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Deconstructing the Legislative Veto*

Girardeau A. Spann**

On June 23, 1983, the Supreme Court invalidated more federal statutes in a single day than it had in all of its prior history. In so doing, the Court also dramatically altered the allocation of governmental power between Congress and the President. At least that is how the press viewed the significance of *INS v. Chadha*,¹ the decision invalidating the legislative veto device on which Congress had come to rely as an expedient method of controlling the exercise of executive discretion. Whether or not the hyperbole proves to have been warranted, the decision does possess a certain intrigue—it is not possible to tell whether the case is right or wrong.

Chadha illustrates, in a striking manner, that legal doctrine is indeterminate. This is true whether the term "doctrine" is defined narrowly to include mere legal rules or is defined broadly to include the social policies served by the rules as well. After all available constitutional principles have been brought to bear upon the problem, it is still not possible to ascertain in a satisfactory doctrinal manner whether the legislative veto is constitutional or unconstitutional. Moreover, such indeterminacy characterizes every effort made to arrive at a principled resolution of every legal problem. In fact, the closer we look at any legal problem the more apparent it becomes that our analytical skills have been outdistanced by our ability to perceive unavoidable contradictions and inconsistencies. Far from being a cause for alarm, however, proper appreciation of our analytical inadequacies may stimulate innovative insights that permit us to confront legal problems on more satisfying conceptual levels. Accordingly, the true significance of

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1. 103 S. Ct. 2764 (1983).

cases such as *Chadha* may lie in their ultimate propensity to launch us into new analytical paradigms.

Part I of this Article undertakes a doctrinal analysis of the constitutional issues raised by the legislative veto in order to demonstrate that doctrine is incapable of resolving those issues. The legal arguments that can be made both for and against the constitutionality of the veto are equally flawed, and there is no principled basis for choosing among them. Moreover, there is a self-defeating circularity inherent in constitutional analysis of the legislative veto that renders any resolution of the constitutional issues logically unacceptable.

Part II suggests that the indeterminacy present in the legislative veto context can be extrapolated to all legal analysis because of fatal defects in the concept of principled decision-making itself. All principles can be "deconstructed," or shown to be equally supportive of contradictory outcomes. Part II then goes on to suggest that appreciation rather than suppression of inevitable indeterminacy may ultimately permit us to understand our legal and social problems in qualitatively different ways that overcome the apparent contradictions inhabiting our present analytical paradigms.

I. DOCTRINAL ANALYSIS

Under the traditional view of the legal system, disputes are resolved in accordance with generally accepted principles of law that constrain the discretion of presiding judges and generate particular results. Although some decisions may be questionable, or even wrong, the defects in those decisions stem from the failure to ascertain the manner in which the governing principles and policies properly apply. Once they are correctly understood, however, the principles illuminate the path to the correct result. Moreover, adherence to this principled mode of decisionmaking is what ensures effective operation of the judicial process by securing for judicial decisions a degree of public acceptability that they could not command if they were merely products of the judges' personal predilections.² This traditional system, however, presupposes the existence of a coherent, determinate set of doctrinal principles; but there is reason to believe that no such set of principles in fact exists. The Supreme Court's decision in *INS v. Chadha*,³ invalidating the legislative

2. The traditional view of the legal system is elaborated more fully in Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 588-92 (1983).

3. 103 S. Ct. 2764 (1983).

veto on constitutional grounds, provides an example of a situation in which doctrine is unable to provide a satisfactory resolution of the pertinent legal issues.

A. THE DECISION

1. Context

A legislative veto is an action—generally the passage of a resolution—taken by Congress, one House, a committee, or an individual member of Congress that invalidates an act of the executive branch through something less than the full legislative process.⁴ In *Chadha*, the Attorney General, acting pursu-

4. See S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 95-96 (1979); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 399-401 (10th ed. 1980); G. ROBINSON, E. GELHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 78-80 (1980) [hereinafter cited as THE ADMINISTRATIVE PROCESS]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 161-63 (1978).

Several articles have been written about the constitutionality and policy desirability of the legislative veto, many of which are cited in Justice White's dissenting opinion in *Chadha*. See 103 S. Ct. at 2797 n.12 (White, J., dissenting).

Among the articles generally favoring the legislative veto, including those cited by Justice White, are Dry, *The Congressional Veto and Constitutional Separation of Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 195 (J. Bessette & J. Tulis eds. 1981); Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064 (1981); Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277 (1975); Rodino, *Congressional Review of Executive Action*, 5 SETON HALL 489 (1974); Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U. L. REV. 1031 (1955); Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593 (1976); Comment, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U.L. REV. 1018 (1977); Comment, *Legislative Control Over Administrative Action: The Laying System*, 10 J. MAR. J. PRAC. & PROC. 515 (1977); Comment, *Legislative Review of Administrative Action: Is the Cure Worse than the Illness?*, 1978 S. ILL. U.L.J. 579; Comment, *Congressional Oversight of Administrative Agencies: The Legislative Veto*, 31 U. KAN. L. REV. 131 (1982); Comment, *The Constitutionality of the Legislative Veto*, 23 WM. & MARY L. REV. 123 (1981).

Among the books and articles generally disfavoring the legislative veto, including those cited by Justice White, are J. BOLTON, THE LEGISLATIVE VETO: UNSEPARATING THE POWERS (1977); Bell with Ostrow, *Congress—The Ultimate Source of Regulatory Power*, 68 A.B.A. J. 1088 (1982); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?* 56 N.C.L. REV. 423 (1978); FitzGer-

ant to his statutory authority as head of the Immigration and Naturalization Service, invoked a hardship provision of the Immigration and Nationality Act to permit an otherwise deportable alien to remain in the United States. The House of Representatives later overruled that hardship determination through passage of a resolution, as it was authorized to do under a one-House veto provision of the same statute.⁵ The

ald, *Congressional Oversight or Congressional Foresight: Guidelines from the Founding Fathers*, 28 AD. L. REV. 429 (1976); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953); Larsen, *Legislative Delegation and Oversight: A Promising Approach from Oregon*, 14 WILLAMETTE L.J. 1 (1977); Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953); Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG., Nov.-Dec. 1979, at 19; Taylor, *Legislative Vetoes and the Massachusetts Separation of Powers Doctrine*, 13 SUFFOLK U.L. REV. 1 (1979); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285; Note, *The Legislative Veto in the Arms Export Control Act of 1976*, 9 LAW & POL'Y INT'L BUS. 1029 (1977); Note, *Legislative Oversight and the South Carolina Experience*, 34 S.C.L. REV. 595 (1982); Comment, *Limiting the Legislative Veto: Chadha v. Immigration & Naturalization Service*, 81 COLUM. L. REV. 1721 (1981).

Articles about the legislative veto that cannot fairly be categorized as favoring or disfavoring the device include Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto,"* 32 AD. L. REV. 667 (1980); Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415 (1976); Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

5. 103 S. Ct. at 2771-72. More specifically, Mr. Chadha, an East Indian born in Kenya who holds a British passport, was admitted to the United States in 1966 pursuant to a nonimmigrant student visa. *Id.* at 2770. Chadha's student visa expired in 1972, after he had received a bachelor's degree and a master's degree. *Chadha v. INS*, 634 F.2d 408, 411 (9th Cir. 1980). The expiration of this student visa made Chadha a deportable alien, and in 1973, the Immigration and Naturalization Service commenced deportation proceedings against him, pursuant to § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (1982). 103 S. Ct. at 2770.

Although Chadha was technically deportable, he applied to the Attorney General for a suspension of his deportation on the grounds of extreme hardship, *id.*, arguing that, because of his East Indian racial derivation, it would be extremely difficult, if not impossible, for him to return to Kenya or to go to Great Britain. 634 F.2d at 408. On June 25, 1974, after a hearing, the Attorney General suspended Chadha's deportation on the grounds of extreme hardship, pursuant to § 244(c)(1) of the Act, 8 U.S.C. § 1254(c)(1). 103 S. Ct. at 2770. The Attorney General also notified Congress of the suspension, as required under

House of Representatives was, therefore, able to invalidate an otherwise legally effective act of the executive branch without the concurrence of either the Senate or the President. The legislative veto exercised in *Chadha* was used to invalidate an administrative agency adjudication of the rights of a single individual, but Congress has also authorized the use of legislative vetoes to invalidate agency rules of general applicability.⁶ Congress has also sought to apply the veto procedure to direct presidential actions, such as arms sales and commitments of American troops to foreign countries.⁷

The legislative veto was first introduced in 1932 as a device for maintaining congressional control of executive actions pursuant to broad statutory delegations of authority to the Executive. Broad statutory delegations accompanied the increase in federal regulatory activity that began during the New Deal, when Congress chose to rely on specialized administrative

the same provision of the Act in order to give Congress an opportunity to review the suspension for possible legislative reversal through a resolution passed by either House in accordance with § 244(c)(2) of the Act, 8 U.S.C. § 1254(c)(2). *Id.* at 2770-71.

Neither House of Congress acted on the suspension of Chadha's deportation for a year and a half. Then, on December 19, 1975, shortly before the end of the statutory time period during which Congress could act in Chadha's case, the House of Representatives passed a resolution overruling the suspension of Chadha's deportation. Because of the rush to finish its business before the end of the session, the resolution had not been printed as resolutions typically are. Rather, it was simply read orally on the floor of the House of Representatives. The resolution, which was approximately fifty words long, gave no reason for overruling the suspension, nor did the floor statement introducing and explaining the resolution. The floor statement, made by the Chairperson of the Immigration Subcommittee of the House Judiciary Committee, merely recited that after reviewing 340 cases in which the Attorney General had suspended deportation, the Subcommittee had concluded that the six aliens named in the resolutions did not satisfy the statutory hardship standard. Chadha was one of the six. The resolution was passed without debate by voice vote. *Id.* at 2771-72; H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975). Ironically, the Immigration Subcommittee had also singled out six other aliens for suspension in an expedited manner one year earlier, after reviewing the hundreds of cases presented to the Subcommittee that year. 103 S. Ct. at 2771-72 n.3.

The Immigration and Naturalization Service ordered Chadha deported in accordance with the House resolution. *Id.* at 2772. Chadha appealed that order to the United States Court of Appeals for the Ninth Circuit, which held the one-House veto exercised in Chadha's case to be unconstitutional on separation-of-powers grounds. 634 F.2d 408, 429-36. The Supreme Court then affirmed that ruling in the decision that is the focus of the present article. 103 S. Ct. at 2772.

6. See, for example, the legislative veto provisions at issue in the *FERC* and *Consumers Union* cases discussed *infra* note 14.

7. See, e.g., Arms Export Control Act, § 211, 22 U.S.C. § 2776(b) (1982), and War Powers Resolution, § 5, 50 U.S.C. § 1544(c) (1982). A list of fifty-six statutes containing legislative veto provisions in effect at the time the *Chadha* case was decided is reprinted as an appendix to Justice White's dissent in *Chadha*. See 103 S. Ct. at 2811-16 (White, J., dissenting).

agencies to implement new regulatory schemes dependent upon technical expertise that Congress itself did not possess. Moreover, because broad delegations could be phrased in general terms, susceptible to varying interpretations, their use avoided political stalemates that might have precluded passage of more precise enabling legislation. The legislative veto made these broad statutory delegations more palatable to Congress than they otherwise would have been, permitting objectionable exercises of executive discretion to be efficiently overruled without the inconvenience and political uncertainty inherent in the full legislative process. Accordingly, the popularity of the legislative veto increased over time as congressional use of broad delegations became more frequent and as criticism of executive exercises of discretion became more vocal.⁸ In the fifty years after its inception, the legislative veto was inserted in nearly 200 statutes,⁹ and although most expired by their own terms, more than fifty veto provisions remained in effect on the day that *Chadha* was decided.¹⁰ In fact, congressional enchantment with the veto device has grown so much that bills subjecting all administrative agency regulations to a legislative veto have been introduced and seriously considered in each of the last three Congresses.¹¹

While proponents of the legislative veto argued that it provided an innovative solution to the problem of overseeing a large federal bureaucracy,¹² opponents of the veto argued that it was inefficient and merely provided well-financed special interest groups an opportunity to lobby congressional committees for reversal on political grounds of decisions they had lost on the merits before administrative agencies.¹³ Each side marshalled constitutional arguments to fortify its position, and, after several false starts, the Supreme Court was finally cajoled

8. See 103 S. Ct. at 2792-96 (White, J., dissenting); see generally S. BREYER & R. STEWART, *supra* note 4, at 95-102; G. GUNTHER, *supra* note 4, at 399; L. TRIBE, *supra* note 4, at 161-63; cf. THE ADMINISTRATIVE PROCESS, *supra* note 4, at 45, 78-79.

9. See 103 S. Ct. at 2793 (White, J., dissenting); see also Miller & Knapp, *supra* note 4, at 371.

10. See *supra* note 7.

11. See, for example, H.R. 1776, introduced by Congressman Levitas in each of the 96th, 97th, and 98th Congresses. H.R. 1776, 96th Cong., 1st Sess. (1979); H.R. 1776, 97th Cong., 1st Sess. (1981); H.R. 1776, 98th Cong., 1st Sess. (1983).

12. See S. BREYER & R. STEWART, *supra* note 4, at 97-102; G. GUNTHER, *supra* note 4, at 399-401; THE ADMINISTRATIVE PROCESS, *supra* note 4, at 78-80, 851-55.

13. See *id.*

into considering the merits of the constitutional issues.¹⁴

2. The Opinions

In *Chadha*, the Supreme Court held the one-House veto exercised in that case to be unconstitutional. Six members of the Court signed an opinion written by Chief Justice Burger, which rested on broad separation of powers grounds that ap-

14. *Chadha* was not the first case in which the Supreme Court was given the opportunity to rule on the constitutionality of the legislative veto. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court confronted the constitutionality of the one-House veto provision in the Federal Elections Campaign Act, but chose not to address the issue after disposing of the case on other constitutional grounds. *Id.* at 140 n.176. Justice White, however, wrote a separate opinion expressing the view that the legislative veto was constitutional. *Id.* at 284-86 (White, J., concurring in part and dissenting in part). *Buckley* involved rulemaking rather than adjudication, which was involved in *Chadha*. A year later, in *Clark v. Kimmitt*, 431 U.S. 950, *aff'g* *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (en banc) (per curiam), the Supreme Court again declined to rule on the constitutionality of the veto provision of the Campaign Act, affirming a lower court decision that avoided the issue on ripeness grounds. *See* 559 F.2d at 647-50. A dissenting opinion written by Judge MacKinnon when the case was before the court of appeals argued that the veto provision was unconstitutional, expressly disagreeing with Justice White's reasoning in *Buckley*. 559 F.2d at 685-90 (MacKinnon, J., dissenting). The following year, the Supreme Court denied certiorari in *Atkins v. United States*, 434 U.S. 1009 (1978), thereby permitting the decision of a divided Court of Claims to remain in effect. The Court of Claims had upheld the one-House veto provision of the Federal Salary Act of 1967, after a challenge by federal judges who had been denied a pay raise as a result of a veto exercised under the Act. 556 F.2d 1028, 1058-71 (Ct. Cl. 1977) (per curiam), *cert. denied*, 434 U.S. 1009 (1978). The same year, the Court also denied certiorari in a Fourth Circuit case raising the constitutionality of the same veto provision. *See* *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

In *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), a court of appeals panel in the District of Columbia Circuit held the one-House veto provision of the Natural Gas Policy Act unconstitutional after the House of Representatives vetoed natural gas pricing regulations issued by the Federal Energy Regulatory Commission. In *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam), *aff'd mem.*, 103 S. Ct. 3556 (1983), both Houses of Congress vetoed a regulation promulgated by the Federal Trade Commission to govern certain warranty and disclosure practices in connection with the sale of used cars to consumers. The full Court of Appeals for the District of Columbia Circuit held the two-House veto provision of the FTC Improvements Act of 1980 unconstitutional, relying on the broad reasoning of the *FERC* case. Both cases were pending before the Supreme Court when that Court decided *Chadha*, and both were summarily affirmed by the Supreme Court shortly after issuance of the *Chadha* decision. *Process Gas Consumers Group v. Consumers Energy Council*, 103 S. Ct. 3556 (1983); *United States Senate v. FTC*, 103 S. Ct. 3556 (1983).

Ironically, *Chadha's* marriage to an American citizen, which made him eligible to remain in the United States, may have eliminated the need for a ruling in the *Chadha* case. In this sense, the *Chadha* decision was advisory in nature. Neither the Ninth Circuit, 634 F.2d at 417 n.6, nor the Supreme Court, 103 S. Ct. 2776-77, however, viewed *Chadha's* marriage as mooted his case.

pear to invalidate all varieties of legislative vetoes.¹⁵ Justice Powell concurred in the judgment on narrower separation of powers grounds applicable to the *Chadha* case itself.¹⁶ Justice White dissented, relying on a variety of theories that he viewed as sufficient to establish the constitutionality of the legislative veto.¹⁷ Justice Rehnquist also dissented, concluding that, if the veto provision was invalid, the entire statute authorizing suspension of the plaintiff's deportation was invalid because the veto provision was not severable from the rest of the statute.¹⁸ Although Justice Rehnquist did not discuss the constitutionality of the veto provision itself, there is reason to believe that he too might view it as unconstitutional.¹⁹

Chief Justice Burger's majority opinion held the legislative veto exercised in *Chadha* to be unconstitutional on broad grounds that extend not only to the *Chadha* case itself, but apparently to all legislative vetoes.²⁰ The majority reasoned that the exercise of a legislative veto is unconstitutional because it constitutes a "law" that is not "enacted" in accordance with the procedures specified in article I of the Constitution.²¹ Because those procedures were designed to ensure that the separate constituencies represented by the President and each House of Congress had appropriate input into legislative policy decisions, failure to comply with the prescribed procedures in making such decisions violated the separation of powers principles implicit in the Constitution.²²

More specifically, the bicameralism provision of article I, sections 1 and 7, requires all laws to be passed by both Houses of Congress, thereby ensuring that the laws are acceptable both to the state interests represented in the Senate and to the local interests represented in the House of Representatives.²³ In addition, the presentment provisions of article I, section 7,

15. See 103 S. Ct. at 2780-88 (1983).

16. *Id.* at 2788-92 (Powell, J., concurring).

17. *Id.* at 2792-811 (White, J., dissenting).

18. *Id.* at 2816-17 (Rehnquist, J., dissenting).

19. See *infra* text accompanying notes 47-48.

20. See 103 S. Ct. at 2788 (Powell, J., concurring); *id.* at 2792 (White, J., dissenting); see also *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (*en banc*) (per curiam), *aff'd*, 103 S. Ct. 3556 (1983) (invalidating two-House veto with respect to rulemaking); *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983) (invalidating one-House veto with respect to rulemaking).

21. 103 S. Ct. at 2784-87.

22. *Id.* The separate-constituency theory was articulated most clearly by the court of appeals in the *FERC* case. See 673 F.2d at 464-65.

23. 103 S. Ct. at 2783-84.

clauses 2 and 3, state that all laws or actions requiring the concurrence of both Houses shall be presented to the President, who is empowered to veto them, thereby precluding their effectiveness unless they are repassed by two-thirds majorities in each House.²⁴ The presentment requirement ensures that the laws are acceptable to, or least influenced by, the national interests represented by the President, as well as the interests represented in Congress.²⁵

The majority opinion rejected the suggestion that a legislative veto is something other than "legislation," and therefore not subject to the article I enactment procedures, by emphasizing that the legislative veto, like traditional forms of legislation, alters the legal rights, duties, and relations of people outside the legislative branch of government, and by stressing that a legislative veto constitutes a policy choice of the type normally embodied in legislation.²⁶ By viewing a legislative veto as an inchoate "law," the majority opinion implies that all legislative vetoes would violate the presentment clauses of the Constitution, and that anything less than a two-House veto would violate the bicameralism clause as well.²⁷

Justice Powell, concurring in the result but not in the majority opinion, criticized the majority for issuing a broad ruling that appeared to invalidate all legislative vetoes, arguing that the atypical *Chadha* dispute should instead have been resolved on narrower grounds.²⁸ In his view, the legislative veto exercised in *Chadha* was an unconstitutional usurpation of judicial power: by overruling the Attorney General's application of the statutory hardship criteria to the facts of the plaintiff's case, the House of Representatives had, in essence, engaged in judicial review of the Attorney General's actions.²⁹ Moreover, such legislative determination of the scope and meaning of the legislature's own enactments undermined the important constitutional separation of law-making and law-applying functions in a way that posed the precise danger that the Framers sought to avoid. It subjected individual rights to the unchecked actions of legislative bodies—who are accountable only to the whims of shifting majorities—without the procedural safe-

24. U.S. CONST., art. I, § 7, cl. 2, 3.

25. 103 S. Ct. at 2782-83. The presentment clause was also designed to help prevent congressional abrogation of presidential power. *Id.* at 2782.

26. *Id.* at 2784-88.

27. See *supra* note 20 and accompanying text.

28. 103 S. Ct. at 2788-89. (Powell, J., concurring).

29. *Id.* at 2789-92.

guards available in a court which insulate those rights from abrogation by the majority.³⁰ Although Justice Powell's disposition would apparently apply to all types of legislative vetoes exercised in an adjudicatory context, his opinion purports not to address the constitutionality of those vetoes that might be exercised with respect to more general executive actions having a less immediate impact on identifiable individuals.³¹

Justice White's dissent also criticized the apparent breadth of the majority opinion, noting that it did not distinguish between rulemaking and adjudication or executive and independent agency actions.³² Unlike Justice Powell, however, Justice White believed that the constitutionality of legislative vetoes was sustainable under a variety of theories.³³ After terming the veto device "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking,"³⁴ Justice White offered four basic arguments favoring the validity of legislative vetoes.

First, because a legislative veto does not create a new law, but merely negates executive action, it is not a legislative act subject to the article I bicameralism and presentment procedures found by the majority to have been violated. A legislative veto is no more a law subject to those procedures than is a presidential veto.³⁵

Second, because the Court has upheld broad congressional delegations of legislative power to administrative agencies, and even to private parties, who act without adhering to the procedures specified in article I, it follows that Congress may also make narrower delegations to administrative agencies subject to legislative vetoes that are exercised without adhering to the article I procedures.³⁶ Stated more succinctly, if administrative agencies can make law independent of the article I procedures,

30. *Id.*

31. *Id.* at 2788-89, 2792.

32. *Id.* at 2792-93, 2796 (White, J., dissenting).

33. Although the theory for upholding the constitutionality of the legislative veto articulated by Justice White in *Buckley v. Valeo*, 424 U.S. 1, 284-86 (1976) (White, J., concurring in part and dissenting in part), might have been limited to rulemaking, which was all that was involved in *Buckley*, Justice White's position in *Chadha* appears to extend to rulemaking and adjudication contexts.

34. 103 S. Ct. at 2795 (White, J., dissenting).

35. *Id.* at 2799-801.

36. *Id.* at 2801-04.

so can a House of Congress.³⁷

Third, as a functional matter, separation of powers principles are honored rather than abrogated under the legislative veto procedure because the status quo cannot be changed without the concurrence of the Executive and both Houses of Congress. The status quo—the plaintiff's deportability—cannot be changed unless the Attorney General suspends deportation, which operates as a proposal for legislation, and both Houses approve of that proposal, as evidenced by their failure to veto the suspension.³⁸ This construct may well uphold the one-House veto only at the expense of invalidating the two-House veto. A two-House veto would permit the disapproval of one House, evidenced by its veto of the suspension proposal, to be negated by the approval of the other House, evidenced by its failure to veto the suspension proposal, thereby permitting the status quo to be changed without the concurrence of the vetoing House.³⁹ Recognizing this apparent anomaly, Justice White concludes that the two-House veto is simply more suspect than the one-House veto.⁴⁰ If the two-House veto must be invalidated in order to save the one-House veto, Justice White at times appears willing to make the sacrifice.⁴¹

Fourth, the legislative veto usurps neither executive nor judicial functions, because the sphere of executive autonomy is statutorily limited to applying laws in circumstances where no veto has been exercised, and Congress has precluded judicial review of those matters reserved for its own judgment under the legislative veto scheme.⁴²

Justice White expressly limits his defense to one- and perhaps two-House vetoes, disclaiming any intent to address committee vetoes.⁴³ Finally, while acknowledging the breadth of

37. This argument was stated more directly by Justice White in his dissent from the Court's summary affirmance of the *FERC* and *Consumers Union* cases, where independent agency rulemaking was involved. See *Process Gas Consumers Group v. Consumers Energy Council*, 103 S. Ct. 3556, 3557 (1983) (White, J., dissenting); *United States Senate v. FTC*, 103 S. Ct. 3556, 3557 (1983) (White, J., dissenting).

38. 103 S. Ct. at 2804-08 (White, J., dissenting).

39. *Id.* at 2807-08.

40. *Id.* at 2808.

41. *Id.* The fact that Justice White dissented from the Court's invalidation of the two-House veto in the *Consumers Union* case indicates that he is not really prepared to hold the two-House veto unconstitutional under the theory that the Attorney General's action is a proposal for legislation. See 103 S. Ct. 3556, 3557 (1983) (White, J., dissenting). For further discussion, see *infra* text accompanying notes 151-57.

42. 103 S. Ct. at 2808-10 (White, J., dissenting).

43. *Id.* at 2798 n.15. Justice White never explains why committee vetoes

the majority's holding, Justice White expresses the hope that its impact will be narrowed in future decisions by permitting a legislative veto to operate as definitive evidence of congressional intent to have withheld statutory authorization for agencies to take vetoed actions.⁴⁴

Justice Rehnquist, joined by Justice White, dissented on the grounds that the legislative veto provision at issue in *Chadha* was not severable from that portion of the Immigration and Nationality Act that authorized hardship suspensions of deportation.⁴⁵ Although the Act did contain a severability clause, it created only a presumption of severability. Here, in light of the general rule that the scope of statutes should not be expanded by treating invalid exception provisions as severable, and in light of the history of congressional reluctance to grant unchecked discretion to the Executive concerning immigration matters, the presumption of severability was overcome.⁴⁶ Justice Rehnquist believed it unlikely that Congress would have enacted the hardship provision if it had known that the legislative veto procedure would not be available to review hardship determinations.

By viewing the veto provision as nonseverable, Justice Rehnquist was able to dispose of the case on nonconstitutional grounds because the plaintiff would have lost regardless of the way in which the constitutional issues were resolved. In addition, Justice Rehnquist's approach enabled him to focus on the legal standard governing severability, which will receive much judicial and scholarly attention in light of the wide variety of statutes that will be affected by the majority's decision. Although Justice Rehnquist did not address the merits of the constitutional issues, he may view the legislative veto as unconstitutional. Justice Rehnquist has twice vocally expressed his preference for a revival of the nondelegation doctrine in order to force Congress to exercise greater control over administrative agencies.⁴⁷ One consequence of invalidating the legislative veto may be the emergence of narrower congress-

might be distinguishable from one- or two-House vetoes. For a suggestion that there may be no doctrinal distinction between the various types of legislative vetoes, see *infra* text accompanying notes 168-69.

44. 103 S. Ct. at 2796-97 n.11 (White, J., dissenting).

45. 103 S. Ct. at 2816 (Rehnquist, J., dissenting).

46. *Id.* at 2816-17.

47. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting with Burger, C.J.); *Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

sional delegations to administrative agencies in order to compensate for any perceived loss of congressional control.⁴⁸

3. Consequences

Although the press immediately pronounced *Chadha* an historic decision that shifted the balance of power from Congress to the White House,⁴⁹ the pronouncement was certainly premature. The decision may well have no appreciable impact on the relations between Congress and the President, but even if it does, it is just as likely to reduce as increase the President's power.

The effect that the decision will have on current statutes that delegate authority to the Executive subject to a legislative veto will depend upon how the judiciary makes severability determinations with respect to each of those statutes. Because the legal standard for determining severability is very solicitous of congressional desires,⁵⁰ it is unlikely that severability determinations will be made in a way that permits the President to amass power at the expense of Congress.⁵¹ If a particular veto provision is held to be nonseverable, the entire statutory delegation will be invalid, leaving the Executive with less power than it possessed prior to *Chadha*. For example, if Justice Rehnquist's position had prevailed in the *Chadha* case, the Attorney General would have been deprived of the authority to suspend deportation in all cases. Even if a veto is held to be severable, as it was by the majority in *Chadha*, thereby leaving the underlying statutory delegation in force, Congress retains the power to overrule that judicial determination if it so desires. In fact, with so many statutes potentially affected by the *Chadha* decision, Congress might choose to pass a new

48. Cf. 103 S. Ct. at 2795 n.10 (White, J., dissenting) and authorities cited therein.

49. See, e.g., *Supreme Court, 7-2, Restricts Congress's Right to Overrule Actions by Executive Branch*, N.Y. Times, June 24, 1983, at A1, col. 6; *High Court Bars Legislative Veto Used by Congress*, Wall St. J., June 24, 1983, at 2, col. 2; *Supreme Court Strikes Down 'Legislative Veto': Hill's Hard-Won Gains of a Decade Wiped Out*, Wash. Post, June 24, 1983, at A1, col. 1; *Supreme Court Strikes Down 'Legislative Veto': Decision Alters Balance of Power in Government*, Wash. Post, June 24, 1983, at A1, col. 3; see also *The Court Vetoes the Veto*, NEWSWEEK, July 4, 1983, at 16; *An Epic Court Decision*, TIME, July 4, 1983, at 12. Some of the press commentary was more moderate and thoughtful. See, e.g., Edley, *Congress Will Have to Change Its Ways*, Wash. Post, June 26, 1983, at D8, col. 2; Sundquist, *More Confrontation, Stalemate, Deadlock*, Wash. Post, June 26, 1983, at D8, col. 1.

50. See 103 S. Ct. at 2816-17 (Rehnquist, J., dissenting) (Court should not infer grants of power that Congress may not have intended).

51. Arguably, however, this was the effect of *Chadha* itself. See *id.*

statute declaring which vetoes are severable and which are not, thereby ensuring that any apparent expansions of executive power that do result from the *Chadha* decision are controlled by Congress itself.⁵² In fact, if Congress does not take some such action, an almost certain consequence of *Chadha* will be to enhance the ability of private litigants to challenge executive actions by contesting the severability of veto provisions in the statutes that authorize the challenged actions.

The effect that *Chadha* will have on future legislation that delegates authority to the Executive will depend upon how badly Congress wishes to control the exercise of executive discretion. If Congress is genuinely apprehensive about unchecked executive discretion, it certainly has the power to circumscribe that discretion. It need only draft narrower delegations of authority, specifying the ranges of options open to the Executive in enumerated situations. This is the result advocated by Justice Rehnquist,⁵³ Chief Justice Burger,⁵⁴ and many commentators⁵⁵ as a means of restoring the proper structure and operation of the federal government. Whether Congress ultimately chooses to narrow its statutory delegations will be determined by the level of priority it gives to the need to control executive discretion.

In the past, Congress has not treated the need to control executive discretion as a high priority. Since the New Deal, broad delegations have been the rule rather than the exception,⁵⁶ and in most cases Congress saw no need to qualify its delegations through inclusion of legislative veto provisions.⁵⁷ The modern congressional preoccupation with the legislative veto⁵⁸ may signify a more serious congressional desire to control executive discretion, or it may reflect nothing more than faddish fascination with the veto device. If recent reliance on

52. If the President were to veto such a statute, Congress would have to override the veto by a two-thirds vote in order to ensure that it retained control over the consequences of the *Chadha* decision.

53. See *supra* note 48.

54. *Id.*

55. See authorities cited in *Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 687 n.6 (1980) (Rehnquist, J., concurring).

56. See generally S. BREYER & R. STEWART, *supra* note 4, at 60-61, 84-85; L. TRIBE, *supra* note 4, at 284-91; cf. THE ADMINISTRATIVE PROCESS, *supra* note 4, at 78-79.

57. Despite the many statutes that have been enacted throughout our history authorizing various Executive actions, only two hundred or so have contained legislative veto provisions, see *supra* note 9, and only fifty-six remained in effect when *Chadha* was decided, *id.*

58. See *supra* note 11 and accompanying text.

the legislative veto does signify a serious concern for the control of executive discretion, and there are no other means available for controlling such discretion, one would expect the apparent unavailability of the legislative veto device to translate that concern into narrower statutory delegations. To the extent that this occurs, the President will acquire less power as a result of *Chadha*, rather than more. To the extent that Congress does not choose to narrow its statutory delegations of authority to the Executive, the Executive may acquire more power as a result of the *Chadha* decision. It is difficult to conclude that *Chadha* will be the harbinger of a significant shift in governmental power, however, because power will accrue to the Executive only in those areas where Congress lacks sufficient concern to prevent its accrual.

It may be that a majority of Congress will genuinely desire to limit executive discretion in a certain area but that no particular substantive limitation will command majority support. Congress may then be forced to continue making broad delegations to the Executive out of political necessity. Indeed, one of the most salient consequences of increased congressional reliance on administrative agencies has been reduced congressional involvement in controversial decisionmaking.⁵⁹ Moreover, the fact that broad delegations have frequently been used in the past without congressional insistence on a legislative veto limitation⁶⁰ suggests that Congress may continue to use such delegations in the future, even though the legislative veto device will apparently be unavailable. In a sense, this can be viewed as an expansion of executive power; the Executive will have the benefit of broad statutory delegations unhampered by a legislative veto, even though if it were politically attainable Congress would prefer a narrower grant of discretion. Viewed from a different perspective, however, the scope of executive power will not expand at all. Just as before the *Chadha* decision, the President will receive only the power that Congress is willing to grant, and the political inability of Congress to agree on a narrower delegation will mean simply that Congress did not desire limited executive discretion enough to do what was necessary to secure it.⁶¹

59. See *supra* note 47.

60. See *supra* notes 56-57 and accompanying text.

61. If the need to override a presidential veto is assumed, two-thirds of the members of each House, rather than a mere majority, will be required to ensure congressional control over the allocation of power between Congress and the Executive.

If any significant change in the relationship between Congress and the President does result from the *Chadha* decision, it is not likely to result from the absence of legislative vetoes in the political process but, rather, from the absence of threatened vetoes. Although enactment of legislative veto provisions has greatly increased in recent years,⁶² they have been exercised only thirty-one times in the last five years.⁶³ The number of vetoes has been extremely small relative to the large number of executive actions that are subject to legislative veto provisions.⁶⁴ The political potency of the legislative veto, however, derives not from its exercise, but from its ability to force the Executive to negotiate with Congress—or more precisely with the pertinent committees of Congress—concerning contemplated executive actions in order to prevent a threatened veto.⁶⁵ Although *Chadha* does deprive Congress of one leverage device in its negotiations with the Executive, Congress possesses many other sources of leverage. The legislative veto may hardly be missed.

Chadha, of course, does nothing to restrict the ability of Congress to “veto” executive actions through the enactment of affirmative legislation, and Congress can use the threat of legislative reversal as a source of leverage in its negotiations with the Executive. *Chadha*’s effect, if any, will be on the degree of credibility with which a threat of legislative reversal is perceived by the Executive. To some extent, *Chadha* reduces congressional credibility because it is politically more difficult to obtain enough votes for affirmative passage of legislation by both Houses of Congress—especially if two-thirds majorities

62. See *An Epic Court Decision*, TIME, July 4, 1983, at 12, 14.

63. See *The Court Vetoes the Veto*, NEWSWEEK, July 4, 1983, at 16-17.

64. The relative rarity of occasions on which legislative vetoes have been exercised can be appreciated when one recalls that a great many executive actions can be taken under a single statute containing a veto provision. For example, in *Chadha* itself, the one-House veto was exercised in six hardship cases, but there were 334 other hardship cases before Congress at the same time in which a veto was not exercised. See 103 S. Ct. at 2771.

65. See *Clark v. Valeo*, 559 F.2d 642, 678-80 (D.C. Cir. 1977) (en banc) (per curiam) (MacKinnon, J., dissenting), *aff'd sub. nom.* *Clark v. Kimmitt*, 431 U.S. 950 (1977). Because of the committee structure under which Congress operates, when a House of Congress retains the power to exercise a legislative veto, the pertinent committees and committee chairpersons effectively wield whatever power derives from the legislative veto. See S. BREYER & R. STEWART, *supra* note 4, at 96-97; see also Edley, *supra* note 49, at D8, col. 2. The power of committees is illustrated by the facts of *Chadha*, where the House of Representatives was willing to give the Immigration Subcommittee its way, at the behest of the Subcommittee Chairperson, with virtually no explanation whatsoever of why the Subcommittee wished to deport Mr. Chadha. See *supra* note 5.

will be necessary to override a presidential veto—than it is to obtain the votes needed to exercise a legislative veto. Congress can, however, take some steps to enhance its credibility. The easiest of these is simply to make a threat of legislative reversal and to carry through on that threat. Although it might ordinarily be difficult for Congress to coalesce around the merits of a particular bill to reverse a particular executive action, it may be considerably easier to obtain the votes in a “test case” designed to establish congressional credibility for future negotiations with the Executive. If the first legislative reversal does not establish the desired negotiating tone, Congress can reverse a second executive proposal, and then a third, until the desired degree of congressional credibility is established. Congress can facilitate this process through the use of “laying over” provisions added to executive enabling legislation, which would delay the effectiveness of executive actions for specified periods of time until Congress has had an opportunity to consider proposals for legislative reversal,⁶⁶ thereby further increasing congressional credibility.

If Congress, in fact, lacks the political cohesiveness to implement the “test case” strategy, it can bind itself in a way that automatically bolsters its credibility through enactment of “sunset” provisions under which executive actions, and the authorizations on which they depend, automatically expire after specified periods of time subject to congressional renewal.⁶⁷ If the Executive knows that it will periodically have to persuade Congress to enact new legislation extending executive authority, the Executive is likely to be quite sympathetic to congressional desires during negotiations between the two.

Congress can also affect the balance of negotiating power through its appropriations authority.⁶⁸ In a general sense, Congress can coerce executive agencies into deferring to congressional desires by threatening unfavorable appropriations for noncooperative agencies in subsequent years. If threats of general budgetary reductions are not sufficient to obtain the desired deference, Congress can use the threat of riders and reauthorization provisions precluding expenditures for particular executive actions in much the same way that it was able to

66. The constitutionality of such “laying over” provisions was upheld by the Supreme Court in *Sibbach v. Wilson*, 312 U.S. 1, 15 (1941). *But see* 103 S. Ct. at 2795-96 n.10 (White, J., dissenting) (suggesting that “laying over” procedure is inadequate substitute for legislative veto).

67. *See* S. BREYER & R. STEWART, *supra* note 4, at 146-47.

68. *See id.* at 147-48.

use the threat of a legislative veto prior to *Chadha*. As a practical matter, the use of such techniques can be more difficult when it is Congress that desires a particular action and the Executive that disapproves.

The congressional strategies discussed thus far require the concurrence of both Houses of Congress and two-thirds majorities in each House if they prompt a presidential veto. Realistically, such concurrence is far from unattainable, because the actions of a House of Congress will be largely dependent upon the actions of controlling committees.⁶⁹ This is especially true with respect to appropriations, but it also applies to routine legislative activity. Nevertheless, if the concurrence of both Houses of Congress is deemed too unwieldy to prompt executive deference to Congress during negotiations, a single congressional committee can generate significant pressure on an executive agency contemplating particular actions by scheduling oversight hearings.⁷⁰ Oversight hearings not only ensure that executive agencies are apprised of congressional views about contemplated executive actions, but the publicity that they generate may affect popular support for particular proposed actions. Although agencies are often characterized as being beyond political accountability,⁷¹ the President, who is identified with agency positions, certainly is not. In addition, oversight hearings can affect the ability of executive actions to survive the judicial review that inevitably follows those actions by calling into question the degree to which the Executive has complied with the congressional intent behind the enabling legislation.⁷² Oversight hearings also provide an ideal opportunity for Congress to make those threats outlined above.

Finally, Congress or some portion thereof can simply veto a contemplated executive action of which it disapproves. Under *Chadha*, such legislative vetoes do not have binding legal ef-

69. See *supra* note 65.

70. See S. BREYER & R. STEWART, *supra* note 4, at 145.

71. See, e.g., 103 S. Ct. at 2793 (White, J., dissenting); see also S. BREYER & R. STEWART, *supra* note 4, at 103-04.

72. Judicial review of administrative agency actions is now commonplace and an accepted method of constraining agency discretion. See S. BREYER & R. STEWART, *supra* note 4, at 162-64. To the extent that congressional committees can persuasively suggest through oversight hearings that a particular executive action does not accord with the intent of Congress in authorizing the agency to act, that executive action is less likely to survive judicial review, because reviewing courts typically must set aside executive actions exceeding the scope of the Executive's statutory authorization. See Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(C) (1982).

fect, but their political effect is not eliminated by the decision.⁷³ An executive agency contemplating a particular action is not likely to simply ignore a "veto" of that action by its oversight committee, let alone a "veto" by one or both Houses of Congress.⁷⁴

If the political ramifications of the *Chadha* decision are uncertain, so are its policy implications. Policy opposition to the legislative veto was premised on the belief that elimination of the veto would improve the quality of governmental decision-making by precluding politically-motivated reversals, at the behest of special interest lobbies, of decisions made on the merits by expert agency decisionmakers.⁷⁵ To the extent that Congress possesses alternate means of influencing agency decision-making, the special interest lobbyists still have reason to direct their energies to congressional targets. Moreover, the initial policy premise may have been incorrect. Special interest lobbyists certainly know how to "work" the agencies as well as the Hill. This is evidenced by the fact that agencies are as frequently criticized for being "captured" as they are for being independent and unaccountable.⁷⁶ In addition, this view presupposes a difference between decisions made on the "merits" and political decisions; if such a difference does exist, it is not certain which type of decision is preferable.⁷⁷

In fairness, the policy assertion on which support for the legislative veto was premised is equally uncertain. The proposition that agency accountability would be enhanced by virtue of the legislative veto is less than obvious. Because much congressional power is vested in committees and committee heads, who are the ones likely to have benefited from any increase in bargaining power that the legislative veto had to offer,⁷⁸ it may

73. Lloyd Cutler, former White House Counsel to President Carter, was quoted as making this point. See *Impact of Court's Ruling on Congress*, N.Y. Times, June 24, 1983, at B4, col. 4.

74. The Senate could also elicit promises of responsiveness to congressional committees at the confirmation hearings of executive officials, although it is difficult to imagine how those promises could be enforced.

If Congress genuinely believed that the legislative veto was indispensable, it could initiate the process of amending the Constitution to permit the veto device—a process in which the Executive plays no role. See U.S. CONST., art. V.

75. See *supra* note 12.

76. See S. BREYER & R. STEWART, *supra* note 4, at 106-21.

77. Unless one is prepared to adopt the view that particular outcomes are correct or incorrect in some absolute sense, the logrolling inherent in the political process may be as good a basis as any for distinguishing between correct and incorrect outcomes in relative terms.

78. See *supra* note 65.

primarily have been accountability to those individuals rather than to a more representative House of Congress that would have been fostered by the legislative veto. It is far from clear that such diluted accountability to the voters would have been any more effective than the derivative accountability to which agencies are presently subject by virtue of their identification with the President. Moreover, the role that campaign contributions and the like would play in shaping final agency decisions is probably equivalent under either scheme.

Despite the fancy arguments that can be made suggesting that *Chadha* may have little or no effect on the government decisionmaking process, it is nevertheless tempting to oversimplify. Before *Chadha*, Congress had the power to overrule an executive action by majority vote in one House of Congress, and after the decision it would take majority votes in both Houses plus presidential concurrence, or two-thirds majority votes in each House, to do the same thing. This would at first appear to constitute a reduction in congressional power, with a concomitant increase in the power of the President. Closer analysis, however, reveals that it is not. *Chadha* does not effect a reduction in the power of Congress because the legislative veto is not a *legislative* veto. It is a veto by some entity less than and different from the legislature operating in accordance with the prescribed legislative process. The reason that the legislative veto is appealing to its proponents is precisely because its efficiency permits the accomplishment of something that the legislature itself is politically unable to accomplish. The legislature by definition lacks the votes needed to negate the executive action at issue, otherwise it would simply enact affirmative legislation accomplishing the same result—by two-thirds votes if necessary to override a presidential veto. Even in cases where use of the full legislative process might be politically possible, it may be simply too expensive in terms of diversion of legislative resources to warrant its use: the legislature would still be politically unable to negate the subject executive action by affirmative vote and yet accomplish all of the other political tasks that it deemed worthy of its attention. If this were not the case, there would have been no need for Congress to have provided for a legislative veto in the first place. Once the legislative veto is recognized as a device for taking actions that the legislature itself could never take, the interesting question becomes whether the Constitution permits such an anomaly to be incorporated into our form of govern-

ment. The answer is that legal analysis, as we now know it, is incapable of providing a satisfactory answer.

B. AN ANALYSIS

Three of the opinions in *Chadha* discuss the constitutionality of the legislative veto, but each is analytically defective in some respect. Arguments other than those relied upon by the Justices can also be made both for and against the validity of the veto, but those arguments are flawed as well. All of the arguments are flawed in that they fail to provide a logical, non-subjective means of determining the constitutionality of the legislative veto without generating intolerable inconsistencies in the process. As a result, it is not possible to adopt a position on the constitutionality of the veto without succumbing to the subjective preferences and personal predilections from which doctrinal analysis was intended to save us. As far as the legislative veto is concerned, the pertinent doctrines are too indeterminate to be of much help.

1. The Majority Opinion

The problem with the majority opinion is that it fails to establish the predicate on which its constitutional analysis depends. Assuming that Chief Justice Burger is correct in his assertion that legislation can constitutionally result only from the bicameralism and presentment processes prescribed in article I,⁷⁹ his opinion never adequately explains why the exercise of a veto should be viewed as "legislation." If a legislative veto is not a law, the article I procedures are not violated because they simply do not apply.

The only justification that the majority offers for characterizing a veto as a law is that a veto has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch"⁸⁰ through "determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President."⁸¹ The government frequently implements policies, however, that alter legal rights without adhering to the article I procedures. Every day, presidential executive orders, agency rulings, and judicial decisions are issued with the express intent of altering legal rights and implementing policies. Despite their noncompliance

79. 103 S. Ct. at 2782-84.

80. *Id.* at 2784.

81. *Id.* at 2786.

with article I, however, such actions are nevertheless recognized as constitutional. The Chief Justice concedes that executive actions, such as administrative agency rulemaking, may "resemble" lawmaking, but rather than distinguishing those actions from the legislative veto, he merely asserts that they are executive rather than legislative in nature.⁸²

The justification on which the majority opinion relies to support this characterization of executive actions stems from the nondelegation doctrine.⁸³ What would otherwise be lawmaking becomes an executive rather than a legislative function when it occurs within the confines of the statutory standards prescribed by the authorizing legislation. Because the executive branch is implementing the statutory standard, it is administering the statute rather than making new law.⁸⁴ If this were not the case—if the statutory standards were broad enough to permit actual lawmaking under the guise of executive administration of the statute—the authorizing legislation would be invalid as an unconstitutional delegation of legislative power.

The problem with this justification is, of course, that at the federal level the nondelegation doctrine is merely a fiction that no longer has any substantive content.⁸⁵ It has repeatedly been construed to tolerate the broadest delegations imaginable, leaving ample latitude for the Executive to engage in actual lawmaking.⁸⁶ By relying on the nondelegation fiction to sound the distinction between executive and legislative activity, the ma-

82. *Id.* at 2785 n.16.

83. *Id.* See also *infra* note 85.

84. 103 S. Ct. at 2785 n.16.

85. The nondelegation doctrine theoretically precludes Congress from delegating legislative power to another branch of government or to a private entity. Certain legal fictions have been created, however, to permit the Executive to engage in activities that closely resemble lawmaking under broad statutory grants of authority. Primary among these is the fiction that the Executive operates within the confines of a standard set by Congress. See *THE ADMINISTRATIVE PROCESS*, *supra* note 4, at 44-78.

86. See, e.g., statutes discussed in S. BREYER & R. STEWART, *supra* note 4, at 60-61, 84-85. Some judicial decisions have suggested that standards developed by the Executive or standards imposed by the judiciary to constrain executive discretion can "save" overbroad congressional delegations. See, e.g., *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758-62 (D.D.C. 1971) (three-judge court) (upholding statute authorizing President to impose wage and price controls in President's discretion). Although that theory demonstrates sensitivity to the abuses that can result when lawmaking and law-applying powers are concentrated in the Executive branch, it is unresponsive to the concern that legislative policy decisions should be made by Congress. At best, that theory still enables the Executive or the judiciary to engage in "lawmaking" without regard to the article I procedures.

jority is simply asking us to pretend that the Executive does not engage in actual lawmaking, rather than proving that proposition. Moreover, the majority's failure to distinguish the legislative veto from the other types of governmental policy enactments that alter legal rights leaves us with no viable definition of legislative activity to which article I procedures apply. If an agency rule or a judicial determination can alter legal rights without adhering to article I procedures, it is difficult to see why a legislative veto cannot do so as well.

It might be argued that, regardless of what other branches do, whenever Congress takes a policy action that alters legal rights, that action must comply with the article I legislative procedures. After all, unlike the other branches, which derive their power from different parts of the Constitution, the only power that Congress possesses is article I legislative power, and legislative power must be exercised in accordance with the constitutionally prescribed legislative procedures. The problem with this argument is that Congress, like the other branches, regularly alters legal rights without adhering to article I procedures and those actions are thought to be constitutional. This is true in matters as mundane as a congressional committee's contractual commitment to reimburse a witness for airplane fare expended in order to testify at legislative hearings, to matters as significant as issuing a congressional subpoena or holding a witness in contempt of Congress for refusing to provide requested information.⁸⁷ When the House of Representatives cited Ann Burford, head of the Environmental Protection Agency, for contempt after she refused to provide requested documents,⁸⁸ the Senate was not required to concur and the President was not given an opportunity to veto the contempt citation. Nevertheless, few would suggest that the contempt citation was unconstitutional for failure to comply with article I legislative procedures, even though the House of Representatives' action altered the legal rights of someone outside the legislative branch. Such actions are authorized as incident to

87. Although Congress now typically refers contempt cases to the Department of Justice and the courts, the Supreme Court has held that each House of Congress has the implied power to punish contempts as an incident to its legislative authority without the participation of the other House or the other branches of government. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). See generally P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *CONSTITUTIONAL LAW* 677-79 (1977).

88. See *House Charges Head of E.P.A. with Contempt*, N.Y. Times, Dec. 17, 1982, at A1, col. 5.

Congress's legislative power,⁸⁹ and the majority opinion never explains why a legislative veto cannot similarly be viewed as an incident to legislative power.

A more serious justification for permitting the Executive but not Congress to alter legal rights without insisting on the safeguards of bicameralism and presentment is that executive actions, unlike legislative actions, are subject to judicial review, thereby providing a substitute for the article I safeguards. Because the protection of judicial review is not present after a legislative veto is exercised,⁹⁰ the political protections of bicameralism and presentment become particularly important. The majority opinion flirts with this justification, but does not develop it fully.⁹¹ Even fully developed, however, this argument is flawed. The article I bicameralism and presentment procedures are not designed to guard against the same dangers that judicial review is designed to prevent. Judicial review is designed to prevent the sacrifice of individual rights to the desires of the majority, because a single individual is politically powerless to hold the majority accountable for its actions.⁹²

To the extent that this abuse of individual rights was present in *Chadha*, it provided a basis for invalidating the legislative veto exercised in that case as an unconstitutional bill of attainder.⁹³ Although Justice Powell was willing to invalidate the veto on grounds that resemble bill of attainder grounds,⁹⁴ the majority was not.⁹⁵ By insisting on article I procedural grounds as the basis for its invalidation, the majority deprived itself of the ability to rely intelligibly on the unsettling arbitrariness that admittedly colors the veto exercised in *Chadha*.⁹⁶ The bicameralism and presentment procedures that were held to have been violated in *Chadha* were simply not designed to

89. See *supra* note 87.

90. See 103 S. Ct. at 2792 (Powell, J., concurring); see also *infra* notes 120-27 and accompanying text.

91. See 103 S. Ct. at 2785 n.16.

92. See *id.* at 2791-92 (Powell, J., concurring); see also L. TRIBE, *supra* note 4, at 474-77, 491-99; Spann, *supra* note 2, at 597-602; Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 787-89 (1971); Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962); see generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

93. Note that due process protections do not apply in any meaningful way to the targets of legislative vetoes. See *infra* notes 120-27 and accompanying text.

94. See 103 S. Ct. at 2789-90 (Powell, J., concurring).

95. See *id.* at 2785 n.17.

96. See *supra* note 5.

guard against arbitrary or capricious legislative actions. The legislature can be as arbitrary and capricious as it desires without offending *article I procedures* as long as it does so with the concurrence of the three separate constituencies represented in the legislative process.⁹⁷ Because Mr. Chadha himself is not among those constituencies, the article I procedures are not designed to protect his personal interests. At best, the majority could argue that its decision based on article I was coincidentally correct because it happened to correct an abuse that another, technically unavailable constitutional provision—the bill of attainder clause—was designed to prevent. But that sort of “rough justice” is far from principled decisionmaking.

A staunch defender of the majority opinion, frustrated by the use of what some would term doctrinal niceties to chip away at the majority’s reasoning, might ask what a legislative veto is, if not an inchoate law. Leaving aside the observation that believers in principled decisionmaking cannot simply shrug off doctrinal inconsistencies by shifting the burden of proof, it is possible to categorize a legislative veto without terming it a “law.” A legislative veto is a contingency on which the effectiveness of the underlying congressional authorization depends. Just as Congress could make supplemental unemployment benefits contingent on unemployment reaching a certain rate, or disaster relief contingent on a presidential declaration of emergency, Congress could also make congressional authorization of a contemplated executive action contingent on the absence of a legislative veto. In this regard, a veto provision contained in a statute is no different than an expiration date contained in a statute. Both are agreed to by the enacting Congress in accordance with the prescribed article I procedures, both supplant legal rights claimed under the statute once they occur, and both have legal effect without further action by Congress.⁹⁸

97. See *supra* note 92; *infra* text accompanying note 194.

98. Note that this embodies a positivist view of law under which individuals possess only those rights granted them by their government. This is a view that the Supreme Court appears to have embraced. See *Board of Regents v. Roth*, 408 U.S. 564 (1972) (for federal due process purposes, individuals possess only those property interests granted by the government); *Meachum v. Fano*, 427 U.S. 215 (1976) (same with respect to liberty interests). One consequence of adopting this view is that it deprives individuals of meaningful procedural due process rights when the legislature has failed to create a substantive property or liberty right, as it arguably has failed to do with respect to those at whom a legislative veto is directed. See *infra* notes 120-27 and accompanying text.

The only sensible basis for distinguishing traditionally accepted contingencies from the legislative veto contingency is that the occurrence or nonoccurrence of the veto contingency is within the control of Congress, whereas other customary contingencies are not. That is relevant because, if Congress both authorizes executive action and then vetoes particular executive proposals under that authorization, the same branch of government is both formulating and controlling the ultimate application of policy in a way that violates separation of powers principles.⁹⁹

Although ultimately unpersuasive, as is discussed further below, this is a serious argument. It is an argument, however, that is unavailable to the majority. The majority, by insisting on the nondelegation fiction,¹⁰⁰ which permits administrative agencies to circumvent the constitutional separation of policy-making and policy-application functions to a greater degree than is possible under a legislative veto scheme, estops itself from relying on separation of powers principles to distinguish the legislative veto from any other contingency. Because there is no acceptable way to distinguish the legislative veto from other legislative contingencies, it is unclear why the majority did not simply view the legislative veto as a valid contingency rather than an unconstitutional "law."

Legal analysis is more likely to be persuasive if it is shown to advance some generally agreed-upon policy objective than if it appears to be simply a hollow application of a legal rule.¹⁰¹ Accordingly, the majority's reasoning would be easier to accept if the article I defects upon which it is based could be shown to further some purpose intended to be served by the legislative procedures specified in article I. Those procedures are generally understood as efforts to ensure that each of the three constituencies with which the Framers were concerned have adequate input into all legislative decisions,¹⁰² thereby permitting only those legislative proposals that satisfy some minimal level of quality or acceptability to become law.

The majority fails to explain why that objective is not fully

99. See Spann, *supra* note 2, at 593-94; see also S. BREYER & R. STEWART, *supra* note 4, at 37-39; L. TRIBE, *supra* note 4, at 474-77, 491-99.

100. See *supra* text accompanying notes 83-86.

101. See Spann, *Functional Analysis of the Plain Error Rule*, 71 GEO. L.J. 945, 979-82 (1983). The present article goes a step further than that article by suggesting that even functional analysis is ultimately flawed. But see *id.* at 988-89 (conceding as much).

102. See *supra* notes 22-25 and accompanying text.

realized under a legislative veto scheme. Each of the pertinent constituencies has necessarily agreed to enactment of every legislative veto provision. Even when the representative of one of the constituencies, say the President, has never actually agreed to a veto provision but rather is bound by the actions of a predecessor in office, the constituency itself is nevertheless deemed to have consented. All statutes are binding on successor Congresses and administrations until they expire or until they are modified or repealed. Legislative veto provisions are no exception. It is not sufficient to simply assert that the legislative veto changes the constitutionally prescribed procedure by which laws are enacted,¹⁰³ or that it circumvents the constitutional amendment process.¹⁰⁴ Such arguments simply beg the question of whether the veto is constitutional—of whether its exercise constitutes “enactment” of a “law.” The majority opinion is unacceptably flawed precisely because it does nothing to resolve that question.

2. Justice Powell's Concurrence

The problem with Justice Powell's opinion is that it ignores the logical implications of its own assertions. By viewing legislative vetoes directed at individuals as usurpations of judicial power,¹⁰⁵ Justice Powell is forced to rely on a model of the judicial function so broad that it envelops many actions that are typically thought to constitute proper exercises of congressional power.

Justice Powell characterizes the legislative veto exercised in *Chadha* as a statutory interpretation of the hardship provision of the Immigration and Nationality Act, and an application of that provision to the facts of the *Chadha* case—something he deems to be a judicial function.¹⁰⁶ As an initial matter, it is doctrinally unclear why Justice Powell believes that his theory of the case is any narrower than the theory relied upon by the majority. Although Justice Powell suggests that invalidating the veto in the context of adjudications would not, under his theory, necessarily invalidate them in the context of rulemaking,¹⁰⁷ the degree to which Congress would be engaged in statu-

103. That is the position adopted by the majority in *Chadha*. 103 S. Ct. at 2785.

104. See U.S. CONST., art. V (prescribing process for amending Constitution).

105. 103 S. Ct. at 2789 (Powell, J., concurring).

106. *Id.* at 2790-92.

107. *Id.* at 2789, 2792.

tory interpretation would be the same whether rulemaking or adjudication were involved. If, instead of vetoing the suspension of Mr. Chadha's deportation, the House of Representatives had vetoed a regulation suspending on hardship grounds the deportation of all aliens who sincerely wished to remain in the United States, the House of Representatives would have been at least as guilty of construing the statutory hardship provision as it was in the *Chadha* case itself. Accordingly, Justice Powell should find both actions unconstitutional.¹⁰⁸ In either situation, however, Justice Powell's characterization of the veto is merely conclusory, and it probably does not accurately describe what the House of Representatives was doing.

Although the Immigration Subcommittee spoke in terms of applying the statutory hardship criteria when it proposed to veto the suspension of Mr. Chadha's deportation,¹⁰⁹ it is unlikely that the Subcommittee or the full House of Representatives had any serious concern for the actual intent of Congress in enacting the hardship provision, as a reviewing court necessarily would have had. What is more likely is that the Immigration Subcommittee simply wished to exercise its veto power periodically in order to avoid atrophy of its political potency and to remind the Immigration and Naturalization Service that Congress was looking over the agency's shoulder.¹¹⁰ Mr. Chadha may well have been nothing more than a victim of circumstances. Viewed in this light, the *Chadha* veto does not readily lend itself to characterization as "judicial activity;" the judicial function does not include the exploitation of individual rights for the purpose of sending messages to other branches of government.¹¹¹

108. There is an additional problem of drawing a meaningful distinction between rulemaking and adjudication. When an action appears to be general and legislative in nature, but affects only a small number of people, or affects a large number of people such as aliens who do not have the right to vote and are, therefore, politically powerless before the legislature, should that action be categorized as legislative rulemaking or as a judicial function? These are problems that complicate analysis under the bill of attainder and equal protection clauses of the Constitution. See *supra* note 92; see also *infra* notes 120-27 and accompanying text.

109. See 103 S. Ct. at 2771.

110. This view is supported by the Immigration Subcommittee's failure to cite any particular reasons for overruling the Attorney General's hardship determinations in the six out of the 340 cases in which it acted; by the fact that deporting Chadha would apparently have entailed a genuine hardship; and by the fact that the Immigration Subcommittee took similar action in six other cases the preceding year. See *supra* note 5.

111. It may well be, however, that the essence of the judicial function consists of using individual cases as opportunities to make pronouncements of law,

Even if the House of Representatives actually disagreed with the Attorney General's application of the statutory criteria when it vetoed the suspension of Chadha's deportation, that does not establish that the veto was a judicial act. It can just as easily be viewed as the final act in the legislative process. Because the veto provision of the Immigration and Nationality Act reserves the right of Congress to finalize the statute's meaning at a later date, the very meaning of the statute is dependent upon the occurrence or nonoccurrence of a legislative veto. The veto, therefore, does not constitute an interpretation of the statute. Rather, it is the referent through which the statute's meaning can be ascertained. For example, if the amount of benefits payable to an individual under a statutory program is tied to the inflation rate, the inflation rate is something that gives the statute meaning in particular contexts, not something that interprets the statute. This is another version of the contingency argument discussed above.¹¹² Although subject to certain objections, as is explained below,¹¹³ this argument nevertheless is an impediment to viewing the legislative veto as an act of statutory interpretation.¹¹⁴

As Justice Powell points out, separation of powers principles are offended not only by one branch's usurpation of powers vested in another branch, but also by one branch's impermissible interference with another's performance of its constitutionally assigned functions.¹¹⁵ The legislative veto exercised by the House of Representatives appears to have complicated Mr. Chadha's life in a way that was arbitrary, if not capricious.¹¹⁶ Accordingly, one might argue that the legislative veto exercised in *Chadha* was unconstitutional because, if not struck down, it would have prevented the judiciary from protecting Chadha's rights from arbitrary governmental abroga-

especially at the Supreme Court level. This is the suggestion advanced in Spann, *supra* note 2, at 592-617.

112. See *supra* text accompanying notes 98-99.

113. See *infra* text accompanying notes 166-67.

114. The majority objects to Justice Powell's characterization of the legislative veto as judicial in nature on case-or-controversy grounds. See 103 S. Ct. at 2787 n.21. Justice Powell points out that this objection is very artificial, see *id.* at 2791 n.8 (Powell, J., concurring), and in so doing makes the majority's argument seem silly. Moreover, the majority itself showed little sensitivity to case-or-controversy concerns when it summarily disposed of the mootness issue raised by Chadha's marriage to an American citizen. See *supra* note 14. For a critical discussion of the Supreme Court's development of case-or-controversy law, as well as a suggestion that the issuance of "advisory" opinions constitutes the essence of the federal judiciary function, see generally Spann, *supra* note 2.

115. See 103 S. Ct. at 2790 (Powell, J., concurring).

116. See *supra* note 5.

tion—a function constitutionally assigned to the judiciary. This argument, however, highlights the central weakness in Justice Powell's position.

To the extent that the legislative veto precludes meaningful judicial review of Chadha's plight, it is only unconstitutional if Congress has *impermissibly* precluded judicial review.¹¹⁷ Under a legislative veto scheme, the judiciary is not precluded from reviewing whether a legislative veto was in fact exercised, whether its exercise was authorized by statute, whether its exercise was procedurally proper, or other similar questions. The veto scheme does, however, preclude judicial inquiry into the merits of a congressional decision to exercise a legislative veto; the courts cannot set aside a veto because it is imprudent, arbitrary, or even capricious. Congress can constitutionally preclude judicial review in this manner as long as it does not run afoul of any constitutional limitation on congressional power.¹¹⁸ In the *Chadha* context, there are two potential limitations on congressional power that are interrelated. First, the legislative veto scheme that had the ultimate effect of depriving Mr. Chadha of any opportunity for judicial review of the arbitrariness to which he was subjected might deprive him of his due process rights. Second, the legislative veto scheme resulting in the suspension of Chadha's deportation might amount to an unconstitutional bill of attainder.¹¹⁹ Ultimately, however, neither theory is sufficient to invalidate the legislative veto.

Although the arbitrary manner in which Chadha's deportation was ordered tends to offend one's intuitive sense of due process,¹²⁰ it does not amount to a due process violation. If an executive agency had ordered Chadha deported for no appar-

117. Article III gives Congress the nominal power to regulate the jurisdiction of all federal courts, other than the original jurisdiction of the Supreme Court. U.S. CONST., art. III. Although few would argue that article III actually gives Congress unlimited power to regulate such federal jurisdiction, there is serious uncertainty concerning the precise limits on congressional power in this regard. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 309-75 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

118. See generally Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), reprinted in HART & WECHSLER *supra* note 117, at 330-60. A more recent discussion of the limits on congressional power to regulate federal court jurisdiction is contained in Sager, *The Supreme Court, 1980 Term, Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

119. To the extent that equal protection concerns might be implicated, they raise problems relevant to a bill of attainder analysis. See *infra* note 127.

120. See *supra* note 5.

ent reason, with no findings or record, Chada's due process rights might well have been violated.¹²¹ Chadha, however, has no due process rights against Congress that would benefit him. Any due process rights Chadha might possess would necessarily be limited to procedural rights because the Supreme Court has rejected the suggestion that individuals possess a substantive due process right to fair treatment by the government.¹²² Rather, because the accountability to which Congress is subject is primarily political in nature, individuals possess only the right to be free from unauthorized governmental action. The due process clause is only relevant to the extent that it prescribes the procedures by which governmental authorization must be established. But, assuming that a congressional decision to deport Chadha does not violate any specific limitation on congressional power, such as the first amendment¹²³ or the equal protection clause,¹²⁴ the deportation is authorized as long as there are enough votes in Congress to pass a deportation statute. Because, as a practical matter, there will be no dispute as to the number of votes, Chadha has no meaningful due process rights.¹²⁵

121. To the extent that a statute, such as the Immigration and Nationality Act, grants Chadha an "entitlement" to remain in the United States under specified conditions, he has a procedural due process right to an adequate determination of whether the specified conditions exist. This is because the statutory entitlement creates a property interest to which federal due process protections attach. See *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972).

122. This seems to be the gist of *Roth*, which precludes the existence of any federal due process protections in the absence of a government-created entitlement. See 408 U.S. at 569-78. Note, however, that entitlements can exist as a *de facto* matter, see *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972), although it appears that the government has substantial power to preclude the existence of *de facto* entitlements that one might intuitively believe to exist. See, e.g., *Bishop v. Wood*, 426 U.S. 341, 347-50 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 151-55 (1974) (plurality opinion by Rehnquist, J.). As noted above, see *supra* note 98, these cases implement a positivist view of law. For suggestions that due process protections should be rooted in substantive rights that are of a more inherent nature, see Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 273-86; Val Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 470-84 (1977).

123. U.S. CONST., amend. I.

124. U.S. CONST., amend. XIV, § 1.

125. At times, procedural due process protections may be completely inapplicable to Congress. In *Groppi v. Leslie*, 404 U.S. 496, 503-04 (1972), the Supreme Court suggested that when circumstances so demanded, a legislature could immediately punish contempt without according any procedural safeguards. An alternate explanation of the Court's statement in *Groppi*, however, might be that due process protections always apply to Congress but in some circumstances no process is "due." Such an outcome is apparently possible. See *Ingraham v. Wright*, 430 U.S. 651, 680-82 (1977) (although due process ap-

Such limited due process protection is tolerable with respect to congressional actions only because of the full due process safeguards available when congressional actions are applied by the executive branch to particular individuals.¹²⁶ If Congress were itself to attempt to apply legislative policies to individuals, circumventing the separation of legislative and executive powers, it might be enacting an unconstitutional bill of attainder.¹²⁷ Therefore, arbitrary governmental action is prevented either through the due process clause or the bill of attainder provision, depending on the stage at which the arbitrariness enters the governmental process.

Because the arbitrariness entered Mr. Chadha's case at the legislative stage of the governmental process,¹²⁸ due process is inapplicable. For the veto exercised in Chadha's case to be found unconstitutionally arbitrary, it must be found to violate the bill of attainder provision. Indeed, that is precisely the thrust of Justice Powell's argument. Because the legislative veto permitted Congress alone to act upon the status of Mr. Chadha, without the stage of executive implementation to which judicial review and due process protections could attach, he was deprived of the constitutional protection from arbitrary and capricious governmental action inherent in separation of powers.¹²⁹ Justice Powell chose to frame his objection in terms of usurping judicial functions rather than in bill of attainder terms¹³⁰ because the veto scheme utilized in *Chadha* could not, doctrinally, be a bill of attainder.

One reason the legislative veto itself could not be a bill of

plied to infliction of corporal punishment in public schools, virtually no procedural protections were "due").

126. Compare *Londoner v. City of Denver*, 210 U.S. 373 (1908) (finding due process right to hearing before tax is assessed against property owned by specific individuals) with *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441 (1915) (finding no due process right to hearing before increase in property tax valuation generally applicable throughout jurisdiction).

127. Congress is constitutionally prohibited from enacting any bill of attainder. U.S. CONST., art. I, § 9, cl. 3. A bill of attainder is a legislative enactment, directed at a particular individual or group, which inflicts punishment on that individual or group without a judicial trial in a manner that is inconsistent with the safeguards of separation of powers. See *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); see also Note, *supra* note 92, at 343-60. The bill of attainder provision is best understood as protecting from legislative abrogation the rights of those who have insufficient political power to participate meaningfully in the legislative process. In this regard, the bill of attainder clause is similar to at least one aspect of the equal protection clause, which is also aimed at protecting politically powerless groups. See generally J. ELY, *supra* note 92, at 135-79.

128. See *supra* note 5.

129. See 103 S. Ct. at 2789-90 n.4 (Powell, J., concurring).

130. See *id.* at 2789-92.

attainder was because it was not a duly enacted law, as the majority opinion points out; it was simply an action of one House of Congress.¹³¹ Moreover, even if the underlying statute is viewed as the pertinent law, whose meaning is finalized through exercise of the legislative veto,¹³² it still cannot amount to a bill of attainder. The bill of attainder prohibition in the Constitution has been limited to proscribing only punitive acts by Congress,¹³³ thereby avoiding unwarranted interference with congressional power to enact narrow legislation and special bills in nonpunitive areas. Deportation, however, has been held to be nonpunitive,¹³⁴ indicating that judicial prohibition of narrow immigration legislation would constitute an unwarranted limitation on congressional power.¹³⁵ Accordingly, Justice Powell is doctrinally unable to save Mr. Chadha, who has fallen through the crack between the due process and bill of attainder protections of the Constitution. In order to save him, Justice Powell would have to reject either the principle that there is no substantive due process right to governmental fairness¹³⁶ or the principle that deportation is not punishment to which the bill of attainder prohibition applies.¹³⁷ Because one of those principles must be rejected in order to invalidate the legislative veto on the grounds suggested by Justice Powell, his position is doctrinally unacceptable.¹³⁸

The flaw in Justice Powell's position can be illustrated even more graphically. It is true that Congress's decision to deport

131. See *id.* at 2784-87.

132. See *supra* text accompanying notes 98-99.

133. See *United States v. Lovett*, 328 U.S. 303, 315-16 (1946).

134. See cases cited in Note, *supra* note 92, at 356 n.142.

135. The cases that construed deportation not to constitute punishment for bill of attainder, or closely related *ex post facto* purposes, see *supra* note 134, apparently did so in order to prevent unwarranted judicial interference with congressional power to formulate legislative policy, such as the policy for dealing with perceived Communist threats to American national security. See, e.g., *Galvan v. Press*, 347 U.S. 522, 529-31 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). This is a construction with which a then-student commentator disagreed. See Note, *supra* note 92, at 360-61.

136. See *supra* note 122.

137. See *supra* note 134.

138. It might be argued that any legislative scheme that permitted Chadha to be deported without political or judicial protection is unconstitutional because the entire scheme violates Chadha's due process rights. This argument, however, amounts to nothing more than a reformulated challenge to the Court's determination that deportation is not punishment for bill of attainder purposes. The Court apparently so construed deportation in order to preserve a certain degree of latitude for Congress in dealing with aliens. Acceptance of a reformulated due process argument would frustrate that objective in the same way that it would have been frustrated by a contrary ruling on the punishment issue.

Mr. Chadha without permitting either the Executive or the judiciary to participate meaningfully in that decision undermined separation of powers principles. It is also true that a single individual such as Chadha typically has no political power with which to influence a legislative decision, thereby making it theoretically sensible to insist that individuals about to be subjected to legislative actions be given access to a judicial forum, which is institutionally competent to take account of their individual interests.¹³⁹ We have, however, nothing more than a rhetorical belief in separation of powers. Though we routinely permit Congress to violate separation of powers principles when it enacts private bills, Justice Powell never adequately explains why the breakdown in separation of powers is tolerable in those cases but not in Chadha's case. If Chadha were admitted into the United States by private bill, Justice Powell would not be offended,¹⁴⁰ but the abrogation of separation of powers would be precisely the same as if he were excluded by private bill. In both cases Congress would have made and implemented policy without the concurrence or participation of the other branches of government, especially if the private bill were enacted over the President's veto.

The only distinction offered by Justice Powell rests on the illusory difference between rights and benefits. He argues that although Congress cannot disadvantage individuals in derogation of separation of powers, it can confer a benefit without regard to separation of powers restrictions because the dangers of arbitrary action are not present when a mere benefit is conferred.¹⁴¹ That, however, is simply not the case. If Mr. Chadha is arbitrarily admitted into the country, he may benefit, but the individual who would otherwise have had his place in college, and the individual who would otherwise have had his place in graduate school, and the individual who would otherwise have had his job, will all be disadvantaged.¹⁴² Moreover, each disadvantaged individual is as politically powerless to influence the legislative decision admitting Mr. Chadha into the United

139. See *supra* note 93 and accompanying text.

140. See 103 S. Ct. at 2792 n.9.

141. See *id.*

142. It might be argued that such individuals would not have standing to complain about the ways in which they were disadvantaged by the admission of a third party into the United States pursuant to a procedure that violated separation of powers principles. However, that merely begs the question. It does not explain why we should not be concerned with the full scope of injuries that accompany congressional acts taken in violation of separation of powers principles.

States as Mr. Chadha would be to influence a legislative decision to deport him. It is, therefore, unclear why separation of powers concerns are not squarely implicated. Justice Powell cannot satisfactorily explain when the doctrine of separation of powers applies and when it does not because the doctrine itself is too indeterminate to permit an intelligible distinction to be drawn. Without such a distinction, however, we cannot be sure that Justice Powell's suggested resolution of *Chadha* is anything other than a product of his personal predilections. His position is thus doctrinally flawed.

3. Justice White's Dissent

The arguments made by Justice White in dissent, maintaining that the legislative veto is constitutional, vary in their degree of seriousness. Some are simply the hollow products of doctrinal manipulations so transparent that it is hard to imagine that even Justice White takes them seriously. Other arguments are better, and one is quite powerful. Even the best argument, however, ultimately succumbs to a legal fiction that cannot be abandoned without intolerable costs, thereby rendering Justice White's position doctrinally unavailable. In fact, the manner in which Justice White subordinates the doctrinal arguments to his subjective preferences concerning the policies implicated by the legislative veto issue illustrates, in a striking way, that his position is far from being the result of detached adherence to neutral principles.

One of the arguments relied on by Justice White is nothing more than a conclusory pronouncement. In order to counter the suggestion that the legislative veto is an unconstitutional usurpation of executive and judicial functions, Justice White asserts that neither branch is ever called upon to perform any function with respect to a case in which a veto is exercised, because the veto itself precludes both branches from ever acquiring any statutory authorization to act in such a case.¹⁴³ In *Chadha*, because of the veto, there simply was no statutory hardship provision for the Executive to administer or the judiciary to use as a basis for review—at least no provision that could apply to Mr. Chadha. This argument, however, merely assumes the constitutionality of the legislative veto rather than establishing it. If the veto is not constitutional it cannot limit the scope of executive or judicial power. This argument by Jus-

143. See 103 S. Ct. at 2809-10 (White, J., dissenting).

tice White thus fails completely.¹⁴⁴

Justice White also proceeds to undermine his own position by suggesting that a legislative veto exercised to nullify prosecutorial discretion would constitute an unconstitutional usurpation of executive power, though the veto in *Chadha* did not.¹⁴⁵ If, as Justice White suggests, the legislative veto in *Chadha* limits the scope of permissible executive action under the statute containing the veto provision, it serves precisely the same function where prosecutorial discretion is involved. Prosecutorial discretion is not the power to ignore a statute. Rather, it is the executive power to resolve matters in a manner not foreclosed by the legislature under the terms of the statute. If the statute forecloses a particular exercise of discretion, however, either by its terms or, under Justice White's view, through exercise of a legislative veto, that particular exercise of discretion is not open to the Executive because the statute does not authorize it. To the extent that this can be characterized as interference with inherent executive power, it is difficult to see why that interference is any different from the interference with executive power that occurred in *Chadha* itself. In fact, the Attorney General's decision not to deport Mr. Chadha even though he was deportable under the statute¹⁴⁶ is, in substance, identical to an exercise of prosecutorial discretion—the very discretion that Justice White suggests cannot be undermined by a legislative veto. If interference with the Executive is impermissible in either case, it should be impermissible in both.

In response to the majority's argument that the legislative veto is unconstitutional because it permits the government to act without the concurrence of the three constituencies specified in the article I legislative process,¹⁴⁷ Justice White argues that the three constituencies have, in fact, agreed to the result produced by a legislative veto. He does this by viewing the subject executive action—the Attorney General's suspension of Mr. Chadha's deportation—as an executive proposal for legislation that becomes effective only if both houses of Congress agree, as indicated by their failure to veto it. Accordingly, in

144. Justice White's argument in this regard would have had more appeal if he had persuasively argued in favor of some version of the contingency theory discussed above. See *supra* text accompanying notes 98-99. There are, however, problems with this theory. See *infra* text accompanying notes 165-66 and *supra* text accompanying notes 139-42.

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

146. See *supra* note 5.

147. 103 S. Ct. at 2782-84.

Justice White's view, the legal status quo—Chadha's deportability—is changed only with the concurrence of each of the three pertinent constituencies, thereby satisfying the objective of the article I procedures required by the majority.¹⁴⁸

Justice White's theory forces him to view Mr. Chadha's deportability as the legal status quo. If the Attorney General's suspension of deportation proceedings were deemed the legal status quo, the legislative veto would permit it to be changed by one House of Congress, thereby defeating the three-constituency concurrence that Justice White is trying to establish. There are substantial reasons for rejecting Justice White's position and viewing the suspension of deportability as the status quo. First, the suspension was the last act to occur before a legislative veto is exercised. Second, if the veto were not exercised, the suspension of deportability would be the act that had legal effect. Third, a duly enacted statute gives the suspension this effect, thus establishing the legal status quo. Moreover, the only argument that Justice White offers in favor of his contrary view assumes that the status quo is set by the statute containing the veto provision. He argues that the exercise of a legislative veto does not change the status quo precisely because it is authorized by the underlying statute.¹⁴⁹ Once again, however, Justice White has improperly assumed the validity of the legislative veto as one of the steps in his argument to establish its validity. If the veto is invalid, the legal status quo is necessarily the state of affairs created by the statute without its veto provision.¹⁵⁰

Further evidence of the unacceptability of Justice White's "proposal for legislation" argument is provided by the anomalous result that would flow from its acceptance. As Justice White himself seems to appreciate, under his analysis the one-House veto would be constitutional, but the two-House veto would be unconstitutional.¹⁵¹ Since under a two-House veto scheme, one House alone could make the Attorney General's

148. *Id.* at 2806-08 (White, J., dissenting).

149. *See id.* at 2807.

150. This is true at least where the offending legislative veto provision is found to be severable from the remaining provisions of the statute as it was in *Chadha*. *See id.* at 2774-76.

A more complicated view of the status quo is that Chadha possesses a contingent right to remain in the United States subject to divestiture through the exercise of a legislative veto. For a discussion of the problems with this view, see *infra* text accompanying notes 165-66, and *supra* text accompanying notes 139-42.

151. *See* 103 S. Ct. at 2807-08 (White, J., dissenting).

proposal to suspend deportation legally effective by simply failing to veto the proposal, the three-constituency concurrence that Justice White is trying to establish would be defeated. Although Justice White at times appears to indicate that he could live with this result,¹⁵² it is truly counter-intuitive. If the constitutional objection to the legislative veto is that it shortcuts the legislative process,¹⁵³ one might well wonder why a veto requiring the concurrence of two Houses of Congress should be *more* offensive than a veto requiring the concurrence of only one. In fact, Justice White's argument in this regard seems to be quite disingenuous. While asserting a position that would invalidate the two-House veto in one part of his opinion,¹⁵⁴ Justice White suggests in another part of the same opinion that the two-House veto should be viewed as constitutional because the Framers contemplated it.¹⁵⁵ Moreover, Justice White appears to have forgotten his "proposal for legislation" argument in *United States Senate v. Federal Trade Commission*,¹⁵⁶ where he dissented from the majority's invalidation of a two-House legislative veto,¹⁵⁷ even though such a veto would have to be viewed as unconstitutional under the theory that he asserted in *Chadha* a few days earlier.

In response to the majority's contention that a legislative veto is an inchoate "law" that must be "enacted" in accordance with the prescribed article I procedures,¹⁵⁸ Justice White argues that a legislative veto is a mere negation of an executive act and not a legislative act that must comply with article I.¹⁵⁹ As noted above, the majority is unable to establish satisfactorily that a legislative veto is a "law,"¹⁶⁰ but Justice White is no more successful in establishing that it is not. In fact, very little of Justice White's opinion addresses this matter, and the portion of the opinion that does is self-defeating.

Justice White concedes that the Framers intended to prevent the article I procedures from being circumvented through nomenclature; an act having legislative effect should not escape article I procedures simply by being termed something other

152. See *id.* at 2808.

153. This is the objection that the majority found to be controlling. See *id.* at 2786-88.

154. See *id.* at 2808.

155. See *id.* at 2800-01 n.18.

156. 103 S. Ct. 3556 (1983).

157. *Id.* at 3557-58.

158. See 103 S. Ct. at 2784-88.

159. *Id.* at 2799-801 (White, J., dissenting).

160. See *supra* text accompanying notes 79-97.

than legislation.¹⁶¹ Curiously, however, rather than then discussing the definition of a legislative act, Justice White proceeds to discuss the necessary and proper clause.¹⁶² Because the necessary and proper clause does nothing to sharpen the meaning of the term "legislative act," Justice White's reference to that provision appears to be a total nonsequitur. That provision would only be even arguably relevant if Justice White intended to suggest that legislative vetoes are constitutional despite their noncompliance with article I simply because Congress has deemed them to be necessary and proper. If that is what Justice White intended, it is unacceptable for two reasons. First, it gives Congress limitless power. If Congress could ignore article I whenever it was expedient to do so, it could also ignore the due process or equal protection clause, or any other provision of the Constitution, whenever expediency so dictated.¹⁶³ Second, the language of the necessary and proper clause is directly at odds with such an expansive construction. The clause does not authorize Congress to do anything that it deems necessary and proper, but only to make "laws" that are necessary and proper.¹⁶⁴ Because, by Justice White's own admission, "laws" can be made only in accordance with the article I procedures,¹⁶⁵ it is difficult to see how the necessary and proper clause could possibly authorize the exercise of a legislative veto. Moreover, by failing to offer any serious explanation of why a legislative veto should not be viewed as a "law," Justice White never establishes that his dissenting opinion is entitled to any more respect than the majority opinion.

Although Justice White failed to establish that a legislative veto is not a "law," one might nevertheless be inclined to adopt his position if some other argument were available to demonstrate that a veto is not a "law." The discussion of the majority opinion above suggested that, rather than itself constituting a law, a legislative veto could be viewed as a contingency whose nonoccurrence triggers the operation of a law.¹⁶⁶ There is nothing particularly wrong with this formulation, but there is nothing

161. 103 S. Ct. at 2799-800 (White, J., dissenting).

162. *Id.* at 2801-02.

163. One could argue that there is a distinction between structural arguments to protect individual liberties and direct arguments to protect individual liberties, and that rejection of the former does not necessitate rejection of the latter.

164. See U.S. CONST., art. I, § 8, cl. 18; see also *Chadha v. INS*, 634 F.2d 408, 433 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983).

165. 103 S. Ct. at 2799-800 (White, J., dissenting).

166. See *supra* text accompanying notes 98-99.

ing particularly right with it either. Intuitively, the formulation seems suspect because the contingency on which the effectiveness of the law depends is under the control of Congress, which also enacted the law. This dilution in separation of powers protections poses the bill of attainder problems discussed in connection with Justice Powell's opinion.¹⁶⁷ In order to determine whether those problems are sufficiently serious to defeat the acceptability of the contingency formulation, however, one would first have to make fundamental decisions about the meaning of our separation of powers principles, as the discussion of Justice Powell's opinion illustrates. Though none of the doctrines discussed in any of the opinions makes those decisions for us, Justice White's opinion is particularly unhelpful in this regard.

The majority opinion notwithstanding, categorization of the legislative veto as a "law" is not necessarily fatal to the constitutionality of the veto. The one powerful argument made by Justice White in favor of the veto's constitutionality, stripped to its essentials, is that, if administrative agencies can make law through rulemaking, a House of Congress should also be able to make law through the exercise of a legislative veto.¹⁶⁸ Once again, Justice White makes a curious concession when he suggests that, although one- and two-House vetoes can survive constitutional scrutiny under this theory, committee vetoes might not be able to do so.¹⁶⁹ The analogy to administrative lawmaking should govern committee lawmaking to the same extent that it governs lawmaking by one House of Congress. Despite this anomaly, however, Justice White's argument has some appeal. Administrative agency rulemaking does not comply with the procedures prescribed by article I, yet it has effects that are every bit as real as the effects of legislation. In fact, because of the volume and pervasiveness of agency regulations, the effects of agency rulemaking may be more significant than the effects of legislation. Congress must comply with article I procedures but agencies need not because, doctrinally, agencies do not make law. The nondelegation doctrine, by requiring Congress to prescribe legislative standards confining executive discretion, ensures that agencies administer rather than make law.¹⁷⁰ On the other hand, because a House of Congress is not part of the executive branch of government, the

167. See *supra* text accompanying notes 130-42.

168. See 103 S. Ct. at 2801-04 (White, J., dissenting).

169. *Id.* at 2798 n.15.

170. See *supra* note 83.

only branch constitutionally empowered to administer laws, it cannot administer a law.¹⁷¹ Although the nondelegation doctrine is largely a legal fiction,¹⁷² it is a fiction that serves a purpose, and Justice White's argument ultimately fails to be persuasive because it never explains why that purpose need not continue to be served.

As a technical matter, the nondelegation doctrine permits agency rulemaking that does not comply with article I procedures to occur only when guided by legislative standards.¹⁷³ Although the standards contained in much modern legislation are so broad that they do virtually nothing to constrain executive discretion,¹⁷⁴ they do have important symbolic value that distinguishes legislative vetoes from agency rulemaking. The distinction relates to judicial review. Under a legislative veto scheme, the power to make law is delegated to a House of Congress with no limitation whatsoever; a House of Congress has the power to exercise a veto for any reason, or no reason at all, without ever explaining its actions. The *Chadha* case itself illustrates this fact quite clearly.¹⁷⁵ Even though administrative agencies operate under statutory standards that are very broad,¹⁷⁶ the mere existence of a standard, despite its breadth, reflects our preference for judicial review of agency actions. In fact, the courts have developed elaborate mechanisms for giving enough meaning to otherwise vacuous statutory standards to permit a degree of judicial review sufficient to ensure that agency rulemaking does not fall below some minimal level of acceptability.¹⁷⁷ Moreover, such judicial review, which applies

171. U.S. CONST., art. II, § 1. This argument was relied on more heavily by the court of appeals when it invalidated the legislative veto in *Chadha*. See 634 F.2d at 431-33.

172. See *supra* note 85 and accompanying text.

173. See *id.*

174. See *id.*

175. See *supra* note 5.

176. See *supra* note 85 and accompanying text; see also *supra* note 8 and accompanying text.

177. When asked to engage in judicial review of agency actions taken under broad statutory delegations, courts are often at a loss for ways in which to exercise their reviewing function without merely substituting their discretion for that of the agency. The reason that judicial review is so difficult is that the governing statute is too general to guide either the agency or the reviewing court in ascertaining the intent of Congress. Indeed, broad statutory delegations may well signify that Congress never formulated any specific intent but, rather, merely gave the problems to the agency to resolve. See *supra* note 47 and accompanying text. A central concern of most administrative law courses relates to how courts should deal with the problem of reviewing agency action taken under broad statutory delegations. One common judicial response to this problem has been to demand that the agency produce an administrative record suf-

to agency rulemaking as well as to agency adjudication,¹⁷⁸ is valuable not only because it protects the due process rights of individuals subject to agency adjudications—the issue with which Justice Powell was concerned¹⁷⁹—but also because judicial oversight presumably improves the quality of agency rulemaking, where individual rights are not of immediate concern. Accordingly, the difference between agency rulemaking and lawmaking by a House of Congress under a legislative veto scheme is that a legislative veto presents no opportunity for judicial review. To be sure, the absence of review is not caused by the absence of any standard governing the exercise of a legislative veto. Rather, the absence of a standard reflects our understanding that courts do not directly review legislative actions, which are primarily controlled through the political accountability of the legislature.¹⁸⁰ What is important, however, is that judicial review is unavailable, regardless of the reason why.

If we were to adopt Justice White's suggestion and either abandon the nondelegation fiction or extend it far enough to encompass the legislative veto, we would be reducing the role of the judiciary in the governmental process to a degree that has not resulted simply from our creation of the administrative state. Whether or not one believes this to be desirable, it does reveal the flaw in Justice White's reasoning. The constitutionality of lawmaking through a legislative veto device does not follow ineluctably from the constitutionality of rulemaking by administrative agencies. In suggesting that it does, Justice White demonstrates little sensitivity to the role that we typically assign to the judiciary in the governmental process.¹⁸¹ If

ficient to convince the court that the agency has adequately considered all the relevant factors before choosing a course of action. This has been referred to as "hard look" review because the reviewing court theoretically ensures that the agency has taken a "hard look" at the regulatory problem. Under this procedure, when the court lacks confidence in the soundness of the agency's decision it tends to remand to the agency for further proceedings. *See generally* S. BREYER & R. STEWART, *supra* note 4, at 291-309.

178. "Hard look" review is generally thought to be authorized by a reviewing court's obligation under § 10(e) of the Administrative Procedure Act to ensure that agency action is not arbitrary, capricious, an abuse of discretion or otherwise unlawful—a standard that applies both to agency rulemaking and adjudication. *See* Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982).

179. *See* 103 S. Ct. at 2789-90, 2792 (Powell, J., concurring).

180. *See supra* text accompanying notes 120-27.

181. It is now generally expected that the judiciary will have the final say about the validity of all significant or controversial administrative agency actions.

Justice White wishes to establish that lawmaking by legislative veto is constitutionally permissible, he must do more than merely ride the coattails of administrative agencies. He must explain why reduced levels of judicial review are appropriate. His opinion is unpersuasive precisely because it does not do this. Moreover, it is unlikely that any doctrine could ever determine what level of judicial review is appropriate. One's views on that matter are almost certainly going to be a function of one's subjective values and policy preferences.

Justice White might have chosen simply to assert that the veto had to be held constitutional unless it was affirmatively demonstrated to be unconstitutional. As a practical matter, that tends to be the way that the burden of proof is allocated in constitutional cases.¹⁸² As a doctrinal matter, however, a decision in favor of constitutionality based on nothing more than defects in the challenging arguments is not very satisfying. It does not establish that the veto is consistent with our doctrinal principles; it merely generates a result in cases where we do not know whether it is consistent with those principles or not. Moreover, to the extent that one might suggest that the burden of proof rule itself reflects a doctrinal principle, one would have to explain satisfactorily what that doctrinal principle was. Although some supporting policies could be specified, such as deferring to the will of the majority, as evidenced by the enactments of its elected representatives, unless there is a demonstrated reason not to do so, equally persuasive policies could also be specified to support a contrary allocation of the burden of proof. For example, one might assert that a government of limited, enumerated powers should not be permitted to take actions that interfere with individual autonomy unless it is first able to demonstrate that a contemplated action falls within the scope of its enumerated powers. Neither principle is manifestly better than the other, and unless a particular allocation of the burden of proof is convincingly shown to advance one controlling doctrinal objective, the burden of proof rule is itself nothing more than a subjective preference.

The very structure of Justice White's opinion, which begins with an extensive defense of the policies thought to be embodied in the legislative veto,¹⁸³ as well as the artificiality and in-

182. The proponent of unconstitutionality, whether a civil plaintiff or a civil or criminal defendant, generally has the burden of establishing the unconstitutionality of the challenged action or enactment.

183. See 103 S. Ct. at 2793-96 (White, J., dissenting).

consistency of many of the arguments made in the opinion, suggest that Justice White was primarily concerned with policy and that he was willing to manipulate doctrine in order to make it coincide with his policy preference. Nothing illustrates this more clearly than Justice White's suggestion that the Court, despite its constitutional holding, deems legislative vetoes to constitute conclusive statements of legislative intent to preclude vetoed executive actions.¹⁸⁴ Such a view of the veto would, of course, permit precisely the policy result that, by hypothesis, was impermissible as a matter of principle. Although Justice White's transparent doctrinal manipulation makes it difficult to conceive of legal doctrine as a determinate set of rules that compel particular results, there would be nothing wrong with deciding cases in accordance with governing policies if the policies were both acceptable and determinate. As the controversy surrounding the policy desirability of the legislative veto reveals,¹⁸⁵ however, policy agreement can be difficult to secure, and even if agreement about policy objectives could be secured, disputes would still arise concerning the best ways to pursue those policies. As has already been discussed, the availability or unavailability of the legislative veto may make little difference with respect to how the government operates.¹⁸⁶ Moreover, if it does turn out to make a difference, it is difficult to predict what that difference will be.¹⁸⁷ As a result, legal decisions based on guesses about the extent to which those decisions will advance a particular policy preference hardly merit homage as a species of principled decisionmaking. Even if one seeks to ignore immediate, politically-tainted policies and root legal decisions in fundamental policies that are generally accepted, the enterprise remains indeterminate. In fact, it becomes dizzyingly circular.

C. ANALYTICAL SPIN

The object of doctrinal analysis is to arrive at resolutions that are rooted in principle rather than subjective preference. For present purposes, a "principle" is a general proposition reflecting an aspirational objective, such as the proposition that people should drive safely. Principles tend to be pursued through "rules," which are specific directives and are easier

184. *Id.* at 2796 n.11.

185. *See supra* text accompanying notes 75-78.

186. *See supra* text accompanying notes 49-74.

187. *See id.*

than principles to apply, such as the directive that people should not drive faster than fifty-five miles per hour.¹⁸⁸ Principles are useful only to the extent that they are generally agreed-upon. Rules are useful only to the extent that they can successfully be shown to follow from some principle. A rule that is not adequately traceable to an underlying principle is merely a subjective preference. All that can be offered to justify the existence of such a rule is that someone approves of it for some arbitrary reason. The principles themselves are actually only subjective preferences, unless one believes in natural truths. But that observation is relatively unimportant as long as the principles are commonly-accepted. Legal doctrine is the collection of principles and rules on which we rely to avoid making arbitrary legal decisions—decisions based upon nothing more than the subjective preferences of the decisionmakers. As used in the present context, “doctrine” also includes any nonlegal policies, such as economic or political science policies, that we might seek to advance through principled legal decisionmaking.

Although the object of doctrinal analysis is to ensure principled rather than subjective decisionmaking, the endeavor is necessarily futile. If the governing principle is stated in terms specific enough to compel particular results in particular cases, it will be too controversial to command general acceptance; the principle itself will be viewed as nothing more than a subjective preference, or a rule that is not linked to any underlying policy. If the principle is stated in terms that are general enough to make it noncontroversial, it will be subject to manipulation permitting it to generate contradictory results, and the only way to choose between those results will be through recourse to subjective preferences.¹⁸⁹ Because of this dilemma, principled analysis simply goes around and around and there is no nonsubjective way out of this analytical spin. Attempted resolution of the constitutional issues raised by the legislative veto demonstrates this.

Principled analysis of the legislative veto starts with specification of the governing principle. The opinions in *Chadha* and in other cases that discuss the constitutionality of the legislative veto treat separation of powers as the governing princi-

188. Various commentators have used the terms “principle” and “rule” in various ways. See, e.g., Spann, *supra* note 2, at 593 n.26, 601.

189. See J. ELY, *supra* note 92, at 64-65 (quoting R. UNGER, KNOWLEDGE AND POLITICS 241 (1975)).

ple.¹⁹⁰ The legislative veto is unconstitutional if it violates the principle of separation of powers and valid if it does not. Selection of separation of powers as the governing principle is in no sense inherent or unexceptionable. The legislative veto also could be viewed, for example, as implicating federalism concerns. The awkward and inefficient legislative procedures prescribed by the Framers have the practical effect of imposing a constraint on the scope of activities in which the federal government can engage. At any given level of legislative effort, Congress could enact more statutes using efficient procedures than it could using inefficient procedures. If the Framers chose to impose this constraint in order to prevent federal regulation from interfering with state sovereignty to an unwarranted degree, the legislative veto may well undermine the principle of federalism. By serving as a device that encourages Congress to make broad delegations to administrative agencies, thereby permitting agencies to engage in regulatory activities traditionally reserved to the states,¹⁹¹ the legislative veto could be seen to upset the balance of federalism. If the veto is as important to the survival of broad agency delegations as many proponents say that it is,¹⁹² there will be fewer broad delegations without the veto and, consequently, less agency interference with state regulation. Accordingly, the veto may be unconstitutional on federalism grounds if the increase in federal regulation that it permits crosses over the line between permissible and impermissible federal interference with state sovereignty. Of course, it could also be argued that the legislative veto enhances federalism concerns by giving the Senate, which represents state interests, more power to overrule executive actions intruding on state prerogatives than the Senate would have in the absence of a legislative veto.¹⁹³ The point is that separation of powers does not constitute the only possible starting place for principled analysis of the legislative veto. In fact, selection of the governing principle is likely to be nothing more than an exer-

190. See cases cited *supra* note 14.

191. The tenth amendment truism is sometimes thought to symbolize the proposition that the federal government cannot properly interfere in matters that are traditionally subject to state control. See L. TRIBE, *supra* note 4, at 225, 301.

192. See 103 S. Ct. at 2793 (White, J., dissenting); see also *supra* note 12.

193. A one-House veto gives the states, acting through the Senate, total power to preclude executive actions thought to frustrate state interests. Although a two-House veto does not give the Senate total power to preclude such executive actions, it does facilitate preclusion by eliminating the need for the two-thirds majority votes in each House that would be required to override a presidential veto.

cise in the very subjectivity from which the principle is designed to protect us. Nevertheless, if the principle could be shown to produce one result, that result would be acceptable at least to those who concurred in the selection of the governing principle. However, no such showing can be made.

Even assuming that separation of powers principles govern the constitutionality of the legislative veto, one cannot determine how those principles apply without going around an endless circle. Whether separation of powers principles are described as preventing one branch from acting without the concurrence of another, or preventing one branch from usurping power belonging to another, or preventing one branch from ignoring procedures prescribed to govern its activities, the gist of separation of powers is that the government as a whole should not take an action without the consent of the governed. The concurrence of specified constituencies, obtained by surviving an ordeal of checks and balances, is relevant only because it ensures the reliability of that consent. If the judiciary approves an action taken by an executive agency in order to further a policy adopted by the Senate and the House of Representatives and signed into law by the President, all in accordance with the way in which the Framers believed that the will of the people could be accurately ascertained, that action is said to have the consent of the governed. The problem is that the governed consent to a lot of things that are mutually exclusive.

The legislative veto is criticized for what amounts to shortcutting the process by which consent is to be obtained,¹⁹⁴ and thereby undermining the genuineness of that consent. When the House of Representatives vetoed the suspension of Mr. Chadha's deportation¹⁹⁵ it did so even though the Senate, the President, and the judiciary might all have disapproved. Accordingly, the veto exercised in *Chadha* is plainly unconstitutional because it can hardly be said to represent the will of the people—except, of course, for the fact that it does. All legislative vetoes are authorized by duly enacted statutes, approved by all pertinent constituencies after exposure to all checks and balances. Accordingly, the veto exercised in *Chadha* is plainly constitutional because it represents the will of the people as measured by our most reliable indicator, the governmental process itself. Now watch the analytical spin begin.

194. See, e.g., 103 S. Ct. at 2787-88.

195. See *supra* note 5.

It might be argued that this analysis is flawed precisely because the legislative veto was not approved by *all* pertinent constituencies. The judiciary, which represents the constituency favoring protection of individuals like Mr. Chadha from unauthorized governmental actions, did not consent to the statute authorizing the legislative veto. It found the statute to be unconstitutional, and thereby vindicated the integrity of the system. The flaw, however, is only apparent. The judiciary did not invalidate the legislative veto because it interfered with Chadha's individual rights. In fact, it studiously avoided doing so.¹⁹⁶ Rather, the Supreme Court held the legislative veto to be unconstitutional because it was inconsistent with separation of powers principles.¹⁹⁷ Why was the legislative veto inconsistent with separation of powers principles? Because it was not approved by the judiciary, whose approval is necessary for a reliable indication of consent. Why was it not approved by the Judiciary? Because it was inconsistent with separation of powers principles. And around and around.

Analytical spin is the doctrinal paralysis that results when a principle acquires meaning only by feeding on itself.¹⁹⁸ Such circular reasoning makes the principle indeterminate. When one of the terms in a formula for applying a principle is the very principle being applied, the formula prescribes no result and the principle does not control the outcome. The only way to break out of analytical spin is to assign the principle some meaning, which ultimately can be derived only from a subjective preference. The way to break out of the separation of powers spin is to decide that popular consent to the underlying legislative veto scheme either is or is not a more reliable indicator of the will of the people than the lack of popular consent

196. Although Justice Powell wished to invalidate the legislative veto for interfering with Mr. Chadha's individual rights, see 103 S. Ct. at 2791-92 (Powell, J., concurring), the majority rejected this theory, see *id.* at 2787 n.21.

197. *Id.* at 2787-88.

198. The present conception of analytical spin was inspired by Duncan Kennedy's theory of "loopification." See Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354-57 (1982). Other commentators have demonstrated the presence of similar circular reasoning in doctrinal analysis. See, e.g., Leff, *Law and*, 87 YALE L.J. 989, 1006-08 (1978) (demonstrating circularity in particular economic analysis of commodity consumption); Tushnet, Book Review, *Marxism As Metaphor*, 68 CORNELL L. REV. 281, 287-90 (1983) (reviewing H. COLLINS, *MARXISM AND LAW* (1982)) (demonstrating circularity in particular Marxist analysis of reification). One of the difficulties in analyzing things is that the analysis is, in part at least, a function of the way that we look at things. In fact, the very act of looking at things may change them. Cf. H. PAGELS, *THE COSMIC CODE* 87-91 (1982) (discussing Heisenberg's "Uncertainty Principle").

that accompanies particular exercises of the veto. There is, however, no way to make this relative reliability determination except by recourse to subjective preferences. The principle necessarily fails to make the determination, and the object of the principled decisionmaking has therefore been frustrated.

This analytical spin is inherent in any formulation of separation of powers principles that can be applied to the legislative veto. The majority in *Chadha* invalidated the veto because it constituted a "law" that has not been enacted in accordance with the constitutionally prescribed procedures.¹⁹⁹ The reason that a particular veto is itself a "law," rather than merely part of the duly enacted underlying law authorizing the veto, is that the veto itself alters Chadha's legal right to remain in the country, which was granted by the underlying statute.²⁰⁰ How do we know that the underlying statute did not merely grant Chadha a right subject to divestiture by a legislative veto? Because a legislative veto cannot divest someone of legal rights since it is not "enacted" in accordance with the constitutionally prescribed procedures. One can break out of this spin only by subjectively adopting a position about the desirability of the legislative veto device and defining "law" in a way that advances that position.

The spin generated by Justice Powell's separation of powers formulation relates to judicial review. Simply put, Justice Powell's objection to the legislative veto is that it interferes with the ability of the judiciary to protect individual rights from arbitrary governmental abrogation.²⁰¹ In the *Chadha* case, the veto prevented the judiciary from protecting Chadha's statutory right to remain in the country. Why was Chadha not divested of that right when the veto was exercised, thereby defeating the existence of any right for the judiciary to protect? Because the veto was unconstitutional, thereby rendering it ineffective to defeat the existence of a legal right. Why was the veto unconstitutional? Because it interfered with the ability of the judiciary to protect individual rights. The only way out of this spin is to arrive at a subjective conclusion about the constitutionality of the veto and to define the legal "right" accordingly.

Justice White's position also spins. Cleared of its doctrinal camouflage, that position appears to be that our organic Consti-

199. See 103 S. Ct. at 2787-88.

200. See *id.* at 2784-85.

201. See *id.* at 2791-92 (Powell, J., concurring).

tution should be flexible enough to tolerate political innovations that arise to meet practical necessities. Because the legislative veto constitutes an innovation that is essential to proper maintenance of the administrative state, something that was not contemplated by the Framers, the separation of powers principle must be construed to permit the legislative veto.²⁰² In order to make that position work, Justice White must explain why the enhanced agency accountability offered by the legislative veto is preferable to the executive discretion that would prevail in the absence of a legislative veto. Presumably, this enhanced accountability is preferable because it places final control over governmental policymaking back in the hands of Congress where it belongs. But this cannot be established without succumbing to analytical spin. Under our constitutional scheme, Congress is supposed to make policy decisions. However, the legislative veto exercised in *Chadha* permitted one House, rather than Congress, to make policy. As a separation of powers matter, why does not that undermine the constitutional requirement that policy be made by Congress? Because the full Congress, acting in accordance with the prescribed procedures, made a policy decision to permit one House to formulate congressional policy.

Although not expressly made in any of the *Chadha* opinions, one of the most common arguments offered to invalidate the legislative veto is that it vests executive power in Congress. This is argued to be unconstitutional because Congress is not part of the executive branch of government, which is the only branch authorized to exercise executive power.²⁰³ This argument spins in three different directions at once. The spin begins by asking why executive power can only be exercised by the executive branch. First, if the answer is that this is necessary to ensure the availability of judicial review, because congressional administration of the statute would be immunized from judicial review,²⁰⁴ the argument spins. Congressional action that would be immune from judicial review would be legislative rather than executive in nature, and because it was legislative in nature, would preclude the existence of any congressionally-created right to serve as the basis for judicial review.²⁰⁵

202. See *id.* at 2793-96 (White, J., dissenting).

203. See *supra* note 171.

204. See *supra* text accompanying notes 120-27.

205. See *supra* text accompanying notes 98-99.

Second, if the reason that executive power can only be exercised by the executive branch is that congressional exercise of executive power would interfere with some inherent discretion possessed by the Executive, the argument spins again. Congress can certainly enact legislation so narrow that it leaves virtually no discretion for the Executive to exercise.²⁰⁶ This is true at least up to whatever limitation the bill of attainder clause imposes, ascertainment of which would have a spin of its own.²⁰⁷ If Congress can make such narrow delegations, it is difficult to see how the Executive can possess some inherent discretion that Congress chose not to delegate when it reserved the right to exercise a legislative veto. If the Executive does possess such discretion, it must be because the mechanism used by Congress to preclude the Executive from possessing that discretion is invalid. Accordingly, the question of whether the legislative veto unconstitutionally usurps executive power turns on something no less monumental than whether the legislative veto is unconstitutional.

Third, if executive power can be exercised only by the Executive because article II of the Constitution provides that it is the President who "shall take care that the Laws be faithfully executed,"²⁰⁸ the argument still spins. The law that the President is required to faithfully execute provides for a legislative veto. If that law is invalid, there is no law for the President to execute and, therefore, no executive function for Congress to usurp.²⁰⁹

Circularity is one thing; but what makes the separation of powers spin so analytically paralyzing is its inherent self-contradiction. The various doctrinal formulations offered to govern constitutional analysis of the legislative veto all assume that the action of a portion of Congress in exercising a veto somehow equals an action of the entire Congress. For Justice White, this equivalence is what gives the veto its efficiency and policy

206. See, e.g., statutes listed in *Myers v. United States*, 272 U.S. 52, 250-74 (1926) (Brandeis, J., dissenting); see also *supra* text accompanying notes 145-46.

207. In order to ascertain whether the bill of attainder prohibition applies under customary jurisprudence one would have to grapple with the right/benefit distinction, see 103 S. Ct. at 2792 n.9 (Powell, J., concurring), which involves the circularity inherent in determining whether conferral of a benefit on one individual abrogates the rights of other individuals on whom the benefit was not conferred. See *supra* note 142 and accompanying text.

208. U.S. CONST., art. II, § 3. See *supra* text accompanying note 203.

209. This is true at least where the offending legislative veto provision is not severable from the remaining provisions of the statute. If the veto provision is severable, the President will be able to administer the remaining statutory provisions without any congressional usurpation of Executive power.

desirability. For Justice Powell and Chief Justice Burger, the equivalence is what makes the veto unconstitutional. A legislative veto, however, is not the equivalent of an act of Congress. Rather, as noted above, a legislative veto is the opposite of an act of Congress.²¹⁰ By definition, a legislative veto is only exercised when the full Congress is unable or unwilling to take the action that the veto is intended to effect. It is at least curious, therefore, that constitutional analysis of the legislative veto has tended to equate the two.

Indeed, if a legislative veto really were the equivalent of an act of Congress, the *Chadha* decision would have no effect whatsoever. *Chadha* holds that Congress cannot constitutionally pass a statute permitting a part of Congress to speak for the entire Congress. If, however, Congress genuinely desired the efficiency of the legislative veto enough to outweigh the loss in representativeness that results when a veto is exercised without the concurrence of all pertinent constituencies, it could easily circumvent the *Chadha* decision. The full Congress would simply have to agree to ratify by two-thirds vote any veto decision made by a specified House or committee of Congress. That ratification would then transform the legislative veto into duly enacted legislation. It would have enough support to withstand a presidential veto and would satisfy all of the requirements specified in *Chadha*.²¹¹ Because the full Congress will have agreed to such ratification beforehand, the whole process could occur with virtually the same efficiency as a direct legislative veto. Members of Congress could agree informally to such a procedure, or they could all sign a contract, or they could even promulgate the procedure into the rules of each House.

One might argue that such an agreement would be unconstitutional precisely because it undermined the holding in *Chadha*. That argument, however, has very questionable merit. Such an agreement looks much like the everyday log-rolling and other forms of political compromise that we tend to accept as the backbone of the political process. Moreover, the Constitution certainly does not require each legislator, without being influenced by political considerations, to formulate an independent position on each legislative issue that comes to the

210. See *supra* text following note 78.

211. The ratification would satisfy the bicameralism and presentment requirements. See 103 S. Ct. at 2780-84.

floor of Congress.²¹² Regardless of the constitutional validity of such an agreement, however, Congress is unlikely to adopt such a scheme. The danger that individual members would breach the agreement with respect to particular vetoes would be too high. Moreover, *Chadha* does seem to hold that such an agreement cannot be made legally enforceable.²¹³ The reason that an individual member would breach the agreement is that the action of the House or committee delegated veto authority would not represent that member's position. The breaching member would not only disapprove of the proposed veto, but would disapprove strongly enough to ignore the need for legislative efficiency that had led to development of the veto scheme. Whenever this were true with respect to more than one-third of the members of either House, the veto could not automatically be ratified.²¹⁴ That Congress is unlikely to implement such a scheme reveals that Congress believes that breaches by more than one-third of the members will be common—something that intuitively seems correct. If fatal breaches will in fact be common, the legislative veto, which could not always secure ratification by Congress, is not the equivalent of an act of Congress.

Although an appreciation of the divergence between legislative vetoes and acts of Congress affects the constitutional analysis of the veto, its effect is, of course, indeterminate. If a veto is not the equivalent of an act of Congress, then it need not comply with article I procedures as the majority insists that it must.²¹⁵ Moreover, such a veto does not interfere with the ability of the judiciary to review its exercise for arbitrariness on due process grounds because it is not a congressional action that is immune from meaningful judicial review.²¹⁶ If a legislative veto is not an act of Congress, however, it must be the exercise of some delegated authority. And this delegation is completely standardless, in seeming violation of the nondelegation doctrine.²¹⁷ In addition, it is difficult to see why one would

212. Even if such an argument had merit, it is likely that the courts would decline to entertain a lawsuit raising the argument, dismissing the suit on political question or other justiciability grounds.

213. Presumably, even if the suggested agreement were made part of the rules of each House, it would not be judicially enforceable. See 103 S. Ct. at 2786 n.20.

214. Without the assurance of the votes of two-thirds of the members of each House, a presidential veto could not automatically be overridden.

215. See *supra* text accompanying note 79.

216. See *supra* text accompanying notes 120-27.

217. See *supra* note 85.

want to expand our organic Constitution²¹⁸ in order to facilitate agency accountability to some entity that is not Congress and necessarily acts in a way that Congress would not act. The legislative veto is not truly a *legislative* veto, but that perception does nothing to improve the quality of constitutional analysis. It merely reverses the direction of the analytical spin. The only way to ascertain the effect that such a perception should have on constitutional analysis is to make a subjective determination of whether the legislative veto represents the will of Congress.

There is a striking irony in all of this. The legislative veto has gained popularity because it provides a possible means for correcting alleged agency abuses.²¹⁹ The cause of those abuses is the near-total breakdown in separation of powers protections that results from broad congressional delegations of authority to administrative agencies. Those broad statutory delegations grant agencies vast discretion to make rules, apply those rules, and adjudicate the validity of particular applications of the rules. The same agency is permitted to exercise all three governmental functions. Moreover, the breadth of the statutory standards governing agency actions limits the scope of judicial review by providing statutory authorization for almost anything that an agency wishes to do.²²⁰

The very reason administrative agencies have become the core of our governmental structure is that their freedom from separation of powers constraints permits them to operate with a degree of efficiency that is indispensable to modern governmental activities. Many people believe that the federal government has become so big and undertaken so many regulatory responsibilities that it can no longer operate in accordance with the separation of powers inefficiencies contemplated by the Framers.²²¹ Whether this renders the administrative agencies themselves unconstitutional depends upon one's subjective views of the nature and function of the Constitution.²²² None-

218. See *supra* text accompanying note 202.

219. See, e.g., 103 S. Ct. at 2793-95 (White, J., dissenting); see also *supra* note 12.

220. Cf. *supra* notes 177-78 (discussion of "Hard look" review).

221. See, e.g., 103 S. Ct. at 2793-95 (White, J., dissenting); see also *supra* note 12.

222. If one believes that the three-branch structure of government designed by the Framers should be retained in a meaningful sense, one would probably conclude that the existence and power of administrative agencies are sufficiently inconsistent with a three-branch form of government that the agencies themselves are unconstitutional. If one believes that the Constitution should

theless, reliance on the legislative veto to cure perceived agency abuses is quite ironic.

The reason that the legislative veto works is that it too constitutes a breakdown in separation of powers safeguards. Congress, acting through the full legislative process, cannot control agency activities as effectively as it can using the legislative veto, because the legislative veto process is more efficient than the full legislative process. It is more efficient because it dispenses with the need for the concurrence, in particular veto decisions, of each of the constitutionally specified constituencies. The irony is that in order to correct abuses produced by the breakdown of separation of powers in administrative agencies, Congress has further broken down separation of powers by authorizing the legislative veto. It is difficult to know whether this is proper because one must "fight fire with fire," or improper because "two wrongs don't make a right." What is clear, however, is that the nature of government has changed since the Framers devised their scheme. Whether the change is viewed as good or bad turns on a complex set of factors that ultimately turns on one's subjective preferences. It certainly does not turn on something as indeterminate as doctrine.

II. IMPLICATIONS

The indeterminacy that frustrates doctrinal analysis of the legislative veto can be extrapolated to all doctrinal analysis. This is true both as a theoretical matter and as a practical matter. Moreover, it is true with respect to strict legal doctrine and with respect to the underlying policies that doctrine is intended to advance. The model of the legal system that emerges from these perceptions is fraught with contradictions and dominated by uncertainty. To the extent that the legal system remains viable, it is only because we choose not to dwell on the inconsistencies that lurk beneath the surface of our doctrinal formulations. However, the perceptions of indeterminacy that are becoming increasingly common among legal analysts threaten to undermine the continued viability of our efforts at principled decisionmaking, at least as presently conceived. But waxing perceptions of indeterminacy may also signal the start of a paradigm shift in legal analysis that can move us to new levels of understanding.

be able to expand to meet contemporary exigencies, and that a large, bureaucratic federal government is a contemporary exigency, one would probably conclude that the administrative branch of government is perfectly constitutional.

A. EXTRAPOLATION

Constitutional analysis of the legislative veto is a useful vehicle for demonstrating the weaknesses in principled analysis because, in the legislative veto context, the weaknesses are so salient. Although people who think about such things may have a position on the constitutionality of the veto, most also have a sincere appreciation for the strengths of opposing arguments, as well as for the soft spots in their own analyses. Moreover, because one's position on the constitutionality of the veto tends to correlate with one's position on its policy desirability, only the most stubborn formalists will refuse to entertain seriously the suggestion that resolution of the constitutional issues is ultimately based on subjective preferences about the proper structure and operation of government. Most would agree that the *Chadha* case could have been decided either way and that an adequate judicial opinion could have been written to accompany either result. Although each of the *Chadha* opinions was less than completely persuasive, all were well within the range of customary Supreme Court persuasiveness. For those willing to accept the view that doctrinal analysis of the legislative veto is indeterminate—that there is no nonsubjective way of resolving the constitutionality of the veto—the challenge is to ascertain the scope of doctrinal indeterminacy in general. There are reasons to believe that such indeterminacy is all-encompassing.

Assuming that *Chadha* is a case in which subjective factors rather than principle governed the outcome, why should one infer that all or even most cases are similar to *Chadha* in this respect? Because the characteristics of doctrine that made it indeterminate in *Chadha* will make it indeterminate in all other cases as well. Separation of powers doctrine was unable to produce only one result in *Chadha* because doctrinal principles are not engineered for literal application. One does not simply honor the bare command to observe separation of powers. Rather, separation of powers is an imprecise, aspirational concept that must be reduced to an operational level in particular context.²²³ It is this process of moving from the abstract to the specific that breeds uncertainty. Reasonable people can differ on what advances separation of powers in the same way that they can differ on what advances justice, and the language used to formulate a doctrinal principle cannot alone be relied

223. See Spann, *supra* note 2, at 632-47.

upon to prevent those differences from being resolved on the basis of mere subjective preference. Accordingly, if doctrine is nevertheless to be viewed as determinate, the body of precedent and subsidiary rules that builds around the doctrinal principle must be shown to constrain judicial discretion and immunize decisions from subjective preferences. However, that is a showing that cannot be made.

Precedent does nothing to help resolve a case of first impression. The first case must be resolved on the basis of the doctrinal language formulation alone, where subjective preferences will necessarily infect the decision. And, in a very meaningful sense, every case is a case of first impression, thereby making the concept of precedent itself largely illusory. If the second case does not differ from the first in any material way, it makes little sense to view the two as separate cases. Resolution of the second case calls for no independent legal analysis because the case of first impression controls completely. As a result, resolution of the second case is determined by precisely the same subjective preferences that governed resolution of the first.

If the second case does differ from the first, the court must determine whether that difference is material. The only way to make this determination is through recourse to the doctrinal principle. But there is no precedent to assist the court in applying the principle; by definition the only precedent that exists is distinguishable. Accordingly, the court must apply the principle directly to the second case, making it too a case of first impression that is captive to the subjective preferences that necessarily govern all cases of first impression. All subsequent cases are subject to characterization as cases of first impression in the very same manner.

Another way of stating this is that, in order to determine whether a precedent is controlling or distinguishable, a court must apply the governing principle to the factual differences in order to learn whether those differences are material. The only way to ascertain the meaning of the governing principle, however, is through recourse to the principle itself. This is precisely the analytical spin that plagued the analyses of the legislative veto in *Chadha*, and it is equally destructive of doctrinal determinacy in all other cases.

One might be tempted to argue that recourse to legislative history, or one of its functional equivalents,²²⁴ can permit prin-

224. One example of a functional equivalent would be the judicial opinion

cipled resolution of a case of first impression. That argument also fails, however. In the strongest case, the legislative history will have spoken directly to the facts of the case at issue, prescribing the result in the clearest possible terms. That does not, however, make the initial case the product of principled judicial resolution. On the contrary, the case will not have been resolved by a court at all. Rather, it will have been decided directly by the legislature on the basis of the legislature's subjective preferences. Moreover, to suggest that the legislature itself may have been acting on the basis of principle rather than subjective preference simply begins an infinite regression reminiscent of analytical spin.

In cases where the legislative history does not speak directly to the case at issue, but rather purports to elaborate upon some general principle that should govern the case, doctrinal determinacy fares no better. If the legislative history does not directly dispose of the case at issue, the court will have to determine whether particular examples or statements of purpose contained in the legislative history do or do not compel a particular result. Once again, the only way to make that determination is through reliance on the very principle being elaborated, thereby presenting the same difficulties that arise when a court tries to follow precedent. Because of all this, the doctrinal indeterminacy evident in *Chadha* can be extrapolated to every case.

If the theoretical extrapolation of indeterminacy from *Chadha* to all other cases is unsatisfying, other observations may make it intuitively more palatable. *Chadha* merely demonstrates that there is at least one case in which doctrine is indeterminate, and it is easy to identify other cases sharing the same defect. Few scholars would argue that the Supreme Court's major policy decisions, such as those desegregating the schools or protecting abortion rights, are compelled by principle. They are highly political decisions that easily could have been decided the other way, and often were, under the same governing principle.²²⁵ The only way that those types of deci-

in a case announcing a common law rule. For present purposes, the concept of legislative history is also broad enough to encompass any articulable social norms or background values that might be thought to aid in the resolution of a case of first impression.

225. Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954), with *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Supreme Court reversal of position on constitutionality of state-sanctioned racial discrimination under the equal protection clause of the fourteenth amendment).

sions can even remotely be deemed to have been determined by principle is by defining the term "principle" in a way that makes its meaning vary over time with the social and political values of the pertinent population. Such a flexible definition of principle may well serve a useful function. By connoting a degree of stability and immutability that reduces the popular resistance that would otherwise accompany the imposition of new values, flexible conceptions of principle may both facilitate social change and provide aspirational objectives for social changers.²²⁶ That is, however, hardly an argument supporting the existence of principled decisionmaking in major social policy cases. It is just a fancy way of saying that the decisions are subjective. At best, the cases turn on the judge's assessment of what the subjective values of the majority will tolerate at the time the decision is rendered. At worst, the cases turn on the judge's own subjective preferences.

Intuitively, doctrinal indeterminacy would not seem to be limited to *Chadha* and the controversial political cases, but would seem to extend to all litigated cases. By hypothesis there are valid arguments on both sides of virtually every litigated case. Indeed, the only reason that a case is litigated at all is that both sides have at least some possibility of winning. Even in abusive litigation, commenced or defended for purposes of delay or harassment, the abusing party must have an argument sufficient to avoid summary disposition and liability for abuse of process. Summary disposition would undermine the purpose of delay. Liability for abuse of process, either through an award of attorneys' fees or damages, would nullify any benefit to be derived from harassment. If this were not the case, we would presumably alter our procedural and liability rules to correct for any improper incentives. If virtually all litigated cases could be resolved either way, there is a vast number of cases in which doctrine is at least potentially indeterminate. One could argue that there are right and wrong doctrinal answers in litigated cases, and that cases are litigated by the party urging the wrong resolution only in the hope that the judge will make a mistake. As an intuitive matter, however, that does not ring true. It is likely that most litigants believe their positions to be correct, and that most judges believe their decisions to be correct. The only reason sincere differences of opinion about proper application of the governing doctrine can coexist is that the meaning of the doctrine is very uncertain.

226. See Spann, *supra* note 2, at 598-602.

As a practical matter, it is as if doctrine were indeterminate. Accordingly, those who reject a theoretical demonstration of doctrinal indeterminacy because it is too removed from "real world" concerns should be moved by the functional indeterminacy of doctrine. One way or the other, doctrinal indeterminacy appears to be inescapable.

But what about cases in which the proper doctrinal outcome is so clear that no one even bothers to litigate the issue; how can doctrine be indeterminate in those cases? As it turns out, there are no such cases. There are only cases in which the litigants lack either the resources or the imagination to illuminate the doctrinal uncertainties. If enough is at stake to warrant the effort, doctrinal uncertainties can always be found. For example, article II of the Constitution says that the President of the United States must be at least thirty-five years of age.²²⁷ The provision seems to plainly prohibit a thirty-four year old from holding the office of President.

As an initial matter, the minimum-age provision of article II may well be a rule rather than a doctrinal principle. Assuming for the moment that rules are determinate, they do nothing to establish doctrinal determinacy. Because doctrinal principles are designed to insulate us from subjective preferences, rules are useful only to the extent that they advance doctrinal objectives. As has been noted, rules that do not purport to emanate from a principle, but rather serve as a starting point for analysis, are themselves nothing more than subjective preferences. Their formulation is arbitrary and little can be said to justify their existence. Therefore, the fact that rules might appear to be determinate could hardly be less consequential. Of course, nothing really fits this definition of a rule. We rarely treat rules as the starting point of legal analysis. Rather, a rule is used as a means of implementing a doctrinal policy. As a result, all of the uncertainties attendant to any doctrinal analysis accompany efforts to apply the rule.

Assuming that the minimum-age provision of article II is not itself a mere subjective preference of the Framers but is, instead, a subsidiary rule designed to advance some unarticulated principle, proper application of the provision would require both specification of the governing principle and determination of what outcome would best serve that principle. Both tasks permit the introduction of doctrinal uncertainty into the analysis. If the governing principle is that Presidents

227. U.S. CONST., art. II, § 1, cl. 5.

should possess a minimum degree of maturity and experience, that principle may best be advanced by ignoring the rule in the case of a particularly precocious thirty-four year old. If the principle is that literal adherence to certain rules will advance the long-term interests of the nation more than case-by-case determinations will, application of the minimum-age provision will be complicated by the uncertainties involved in ascertaining whether the rule really falls within the scope of that principle, or whether it is more like a speed limit that we permit to be violated by fire trucks and ambulances. Moreover, the minimum-age provision does not reflect the only principle embodied in the Constitution. The Constitution also incorporates the democratic principle that the voters should be able to select the President of their choice. The manner in which the conflict between that principle and the minimum-age rule should be resolved is far from certain.²²⁸ The suggestion that latent uncertainties can be found in seemingly specific constitutional rules is not fanciful. Finding such uncertainties is something that the Supreme Court has, in effect, done repeatedly.²²⁹ Accordingly, there is no case in which the outcome is so clear that it escapes the influence of doctrinal indeterminacy.

There is one final way in which doctrinal indeterminacy can be established as a theoretical matter. Assume that we are required to determine whether result *A* or result *B* is compelled by a particular principle, and we are certain that result

228. The minimum-age provision is also cited in Nagel, *Interpretation and Importance in Constitutional Law: A Re-assessment of Judicial Restraint*, 25 *NOMOS* 181, 190-93 (1983), along with other examples, in arguing that seemingly specific constitutional provisions can contain latent ambiguities.

229. In *Ex parte Levitt*, 302 U.S. 633 (1937), the Supreme Court refused to preclude Justice Black from taking his seat on the Supreme Court even though, by voting as a Senator to increase the retirement benefits of Supreme Court Justices, Justice Black would appear to have been ineligible for a seat on the Court by virtue of the article I, § 6 proviso that no member of Congress shall hold an office whose emoluments were increased while that member was in Congress. In *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Supreme Court declined to prohibit members of Congress from simultaneously serving as members of the armed services reserves, despite the fact that the incompatibility clause of article I, § 6 would appear to prohibit such simultaneous membership. In *United States v. Richardson*, 418 U.S. 166 (1974), the Supreme Court refused to order disclosure of the Central Intelligence Agency budget despite the article I, § 9 requirement for periodic publication of a regular statement and account of the receipts and expenditures of "all" public funds. All of those cases were dismissed on standing grounds, but it is unlikely that the Court would have permitted itself to be halted by standing barriers if it had believed the underlying constitutional provisions to be important enough to merit enforcement. Realistically, the Court simply chose to ignore the "plain" meanings of the subject constitutional provision, thereby causing one to wonder how "plain" their meanings really were.

A is the correct choice. Those with even a passing appreciation of the power of psychological techniques of persuasion would concede that, given the right circumstances and sufficient time, we could be "convinced" to abandon our initial conclusion and favor result *B*. Stated bluntly, we could be brainwashed and made to change our minds. Doesn't the fact that we can be made to abandon result *A* in favor of result *B* indicate that the principle governing our selection is indeterminate? If not, it must be because result *A* was the *truly* correct result, and our preference for result *B* was caused only by the artificial alteration of our values and perceptions through brainwashing techniques. But where did our initial preference for result *A* come from? Wasn't it too merely the result of the way that our values and perceptions were formed through our socialization processes? Why then is the psychological conditioning that forced us to shift our allegiance from result *A* to result *B* any more artificial or suspect than the psychological conditioning that caused us to prefer result *A* in the first instance? More significantly, if doctrine is determinate, which is the correct, doctrinally determined result; the one produced by conditioning process *A* or the one produced by conditioning process *B*? There is, of course, no answer. If human beings reared in Western cultures can be "convinced" to sell each other into slavery or to slaughter each other by the millions because of their religious beliefs, and to do so in the sincere belief that their actions are permitted by the principles that govern their conduct, those principles must be so vulnerable to manipulation that they merit designation as indeterminate. Accordingly, for all of the theoretical and intuitive reasons that have been discussed, the indeterminacy evident in *Chadha* safely can be extrapolated to all other cases.

The legal realists perceived that doctrine was indeterminate quite some time ago.²³⁰ The response of many legal realists was to shift the focus of legal analysis from doctrine to the

230. See *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652-53 (2d Cir. 1943) (Frank, J.) (prejudices and preconceptions shared by society, as well as idiosyncratic sympathies of judge, find expression in society's legal system); J. FRANK, *LAW AND THE MODERN MIND* xiii, 115 (6th ed. 1963) (judges' temperament, training, biases, and predilections influence decisions); K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 3-4, 11-18, 393 (1960) (human psychology, particular circumstances, and inherent probabilities create nonuniform pattern of decisions); cf. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435-38 (1934) (judges often decide cases on policy grounds, then "wring" from legal doctrine a legally acceptable basis for decision); see generally Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1670-76 (1982).

underlying policies that doctrine was to implement.²³¹ Accordingly, belief in doctrinal determinacy was replaced by belief in policy determinacy. That legal doctrine could neither control nor explain the outcomes in particular cases became inconsequential as long as policy considerations could control and explain those outcomes. Although we might have stated the outcome of a contracts case in the indeterminate language of consideration or damages, what we were really doing—or at least should have been doing—was advancing economic efficiency, or social psychological objectives, or whatever goals are dictated by your favorite social science.

Recently, the critical legal theorists have pointed out that the legal realists merely moved the indeterminacy from the level of doctrine to the level of policy.²³² All of the possible social science explanations for case outcomes depend upon both the validity and determinacy of some governing principle, but social science principles are as indeterminate as any other principles.²³³ Despite their claimed empirical verification—a claim that was also made for legal doctrine when law was portrayed as a science²³⁴—social science principles invariably incorporate a “fudge factor” that permits them to escape falsification but, in the process, achieves indeterminacy. If demand increases as price increases, in seeming violation of price/demand principles, an economist will explain that the higher price created a new product perceived to be of higher value, thereby stimulating demand and preserving the validity of the price/demand principle. If an individual resists rather than succumbs to peer pressure, in seeming violation of social psychological principles, the social psychologist will explain that we have merely failed to identify the relevant peer group, thereby preserving the validity of peer-pressure principles. Like lawyers, social scientists are adept at generating analytical spin. As has been repeatedly demonstrated, policy principles

231. See Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1384-88; Note, *supra* note 230, at 1670-76.

232. See Note, *supra* note 230, at 1677-86, and critical legal theorists cited therein.

233. See *id.* Some of the legal realists themselves also recognized this. See, e.g., Gilmore, *The Age of Antiquarius: On Legal History in a Time of Troubles*, 39 U. CHI. L. REV. 475, 483-85 (1972); cf. Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 109 (1970) (a desired legal outcome can be obtained by categorizing a cause of action in a favorable way); see also Leff, *supra* note 198, at 1008-11 (calling attention to Gilmore's appreciation of extreme relativity).

234. See G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 20-62 (1980).

work no better than legal principles.²³⁵ Therefore, doctrinal indeterminacy in its broad sense means total indeterminacy. It means that principle itself can never work and that, as a result, we are forever consigned to the evils of subjective preferences—the very evils that we initially set out to avoid.

B. DECONSTRUCTION

The process of demonstrating indeterminacy is sometimes referred to as “deconstruction.” Deconstruction is a term that the critical legal theorists have borrowed from proponents of a current trend in philosophy and literary criticism, which focuses on the problems inherent in using language as a device for communicating meaning. The author’s intended meaning in making any linguistic assertion—whether in a poem, a philosophical treatise or a constitutional provision—can be shown to depend upon certain implicit assumptions that the author took for granted in making the assertion. By highlighting those implicit assumptions, a deconstructive “critique” of the text exposes the subjectivity of the linguistic assertion. For those who do not share the author’s implicit assumptions, but rather bring to the text their own assumptions, the text has a different meaning. Moreover, if the implicit assumption is itself imprecise, it can be shown logically to support an assertion that is contrary to the original assertion made in the text. Accordingly, the author does not “control” the meaning of the text; meaning emanates from an interactive process between the language of the text and the particular assumptions made by the reader.

The majority opinion in *Chadha* provides a perfect example. Chief Justice Burger held that the Constitution—for present purposes, a “text” containing linguistic assertions—prohibited congressional use of the legislative veto because the veto did not comply with the article I procedure prescribed for making “laws.” The implicit assumption was that the exercise of a legislative veto constituted the process of making a “law.” If, like Justice White, one does not share that assumption, one can conclude that the text—the Constitution—does not prohibit

235. The most popular social science for contemporary legal analysts with a policy bent to invoke is economics. See Tushnet, *supra* note 231, at 1388. Among the articles demonstrating the manipulability of economic reasoning are Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); cf. Tushnet, *supra* note 231, at 1388-95.

the legislative veto because the article I enactment procedures simply do not apply. For Justice White, the text means something different than it means for Chief Justice Burger, and both meanings may differ from the meanings intended by the various Framers, who relied upon their own assumptions in authoring the text. No particular meaning is more "correct" than any other; the reader of a text will simply be persuaded by the view that most nearly coincides with the reader's own subjective assumptions.

One might argue that there is a perfectly good, nonsubjective way to choose between the majority and dissenting views of the constitutionality of the legislative veto and ascertain the true meaning of the text; one need simply determine whether a legislative veto really is or is not a "law." However, the charm of deconstruction lies in its relentless availability to expose the subjective foundation of any seemingly objective assertion. The question of what constitutes a "law" can, for example, be shown to turn on implicit assumptions about what constitutes a "right," which in turn, can be shown to turn on implicit assumptions about moral philosophy, which in turn, can be shown to turn on implicit assumptions about social interdependence. . . and so on. Because any text can be deconstructed, the meaning of a text is indeterminate; it has as many different meanings as it has readers who bring to it their own sets of subjective values and assumptions.²³⁶

The paradox is that the same text can have simultaneous contradictory meanings, and in a legal text, an operative principle can tolerate simultaneous contradictory results. On a modest level, the paradox can be unsettling: we invented principle because we were unable to tolerate total subjectivity, yet the only way that principle can work is through recourse to subjective preferences. On a cosmic level, the paradox can be downright disturbing: if there is no principle because there is only subjectivity, then there may be no reality, only subjective perceptions. As if that were not enough, on an analytical level, the

236. The foregoing discussion of deconstruction is somewhat stylized. There are ways in which deconstruction in the legal context has taken on a life of its own, with connotations that do not necessarily accompany literary and philosophical deconstruction. Nevertheless, it is the indeterminacy that has been attributed to legal deconstruction that is of concern for present purposes. For a general discussion of literary and philosophical deconstruction, see C. NORRIS, *DECONSTRUCTION THEORY & PRACTICE* (1982). For an example of deconstruction in a legal context, which focuses on substantive criminal law doctrines, see Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 669-73 (1981).

paradox simply makes everything fall apart: if all principles can be deconstructed, the principles on which deconstruction itself are based can also be deconstructed, thereby leaving us with nothing. The only reason that deconstruction might seem alarming, however, is that we do not yet understand how to understand it. To the extent that deconstruction is able to prompt whatever paradigm shifts are necessary to take us to new levels of understanding, it is not deconstruction at all. It is the threshold of reconstruction—the vehicle for moving us from here to whatever comes next.

It is necessary to understand the full scope of the problem in order for the solution to be appreciated fully. At least as a theoretical matter, doctrinal indeterminacy is simply the first step along a very slippery slope that inevitably leads to total deconstruction of everything. The reason that doctrine is indeterminate is that principles themselves are indeterminate. The reason that principles are indeterminate is that they derive their operative meaning from subjective preferences, which are either random or are the end product of countless influencing factors whose operation and interaction we cannot even begin to understand. Even those who believe that subjective preferences are arrived at after an exercise of free will cannot explain why free will was exercised in one particular way rather than another. What ultimately emerges is a world in which all truths are contingent upon subjective preferences, about which virtually nothing is understood. Because of the contingent nature of everything important, it is difficult to have confidence in the correctness of the choices that one makes. And if everything is so contingent, one might well ask "why bother?"

Traditional legal scholars tend to have two reactions to total deconstruction. The first one is one of xenophobic alarm, which, although easy to understand, is difficult to defend. The second response, which is shared by many of the deconstructionists themselves, is more serious. This response is one of apprehension about deconstruction because it offers nothing to replace what it tears down. The implication appears to be that, unless paired with a constructive program, deconstruction insights would be better left unexplored. This response, however, is also difficult to defend, particularly because it poses the risk of suppressing whatever benefits stand to be derived from legal deconstruction.

Deconstruction does differ from traditional analysis, but that is no cause for alarm. True, deconstruction challenges our

intuitions by pushing our assumptions to their logical extremes, but the assumptions and the logic with which they are pushed are our own inventions. Because these inventions are not natural truths, we have the power to modify them whenever we perceive a need to do so. It is also true that deconstruction precludes determinate meaning. Once deconstructed, it becomes apparent that things have no substance of their own. Things are only what they appear to be, and appearances can be manipulated in a thousand different ways. But we have known that for a very long time. Eskimos are said to have names for several different types of snow, because they believe the distinctions between those types to have meaning for their lives. New Yorkers categorize snow only by whether it is clean or dirty. How many types of snow are there really? Naturally, the answer to that question depends upon the way that you look at things. Similarly, we used to believe that slavery was tolerable and that women belonged in the kitchen. Now we condemn slavery and believe that women belong on the Supreme Court. Now we look at things differently, and because we do, things are different.

The thought that the constitutional status of the legislative veto is an indeterminate, self-contradictory function of the way that one happens to look at separation of powers should not be unsettling. Many phenomena—some of which are intimately connected to fundamental conceptions about reality—are commonly recognized to have no existence apart from the theoretical constructs that we have created for them, and many of those constructs contain inherent contradictions. In order to explain the observed properties of light, we sometimes pretend that it is a particle, and sometimes pretend that it is a wave. We do so even though we know that it is neither and cannot be both.²³⁷ Nevertheless, we manage to sleep at night after turning off the inherently contradictory phenomenon.

Subatomic nuclear physics makes tolerance of the contradictions inherent in light look like child's play. If one were now to suggest that matter is made up of atoms with tiny electrons orbiting a nucleus composed of protons and neutrons, it would take a very polite physicist not to laugh out loud. Subatomic physics can no longer be conceptualized in ways that can be reduced to descriptive pictures. It can only be conceptualized in a universe where one looks at things as probabilities described

237. See H. PAGELS, *supra* note 198, at 23-24, 67.

by equations rather than as three-dimensional objects.²³⁸ Moreover, the nature and history of scientific progress indicate that if there is anything that we know about the natural sciences, it is that by tomorrow we will realize that everything we know today is wrong. Nevertheless, the natural sciences are typically thought to embody our best approximations of objective reality.

Even mathematicians, whose discipline is very precise and rigorous, realized decades ago that the categories of "true" and "false" were not exhaustive, thereby undermining the foundation of a logical system that is much more formal than the logic we employ to ascertain doctrinal answers to our legal problems.²³⁹ If assertions of formal logic can be neither true nor false, it should not be surprising that, under the less precise system of legal analysis, the legislative veto can be neither constitutional nor unconstitutional.²⁴⁰ If we can tolerate massive amounts of contradiction, inconsistency, and uncertainty with respect to mathematics and the natural sciences, one would think that the contradictions, inconsistencies, and uncertainties produced by deconstruction of law and the social sciences could be tolerated as well. That has yet to be the case, however.

Legal deconstruction has generated its fair share of alarmist opposition,²⁴¹ but so did Copernicus's suggestion that the Earth was not the center of the universe, Pasteur's belief that invisible germs caused disease, and Columbus's insistence that the Earth was round. Opposition based on nothing more than the fact that deconstruction is different, and therefore threatening, is not particularly helpful. Certainly, deconstructive techniques have made a sufficient threshold showing to merit more serious analytical responses.²⁴²

Some criticism of deconstruction has been substantial. Questions about methodology or the implications of decon-

238. See *id.* at 235-42.

239. See M. KLINE, *MATHEMATICS: THE LOSS OF CERTAINTY* 260-64 (1980) (discussing Gödel's "undecidability" theorem).

240. Cf. L. TRIBE, *supra* note 4, at 47 (arguments about constitutional law ultimately cannot be limited to the parameters of a closed system comprised of mere constitutional argument, but must be broadly-based in politics, philosophy, and history).

241. See, e.g., Schwartz, *With Gun and Camera Through Darkest CLS Land*, 36 *STAN. L. REV.* 413 (1983).

242. Perhaps one explanation for some hostile responses to deconstruction relates to its coincidental association with the Marxist objectives of many of the critical legal theorists who practice deconstruction. See, e.g., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 6 (D. Kairys ed. 1982).

struction are likely to advance legal analysis. Indeed, whether deconstruction accomplishes anything that is at all useful is a serious question. Some have argued that deconstruction, without more, leads to extreme cynicism, and even nihilism, that can be counterproductive. Accordingly, they argue that, unless deconstruction can be shown to lead to constructive strategies for the improvement of legal analysis, the costs of deconstruction outweigh the benefits.²⁴³ Some deconstructionists themselves appear to have taken this criticism to heart and have made the initial movements toward the formulation of a post-deconstruction program of legal analysis. Indeed, the current preoccupation of the critical legal school appears to be with the development of a constructive program.²⁴⁴ Exploring the implications of deconstruction is desirable, but insisting upon the development of a positive, constructive program is dangerous.

Deconstruction is tricky because its techniques can be applied to its own assertions. This has two consequences. The first is that any proposal for a constructive program is doomed to failure. Because any proposal can be deconstructed, no proposal can ever command the respect of those who insist on principled justification as a prerequisite to action. That realization has frustrated those who hoped to use deconstructive techniques as a means for advancing their own social, political, and economic objectives.²⁴⁵ In addition, those attempting to develop affirmative, constructive programs have, even in the process of doing so, recognized the necessary shortcomings of their proposals. As a result, they have tended to make only the modest claims of a partial and tentative first effort.²⁴⁶

The second consequence of deconstruction is even more fundamental. Because deconstructive techniques can be applied to deconstruction itself, it is difficult to know precisely what to make of perceptions of indeterminacy. Deconstruction is appealing because it logically follows from the many observations that have already been discussed. It is equally true, however, that deconstruction has no appeal whatsoever because

243. See, e.g., Hutchinson and Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. — (1983).

244. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 577-648 (1983); see Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229, 239-48 (1983) (reviewing *THE POLITICS OF LAW* (D. Kairys ed. 1982)).

245. See Dalton, *supra* note 244, at 231-39; Tushnet, *supra* note 198, at 281 (demonstrating how deconstruction can interfere with politically-motivated analysis).

246. See Unger, *supra* note 244, at 576-83; Dalton, *supra* note 244, at 246-48.

the logic and principles from which it emanates can themselves be deconstructed. Accordingly, in addition to the relatively minor doctrinal inconsistencies that deconstruction exposes, it also contradicts itself in the most fundamental way imaginable. It both asserts and denies its own validity. Roaming about in the midst of such potentially paralyzing perceptions can be perilous. The peril, however, lies not in the risk that we will succumb to analytical paralysis. Rather, it lies in the risk that we will not.

If there is a benefit to be derived from deconstruction, it is that deconstruction will serve as a stimulus to spur us along to whatever forms of understanding come next. Again, the natural sciences provide a useful analogy. We used to think the Earth was flat, and now we think it is round. In order to move from the flat to the round paradigm, it was necessary to have perceptions that were inconsistent with flatness, such as the ability to sail around the globe. Today we think that the Earth is round, but who knows what shape it will become tomorrow when we have imbibed a few more perceptions? Similarly, we used to think that matter was made up of little balls spinning around other little balls, but now we think of matter in terms of descriptive equations.²⁴⁷ Again, in order to move from the ball paradigm to the equation paradigm, it was necessary to have perceptions that were inconsistent with the ball paradigm.

Legal analysis is presently caught in a paradigm that cannot explain the phenomena exposed by deconstruction. Traditional legal analysis is a "normal science," and deconstruction may well be the harbinger of a "deviant science" that will shortly replace it.²⁴⁸ It is not clear what the characteristics or parameters of that deviant science will be, but the form of analysis that it condones is likely to harmonize the contradictions exposed through deconstruction. Revolutions in scientific thought suggest that this is the case.

The likely way that deviant science will become normal science is through some sort of a paradigm shift that permits what now appear to be mutually-exclusive or contradictory observations to peacefully coexist.²⁴⁹ The paradigm shift will change how we look at things in a way that supplants the present apparent contradictions. After the paradigm shift, the presently

247. See *supra* note 198 at 235-42.

248. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

249. See *id.* at 52-53.

impossible will be as commonplace as television, airplanes, and nuclear reactors—all of which used to be quite impossible. The paradigm shift is unlikely to occur, however, if we manage to suppress, ignore, or somehow domesticate deconstruction. Ironically, any benefits that deconstruction has to offer are more likely to be realized if we revel in it, appreciating every nook and cranny, than if we try to compromise it in order to produce a positive, constructive program that will not upset our present world view. If the implications of deconstruction are indeed as counterintuitive as they appear to be, deconstruction may be program enough in itself. Deconstruction may constitute the beginning of reconstruction, and our job may be simply not to get in the way of whatever comes next.

III. CONCLUSION

Constitutional analysis of the legislative veto is indeterminate in a way that can be extrapolated to all efforts at principled decisionmaking. As a result, it is apparent that principle does not work and that we are left at the mercy of our subjective preferences. Because our subjective preferences are not reliable enough to serve as the basis for rational decisionmaking, we cannot make rational decisions. Our decisions are either random or are determined by forces that we cannot control or understand. Moreover, those decisions are riddled with inconsistencies and contradictions of which we do not approve, but about which we can do very little. Even the deconstructive techniques used to expose the contradictions and reveal these fundamental “truths” can be turned against themselves and made to undermine the validity of their own assertions. In the final analysis, there is nothing but confusion.

Some may find such perceptions debilitating because there is no hope of ever being right. Others may find them liberating because there is no danger of being wrong. The power of the perceptions, however, lies in their simultaneous assertion and negation of both right and wrong. We cannot yet cope with such absolute contingency. But if anything useful is to come of all this, it may be the development of new ways of understanding that reconcile so many irreconcilable contradictions. And certainly such progress—the arrival at new levels of understanding—will have been worth the troubles encountered along the way.

Perhaps the undercurrent of optimism that has accompanied the suggested potential of indeterminacy is wholly unwar-

ranted. Perhaps the new insights permitting us to understand tomorrow what we cannot understand today will simply make our understanding different rather than more advanced. Perhaps there is only movement and no direction. Perhaps there is not even movement. Rationality cannot resolve these matters. As a result, rationality has historically traveled in the company of religion, and those who insist on weaving ideas of progress into their justifications will have to make at least a little leap of faith.