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Immigration and Naturalization Service v. Chadha: The Legislative Veto Vanishes, 17 J. Marshall L. Rev. 523 (1984)

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CASENOTES

IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA:* THE LEGISLATIVE VETO VANISHES

Section 244 of the Immigration and Nationality Act (Act)[1] empowers the Attorney General of the United States to suspend deportation proceedings against an otherwise deportable alien.[2] This exercise of discretion is subject to section 244(c)(2) of the Act,[3] which allows either house of Congress to invalidate the At-

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* 103 S. Ct. 2764 (1983).

1. The Immigration and Nationality Act, 8 U.S.C. § 1254 (1976 & Supp. V 1981). Suspension of deportation is a remedy available to only a limited, statutorily prescribed class of persons: deportable aliens who have been present in the United States for seven years, who are of good moral character, and who would suffer severe hardship if deported. *Id.* During a seven year period, from 1971-1977, the Attorney General of the United States submitted over 1,000 cases recommending suspension of deportation to Congress for its approval. Congress noted its disapproval in only twenty-one of these cases, and therefore, denied relief to those aliens. McClure, *Legislative Veto Provisions Under the Immigration Laws, printed in*, SUBCOMM. ON RULES OF THE HOUSE, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 378-432 (Comm. Print 1980). Suspension of deportation is a remedy of last resort because an alien must admit that he is deportable before he can obtain a suspension of deportation. If the suspension of deportation is denied, the alien is estopped from denying that he is deportable. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 7.9d & 7.9e (rev. ed. 1983).

2. Section 244(a) of the Immigration and Nationality Act provides in pertinent part: "[T]he 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." 8 U.S.C. § 1254(a) (Supp. V 1981). Whether any alien satisfies the requirements for suspension of deportation is subject to the sound discretion of the Attorney General. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1959); Ramos v. INS, 695 F.2d 181, 184 (5th Cir. 1983). For two views on the particular statutory factors and the impact of the construction given them by the courts and the Attorney General compare Comment, *Suspension of Deportation: A Revitalized Relief for the Alien*, 18 SAN DIEGO L. REV. 65 (1980), with Comment, *Suspension of Deportation—Toward a New Hardship Standard*, 18 SAN DIEGO L. REV. 663 (1981).

3. This section provides: "If the deportation of any alien is suspended under § 244, 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." 8 U.S.C. § 1254(c)(1) (1976). Then, if during that session or the next, "either the Senate or the House of Representatives

torney General's decision[4] by resolution.[5] If one house of Congress, exercising its legislative veto power,[6] decides that a

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." *Id.* at 1254(c)(2) (1976).

4. The decision to suspend deportation is not strictly made by the Attorney General. The Immigration and Naturalization Service, a division of the Department of Justice, makes the decision through statutorily defined procedures and its own guidelines and regulations. *See generally* 4 GORDON & ROSENFIELD, *supra* note 1, at 23-1 to 23-79 (INS's operations and procedures); 5 GORDON & ROSENFIELD, *supra* note 1, at 26-6 to 26-179 (INS regulations).

5. The Attorney General's decision is invalidated by means of a one-house (simple) resolution. 8 U.S.C. § 1254(c)(2) (1976). Veto provisions may call for either simple or concurrent (two-house) resolutions expressing approval or disapproval of a proposed executive action. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 570 (1953). Simple and concurrent resolutions are generally used to express the sentiments of one house or both houses on a particular, current issue. They are also largely used to make or amend rules applicable to one or both houses. *Id.* Neither simple nor concurrent resolutions have the force of law and neither require presentation to the President. W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 221, 224, 228 (1978). Joint resolutions and bills do have the force of law and are required to be presented to the President. *Id. See also* Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U. L. REV. 1031 (1955).

6. Section 244(c)(2) is a legislative veto requiring a one-house resolution to overturn the Attorney General's decision. 8 U.S.C. § 1254(c)(2) (1976). The legislative veto is a statutory device commonly used by Congress "to monitor the implementation of its policies by the executive without the enactment of additional legislation." Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 456 (1977). The veto provisions typically serve an oversight function and aid Congress in assuring that programs and policies it enacts are implemented by the executive and independent agencies according to its statutory directive. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277 (1975).

The legislative veto's popularity has risen in the past half century as a direct response to the rapid increase in federal power. The complex, highly-technical problems Congress is faced with on a daily basis are not amenable to quick, simple solutions; the expertise and sophistication of executive agencies are needed to implement the broad policy directives of Congress. *See* F. ROURKE, BUREAUCRACY, POLITICS, AND PUBLIC POLICY 119-53 (2d ed. 1976). *See also* SUBCOMM. ON RULES OF THE HOUSE, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 328-432 (Comm. Print 1980). The veto provisions essentially afford Congress an opportunity to delegate broader authority to the independent and executive agencies in implementing policy while reserving control and direction over those policies. In this manner, the legislative veto represents a compromise between Congress' desire to focus and direct the general scope of policy and the executive agencies' desire to maintain its independence in developing the nuances and particulars of the policy. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 258-60 (1982). *See also* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1009-29 (1975).

There is simply no prototype legislative veto; veto provisions appear in various forms in over 200 statutes in a myriad of policy areas. A veto provi-

deportable alien should not be allowed to remain in the United States, the suspension order is invalidated and the alien is deported.[7] In *INS v. Chadha*,[8] the Supreme Court of the United States confronted the issue of the constitutionality of the legislative veto.[9] The Court held that the one-house veto provision was unconstitutional[10] because, as an exercise of legislative power,[11] such a resolution was subject to article I, section 7[12]

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sion may provide that policy decisions of the executive be subject to the approval or disapproval of one house of Congress, both houses of Congress, a committee, or a single member of a committee. Watson, *supra*, at 1053-80. The proposal of the executive may take effect only upon the positive approval or disapproval of Congress or may take effect merely upon the failure to disapprove. *See, e.g.*, War Powers Resolution, 50 U.S.C. § 1544 (Supp. V 1981) (requires concurrent resolution of Congress to order President to remove armed forces engaged in foreign hostilities when Congress has not declared war); Energy Conservation and Production Act, 42 U.S.C. § 6834 (Supp. V 1981) (requires concurrent resolution of approval before proposed regulations involving energy conservation standards take effect); Reorganization Act of 1977, 5 U.S.C. § 906(a) (Supp. III 1979) (requires simple resolution of disapproval within sixty days or proposal becomes effective). None of these provisions allow Congress to modify proposals submitted to it by executive agencies. Congress must either accept or reject the proposals as presented and await new proposals from the agency. Javits & Klein, *supra*, at 458. Thus, the legislative veto, much like the presidential veto, is negative in effect and cannot be used to create wholly new and different legislation. *Id.*

7. 8 U.S.C. § 1254(c)(2) (1976).

8. 103 S. Ct. 2764 (1983).

9. Before the Supreme Court's decision in *Chadha*, one court had decided that the legislative veto was constitutional. Atkins v. United States, 556 F.2d 1028 (Ct. Claims) (per curiam), *cert. denied*, 434 U.S. 1009 (1977). Another court had declared the legislative veto unconstitutional in two cases. Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (per curiam), *aff'd mem.*, 103 S. Ct. 3556 (1983); Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983). *See infra* note 121.

The constitutionality of the legislative veto had been raised in other contexts, but had not been decided on the merits. Buckley v. Valeo, 424 U.S. 1, 140 n.176 (1976) (per curiam) (Court had "no occasion to address" issue because Court decided constitutionality of Federal Elections Campaign Act on other grounds); Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (per curiam) (en banc), *aff'd sub nom*, Clark v. Kimmitt, 431 U.S. 590 (1977) (challenge to one-house veto dismissed for lack of standing); Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 420 F. Supp. 162 (S.D. Ala. 1976), *cert. denied*, 444 U.S.879 (1978), *remanded*, 578 F.2d 1149 (5th Cir.) (dismissed for lack of standing). In addition, several judges had expressed views on the constitutionality of the legislative veto without deciding the issue. *See* Buckley v. Valeo, 424 U.S. 1, 284-86 (1976) (per curiam) (White, J., concurring in part and dissenting in part) (Justice White, in a precursor to his dissenting opinion in *Chadha*, raised several arguments that he later repeated in support of the validity of the legislative veto) *with* Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (per curiam) (en banc), *aff'd sub nom*, Clark v. Kimmitt, 431 U.S. 950 (1977) (MacKinnon, J., dissenting) (declaring one-house veto provision unconstitutional).

10. INS v. Chadha, 103 S. Ct. 2764, 2787 (1983).

11. Critical to the Court's reasoning was its definition of the congressional action under section 244(c)(2) as legislative. *See infra* notes 36, 57-61

requirements for legislative action by Congress: passage by a majority of both houses and presentation to the President for his approval.[13]

Jagdish Rai Chadha was lawfully admitted to the United States as a nonimmigrant student and became subject to deportation when he failed to renew his visa.[14] At a deportation proceeding before an immigration judge, Chadha successfully acquired a suspension of deportation.[15] The Attorney General,

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and accompanying text. This conclusion was disputed by Justice Powell in his concurring opinion. INS v. Chadha, 103 S. Ct. 2764, 2791 (1983) (Powell, J., concurring). Justice Powell saw the act as essentially judicial in that it sought to adjudicate the rights of individuals and not to pass a general rule applicable to all. In so doing, the Congress "assumed a function ordinarily entrusted to the federal courts." *Id.* This particular veto provision has also been described as executive in that it reverses decisions of an executive agent, the Attorney General. Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 H.J. ON LEGIS. 735, 756 (1979).

These differing views of one legislative veto illustrate the inherent difficulties in trying to define the practical effect of any particular provision. The distinction between executive, legislative, and judicial acts is difficult to divine even for the most sophisticated analysts. *See* THE FEDERALIST NO. 37, at 228 (J. Madison) (Mentor ed. 1961) ("Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches.") Perhaps the best distinction between the three departments was drawn by Chief Justice John Marshall when he wrote that "the difference between the departments is that the legislature makes, the executive executes, and the judiciary construes the law." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

12. The pertinent provisions of article I of the United States Constitution provide:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. CONST. art. I, § 1.

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated.

Id. § 7, cl. 1.

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) 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 the Rules and Limitations prescribed in the Case of a Bill.

Id. § 7, cl. 2.

13. *Id.*

14. *Id.* at 2770.

15. *Id.* For additional facts regarding the original grant of suspension of deportation see Petitioner and Respondent's Joint Appendix at 7-46 INS v. Chadha, 103 S. Ct. 2764 (1983).

acting under section 244(c)(2) of the Act, reported his recommendation of suspension to Congress.[16] The House of Representatives passed a resolution, pursuant to section 244(c)(2), denying the suspension of deportation.[17] The immigration judge then reopened the deportation proceedings in order to deport Chadha.[18] At this hearing, Chadha moved to challenge the constitutionality of section 244(c)(2).[19] The immigration judge held that he had no authority to declare a statutory provision unconstitutional and ordered Chadha deported.[20] On appeal to the Board of Immigration Appeals, the Board affirmed the immigration judge's decision.[21] The Board further stated that, as an administrative body, it too was without authority to declare an act of Congress unconstitutional.[22]

On appeal to the United States Court of Appeals for the Ninth Circuit, the Immigration and Naturalization Service joined with Chadha to attack the constitutionality of the legislative veto provision.[23] The Court of Appeals held that the legislative veto was unconstitutional because Congress could not reserve, to only one house, the power to review and revoke administrative and judicial decisions originally entrusted to the executive and judicial branches.[24] Such congressional action violated the separation of powers doctrine because it constituted "prohibited legislative intrusion upon the Executive and Judicial branches."[25]

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16. INS v. Chadha, 103 S. Ct. 2764, 2770 (1983).

17. H.R. Res. 926, 93d Cong., 2d Sess., 121 CONG. REC. 40800 (1975). The Court described in detail the congressional action leading up to the final resolution denying the suspension of deportation to Chadha and five others. INS v. Chadha, 103 S. Ct. 2764, 2771 (1983). The Court's examination revealed that Rep. Eilberg, Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, controlled significant power in determining the fate of applicants seeking a suspension of deportation. The final resolution adopted Rep. Eilberg's recommendations without debate, and Chadha and five others were ordered deported. *Id.*

18. Petitioner and Respondent's Joint Appendix at 48-53, INS v. Chadha, 103 S. Ct. 2764 (1983).

19. *Id.*

20. *Id.* at 53.

21. INS v. Chadha, 103 S. Ct. 2764, 2772 (1983).

22. *Id.* The Board of Immigration Appeals has no authority to declare acts of Congress unconstitutional. *Cf.* Panitz v. District of Columbia, 112 F.2d 39 (D.C. Cir. 1940). *See generally* 4 GORDON & ROSENFIELD, *supra* note 1, at 23-1 to 23-7.

23. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983). Chadha's right to appeal to the Court of Appeals for the Ninth Circuit was based on 8 U.S.C. § 1105(a) (Supp. V 1981) which provides the exclusive procedure for appeals from orders of deportation.

24. Chadha v. INS, 634 F.2d 408, 436 (9th Cir. 1980) *aff'd*, 103 S. Ct. 2764 (1983).

25. *Id.* at 420.

The United States Supreme Court affirmed the decision of the Court of Appeals.[26] Chief Justice Burger wrote the opinion for the majority, with Justice Powell[27] concurring and Justices White[28] and Rehnquist[29] separately dissenting. Since the legis-

26. INS v. Chadha, 103 S. Ct. 2764 (1983). The Supreme Court affirmed the appellate court's decision in an opinion which espoused a broader, more encompassing separation of powers theory. The appellate court viewed the violation from a traditional perspective, finding that the legislative veto was an impermissible intrusion on the other branches' prerogatives. Chadha v. INS, 634 F.2d 408, 420 (9th Cir. 1980). For examples of other impermissible intrusions see *infra* note 77 and accompanying text. The Supreme Court avoided any traditional approach and instead based its holding on a reading of historical authorities. *See infra* notes 82-85 and accompanying text.

27. Justice Powell, in his concurring opinion, agreed with the majority that the separation of powers doctrine was violated by section 244(c)(2) and was therefore unconstitutional. INS v. Chadha, 103 S. Ct. 2764, 2792 (1983) (Powell, J., concurring). He disagreed with the Court's reasoning, however, and expressed concerns about the overbreadth of the majority's opinion. *Id.* at 2788. Justice Powell's decision was based on traditional separation of powers analysis. He defined the congressional action under section 244(c)(2) as judicial in that it constituted a review of a particular alien's status. *Id.* at 2791. Such a review is normally the function of the judiciary, and therefore, the legislative veto constituted an attempt by Congress to assume a "function that more properly is entrusted to another." *Id.* at 2790. The majority recognized that to a certain extent the congressional action under section 244(c)(2) had a "judicial cast." *Id.* at 2787 n.21. The Court was not convinced with Powell's argument, however, and restated its assertion that the congressional action in question was essentially legislative in purpose and effect. *Id.*

28. In his dissent, Justice White advanced numerous arguments in favor of the legislative veto. INS v. Chadha, 103 S. Ct. 2764, 2792 (1983) (White, J., dissenting). In resolving the issue before the Court, Justice White adopted a pragmatic, empirical approach. He focused on the practical use of veto provisions in general and on the limited effect of section 244(c)(2) in particular. *Id.* at 2793-96. Justice White conceded the majority's "truismatic" discussion of the separation of powers doctrine and the dual requirements of bicameralism and presentment to the President, but did not agree that such an exposition answered the question before the Court. *Id.* at 2799. The critical issue then became whether the congressional action in question "is the kind to which the procedural requirements of art I, § 7 apply." *Id.* Justice White reasoned that the congressional action did not amount to positive lawmaking and therefore art I, § 7 does not apply. *Id.* at 2799-2802. Merely calling an act legislative does not make it so; nor is an act necessarily legislative because it emanates from the legislative branch. *Id.* at 2801. Justice White maintained that the majority's holding simply "ignores that legislative authority is routinely delegated to the Executive branch, to the independent regulatory agencies, and to private individuals and groups." *Id.*

Merely defining the action as legislative and resolving the issue of the constitutionality on that basis was an improper tack for the majority to take. According to Justice White, the appropriate perspective to adopt is to determine whether the legislative veto is consistent with the purposes of article I and the principle of separation of powers reflected in that article and throughout the Constitution. *Id.* at 2798. Justice White essentially concluded that from this perspective the veto provision was constitutional because it was part of a validly enacted statute and because it was negative in effect. *Id.* at 2810.

29. Justice Rehnquist's dissent does not address the merits of the legislative veto. INS v. Chadha, 103 S. Ct. 2764, 2816 (1983) (Rehnquist, J., dis-

lative veto is a modern "political invention,"[30] the Court first considered whether the exercise of a congressional veto power was consonant with the dictates of the Constitution.[31] The Court examined the concerns of the Framers of the Constitution when they established a government based on separation of powers[32] and bicameralism.[33] From its examination, the Court concluded that the Framers provided only one permissible way to enact laws: passage by a majority of both houses of Congress and presentment to the President, the explicit provisions of article I.[34]

The Court then considered whether the congressional action under section 244(c)(2) of the Act amounted to positive lawmaking, thereby providing an alternative means of legislating.[35]

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senting). Rather he stated that section 244(c)(2) was not severable from section 244, and therefore, the Court could not declare the veto provision unconstitutional without also declaring the entire suspension of deportation provision unconstitutional. *Id.* at 2817. Justice Rehnquist reasoned that while the Act contained a severability clause, 8 U.S.C. § 1101, note (1976), the determination of whether the statute was severable did not "turn on the presence or absence of such a clause." *Id.* at 2816 (quoting United States v. Jackson, 390 U.S. 570, 585 n.27 (1968)). Justice Rehnquist concluded that since section 244 was meaningless without section 244(c)(2), and since the legislative history of section 244(c)(2) strongly suggested that Congress did not wish to give complete control over the suspension of deportation process to the executive, section 244(c)(2) could not be severed from section 244. *Id.* at 2817.

30. INS v. Chadha, 103 S. Ct. 2764, 2795 (1983) (White, J., dissenting).

31. *Id.* at 2781.

32. Perhaps the best explanation of the aims and methods of constructing a government based on sepration of powers was given by James Madison. Madison wrote:

> In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. . . . It is equally evident that the members of each department should be as little dependent as possible on those of the others. . . .
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> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the other. . . . Ambition must be made to counteract ambition.

THE FEDERALIST NO. 51, at 321-22 (J. Madison) (Mentor ed. 1961).

33. Bicameralism refers to a governmental system based on two legislative chambers. *See generally* THE FEDERALIST NO. 51 at 322, NO. 62 at 378-82, NO. 63 at 384 (J. Madison) (Mentor ed. 1961).

34. *See supra* note 12.

35. Because the Court was concerned that congressional action under § 244 might circumvent the president's veto power and the two-house passage requirements, the Court had to conclude that such congressional action was amenable to article I procedures in order for there to be a violation of separation of powers. If the action did not amount to positive lawmaking,

The Court reasoned that the veto provision did amount to positive lawmaking in that it altered legal rights, displaced positive lawmaking, and determined policy.[36] Thus, the Court held that because the veto provision was an alternative means of enacting law, circumventing the article I procedure, it was unconstitutional as a violation of the separation of powers doctrine.[37]

The Court began its analysis of the constitutionality of the legislative veto with the presumption that section 244(c)(2) was valid.[38] The Court stated that the wisdom, utility, or efficiency of a legislative veto provision was not dispositive of the issue, however, because such a "political invention" must meet the demands of the Constitution.[39] The Court saw these demands as the "explicit and unambiguous" terms set forth in article I, section 1,[40] and article I, section 7, clauses 2 and 3,[41] for passage of legislation: namely, that all legislative power is vested in a Congress consisting of a Senate and House of Representatives,[42] that all bills be passed by a majority of both houses and presented to the President for his approval,[43] or if he should veto,[44] then by an override vote of two-thirds of both houses.[45] The Court reasoned that the constitutional Framers adopted this express procedure for the passage of laws so that all power would not be deposited in any one person or body, resulting in a

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then article I would never have applied, and the Court's reasoning would have had to fail. The Court did conclude, however, that the congressional action under section 244(c)(2) was legislative. INS v. Chadha, 103 S. Ct. 2764, 2787 (1983). *See infra* notes 56-61 and accompanying text.

36. *See infra* notes 56-61 and accompanying text.

37. INS v. Chadha, 103 S. Ct. 2764, 2788 (1983). *See infra* notes 56-61 and accompanying text.

38. *Chadha*, 103 S. Ct. at 2780. *Cf.* Tennessee Valley Authority v. Hill, 437 U.S. 153, 194-95 (1978) (Court does not sit as "committee of review" over policy decisions of Congress); *see also* Hampton & Co. v. United States, 276 U.S. 394, 406 (1928) (a branch of government presumptively acts within the power that the Constitution has delegated it).

39. *Chadha*, 103 S. Ct. at 2781. Interestingly, the Court began its analysis with a refutation of one of Justice White's dissenting arguments. Justice White had asserted that the legislative veto was "an important if not indispensible political invention." *Id.* at 2795 (White, J., dissenting). The Court plainly stated that no matter how "efficient, convenient, and useful" the legislative veto is, it must meet, as all positive legislation must, the rigors of article I. *Id.* at 2780-81.

40. *See supra* note 12.

41. *See supra* note 12.

42. U.S. CONST. art. I, § 1; *see supra* note 12; *see also* THE FEDERALIST NO. 45 (J. Madison).

43. U.S.CONST. art. I, § 7, cl. 2; *see supra* note 12; *see also* THE FEDERALIST NOS. 69 & 73 (A. Hamilton).

44. *See infra* note 50; *see also* THE FEDERLIST NOS. 68 & 73 (A. Hamilton).

45. U.S. CONST. art. I, § 7, cl. 3; *see supra* note 12.

certain "tyranny."[46]

Specifically, the Court cited three critical procedures as inseparable from the separation of powers doctrine:[47] a three branch government delineated by its primary functions, i.e., executive, legislative, and judicial,[48] a bicameral Congress,[49] and a presentment to the President.[50] Together, these three procedures define the entire separation of powers principle. Each

46. The Framers of the Constitution were most concerned that the entire federal power, already separated from the states' power, not be placed in one body or person. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (J. Madison) (Mentor ed. 1961). The Framers sought to prevent this problem by separating power according to governmental function. *See generally* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 99-104 (M. Farrand ed. 1966). Still the fear of an oppressive federal government was to linger for many decades. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION, ITS ORIGINS AND DEVELOPMENT 105-57 (5th ed. 1976).

47. For a general discussion of the doctrine of separation of powers see W. GWYN, THE MEANING OF SEPARATION OF POWERS (1965); Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 369 (1976); Sharp, *The Classic American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935).

48. *See supra* notes 32 & 46.

49. The salient advantage of a bicameral legislature is that each branch acts as a check on the other, and only through cooperation and compromise can the passage of laws be accomplished. W. OLESZEK, *supra* note 5, at 201-05. A central fear of the Framers was that the larger states might dominate the smaller ones through the sheer weight of numbers. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 99-104. Indeed, the Great Compromise provided for a system where one house, with equal representation, could check the other house, with the proportionate representation. *See also* THE FEDERALIST NOS. 62 & 63 (J. Madison?); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 26-45 (1833).

50. The Court identified three principal virtues that the presence of the presidential veto accomplishes: it provides the executive branch with a self defense mechanism, protecting the President's independence and integrity; it acts as a check on any "oppressive" or ill considered laws passed by Congress; and it provides an opportunity for a national view on important issues of the day. INS v. Chadha, 103 S. Ct. 2764, 2782 (1983). *See* THE FEDERALIST NO. 73, at 443 (A. Hamilton) (Mentor ed. 1961). The president's veto power has another function

> [The Presidential veto] not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

But see L. WHITE, THE FEDERALISTS 56, n.19 (1948) "Hamilton . . . grasped the truth at once . . . that not even the Constitution of the United States could keep apart two such inseparable actors in government as executive and legislature. His official position [as Washington's Secretary of the Treasury] naturally brought him into close contact with Congress, and enabled him to see that such a loosely organized body was simply waiting for a commander." (quoting R. HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825 140 (1917)).

branch must act within its properly delegated sphere, serve as a check on the other branches, and collectively organize into a workable government.[51] Within a divided legislature, the same system of conflict and cooperation must occur.[52] The ultimate conclusion that the Court drew from its examination of these procedures is that the Framers intended that "the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[53] Article I of the Constitution provides this "finely wrought" procedure.[54]

Since the Framers provided an exclusive method for passage of laws in article I,[55] the only remaining question is whether section 244(c)(2) provided another, impermissible method. The critical consideration is whether the veto provision creates new, positive law. The Court found that the act of Congress under section 244(c)(2) did amount to new, positive lawmaking[56] because it altered the legal rights of persons outside the legislative branch;[57] displaced a legislative action, private

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51. As stated in Justice Brandeis' often quoted passage:

> The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by *means of the inevitable friction* incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (emphasis added). *See also* Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("For them [the Framers] the doctrine of separation of powers was not mere theory, it was felt necessity."). Thus, the requirement for passage of laws, with all of its nuances and built-in checks, puts the separation of powers doctrine into daily practice.

52. Deliberation, confrontation, and compromise are all necessary consequences of a bicameral legislature. Since one house cannot enact legislation by itself, each must depend on the other to effect its political power. Through this procedure, the rights of the people are better secured.

> The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men than where the concurrence of separate and dissimilar bodies is required in every public act.

THE FEDERALIST NO. 63, at 386 (J. Madison) (Mentor ed. 1961).

53. INS v. Chadha, 103 S. Ct. 2764, 2784 (1983).

54. *See supra* note 12.

55. *See supra* note 12.

56. INS v. Chadha, 103 S. Ct. 2764, 2785 (1983).

57. *Chadha*, 103 S. Ct. at 2784. The Court found that section 244(c)(2) had the effect of deporting individual aliens who could not have been deported after the Attorney General granted them a suspension of deporta-

bills;[58] and involved a "determination of policy"[59] that could have been implemented in only one other way—bicameral passage followed by presentment to the President.[60] The legislative action was required to follow the established article I procedure for passage of bills and resolutions because this one-house veto action was essentially legislative in effect and purpose, and because it was not one of the express constitutional authorizations for unicameral action.[61] The legislative veto provision did not follow the required article I procedure and, therefore, was held unconstitutional.[62]

A major flaw in the Court's resolution of the issue presented in *Chadha* is that the Court was too selective in the authority it chose to examine, and exceedingly broad in its application of the principles it derived from that authority. First, the Court abandoned its traditional method of examining separation of

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tion. *Id.* If the House of Representatives had not acted, Chadha would have lawfully remained in the United States. *Id.* at 2785. Thus, the Court concluded that the congressional act under section 244(c)(2) altered Chadha's legal status. *See infra* notes 91-94 and accompanying text.

58. *Chadha*, 103 S. Ct. at 2785. The Court concluded that the effect of the one-house action could only have been achieved by legislative enactment. *Id.* Absent the veto provision, Chadha's status would only have been affected by the Attorney General's decision or by passage of a subsequent private bill. *Id.* Private bills deal with particular matters "such as claims against the government, immigration and naturalization cases, land titles, etc.," and affect specific parties or individuals. OLESZEK, *supra* note 5, at 220. Private bills, like all other bills, must be enacted by both houses and presented to the President for his approval. *Id.* Congress formerly dealt with suspension of deportation of aliens on a case-by-case basis, making the decision to suspend deportation through private bills. *See, e.g.*, McClure, *supra* note 1, at 380-82. Since section 244(c)(2) supplanted private bills, the Court concluded that the effect of one-house veto provision was legislative. *See infra* notes 96-101 and accompanying text.

59. INS v. Chadha, 103 S. Ct. 2764, 2786 (1983). *See infra* notes 101-04 and accompanying text.

60. *See supra* note 12.

61. The Court examined those express occasions when the Constitution permits one branch of Congress to act independently of the other. *Chadha*, 103 S. Ct. at 2786. The legislative veto was not among them. From this the Court deduced that when the Framers intended each house to act independently of the other, they expressly provided for it in clear and unambiguous terms. *Id.* Thus, the Court concluded that the absence of any enumeration necessarily infers the absence of any delegation. *Id.* at 2787. *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Unenumerated powers do not mean undefined powers.")

62. INS v. Chadha, 103 S. Ct. 2764, 2788 (1983). The Court recognized that the legislative process is often slow, cumbersome, and ineffective. *Id.* The Court maintained however, that these are natural, albeit burdensome, consequences of the system of government the Framers had deliberately established in order to prevent the greater evils attendant to the exercise of arbitrary power. *Id.* As the Court candidly stated, "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." *Id.*

powers disputes and adopted a strict, historical analysis.[63] Second, the Court overlooked the limited scope and essentially negative character of the legislative veto, and reasoned instead that the veto provision was the type of positive lawmaking encompassed by article I.[64] Third, the Court failed to consider any post-Constitutional Convention alterations in the structure, balance, and workings of the federal government.[65] Thus, the Court struck down, categorically, the concept of the legislative veto as an aberration from the clearly delineated separation of powers doctrine, despite its appearance in over 200 statutes.[66]

The doctrine of separation of powers, the sharing of power along lines of governmental function, is one of the salient principles of American government.[67] The three branches of government each have independent sources of power and distinct functions.[68] They are, however, all part of one cohesive unit. Consequently, their responsibilities and prerogatives frequently overlap.[69] This governmental system contemplates that inher-

63. Facing difficult constitutional issues "requires a spacious view in applying an instrument of government 'made for an undefined and expanding future,' *Hurtado v. California*, 110 U.S. 516, 530, and as narrow a delimitation of the constitutional issues as the circumstances permit." Youngstown Sheet & Tube Co. v. Sawyer, 343 US. 579, 596 (1952) (Frankfurter, J., concurring). It appears that the majority opinion violated both of these precepts. First, the Court adopted a very narrow focus in its interpretation of the Constitution, concentrating only on the express provisions of article I and contemporaneous debates. *See infra* notes 81-84 and accompanying text. Second, the Court drew its conclusions from that study and applied them to a broad, diverse class of statutes. In so doing, the Court failed to demonstrate the relevancy of eighteenth century theory on twentieth century practice. *See infra* notes 109-19 and accompanying text.

64. Not every action of Congress is subject to approval of both houses and presentment to the President. One exception is that each house may act alone in determining internal matters pertaining to its own operation. *See* U.S. CONST. art. I, § 5, cl. 2 (each house may determine its own rules and proceedings). Another exception is that the President's approval is unnecessary for proposed amendments to the Constitution. Hollingsworth v. Virginia, 3 U.S. (3 Dallas) 378, 380 (1978) (the "negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the proposition of adoption of amendments to the Constitution."); *compare* Javits & Klein, *supra* note 6, at 482 (If the President's power is not needed for amendments to the Constitution, then "should it be necessary to the exercise or a legislative veto, a mechanism clearly subordinate to a validly enacted scheme?") *with* Ginnane, *supra* note 5, at 574 (since two-thirds vote is required for passage of amendments under article V, there would be little sense in requiring presentment to the President when the votes necessary for override are already present).

65. *See infra* notes 106-18 and accompanying text.

66. INS v. Chadha, 103 S. Ct. 2764, 2788 (1983).

67. *E.g.*, Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 369 (1977).

68. *See supra* notes 32, 49 & 50.

69. For example, the President is made part of the legislative process with the exercise of the presentment and veto procedures. The Pocket Veto

ent checks and balances will generate the concessions and compromises needed to formulate policy.[70] When one branch exceeds its authority, this balance is lost and compromise is replaced with recalcitrance and tyranny.[71] Thus, the separation of powers doctrine must be viewed as a flexible doctrine within limited bounds.[72] The doctrine does not contemplate a permanent distribution in power, but rather a fluid, shifting balance precariously maintained by the inevitable conflict that arises when "ambition [is] made to counteract ambition."[73]

The Supreme Court has recognized both the rigid and flexible aspects of the separation of powers doctrine[74] and has traditionally examined violations of the doctrine in two ways. First, the doctrine may be violated when one branch impermissibly interferes with the performance of another branch that is acting within its constitutionally prescribed area.[75] Second, the doc-

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Case, 279 U.S. 655, 678 (1929). Likewise, the critical function of oversight involves Congress in the executive role. *See* Hanna v. Plumer, 380 U.S. 460, 471-72 (1965) (Supreme Court recognized the value of reservation of power to examine proposed rules, before they become effective). Thus, there is considerable overlap between the branches in carrying out their assigned functions.

70. *See supra* notes 49 & 52.

71. *See* THE FEDERALIST NOS. 47 & 58 (J. Madison).

72. *E.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 441-42 (1977) (Court noted "the contemporary realities of our political system" in rejecting the view that the Constitution contemplated a complete division of authority between the branches, and adopted a "more pragmatic, flexible approach"); Miller & Knapp, *supra* note 67, at 369 ("The Constitution did not separate power; it established a system of separated institutions sharing power—a quite different, and indeed fundamental, proposition.")

73. THE FEDERALIST NO. 51, at 322 (J. Madison) (Mentor ed. 1961). *E.g.*, Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Sibbach v. Wilson, 312 U.S. 1 (1941); Humphrey's Executors v. United States, 295 U.S. 602 (1935); The Pocket Veto Case, 279 U.S. 655 (1929); Hampton & Co. v. United States, 276 U.S. 394 (1928).

74. *Compare* Humphrey's Executors v. United States, 295 U.S. 602, 628 (1935) ("purely executive officers" are distinguishable from ordinary "executive" officers) *with* Buckley v. Valeo, 424 U.S. 1, 121 (1976) (three functions of government are not "hermetically" sealed).

75. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) ("Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."); United States v. Nixon, 418 U.S. 683, 711-12 (1974) (proper inquiry in separation of powers cases is to what extent does the act in question prevent the executive branch from carrying out its constitutionally assigned function); Weiner v. United States, 357 U.S. 349, 356 (1958) (no interference by Congress of President's power to dismiss executive officers when it created independent agencies whose members were outside executive branch); Humphrey's Executors v. United States, 295 U.S. 602 (1935) (no impermissible interference with President's appointment power); Myers v. United States, 272 U.S. 52 (1926) (legislative provision prohibiting President from removing officers in

trine may be violated when a function more properly delegated to one branch is assumed by another branch.[76] The *Chadha* majority did not, however, identify which type of violation had taken place;[77] nor did the majority even attempt to analyze the legislative veto using either of these traditional approaches. If the Court was correct in defining the act of Congress under section 244(c)(2) as essentially legislative, it is difficult to understand how Congress, entrusted with "all legislative power" under article I,[78] has impermissibly invaded either the executive or judicial branches.[79] Furthermore, if section 244(c)(2) is essentially legislative, then Congress could not have assumed a function better delegated or better suited to another branch of government.[80]

The Court, however, adopted a novel approach in its analysis. This new approach looks only at the "true meaning" of arti-

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executive branch without the consent of Congress was impermissible interference, and therefore unconstitutional); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (congressional act affecting President's right to grant pardons found unconstitutional because it interfered with presidential power to pardon).

76. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (agency with a majority of congressional appointees can only exercise congressional powers and not executive power because executive officers, carrying out executive duties, must be appointed by President); Schick v. Reed, 419 U.S. 256 (1974) (President's pardoning power is granted by the Constitution, and Congress cannot modify, abridge, or diminish it by legislative action); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (where Congress has provided a method for seizure of an industry in a crisis, President must follow that method and cannot seize the industry however he wants); Springer v. Government of the Phillippine Islands, 277 U.S. 189 (1928) (Congress impermissibly assumed the President's power to appoint executive personnel in the Philippines).

The Court of Appeals for the Ninth Circuit held that section 244(c)(2) of the Act violated the separation of powers doctrine in this manner, holding that the legislative veto impermissibly invaded both executive and judicial perogatives. Chadha v. INS, 634 F.2d 408, 436 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983) (section 244(c)(2) allowed Congress to assume both executive and judicial functions which were better suited to those branches). Justice Powell also viewed section 244(c)(2) as this type of violation of separation of powers on the narrow ground of assuming judicial functions. INS v. Chadha, 103 S. Ct. 2764, 2790 (1983) (Powell, J., concurring). *See also supra* note 27.

77. The Court avoided a discussion of any traditional view and instead concentrated on the requirements of bicameralism and presentment to the President. INS v. Chadha, 103 S. Ct. 2764, 2782-83 (1983). *See also infra* note 81.

78. *See supra* note 12. Congress has plenary power over aliens. *See* U.S. CONST. art. I, § 8, cl. 4 (Congress has power "To establish an uniform Rule of Naturalization.")

79. *Accord* Miller & Knapp, *supra* note 67, at 379 (one-house veto cannot consistently be an exercise of legislative action under article I and "impermissibly interject" into the executive branch).

80. Justice White makes this observation in his dissent. INS v. Chadha, 103 S. Ct. 2764, 2802 (1983) (White, J., dissenting).

cle I as expressed by the Framers of the Constitution.[81] The Court applied a strict, historical analysis, attempting to ascertain what the Framers intended when they wrote the Constitution and fought for its ratification.[82] The majority determined that the legislative veto, as a modern political invention, was simply inconsistent with the Framers' carefully considered and delineated plan used to establish our government based upon the principle of separation of powers.[83] The Court concluded that the Framers provided only one permissible way to make law.[84] Because the legislative veto offered an alternative way to make law, circumventing article I, it was unconstitutional.[85]

The Court's reasoning depends then on its finding that the

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81. The Court examined three principal authorities in deciding this case: the Records of the Convention, the *Federalist*, and the express provisions of article I. From this examination, the Court concluded that the one-house veto was an unconstitutional device because it circumvents the requirements of bicameralism and presentment to the President, two critical concerns of the Framers. *Chadha*, 103 S. Ct. at 2788. The validity of using the *Federalist* as authority has been questioned. *See* Miller & Knapp, *supra* note 67, at 368 ("this work is authoritative only to the extent that it reflects the views of three articulate men who wrote as advocates, not as dispassionate scholars."). More broadly attacked has been the use of merely an historical analysis which fails to demonstrate the relevancy of the Framers' intentions to the current structure of governmental institutions. *E.g.*, Martin, *supra* note 6, at 263; Miller & Knapp, *supra* note 67, at 390-92.

82. In adopting this historical approach, the Court disregarded the weight of much of its own authority which suggested that the development of custom and practice and the current political setting were important considerations in determining the construction of a statute. Nixon v. Administrator of General Services, 433 U.S. 425, 441 (1977) (historical view of separation of powers doctrine is "inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system."); Buckley v. Valeo, 424 U.S. 1, 23-28 (1976) (per curiam) (recognizing the current state of campaigns and massive expenditures, Court upheld statute placing $1,000 ceiling on political contributions); Myers v. United States, 272 U.S. 52, 176 (1926) (Court viewed political history of the nation over three-quarters of a century to aid it in interpreting the Constitution). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). In *Youngstown*, Justice Jackson stated:

> The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

83. INS v. Chadha, 103 S. Ct. 2764, 2787 (1983). *See* Javits & Klein, *supra* note 6, at 466 (contention that "post hoc congressional review is inherently inconsistent with the separation of powers doctrine requires a rigid and literal construction of that doctrine that is unsupported in the case law, at odds with the text and purpose of constitutional provisions, and incompatible with the effective operation of modern government.").

84. *Chadha*, 103 S. Ct. at 2787.

85. *Id.*

veto provision constitutes an act of positive lawmaking,[86] the kind of lawmaking contemplated by article I.[87] If an action of Congress is not legislative, then the article I requirements for legislating naturally do not apply.[88] The Court, however, overlooked the veto's essentially negative character[89] and concluded that the veto provision was the type of positive legislation that is subject to the article I procedures.[90]

The Court first stated that the veto provision was legislative because it altered legal rights; Chadha would have been legally permitted to remain in the United States if the House had not denied his suspension of deportation.[91] This, however, is not the case. As Justice White pointed out in his dissent,[92] Chadha faced deportation until and unless the Attorney General and both houses of Congress agreed to suspend it.[93] If any one of these three actors declined to suspend the deportation, Chadha would have had to have been deported.[94] Section 244(c)(2) does not change Chadha's status. Rather, it merely maintained the status quo by extending the time before the suspension is finalized.

Nor is section 244(c)(2) legislative because it displaces private bills.[95] Section 244(c)(2) alone cannot displace private

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86. *See supra* note 35.

87. *See supra* note 12 for the text of article I.

88. *See supra* note 64.

89. Section 244(c)(2) is essentially negative in character because it can only prevent the suspension of deportation from taking effect. *See supra* notes 2 & 3. As part of a duly enacted statute, it only gives Congress a limited, negative power. Section 244(c)(2) cannot allow Congress to grant suspensions of deportation to aliens whom the Attorney General has decided are not eligible for such relief.

90. *Chadha*, 103 S. Ct. at 2878. The Court stated that even though the veto provisions are part of duly enacted statutes, passed by both houses and signed by the President, it cannot be inferred that the provisions are valid. *Id.* at 2779 n.13. The Court then proceeded to cite numerous statements by Presidents challenging the constitutionality of the legislative veto. *Id.* The mere fact that a President signed a law which contained a veto provision does not mean that he supported the provision; nor does the rejection of a statute containing a veto provision signify a rejection of the veto provision. The fact remains that both Congress and the President frequently compromise and accept provisions they do not like in order to have other, favored provisions enacted into law.

91. *Chadha*, 103 S. Ct. at 2784, 2785.

92. *Id.* 103 S. Ct. at 2807 (White, J., dissenting); *see also supra* notes 2 & 3.

93. *Chadha*, 103 S. Ct. at 2807 (White, J. dissenting); *see generally* 2 GORDON & ROSENFIELD, *supra* note 1, § 7.9d.

94. *See supra* notes 2 & 3.

95. The essence of the Court's reasoning was that section 244(c)(2) supplanted the prior use of private bills. Because private bills required passage by a majority of both houses and presentment, so must section 244(c)(2). *See supra* note 59.

bills. Displacement requires all of section 244 of the Act. Section 244(c)(2) only defines and limits the power given to the Attorney General.[96] Congress never intended to give the Attorney General plenary power to suspend the deportation of aliens.[97] The result of the Court's holding in striking down section 244(c)(2) is to leave the Attorney General with sole authority over suspension of deportation proceedings.[98] This is not only inconsistent with the obvious intention of Congress,[99] but it also grants the Attorney General the very power it denies to Congress.[100]

Finally, the Court maintained that the congressional action under section 244(c)(2) was legislative because it effected a determination of policy.[101] This conclusion is inconsistent with the Court's earlier assessment that the same decision displaces private bills.[102] The action cannot be at once a private bill substitute, affecting the rights of a minute class of persons, and also be a general determination of policy.[103] Even if the decision is, at its most attenuated level, a determination of policy, the majority has again failed to note the resulting paradox. The Court has sanctioned legislative determinations of policy in the executive branch, but has denied the same right to Congress, the branch of

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96. *See supra* note 3.

97. The legislative history of section 244(c)(2) demonstrates that Congress wanted to maintain control over the suspension of deportation process. *See* INS v. Chadha, 103 S. Ct. 2764, 2804-06 (1983) (White, J., dissenting). Congress refused to grant final authority to the Attorney General on several occasions, despite many requests for such authority. *Id.* at 2805-06.

98. The Court of Appeals for the Ninth Circuit stated that the effect of its decision was to make the decision of the Attorney General final. Chadha v. INS, 634 F.2d 408, 436 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983). That section 244(c)(2) is meaningless without section 244 becomes even clearer from this perspective. While the Attorney General will continue to suspend deportations without section 244(c)(2), Congress's invovlement in that decision has been removed. This lends further credence to Justice Rehnquist's dissent and undermines the majority's position that this statute was severable on such a fine level. *See supra* note 29.

99. *See supra* note 97; *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 602 (1952) (Frankfurter, J., concurring) ("Congress acted with full consciousness of what it was doing and in the light of much recent history . . . its express wishes should be followed.")

100. Justice White recognized this paradox in his dissent. INS v. Chadha, 103 S. Ct. 2764, 2803 (1983) (White, J., dissenting).

101. *Id.* at 2786.

102. *See supra* note 95.

103. Except in the most obvious sense that denials of suspension of deportation are reflective of a national policy regarding immigration, this statement is correct. For a discussion of current United States policy on immigration see *Symposium, Strangers to the Constitution: Immigrants in American Law*, 44 U. PITT. L. REV. 163 (1983). *See also* Comment, *Refuge in America: What Burden of Proof?* 17 J. MAR. L. REV. 81 (1984).

government vested with "all legislative power" by the Framers in article I.[104]

The failure of the Court to see this paradox illustrates the narrow perspective the majority adopted in its reasoning.[105] The Court unduly limited its focus of this constitutional question by only examining and considering the historical aspects of the problem.[106] By concentrating on the Records of the Convention and the *Federalist*,[107] the Court seems to have fixed its understanding of the separation of powers doctrine in the late eighteenth century.[108] Nowhere does the Court examine any subsequent developments to the Constitutional Convention, even though many of these developments have previously been recognized by the Court.[109] The Court failed to note the contemporaneous exposition of the Constitution by the Framers when

104. This is perhaps the most disconcerting aspect of the majority's opinion. Not only has the Court denied Congress the right to monitor the agencies through the use of the legislative veto, but it has also further insulated the executive agencies' role as a lawmaker through administrative rules and regulations. The Court stated that Congress is armed with "abundant means to oversee and control its administrative creatures." INS v. Chadha, 103 S. Ct. 2764, 2786 n.19 (1983). The increasing reliance on the legislative veto, however, tends to suggest that Congress' stockpile of weapons may not be as efficient or abundant as the Court suggests.

Moreover, the Court's reluctance to admit that executive and independent agencies make law, as well as execute it, only clouds the issue. The Court states that "some administrative agency action—rulemaking, for example—may resemble 'lawmaking.' " *Id.* at 2785 n.16. In his dissent, Justice White flatly states, without equivocation, that agency rules "have the force of law." *Id.* at 2802 (White, J., dissenting). At the same time that the Court sought to prove that the congressional action under section 244(c)(2) is legislative, it asserted that the same action by the Attorney General is executive. *Id.* at 2785 n.16. Such casual definitions serve only to make such distinctions more blurred rather than more clear, and undermine the Court's reasoning rather than support it. *See supra* note 11.

105. The Court properly explained the concerns of the Framers, but then failed to demonstrate how the legislative veto necessarily contradicts them. The Court did not demonstrate that section 244(c)(2), or for that matter, any legislative veto, resulted in oppressive laws. Nor did it show that the President's independence and integrity were diminished. Nor did the Court suggest that the veto provision did not adequately represent a national view. Nowhere did the Court demonstrate that this veto caused *any* of the harm that the Framers feared and anticipated when they established the government of the United States.

106. *See supra* notes 82 & 83 and accompanying text.

107. There are definite advantages in examining the Records of the Constitutional Convention and the *Federalist*. Examining the Framers' intentions is an appropriate starting point in analyzing a separation of powers issue. But it does not, it cannot, resolve the constitutional issue of the legislative veto because the historical authorities, as prophetic as they may be, do not reflect the present realities and fundamental differences of modern government and its institutions. Thus, an historical view must be, by definition, shortsighted and distorted.

108. *See supra* notes 81 & 107.

109. *See infra* notes 110-16 and accompanying text.

many of them served in the first Congress,[110] its own construction of the separation of powers doctrine as a changing, fluid doctrine,[111] the legislative history of section 244(c)(2),[112] the emergence of the legislative veto as an effective tool of oversight,[113] the growing dominance of the executive branch,[114] and

110. The Supreme Court has "repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." Hampton & Co. v. United States, 276 U.S. 394, 412 (1928); Myers v. United States, 272 U.S. 52, 175 (1926). *See also* Powell v. McCormack, 395 U.S. 486 (1969) (first Congress' construction is the one adopted). Justice White concluded that the actions of the first Congress illustrate that article I was not "envisioned as a straightjacket" on Congress. INS v. Chadha, 103 S. Ct. 2764, 2800 n.18 (1983). In fact, Congress did not view a "precursor of the modern day legislative veto" as unconstitutional. *Id.* at 2801 n.18.

111. *See supra* notes 72, 82 & 83.

112. *See supra* note 97.

113. The legislative veto is a twentieth century invention that has become increasingly popular as other oversight devices have become less effective. Watson, *supra* note 6, at 1046-48. The increase in the size and activism of the federal government has required Congress to delegate more and more authority to the executive branch with less and less specificity. Hampton & Co. v. United States, 276 U.S. 394, 407 (1928) ("Congress may feel itself unable to conveniently determine exactly when its exercise of the legislative power should become effective."). The legislative veto, then, struck a balance between delegating power and reserving control. The legislative veto arose in direct response to the growing power of the executive branch and should be viewed as an attempt to reset the balance of powers rather than an attempt to augment legislative powers at the expense of the executive.

114. The Court's opinion does not reflect the rise of the executive branch to its current state of dominance. The Framers could not have imagined the increase in the President's authority in the twentieth century and particularly in the post World War II era. *See* C. ROSSITER, AMERICAN PRESIDENCY 28 (2d ed. 1960). What is most interesting is that this increase power does not have its source in any additional constitutional powers. The Constitution has remained the same; the presidency, however, through tradition and expansion, has changed significantly. The increased power of the presidency has developed from extraconstitutional sources, most notably, from the rise of political parties and the executive's access to the media, especially television. The balance of power today is markedly different from that of 1787. *See generally* C. ROSSITER, *supra*, at 27-29.

It is not coincidental that the legislative veto was born during the years of executive activism in the Roosevelt Administration. Nor is it surprising that the legislative veto would regain popularity during the late sixties and early seventies when presidential dominance was again at a zenith. W. OLESZEK, *supra* note 5, at 1-23, 201-05; Martin, *supra* note 6, at 253. As Justice Jackson noted:

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. . . . Moreover, rise of the party system has made a signif-

the rise of the modern bureaucratic state.[115] These developments, as well as others,[116] clearly illustrate that the institutions of government have significantly changed since the inception of this country, and that the balance of power between the branches of government has been fundamentally altered. Yet the Supreme Court overlooked all of these developments and instead concentrated on the fears and concerns of the Founding Fathers.[117] By allowing the Framers to "rule from the grave,"[118] the Court neglected the present realities within the governmen-

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> icant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. . . . [H]e often may win, as a political leader, what he cannot command under the Constitution.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring). Thus, the modern executive has fundamentally altered the separation of powers between the three branches.

115. Another example of a significant post-Convention development has been the rise of the bureaucratic state and the independent agencies. This development has naturally corresponded with the general increase in federal power. It has given the executive a powerful policy initiating and implementing weapon. F. ROURKE, *supra* note 6, 119-54. All of this increased power has resulted in a corresponding loss of power in Congress, which has been forced to delegate more and more authority to the executive branch in order to run the complex network of laws, programs, and agencies of modern government. F. ROURKE, *supra* note 6, at 119-32. *See also* J. GROSSMAN & R. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICYMAKING 982 (2d ed. 1980) (rise of administrative state "has only exacerbated" tendency of executive dominance); *but see* THE FEDERALIST NO. 71, at 433 (A. Hamilton) ("The tendency of the legislative authority to absorb every other has been fully displayed and illustrated throughout history. In governments purely republican, this tendency is almost irresistable.")

116. The rise of modern political parties has also contributed to the increase in presidential power. *See supra* note 115. The present realities of modern government have fundamentally altered the historical notion of separation of powers and have called into question the relevancy of the concerns of the Framers. Levi, *supra* note 47, at 372. "It may be that the expansion of governmental activity into wide areas of the nation's life, and the corresponding growth of the federal bureaucracy, have caused an irreversible change in our constitutional system that requires new modes of understanding." *Id.*.

117. This is perhaps the fundamental difference between the majority opinion and Justice White's dissent. The majority is satisfied that an exposition of the Framers' plan for government, and the resulting, apparent conflict with that plan the legislative veto causes are sufficient to resolve the issue of the constitutionality of section 244(c)(2). INS v. Chada, 103 S. Ct. 2764, 2781 (1983). Justice White does not believe that these two factors are sufficient to answer the issue. Instead, he examined the history of section 244(c)(2), the history of legislative vetoes, the way that the Court has resolved similar issues, and the practical realities of the times. *Id.* at 2804-08. It was not necessary that the two approaches would lead to different conclusions; yet Justice White, unlike the majority, was unwilling to decide the constitutionality of the legislative veto without indicating the relevance of the separation of powers doctrine on current, political institutions.

118. The phrase is from Miller & Knapp, *supra* note 67, at 368. The authors wrote, "the Founding Fathers have been buried; they cannot and, indeed, should not rule us from their graves."

tal institutions and denigrated the notion of a living Constitution.[119]

The breadth of the Court's decision, calling into question the constitutionality of similar provisions in over 200 statutes, is overwhelming. Given the Court's reasoning, it is unlikely that any legislative veto can survive.[120] Requiring presentment to the President, an act inconsistent with the legislative veto, will prove to be an impossible standard to meet. When Congress chooses to delegate authority to an executive agency, it will now be faced with two undesirable alternatives. Congress can delegate power generally, and risk the chance that the agency will become unwieldly or stray from its focused path, or enact statutes with greater specificity, and risk the chance that the agency might become weakened or ineffective because of statutory restrictions. Congress will now have to utilize other methods of oversight and control with greater efficacy and vigor in order to assure the accountability of the executive and independent agencies. Congress's dilemma is imminent because, after *Immigration and Naturalization Services v. Chadha*,[121] the legislative veto, once the most effective means of directly controlling executive agencies while still allowing them substantial freedom, is certain to vanish as an effective congressional tool.

Steven Shobat

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119. As stated in Buckley v. Valeo, 424 U.S. 1, 121 (1975) (per curiam):

> The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

120. The Court's emphasis on bicameralism left open the issue of whether a veto provision based on a concurrent resolution would also be struck down as unconstitutional. The requirement of presentment to the President indicated, however, that even a legislative veto provision based on a concurrent resolution would prove constitutionally invalid. Shortly after the *Chadha* decision, the Court summarily affirmed two lower court holdings declaring the legislative veto unconstitutional even though one of them contained a concurrent resolution, Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (per curiam), *aff'd mem.*, 103 S. Ct. 3556 (1983), and the other did not contain a severability clause, Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem.*, 103 S. Ct. 3556 (1983). Thus, the Supreme Court unequivocally declared the legislative veto, in any form, unconstitutional. The Congress and the President are not so convinced. Both have continued to enact into law statutes that contain legislative veto provisions. *See* Tolchin, *In Spite of the Court, the Legislative Veto Lives On*, N.Y. Times, Dec. 21, 1983 at 14. A political resolution may well be needed before the constitutional question is put finally to rest. *See* Smith & Struve, *Aftershock of the Fall of the Legislative Veto*, 69 A.B.A.J. 1258 (1983).

121. 103 S. Ct. 2764 (1983).