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Constitutional Law - Elections - Strict Scrutiny of State Ballot Access Restrictions Assures Easier Access for Independent Presidential Candidates Case Notes

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CASE NOTES

CONSTITUTIONAL LAW—ELECTIONS—STRICT SCRUTINY OF STATE BALLOT ACCESS RESTRICTIONS ASSURES EASIER ACCESS FOR INDEPENDENT PRESIDENTIAL CANDIDATES—*Anderson v. Celebrezze,* 103 S. Ct. 1564 (1983).

On April 24, 1980, Rep. John Anderson (R-Ill.) announced that he was an independent candidate for the presidency of the United States. Thereafter, he met all of the substantive requirements for having his name placed on the ballot in all fifty states and the District of Columbia for the November, 1980 general election.[1] By that time, however, it was too late for Anderson to qualify for a position on the Ohio ballot because the statutory deadlines for filing a statement of candidacy had passed.[2] On May 16, Anderson's supporters tendered a nominating petition to Anthony J. Celebrezze, Jr., Ohio's Secretary of State. Celebrezze refused to accept the petition because it had not been filed within the time required by section 3513.257 of the Ohio Revised Code.[3]

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1. Specifically, his supporters gathered the requisite signatures of registered voters, filed the necessary documents, and submitted the required filing fees. Anderson v. Celebrezze, 103 S. Ct. 1564 (1983).

2. It was also too late for Anderson to qualify in four other states. *See* Anderson v. Quinn, 495 F. Supp. 730 (Me. 1980), *aff'd,* 634 F.2d 616 (1st Cir. 1980); Anderson v. Morris, 500 F. Supp. 1095 (Md. 1980), *aff'd,* 636 F.2d 55 (4th Cir. 1980); Anderson v. Hooper, 498 F. Supp. 898, 905 (N.M. 1980); Anderson v. Mills, 497 F. Supp. 283 (E.D. Ky. 1980), *rev'd in part on other grounds,* 664 F.2d 600 (6th Cir. 1981).

3. Section 3513.257 provides, in relevant part:

> Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in § 3513.261 of the Revised Code.

OHIO REV. CODE ANN. § 3513.257 (Page Supp. 1982). The Code defines "independent candidate" as

> any candidate who does not consider himself affiliated with a political party, and who has his name certified on the office-type ballot at a general or special election through the filing of a statement of candidacy and nominating petition, as prescribed in § 3513.257 . . . of the Revised Code.

On May 19, 1980, Anderson and three voters brought suit in the United States District Court for the Southern District of Ohio challenging the constitutionality of Ohio's early filing deadline.[4] The district court held the deadline unconstitutional and granted summary judgment for the plaintiffs, ordering Celebrezze to file Anderson's nominating petition and other documents.[5]

Respondent Celebrezze then unsuccessfully sought expedited review in both the court of appeals and the United States Supreme Court.[6] When the case was finally heard by the circuit court, that court reversed the district court.[7] The circuit court held that Ohio's early filing deadline ensured voters an opportunity for a careful study of the presidential candidates and a chance to see how the candidates withstood political campaign scrutiny.[8]

Because of a conflict among the circuit courts,[9] the Supreme Court granted certiorari.[10] In a six-three decision, the Supreme

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Id. § 3501.01.

4. Anderson v. Celebrezze, 499 F. Supp. 121 (S.D. Ohio 1980).

5. *Id.* at 124. The deadline was held unconstitutional on two grounds: (1) it imposed an impermissible burden on the first amendment associational rights of Anderson and his Ohio supporters, thereby diluting the potential value of votes that might have been cast for him in other states, and (2) it violated the equal protection clause of the fourteenth amendment because it required an independent candidate to declare his candidacy in March without mandating comparable action by the nominee of a political party. *Id.* at 139.

6. Celebrezze v. Anderson, 448 U.S. 914 (1980). Curiously, respondent did not seek to stay the district court's order. Anderson's name was added to the ballot because his nominating papers were filed as per the district court's order, and the election was held while appeal to the circuit court was pending. In fact, Anderson made it onto the ballot of every state and the District of Columbia. 69 A.B.A. J. 824 (1983). In Ohio, Anderson received 254,472 votes, or 5.9% of the votes cast. Nationally, he received 5,720,060 votes or 6.6% of the total. *Anderson*, 103 S. Ct. at 1567 n.4 (citing OHIO ELECTION STATISTICS 152 (1980) and AMERICA VOTES 14, A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 19-20 (1981)).

7. Anderson v. Celebrezze, 664 F.2d 554 (6th Cir. 1981).

8. *Id.* at 563. Specifically, the circuit court found that the Ohio filing deadline for independent candidates merely required presidential candidates to be in the public eye for a significant period of time, advancing the state's interest in the careful election of presidential candidates. *Id.*

The court held that the equal protection argument was without merit. The court reasoned that the provision in the Ohio Revised Code that partisan candidates may run in the general election without running in the primary does not, in fact, create a right for partisan candidates at all, but rather "[i]t is a right of political parties, with rather an incidental effect on partisan candidates." *Id.* at 567.

9. *See* Anderson v. Celebrezze, 664 F.2d 554 (6th Cir. 1981) (holding for the state filing deadline), and Anderson v. Quinn, 634 F.2d 616 (1st Cir. 1980) and Anderson v. Morris, 636 F.2d 55 (4th Cir. 1980) (both affirming district court decisions holding for Anderson in striking down state filing deadlines for independent candidates).

10. Anderson v. Celebrezze, 456 U.S. 960 (1982). Although the 1980 election had long since passed, the case was not moot because the question of ballot access for independent candidates was, and is, an ongoing problem. *See* Storer v. Brown, 415 U.S. 724 (1974). In *Storer*,

Court reversed the circuit court and held that Ohio's filing deadline was indeed unconstitutional.[11]

The Court agreed with Anderson's arguments on all counts. Specifically, the Court found that the Ohio filing deadline (1) burdened the first amendment associational rights of independent voters and candidates, (2) placed significant state-imposed restrictions on the nationwide electoral process, (3) discriminated against candidates and voters whose political preferences lie outside existing political parties, and (4) implicated a uniquely important national interest in that the president and vice-president are the only elected officials who represent *all* voters in the United States and, hence, the impact of the votes cast in each state affects the votes cast in other states.[12]

The Court set forth a strict scrutiny test to be applied by courts in resolving constitutional challenges to state election laws.[13] First, the court must balance the character and magnitude of the asserted injury against the rights protected by the first and fourteenth amendments that the plaintiff seeks to vindicate.[14] Second, the court must identify and evaluate the precise interests asserted by the state, including the legitimacy, strength, and necessity of those interests, to justify the burden imposed by its rule.[15]

Applying the first part of this balancing test, the Court found that the Ohio filing deadline burdened the first amendment associational rights of independent voters and candidates.[16] The Court relied on the reasoning of *Williams v. Rhodes*,[17] the first case in which the Court considered the constitutionality of ballot access restrictions on independent candidates. In that case, Ohio had an election statute that required a number of signatures on petitions equal to fifteen percent of the number of voters in the last gubernatorial election.[18]

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an action to challenge the constitutionality of statutes establishing requirements for independent candidates to achieve ballot status was not moot by virtue of the mere fact that the election date had passed during the pendency of the case. The Supreme Court in *Storer* held that where "construction of the statue, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.* at 737 n.8.

11. Anderson v. Celebrezze, 103 S. Ct. 1564 (1983).
12. *Id.* at 1570-73.
13. *Id.* at 1570.
14. *Id.*
15. *Id.*
16. *Id.* at 1570-73.
17. 393 U.S. 23 (1968).
18. 1929 Ohio Laws 113 § 4785-61. The Ohio Legislature has since reduced the requirement to one percent. OHIO REV. CODE ANN. § 3517.01 (Supp. 1982).

In addition, the statute required the formation of an elaborate party organization in order for third party and independent candidates to gain access to the ballot.[19]

The *Williams* Court declared the statute unconstitutional, finding that it placed substantially unequal burdens on the rights to vote and to associate because minority parties were denied the same opportunity as partisan candidates to win votes.[20] The Court found that these rights were expressly implicated by ballot access restrictions, and, therefore, were subject to the strict scrutiny standard of equal protection review.[21]

Applying the second part of the balancing test, the Court in *Anderson* identified and handily rejected each of Ohio's asserted interests. Ohio first claimed that the deadline allowed a longer time for voter education. The Court held that it would be unrealistic in this age of modern telecommunications to think that it would take more than seven months to inform the electorate about a candidate just because he lacked a party label.[22]

Ohio next claimed that it was providing equal treatment for partisan and independent candidates alike since a candidate participating in a primary election had to declare his or her candidacy on the same date as an independent. The Court found that both the burdens and benefits of the respective requirements were materially different[23] and that the reasons for early filing for a primary candidate were inapplicable to independent candidates in the general

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19. Specifically, party members had to elect county committee members at the primary election. 1924 Ohio Laws 113 § 4785-63. A state central committeee had to be elected as well. *Id.* at §§ 4785-62 to 63.

20. 393 U.S. at 31.

21. *Id.* at 32. Under this standard, the challenged provision can only be upheld if it is in furtherance of a *compelling* state interest. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8 at 602 (1978).

The Court held for the first time that while citizens of a state are free to associate with one of the two major political parties, to participate in the nomination of their chosen party's candidates for public office, and to cast their ballots in the general election, the state must also provide feasible means for other political parties and candidates to appear. 393 U.S. at 32.

22. Anderson v. Celebrezze, 103 S. Ct. at 1574. The Court also stated, "this reasoning applies with even greater force to a presidential election, which receives more intense publicity." *Id.* It was also not self-evident that the interest in voter education was even served by the early filing deadline. *Id.* at 1575.

23. *Id.* at 1575. In fact, the Court found that the consequences of failing to meet the statutory deadline were entirely different for party primary candidates and independent candidates: the name of the partisan candidate nominated at the convention would appear on the Ohio ballot in the general election even if he or she did not decide to run until after Ohio's March deadline had passed. The independent candidate, on the other hand, would simply lose out if he or she decided to wait too long. *Id.*

election.[24]

Thirdly, Ohio relied on the Court's decision in *Storer v. Brown*[25] in claiming that the filing deadline preserved the stability of the state political system.[26] In *Storer,* the Court applied the strict scrutiny test of *Williams* to uphold a California election statute that required independent candidates to be politically disaffiliated for at least one year prior to the immediately preceding primary election.[27] Justice White concluded that the state may limit voter participation to one of two alternative procedures—partisan or non-partisan—for nominating candidates for the general election ballot. The Court held that the statute requiring party disaffiliation was not unconstitutional since it involved no discrimination against independent candidates.[28] Further, the statute reflected a "compelling state interest" in protecting the electoral process from "splintered parties and unrestrained factionalism."[29] The *Storer* Court stated that factionalism may lead to the destruction of the stability of the state's political system.[30] However, the Court in *Anderson* stated that this did not suggest that a political party could invoke the powers of a state to assure that party's complete control over its own members and supporters.[31] Rather, the *Anderson* Court found that the deadline amounted to nothing more than a desire to protect existing political parties from competition generated by independent candidates who had previously been affiliated with a party—and, as such, conflicted with first amendment values.[32]

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24. *Id.* The Court also agreed with the district court in holding that although a write-in vote for the independent candidate is always available, it is an inadequate alternative to ballot placement. "The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Id.* n.26 (quoting Lubin v. Panish, 415 U.S. 709, 719 n.5).

25. 415 U.S. 724 (1974).

26. 103 S. Ct. at 1577-78.

27. 415 U.S. at 738-46.

28. The provision was not discriminatory because a party candidate, as well, could not change parties within a year prior to the election. *Id.* at 733-34.

29. *Id.* at 736. The Court also found that the California provision: (1) protected the direct primary process—an integral part of the entire election process—by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot, (2) worked against independent candidacies "prompted by short-range political goals, pique, or personal quarrel," and (3) was a substantial barrier to a party fielding an "independent" candidate to capture and "bleed off" votes in the general election that might well go to another party. *Id.* at 735.

The Court thus concluded that the California provision furthered the state's compelling interest in the stability of its political system. *Id.* at 736.

30. *Id.* at 736.

31. 103 S. Ct. at 1577.

32. *Id.* at 1576-77.

Fourthly, Ohio contended that the deadline helped to maintain the integrity of various routes to the ballot for the presidency. This interest was not served, the Court stated, because Ohio's presidential preference primary did not serve to narrow the field for the general election.[33]

Finally, the state contended that by forcing independent candidates to register early, there would be less chance of an independent candidate "splintering" his or her party to "bleed off" votes in the general election. In essence, the deadline protected parties from intraparty feuding. In fact, the Court held, the deadline may have actually impaired the state's interest in preserving party harmony.[34]

In his dissent,[35] Justice Rehnquist, rather than applying the strict scrutiny test that the majority used, argued that the Ohio ballot access laws need only be rational and allow reasonable—not absolute—access to the general election ballot to independent candidates.[36] Relying on *Storer*, the dissent found that the deadline would not have totally excluded Anderson from the general election ballot because write-in votes were still available.[37] It further stated that the deadline did not impede Anderson's signature gathering efforts; rather, "a reasonably diligent" independent candidate should have had little difficulty in obtaining the requisite signatures in a timely fashion.[38]

Next, although the majority held that the deadline infringed upon attempts by non-partisan candidates who attempted to run after the March deadline, the dissenters stated that there is, in fact, little chance of a serious candidacy if the declaration of such candidacy is made after spring of an election year.[39] The dissent also reasoned that because Anderson had already declared as a Republican in Ohio and had dropped out because he realized he could not get the Republican nomination, the deadline only prohibited him from

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33. *Id.* at 1578.

34. *Id.* The Court also held that the state actually has a less important interest in regulating presidential, as opposed to local, elections because the outcome of presidential elections will be largely determined by voters outside the state. *Id.* at 1573. However, the author contends that this reasoning should not be dispositive and suggests that the state *still* has an interest in regulating presidential elections within its own boundaries although this interest must be promulgated within prescribed constitutional limits.

35. *Id.* at 1579.

36. *Id.* at 1580.

37. 103 S. Ct. at 1580 n.1. *But see supra* note 24.

38. *Id.* at 1580 (quoting *Storer*, 415 U.S. at 742). In fact five other independent candidates submitted nominating petitions with the necessary signatures before the deadline. *Id*

39. *Id.* at 1581 n.3.

having two chances at the presidency in the same election year.[40]

Finally, the dissent held that the deadline did not serve to protect political parties; rather, it merely required an independent candidate to make an early decision to run for office.[41] In fact, the dissenters reasoned, party candidates actually have a harder time getting on the ballot because they must be nominated by their party as well as obtaining the signatures required by the state.[42]

Ballot access restriction cases have been see-sawing in the Supreme Court since 1968.[43] Three years after *Williams v. Rhodes*,[44] in which the Court used a first amendment fundamental rights analysis to strike down minimum signature requirements for independent and third party candidates in Ohio, the Court in *Jenness v. Fortson* retreated from the fundamental rights approach.[45] In *Jenness*, the Court rejected plaintiffs' contention that petition signatures and other qualifying requirements denied independent candidates and their supporters equal protection of the law and infringed upon their first amendment rights of free speech and association.[46] Instead, the Court affirmed the state's interest in regulating elections and sustained a Georgia election statute which required signatures totaling five percent of the total vote for third parties and independent candidates in the last election.[47]

The focus of the *Jenness* opinion was the right of the state to regulate its elections, while in *Williams* the interest of the candidate and his or her supporters was of central concern. In *Jenness*, the Court held that the state has an obligation to protect the integrity of the political process from frivolous candidacies.[48] The Court indicated that in order to achieve this, the state should require a preliminary showing of moderate support before printing the name of a po-

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40. *Id.* at 1581. Thus, the Ohio filing deadline could be classified as a "sore loser" statute of sorts, in that it prohibits a candidate defeated in a party primary from appearing on the general election ballot. *See* Anderson v. Morris, 636 F.2d 55, 58 (4th Cir. 1980). In the instant case, however, Anderson was not actually defeated in the primary, but had dropped out before it took place.

41. 103 S. Ct. at 1583.

42. *Id* at 1584.

43. *See Developments in the Law - Elections*, 88 HARV. L. REV. 1111 (1975) and Comment, *Ballot Access: Applying the Constitutional Balancing Test to the West Virginia Election Code*, 83 W. VA. L. REV. 227 (1980) (both setting forth the background of ballot access cases decided by the Supreme Court).

44. 393 U.S. 23.

45. 403 U.S. 431 (1971).

46. *Id.*

47. *Id.*

48. *Id.* at 442.

litical organization's candidate on the ballot.[49] This requirement would help to avoid confusion at the general election.[50] In articulating its concern for the state's interest in regulating elections, the *Jenness* Court approached a "rational relation" standard of review rather than the strict scrutiny standard of *Williams*.[51] Although the Court found the state's interests to be "compelling," it in fact accepted regulations that had only a rational connection to the state's purpose.[52]

In *Storer*,[53] the Court once again applied the *Williams* strict scrutiny test to uphold the California disaffiliation statute.[54] When John Anderson challenged the Ohio statute, there were already two standards of review regarding ballot access cases in the federal court system—a "minimum rationality" standard and a "strict scrutiny" standard.[55] These two conflicting standards came to a head in March of 1983 in *Anderson*.[56]

The district court applied a standard equal protection analysis,[57] balancing the interests of the state in maintaining a classification against the burden on individual rights imposed by the classification, and held that the classification was unnecessary to achieve any compelling state interest.[58] The Supreme Court, however, based its conclusions directly on the first and fourteenth amendments and did not engage in a separate equal protection analysis.[59] Instead, the Court chose to rely on the analysis of prior election cases which applied the "fundamental rights" strand of equal protection analysis.[60]

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49. *Id.*

50. *Id.*

51. *Developments in the Law, supra* note 44, at 1139. This can be inferred from the fact that the Court upheld the state statute, finding that the burden on minor parties was slight. Comment, *supra* note 44, at 233. *See also,* Note, *Nominating Petition Requirements For Third-Party and Independent Candidate Ballot Access,* 11 SUFFOLK U.L. REV. 974, 980-81 (1977).

52. Comment, *supra* note 44, at 233.

53. 415 U.S. 724.

54. *See supra* notes 25-30 and accompanying text.

55. *See Anderson*, 664 F.2d at 565; *Morris*, 636 F.2d at 57.

56. 103 S. Ct. 1564.

57. 499 F. Supp. at 130.

58. *Id.*

59. 103 S. Ct. at 1569 n.7.

60. *Id. See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972); *Williams*, 393 U.S. 23. Although the Court stated that it was not embarking on a separate equal protection analysis, the Court's analysis and rejection of Ohio's arguments seem to closely resemble this type of analysis. *See supra* notes 12-34 and accompanying text. The Court applied a strict scrutiny balancing test and found that the state simply had no compelling interest in maintaining a filing deadline for independent candidates. *Anderson*, 103 S. Ct. at 1573-79.

The Supreme Court has taken a special interest over the years since the 1960's civil rights movement in preserving the right of all citizens to vote freely for the candidate of their choice.[61] The freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the first and fourteenth amendments.[62] Even the most basic of rights is illusory if the right to vote is undermined.[63]

With its decision in *Anderson,* the Court has moved toward applying a strict scrutiny standard when considering state ballot access restrictions. The Court's decision does not overrule *Storer.* Rather, *Storer* can be distinguished because the portion of the case that upheld a compelling interest on the part of the state dealt with *state* congressional candidates.[64] In this respect, it seems only fair that the state should be allowed to play a significantly greater role in the regulation of elections affecting the direct representation of its citizens in Washington.

In the sphere of national elections, however, the right of the state to restrict ballot access should be strictly scrutinized because what happens in one state usually has a direct effect in another. A uniform rule in the realm of national elections will best serve the interests of the American people. That uniformity now exists after *Anderson.* One state will not be able to impose an unconstitutional early filing deadline upon an independent presidential candidate who would thereby be denied ballot access.

If an independent candidate now wishes to obtain ballot status in the general election, he must still fulfill the substantive statutory requirements that the particular state imposes. However, if the statute is challenged, the state must show that it has a compelling need in the enforcement of the statute's provisions.

With its decision in *Anderson,* the Supreme Court has not closed the door on states exercising their powers of supervision over elections and for setting qualifications for voters—it has merely held that the states may not infringe upon other basic constitutional protections when doing so.

Stephen J. Schwartz

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61. *See, e.g.,* American Party v. White, 415 U.S. 767 (1974); *Jenness,* 403 U.S. 431; *Williams,* 393 U.S. 23.

62. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

63. Anderson v. Celebrezze, 499 F. Supp. 121, 127.

64. 415 U.S. at 728-37. With respect to the claims by the presidential candidates, the Court remanded the case to the district court. *Id.* at 738.

RECONCILING THE PUBLIC TRUST AND APPROPRIATIVE WATER RIGHTS IN CALIFORNIA: *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *modified*, 33 Cal. 3d 726a, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

The right to use and divert water in California has traditionally been governed by a dual system of water rights: the riparian system and the appropriative system.[1] The common law riparian system of water allocation provides that an owner of land contiguous to a watercourse has the right to use that water on the land.[2] The statutory appropriative system gives the right to use and divert water to the first person who does so for reasonable and beneficial purposes.[3] The latter was developed during the California gold rush when water was needed for use on land not adjacent to water sources. Because of the great agricultural and domestic demands for water, the appropriative system has dominated California water rights and is now regulated by a statutorily created administrative board: the California

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1. *See* Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power*, 33 HASTINGS L.J. 653 (1982).

2. *Id.*

3. All water rights in California are subject to "reasonable and beneficial" use requirements. Thus, riparian owners must put water to reasonable or beneficial use before they can use it to the exclusion of appropriators. This additional requirement that the state's water resources be fully and beneficially used promotes the development and use of water resources. CAL. CONST. art. X, § 2 (formerly CAL. CONST. art. XIV § 3) provides in part:

> [B]ecause of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonble method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State . . . shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right . . . shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled.

Water Resources Control Board (Water Board).

The public trust doctrine, in contrast, has applied only sporadically to California water rights. The doctrine, developed from Roman and English laws, has traditionally protected the public's right to use navigable waters for certain activities. This doctrine holds that the public's right to water is held in trust by the state and is superior to all private claims of right.[4]

The California water rights system and the common law public trust doctrine developed independently and met for the first time in a recent California Supreme Court decision, *National Audubon Society v. Superior Court.*[5] The court balanced increasing demands for water against increasing environmental concerns and held that neither doctrine could stand alone, and that an integration of the two was required to make California water law more responsible to the state's diverse needs.[6]

The court's decision has been crucial in the sixty-year old war raging over the waters of Mono Lake, the second largest lake in California, located at the base of the Sierra Nevadas.[7] Mono Lake is naturally saline and, while it supports no fish, brine shrimp and brine flies thrive in its habitat. Migratory birds feed on the shrimp and flies and ninety percent of California's gull population breed at the lake.[8] In 1940, the predecessor to the California State Water Resources Board[9] granted the City of Los Angeles Department of Water and Power (DWP) a permit to divert the freshwater streams that filled Mono Lake.[10] In 1941, the city completed its aqueduct which, with a 1970 addition, currently diverts almost the entire source of freshwater from the lake.[11]

As a result of these diversions, the level of the lake has fallen forty-six feet. The resulting decrease in volume has increased the salinity level of the remaining water to three times that of the ocean. The increased salinity may destroy the brine shrimp and flies which inhabit the lake, thus cutting off a food supply for migratory birds.[12]

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4. *See infra* text accompanying notes 27-37.

5. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *modified,* 33 Cal. 3d 726a, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

6. *Id.*

7. *Id.* at 424, 658 P.2d at 711, 198 Cal. Rptr. at 348.

8. *Id.*

9. The Division of Water Resources was the predecessor to the California State Water Resources Control Board.

10. 33 Cal. 3d at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

11. *Id.*

12. *Id.* at 430, 658 P.2d at 715, 189 Cal. Rptr. at 352.

In addition, the reduced lake level has turned one of the lake's islands into a peninsula, thus allowing predators to invade gull nesting areas.[13]

Environmental groups, led by the National Audubon Society, filed suit in Mono County Superior Court on May 21, 1979, against the State of California and DWP to enjoin the diversions.[14] DWP moved to change venue, and the case was removed to Alpine County Superior Court.[15] In January, 1980, the DWP named the federal government as a cross-complainant, and the government removed the case to the United States District Court for Eastern California.[16]

The DWP subsequently filed a motion to stay the proceedings under the federal abstention doctrine, asserting that the case involved fundamental principles of state law which had never been addressed by the state courts.[17] The federal court judge, without relinquishing jurisdiction over the suit, declined to rule on the case until the state courts had determined: (1) the relationship between the public trust doctrine and the California water rights system and (2) whether plaintiffs were required to exhaust their administrative remedies before the water board.[18]

Subsequently, plaintiffs filed a new complaint in the Superior Court of Alpine County, where the court entered summary judgment against them.[19] The Superior Court held that the public trust doctrine provided no grounds to attack DWP's board-granted water rights. The court further ruled that the California water rights system was comprehensive, and that any attempt to challenge the city's water rights had to be made first to the Water Board.[20]

Plaintiffs then petitioned for a writ of mandamus with the California Supreme Court. The court issued the alternative writ because of the importance of the issues presented.[21] Justice Broussard, writing for the majority in this five-one opinion,[22] held that plaintiffs could rely on the public trust doctrine in challenging the allocations

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13. *Id. See generally* Hoff, *The Legal Battle Over Mono Lake,* CAL. LAW., Jan., 1982, at 28.

14. 33 Cal. 3d at 431, 658 P.2d at 716, 189 Cal. Rptr. at 353.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 431-32, 658 P.2d at 717, 189 Cal. Rptr. at 353-54.

19. *Id.* at 432-33, 658 P.2d at 717-18, 189 Cal. Rptr. at 354.

20. *Id.* at 433, 658 P.2d at 718, 189 Cal. Rptr. at 354-55.

21. *Id.* at 433, 658 P.2d at 718, 189 Cal. Rptr. at 354-55.

22. Chief Justice Bird and Justices Mosk, Kaus, and Reynoso concurred in Justice Broussard's opinion; a separate concurring opinion was written by Justice Kaus. A separate concurring and dissenting opinion was written by Justice Richardson.

of the waters of Mono Lake. Concluding that the California water rights system could not operate independently from the public trust doctrine, the court held that the state must take the public trust into account when allocating its water resources. The court emphasized that this duty is a continuous one and includes the reconsideration of past allocation decisions, even if environmental concerns were considered in the initial hearing process.[23]

In acknowledging the relationship between the public trust and the California water rights system, the court rejected plaintiff's argument that the public trust supercedes statutory water rights, and that state-granted water rights which impair public trust uses are invalid.[24] Similarly, the court rejected defendant's contention that the water rights system has preempted the common law public trust doctrine, and that water rights granted under that system may not be reconsidered.[25] Justice Broussard explained that favoring one doctrine to the exclusion of the other would create an unbalanced structure, one which would treat appropriations essential to the economic development of the state as violative of the public trust, or alternatively preclude any consideration of the public's environmental concerns.[26]

The court first determined that Mono Lake is protected by the public trust doctrine by examining the purpose and scope of the doctrine. The court recognized that the original purpose of the doctrine was to protect the public's use of waterways for navigation, commerce and fishing.[27] However, the court acknowledged that the uses protected by the public trust have been expanded as the public's uses of California's waterways have changed. The court held that the public's uses of Mono Lake are protected under the expanded view of public trust uses set forth in *Marks v. Whitney*.[28] In *Marks*, the California Supreme Court concluded that changing public need demanded a broader definition of the uses protected by the public trust. Building upon *Marks*, the court in *National Audubon Society* emphasized that the trust protected recreational uses of navigable waterways, and that the preservation of waterways in their present environmental state is one of the most important uses protected by the

23. 33 Cal. 3d at 445-47, 658 P.2d at 727-29, 189 Cal. Rptr. at 363-65.
24. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363-64.
25. *Id.*
26. *Id.*
27. *Id.* at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.
28. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

trust.[29]

The court acknowledged that because the lakes, beds, and shores of Mono Lake are navigable waterways, they are protected by the traditional scope of the common law public trust doctrine.[30] The court then considered whether the nonnavigable tributaries of Mono Lake diverted by Los Angeles are also within the scope of the doctrine. The court relied on prior California decisions[31] which prohibited the use of nonnavigable tributaries in ways that affect the public trust uses of navigable waterways, and held that:

> [T]he principles recognized by those decisions apply fully to a case in which diversions from a nonnavigable tributary impair the public trust in a downstream river or lake. 'If the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests.'[32]

Therefore, the court concluded that the public trust also "protects navigable waters from harm caused by diversion of nonnavigable tributaries."[33]

The court then considered the state's duties and powers over lands protected by the public trust. Following the precedent of *Illinois Central Railroad Company v. Illinois*,[34] the court in *National Audubon Society* concluded that the state has a continuing duty to protect the public interest in its navigable waters. In *Illinois*, which the California Supreme Court recognized as the primary authority on this issue,[35] the United States Supreme Court affirmed the right

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29. The court said: "[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356 (quoting Marks v. Whitney, 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796).

30. 33 Cal. 3d at 435, 658 P.2d at 720, 189 Cal. Rptr. at 356.

31. People v. Gold Run D. & M. Co., 66 Cal. 138, 4 P. 1152 (1884) (defendants were enjoined from discharging debris into a nonnavigable stream because it resulted in the debris being deposited into and impeding the navigability of a navigable stream). People v. Russ, 132 Cal. 102, 64 P. 111 (1901) (holding that if a tributary to a navigable stream is necessary to its navigability, the owner of such land upon which the tributary is situated has no right to dam it in order to reclaim his land).

32. 33 Cal. 3d at 436-37, 658 P.2d at 720, 189 Cal. Rptr. at 357 (quoting Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C.D. L. REV. 233, 257-58 (1980) (emphasis in original)).

33. *Id.* at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

34. 146 U.S. 387 (1892).

35. *See* City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980).

of the Illinois Legislature to revoke its previous grant of one thousand acres of submerged lands to a private party. The United States Supreme Court held that the state could not abdicate its power over lands held in trust for the public, just as it cannot abdicate its police powers in the administration of government.[36] In *National Audubon Society*, the California Supreme Court extended the state's public trust duty to the distribution of appropriative water rights, and concluded that the state's duty necessarily includes the ability to re-allocate or revoke rights previously granted under the water rights system.[37] Thus, the court rejected defendant's argument that DWP had a vested interest in the state-granted water rights which, once granted, could not be disturbed. The California Supreme Court stressed that the public trust doctrine bars the DWP from asserting a vested right to the waters of Mono Lake when such diversions harm the interests protected by the public trust.[38]

Also rejected were the defendant's contentions that since the state has the right to choose between competing trust uses,[39] it also has the right to prefer consumptive uses over instream uses.[40] The court clarified that the "trust uses" protected are the public's actual uses of the navigable waterway at issue.[41] Thus, in the Mono Lake litigation, the trust uses protected are the public's recreational uses and environmental enjoyment of the Mono Lake environment; DWP could not claim to be promoting public trust uses by providing water to Los Angeles for domestic use. In limiting the scope of trust uses in this way, the court made it clear that the state's duty to protect the public trust cannot be satisfied merely by allowing the use of public property for public purposes;[42] rather, the state must protect the public's right to stable streams, lakes and tidelands.[43]

Finally, the court addressed the second question raised by the federal district court: did plaintiffs have to exhaust all administrative remedies? While acknowledging that plaintiffs possessed a remedy

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36. 146 U.S. at 453.

37. 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

38. *Id.* at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349.

39. *See, e.g.*, Colberg, Inc. v. California *ex. rel.* Dept. of Public Works, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973).

40. 33 Cal. 3d at 440, 658 P.2d at 728, 189 Cal. Rptr. at 360, *modified*, 33 Cal. 3d at 726b, 658 P.2d at 723, 189 Cal. Rptr. 360.

41. *Id.*

42. *Id.* at 441, 658 P.2d at 724, 189 Cal. Rptr. at 360.

43. *Id.*

before the Water Board,[44] the court concluded that plaintiffs were not required to pursue this remedy prior to filing suit. Noting that the legislature had provided a statutory method for "reconciling board expertise and judicial precedent,"[45] the court upheld its prior decision[46] granting the courts concurrent jurisdiction with the water board for the determination of water rights issues.[47]

Justice Richardson dissented only from that part of the majority's opinion which granted concurrent jurisdiction to the Water Board and the California courts.[48] Justice Richardson would have granted exclusive jurisdiction to the Water Board in this instance because the complex issues required the high level of expertise which only the Water Board possessed.[49]

National Audubon Society is a novel case in its extension of the public trust doctrine. Never before has the public trust doctrine been used to prevent diversions of water that interfere with instream public trust uses. In the past state water rights laws have provided the exclusive basis for allocation of water rights. Traditionally, it was assumed that once granted, these rights were virtually unadjustable

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44. We therefore construe Water Code section 2501 to permit a person claiming that a use of water is harmful to interests protected by the public trust to seek a board determination of the allocation of water in a stream system, a determination which may include reconsideration of rights previously granted in that system. Under this interpretation of section 2501, plaintiffs have a remedy before the Water Board.

33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366.

45. The court said:

> Water Code section 2000 provides that "[i]n any suit brought in any court of competent jurisdiction in this State for determination of rights to water, the court may order a reference to the board, as referee, of any or all issues involved in the suit." Section 2001 provides alternatively "the court may refer the suit to the board for investigation of and report upon any or all of the physical facts involved." Finally, recognizing that some water cases will be filed in or transferred to federal courts, section 2075 provides that "[i]n case suit is brought in a federal court for determination of the rights to water within, or partially within, this State, the board may accept a reference of such suit as master or referee for the court."

Id. at 451, 658 P.2d at 731, 189 Cal. Rptr. at 368 (quoting CAL. WATER CODE §§ 2000, 2001, 2075 (West 1971)).

46. Environmental Defense Fund Inc., v. East Bay Municipal Utility Dist., 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).

47. The court said: "[a]part from overriding considerations such as are presented by health and safety dangers . . . we are satisfied that the courts have concurrent jurisdiction with . . . administrative agencies . . . ." 33 Cal. 3d at 450, 658 P.2d at 731, 189 Cal. Rptr. at 368 (quoting Environmental Defense Fund Inc., 26 Cal. 3d at 200, 605 P.2d at 10, 161 Cal. Rptr. at 475).

48. 33 Cal. 3d at 453, 658 P.2d at 733, 189 Cal. Rptr. at 370 (Richardson, J. dissenting).

49. *Id.* at 454, 658 P.2d at 735, 189 Cal. Rptr. at 372.

and irrevocable, regardless of their environmental consequences. The public trust has been expanding in recent years to include the protection of "in-place" water uses such as recreation, wildlife preservation and ecological quality.[50] Yet, until *National Audubon Society,* it was uncertain whether the doctrine was strong enough to provide an independent challenge to diversionary water uses found reasonable by the state's Water Board. As recognized by the California Supreme Court in *National Audubon Society,* since the expansion of the public trust's protection asserted in *Marks,* the "two systems of legal thought have been on a collision course."[51]

The supreme court recognized that the two legal doctrines had developed independently. The public trust was advanced from common law to protect the interests of the general public in its use of navigable waters against interference by the private sector.[52] In contrast, the water rights system has promoted private consumptive use, with its major criteria that water use be "reasonable and beneficial."[53] By holding that the public trust must be considered when granting appropriative water rights, the California Supreme Court clearly dictated that the California water rights system would now depend upon both legal doctrines. Thus, regardless of their reasonableness, water rights are still subject to challenge under public trust principles.

The court was concerned that no decision-making body had ever balanced the benefit of Los Angeles in its use of the diverted water against the environmental harm inflicted upon Mono Lake.[54] The court indicated that DWP had acquired its diversionary rights from a water board which erroneously believed it lacked the power and the duty to protect the Mono Lake environment.[55] As clarification, the court stated that the state not only has the duty to take the public trust into account when allocating water rights, but also has the power to reconsider decisions which may be incorrect in light of changing facts or public needs. Consequently, a party cannot claim a

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50. *See supra* notes 28, 29.

51. 33 Cal. 3d at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

52. People v. Truckee Lumber Co., 116 Cal. 397, 48 P.374 (1897) (depositing debris in river that obstructs public instream use violates public rights); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884) (defendant's deposits of mining debris were unauthorized impairment of public right of navigation); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971) (fencing off a stream from the public inconsistent with public trust protection).

53. *See supra* note 3.

54. 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

55. *Id.*

vested right to water which precludes recognition of the public trust.[56]

National Audubon Society suggests that water rights related to navigable waters in California, previously thought immutable, can now be challenged by persons claiming violation of the public trust. But, while the California Supreme Court provided environmentalists with a tool to challenge board-granted water rights, the court did not necessarily give environmentalists the strength to defeat those existing rights. While the court emphasized the state's duty to consider public trust values in its water resource planning and to protect the public trust whenever feasible,[57] the justices cushioned the potentially disrupting impact of this duty on California water rights by reaffirming the state's power to grant diversionary water rights even if the diversion "does not promote, and may unavoidably harm, the trust uses at the source stream."[58] Thus, while the court ensured that the public trust would be considered, it clarified that diversions which harm the envionment may be valid despite the public trust in times of water scarcity.[59] To support its conclusion, the court noted that since industry, agriculture, and cities have developed in reliance upon appropriated water, "it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses."[60] Consequently, the stability of present California water rights is uncertain.[61]

On remand, the federal district court will have to reach a compromise between the competing demands of Los Angeles and Mono Lake for water. The California Supreme Court in *National Audubon Society* suggested that those interests could be balanced, perhaps by reducing the amount of water allocated to Los Angeles. Yet, while the court may have indicated a desirable compromise, it did not set a clear judicial precedent for future court decisions. By attempting to reconcile the public trust with appropriative water rights, the court protected neither interest at the expense of the

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56. *Id.* at 440, 658 P.2d 723, 189 Cal. Rptr. at 360, *modified,* 33 Cal. 3d at 726a, 658 P.2d at 723, 189 Cal. Rptr. 360.

57. *Id.* at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.

58. *Id.* at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364.

59. *Id.*

60. *Id.*

61. A representative of the California Water Resources Control Board has stated that, at the present time, the board has no intention of re-evaluating presently appropriated water rights. Thus, any re-evaluation will have to come from challenges to those present appropriative rights from the public. Address by Roger Johnson, Santa Clara University Water Law Class (Sept. 13, 1983).

other. Lower courts in the future faced with judicial review of appropriative water rights must balance developmental needs against environmental interests. Yet, while it is clear that the trial judge must ensure that the public trust is considered, he/she is given no guidance as to how much weight to give public trust values over reasonable and beneficial uses of water.[62] With no a priori weight given to public trust protections, a balancing test may realistically prove nothing more than a procedural check that the Water Board has made a good faith consideration of the effects of the appropriative water right on the public trust use being protected.

Nevertheless, the California Supreme Court in *National Audubon Society* made a fundamental change in the state's water law by ruling that the public trust may be used to challenge licenses and permits granted under the state's water rights system. Its mandate to the water board is clear: a determination of the reasonableness of water use must include a consideration of its interference with public trust uses.[63] Thus, California has ensured that no matter how the statutory water rights system is altered, the public trust will continue to be an independent source of protection for the public's environmental concerns.

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62. A request for rehearing made by the State of California was denied by the California Supreme Court. The state argued that the court's opinion does not sufficiently explain the relationship between the two doctrines, nor does it give adequate guidance to the federal district court. Fulton, *State Asks Justices to Clarify Ruling in Mono Lake Dispute: Water Rights Dispute*, L.A. Daily J., March 7, 1983, at 1, col. 2.

63. *See* Comment, *The Public Trust Doctrine and California Water Law:* National Audubon Society v. Department of Water and Power, 33 HASTINGS L.J. 653 (1982).

CONSTITUTIONAL LAW—TAX DEDUCTION FOR PARENTS FOR CERTAIN EXPENSES INCURRED IN SENDING THEIR CHILDREN TO SCHOOL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE—*Mueller v. Allen*, 103 S. Ct. 3062 (1983).

In *Mueller v. Allen*,[1] certain Minnesota taxpayers challenged a state statute[2] which allowed state taxpayers to deduct tuition costs and other school-related expenses from their state income tax. The petitioners alleged that this statute, section 290.09(22), violated the first and fourteenth amendments of the United States Constitution because it provided financial assistance to sectarian institutions.[3] The petitioners brought suit against the Commissioner of the Minnesota Department of Revenue and the parents who, pursuant to section 290.09(22), received a tax deduction for expenses incurred in sending their children to parochial schools.[4]

In support of their claim, the petitioners provided statistical evidence which demonstrated that an overwhelming majority of taxpayers who utilize the deduction have dependents attending nonpublic

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1. 103 S. Ct. 3062 (1983).

2. MINN. STAT. § 290.09(22) (Supp. 1982) permits a taxpayer to deduct from his or her computation of gross income the following:

> *Tuition and transportation expense.* The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

Id.

3. Mueller v. Allen, 514 F. Supp. 998 (D. Minn. 1981). Among the plaintiffs who brought the challenge in *Mueller*, were some who had previously tried and failed in Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978). *Id.* at 999.

4. 514 F. Supp. 998 (D. Minn. 1981).

schools.[5] The petitioners' data indicated that over ninety-five percent of nonpublic school students in Minnesota attended sectarian institutions during the 1979-80 school year.[6] The petitioners argued that their evidence proved that the primary effect of the statute was not to further secular education, but rather to advance religion. The petitioners also contended that the statute lacked a valid secular purpose and that it led to an impermissible entanglement between church and state.[7]

The United States District Court for Minnesota granted the respondents' motion for summary judgment and held that the statute was neutral on its face and in its application, and that its primary effect was neither to advance nor inhibit religion.[8] On appeal, the Eighth Circuit Court of Appeals affirmed the district court's decision. The court held that the statute did not violate the establishment clause of the first amendment.[9] The appellate court conceded that the deduction may confer some benefit upon church-affiliated schools, but nevertheless decided that such benefit was too remote and incidental to be violative of the constitutional separation of church and state.[10] The court concluded that "there are substantial benefits flowing to all members of the public," and therefore the statute was not violative of the first and fourteenth amendment.[11]

In upholding the Minnesota tax statute, the United States Supreme Court found that section 290.09(22) satisfied the three-part establishment clause test as set forth in *Lemon v. Kurtzman.*[12] Under the test in *Lemon*, a legislative enactment is invalid if it does not have a secular legislative purpose, if its primary effect either advances or inhibits religion, or if it fosters an excessive government entanglement with religion.[13]

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5. Mueller v. Allen, 676 F.2d 1195, 1198 (8th Cir. 1982).

6. 676 F.2d at 1198 n.9. The evidence showed that of the total 820,000 elementary and secondary students in Minnesota, only 90,954 attended nonpublic schools during the 1979-80 school year. Of these 90,954 students, 86,906 attended sectarian schools, thus over 95%.

7. 676 F.2d at 1197.

8. 514 F. Supp. at 1003. In an earlier suit the same statute withstood a similar constitutional attack before a three-judge court. *See* Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316, 1322 (D. Minn. 1978).

9. 676 F.2d at 1206.

10. *Id.* at 1205-06.

11. 676 F.2d at 1205. The First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855, 857 (1st Cir. 1980), invalidated a statute almost identical to the one in *Mueller.* To resolve this conflict between circuits, the United States Supreme Court granted certiorari in *Mueller.* Mueller v. Allen, 103 S. Ct. 48 (1982).

12. 403 U.S. 602, 612-13 (1971).

13. *Id.* Failure to satisfy any one of the three elements of the test renders the legislation unconstitutional.

Justice Rehnquist, writing for the majority,[14] found that the statute had a valid secular purpose. He acknowledged that a state's decision to lessen the burden of educational costs incurred by parents served the secular purpose of educating the state's citizenry.[15] In addition, he noted that Minnesota had a strong public interest in assuring the continuity of private schools; these schools indirectly benefit all taxpayers by easing the burden on the public school system since fewer students will attend public schools.[16]

The Court then focused on the primary effect analysis of the *Lemon* test. First, the Court distinguished *Mueller* from *Committee of Education v. Nyquist*[17] in that section 290.09(22) allows *all* parents incurring educational expenses on behalf of their children to claim a tax deduction for such expenditures.[18] In *Nyquist*, the statute provided tax benefits for educational expenses to those parents whose children attended *nonpublic* schools.[19] In Justice Rehnquist's opinion, this distinction prevented section 290.09(22) from being "subject[ed] to challenge under the Establishment Clause" because the statute in *Mueller* provided state benefits to a "broad spectrum" of taxpayers instead of a narrow class.[20]

Justice Rehnquist also distinguished *Nyquist* on the grounds that the statute in that case involved a program whereby the amount deducted was unrelated to the tuition expense incurred by parents on behalf of their children.[21] The Court found that the Minnesota program embodied more of a "genuine tax deduction" because it al-

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However, in applying this test, Justice Rehnquist, writing the majority opinion in *Mueller*, stated that although the *Lemon* test "is well settled, our cases have also emphasized that it provides 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges." 103 S. Ct. at 3066 (1983) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

14. The majority opinion, written by Justice Rehnquist, was joined by Chief Justice Burger and Justices White, Powell, and O'Connor. Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, dissented.

15. 103 S. Ct. at 3066.

16. *Id.* Justice Rehnquist also noted that the lack of an express statement of legislative purpose did not affect the constitutionality of the statute. He stated that prior decisions reflected the Court's "reluctance to attribute unconstitutional motives to the states, particularly when a [valid] purpose . . . may be discerned from the face of the statute." *Id.* Therefore, in the case at bar, the Court's discernment of a valid purpose from the face of the statute overcame the absence of an express statement of purpose.

17. 413 U.S. 756 (1973). The petitioners in *Mueller* relied heavily upon the Court's decision in *Nyquist*. In *Nyquist*, the Court found as unconstitutional a tax benefit statute which permitted tax deductions, with features of a tax credit, for certain expenses incurred by those parents sending their children to nonpublic schools. *Id.*

18. 103 S. Ct. at 3068.

19. 413 U.S. 756 (1973).

20. 103 S. Ct. at 3068.

21. *Id.* at 3067 n.6.

lowed parents to deduct $500 to $700 on tuition and related educational expenses *actually* spent.[22] This differed significantly from the arbitrarily calculated amount deducted in *Nyquist* which actually resembled a tax credit disguised as a deduction. The statute in *Nyquist* provided a formula that calculated the amount to be deducted by each qualifying taxpayer.[23] A genuine tax deduction does not involve pre-determined amounts, but rather reduces taxable income by *actual* expenditures incurred.

The fact that the Minnesota plan more closely reflected a genuine system of tax laws was also relevant since, traditionally, state legislatures have been afforded great deference in creating classifications in tax statutes.[24] According to Justice Rehnquist, section 290.09(22) represented one of the many other deductions available under Minnesota tax laws[25] that may substantially benefit religious institutions.[26] Justice Rehnquist indicated that the holding in *Walz v. Tax Commissioner*[27] established the proposition that a statute that substantially benefits a religious institution does not require the conclusion that such a statute violates the establishment clause.[28] In his opinion, section 290.09(22) did not deserve different treatment and, therefore, the state legislature should be "entitled to substantial deference" in enacting tax statutes that may benefit parochial schools.[29]

Another significant factor in the Court's primary effect analysis was that parents, not the schools themselves, received the tax benefits granted by the statute.[30] Under section 290.09(22), schools received state funds indirectly as a result of parents choosing to send their children to private schools.[31] Justice Rehnquist stated that "as a result of decisions of individual parents no 'imprimatur of State ap-

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22. *Id.*

23. 413 U.S. 756 (1973).

24. Regan v. Taxation with Representation, 103 S. Ct. 1997, 2002 (1983).

25. Deductions for charitable contributions are allowed under MINN. STAT. § 290.21 (1933); Deductions for medical expenses are allowed under MINN. STAT. § 290.09(10) (1955); Exemptions from property tax for property used for charitable purposes are allowed under MINN. STAT. § 272.02 (1943).

26. 103 S. Ct. at 3067.

27. 397 U.S. 664 (1970). In *Walz*, the Court upheld a statute that provided tax exemptions to religious organizations for property used solely for religious worship.

28. 103 S. Ct. at 3067 n.5.

29. 103 S. Ct. at 3067.

30. The *Nyquist* Court had noted that aid disbursed indirectly rather than directly to the schools is a material consideration in an establishment clause analysis, albeit "only one among many to be considered." 413 U.S. 756, 781 (1973). Of the most recent cases involving state aid, only *Nyquist* invalidated a statute involving indirect aid. The majority in *Mueller* distinguished *Nyquist* on other grounds. *See supra* notes 18-23 and accompanying text.

31. 103 S. Ct. at 3069.

proval' can be deemed to have been conferred . . . on religion [in general]."[32] The Court also recognized that the historical purpose of the establishment clause did not include the prohibition against attenuated financial benefits indirectly received by private schools when such benefits are controlled by private choices of individual parents.[33]

In reaching its decision, the majority did not consider the petitioners' statistical evidence which showed that an overwhelming majority of those claiming the deduction were parents of parochial school children.[34] The majority stated that "[w]e would be loathe to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[35] The majority noted that such an approach does not provide the certainty nor the principled evaluative standards necessary to this field of the law.[36]

Discussing the final part of the *Lemon* test, Justice Rehnquist found only one possible source that could result in state entanglement with religion. The textbook provision of the statute required state officials to determine whether certain texts could qualify for the deduction.[37] Based upon the decision in *Board of Education v. Allen*,[38] however, the Court found that such a determination would not

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32. *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

33. 103 S. Ct. at 3069. In Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970), Justice Harlan, in a concurring opinion, explained the evils which the establishment clause was designed to protect against: "[w]hat is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."

However, the majority in *Mueller* adopted Justice Powell's views in *Walz* where he found the dangers which prompted the Framers to adopt the establishment clause to be remote in today's society, and furthermore, when weighed against the contributions made by sectarian schools, such dangers are "entirely tolerable." 103 S. Ct. 3069.

34. *See supra* notes 5 and 6 and accompanying text. *See also* 103 S. Ct. at 3070.

35. 103 S. Ct. at 3070.

36. *Id.* Justice Rehnquist acknowledged that any unequal effect resulting from the statute would be equalized by the contributions conferred upon the state and its taxpayers by the parents of children attending private schools. Contributions which Rehnquist considered as important were the educational alternatives parochial schools offered and the wholesome competition resulting with the public schools. The majority made it clear that in light of these factors the Court would not "engage in [an] empirical inquiry . . . which petitioners urge." *Id.*

37. *Id.* In relying on *Board of Educ. v. Allen*, 392 U.S. 236 (1968) and *Everson v. Board of Educ.* 330 U.S. 1 (1947), the Court held that the textbook and transportation provisions of the statute were constitutional. These cases had been distinguished in *Nyquist* because the statutes at issue in *Allen* and *Everson* applied to a broad class of taxpayers, namely all parents and school children. 103 S. Ct. at 3070 n.10.

38. 392 U.S. 236.

violate the establishment clause. The *Allen* Court upheld a statute that provided loans of secular textbooks to parents of children attending nonpublic schools. The program also required state officials to determine whether the particular books were or were not secular. The *Mueller* majority concluded that section 290.09(22) did not "excessively entangle" the state in religion because it involved no more state entanglement than that which was upheld in *Allen*.[39] Thus, having determined that the Minnesota statute satisfied the *Lemon* test in its entirety, the Court affirmed the court of appeals decision by holding that a statute providing *all* parents of elementary and secondary school children with a genuine tax deduction for certain educational expenses incurred does not violate the establishment clause.

Justice Marshall, writing for the dissent, found that the statute violated the establishment clause because section 290.09(22) had the primary effect of "advancing religion."[40] Justice Marshall interpreted the establishment clause as prohibiting a state from providing any tax benefits which would directly or indirectly aid religious education.[41] Justice Marshall explained that *Nyquist* established the principle that no state may support religious education "either through direct grants to parochial schools or through financial aid to parents of parochial school students."[42] Justice Marshall found no significant difference between the statute struck down in *Nyquist* and the one upheld in *Mueller*. He noted that both statutes provided tax deductions, albeit the statute in *Nyquist* had tax credit characteristics which had a "direct and immediate effect of advancing religion."[43] Relying on *Nyquist*, Justice Marshall also noted that aid in the form of tuition deductions is prohibited by the establishment clause because there is no means of insuring that the aid would support only secular education.[44]

Justice Marshall further stated that the majority's attempt to distinguish *Nyquist* from *Mueller* on the ground that the *Mueller* statute represented a "genuine tax deduction" was unfounded.[45] He

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39. 103 S. Ct. at 3071.

40. 103 S. Ct. at 3072 (Marshall, J., dissenting).

41. *Id.* at 3071.

42. *Id.* at 3072 (citing *Nyquist*, 413 U.S. at 780, 785-86). In Justice Marshall's opinion it makes no difference whether the aid be for tuition, textbooks, or other instructional materials. If it is used to advance sectarian purposes, then it is prohibited by the establishment clause. 103 S. Ct. at 3072.

43. 103 S. Ct. at 3072 (quoting *Nyquist*, 413 U.S. at 783-84).

44. 103 S. Ct. at 3073.

45. *Id.* at 3075.

found the form of the aid to be irrelevant because the result of allowing such a tax reduction program, whether in the form of credits or deductions, is that state taxpayers, in general, pay for parochial school education.[46] In addition, he noted the "primary effect" portion of the *Lemon* test focused on the "substantive impact" of the aid, not its form.[47] Therefore, Justice Marshall stated that Minnesota's "genuine tax deduction" was unconstitutional because the substantive impact of the statute was to assist sectarian schools.[48]

The dissent asserted that even though the statute on its face appeared to apply to *all* parents, this simply was not the case. Minnesota, by law, cannot charge tuition to those attending public schools. Accordingly, parents whose children attend public schools are denied the benefit of deducting the largest educational expense, namely tuition.[49] Although textbook and transportation expenses could be claimed by parents of public school children, Justice Marshall noted that it was unlikely that $700 worth of supplies and bus fare could be incurred.[50] Therefore, in Justice Marshall's opinion, the statute's most substantial benefit is available only to parents of children attending nonpublic sectarian schools that charge tuition.[51]

The dissent also found that the cases relied upon by the majority, *Allen*[52] and *Everson*,[53] were inapposite because they dealt with *indirectly* benefited sectarian schools in which the aid was clearly restricted to secular functions.[54] Section 290.09(22) was a direct benefit to parochial schools, in the dissent's view, because it conferred

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46. *Id.* at 3073.

47. *Id.* Justice Marshall referred to prior decisions of the Court that had rejected such distinctions between tax deductions and tax credits in striking down statutes that provided state aid to parochial schools. *Id.* at 3075 n.5. However, those decisions dealt with *fixed* tax deductions with no correlation to *actual* amounts expended or tax credits based upon *actual* expenses. *See* Byrne v. Public Funds for Public Schools of New Jersey, 442 U.S. 907, *aff'g* 590 F.2d 514 (3d Cir. 1979); Grit v. Wolman, 413 U.S. 901 (1973), *aff'g* 353 F. Supp. 744 (S.D. Ohio 1972).

48. 103 S. Ct. at 3076 (Marshall, J., dissenting). Justice Marshall noted that "the substantive impact of the financial support . . . [had] rendered the programs in *Nyquist* and *Sloan v. Lemon* unconstitutional." *Id.* (citations omitted).

49. 103 S. Ct. at 3074 (Marshall, J., dissenting).

50. *Id.*

51. *Id.*

52. 392 U.S. 236.

53. 330 U.S. 1.

54. 103 S. Ct. at 3076 (Marshall, J., dissenting). Justice Marshall distinguished these two cases as they had been distinguished in *Nyquist*, 413 U.S. at 781-82, and *Sloan*, 413 U.S. at 832. 103 S. Ct. at 3076. The Court in *Nyquist* and *Sloan* held that *Allen* provided indirect assistance which was restricted to the secular side of parochial schools. The financial assistance provided in *Nyquist* and *Sloan* was not restricted to secular functions. *Id.*

benefits only upon parents of parochial school children. However, the benefits under scrutiny in *Allen* and *Everson* were merely indirect and incidental benefits available to all parents of school children. Justice Marshall noted that the direct benefit in *Mueller*, unlike the aid in *Allen* and *Everson*, could not be restricted to secular functions of parochial schools.[55]

During the last thirty-five years, the United States Supreme Court has labored to formulate principles and guidelines to determine the constitutionality of state programs, like the one in *Mueller*, challenged under the establishment clause.[56] In the early cases regarding governmental aid to sectarian schools, most notably *Everson*[57] and *Allen*,[58] the Court focused on the purpose and primary effect of the enactment. These cases established that a statute with a valid secular purpose granting aid directly to parents or school children is constitutional because the effect on religion is indirect and incidental.[59]

The Court next added another factor to be considered when reviewing challenges under the establishment clause. In *Walz v. Tax Commissioner*,[60] the Court determined that state and federal governments must avoid excessive entanglement with religion in order to comply with the neutrality requirement of the establishment clause.[61] The Court in *Walz* stated that the nature of the aid, as well as the form it takes, determines whether the resulting involvement between church and state is permissible.[62] This concept was further

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55. 103 S. Ct. at 3076 (Marshall, J., dissenting).

56. In *Everson*, the Supreme Court defined the establishment clause for the first time and noted that the government could not set up a church or otherwise aid religion. 330 U.S. 1, 15-16. For other programs upheld by the Supreme Court, see Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (direct reimbursement to sectarian schools for maintaining state mandated attendance records and administering and grading state prepared tests); Wolman v. Walter, 433 U.S. 229 (1977) (reimbursement to schools for carrying out standardized testing and scoring services, on-premises diagnostic services, and off-premises therapeutic services); Board of Educ. v. Allen, 392 U.S. 236 (1968) (loans of secular textbooks to nonpublic school children); Everson v. Board of Educ., 330 U.S. 1 (1947) (provision of transportation of nonpublic school children to and from school).

57. 330 U.S. 1.

58. 392 U.S. 236.

59. This proposition of indirect aid to parents of school children was accepted by the Court when it recognized that these cases could become a "platform for yet further steps." Lemon v. Kurtzman, 403 U.S. 602, 624 (1971).

60. 397 U.S. 664 (1970) (statute allowing property tax exemptions for religious institutions upheld as constitutional).

61. *Id.*

62. *Id.* at 674-75.

developed in *Lemon v. Kurtzman*[63] in which the Court set forth the test as it stands today.[64] *Lemon* invalidated a state subsidy of parochial school teachers' salaries, holding that the requirement of the state to engage in investigations to classify school activities as either religious or secular excessively entangles government with religion.[65]

Of the cases that followed *Lemon*,[66] *Committee for Public Education v. Nyquist*[67] most closely resembles the challenged program in *Mueller*. *Nyquist* represented an attempt by the state of New York to aid nonpublic schools by granting a tax deduction for tuition costs incurred by parents sending their children to those schools. Prior to *Nyquist*, attempts by states to provide such tuition benefits had taken the form of direct grants[68] or tax credits.[69] These attempts were held to be unconstitutional. However, the program in *Nyquist* offered a tax *deduction* based on a statutorily determined amount depending on the taxpayer's income.[70] The Court had difficulty categorizing the benefit as either a credit or a deduction. Although the statute in form allowed a deduction, it was struck down because it operated like a credit.[71] The Court in *Nyquist* left unanswered the question of whether "a genuine tax deduction, such as for charitable contributions . . . [would be] constitutionally acceptable."

The *Mueller* statute presented a combination of elements which had never been before the Court in the area of state school-aid cases. It not only granted benefits in the form of genuine tax deductions, but also made them available to a facially broad class of recipients. The statute in *Nyquist* had none of these features. It applied only to parents of nonpublic school children and offered a tax deduction that

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63. 403 U.S. 603.

64. *See supra* notes 12 and 13 and accompanying text.

65. 403 U.S. at 620-21.

66. Since *Lemon*, the Court has ruled on many state laws aiding elementary and secondary parochial schools. For some of the programs struck down, see Wolman v. Walter, 433 U.S. 229 (1977) (program providing field trip transportation benefits); Meek v. Pittenger, 421 U.S. 349 (1975) (direct loans by state to nonpublic schools of instructional materials and equipment); Sloan v. Lemon, 413 U.S. 825 (1973) (direct reimbursment by state to parents of children attending nonpublic schools for tuition costs). *See supra* note 56 for those programs upheld since *Lemon*.

67. 413 U.S. 756 (1973).

68. *See Sloan*, 413 U.S. at 828 (1973).

69. *See* Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972) (invalidating an Ohio statute allowing a tax credit for tuition to nonpublic schools).

70. 413 U.S. at 765-66.

71. *Id.* at 790 n.49. The Court in *Nyquist* left unanswered the question of whether a program that provided a "genuine tax deduction, such as for charitable contributions . . . is constitutionally acceptable." *Id.*

operated as a credit.[72] The majority in *Mueller*, as a result, had no difficulty in distinguishing the Minnesota statute from the one in *Nyquist*.[73] Focusing on the primary effect of section 290.09(22), Justice Rehnquist determined that it was unnecessary to look beyond the face of the statute since it provided relief to *all* parents of Minnesota school children.[74] In his view, the statute's primary effect was to promote education for all schools, not merely for those of a sectarian nature.[75] Such an analysis[76] was used in *Everson*[77] and *Allen*,[78] the only other Supreme Court cases in which states granted benefits facially to *all* parents and children. However, later cases suggest that this approach is questionable.[79]

The *Mueller* decision seems to reflect the Supreme Court's changing attitude toward establishment clause cases. The Court appears willing to uphold facially neutral statutes even though these statutes may excessively entangle government with religion or may have the primary effect of advancing religious education. Further, the *Mueller* Court considered the form of the aid important although, in effect, the statute was no different from unconstitutional provisions previously struck down.

In previous establishment clause cases, the Supreme Court considered the actual impact of a challenged statute relevant in its primary effect analysis. In *Wolman v. Walter*,[80] the Court stated that in future cases the *Allen* "exten[sion of] presum[ed] neutrality to other items" based upon facially neutral statutes would be declined.[81] It follows, then, that cases involving tuition or transportation provisions should not be afforded a de jure treatment. Furthermore, the Court in *Nyquist* had stated that *Everson* and *Allen* "make clear that [these cases are] far from providing a *per se* immunity from examination of the substance of the state's program."[82]

As the First Circuit asserted in *Rhode Island Federation of*

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72. *See supra* text accompanying notes 17 and 71.

73. *See supra* text accompanying notes 18-23.

74. *See supra* text accompanying notes 34-36.

75. 103 S. Ct. at 3070-71.

76. This type of an analysis, looking only at the face of the statute, is commonly referred to as a de jure analysis.

77. *See supra* text accompanying notes 58-60.

78. *See supra* text accompanying notes 57-59.

79. In *Wolman v. Walter*, the Court concluded that although *Allen* remained law, it was only followed as a matter of stare decisis in cases involving *textbook* provisions. 433 U.S. 229, 252 n.18 (1977).

80. 433 U.S. 229.

81. *Id.* at 252 n.18.

82. 413 U.S. at 781.

Teachers v. Norberg,[83] disregarding a factual inquiry will lead to unconstitutional "window dressing" statutes as states will simply enact legislation which appears on the face to benefit a broad class.[84] The *Mueller* dissent noted that it is unlikely that any court could find a primary effect of advancing religion under such circumstances.[85] Therefore, in order to adequately review legislation challenged under the establishment clause, a factual or statistical inquiry into the *actual* breadth of the benefited class should be made.[86]

The result of such an inquiry is the determination that the fact that section 290.09(22) facially applied to parents whose children attended public schools is of little practical significance. Because public schools in Minnesota do not charge tuition, the majority of parents whose children attend those schools can only deduct minimal expenses for such items as pencils, notebooks, and gym clothes. Thus, the substantial benefit of this statute, deductions for tuition payments, flows to the parents of children attending nonpublic schools. As noted by Justice Marshall in *Mueller*, the only factual inquiry necessary in determining this effect is whether the program "primarily benefits those who send their children to [parochial] schools."[87] It was undisputed in *Mueller* that over ninety percent of the tuition-charging schools in Minnesota were of a sectarian nature.[88] Similarly, in the majority of cases holding that tax credits or deductions for educational expenses are unconstitutional, the courts have found that most of the qualifying schools under the program were sectarian.[89] Therefore, it follows that a statute such as section 290.09(22) cannot avoid primarily benefiting religious institutions.

In *Mueller* the Court also stressed that the Minnesota statute differed from the one in *Nyquist* because section 290.09(22) provided

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83. 630 F.2d 855 (1980).

84. *Id.*

85. 103 S. Ct. at 3075 n.4 (Marshall, J., dissenting).

86. This type of an analysis, involving a factual or statistical inquiry, is commonly referred to as a de facto analysis.

87. 103 S. Ct. at 3074 (Marshall, J., dissenting). The same inquiry was made in *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 783 (1973) and *Sloan v. Lemon*, 413 U.S. 825, 829 (1973).

88. 103 S. Ct. at 3075.

89. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 768 (1973) (85% of eligible New York schools were sectarian); Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855, 859 (1st Cir. 1980) (94% of eligible Rhode Island schools were sectarian); Public Funds for Pub. Schools v. Byrne, 590 F.2d 514, 516 (3d Cir. 1979) (95% of eligible New Jersey schools were sectarian); Kosydar v. Wolman, 353 F. Supp. 744, 748 n.1 (S.D. Ohio 1972) (98% of eligible Ohio schools were sectarian).

a "genuine tax deduction."[90] The majority's rationale behind this distinction was that a true tax deduction, as opposed to a tax credit, is constitutional because it is related to actual expenditures incurred.[91] However, this is a misconception because tax credits can also relate to, and be determined by, actual expenditures. Moreover, the Court in *Grit v. Wolman*[92] summarily affirmed a decision which invalidated a system of tax credits based upon the amount of tuition paid by parents of nonpublic school children.[93] This decision operates against any distinction which regards the form of the aid as constitutional merely because it is related to actual costs incurred. Furthermore, the difference between a tax credit and a tax deduction is only one of degree. A tax credit directly reduces the amount of tax due, while a tax deduction reduces the taxable base which indirectly decreases the tax due. However, both still result in some benefit to qualifying taxpayers because the net result is a reduction in the tax due.

If the benefited class of the statute consists predominantly of parents whose children attend sectarian schools, then even these "indirect" benefits generated by "genuine tax deductions" flow to religious institutions. This is prohibited by the establishment clause because, whether direct or indirect, the principle of neutrality between church and state forbids state subsidization of religious education. Therefore, a distinction between a "genuine tax deduction" and a tax credit should not be made because both have the end result of providing parents with a financial incentive to send their children to sectarian schools. This unmistakably provides support to these schools, which was held by *Nyquist* as impermissible.[94]

Even if the statute in *Mueller* could be validly distinguished from the one in *Nyquist*, it still violates the establishment clause because it leads to an excessive entanglement between government and religion.[95] The dissent in *Mueller* noted that the Minnesota statute provided benefits that could not be restricted to the secular functions

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90. 103 S. Ct. at 3067-68 n.6.

91. *Id.*

92. 413 U.S. 901 (1973), *aff'g* 353 F. Supp. 744 (S.D. Ohio 1972).

93. *Id.* In his dissent, Justice Marshall stated that "[t]he Court's affirmance of the result in [this case] was a 'decision on the merits, entitled to precedential weight.' " 103 S. Ct. at 3075-76 n.5 (Marshall, J., dissenting) (quoting Meek v. Pittenger, 421 U.S. 349, 366-67 (1975)).

94. 413 U.S. 756, 783, 786.

95. *See supra* note 12 and accompanying text. The *Lemon* test requires that each of the three parts of the test be satisfied.

of education without excessively entangling government in religion.[96] This is especially true of the tuition tax benefit because, as a substantial source of parochial school revenue, these payments support the schools' total educational program. Because parochial schools necessarily include religious instruction, it follows that tuition tax benefits will inevitably support this function. There is no effective means in which the state can guarantee that these funds will be used only for secular purposes without extensive involvement with the religious institution.

The Minnesota statute's textbook provision also leads to excessive entanglement. The Court in *Meek v. Pittenger*,[97] invalidated loans of "instructional material" to nonpublic schools by reversing the logic of *Allen*.[98] In *Meek*, the Court reasoned that the program in question benefited parochial schools that provided integrated secular and religious education.[99] The only way to insure that the tax benefits served only the secular function would be to excessively involve the state in religion. The Minnesota statute deserves no different treatment under this analysis. It provides tuition and textbook deductions that also lead to state involvement in religion because the state must insure that only secular functions are benefited. Accordingly, the court should have invalidated section 290.09(22) because it failed to satisfy the third part of the *Lemon* test.

In *Mueller*, the Court held that section 290.09(22) did not violate the establishment clause because it did not have the effect of providing financial assistance to sectarian institutions. *Mueller* stands for the proposition that state school-aid statute, neutral on its face, does not require a scrutiny of its practical effects. The Court's holding now makes it constitutional for states to support sectarian schools through tax deduction benefits. To comply with *Mueller* a state must simply enact legislation which is neutral on its face and offers relief in the form of a genuine tax deduction.

Randel Mathias

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96. 103 S. Ct. at 3076-78 (Marshall, J., dissenting).

97. 421 U.S. 349 (1975).

98. 392 U.S. 236. *Allen* provided precedent regarding textbook deduction provisions. The rationale behind [*Allen*] was that public school authorities prescreened the materials provided to nonpublic schools which insured that books were of a secular nature. *Id.*

99. 421 U.S. at 366.

CONSTITUTIONAL LAW—LEGISLATIVE VETO HELD UNCONSTITUTIONAL—*Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983).

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[1]

It was with that seemingly trepid reservation that the United States Supreme Court sounded the deathknell for the legislative veto in *Immigration and Naturalization Service v. Chadha.*[2]

A legislative veto is a device that Congress created to review the application of power that it had previously delegated to the executive branch and/or its agencies. The veto is usually in the form of "a statutory provision that delays an announced administrative [agency] action, usually for a specified number of days, during which time Congress may vote to approve or disapprove the action without further presidential involvement."[3] Congressional action may take the form of a one-house veto (by simple resolution), a modified one-House veto (so called one-and-a-half-House veto), a two-House veto (by concurrent resolution), a committee veto, or a committee chairman's veto.[4] *Chadha* involved the one-House veto provision.

Jagdish Rai Chadha, an East Indian and native of Kenya, was lawfully admitted to the United States on a nonimmigrant student visa in 1966. His visa expired in 1972. After attempts to return to either Kenya or Britain were rebuffed by both governments,[5] Chadha applied for United States citizenship. On October 11, 1973, the Immigration and Naturalization Service (INS), an arm of the Justice Department, instituted deportation proceedings against Chadha for overstaying his visa.[6] Pursuant to section 242(b) of the

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1. Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764, 2780 (1983) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404 (1821)).

2. 103 S. Ct. 2764 (1983).

3. SUBCOMMITTEE ON RULES OF THE HOUSE, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 1 (Comm. Print 1980) [hereinafter cited as *Studies.*]

4. *Id.*

5. Although Chadha held a British passport, Britain informed him that he would have to wait a year before being admitted to that country. Kenya refused to admit him because they felt that he was a "British subject." Anderson, *A Foreigner Who Upset U.S. History*, TIME, July 4, 1983, at 14.

6. 103 S. Ct. at 2770.

Immigration and Nationality Act of 1952 (Act),[7] a deportation hearing was held before an immigration judge on January 11, 1974.[8] Under the Act, the Attorney General (or other bodies in conjunction with him, i.e., the INS), at his (their) discretion, may suspend deportations where the statutory criteria described in section 244(a)(1) of the Act has been met.[9]

Although Chadha conceded his deportability under the time limit provision of his visa, he requested the right, as provided in section 244(a)(1) of the Act, to file an application to suspend his deportation. The hearing, having been adjourned until after Chadha filed the application, resumed on February 7, 1974, and Chadha's deportation was suspended on June 25, 1974 by the INS.[10]

Section 244(c)(1) of the Act[11] requires that if the Attorney General suspends any deportations under subsection (a),[12] a report of that suspension shall be submitted to Congress. Then, under section 244(c)(2) of the Act,[13] either House of Congress has the power to

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7. 8 U.S.C. § 1252(b) (1976 & Supp. V 1981).

8. 103 S. Ct. at 2770.

9. 8 U.S.C. § 1254(a)(1) (1976 & Supp. V 1981). This section provides:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien . . . who applies to the Attorney General for suspension of deportation and—
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> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship of the alien or his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]

10. In applying the criteria set forth in § 1254(a)(1) (*see supra* note 9), the immigration judge reviewed evidence, affidavits, and the results of a character investigation conducted by the INS, before concluding that Chadha's deportation should be suspended. 103 S. Ct. at 2770.

11. 8 U.S.C. §1254(c)(1) (1976). That section provides:

> Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

12. *See supra* note 9.

13. 8 U.S.C. § 1254(c)(2) (1976). This section, referred to as a legislative (or congressional) veto, provides:

> (2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

"veto"[14] the suspension within a specified time period.[15] In this case Congress was required to act during the session at which the case was reported or before the close of the following session. Three days prior to the close of that following session, the House of Representatives passed a resolution overturning the suspension[16] and ordered the INS to deport Chadha.[17] In response to this order, the immigration judge reopened the deportation hearing.[18] However, Chadha motioned for a termination of the proceedings on the grounds that the legislative veto provision of the Act, section 244(c)(2), was unconstitutional.[19] Because the immigration judge held that he had no authority to rule on the constitutional validity of section 244(c)(2), Chadha was ordered deported on November 8, 1976.[20]

In an appeal of this order to the Board of Immigration Appeals, Chadha again maintained that section 244(c)(2) of the Act was un-

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> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

See infra note 14.

14. Although the term "veto" is most commonly associated with the presidential veto provision of U.S. CONST. art. I, § 7, provisions like § 1254(c)(2) have become known as "legislative vetoes." *See supra* note 13. *See also* INS v. Chadha, 103 S. Ct. at 2771 n.2.

15. *See supra* note 13.

16. 103 S. Ct. at 2772 (citing H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40800 (1975)).

17. The circumstances surrounding passage of this resolution are somewhat of a mystery, and apparently a subject of irritation with the Supreme Court. 103 S. Ct. at 2771, 2771 n.3, 2772. Representative Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, introduced the resolution which opposed suspending the deportation of Chadha and six others. *Id.* at 2771 (citing H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40247 (1975)). Coincidentally, Rep. Eilberg had introduced a similar bill one year earlier, disapproving the Attorney General's decision to suspend six other aliens' deportation. *Id.* (citing H.R. Res. 1518, 93rd Cong., 2d Sess. 120 CONG. REC. 41412 (1974)).

The court noted, in response to Resolution 926, that "[t]he resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. . . . The Resolution was passed without debate or recorded vote." *Id.* at 2771 n.3. Sharing the Court's sentiment, one commentator noted, "[A] single chamber, mindlessly following a single committee chairman, overturned the Justice Department's grant of a hardship suspension." L.A. Daily J., June 28, 1983, § 1, at 4, col. 2. *See infra* note 97 and accompanying text.

18. 103 S. Ct. at 2772.

19. *Id.*

20. *Id.*

constitutional. The Board, however, held that it also had no authority to render a ruling on the constitutionality of the provision.[21] Thus, Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit.[22] Although Chadha's action was against the INS, the INS shared Chadha's view that section 244(c)(2) of the Act was unconstitutional. Based on the separation of powers doctrine,[23] the court of appeals found section 244(c)(2) of the Act unconstitutional and directed the Attorney General to terminate deportation of Chadha.[24]

Because, absent the Ninth Circuit's ruling, deportation would have proceeded against Chadha, the INS appealed the court of appeals decision to the United States Supreme Court.[25] The Supreme Court affirmed the court of appeals opinion and held section 244(c)(2) of the Act unconstitutional.[26] Before the Court could address the constitutionality of the legislative veto, however, it evaluated the merit of several procedural questions involving its jurisdiction and the suitability of the parties before it.

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21. *Id.*

22. Pursuant to § 106(a) of the Act, a petition for review of a deportation order may be filed in a United States Court of Appeals having appropriate jurisdiction. 8 U.S.C. § 1105(a) (1976 & Supp. V 1981).

Recognizing the importance of the questions presented by the action, the Court of Appeals invited both the Senate and House of Representatives to file briefs amici curiae. The Houses of Congress also filed motions to intervene, and these motions were granted. *See infra* notes 30-33 and accompanying text. *See also* 103 S. Ct. at 2773 n.5.

23. 103 S. Ct. at 2772. *See also infra* notes 124-25 and accompanying text.

24. 103 S. Ct. at 2772 (citing Chadha v. Immigration and Naturalization Serv., 634 F.2d 408, 436 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983)).

25. *See infra* notes 28-33 and accompanying text. *See also* 103 S. Ct. at 2773-74. After Congress's motions to intervene were granted (*see supra* note 22), both Houses instituted actions against the INS. Then, while the INS appeal was being taken to the Supreme Court, Congress petitioned for writs of certiorari. 103 S. Ct. at 2772.

These actions were instituted in response to the INS's decision to appeal the Ninth Circuit's holding. Apparently, the Senate and House of Representatives wanted to prevent the INS from appealing that decision, so as not to allow the Supreme Court to make a definitive ruling on the validity of the legislative veto. Indeed, both Houses motioned to have the Court dismiss the INS appeal on appellate jurisdictional grounds. *See* 103 S. Ct. at 2773.

The Supreme Court granted Congress's petition for writs of certiorari (United States House of Representatives v. INS, 634 F.2d 408, *cert. granted*, 454 U.S. 812 (1981), and United States Senate v. INS, 634 F.2d 408, *cert. granted* , 454 U.S. 812 (1981)), but postponed consideration of Chadha's case. INS v. Chadha, 454 U.S. 812 (1981). Finally, after twice hearing oral argument (February 22, 1982 and reargued, October 7, 1982), the Court affirmed the court of appeals decision. 103 S. Ct. at 2788.

26. 103 S. Ct. at 2788.

A. *Procedural Questions*[27]

1. *Appellate Jurisdiction*

The parties in intervention, both Houses of Congress, challenged the appellate jurisdiction of the Court in this action pursuant to 28 U.S.C. section 1252,[28] which sets forth the criteria for an appeal to the United States Supreme Court. They also moved to dismiss the INS appeal on the basis of the Court's statement in *Deposit Guaranty National Bank v. Roper.*[29] While the Court had little trouble in finding jurisdiction under section 1252,[30] the logic used in defense of Congress's motion to dismiss was conceptually more complicated. In *Deposit Guaranty*, the Court stated that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording relief and cannot appeal from it."[31] Since the INS also alleged that section 244(c)(2) of the Act was unconstitutional, it was arguable that the INS has been granted all that they generally sought in the court of appeals's decision, and thus under *Deposit Guaranty*, had no basis for an appeal. However, the Court reasoned that because the INS had concluded that it had no power to rule on the constitutionality of section 244(c)(2) of the Act prior to Chadha's appeal to the Ninth Circuit, the INS had no choice but to implement the deportation order pursuant to the House's resolution.[32] Thus, because the INS was responsible for the implementation of that order, the INS was prohibited from taking action it would otherwise have taken pursuant to the Attorney General's decision to suspend

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27. The Court, in addressing these issues, used the following headings: Appellate Jurisdiction, Severability, Standing, Alternative Relief, Jurisdiction, Case or Controversy, and Political Question. For the sake of simplicity, those same headings will be used in this note.

28. 28 U.S.C. § 1252 (1976). This section provides, in pertinent part:

> Any party may appeal to the Supreme Court from [a] . . . decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee therof, as such officer or employee, is a party.

29. "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." 103 S. Ct. at 2772 (quoting Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980)).

30. The Court noted in finding all the elements necessary for establishing jurisdiction under 28 U.S.C. § 1252, that the Court of Appeals is a "court of the United States," the proceeding below was a "civil action, suit or proceeding," the INS is an agency of the United States and was a party to the proceeding below, and that the lower court proceeding found an act of Congress unconsituitional. 103 S. Ct. at 2773.

31. 103 S. Ct. at 2773 (quoting Deposit Guaranty National Bank v. Roper, 445 U.S. at 333).

32. 103 S. Ct. at 2773.

deportation.[33] In light of this prohibition, the Court found the INS to be sufficiently aggrieved.

2. *Severability*

Congress also contended that finding the legislative veto provision unconstitutional would result in the invalidation of the entire Act.[34] However, the Court noted that the drafters of the legislation had provided for any severability questions by incorporating a severability clause into the Act itself.[35] Indeed, the Court found, "Congress could not have more plainly authorized the presumption that the provision for a one-House veto in section 244(c)(2) is severable from the remainder of section 244 and the act of which it is a part."[36] The Court discovered evidence of similar congressional intent through an evaluation of the legislative history of section 244.[37] This history provided further credence for the Court's conclusion that Congress designed the Act to stand in the event that provisions were severed.[38]

3. *Standing*

The legitimacy of Chadha's standing was also questioned by Congress. The Houses argued that if Chadha were to prevail, he would receive no real relief; the actual consequence of a victory by Chadha, Congress maintained, would be the advancement of Executive Branch interests, leading to a separation of powers with Congress.[39] The Court dismissed this assertion, finding that Chadha had

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33. *Id.*

34. This contention sparked one of the dissenting opinions. Justice Rehnquist, in his dissent, agreed with Congress and would have found § 244(c)(2) inseverable from the rest of § 244. Joined by Justice White, Justice Rehnquist never reached the merits of the case. Rather, he argued that the veto provision, being inseverable, was evidence of Congress' intent to regulate deportations. From an examination of the Act's history, Justice Rehnquist noted that because Congress had always retained some type of control over Executive Branch decisions to suspend deportations, it did not intend for the Act to be functional without § 244(c)(2). 103 S. Ct. at 2816-17 (Rehnquist, J., dissenting).

Although the presence of the severability clause in the Act would seem to be contrary to this analysis (*see infra* notes 35 and 154), the dissent argued that such a clause "does not conclusively resolve the issue." 103 S. Ct. at 2816 (Rehnquist, J., dissenting).

35. 103 S. Ct. at 2774 (construing Immigration and Nationality Act of 1952, § 406, 8 U.S.C. § 1101 (1983)).

36. 103 S. Ct. at 2774.

37. *Id.* The Court traced the evolution of deportation proceedings from their origin as private bills enacted by both Houses of Congress and presented to the President, to their present stature involving the Attorney General's discretion to suspend. It concluded that the legislative history was not "sufficient to rebut the presumption of severability raised by § 406." *Id.*

38. *See infra* notes 153-62 and accompanying text.

39. 103 S. Ct. at 2776. This contention was also advanced under Congress's severability

demonstrated injury capable of being redressed through the judicial relief he sought.[40]

4. *Alternative Relief*

In another procedural challenge, Congress maintained that because Chadha had alternative forms of statutory relief available to him,[41] the Court should not entertain the constitutional question presented by the case, i.e., the validity of the legislative veto. However, the uncertainty of these avenues of relief compelled the Court to reject this assertion.[42] In the Court's view, the fact that Chadha was being threatened with deportation required that he be granted the right to challenge the statutory provision responsible for that threat; moreover, speculative alternative forms of relief would not be a bar to this right.[43]

5. *Jurisdiction*

Pursuant to section 106(a) of the Act,[44] Chadha was able to, and did, appeal the INS's deportation order. Congress, however, challenged the applicability of that section to the case at hand. Section 106(a) of the Act provides that a petition for review in the court of appeals shall be "the sole and exclusive procedure for judicial review of all final orders of deportation . . . made against aliens

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challenge. However, this argument, as it would apply to severability, would only have been valid if the Court were to have found § 244(c)(2) inseverable. Then, the whole Act being invalid, the Attorney General would have had no authority to suspend Chadha's deportation under § 244(a)(1), and Chadha would have been deported for overstaying his visa. Thus, Congress reasoned, if Chadha prevailed in his constitutional attack against § 244(c)(2), he would still face deportation because the Act would then be invalid. *See also id.* at 2774 n.7, 2816-17 (Rehnquist, J., dissenting).

40. 103 S. Ct. at 2776 (citing Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 79 (1978).

41. 103 S. Ct. at 2776. On August 10, 1980, Chadha married a U.S. citizen. At that point, under §§ 201(b), 204, and 245 of the Act (8 U.S.C. §§ 1151(b), 1154, 1255 (1976)), Chadha may have been eligible for permanent residence as an "immediate relative." 8 U.S.C. § 1151(b) (1976) ("immediate relative" refers to "children, spouses, and parents of a United States citizen"). The Court noted that Chadha may also have been eligible for asylum under The Refugee Act of 1980. 8 U.S.C. § 1101 (1980) (giving the Attorney General authority to grant asylum and then permanent residency to aliens unable to return home for " fear of persecution"). 103 S. Ct. at 2776.

42. 103 S. Ct. at 2777. The Court, in relying on a court of appeals decision affirming the court's discretion in applying §§ 245 and 201(b) of the Act (Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979)), stated " It is by no means certain, for example, that Chadha's classification as an immediate relative would result in the adjustment of Chadha's status from nonimmigrant to permanent resident." 103 S. Ct. at 2777.

43. 103 S. Ct. at 2777.

44. *See supra* note 22.

within the United States pursuant to administrative proceedings under section 242(b)[45] of this act."[46] Congress argued that because the resolution invoked through section 244(c)(2) of the Act was conducted *outside* of the hearing (and hence outside of any "administrative proceedings"), section 106(a) of the Act does not "encompass Chadha's constitutional challenge,"[47] and as a result, he had no right to an appeal under the criteria set forth in section 106(a) of the Act. Thus, Congress maintained that given this analysis, the Ninth Circuit did not have a basis for taking the case, and consequently any decision handed down by the court was void for want of jurisdiction. Although confronted with a contrary interpretation of section 106(a),[48] the Court accepted the Ninth Circuit's construction of "final orders" to include "all matters on which the validity of the final order is contingent."[49] The Court also distinguished its holding in *Cheng Fan Kwok v. INS*,[50] stating that unlike petitioner Cheng, Chadha was directly attacking the deportation order itself. Cheng had sought relief similar to the deportation order.[51]

6. *Case or Controversy*

Congress also contended that Chadha's action did not present a genuine case or controversy as required by Article III of the Constitution,[52] but rather it represented "a friendly, non-adversary proceeding"[53] because both Chadha and the INS were arguing that section 244(c)(2) of the Act was unconstitutional. In rejecting this contention and finding sufficient adversity, the Court adopted generally the same analysis that it used to dismiss Congress's jurisdiction attack.[54] The Court also recognized the inherent adversity present as

45. *See supra* note 7 and accompanying text.

46. 103 S. Ct. at 2777 (quoting 8 U.S.C. § 1105a(a) (1981)). *See supra* note 9 and accompanying text.

47. 103 S. Ct. at 2777.

48. *See* Dastmalchi v. INS, 660 F.2d 880 (3d Cir. 1981).

49. 103 S. Ct. at 2777 (quoting Chadha v. INS, 634 F.2d 408, 412 (9th Cir. 1981)). The Court noted that a House resolution *led* to Chadha's "final order" of deportation. *Id.*

50. 392 U.S. 206 (1968). The Court in *Cheng* held that § 106(a) of the Act "embraces only those determinations made during a proceeding conducted under § 242(b) [of the Act]." *Id.* at 216. By implication, this holding would suggest that Chadha was not entitled to an appeal under § 106(a) of the Act because his constitutional challenge was *based* on a House resolution, and not a determination made under § 242(b) of the Act.

51. *See* 103 S. Ct. at 2777 n.11.

52. U.S. CONST. art. III, § 2. This section provides that judicial power will only extend to specified cases or controversies.

53. 103 S. Ct. at 2778 (quoting Aswander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

54. *See supra* notes 30-33 and accompanying text.

a result of Congress's intervention, and noted that Congress was "both a proper party to defend the constitutionality of section 244(c)(2) [of the Act] and a proper petitioner [for writ of certiorari] under section 1254(1)."[55]

7. *Political Question*

Finally, Congress presented the argument that Chadha was merely challenging congressional authority under its constitutional powers,[56] and as a result, the case presented a nonjusticiable political question. Congress reasoned that actions taken pursuant to those plenary power were nonreviewable as applied to aliens. Although the Court conceded Congress' plenary power over aliens, its concern was whether Congress, in exercising that power, violated some other constitutional restriction.[57]

Relying on the criteria set out in *Baker v. Carr*[58] for determining the presence of a nonjusticiable political question, the Court deduced, since Congress had not specified, that the congressional argument was based on "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[59] In short, Congress impliedly asserted that Chadha had no grounds for his action in that the Constitution had granted Congress authority to enact and implement section 244(c)(2) of the Act. Yet, the Court pointed out that this analysis would categorize all challenges to the constituionality of a statute as political questions.[60] Moreoever, any challenges to the constitutionality of a statute must be decided by the

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55. 103 S. Ct. at 2778. *See also* 103 S. Ct. at 2774 n.6. The Court pointed out that it had long been its practice to hold that Congress should defend the validity of a statute when an agency, like the INS, is a defendent charged with enforcing the statute, but agrees with the plaintiff as to its constitutional status. 103 S. Ct. at 2778.

56. The powers Congress referred to were the naturalization clause, U.S. CONST. art. I § 8, cl. 4, and the necessary and proper clause, *id.* 8, cl. 18. 103 S. Ct. at 2778.

57. 103 S. Ct. at 2779 (citing Buckley v. Valeo, 424 U.S. 1, 132 (1976)).

58. 369 U.S. 186, 217 (1962). *Baker* lists several circumstances under which a political question may arise. They are:

> [a] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

Id.

59. 103 S. Ct. at 2779 (quoting Baker v. Carr, 369 U.S. at 217).

60. 103 S. Ct. at 2779.

courts.[61] While it is true that by its very nature Chadha's assertions had political implications, the Court, relying on *Marbury v. Madison*,[62] concluded that the "presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine."[63]

B. *Constitutionality of the Legislative Veto*

Having dispensed with these challenges, the Court addressed the constitutionality of section 244(c)(2) of the Act.[64] The analysis began with the traditional constitutional law presumption that the challenged statute is valid. However, the Court noted that the efficiency and convenience of a law or procedure will not justify its existence if the instrument is not constitutional.[65] Although acknowledging Justice White's argument that the one-House veto is a useful "political invention,"[66] the Court maintained that even useful "political inventions" are required to adhere to the guidelines set forth in the Constitution.[67]

The crux of the majority opinion[68] was that the use of a legislative veto amounted to a legislative act. Because Congress was, in effect, enacting legislation through the use of veto provisions like section 244(c)(2) of the Act,[69] the Court reasoned that that legislation should be amenable to the same constitutional procedures as any other legislation passed by Congress; namely, the legislation must be passed by both Houses of Congress and then presented to the President.[70] To the extent that the House's resolution pursuant to section

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61. *Id.*

62. 5 U.S. 137 (1803).

63. 103 S. Ct. at 2780.

64. While the Court clearly *directs* its analysis only towards the one-House veto provision (throughout the opinion the Court is careful to refer only to the one-House veto), its constitutional law analysis would seem to invalidate *all* forms of the legislative veto. *See supra* note 4 and accompanying text. *See also* 103 S. Ct. at 2796 (White, J., dissenting).

65. 103 S. Ct. at 2780-81.

66. *Id.* at 2781 (quoting 103 S. Ct. at 2795 (White, J., dissenting)).

67. 103 S. Ct. at 2781.

68. Chief Justice Burger wrote the majority opinion, and was joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor. Justice Powell concurred in the result, but filed a separate opinion.

69. *See supra* note 13. Section 244(c)(2) allowed either House of Congress to pass *a resolution* overturning the Attorney General's suspension of an alien's deportation. Without the resolution, Chadha would not have been subject to deportation.

70. U.S. CONST. art. I, §§ 1, 7. Section 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST. art. I, § 1. Section 7, cl. 2 provides: "Every bill shall have passed the House of Representatives and the Senate, shall, before it becomes Law,

244(c)(2) of the Act did not provide for a two-House vote or presentment to the President, the Court found the action unconstitutional.

In reaching this conclusion, the Court noted, "*[E]xplicit* and *unambiguous* provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[71] The importance of these article I provisions prompted the Court to break down its initial analysis into two sections—the presentment clauses, and bicameralism.[72]

1. *The Presentment Clauses*

The presentment clauses refer to those constitutional provisions requiring that all legislation be presented to the President before becoming law.[73] After noting that the language of those provisons *mandates* adherence to that procedure,[74] the Court turned to the history of the Presentment Clauses. As did the Ninth Circuit,[75] the Supreme Court exhaustively reviewed commentaries espousing the intent of the Framers of the Constitution.[76] In particular, the Court focused on the role of the presidential veto as a "salutory check upon the legislative body," necessary for, among other things, the prevention of collusive action on the part of a majority of that body.[77] In addition, the Court noted that by allowing for the presidential veto, the Framers insured that the legislative process was subject to review from a national perspective.[78]

2. *Bicameralism*

The Court approached this topic with essentially the same man-

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be presented to the President of the United States. . . ."

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3

71. 103 S. Ct. at 2781 (emphasis added).

72. *Id.* at 2782-83.

73. *See supra* note 70.

74. The Court, in citing these constitutional provisions, emphasized the Framers' use of the word "shall" (*see supra* note 70) and construed this usage as definitive proof as to how the provisions were meant to be applied. 103 S. Ct. at 2781.

75. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983).

76. 103 S. Ct. at 2782-83.

77. *Id.* at 2782.

78. *Id.* The Court relied partly on its decision in Myers v. United States, 272 U.S. 52 (1926). In *Myers*, the Court upheld the power of the President to appoint and remove execu-

ner of analysis that it used in discussing the presentment clauses. After commenting on the unambiguous and positive language of article I, sections 1 and 7 of the Constitution,[79] which state that effective legislation must be passed in both Houses, the Court reviewed the history of their incorporation into the Constitution. That review began with the emphasis the Framers gave to insuring that all legislation be carefully considered by the nation's elected officials,[80] and also the Framers' concern with the adoption of a bicameral system.[81] In short, it was the intention of the Framers to provide for the exercise of legislative power "only after opportunity for full study and debate in separate settings."[82] Recognizing the interdependency promoted by the Constitution's system of checks and balances, the Court concluded in no uncertain terms that the legislative power of the federal government should be exercised "in accord with a single, finely wrought and exhastively considered procedure."[83]

3. *Separation of Powers*

Satisfied with the stringency of these two constitutional mandates, the Court proceeded to determine the validity of the legislative veto in light of them. This analysis was undertaken through the separation of powers doctrine. The initial presumption was that when the House of Representatives passed the resolution pursuant to section 244(c)(2), it was acting within the sphere of its authority as granted by the Constitution. However, this presemption was rebutted by the Court's conclusion that the presentment and bicameralism requirements of article I should have been applied to action taken under section 244(c)(2).

The test used by the Court to determine whether or not section 244(c)(2) was within the legislative sphere governed by article I was,

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tive officials. The *Myers* holding reflected the Court's strict adherence to constitutional language, especially that describing executive branch power: "[T]he President [having been] elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide." 103 S. Ct. at 2782-83 (quoting *Myers*, 272 U.S. at 123).

79. *See supra* note 70.

80. 103 S. Ct. at 2783.

81. *Id.* The Court quoted several of the Framers' reasons for not adopting a one-House *legislature*. This analysis was provoked by the fact that the Court found that the legislative veto action taken under § 244(c)(2) was similar to action taken under a one-House legislature. Both procedures, by their very nature, lack bicameral structure. This approach then, would seem inapplicable to the two-House veto provision. *But cf.* 103 S. Ct. at 2807-08 (White, J., dissenting) (one-House veto more susceptible to validity than two-House veto).

82. 103 S. Ct. at 2784.

83. *Id.*

whether action taken by either House contains matter which should be regarded as legislative in its "character and effect."[84] In deciding that the House action was legislative in its "character and effect," the Court found that the resolution had the effect of "altering the legal rights, duties and relations of persons . . . outside the legislative branch."[85] Indeed, without the House action, the Attorney General's decision would not have been overruled, and Chadha would not have been subject to deportation.

The Court also found that the legislative nature of action taken under section 244(c)(2) was exhibited by the "character of the Congressional action it supplants."[86] Simply, had the veto provision not existed, neither House of Congress, short of enacting new legislation, could have effectively overturned the Attorney General's decision to suspend Chadha's deportation. Hence, the Court viewed the House's resolution as an unconstitutional attempt to circumvent the constitutionally prescribed legislative process. Congress, however, attempted to shift the Court's focus by arguing that if the Court's reasoning was valid, then the Attorney General, in his decision to suspend deportations, should also be amenable to the full bicameral process. The Court rejected that contention, declaring that "[t]he bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it . . . ."[87] As the Court noted, the constitutionality of the Attorney General's action under section 244 involves only a delegation question, and merely because Congress is entitled to delegate power to administrative agencies such as the INS, does not support the argument that Congress has the right to control administration of agency laws through a legislative veto.[88] In short, if Congress wanted to overrule the Attorney General's decision to suspend Chadha's deportation, it would have had to have passed legislation to that effect through the prescribed bicameral and presentment process.[89]

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84. *Id.* (quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)). It is interesting to note that for this seemingly important proposition, the Court was unable to find prior case law to support it.

85. 103 S. Ct. at 2784. Specifically, the Court found the resolution would alter "the legal rights, duties, and relations" of the Attorney General, Chadha, and Executive Branch officials. *Id.*

86. 103 S. Ct. at 2785.

87. *Id.* at 2785 n.16. The Court also noted that statutes creating the Executive's authority are all "duly enacted pursuant to [a]rticle I, §§ 1, 7" of the Constitution. *Id.*

88. 103 S. Ct. at 2785 n.16.

89. Congress also argued that the resolution was either amending § 244(a)(1) of the Act

Finally, the Court pointed out that the Framers, when drafting the Constitution, clearly did not contemplate the employment of legislative veto provisions. This observation was based on the fact that the Constitution expressly provided for situations that required only the action of one House.[90] Since the one-House veto was not among those situations, the Court concluded that the veto was unconstitutional.[91] In reaching this conclusion the Court reasoned that because the exceptions to the usual bicameral requirements were "narrow, explicit, and separately justified,"[92] not only did they not authorize the legislative veto's use, but they also provided further support for the Court's finding that congressional authority in this area could not be implied.[93]

In sum, having characterized the House's resolution as legislation, the Court was able to apply bicameral and presentment clause analysis to find section 244(c)(2) invalid. Simply, the resolution was unconstitutional because it was neither passed by both Houses of Congress nor presented to the President for his review. The Supreme Court recognized that the constitutional requirements for passing legislation are often cumbersome and time-consuming, but concluded that "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[94]

C. *Other Opinions*

1. *Concurring*

Justice Powell's concurring opinion[95] was not necessary for a majority, but his reasoning provided an interesting approach to the issue. Justice Powell was concerned over the apparent breadth of the decision. This breadth, he felt, was achieved as a result of the

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as to Chadha, or repealing § 244 as to Chadha. However, as the Court points out, both of these avenues also require conformity to article I of the Constitution. *See* 103 S. Ct. at 2785 & n.18.

90. 103 S. Ct. at 2786. These were the House of Representative's power to impeach, U.S. CONST. art. I, § 2, cl. 6; and the Senate's power to conduct trials following impeachment, U.S. CONST. art. I, § 3, cl. 5, disapprove or approve presidential appointments, U.S. CONST. art. II, § 2, cl. 2, and to ratify treaties negotiated by the President, U.S. CONST. art. II, § 2, cl. 2.

91. 103 S. Ct. at 2787.

92. *Id. See also supra* note 90.

93. 103 S. Ct. at 2787.

94. *Id.* at 2788.

95. *Id.* (Powell, J., concurring).

Court's reliance on the presentment clauses in reaching its decision. Thus, Justice Powell would have decided the case on narrower grounds. Although he too found the veto provision unconstitutional, he felt that in finding Chadha deportable, the House had "assumed a judicial function in violation of the principle of separation of powers."[96]

While conceding the existence of indeterminate boundaries separating the three branches of our government, Justice Powell found that the separation of powers doctrine had been violated by the House's resolution under section 244(c)(2): an action he found on its face "clearly adjudicatory."[97] In particular, he felt that the House acted as an appellate court in overruling the Attorney General's "application of established law to Chadha."[98]

2. *Dissenting*

The majority's conclusion and invalidation of the legislative veto

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96. *Id.* at 2789 (Powell, J., concurring). While Justice Powell, like the majority, also relied on the separation of powers doctrine, his analysis reflected a much narrower application. The majority found a violation of that doctrine through the failure of § 244(c)(2) of the Act to provide for presentment of the resolution to the President. Justice Powell, however, was concerned *only* with the procedures and effects of *this particular* legislative veto provision because it allowed one House of Congress, based on the review of statutory criteria, to render a definitive ruling on the issue of an alien's deportability. Thus, under this analysis, not all legislative vetoes would be invalid; only those found to usurp judicial functions would be susceptible to revocation. To the extent that the legislative veto, by its very nature, does not require presidential presentment, the majority's analysis under the separation of powers doctrine is clearly the more pervasive of the two applications.

Justice Powell's approach resembled that taken by the Ninth Circuit. *See infra* notes 124-26 and accompanying text. He relied on historical references exhibiting the Framers' concern with preventing legislatures from usurping judicial functions, and also, his analysis included specific Constitutional language such as the bill of attainder clause. U.S. CONST. art. I, § 9, cl. 3. *See also* U.S. v. Brown, 381 U.S. 437 (1965) (Court construction of bill of attainder clause).

97. 103 S. Ct. at 2791. Justice Powell was especially concerned with the procedure by which the House passed its resolution pursuant to § 244(c)(2). *See supra* note 17 and accompanying text. He notes that Congress is "not bound by [either] substantive rules" or "procedural safeguards." 103 S. Ct. at 2792. This observation suggests that Justice Powell felt that some due process issues may also have been at stake in this action. *See infra* notes 128-29 and accompanying text.

98. 103 S. Ct. at 2791 n.8. Representative Eilberg, the resolution's sponsor (*see supra* note 17), argued that Chadha had not met the statutory requirements for suspension of his deportation. 103 S. Ct. at 2791. Justice Powell's contention was that this type of decision is generally one to be made by the courts. *Id. See supra* note 96 and accompanying text. However, the majority directly addressed this argument and found Justice Powell's analogy between judicial action and the one-House veto less than perfect. *Id.* at 2787 n.21. Although acknowledging that in a sense action taken pursuant to § 244(c)(2) had a "judicial cast," they noted that no justiciable case or controversy was presented by the Attorney General's decision to suspend Chadha's deportation. *Id.* The Court observed that " 'courts have not been given the authority to review whether an alien should be given permanent status; review is limited to

sparked a bitter and lengthy dissent from Justice White.[99] Although unable to garner any other votes, the opinion presented a comprehensive attack on the majority's reasoning.

Justice White's overriding concern was with the magnitude of the holding. Noting that there are a number of statutory provisions now endangered by the Court's decision,[100] he also would have decided the case on narrower grounds.[101] In briefly giving the history of the legislative veto and its current stature, the dissent argued that empirically both the executive and legislative branches had accepted the use of the device, and had adjusted to it with minimal disagreement.[102] Justice White not only termed the legislative veto an "indispensable political invention," but he also regarded it as an effective mechanism for assuring the "accountability of independent regulatory agencies" for preserving Congress's control over lawmaking.[103] While the majority viewed the veto provision as a means by which Congress could overstep its constitutional bounds, Justice White argued that the veto was, in contrast, a "means of defense" necessary to Congress in its role as the country's lawmaker.[104] Unlike the majority, he felt that the Framers would have readily accepted the legislative veto as a necessary consequence of the growing size and complexity of modern government. Because the Constitution was silent on the issue, Justice White regarded the Court's task as determining whether the legislative veto was consistent with article I and the sep-

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whether the Attorney General has properly applied the statutory standards for' *denying* a request for suspension of deportation." *Id.* at 2787 n.21 (quoting 103 S. Ct. at 2810 (White, J., dissenting) (emphasis in the original)). Thus, the majority concluded that since the House's action was not one ordinarily assumed by the courts, the resolution was legislative for all intents and purposes, and consequently subject to the procedures set out in article I. *Id.* at 2787 n.21.

99. After the Court's decision was announced from the bench by Chief Justice Burger, in a rare occurrence, Justice White read portions of his dissent aloud. In an even "rarer moment of drama," when Justice White had finished, the Chief Justice responded with an impromptu defense of the majority opinion. N.Y. Times, June 24, 1983, § 1, at 1, col. 6.

100. Justice White even went so far as to attach an appendix to his opinion, listing the affected provisions. 103 S. Ct. at 2811-16 (White, J., dissenting).

101. *Id.* at 2792. Justice White suggested that, if possible, the case should only have been decided on separation of powers grounds, leaving open the constitutionality of other legislative veto provisions. *See supra* note 64. *See also* 103 S. Ct. at 2788 (Powell, J., concurring). Furthermore, Justice White found it regrettable that such a sweeping decision emerged from such an atypical case. He wrote, "to strike an entire class of statutes based on consideration of a somewhat atypical and more readily indictable exemplar of this class is irresponsible." *Id.* at 2796 (White, J., dissenting).

102. *See* 103 S. Ct. at 2804-07.

103. *Id.* at 2795.

104. *Id.* at 2796.

aration of powers doctrine. In his view, it was clearly consistent.[105]

The dissent agreed with the majority's construction of article I of the Constitution.[106] However, Justice White refused to find that the exercise of the legislative veto by the House of Representives amounted to new legislation. Rather, he regarded the Attorney General's suspension of Chadha's deportation as an INS proposal for legislation[107] which Congress, in its discretion, can only negate through its use of section 244(c)(2).[108] In effect, his contention was that Congress does not, in any way, make new law through this action.[109] Before reaching this conclusion though, Justice White argued that the Framers, in adopting the presentment clauses, did not intend for them to be restraints on congressional authority. On the contrary, he noted that Congress was given expansive lawmaking power, especially through the necessary and proper clause of the Constitution.[110] Thus, he continued, in keeping with the scope of this authority, Congress has seen fit to delegate legislative authority "to the Executive branch, to the independent regulatory agencies, and to private individuals and groups."[111]

Although the Supreme Court initially required this delegation to be well-defined and delegated under prescribed standards,[112] the dissent's position was that the Court has condoned broad and undefined delegations in the past.[113] The crux of this argument is that agencies delegated this power have no choice but to enact rules, regulations, and other measures to implement this extensively delegated authority. Justice White argued that these enactments amount to ex-

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105. *Id.* at 2798.

106. *Id.* at 2799. Justice White found this construction to be a "truismatic exposition" of the clauses. *Id.*

107. Essentially, Justice White is arguing that the Attorney General's decision to suspend Chadha's deportation represented only a proposal as to what the Attorney General intended to do. Thus, through the Attorney General's subsequent report to Congress pursuant to § 244(c)(1) of the Act, the House had the opportunity to negate that proposal. *See supra* note 11.

108. 103 S. Ct. at 2799. (White, J., dissenting).

109. Justice White analogized this point with the observation that the President does not make new law when he exercises the presidential veto power. *Id.*

110. U.S. CONST. art. I, § 8, cl. 18. *See also* McCulloch v. Maryland, 17 U.S. 316 (1819) (construction of necessary and proper clause).

111. 103 S. Ct. at 2801.

112. J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928).

113. 103 S. Ct. at 2802. For example, several delegations have provided only that they be effectuated in the "public interest," or for "public convenience, interest, or necessity." *See, e.g.*, Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930) ("public interest"); Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) ("public convenience, interest, or necessity").

plicit lawmaking,[114] but are not susceptible to the legislative procedures required by article I of the Constitution. Thus, he maintains that without the legislative veto, Congress has no way of checking that delegation.[115]

In his final argument, Justice White reasoned that the nature of the legislative veto provision satisfies the purpose of the bicameral and presentment clause requirements. Generalizing, he observed that the main concern in adopting these requirements was to insure that any changes in the status quo were made with the approval of both the President and Congress.[116] Arguing that that concern is addressed under the nature and procedure of a legislative veto, he suggested that the Attorney General's recommendation for deportation suspension represents Executive approval and that Congress's approval is reflected in its failure to vote.[117]

D. *The Impact of the Majority Opinion*

Prior to *Chadha*, the legislative veto had played a prominent role in the relationship between Congress and the Executive Branch. Since the 1930's, legislative vetoes have been incorporated into nearly two hundred statutory provisions affecting at least fifty-seven federal laws.[118] Veto provisions have been utilized in a variety of statutory settings, ranging from foreign affairs to energy to international trade.[119] With this degree of permeation, one would expect prior case law to be fairly extensive. However, very few federal courts[120]

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114. 103 S. Ct. at 2802 (White, J., dissenting).

115. In expressing his concern, Justice White stated, "It is . . . not apparent why the reservation of a veto over the exercise of that [delegated power] must be subject to a more exacting test. In both cases, it is enough that the initial statutory authorizations comply with [a]rticle I requirements." *Id.*

116. *Id.* at 2806-08.

117. *Id.* at 2806. Justice White's analogy, however, does not work as effectively or as simply if either House decides to express its *disapproval*, as was the situation in *Chadha*. As the majority notes, "[T]hat approach 'would analogize the effect of one House disapproval to the failure of one House to vote affirmatively on a private bill.' " *Id.* at 2787 n.22 (quoting Chadha v. INS, 634 F.2d at 635). Since such action is clearly violative of article I procedures, the Court maintained that if that interpretation was Congress's intent in enacting § 244(c)(2), it would amount to "an amending of [Article] I." *Id.* Continuing, the Court concluded that to "allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with [Article] I." *Id.*

118. *See* 103 S. Ct. at 2811-16 (White, J., dissenting)(appendix). In September of 1976, the House of Representatives nearly passed a bill that would have subjected virtually all of the independent regulatory agencies to the legislative veto. *See* H.R. Res. 12048, 94th Cong., 2d Sess. (1976), *defeated*, 122 CONG. REC. H10718-19 (1976).

119. 103 S. Ct. at 2811-16 (White, J., dissenting) (appendix of statutes affected).

120. This note is concerned only with the legislative veto as it applies to federal laws.

have been presented with the issue, and only three have reached the merits.[121]

It was then with great anticipation that the courts and constitutional law experts alike awaited the Supreme Court's decision in *Chadha*. In light of the Ninth Circuit's ruling in *Chadha v. INS*,[122] the Supreme Court surely felt that it could no longer delay expressing an opinion. While the Court affirmed the Ninth Circuit's conclusion, the analysis used was somewhat different. Justice Powell's concurring opinion echoed reasoning similar to that expressed by the court of appeals.[123] Like Justice Powell, the Ninth Circuit was also concerned with rendering an unnecessarily broad ruling.[124] Thus,

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For a good discussion of the use of the veto in state statutes, see Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982).

121. Atkins v. United States, 556 F.2d 1028, *cert denied*, 434 U.S. 1009 (1977) (per curiam)(en banc), was the first federal court to directly confront the constitutionality of the one-House veto provision. In that action, a group of federal judges contested the use of a one-House veto in barring an increase in their salary. Relying primarily on the necessary and proper clause, the Court of Claims found the veto provision constitutional and within the mandates of the separation of powers doctrine.

The Ninth Circuit was the second federal court to address the issue, Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983), finding the legislative veto in the Immigration and Nationality Act of 1952 unconstitutional.

Finally, the D.C. Circuit invalidated a House of Representatives resolution vetoing Federal Energy Regulatory Commission regulations on national gas prices. Process Gas Consumers Group v. Consumer Energy Council of America (CECA), 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); Interstate National Gas Ass'n of America v. CECA, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); Petrochemical Energy Group v. CECA, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); American Gas Ass'n v. CECA, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983).

The Court has, though, had other opportunities to address the issue. In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (en banc), a legislative veto existed in the Federal Elections Campaign Act, but the Court stated that it had " no occasion" to consider the question in determining the validity of that statute. *Id.* at 140 n.176. That same veto provision surfaced again in Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (per curiam) (en banc), *aff'd sub nom*, Clark v. Kimmit, 431 U.S. 950 (1977), but the challenge to its validity was dismissed for lack of standing. A dismissal on similar grounds was entered on another veto provision attack in Cintronell-Mobile Gathering, Inc. v. Gulf Oil Corp., 420 F. Supp. 162 (S.D. Ala. 1976). *See also* McCorckle v. United States, 559 F.2d 1258 (4th Cir. 1977) (inseverability of veto provision precludes decision as to its validity).

While courts have generally been able to avoid reaching a decision on the merits, several judges have expressed their conclusions through separate opinions. *Compare* Buckley v. Valeo, 424 U.S. at 284-86 (White, J., concurring in part and dissenting in part) (one-House veto constitutional) *with* Clark v. Valeo, 559 F.2d at 678, 684-90 (MacKinnon, J., dissenting) (one-House veto unconstitutional).

122. 634 F.2d 408 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983). *See supra* note 121.

123. 103 S. Ct. at 2788-92 (Powell, J., concurring).

124. The court stated:

> [W]e are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an

the court of appeals's decision rested on the separation of powers doctrine, but applied on a narrower basis.[125] As noted earlier, that decision was reached through analysis primarily applicable to only section 244(c)(2) of the Act. Had the Court then chosen to affirm under the Ninth Circuit's reasoning, some legislative veto provisions may have been able to pass constitutional muster.[126] Other actions would have had to have been brought in order to decide the constitutionality of legislative veto provisions on a case-by-case basis. However, the Supreme Court avoided that possibility[127] by treating the Act's veto provision as all-encompassing, and typical.

The propriety of this assumption, though, is debatable. Indeed, that provision may have been atypical. As one author noted, "The *Chadha* case presents the Court with a somewhat anachronistic, and perhaps unusually vulnerable, use of the legislative veto."[128] The point of this argument was that the possibility of other constituional issues being at stake in the use of the legislative veto under the Act[129] may result in the Court increasing its scrutiny, and in doing so, increasing the likelihood of a finding of invalidity. Yet, if this is the case, the majority[130] gives no hint of it in their opinion. Rather, the

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agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device. 634 F.2d at 433.

125. The Court of Appeals held that under the legislative veto,

[T]he Executive's duty of faithful execution of the laws becomes meaningless, as the law to be executed in a given case remains tentative until after action by the Executive has ceased. The role of judicial review in determining the procedural or substantive fairness of administrative action becomes equally nugatory because ex parte influence on administrative decisionmakers, once condemned, now is made the norm. *Id.* at 436.

126. *See supra* note 96. The Ninth Circuit was addressing the constitutionality of the legislative veto provision as employed under the Immigration and Nationality Act of 1952. Thus, the decision could, and it was apparently the intent of the court that it should (*see supra* note 124), be read as maintaining that the courts, or the Executive pursuant to properly delegated power (as under the Act), should be the only bodies making ultimate decisions regarding deportability. This reading would be in keeping with the Supreme Court's majority opinion statement that once authority is delegated, "Congress must abide by [that] delegation . . . until [it] is legislatively altered or revoked." 103 S. Ct. at 2786.

127. Even though it may have avoided a case-by-case approach in regard to determining a legislative veto's validity, the Court may still have to address veto provisions individually on the basis of its severability analysis. *See infra* notes 155-62 and accompanying text.

128. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 261 n.22 (1982).

129. Recall the due process and Bill of Attainder issues suggested by Justice Powell's concurring opinion. *See supra* notes 96-97 and accompanying text. *See also* 634 F.2d at 428-32.

130. This majority does not include Justice Powell's vote, which as noted earlier, was

Court seemed sufficiently provoked by the other aspects of section 244(c)(2), which it addressed.

To be sure, the Court decided the case on narrower grounds. The Court, like Justice Powell and the Ninth Circuit, could have decided the question on a more limited separation of powers basis,[131] finding that Congress was acting outside of its sphere of power. Or, as one commentator suggests, the Court could have "held one-[H]ouse vetoes illegal, but two-[H]ouse" vetoes permissible.[132] In any event, the fact that the majority did not choose to limit the scope of its decision confirms its intent to conclusively resolve the issue. Whether that goal was attained, however, warrants further discussion.

After *Chadha*, there is little doubt about the Court's desire to invalidate the legislative veto.[133] Although initially there was some question as to the Court's true intent,[134] those questions were at least partially answered by Supreme Court action taken only a couple of weeks subsequent to the *Chadha* decision. On July 6, 1983, the Court refused to hear six other cases involving the legislative veto which had been pending on its docket.[135] Those cases, also concerning appellate court findings that legislative veto provisions were unconstitutional, were either affirmed or writs of certiorari were denied.[136] Their outcome apparently hinged on the decision in

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seemingly influenced by the presence of other constitutional issues. *See supra* note 97.

131. *See supra* note 96.

132. L.A. Daily J., June 24, 1983, § 1, at 1, col. 6. The permissibility of the two-House veto, would only have resulted from a majority decision finding the one-House veto invalid on bicameral grounds *alone*. This conclusion is necessitated by the fact that a two-House veto, or for that matter any type of legislative veto, would still not appear to satisfy the majority's presentment clause analysis.

133. One observer noted, "The Court was seizing the opportunity to rule as broadly and in the strongest language possible on the question." *Id.* In addition, it goes without saying that the impressive majority vote (7-2) lends further credence to the argument that the Court was intent on rendering a definitive ruling.

134. *Id.*

135. Those cases involving the legislative veto which the Court refused to hear are: Process Gas Consumers Group v. Consumer Energy Council of America (CECA), 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); Interstate National Gas Ass'n v. CECA, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); Petrochemical Energy Group v. CECA, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); American Gas Ass'n v. CECA, 673 F.2d 425 (D.C.Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); United States Senate v. CECA, 673 F.2d 425 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 3556 (1983); United States House of Representatives v. CECA, 673 F.2d 425 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 3556 (1983); United States Senate v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983); United States House of Representatives v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983).

136. *See supra* note 135.

Chadha. Having decided that case, the Court was able to reaffirm its decision there by summarily disposing of these other legislative veto cases. As one observer proclaimed, "The Supreme Court's refusal to review the [cases] removes any doubt that might have existed that the justices' decision in *Chadha* was a sweeping condemnation of the veto principle."[137] Justice White, who, along with Justice Rehnquist, voted to hear the other legislative veto cases, confirmed, stating in a short opinion that the Court's action in refusing to hear the cases illustrated the "constitutional myopia" of the earlier ruling in *Chadha*.[138]

In an effort to decide who, between Congress and the President, was the winner after *Chadha*, some commentators argued that as a consequence of the decision, the Executive Branch had more power,[139] while others predicted that Congress would be the ultimate winner.[140] That question should be asked, but not in such simplistic terms. The truth is that there is no clear winner—only a situation that will demand, as the Framers intended, continued accomodation between the two branches. For instance, while it may appear at first glance that executive actions cannot go unchecked, an alternative reading suggests that the President has been granted no new constitutional power because Congress will be more likely to restrict its delegation in the future. Therefore, the questions that must be asked in light of this decision are: what alternatives, if any, should Congress now turn to to validly maintain its oversight functions; and, what acts, if any, are rendered invalid by this decision, and how does their invalidity affect both executive and legislative power?

The extensive placement of the legislative veto over the last fifty years would appear to indicate Congress's preoccupation and reliance on the device. As one observer notes, "When [the veto] was invented in the 1930's, [it] was supposed to allow the [P]resident to reorganize the [E]xecutive [B]ranch without undue congressional interference. . . . By the 1970's, the legislative veto had acquired a very different symbolism."[141] That "symbolism" was that the device had been inserted into foreign policy legislation and other statutes to

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137. L.A. Daily J., July 7, 1983, § 1, at 16, col. 2.

138. 103 S. Ct. at 3556-57 (White, J., dissenting).

139. *See, e.g.*, L.A. Daily J., June 27, 1983, § 1, at 2, col. 6; L.A. Daily J., July 8, 1983, § 1, at 3, cols. 1-2; N.Y. Times, June 24, 1983, § 1, at 1 cols. 5-6; NEWSWEEK, July 4, 1983, at 16.

140. *See e.g.*, L.A. Daily J., June 28, 1983, § 1, at 4, cols. 1-2; N.Y. Times, June 24, 1983, § 1, at 1, cols. 5-6 and at B4, cols. 3-5.

141. L.A. Daily J., June 28, 1983, § 1, at 4, col. 1.

"limit the discretion of executive branch regulatory agencies."[142] However, "placement" is different than "use." To be sure, Congress was more than generous in its insertion of veto provisions, but the fact that the legislative veto was more of a threat than a weapon is illustrated by Congress's relatively little actual use of it.[143]

While Congress may have been somewhat reluctant to apply it, the impact attributed to the legislative veto's presence has not been entirely unnoticeable. The device proved useful in "making independent regulatory agencies politically accountable for their actions," and as a result, eroding the independence of these agencies and the executive branch.[144] Although the legislative veto may have been an influencing factor for some overly zealous regulatory agencies, the death of the legislative veto does not mean that Congress will no longer have any control over these agencies as many observers initially declared.[145] Indeed, instead of invoking the veto, "Congress has [been exercising] control over regulatory agencies—and over the [P]resident—by the political tools provided it in the Constitution."[146] The bottom line is that Congress has a variety of alternatives to consider; while a discussion of those alternatives is beyond the scope of this note,[147] suffice it to say that they can provide that body with the oversight power it requires.

The Court confirmed this fact, stating that its decision does not mean that Congress is "required to capitulate to the 'accretion of policy control by forces outside its chambers,' "[148] but that the Constitution provides it with sufficient mechanisms of control.[149] At

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142. *Id.*

143. "In the last five years. Congress exercised its veto thirty-one times, [and] usually on minor issues. [For instance], Congress has never vetoed an arms sale . . . ." N.Y. Times, June 24, 1983, at B4, col. 1.

144. Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735, 737 (1979).

145. As one observer confirmed, "If [there is a shift in power], it may prove to be something less than tidal." Wall St. J., July 8, 1983, § 1, at 16, col. 1.

146. L.A. Daily J., June 27, 1983, § 1, at 2, col. 5. Those "tools" are, for example, related to Congress' appropriation, legislation drafting, and delegation powers. *See generally* U.S. CONST. art. I, §§ 1 and 8. Moreover, those "tools" are unaffected by the *Chadha* decision, as *Chadha* goes only towards the invalidation of the legislative veto. *See infra* note 148 and accompanying text.

147. For commentary on alternatives to the legislative veto, see generally Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 AD. L. REV. 667 (1980) and Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982).

148. 103 S. Ct. at 2786 n.19 (quoting Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 462 (1977)).

149. 103 S. Ct. at 2786 n.19. *But cf.* 103 S. Ct. at 2795 and 2795 n.10 (White, J.,

most, Congress will only be inconvenienced by some additional work, but should they "respond with better written laws and more scrupulous oversight, the Court's decision will serve to enhance rather than diminish the proper legislative powers of Congress."[150]

While there is no question that this decision will force Congress to reassess and reorganize its current delegatory process,[151] the overriding issue presented by the *Chadha* decision involves the fate of those laws containing legislative veto provisions.[152] Generally, invalid portions of a statute will be severed "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."[153] As discussed earlier, the Court in *Chadha* had little trouble in determining the Legislature's intent, for the Act contained a severability clause.[154] Thus, section 244(c)(2) was severed, leaving the rest of section 244 intact and valid. At this point it is unclear whether that procedure will be applicable to all of the other laws affected, or whether some entire laws will be rendered ineffective by the decision.

This uncertainty stems from the Court's failure to address the severability issue in broader terms. While the Court has made it clear that affected provisions will be presumed severable, it is by no means certain that all legislative veto provisions will be able to meet the criteria for satisfying the presumption. Thus, the Court's failure to shed more light in this area raises some important questions regarding executive branch power. For instance, if some veto provisions cannot be severed, and as a result the acts are rendered invalid, the authority of the President or Executive Branch regulatory agencies could be sharply curtailed. On the other hand, if veto provisions are severed from acts delegating a great deal of power to the Presi-

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dissenting) (alternatives not adequate).

150. L.A. Daily J., June 27, 1983, § 1, at 2, col. 6. In its first action after the Supreme Court decision in *Chadha* was handed down, Congress passed a bill prohibiting the Consumer Product Safety Commission from using any newly authorized funds to implement a regulation until it is approved by Congress. *See* L.A. Daily J., June 30, 1983, § 1, at 3, cols. 2-4.

151. In the aftermath of the Court's decision, both Houses of Congress indicated that task forces would be organized to "explore the extent of the damage." NEWSWEEK, July 4, 1983, at 16. *See also* N.Y. Times, June 24, 1983 § 1, at 1, col. 5.

152. *See supra* note 104.

153. Champlin Refining Co. v. Corp. Comm'n of Oklahoma, 286 U.S. 210, 234 (1932), *reaff'd*, Buckley v. Valeo, 424 U.S. 1, 108 (1976).

154. Such a clause is also known as a "separability clause." Under either term, it is similar to the one found in § 406 of the Act, printed below:

> If any particular provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby. 8 U.S.C. § 1101 (1983).

dent or these agencies, such as foreign affairs statutes, Presidential power may be greatly increased in already permissive[155] areas. While it is, of course, too early to speculate to any great degree, certainly the invalidation of *any* statute will have some repercussions. Likewise, even the severance of legislative veto provisions may provide unexpected ramifications. Furthermore, an already overburdened Congress would seemingly have to relegislate in the affected area.

Since the Supreme Court's analysis appears to imply that severance is the rule rather than the exception,[156] perhaps the issue is not as distressing as it seems. One Justice Department official has said that after the Department reviews the laws involved, in most cases "[they] will come to the conclusion that veto provisions can be separated."[157] The accuracy of this statement, however, seems to rest on whether the Court's severability analysis is met.

Besides determining the Legislature's intent,[158] the Court also presumes a provision's severability if what remains after severance "is fully operative as a law."[159] This requirement did not present a problem in *Chadha*, but may with other affected laws. Of the fifty-seven laws listed in the appendix to Justice White's dissent, only ten have severability clauses.[160] In addition, many have more than one legislative veto provision, with the provisions often intertwined throughout the act.[161] Thus, depending on the extent of veto provision usage in a statute, it seems fairly plausible that some laws will be so infected with veto provisions, that severability will leave these statutes completely inoperative. Given this supposition, it is reasonably clear that more than a Justice Department review will be needed to determine the constitutionality of at least some of these laws. Hence, instead of conclusively resolving the issue, the Court has

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155. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (Court recognizes inherently broad Presidential power in foreign affairs).

156. *See supra* note 153 and accompanying text.

157. Wall St. J., June 24, 1983, § 1, at 2, col. 2.

158. *See supra* note 153 and accompanying text.

159. *Champlin*, 286 U.S. at 234.

160. Among those acts without severability clauses are, for example: International Security Assistance and Arms Control Act of 1976, Pub. L. No. 94-329, § 211, 90 Stat. 729 (concurrent resolution may disapprove President's offer to sell arms), and the National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 302c, 72 Stat. 426 (concurrent resolution may disapprove President's transfer of functions to National Air and Space Administration).

161. For instance, the *primary* purpose for enacting the War Powers Res. Act of 1973, 50 U.S.C. § 1544 (1976), was to monitor (and by concurrent resolution, overrule) the President's use of U.S. armed forces abroad. *See Studies, supra* note 3.

opened the floodgates for hundreds of test cases. Moreover, as evidenced from the presence of Justice Rehnquist's dissenting opinion, lower courts will be subjected to the difficult task of applying the often confusing and complex severability analysis.[162] Many observers had hoped that the Court would shed some light in this area through its decision in the other legislative veto cases pending during *Chadha*.[163] However, as noted earlier, those cases were denied hearings.

E. *Conclusion*

In holding section 244(c)(2) of the Immigration and Nationality Act of 1952 unconstitutional, the Supreme Court has made a strong statement regarding its current position on how the Constitution should be read. Its analysis, based primarily on the constitutional language of article I, reflects rigid and strict construction; in effect, illustrating that the requirements of the Constitution are adaptable, but not subject to change. By construing the House's resolution under section 244(c)(2) as legislation, invalidation of the legislative veto was then just a matter of applying basic constitutional principles. Namely, all legislation must go through the full legislative process: first, passage by both Houses of Congress, and second, presentment to the President. This approach connotes that the Constitution's provisions will be made to apply irrespective of whether there is a more efficient way. Justice White's dissent argued that the majority's opinion reflected an insensitivity to the requirements of the modern "administrative state,"[164] but as one commentator has stated, "the Constitution was written in pervasive distrust of the administrative state and with a settled determination to bend the state's requirements to the requirements of liberty."[165] Whatever the requirements of the administrative state may be, Congress has all the tools it needs to perform its role, and thus concern in this direction is misplaced. Real concern with the majority opinion should be on legislation with legislative veto provisions. Not only will lower courts be

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162. As evidenced by the *Champlin* opinion (*see supra* notes 153 and 159), severability analysis requires determination of relatively difficult-to-discern factors. For instance, legislative intent is usually susceptible to a number of interpretations. As one observer notes, "future severability litigation is virtually certain given the discrete nature of the issues and the flexibility inherent in reconstructing the legislative intent of a past Congress." Rein & Stone, *Legislative Veto: Can Congress Go Back to Basics?*, LEGAL TIMES, July 25, 1983, at 40, col. 2.

163. *See supra* note 135.

164. 103 S. Ct. at 2810 (White, J., dissenting).

165. L.A. Daily J., June 28, 1983, § 1, at 4, col. 2.

inundated by severability issues as a result of the decision, but the Court's failure to expressly reveal the breadth of its holding will incite ambitious lawyers all over the country to attempt to distinguish this one-House veto analysis to avoid its inherently sweeping effect. However, to the Court's surprise, and perhaps dismay, the *Chadha* ruling may not have been broad enough.

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