 1, 1997." *Id.* § 536.017.2. Consequently, the takings analysis requirement will "sunset" as of that date, unless the General Assembly takes further legislative action to extend the experiment for a time certain, or in perpetuity, and in the same or refined form.

10. 1945 Mo. Laws 1504, *amended by* 1994 Mo. Laws S.B. 558, H.B. 1099; 1993 Mo. Laws 1212, 1214; 1992 Mo. Laws 327; 1989 Mo. Laws 1071; 1985 Mo. Laws 953; 1981 Mo. Laws 633; 1979 Mo. Laws 628; 1978 Mo. Laws 459, 962; 1976 Mo. Laws 768, 773; 1975 Mo. Laws 403; 1957 Mo. Laws 748; 1953 Mo. Laws 679.

11. At one time the order of final rulemaking itself bore "[t]he effective date of the rule, which shall be not less than ten days after the publication of the order of rulemaking in the Missouri Register." MO. REV. STAT. § 536.021.5(2) (1986) (repealed 1989). On its surface this ten day limitation appeared to reflect the Missouri constitutional provision that delays a rule's effective date until ten days after filing with the Secretary of State. MO. CONST. art. IV, § 16. However, MAPA actually measured the ten day period from a later time, specifically the date of publication.

In 1989, this requirement was replaced with a provision that "no rules, except emergency rules, may become effective prior to the tenth day after the date they are published in full in the Missouri code of state regulations. The publication date of each rule shall be printed below the rule in the Missouri code of state regulations." MO. REV. STAT. § 536.021.7 (1986 & Supp. 1993), *amended by* 1994 Mo. Laws S.B. 558. Thereafter, the time for effectiveness of a rule was to be measured against the date of its publication in the *Code of State Regulations* rather than the *Missouri Register*.

12. 1994 Mo. Laws S.B. 558, § 536.021.7. With a rule's effectiveness measured under these terms, early notice to interested persons is especially important. To that end a provision also was added requiring that "[t]he Secretary of State shall distribute revisions of the Missouri code of state regulations to all subscribers of the Missouri code of state regulations on or before the date of publi-

measured from publication of the revision of the *Code* next following the revision in which the rule itself was published.<sup>13</sup>

As enacted, Senate Bill 558 also addressed the process of legislative veto of administrative rules. For many years this, too, has been the object of considerable legislative attention in Missouri.<sup>14</sup> In 1994, the General Assembly consolidated prior efforts within MAPA into the shape of a new section 536.024. This new formula for legislative review sets as its basic premise the proposition that “[n]o rule or portion of a rule promulgated under the authority of any provision of Missouri statutes shall become effective until it has been approved by the joint committee on administrative rules in accordance with the procedures provided herein . . . .”<sup>15</sup> The Joint Committee is thus cast in a central role in the rulemaking process.<sup>16</sup>

cation of such revision.” *Id.* The *Code* itself must “be revised no less frequently than monthly . . . .” MO. REV. STAT. § 536.031.2 (1986 & Supp. 1993).

13. 1992 Mo. Laws 327, § 536.021.7. This added one *Code* publication cycle to the time for a rule to become effective. It seems that this was not expeditious enough in some instances. The section was amended again in 1993 to provide that “rules pertaining to changes in hunting or fishing seasons and limits that must comply with federal requirements or that are necessary because of documented changes in fish and game populations may become effective no earlier than on the tenth day after the filing of the order of rulemaking.” 1993 Mo. Laws 1212, § 536.021.7. For such rules the date of filing, not publication, was and remains the focal point for determining permissible effective dates.

14. In 1975, the General Assembly created a permanent joint legislative committee, the Committee on Administrative Rules, for the purpose of legislative review and oversight of the rulemaking process in the state agencies. However, until quite recently, the General Assembly had not adopted a comprehensive form of legislative veto of administrative rules. The power granted the Committee on Administrative Rules under MAPA was only advisory. Although important, the Committee’s role was limited to one of review and report—the Committee reviewed the product of the rulemaking process and reported its findings to the legislature, with the possibility of subsequent legislative action should the legislature agree with its Committee’s findings. This process of Committee action might influence and even dissuade prudent agency officials, but it had no independent coercive force and, thus, no dispositive consequence. Actually, legislative veto under these conditions may be a misnomer that promises more than it delivers. *See generally* MO. REV. STAT. § 536.037 (1986); NEELY, *supra* note 6, § 7.42.

This has changed dramatically. This movement, at first piecemeal, has become wide-ranging and comprehensive, with greater and more intrusive roles for the Committee. At first the legislature gave the Committee specific assignments concerning the rulemaking of specific agencies, in some instances including powers to disapprove or suspend existing rules, subject to reinstatement by resolution of the General Assembly. In other cases it granted powers of approval before proposed rules could become effective. In 1993, it moved toward standardizing the Committee’s role in enacting Senate Bill 52. *Id.*

15. 1994 Mo. Laws S.B. 558, § 536.024.2.

16. The involvement of the Joint Committee begins in the earliest stages of rulemaking when proposed rules are filed with it, as well as the Secretary of State, and continues when final orders of rulemaking are forwarded to it as well. 1994 Mo. Laws S.B. 558, § 536.024.3-4. “The committee may hold one or more hearings upon such final order of rulemaking during the thirty day period,” just as it may as to proposed rules. *Id.* § 536.024.4. If the Joint Committee takes no action on an order of rulemaking within thirty days, the agency may “file such order of rulemaking with the Secretary of State and the order of rulemaking shall be deemed approved.” *Id.* § 536.024.4. These requirements represent more than just complicating delay and more than the original “report-and-wait” concept.

Under section 536.018 “[t]he committee may, by majority vote of the members, suspend the order of rulemaking or portion thereof by action taken prior to the filing of the final order of rulemaking . . . .” *Id.* § 536.024.5. If it does, the rulemaking process halts for the moment for both the agency and the Secretary of State, *id.* § 536.024.6, while the Joint Committee reports its findings to the General Assembly. *Id.* § 536.024.7. In the meanwhile “[n]o rule or portion thereof disapproved by the committee shall take effect so long as the Senate and the House of Representatives ratify the act of the Joint Committee by resolution adopted in each house within thirty legislative days after such rule or portion thereof has been disapproved by the Joint Committee.” *Id.* § 536.024.7. This may take some time. The statute tolls by legislative, not calendar days.

The Joint Committee is not empowered to disapprove under any circumstance for any reason. It may take such action

It would have been noteworthy, yet not unusual, had Senate Bill 558 and House Bill 1099 been limited to an experiment in takings analyses, refinements in effective dates and legislative review in administrative rulemaking. However, there was further baggage that was both important and exceptional.

When approved by the Governor, both bills contained an addition to MAPA that was striking in its brevity relative to its reach and consequence. The new provision created a conditional exclusion from MAPA's threshold "term[s] of 'agency' and . . . 'state agency' as defined by section 536.010, RSMo," and provided that they

shall not include an institution of higher education, supported in whole or in part from state funds, if such institution has established written procedures to assure that constitutionally required due process safeguards exist and apply to a proceeding that would otherwise constitute a "contested case" as defined in section 536.010 . . . .<sup>17</sup>

Its effect was to remove publicly supported higher education in Missouri entirely from MAPA's procedural requirements for adjudication of contested cases and the promulgation of rules. Its purpose was to change the result in the Supreme Court of Missouri's 1993 decision in *Byrd v. Board of Curators*.<sup>18</sup>

When approved by the Governor, Senate Bill 558 also contained amendments to MAPA's requirements for fiscal notes in rulemaking by Missouri agencies.<sup>19</sup> These, too, were the General Assembly's response to recent judicial action, in this instance a Missouri Court of Appeals decision, *Missouri Hospital Association v. Air Conservation Commission*.<sup>20</sup> The court had determined that certain Air Conservation Commission rules regulating medical waste and solid waste incinerators, as well as sewage sludge

only for one or more of the following grounds: (1) An absence of statutory authority for the proposed rule; (2) An emergency relating to public health, safety or welfare; (3) The proposed rule is in conflict with state law; (4) A substantial change in circumstances since enactment of the law upon which the proposed rule is based.

1994 Mo. Laws S.B. 558, § 536.024.5. This list was drawn with an eye to the types of reasons traditionally perceived as underlying legislative action and, thus, properly within the legislative domain. In varying intensity all have an eye to assuring that a proposed rule is consistent with the will of the legislature. Presumably the General Assembly hopes this will afford some protection against inevitable assertions that this scheme unconstitutionally usurps judicial and executive powers. The General Assembly also seems to have anticipated the prospect that its hope might not be realized, and this is why it also provided that "the delegation of the legislative authority to enact law by the adoption of such rules is dependent upon the power of the joint committee on administrative rules to review and suspend rules pending ratification by the Senate and the House of Representative as provided herein." *Id.* § 536.024.2. Should the scheme of legislative veto fall, so will the grant of rulemaking authority to the agency and, in turn, the rule itself.

To date, the courts in Missouri have not had an opportunity to consider the issue of the constitutionality of the legislative veto in its various forms. However, some guidance on the matter soon appears likely. Cases testing the constitutionality of Missouri's system of legislative review of agency rules are making, or about to make, their way through the Missouri courts. See Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus?*, 57 MO. L. REV. 1157 (1992). See also ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULEMAKING §§ 8.3.1.-8.3.3 (1986 & Supp. 1993); NEELY, *supra* note 6, §§ 7.42-7.43.

17. 1994 Mo. Laws S.B. 558, § B; H.B. 1099, § 536.018.

18. *Byrd v. Board of Curators*, 863 S.W.2d 873, 875 (Mo. 1993) (en banc).

19. 1994 Mo. Laws S.B. 558, §§ 536.200, 536.205.

20. *Missouri Hospital Association v. Air Conservation Commission*, 874 S.W.2d 380 (Mo. Ct. App. 1994).

rules regulating medical waste and solid waste incinerators, as well as sewage sludge and industrial waste incinerators were void, because the Commission had not complied with MAPA's fiscal note requirements.<sup>21</sup> There was the prospect that the Air Conservation Commission was not alone among state agencies in this failure. Thus, the General Assembly responded with Senate Bill 558 and a conditional moratorium on the invalidity for such shortcomings of any rules in existence as of June 3, 1994, with a five year period of limitations on such challenges in the future.<sup>22</sup>

The legislature's sense of urgency in all of this is noteworthy. Senate Bill 558 was designated an emergency act, and, as such, the new law stood "in full force and effect" on June 3, 1994, after approval by the Governor. As explained in Section B of the bill;

Because there is an urgent and immediate need to know the full fiscal costs of administrative rules and how property rights are affected by administrative rules [pursuant to the takings analysis requirements of section 536.017], section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.<sup>23</sup>

The exclusion of public higher education from MAPA, and the refinements in effective dates and legislative review in the rulemaking process, were caught up in the tide of these concerns over fiscal notes and takings analyses. Thus, they too became effective immediately upon approval.<sup>24</sup>

What emerged was an amalgam of legislative will moving in several disparate directions. The new interest in takings analyses in rulemaking was supplemented by old interests in effective dates and legislative veto, and accompanied by specific correctives for judicial decisions concerning the applicability of MAPA to public higher education and compliance with fiscal note requirements in rulemaking. The latter, in particular, implicates issues of the legislature's relationship to the judiciary in control of agency action.

### III. PROCESS DUE AND PROCESS DENIED—MAPA AND PUBLIC HIGHER EDUCATION

The definitions of "agency" and/or "state agency" are MAPA's points of entry. If one or both of these definitions are not met, MAPA becomes irrelevant, in part or in whole, to the procedural paths to be followed in administrative decisionmaking. Under the statute "agency means any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases."<sup>25</sup> State agency is an important subcategory within the class, and

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21. *Id.* at 386-98.

22. 1994 Mo. Laws S.B. 558, §§ 536.200.4-.5, 536.205.3-.4.

23. 1994 Mo. Laws S.B. 558, § B.

24. The declaration of emergency was confined to Senate Bill 558. House Bill 1099, which contained only the provision for takings analyses and the exclusion of public higher education from MAPA, was approved on June 3. However, by its terms, it was not to be effective until ninety days after adjournment. The identical provisions in Senate Bill 558, nevertheless, had the effect of accelerating the effective date.

25. MO. REV. STAT. § 536.010(1) (1986).



means each board, commission, department, officer or other administrative office or unit of the state other than the general assembly, the courts, the governor, or a political subdivision of the state, existing under the constitution or statute, and authorized by the constitution or statute to make rules or to adjudicate contested cases.<sup>26</sup>

Important consequences follow from whether an entity is an agency and/or a state agency for purposes of MAPA. Generally, any agency is subject to MAPA's procedures for adjudication of contested cases.<sup>27</sup> A state agency is also subject to its rulemaking procedures.<sup>28</sup>

A wide range of governmental entities have been found to satisfy the definition of agency.<sup>29</sup> This was true of the Board of Curators of Lincoln University and, for

26. *Id.* § 536.010(5). This provision "was added in 1977 in order to make it clear that the provisions of the Rules Publication Act applied only to the statewide agencies and not to the municipalities." Frederick Davis, *The Missouri Administrative Procedure Act and the Cities*, 35 J. MO. BAR 433, 435 (1979).

27. *Weber v. Firemen's Retirement Sys.*, 872 S.W.2d 477, 479 (Mo. 1994) (en banc) (stating that MAPA's "contested case requirements apply not just to state agencies, but also to any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or adjudicate contested cases."); see generally NEELY, *supra* note 6, at chs. 8-12 (discussing the procedures in adjudication of contested cases under MAPA).

28. See MO. REV. STAT. § 536.021 (1986 & Supp. 1993). Furthermore, only state agencies are subject to MAPA's requirement that "[a]ll correspondence sent from any state agency shall contain the name, address and phone number of the person or agency responsible for sending the correspondence. The name, address and phone number may be printed or typed." MO. REV. STAT. § 536.055. See generally NEELY, *supra* note 6, at chs. 5-7 (discussing the rulemaking procedures under MAPA).

29. See, e.g., *Weber v. Firemen's Retirement Sys.*, 872 S.W.2d 477, 479 (Mo. 1994) (en banc) (Board of Trustees of the Police Retirement System); *Byrd v. Board of Curators*, 863 S.W.2d 873, 875 (Mo. 1993) (en banc) (noting that the Board of Education of Webster Groves was treated as an agency in *Hagely v. Bd. of Educ.*, 841 S.W.2d 663 (Mo. 1992) (en banc)); *Staley v. Missouri Director of Revenue*, 623 S.W.2d 246, 248 (Mo. 1981) (en banc) (dictum) (Administrative Hearing Commission); *Star Serv. & Petroleum Co. v. Administrative Hearing Comm'n*, 623 S.W.2d 237, 238 (Mo. 1981) (en banc) (dictum) (Administrative Hearing Commission); *Mills v. Federal Soldiers Home*, 549 S.W.2d 862, 865 (Mo. 1977) (en banc) (Personnel Advisory Board); *In re Roadway in Section 21, Township 60, Range 6, West*, 357 S.W.2d 919, 921-22 (Mo. 1962) (court assumes for purposes of case that a county court is an agency for purposes of the MAPA definition); *State ex rel. State Highway Comm'n v. Weinstein*, 322 S.W.2d 778, 783 (Mo. 1959) (en banc) (for purposes of decision to relocate water mains on state-owned right of way the commission was an agency within § 536.010(1)); *Kansas City v. Rooney*, 363 Mo. 902, 903, 254 S.W.2d 626, 627 (1953) (en banc) (county court now an administrative agency); *State ex rel. Police Retirement Sys. v. Murphy*, 359 Mo. 854, 858, 224 S.W.2d 68, 72 (Mo. 1949) (en banc) (Board of Trustees of the Police Retirement System); *Kish v. Chilhowee R-IV Sch. Dist.*, 814 S.W.2d 649, 651-52 (Mo. Ct. App. 1991) (concerning the definition of agency under § 536.010(1), "[t]he appellate courts of this state have repeatedly recognized school districts as 'agencies' within the meaning of the Administrative Procedure Act and have held that school board decisions concerning employee contracts were reviewable under Chapter 536."); *Medley v. Missouri State Highway Patrol*, 672 S.W.2d 169, 171 (Mo. Ct. App. 1984) ("[t]he patrol is a state agency, per § 536.010(5), authorized by law to make rules . . . and adjudicate contested causes;" disciplinary proceeding reducing state highway patrol member in rank required "predisciplinary hearing"); *Brown v. Weir*, 675 S.W.2d 135, 142 (Mo. Ct. App. 1984) (St. Louis City Board of Education was an agency under MAPA, and thus its dismissal of a teacher was subject to MAPA); *Kissinger Private Levee Sys. v. Mackey*, 624 S.W.2d 64, 71 (Mo. Ct. App. 1981) (dictum) (public drainage district); *In re Application of 354 Skinker Corp.*, 622 S.W.2d 724, 726-27 (Mo. Ct. App. 1981) (city excise commissioner); *Ackerman v. Creve Coeur*, 553 S.W.2d 490 (Mo. Ct. App. 1977) (court assumes that planning and zoning commission is an agency); *Burrows v. County Court*, 308 S.W.2d 299, 301 (Mo. Ct. App. 1957) (county court an administrative agency with MAPA judicial review provisions expressly applicable by statute); *Ruedlinger v. Long*, 283 S.W.2d 889, 890 (Mo. Ct. App. 1955) (Board of Trustees of the Police Retirement System); *Scism v. Long*, 280 S.W.2d 481, 483 (Mo. Ct. App. 1955) (city board of police commissioners); *Carroll Constr. Co. v. Kansas City*, 278 S.W.2d 817, 820 (Mo. Ct. App.

that matter, other public institutions of higher education in Missouri. The Supreme Court of Missouri so held in the 1993 case of *Byrd v. Board of Curators*.<sup>30</sup> Byrd, a tenured professor at Lincoln University, was discharged for an alleged failure to teach his assigned classes. On the path to discharge, he received notice of the University's reasons for the action and was offered several opportunities to request a hearing. However, he never took advantage of these offers. He communicated by letter with Lincoln's Board of Curators, first in "appeal" of the President's recommendation of discharge and later in seeking reconsideration of the Board's own decision supporting the President. In March, 1989, the President advised Byrd that he deemed "the matter closed," and Byrd filed suit nineteen months later in October, 1990.<sup>31</sup>

The Supreme Court of Missouri agreed with the Court of Appeals that Byrd's petition for review was not timely, based on MAPA section 536.110. Under this provision, Byrd had only thirty days from the Board's final decision to petition for judicial review of his discharge.<sup>32</sup> This conclusion required the crossing of two important MAPA thresholds. The first was a determination of the Board's agency status under section 536.010(1). The court determined that the board was an agency since it had been created by law and had the power to adjudicate contested cases.<sup>33</sup> The second threshold was a determination that Byrd's case was itself a contested case. This was necessary if the thirty day limitation were to govern, because section 536.110(1) applies only to contested cases.<sup>34</sup> The court concluded that it was a contested case within the meaning of section 536.010(2), because Byrd's constitutionally protected interest as a tenured professor afforded him a legal right to a hearing in connection with his

1955) (board of zoning adjustment).

30. *Byrd*, 863 S.W.2d at 875. The court suggests that other state universities and colleges, the University of Missouri, Central Missouri State University, Southeast Missouri State University, Northeast Missouri State University, Northwest Missouri State University, Harris-Stowe State University, Missouri Western State College, and Missouri Southern State College, amici in the proceeding, should also be considered agencies. *Id.* There was nothing unique in this.

Some other jurisdictions also treat higher educational institutions as agencies for purposes of comprehensive administrative procedure acts. *See, e.g., Genetzky v. Iowa State University*, 480 N.W.2d 858 (Iowa 1992) (state university's action denying professor tenure was agency action for purposes of Iowa Administrative Procedure Act); *McBeth v. Elliott*, 601 P.2d 871 (Or. Ct. App. 1979) (in conduct of grade grievance proceeding, state college was acting as a state agency subject to the Administrative Procedures Act).

Some do not. *See, e.g., MINN. STAT. ANN. § 14.03.1* (1988 & Supp. 1994) (express exclusion of the Regents of the University of Minnesota from Administrative Procedure Act); *Sinha v. Board of Trustees of Delaware Technical & Community College*, 585 A.2d 1310, 1311 (Del. Super. Ct. 1990) (employee discharge was not subject to Administrative Procedures Act because Del Tech was not included in the list of agencies covered); *Maas v. Board of Trustees of Community College Dist. No. 529*, 418 N.E.2d 1029, 1037 (Ill. App. Ct. 1981) (Administrative Review Act inapplicable to community college's termination of teacher because enabling act did not expressly adopt it); *Grace v. Board of Trustees for State Colleges and Universities*, 442 So. 2d 598, 601 (La. Ct. App. 1983) (for state constitutional and statutory reasons, management board for state colleges and universities was not subject to Administrative Procedure Act; both rules and adjudications with respect to faculty grievances expressly excluded); *Huang v. North Carolina State University*, 421 S.E.2d 812, 814 (N.C. Ct. App. 1992) (Administrative Procedure Act, other than its judicial review provisions, did not apply to university by reason of statutory exclusion, and thus did not apply to its termination of tenured professor).

31. *Byrd*, 863 S.W.2d at 874-75.

32. *Id.* at 876. The court found that Byrd could not forego that remedy and proceed by contract action, citing *Franklin v. Harris*, 762 S.W.2d 847, 849 (Mo. Ct. App. 1989). *Id.*

33. *Byrd*, 863 S.W.2d at 875.

34. Had Byrd's case been deemed a noncontested case, the time for seeking review would have been the greater and more open-ended standard of a reasonable time. *See NEELY, supra* note 6, § 12.02.

discharge.<sup>35</sup> With these two findings in tandem and “[g]iven the plain and ordinary meaning of the statutes,” the court saw that “it . . . [was] crystal clear that the term ‘agency’ applies to the Board of Curators of Lincoln University in deciding ‘contested cases.’”<sup>36</sup>

With firmness, yet considerable gentleness, the court disposed of the various arguments of the state colleges and universities appearing amici. It did so against the backdrop of its observation that these arguments were offered “notwithstanding the clarity of the statutes . . . .”<sup>37</sup> First, it found irrelevant the argument that such institutions were not state agencies. Since “[t]he term ‘state agency’ is used in MAPA provisions relating to rulemaking only, whereas the term ‘agency,’ section 536.010(1), is the term used in the sections relating to agency adjudications,”<sup>38</sup> only the latter was germane to Byrd’s discharge. Second, amici argued that MAPA’s definitions should be read to exclude public colleges and universities. The court rejected the invitation:

Aside from relying on the wrong subsection for its definition, amici would have us pore over the statute books in search of narrower definitions to obfuscate the plain meaning of section 536.010(1). The use of narrower language in other unrelated statutes does not justify ignoring the broad and inclusive language in the statute at hand.<sup>39</sup>

Third, amici argued that MAPA was intended to reach only those traditional state agencies which affect the public generally. This, too, was rejected.

MAPA is not solely applicable to conventional agencies, whatever those are . . . . MAPA was applied to the Board of Education of Webster Groves . . . . The impact the Board of Education has as an agency is of the same nature as that of amici, only each amicus probably has an even broader public effect than local school boards.<sup>40</sup>

Finally, although “[a]mici also complain[ed] that having to comply with the rulemaking provisions of chapter 536 will create a hardship,” the court found “[t]he fact that amici might potentially have to promulgate rules pursuant to chapter 536 cannot invalidate the plain language of section 536.010(1).”<sup>41</sup>

Senate Bill 558 and House Bill 1099 changed all of this with the new definitional exclusion.

The term “agency” and the term “state agency” as defined by section 536.010, RSMo, shall not include an institution of higher education, supported in whole or in part from state funds, if such institution has established written procedures to assure that constitutionally required due process safeguards exist and apply to a proceeding that would otherwise constitute a “contested case” as defined in section

35. *Byrd*, 863 S.W.2d at 875. “Due process gives a tenured professor a legal right to a hearing regarding termination of services,” and thus the controversy is “required by law to be determined after a hearing” and accordingly is a “contested case.” *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 875-76.

41. The court also pointed out that the question of the applicability of MAPA’s rulemaking procedures to public colleges and universities was not involved in Byrd’s case. *Id.* at 876.

536.010.<sup>42</sup>

The result is that state supported higher educational institutions are removed from the reach of MAPA's adjudicatory and rulemaking procedures if the new provision's key condition is satisfied. This is accomplished if they have in place written procedures sufficient to satisfy constitutional principles of due process. As a consequence, the result in *Byrd* is now within the control of publicly supported colleges and universities themselves. They have the power to undo *Byrd* and take themselves beyond MAPA's reach.

It is apparent that the *Byrd* court would not disagree with the amendment. The common thread in its reasoning throughout its opinion was its respect for the statutory boundaries drawn by the General Assembly and reflected in MAPA's definitions. Its determinations were not products of constitutional principle nor judicial discretion. They were statute-dependent, and MAPA was dispositive. Had the statute provided otherwise, the court would have followed it according to its terms. Today the court would respect the recast boundaries of agency and state agency as well.

The Supreme Court of Missouri's stance in *Byrd* is not unique. Other courts in other jurisdictions have reacted similarly in cases involving the reach of their own comprehensive administrative procedure acts in regard to adjudication in educational contexts. The similarity is in the constancy of judicial attention given the terms of the relevant statutes. When there have been differences in results, it has usually been a consequence of differences in statutory treatments, sometimes reflected in a combination of comprehensive administrative procedure act and underlying statutes.<sup>43</sup> The *Byrd* scenario—judicial decision followed quickly by legislative reaction—is not

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42. 1994 Mo. Laws S.B. 558, H.B. 1099, § 536.018.

43. See, e.g., *Klein v. State Bd. of Educ.*, 547 So. 2d 549, 551-52 (Ala. Civ. App. 1988) (post-secondary education department was an agency under Alabama Administrative Procedure Act, but tenured teacher's termination grievance was not a contested case by reason of statutory exclusion under ALA. CODE § 41-22-3(1) (1975 & Supp. 1993) for intra-agency personnel actions); *Ernst v. Arizona Bd. of Regents*, 579 P.2d 1099, 1101 (Ariz. 1978) (en banc) (Arizona Board of Regents was an agency within Arizona Administrative Review Act, but termination of university police officer was not a contested case); *Reitzer v. Bd. of Trustees*, 477 A.2d 129, 133-34 (Conn. App. Ct. 1984) (state college was subject to Uniform Administrative Procedure Act, but professor's mandatory retirement challenge was not a contested case); *Sinha v. Bd. of Trustees of Delaware Technical & Community College*, 585 A.2d 1310, 1311 (Del. Super. Ct. 1990) (employee discharge was not subject to Administrative Procedures Act because Del Tech not included in the list of agencies covered); *Davis v. Univ. of the Dist. of Columbia*, 603 A.2d 849, 853 (D.C. 1992) (university was subject to Administrative Procedure Act, but cases involving tenure of employees were expressly excluded from the definition of contested case); *Abramson v. Bd. of Regents, Univ. of Hawaii*, 548 P.2d 253, 263 (Haw. 1976) (denial of tenure application was not a contested case under Administrative Procedure Act, assuming university was an agency for purposes of the act); *Maas v. Bd. of Trustees of Community College Dist. No. 529*, 418 N.E.2d 1029, 1037 (Ill. App. Ct. 1981) (Administrative Review Act inapplicable to community college's termination of teacher because enabling act did not expressly adopt it); *Grace v. Bd. of Trustees for State Colleges and Universities*, 442 So. 2d 598, 601 (La. Ct. App. 1983) (for state constitutional and statutory reasons management board for state colleges and universities was not subject to Administrative Procedure Act; both rules and adjudications with respect to faculty grievances expressly excluded); *Huang v. North Carolina State Univ.*, 421 S.E.2d 812, 814 (N.C. Ct. App. 1992) (Administrative Procedure Act, other than its judicial review provisions, did not apply to university by reason of statutory exclusion, and thus did not apply to its termination of tenured professor). Cf. *State Bd. of Regents v. Gray*, 561 S.W.2d 140, 142-43 (Tenn. 1978) (state university was agency under Administrative Procedures Act, and student disciplinary proceeding, and rules applied in it, must satisfy the Act); *Frye v. Memphis State Univ.*, 671 S.W.2d 467 (Tenn. 1984) (Administrative Procedures Act did not apply to proceeding terminating tenured faculty member because more specific statute governed such).

unique. In 1993, the Supreme Court of Alaska determined that the state's Administrative Procedures Act was applicable to the University of Alaska at Anchorage and must be satisfied in a pretermination hearing for a tenured professor. It noted that any exemption for the University must be granted by the legislature and not the courts.<sup>44</sup> Later in the year, the Alaska legislature did just that by removing the University from the list of state boards, commissions and officers subject to the act.<sup>45</sup>

The new Missouri provision, with its conditional exclusion of public higher education, is nevertheless striking in several dimensions. These range from the new definitional boundaries themselves, to their implications for adjudication of contested and noncontested cases, as well as rulemaking in publicly supported higher education. Overall, the probable result will be less certain procedure and less ascertainable procedure for the administrative functions of public colleges and universities in Missouri.

In the course of deciding that Lincoln University was an agency, the court in *Byrd* determined MAPA's boundaries to be rather precise. This is no longer the case, however, for the path for locating the boundaries is now more complicated. First and foremost, public supported higher education's relationship to MAPA now is tied to constitutional principles of due process. These principles are flexible, if nothing else, and what is due in one case may be more, or less, than what is due in another.<sup>46</sup> What is due for dismissal of a tenured professor is not the same as what is due upon suspension of a student, and so on.<sup>47</sup>

This flexibility and attendant variability guarantee that all but the most fully developed and articulated written procedures will be objects of debate and litigation concerning their adequacy under due process. The high stakes involved accentuate this. If one dealing with a public college or university can demonstrate that the school's written procedures are insufficient and fall short of the constitutional demands for adjudicatory due process, the exclusion from agency or state agency status would be lost. This would mean that the institution's actions would be subject to, measured against, and often found invalid under the requirements of MAPA.

Consequently, prudence would dictate erring on the side of more than what due process requires when designing written procedures for a college or university. The most obvious way to accomplish this would be to adopt written procedures that mimic

44. *Odum v. University of Alaska*, 845 P.2d 432, 434-35 (Alaska 1993).

45. 1993 Alaska Sess. Laws § 1, ch. 30 (ALASKA STAT. § 44.62.330(a)(45) repealed).

46. A principal source of variation is in the nature of the test developed by the courts to address matters of procedural due process. As a result, "the type of hearing may vary with the seriousness of the particular case [because] . . . [t]he Supreme Court has been following a 'simple cost-benefit test' for deciding what hearing is required in a given case." BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 289 (3d ed. 1991). See also 1 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* 564 (1985) ("The procedural components that will satisfy the Due Process Clause's requirements will vary from situation to situation.").

47. See generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 147-98 (1993) (discussion of when due process is applicable, its variable content and timing); WILLIAM F. FOX, JR., *UNDERSTANDING ADMINISTRATIVE LAW* 101-26 (2d ed. 1992) (discussing whether the constitution requires due process, and if so, when and what kind of due process); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 208-55 (2d ed. 1992) (discussion of interests protected and process due); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 223-92 (3d ed. 1991) (discussion of flexible due process and the constitutional right to notice and an opportunity to be heard at some time in some fashion); PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 32-48 ("'Due process of law' as procedure") (1989); Fernand N. Dutile, *Higher Education and the Courts: 1991 in Review*, 19 J.C. & U.L. 73, 135-39 (1992); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984).

the formality and complexity of MAPA procedures for contested cases. The irony here is that salvation lies in the very procedures that the conditional exclusion was intended to escape. The more likely prospect is the adoption of written procedures of less formality and complexity, with greater uncertainty concerning whether due process has been met. This is why debate and litigation concerning MAPA's applicability are likely every time public higher education acts in a fashion that affects persons, whether student, staff, faculty or others, in significant ways.

There are other potentially complicating considerations in the multiple sources and varieties of due process. "[C]onstitutionally-required due process safeguards" may be derived from either federal or state constitutional sources.<sup>48</sup> These independent and distinct sources present the possibility that the process deemed sufficient under one will be considered inadequate under the other. Such divergence has developed on occasion when state courts have become disenchanted with what they consider unwarranted restriction and retrenchment in due process jurisprudence under the United States Constitution. The result has been requirements of due process under state constitutions when none, or less, was due under the federal.<sup>49</sup> There have not been comparable developments in Missouri,<sup>50</sup> however, the constitutional past of due process in Missouri is no guarantee of its future.

The task is complicated further because testing the institution's written procedures against the demands of due process is but one aspect of determining whether the conditional exclusion is available. Another aspect is the requirement that such procedures "exist and apply to a proceeding that would otherwise constitute a 'contested case' as defined in section 536.010."<sup>51</sup> To establish the exclusion it is still necessary to consider and apply this latter condition.<sup>52</sup>

The reason the pertinent procedures may be less ascertainable today is that inter-

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48. U.S. CONST. amend. XIV, § 1 (prohibiting a state from depriving "any person of life, liberty or property without due process of law"); MO. CONST. art. I, § 10 (stating that "no person shall be deprived of life, liberty or property without due process of law."); see generally NEELY, *supra* note 6, § 2.01.

49. See, e.g., ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 2-3 (Supp. 1993) (discussing *Saleeby v. State Bar*, 702 P.2d 525 (1985), where the California Supreme Court recognized greater due process protections under the state due process clause than that afforded under the federal); ALFRED S. NEELY, ADMINISTRATIVE LAW IN WEST VIRGINIA § 3.03 (1982 & Supp. 1983) (discussing the West Virginia Supreme Court's view that its ultimate task is assuring that the state constitution's due process standard is met, so long as it does not fall short of the federal); Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1084-87 (1992) (stating that "[i]n California, federal due process is far from the whole story. Procedural due process under the California constitution is much more inclusive than due process under the federal constitution.").

50. See generally NEELY, *supra* note 6, § 2.01. Today in Missouri, due process comes in more than procedural packages. Sometimes it is of the substantive variety. See generally NEELY, *supra* note 6, § 2.01; Charles B. Blackmar, *Neutral Principles and Substantive Due Process*, 35 ST. LOUIS U. L.J. 511 (1991) (dissenter in *Callier v. Director of Revenue*, 780 S.W.2d 639 (Mo. 1989) (en banc) discusses procedural and substantive due process). It does seem, however, that substantive due process would not be germane to assessing the adequacy of an institution's written procedures in relation to the exclusion's requirement of "established written procedures to assure . . . constitutionally required due process safeguards." The cast of language such as "procedures" and "safeguards" suggests statutory focus upon the path of decision and not its nature. Nevertheless, whether substantive due process feeds into the mix is another, potentially debatable consideration in determining whether MAPA applies to public higher education.

51. 1994 Mo. Laws S.B. 558, H.B. 1099, § 536.018.

52. See NEELY, *supra* note 6, § 8.10 (discussing what is a contested case under MAPA).

ested persons may find reliable access difficult. The procedures need only be written in order to satisfy the condition and obtain exclusion from MAPA. The statute says nothing about written and published, or written and made readily and reasonably available. Previously, the minimum applicable procedures for adjudication of contested cases were, by and large, available on the face of MAPA. Now, depending on how a college or university exercises its discretion, these procedures are elsewhere: perhaps conveniently accessible or perhaps not. It seems that so long as the procedures are reduced to writing, the condition for exclusion is met.<sup>53</sup>

The uncertainties and opportunities for litigation are compounded when one considers the exclusion's impact beyond proceedings which otherwise would be contested cases under MAPA. At least for adjudicatory proceedings of this sort, the process by which the exclusion is met, and its condition satisfied, leaves some guidance as to how such proceedings are to be conducted. The written procedures necessary to obtain exclusion from MAPA also will perform the double duty of charting the path of adjudication in cases which otherwise would be contested cases subject to MAPA. If the written procedures for some reason fall short and do not do this, the circle is drawn, and the institution will still be an agency subject to MAPA.

However, written procedures that satisfy the exclusion's condition by their very nature are of no application and utility for the adjudication of noncontested cases in public higher education.<sup>54</sup> They are similarly of no relevance to the procedures required for the promulgation of rules in public higher education. Thus, the adjudication of noncontested cases and rulemaking are left with no guidance from MAPA itself and none from the written procedures which took them out from under MAPA. This is so because the new section's terms are not as broad as its reach. Although drafted with an apparent eye to *Byrd* and the adjudication of contested cases, the conditional exclusion's impact exceeded these most obvious targets when it removed public higher education from all aspects of MAPA, including its applications to noncontested cases and rulemaking. Absent procedures for these important administrative functions afforded as a matter of institutional discretion,<sup>55</sup> by an underlying statute,<sup>56</sup> or through due

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53. If an institution's written procedures are not published, distributed, or otherwise made available, one might craft an argument that the statute still has not been satisfied because availability is implicit in the statutory requirement of "written." This is a difficult argument to pursue. The statutory language seems clear and limited, and there is no formal legislative history in Missouri to search for broader and unexpected meanings. In addition, if more than "written" was expected, the legislature might have said so. *Cf. Blue Springs Reorganized Sch. Dist. IV v. Landuyt*, 499 S.W.2d 33, 39-40 (Mo. Ct. App. 1973) (statute independent of MAPA allowed termination of teacher for certain violations of school board's "published regulations." Absence of publication precluded enforcement).

A more convincing argument might be that the prescribed procedural path for administrative adjudication must be made known if due process is to be satisfied. Thus, the argument goes that written procedures alone may satisfy the condition for exclusion in one dimension, but they must also be made available in convenient and timely fashion if those affected by them are to receive due process and the institution is to receive the benefit of the exclusion from MAPA. *See generally NEELY, supra* note 6, § 2.01.

54. The noncontested case is not defined in MAPA other than by exclusion. Those adjudicatory proceedings which are not required by law to be determined after hearing are considered noncontested. *See NEELY, supra* note 6, § 8.10. MAPA does not have as much to say about the conduct of the noncontested as the contested case, but MAPA does contain important provisions concerning judicial review of the noncontested case. *Id.* § 8.11 ("Effect of Agency Proceeding Being a Contested Case Instead of a Noncontested Case").

55. The absence of external sources of procedure for particular administrative actions does not usually dictate an absence of procedures. Procedural constraints may be self-imposed as a matter of

process in noncontested cases,<sup>57</sup> the step backward is a long one. The virtues of the comprehensive administrative procedure act have been lost, and procedural uncertainty, and even license, are now in their place.

These developments in the relationship between public higher education and MAPA reflect the necessary partnership between courts and legislature in the control of administrative action functioning at different levels and with mixed results. The legislature's initial determination of what constitutes an agency and state agency under MAPA revealed a commitment—one of MAPA's general application to public higher education, and thus to comprehensive procedures widely applicable to the administrative state in both its adjudicatory and rulemaking aspects. This was a policy decision in common with the well-recognized and established trend in this century toward comprehensive statutory treatment of administrative procedure in the federal government and in other states. In *Byrd*, the Supreme Court of Missouri quite appropriately and necessarily carried out that policy. In this the partnership was working just as it should. However, when the legislature amended MAPA to offer higher education a way out, it strained the partnership. As it made its decision to chip away at the principle of comprehensive application of generally applicable administrative procedures, it sent the signal that judicial decisions rigorously carrying out the unambiguous will of the legislature might be readily reversed in the legislative arena. In the process it also sent an undesirable signal to state agencies concerning just how seriously they should take the legislature's commands. However, at least the new conditional exclusion was fully within the General Assembly's lawmaking power, and it was relevant only to the future. Any actions of public higher education taken in the past, or before satisfying the new condition for exclusion from MAPA, would still be governed by the principles of MAPA and *Byrd*. By contrast, in Senate Bill 558's attention to fiscal notes in rulemaking the General Assembly proceeded with a determined eye to the past.

#### IV. SOUR NOTES SWEETENED

The fiscal note was introduced to the rulemaking process in Missouri in 1978.<sup>58</sup> Its object is

assurance that state agencies and, in turn, the legislature and the public are aware of the economic costs as well as the benefits of rulemaking actions. To achieve this, fiscal notes are required when the effect of rulemaking includes a material economic impact on public and private expenditures, public revenues and private incomes.<sup>59</sup>

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institutional discretion. Sound practice, management and policy often recommend exercise of that discretion. See generally NEELY, *supra* note 6, § 3.04 ("Practice and Procedure in the Exempt Agencies").

56. See, e.g., *Blue Springs*, 499 S.W.2d at 39-40 (statute independent of MAPA allowed termination of teacher for certain violations of school board's "published regulations;" absence of publication precluded enforcement).

57. Procedural due process is relevant to noncontested as well as contested cases. See generally NEELY, *supra* note 6, §§ 2.01, 8.11, 8.13. Under traditional notions of due process in administrative settings, rulemaking need not be accompanied by the notice and opportunity for the kinds of hearings required in adjudicatory contexts. *Id.* § 6.12.

58. 1978 Mo. Laws 981.

59. *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 391 (Mo. Ct. App. 1994) (quoting ALFRED S. NEELY & DANIEL W. SHINN, *MISSOURI PRACTICE: ADMINISTRATIVE PRACTICE AND PROCEDURE* § 6.51 (1986)). It has also been noted that another purpose served is "to give potentially affected entities notice of the estimated financial impact a given rule might have on them."



The fiscal note does for economic consequences what the environmental impact statement does for environmental effects.<sup>60</sup> Missouri is not unique in its concerns. Economic impact analysis is integral to rulemaking in a number of jurisdictions.<sup>61</sup>

Under MAPA, fiscal notes proceed with a view to both private and public concerns. Regarding private persons or entities, if a state agency's proposed rulemaking "would require an expenditure of money by or a reduction in income for any person, firm, corporation, association, partnership, proprietorship or business entity of any kind or character which is estimated to cost more than five hundred dollars in the aggregate," a fiscal note must be filed along with the notice of proposed rulemaking.<sup>62</sup> There are similar concerns about rulemaking's impact on public funds. A fiscal note is required if an agency's proposed rulemaking would result in an estimated expenditure of public funds, or reduction of public revenues, of more than \$500 in aggregate "for that agency or any other state agency of the state government or any political subdivision thereof . . ."<sup>63</sup> The note must also be filed with the Secretary of State at the time the notice of proposed rulemaking is filed.<sup>64</sup> "If no fiscal note is filed" because

*Id.*

60. Environmental impact analysis is not, however, part of the rulemaking process under MAPA. Cf. ALA. CODE § 41-22-23(f) (1975 & Supp. 1993) (fiscal note must include "effect of the regulation on the environment and public health," as well as "short-term and long-term economic impact.")

61. See, e.g., ALA. CODE § 41-22-23(f) (1975 & Supp. 1993) (fiscal note required for rules having "economic impact" when rules are submitted to Joint Committee on Administrative Regulation Review); MONT. CODE ANN. § 5-18-107 (1993) (economic impact statements in conjunction with Review Oversight Committee's review of Department of Revenue rules); TENN. CODE ANN. § 13-28-113 (1992) (Enterprise Zone Act; exemption from rules requires "fiscal note" as to impact on government and "economic impact statement" as to effect on the public); VA. CODE ANN. § 9-6.14:7.1.G (1993 & Supp. 1994) ("economic impact analysis" required for proposed rules); and W. VA. CODE §§ 29A-3-4, 29A-3-11, 29A-3A-5, 29A-3A-12, 29A-3B-4, and 29A-3B-9 (1993 & Supp. 1994) ("fiscal note" required for proposed rules). See generally ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULEMAKING §§ 6.5.2-6.5.6 (1986 & Supp. 1993) (discussing various forms of regulatory analysis in rulemaking, including § 3-105 of the 1981 Model State Administrative Procedure Act).

One of the early forms these interests have taken at the federal level is the regulatory analysis whose broad objective is to force agencies to consider the costs as well as benefits of agency rulemaking. The typical source has been by way of presidential executive order. These interests have advanced under various banners, including "inflation impact statement," "regulatory analysis," and "regulatory impact analysis." RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 453-57 (2d ed. 1992). Also ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 563-67 (1993) (Office of Management and Budget, Executive Order 12,291 and regulatory impact analysis); WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 163-68 (2d ed. 1992) (Office of Management and Budget supervision of federal rulemaking through executive orders and cost-benefit analyses).

62. 1994 Mo. Laws S.B. 558, § 536.205.1. The fiscal note must be filed on forms established by the Secretary of State. Failure to use these forms will result in rejection. *Id.* § 536.210.

The fiscal note must present:

- (1) An estimate of the number of persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character by class which would likely be affected . . . ;
- (2) A classification by types of the business entities in such manner as to give reasonable notice of the number and kind of businesses which would likely be affected;
- (3) An estimate in the aggregate as to the cost of compliance with the rule . . . by the affected persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character.

*Id.* § 536.205.1.

63. *Id.* § 536.200.1.

64. It must estimate "the cost to each affected agency or to each class of the various political subdivisions to be affected" and "contain a detailed estimated cost of compliance and . . . be support-

none is required, the agency must attest to that by filing a supporting affidavit "which states that the proposed change will cost less than five hundred dollars in the aggregate to all such agencies and political subdivisions."<sup>65</sup>

An initial filing of a fiscal note with the notice of proposed rulemaking does not necessarily end the matter. As stated in MAPA:

If before the effective date, such rule, amendment or rescission is altered to the extent that the cost or reduction in income is changed by more than ten percent, then a new fiscal note and affidavit shall be filed with the order of rulemaking and the new estimated cost shall be published in the *Missouri Register*.<sup>66</sup>

An agency also may find it necessary to tend its fiscal note later in the life of its rule. At the end of the first full fiscal year following implementation of the adoption, amendment or repeal of a rule affecting public expenditures or revenues, a state agency must assess the accuracy of its original estimate of impact in light of experience during the year just past. If the cost of the rulemaking,

to all affected entities, has exceeded by ten percent or more the estimated cost in the fiscal note or has exceeded five hundred dollars if an affidavit has been filed stating that the proposed change will cost less than five hundred dollars, the original estimated cost together with the actual cost during the first fiscal year shall be published by the adopting agency in the *Missouri Register* . . . .<sup>67</sup>

The cumulative implication of these provisions is that a fiscal note may be required when the notice of proposed rulemaking is filed and also before the final order of rulemaking is filed, usually depending on the nature of changes in the rule during the rulemaking process. There is the further possibility of another filing if there is an overrun in estimated costs of a public nature during the first full year of implementation.

The complexity and specificity of the legislature's requirements for fiscal notes suggest a seriousness of legislative purpose that these matters are not to be taken lightly. The same is indicated in its statutory pronouncements on the consequences of non-compliance. Under section 536.200.3 with respect to rules affecting public funds, estimated costs must be published in the *Missouri Register* along with the notice of proposed rulemaking, and "failure to do so shall render any rule promulgated thereunder void and of no force or effect."<sup>68</sup> Under the similar, but not quite parallel section 536.205.2 with respect to rules affecting private persons or entities, the fiscal note itself must be published in the *Missouri Register* along with the notice of proposed

ed with an affidavit by the director of the department to which the agency belongs that in his opinion the estimate is reasonably accurate." *Id.* § 536.200.1.

65. *Id.* § 536.200.1.

66. *Id.* § 536.215.

67. *Id.* § 536.200.2. This is to be done "within ninety days after the close of the fiscal year." *Id.* § 536.200.2. The provision applies only to effects on public funds and not the resources of private entities. *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 390 (Mo. Ct. App. 1994). It takes into account the reality "that an agency might not be able to predict future compliance costs with a great deal of precision" and thus gives "affected entities . . . at least . . . some notice that the aggregate cost estimate may be on the low side. This enables them to better plan for the future and could induce further discussion and debate about the rule and whether it needs to be amended or repealed." *Id.* at 390 n.14.

68. 1994 Mo. Laws S.B. 558, § 536.200.3. "This must be done even if a fiscal note is not required." *Missouri Hosp. Ass'n*, 874 S.W.2d at 386 n.4.

rulemaking. Noncompliance will also "render any rule promulgated thereunder void and of no force and effect."<sup>69</sup> Also, if the statement of actual cost, required of a public entity in the event it experiences cost overruns during the first full fiscal year after implementation of its rule, is not published "as required . . . , the rulemaking action is correspondingly void and of no further force or effect."<sup>70</sup>

It seems, however, that whatever the legislature's measure of the importance and seriousness of its fiscal note requirements and the sanctions for cases of noncompliance, it apparently was not shared by the state agencies whose rulemaking was within their ambit. Notwithstanding that only \$500, in the aggregate, will trigger the fiscal note requirements,<sup>71</sup> agencies frequently have found themselves conveniently short of the threshold. As the Court of Appeals observed in *Missouri Hospital Association*, "[w]e have examined several recent issues of the *Missouri Register*, and it certainly appears that state agencies routinely decide that their rulemaking activities do not impose public or private costs high enough to trigger the fiscal note and disclosure provisions of sections 536.200 and 536.205. We find this disconcerting."<sup>72</sup> Considering that administrative rules more often than not affect many persons, and that impact is to be measured in the "aggregate," the modesty of the \$500 threshold becomes apparent. The court's uneasiness seems warranted.

An alternative to the court's disquiet is congratulatory praise rather than the raised eyebrow. Perhaps the frequency with which Missouri state agencies fail to pass the \$500 threshold simply reflects the remarkable efficiency of their rulemaking. Perhaps the typical Missouri rule tends to confer its benefits with at most sporadic and modest costs. If so, it is a noteworthy achievement that beneficial rulemaking can go forward at virtually no public or private costs, but it is noteworthy because it also is patently improbable. In this light, the court's suspicions seem doubly warranted.

Even if state agencies have been casual and even cavalier in their attention to MAPA's fiscal note requirements, the Court of Appeals in *Missouri Hospital Association* was not.<sup>73</sup> At issue was the validity of rules of the Air Conservation Commission of Missouri rules governing medical, solid waste, sewage sludge and industrial waste incinerators. The circuit court determined that both rules were void and of no effect, because MAPA's fiscal note requirements had not been satisfied. It also determined that the rules themselves were in excess of delegated rulemaking authority. The Court of Appeals agreed in both respects.<sup>74</sup> In so doing, the court highlighted the rigor of

69. 1994 Mo. Laws S.B. 558, § 536.205.2. See *Missouri Hosp. Ass'n*, 874 S.W.2d at 387 ("§ 536.205.2 mandates that the fiscal note itself be published . . . in the *Missouri Register*.").

If no fiscal note is required, the statute requires no publication. On this point the court commented further:

If, on the other hand, a fiscal note is not required because the proposed rule is estimated to cost \$500 or less in the aggregate to any such private entity or entities, the agency need take no other action. However, it would be prudent for the agency to publish this determination to avoid possible misunderstandings.

*Id.* at 386 n.5.

70. 1994 Mo. Laws S.B. 558, § 536.200.2.

71. 1994 Mo. Laws S.B. 558, §§ 536.200.1, 536.205.1.

72. *Missouri Hosp. Ass'n*, 874 S.W.2d at 391 n.16.

73. See *Id.* at 380. This court was not the first in Missouri to do so. Cf. *Missouri Hosp. Ass'n v. Missouri Dep't of Consumer Affairs, Regulation and Licensing*, 731 S.W.2d 262 (Mo. Ct. App. 1987) (court found rules invalid because of failure to satisfy fiscal note requirements, but the Court of Appeals found it unnecessary to reach this issue).

74. *Missouri Hosp. Ass'n*, 874 S.W.2d at 386, 388-98. The statutory prohibition of state rules

MAPA's strictures as to fiscal notes and the consequences for noncompliance.

The Court of Appeals was not willing to accept substantial or rough approximations of compliance. The statute prescribes the content of fiscal notes with precision. The Air Conservation Commission came no closer to compliance than a published estimate of "private entity cost," and this was not enough:

[B]ecause it did not make a comprehensive and diligent effort to determine all private entities that would likely be affected and did not estimate the number of such entities by class in a manner giving them reasonable notice they would be affected, in adopting Rule 160 the Commission failed to meet its obligations under section 536.205.<sup>75</sup>

The court took a comparable position with respect to the threshold determination of whether the proposed rule "is estimated to cost more than five hundred dollars in the aggregate . . . ."<sup>76</sup>

Concerning another Commission rule, Rule 190, the agency argued that no fiscal note had been required because of its estimate that private entity costs were less than \$500. The court agreed, but only "[i]f the cost estimate had been properly computed . . . ."<sup>77</sup> In this instance, it found that the agency had not done so. The Commission had made its estimate for only the first two fiscal years after adoption of the rule, and the court "emphatically repudiate[d] this reasoning" in light of the language and purpose of the statute which require an estimate "measured over the lifetime of the proposed rule."<sup>78</sup> The court also noted that "[e]verything we have said here with regard to aggregate cost estimates under § 536.205 applies with equal force to those prepared to comply with . . . § 536.200.1 . . . and § 536.200.3 . . . , " both of which require cost estimations in the aggregate.<sup>79</sup>

The court also took seriously that the statute, by its terms, applies to the various discrete events that might take place in the life of a rule. For this reason, it recognized that it must test the validity of rulemaking actions against the statute's requirements first, as of the time when a rule is proposed, later, when amended, and finally, upon its repeal. And no matter how close in time these events might occur, the fiscal note in one could not serve double duty for a later one. As the court saw it, to do so would do obvious damage to the language of the statute. In the case before it, the Commission had initially proposed one of its rules with an accompanying affidavit and fiscal note as to public funds. Subsequently, the initial proposal was withdrawn, and a revised

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stricter than federal rules under the federal Clean Air Act, or for that matter any rules earlier than required under the latter, rendered the Commission's rules ultra vires. *Id.* at 392-98. See Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretational Problems*, 54 MD. L. REV 501,532-37 (1995) (discussing ultra vires aspects of *Missouri Hospital Association*); Fred W. Lindecke, *State Official Compliant on Waste*, ST. LOUIS POST-DISPATCH, May 21, 1994, at B3 (DNR Director held in contempt for subsequent attempt to promulgate same incinerator rules under solid waste laws; Director then dropped the rules).

75. *Missouri Hosp. Ass'n*, 874 S.W.2d at 388. Rule 160 concerned medical and solid waste incinerators. The court was similarly inclined when it looked to the shortfall in meeting the requirements of § 536.200 in promulgating Rule 190 concerning industrial waste and sewage sludge incinerators. *Id.*

76. 1994 Mo. Laws S.B. 558, § 536.205.1.

77. *Missouri Hosp. Ass'n*, 874 S.W.2d at 389.

78. *Id.* at 389-90.

79. *Id.* at 390 n.12.

proposal of rulemaking was filed without an accompanying affidavit or fiscal note.<sup>80</sup> The court rejected the Commission's argument that its filings with the initial, withdrawn proposal satisfied section 536.200.1's requirements for its revised proposal:

Despite the similarities between the old and new forms of Rule 160, the fact remains that the rule to which the previously-filed fiscal note and affidavit applied was officially *withdrawn* in August, 1990. The October 16, 1990, version of Rule 160 at issue in this case is not the same rule originally promulgated on April 18, 1990. It was a new proposed rule and triggered the fiscal note and affidavit requirements . . . .<sup>81</sup>

The result was invalidity. According to MAPA, a fiscal note, when applicable, is a condition that must be satisfied and accompanied by appropriate filings with the Secretary of State, and frequently by publication in the *Missouri Register*, if the rulemaking proceeding is to result in a valid rule.

The reason for the court's determination of the rules' invalidity was neither the will of the court nor the agency.<sup>82</sup> It was the legislative will that controlled. Thus, when the Commission argued its position on the basis of the Secretary of State's Rulemaking Manual for State Agencies, the court responded appropriately and consistently: "[E]ven if the manual did support the State's position, it is the statute, not the manual, with which it must comply."<sup>83</sup> The court emphasized that they would take the General Assembly seriously and at its word even if the agencies did not: "Where statutory language is clear, unambiguous and admits of one meaning, there is no room for construction. Sections 536.200.3 and 536.205.2 mean exactly what they say: rules adopted in violation of their mandates are void and of no force and effect."<sup>84</sup>

In its posture as to the statute and in its decision, the court did exactly what the legislature had asked of it with respect to fiscal notes. In declaring the rules invalid, the court was acting in the traditional discharge of its judicial functions; in support of, and in partnership with the legislature. The legislature had established the law, and the judiciary was seeing that the law was satisfied. This was not one of those cases for the oft-stated and debated charge of judicial activism and lawmaking. Here the court acted to assure that the agency stayed within the boundaries intended by the legislature and proceeded in accordance with the prescribed procedural pathway. When the agency failed, the court meted out the sanctions that the legislature had also prescribed, namely the rules' invalidity. This makes the legislature's response all the more noteworthy and curious.

The lesson the legislature took from this exercise in judicial furtherance of the legislative word was the need to change its word. In 1994, in reaction to the situation in which the Air Conservation Commission now found itself, and with the prospect

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80. *Id.* at 387.

81. *Id.* at 387-88. In an appropriate situation the same principles would apply to a rule affecting private persons or entities under § 536.205.

82. An agency retains its discretion over the final outcome in the rulemaking without regard to the magnitude of the economic impact revealed in the fiscal note. What the fiscal note does is to force the agency to think about the economic consequences of its rulemaking. It neither dictates the form and content of a rule, nor ordains that there be any rule at all.

83. *Missouri Hosp. Ass'n*, 874 S.W.2d at 389. The court found in any event that the manual did not support the Commission's position. The Secretary of State's decade old RULEMAKING MANUAL FOR STATE AGENCIES (5th rev. ed. 1985) is under review and revision with an eye to a new edition.

84. *Id.* at 392.

that the Commission was not alone among state agencies in its failure to comply with MAPA's fiscal note requirements, the General Assembly amended the statute.<sup>85</sup>

On one level the legislature's actions were not unusual. Today the risk of a rule's invalidity for failure to satisfy MAPA's fiscal note requirements is finite. The 1994 amendments established a five-year period of limitation, measured from a rule's effective date, on challenges for such failures for both rules affecting public funds and those affecting private persons or entities.<sup>86</sup> The idea of placing some limit on the possibility of a rule's invalidity for shortcomings long past seems reasonable and five years fully adequate.

On another level, the legislature's actions are arresting. Senate Bill 558 offers special dispensation for rules published prior to its effective date, June 3, 1994. With respect to rules affecting public funds the amendments provide:

In the event that any rule published prior to the effective date of this section shall have failed to provide a fiscal note as required by this section, such agency shall publish the required fiscal note cross referenced to the applicable rule prior to August 28, 1995, and in that event the rule shall not be void. Any such rule shall be deemed to have met the requirements of this section until that date.<sup>87</sup>

The amendments contain a similar provision for rules affecting private persons or entities.<sup>88</sup> The result is amnesty for agencies that did not comply with MAPA's fiscal note requirements—those that “failed to provide a fiscal note as required . . . .” The amnesty is conditional, because an agency must “publish the required fiscal note prior to August 28, 1995,” but if it does so, its “rule shall not be void.”<sup>89</sup> During this ample, almost fifteen-month grace period, all such rules will be treated as if MAPA's fiscal note requirements had been satisfied. Only after August 28, 1995, will the moratorium lift on challenges to the validity of pre-June 3, 1994 rules. The rules of those who have not taken advantage of this legislative largesse will then be subject to chal-

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85. 1994 Mo. Laws S.B. 558.

86. *Id.* Section 536.200.4 provides: “Any challenge to a rule based on failure to meet the requirements of this section shall be commenced within five years after the effective date of the rule.” Section 536.205.3 provides: “Any challenge to a rule based on failure to meet the requirements of this section shall be commenced no later than five years after the effective date of the rule.”

87. *Id.* § 536.200.5.

88. *Id.* § 536.205.4. Unlike 536.200.5, this provision does not require that “the required fiscal note [be] cross referenced to the applicable rule . . . .”

89. The effect is to reach into the past to cure deficiencies in agency compliance with fiscal note requirements. This might be argued as implicating the state constitutional provision prohibiting “ex post facto” laws, or laws “impairing the obligation of contracts,” or laws “retrospective” in operation. MO. CONST. art. I, § 13. This prohibition, however, has not been applied to laws considered only “retroactive.” As one court observed, “[t]he distinguishing feature that has developed in our laws is that when a law makes only a procedural change, it is not ‘retrospective’ and hence can be applied ‘retroactively.’” *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo. Ct. App. 1989). See *Cosada Villa of Mo., Inc. v. Missouri Dep’t of Social Servs.*, 868 S.W.2d 157, 160 (Mo. Ct. App. 1994) (nursing home has no vested right in agency’s substantive Medicaid rate readjustment rule in effect when home applied to program, or in rule in effect at time its base rate was determined; not unconstitutionally retroactive under art. I, § 13); *State ex rel. City of Springfield v. Public Serv. Comm’n*, 812 S.W.2d 827, 831-32 (Mo. Ct. App. 1991) (gas safety rule prohibiting customer-owned lines not unconstitutionally retroactive under art. I, § 13 because it applied only from its effective date into the future). The object of the constitutional provision is the curtailment of “laws that operate retrospectively . . . if the law in question impairs some vested right or affects past transactions to the substantial prejudice of the parties.” *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 447 (Mo. 1994) (en banc) (effect of statutory amendment on teacher’s contractual rights).

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There is quiet and unintended irony in the leisurely generosity of the grace period. In order to make the act effective immediately upon passage and approval, the legislature declared an emergency

[b]ecause there is an urgent and immediate need to know the full fiscal costs of administrative rules and how property rights are affected by administrative rules [pursuant to the takings analysis requirements of § 536.017], section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.<sup>90</sup>

Whether this "immediate need" is satisfied in "urgent" fashion will depend on how quickly agencies move to remedy any deficiencies in required fiscal notes. There is neither requirement nor incentive to do so until August 28, 1995 approaches.

From their inception MAPA's fiscal note provisions have been one of many manifestations of legislative commitment to comprehensive administrative procedures, as well as a more specific insistence that adequate attention be given to the economic consequences of rulemaking. The General Assembly backed its intentions and concerns with the promise that noncompliance would be rewarded with a rule's invalidity. In *Missouri Hospital Association*, the court fulfilled the promise, and in Senate Bill 558 the General Assembly withdrew it. The signal to state agencies is that the legislative will may be ignored with at least the prospect of the legislature's subsequent and generous forgiveness. Indeed, the perverse irony is that legislative forgiveness may be most likely when noncompliance is at its most complete and rampant. The policy decision represented in this aspect of Senate Bill 558 was clearly within the General Assembly's lawmaking power, but it was at best questionable policy. When the legislature acts in such fashion, the partnership in which it asks the courts to carry out its will becomes one-sided, and the likelihood diminishes that the partnership will succeed in its goal of controlling administrative action.

## V. PROGNOSIS AND PRESCRIPTION

If the sort of legislative judgments represented by Senate Bill 558 and House Bill 1099 are the leading edge of the legislative future for administrative law in Missouri, the prognosis is dour. The problem was not the bills as introduced, with their proposal for takings analysis in rulemaking. Instead, the problem was much of the disparate baggage accumulated as the bills worked through the legislative process, and particularly the conditional exclusion of public higher education from MAPA and relief for noncompliance with MAPA's fiscal note requirements.

The Missouri scenario does not merit imitation in other jurisdictions, but the temptations elsewhere are likely to be similar. For example, the success of public higher education in Missouri and Alaska<sup>91</sup> in carving themselves out from under the constraints of their respective comprehensive administrative procedures acts is assured to attract attention, envy and attempts at emulation among some educators in other states. This is expected. Agencies subject to procedural constraints from without often

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90. 1994 Mo. Laws S.B. 558, § B.

91. See *supra* text accompanying notes 44-45.

resist and seldom welcome being told how to conduct their affairs. From a narrow agency perspective, procedural constraint is frequently synonymous with delay, inconvenience and inefficiency. It should not surprise that some agencies will feel put upon when told to conduct adjudicatory proceedings in accordance with rather formal, trial-type procedures, to promulgate rules in accordance with fiscal note and notice-and-comment procedures in the open forum of official publications such as the *Missouri Register*, or for that matter, grant public access to their meetings and records.<sup>92</sup> Nor should it surprise when agency disenchantment reaches the point of legislative initiatives to undo the statutes they dislike and the court cases they have lost. Their cries of distress, however, should not be mistaken for a sign of failed procedures. Their cries may in fact be a barometer of effective procedures. When legislative bodies prescribe administrative procedures, the intended beneficiaries are rarely the agencies themselves. Rather, the beneficiaries are the wider publics which come in contact with the administrative state. Part of the prescription is to keep this in sight when the cries are at their loudest. If this is done, the story of Senate Bill 558 and House Bill 1099 will be an intriguing aberration and not the first stitches in a pattern.

If a pattern were to develop, the comprehensive administrative procedure act's content and meaning would erode. Statutes such as MAPA often command how agencies are to conduct their affairs and couple their directives with the threat of legal consequence detrimental to agencies and their actions. If a legislature expects administrative agencies to take it seriously and at its word, it must do so itself.

In either event, pattern or not, the judiciary in Missouri, upon which the legislature so often relies for carrying out its will, can be expected to continue to take the legislature at its word no matter what the position of others, including the legislature itself. As noted, *Byrd* and *Missouri Hospital Association* are not cases in which court and legislature stand in constitutional opposition and confrontation. Sometimes the courts will determine that the legislature has gone too far and that its legislative act is constitutionally impermissible.<sup>93</sup> That has happened in administrative law settings in the past in Missouri,<sup>94</sup> and will no doubt happen again. MAPA's new provision for legislative review of agency rules is a likely candidate.<sup>95</sup> When such cases do arise, court and legislature are linked in anything but partnership. Rather, they are then often at loggerheads. *Byrd* and *Missouri Hospital Association* are not of this variety.

Nor do they present the sort of complicated, subtle and often debated issues of the proper role of courts in the course of judicial review of administrative action. These are not cases involving matters of the permissible and appropriate degree of

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92. See generally NEELY, *supra* note 6, chs. 14-15 (discussing the Missouri Open Governmental Proceedings Act, MO. REV. STAT. §§ 610.010-610.150 (1986 & Supp. 1993) as to public access to meetings and records).

93. See RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 111 (2d ed. 1992) ("The judiciary has the power to hold not only that a particular agency action lies impermissibly beyond constitutional boundaries, but also that [the legislature] acted unconstitutionally in purporting to grant an agency the power to take some types of actions."); see also NEELY, *supra* note 6, §§ 2.02, 2.03 (discussing cases in which Missouri courts have found legislative acts in contravention of constitutional requirements concerning separation of powers and nondelegation).

94. See, e.g., *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69 (Mo. 1982) (en banc) (declared unconstitutional statutory provision for declaratory judgment in the Administrative Hearing Commission on the validity of rules); NEELY, *supra* note 6, §§ 2.01-2.03, 7.03-7.04, 12.44.

95. 1994 Mo. Laws S.B. 558, § 536.018. See generally Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus?*, 57 MO. L. REV. 1157 (1992).



judicial scrutiny into an agency's substantive decision. For example, debate in judicial and academic circles concerning the "hard look" doctrine has been persistent over the years.<sup>96</sup> In place of deference, this stance "requires a court to attempt to understand and to assess in detail the data and methodology an agency used to address a complicated scientific issue."<sup>97</sup> Instead, *Byrd* and *Missouri Hospital Association* illustrate the court's performing a very straightforward and traditional role in enforcing equally straightforward statutory terms. It is a role in aid, not opposition of the legislature.<sup>98</sup> The prognosis is that Missouri courts will continue in this manner.

There is a third alternative for legislatures, one which lies in between siding with the courts when the courts take the legislature's side in enforcement of a comprehensive administrative procedure act such as MAPA, and siding with the agencies by way of charitable, after-the-fact correction of agency noncompliance, as exemplified by the Missouri General Assembly in 1994. It is not an attractive choice. It would require abandoning the course which administrative law has taken for years throughout the country, including Missouri. Under this scenario a comprehensive administrative procedure act such as MAPA would be given exhortatory rather than mandatory qualities. It might urge, recommend, plead, cajole, entice—anything but command at the risk of sanction. A fair reaction to a statute of such modest promise and prospect would be—what's the point? A sufficient response is that it is better than one whose commands are not taken seriously. The corrosive effects, sometimes insidious, of the latter on the administrative process are worth avoiding, even at the price of less law and more discretion under comprehensive administrative procedure acts.

One prescription for reasonable resolution of the problem is actually presented in Senate Bill 558 and House Bill 1099. Their treatment of the conditional exclusion of public higher education, and of fiscal notes, illustrates the problem. The prescription is for serious statutory requirements to be taken seriously, and once a legislative judgment is made that serious consequences will follow agency noncompliance, the legislature as well as the courts should not be too quick to forgive and forget. If the legislature is not certain that it wishes to go so far, it should take that into account in the initial design of its commands and its designation of the effects of agency inattention. In this light the new provision for takings analyses in rulemaking seems sound in its limitations. It avoids wrong signals to the agencies and pitfalls in its partnership with the courts. As noted at the outset,<sup>99</sup> section 536.017 requires only that a takings analysis be done, and that the Secretary of State be told in the letter transmitting the notice of proposed rulemaking that it was done. Nothing in the provision probes the adequacy of the takings analysis or thunders ominously that a rule will be void without force and effect as law should something not be done or not done just right. The legislature's hesitancy is displayed further in its provision for "sunset" of section 536.017 on September 1, 1997.<sup>100</sup> If, with experience, the legislature becomes fond of the takings analysis and its utility, it may wish to amplify its wishes and attach serious conse-

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96. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 331-34, 359-65 (2d ed. 1992) (discussing the appropriate judicial role in reviewing the substantive basis for agency's decision).

97. *Id.* at 361.

98. See *id.* at 111-14 (courts act in assistance of legislatures when they make sure agencies act in accordance with the legislative will on matters of substance, policy and procedure).

99. See *supra* text accompanying notes 7-10.

100. See *supra* note 9.

quences should agencies fail to comply. In that event the legislature can expect the courts to see that the legislative will is carried out, and when Missouri courts decide the takings analysis counterpart to *Byrd* and *Missouri Hospital Association*, there will be no need for the legislature to undo the judicial decision. In that event the judicial/legislative partnership will be working as it should and must if administrative action is to be controlled effectively.

