

# Slouching Toward Constitutional Duty: The Legislative Veto and the Delegation of Authority

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On the 23rd of June, 1983, the Supreme Court declared unconstitutional a section of the Immigration and Nationalization Act authorizing the legislative veto.<sup>1</sup> On that day, in that single decision, the Court implied the unconstitutionality of more provisions in more federal laws than in all its other decisions combined since 1789.<sup>2</sup> With such an impact, the decision's reasoning should

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1. *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983). Jagdish Rai Chadha, an East Indian, had applied for and received from the Attorney General of the United States, pursuant to § 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1) (1976), an exception from § 242(b) of that Act, which would have mandated his deportation for having overstayed his nonimmigrant student visa. The Attorney General's action had legal effect only if neither House of Congress voted a resolution of disapproval. Along with 339 other cases that were excepted from § 242(b), Chadha's case was reviewed by the House Committee on the Judiciary and was one of six found by the Committee (contrary to the Attorney General's opinion) not to have met the "statutory requirements, particularly as it relates to hardship." 121 CONG. REC. 40800 (1975), *quoted in* 103 S. Ct. at 2771. Accepting the Committee's recommendation, the House passed the resolution of disapproval without a recorded vote.

In *Chadha*, the legislative veto reversed an exception to the operation of the law; thus, as a direct consequence an injury befell Chadha, that is, he was ordered deported. Much more typically, a legislative veto prevents a governmental action, thus making it difficult to identify any individual who is directly injured.

That the Court was intent on following the logic of *Chadha* to its limits was shown on July 6, 1983, when it summarily affirmed two lower court decisions invalidating the legislative veto, 103 S. Ct. 3556 (1983). One (*Process Gas Consumers Group v. Consumers Energy Council of America*, No. 81-2008) struck down a requirement that the Federal Energy Regulatory Commission submit to legislative review any proposal for the decontrol of fuel; either house could "veto" the proposal. The other (*U.S. Senate v. FTC*, No. 82-935) found unconstitutional the legislative veto provision of the Federal Trade Commission Improvements Act, requiring the FTC to submit to legislative review any proposed "final rule." A concurrent resolution of disapproval was necessary to veto the proposal.

As Justice White argued in his solitary dissent from these decisions (103 S. Ct. 3556, 3557-58), distinctions could be drawn between these cases and *Chadha* as a) they involved independent regulatory agencies over which the president has little control, and b) the second case involved a *two*-House veto.

2. Estimates vary, but the Justice Department, somewhat more conservatively than others, has reported that the Court's decision in effect overturned 207 legislative veto provi-

be extraordinarily cogent, written with great care for precise characterization of the veto as well as close analysis of its purpose and effect. Coming to the opinion with such an expectation, one is bound to be disappointed and must be left with a sense of wonder at the disproportion between the force of the reasoning and the extent of its consequences. I shall suggest, however, that these consequences can be justified, but only on a ground that the opinion failed to articulate and that has major implications for administrative law—one that requires revitalization of the moribund nondelegation doctrine.

### I. THE CASE FOR THE LEGISLATIVE VETO

The legislative veto conditions a delegation of legislative authority upon a later judgment by Congress<sup>3</sup> on whether a rule or act implementing that delegation conforms to congressional intent.<sup>4</sup> Generally statutes containing a legislative veto provision require that the president or agency head submit to Congress rules or actions designed to implement that legislation; within a stated period—usually 30 or 60 days, though some are as short as 15 days or as long as 120 days<sup>5</sup>—Congress may either acquiesce in the proposal or vote a simple resolution of disapproval. Power to cast this “veto” is usually given to one or both branches of the legislature, though it has occasionally been vested in a single congressional committee.<sup>6</sup> If this vote on the resolution fails, or as is more common, Congress passively acquiesces in the administration’s proposal, it becomes law.

This method of qualifying legislative authority originated in the Executive Reorganization Act of 1932, permitting the president to reorganize the Executive Branch subject to disapproval of

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sions in 126 different laws. N.Y. Times, July 2, 1983, at A19. Because of different criteria, studies also vary on the number of laws the Supreme Court has declared unconstitutional. Professor Abraham’s careful study indicated 122 provisions of federal laws declared unconstitutional as of the 1980 term. H. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 305-10 (4th ed. 1980).

3. Legislative-veto provisions do not require adherence to the normal requirements of bicameral support and presentation to the president, as required by Art. I, § 7.

4. Provisions exist calling for a congressional vote of approval before proposals or acts become lawful, and some (e.g., Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 456 (1979)) have also called these requirements for affirmative approval “legislative vetoes.” I will reserve the term “legislative veto” to affirmative acts that have the effect of negating proposals.

5. Javits & Klein, *supra* note 4, at 456. The veto period in *Chadha* was extraordinarily long, authorizing Congress to disapprove the recommendations of the Attorney General any time during the session in which they were submitted to Congress or the next session. Immigration and Nationality Act § 244(c)(2).

6. See J. HARRIS, *CONGRESSIONAL CONTROL OF ADMINISTRATION* 213-38 (1964).

his plans by either House of Congress within sixty days of its submission,<sup>7</sup> and for the rest of that decade, legislative veto provisions were confined to legislation of this genre.<sup>8</sup> In the next two decades use of the legislative veto spread, as Congress sought to maintain control over power that it had delegated to the president during World War II and the Cold War. During the sixties and seventies, the device became more common and its character changed. Its most popular use was to curb the "imperial" president through tighter controls on his use of military force,<sup>9</sup> foreign aid,<sup>10</sup> and budgetary discretion.<sup>11</sup> Of even greater significance, at least numerically, was its spread to control rule-making by administrative agencies;<sup>12</sup> indeed, since the mid-seventies there have been several proposals to make the authority to exercise the legislative veto a standard qualification to all administrative rule-making.<sup>13</sup>

Although the legislative veto does not appear to fit the pristine concept of separation of powers, a strong argument can be made that it does serve constitutional ends.<sup>14</sup> To start, it should be noted that the Constitution itself embodies an impure conception of the separation of powers and that this very impurity was designed to serve ends that the framers thought essential to good government: balance, energy, and accountability. In the name of balance, the system employs checks and balances to achieve an equilibrium making it unlikely that one branch of government

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7. Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414.

8. Brief histories of congressional use of the "veto" are found in Fisher, *Introduction*, in CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 2D SESS., STUDIES ON THE LEGISLATIVE VETO 1-15 (L. Fisher ed.) (Comm. Print 1980) (hereinafter cited as STUDIES ON THE LEGISLATIVE VETO); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 256-62 (1982); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1002-29 (1975). Although Watson traces the legislative veto provisions to 1895, *id.* at 1003, I am following the conventional wisdom by starting with 1932.

9. War Powers Resolution, Pub. L. No. 93-148, § 5, 87 Stat. 555, 556-57 (1973) (codified at 50 U.S.C. § 1544) (1976)).

10. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 211, 90 Stat. 729, 743 (codified at 22 U.S.C. § 2776(b)(1) (Supp. V 1981)).

11. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334-35 (codified at 2 U.S.C.S. § 684 (Law. Co-op. 1980 & Supp. 1983)).

12. *See, e.g.*, 20 U.S.C. § 1232(d)(1) (Supp. V 1981) (education); 2 U.S.C. § 438(d)(2) (campaign financing) (Supp. V 1981); 49 U.S.C. § 1552(f)(3) (airline deregulation) (Supp. V 1981).

13. *E.g.*, H.R. 12048, 94th Cong., 2d Sess., 122 CONG. REC. 31,615-24, 31,668-69 (1976).

14. *See, e.g.*, Dry, *The Congressional Veto and the Constitutional Separation of Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 195-233 (J. Bessette & J. Tulis eds. 1981).

could oppress the others or that any group, including a majority, could grasp the instruments of government to oppress the rest. In the name of energy, the president was given the leading role in foreign affairs—even when that involved the arguably legislative task of negotiating a treaty—and an influential role in the legislative process through his veto power and his obligation to recommend to the legislature “measures as he shall judge necessary and expedient.”<sup>15</sup> And in the name of accountability, the framers constructed a deliberately impure and complex legislative process involving both Houses of Congress and the executive. They sought to avoid a system overly responsive either to the potentially narrow and basely selfish “will of all” embodied in the legislature or to a “general will” which could too easily be confused in the executive’s mind with his own vainglory.

One of the most frequently acclaimed virtues of this scheme is its flexibility, its ability to generate or accept adaptations to situations whose precise nature the framers could not foresee. The legislative veto, some say,<sup>16</sup> is such an adaptation to such a situation.

We are probably in greater need of being reminded that our contemporary situation resembles the framers’ vision than that it differs, yet there is substantial truth in the cliché that the framers’ Constitution has ushered into being a society of such interdependence and complexity that only dimly at best could they have foreseen its outline.<sup>17</sup> It is a situation in which it is necessary for Congress to act, yet it is impossible for Congress to act with the sort of detailed legislation congressmen were accustomed to writing in the eighteenth and nineteenth centuries. The solution, of course, was to delegate legislative authority to the executive and to independent regulatory agencies—a course of action that was made more palatable by the ideas of “scientific management” and a neutral bureaucracy.<sup>18</sup>

This solution did serve the constitutional end of energy and efficiency, but, especially as it was realized that scientific management and neutral bureaucracy were illusions, at the cost of accountability and balance. In the late sixties and early seventies,

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15. U.S. CONST. art. II, § 3.

16. See, e.g., Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Javits & Klein, *supra* note 4.

17. See, e.g., Abourezk, *supra* note 16, at 328.

18. Fisher & Moe, *Presidential Reorganization Authority: Is it Worth the Cost?*, 96 POL. SCI. Q. 301 (1981).

we were told that the president had become "imperial,"<sup>19</sup> confusing the general will with his personal image of glory, and more basely, with his own re-election. Even more distant from the ken of the framers was the rise of an entrenched bureaucracy with its own interests, its own visions of the good life, and with substantial authority to make law, for much of which it was accountable, realistically, neither to the Congress nor to the president.

In this situation, Congress faced an apparent dilemma. It could continue to delegate, furthering energy and efficiency at the expense of balance and accountability, or it could maintain balance and accountability while sacrificing energy and efficiency to such an extent that areas demanding governance would remain ungoverned. Even if one believes that the scale of contemporary government could be trimmed dramatically, the contrast between the 350 bills typically enacted by Congress and the 7,000 rules and amended rules listed in the Federal Register in a single year<sup>20</sup> suggests that the dilemma is at least partly real.

The legislative veto, it is argued, is a permissible constitutional adaptation, enabling Congress to escape this unforeseeable dilemma.<sup>21</sup> By delegating a qualified authority, Congress can maintain the system's energy, while by reserving authority to review proposed rules and acts, it can restore balance and accountability.<sup>22</sup> In short, the legislative veto is an attractive device, and far from violating the ends of the separation of powers, it appears to render those ends possible in a changed environment.

The veto also survives more technical arguments concerning the means of separation of powers, including those of the majority in *Chadha*. The force of these arguments largely depends upon a characterization of the proposed rule or act that Congress reviews as "law." But the very terms of the legislative veto provisions state that the proposal or act does not have the status of law until after the period of time has elapsed during which Congress has the opportunity to review it. The majority's contrary characterization is therefore baffling. It is said that the legislative veto interferes with the executive branch's authority to implement the law by unconstitutionally restricting its choice of means, as well as its authority to determine the meaning of legislation, subject to later review by the courts. But if the proposal is not yet law, it can hardly be said

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19. See, e.g., A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 *IND. L.J.* 367, 377 (1977).

20. See Abourezk, *supra* note 16, at 323.

21. See, e.g., Dry, *supra* note 14, at 228.

22. *Id.* at 201-02.

that Congress is interfering with the executive's authority to implement the law. Moreover, there can be no claim that the substance of the restrictions effected by the legislative veto encroaches upon some *inherent* executive prerogative,<sup>23</sup> for there is no question that Congress, if it had the time, could legislate with as much detail as is given through the 7,000 rules and amended rules written annually by administrators. A more realistic criticism of the effect of the legislative veto is that it affronts the dignity of the executive branch by obliging it to develop rules, without any guarantee that these rules can be placed into effect.<sup>24</sup> While accurate, this criticism does not rise to constitutional significance, for there is little reason to doubt that Congress has the authority, through the normal legislative process, to require executive bodies to submit proposals for the legislature to consider.

Some critics say the legislative veto interferes with the presidential authority to veto legislative proposals. The president does have authority to veto all legislative acts, with very few explicit<sup>25</sup>

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23. Abourezk, *supra* note 16, at 328-30. The idea of executive prerogative, of course, more commonly refers to presidential authority that can be exercised independently of legislative action, such as presidential authority to remove executive officers, *Myers v. United States*, 272 U.S. 52 (1926). Legislative action restricting such a prerogative would be unconstitutional regardless of the form it took, whether that be ordinary legislation, a concurrent resolution, a two-thirds override of a presidential veto, or a legislative veto.

Between presidential authority that is entirely dependent on legislation and authority that is entirely independent of legislative action lies what Justice Jackson called the "zone of twilight," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952), where the President and Congress may have concurrent authority. It would be convenient to agree with Justice Black in his opinion of the Court in *Youngstown* that the zone simply does not exist, a position affirmed by Professor Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976): either the President has a prerogative essential to his executive function or his authority depends entirely upon legislative authorization. But the concurring opinion of Justice Jackson in *Youngstown*, it must be admitted, has considerable force.

Only a small minority of legislative veto provisions can even arguably be placed in this zone (conceivably, e.g., the impoundment provision of the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. 1403, and the troop removal provision of the War Powers Resolution, 50 U.S.C. 1544). But here the case against the legislative veto cannot be dismissed as casually as in the text above, because the veto attempts more than simply to prevent a proposed act from becoming law; it seeks to block presidential action that would be legitimate in the absence of congressional action. Because the veto here does have the purpose and effect of legislation, it would seem unconstitutional for failing to meet the requirements of bicameralism and presentation to the President; that is, in these unusual instances, the legislative veto would be unconstitutional for the reasons articulated by Chief Justice Burger in *Chadha*.

24. See Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978).

25. Authority to initiate impeachments (U.S. CONST. art. I, § 3, cl. 6); authority to conduct trial following impeachment (art. I, § 3, cl. 7); authority to approve or disapprove presidential appointments (art. II, § 2, cl. 2); authority to ratify or refuse to ratify treaties negotiated by the president (art. II, § 2, cl. 2).

and implicit<sup>26</sup> exceptions, which would have the effect of law, and the framers were careful to ensure that legislative proposals could not slip by the executive authority merely by being called something other than a bill.<sup>27</sup> But the legislative veto does not prevent anything from coming before the president that would have the effect of law or that would rescind law;<sup>28</sup> it merely prevents what has the potential of law from achieving the actuality of law. Also, although no president can permanently yield to Congress the inherent authority of his office, it is not without significance that the law containing the authorization of the legislative veto was presented to him in accordance with the Constitution.<sup>29</sup>

Another theory is that Congress improperly performs an essentially judicial function in employing the legislative veto, since its object is to ensure that proposals conform to the intention of the law. Conceivably, the veto could be used in a manner that is essentially judicial, as when instead of determining what *rules* should be devised to implement a policy, Congress determines whether these rules *apply* in discrete circumstances. Justice Powell argues persuasively<sup>30</sup> that this is what happened in *Chadha*, as Congress did attempt to determine whether the 340 aliens whose deportation orders were suspended by the Attorney General met "statutory requirements, particularly as it relates to hardship."<sup>31</sup> But in its characteristic use, reviewing rules that would have the effect of law unless vetoed by Congress, the legislative veto seems invulnerable to this charge. First, since what the legislature reviews is not yet law, the review could displace the judicial function only if the judiciary had authority to render advisory opinions.<sup>32</sup> Second, judicial review of administrative actions is supposed to follow the rule of the "clear mistake,"<sup>33</sup> that is, law is to be declared void only if the administrative agency has clearly

26. These relate to powers incidental to the effective performance of the legislative function, such as authority to investigate, *McGrain v. Daugherty*, 273 U.S. 135 (1927), or to cite and punish recalcitrant witnesses for contempt of Congress, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

27. U.S. CONST. art. I, § 7, cl. 3.

28. A possible exception arises when a concurrent resolution is deemed sufficient to halt an ongoing policy. *See, e.g.*, Lease-Lend Act, Act of Mar. 11, 1941, ch. 11, § 3(c), 55 Stat. 31-32 (codified before expiration at 22 U.S.C. § 412); Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953).

29. *See, e.g.*, *Dry*, *supra* note 14, at 209.

30. 103 S. Ct. at 2788-92 (Powell, J., concurring).

31. *See supra* note 1.

32. *See, e.g.*, *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

33. *See, e.g.*, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

erred in its interpretation of the statute. Congressional review does not duplicate or displace this function, as Congress examines whether the proposal does conform to the *actual* intent. Third, although some commentators call for a different approach,<sup>34</sup> it remains the prevailing rule that the courts should refer to the congressional intent when the legislation was passed,<sup>35</sup> not to what that Congress would do if it were in session today or what the current Congress would do if it were to consider the legislation. As Senator Javits has emphasized, a distinguishing feature of the legislative veto is that it permits Congress to review administrative proposals "in accordance with a *dynamic political intent* based on Congress's *current* interpretation of the public interest," ensuring that legislation does "meet the test of *current public interest* as determined by Congress."<sup>36</sup>

Some contend that the legislative veto is itself a legislative act, having the purpose and effect of amending or rescinding prior legislation, but not following the established legislative route of bicameral support and presentation to the executive. This is the central point of Chief Justice Burger's opinion for the Court in *Chadha*. The basis for this characterization of the veto should be scrutinized carefully since it undergirds the claims of encroachment on executive and judicial authority. The Chief Justice argues that the one-House veto "had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch."<sup>37</sup> But in what sense can there have been rights and duties prior to the legislative veto? Only after the expiration of the congressional review period were the Attorney General's proposals to have vested rights in Chadha and duties in governmental officials.<sup>38</sup> And if there were no rights and duties antecedent to the legislative veto, the court cannot logically argue that the legislative veto altered them.

The Chief Justice reiterates his characterization of the legislative veto as having the purpose and effect of full-fledged legislation by arguing that absent the legislative veto provision, neither House of Congress nor both of them acting together "could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated author-

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34. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

35. The classic statement is found in E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 27-57 (1949).

36. Javits & Klein, *supra* note 4, at 473 (emphasis added).

37. 103 S. Ct. at 2784.

38. See Immigration and Nationality Act § 244(c)(2).



ity, had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation.”<sup>39</sup> The short answer to this statement is that Congress did not fully delegate authority to the Attorney General; it reserved control over that authority by the inclusion of the legislative veto provision.

Possible insight is given into the source of the Court’s confusion by the following section of the opinion:

Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation *otherwise* would be cancelled under § 244. The one-House veto operated in this case to overrule the Attorney General and mandate Chadha’s deportation; *absent the House action*, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha’s status.<sup>40</sup>

There is a crucial ambiguity in the term “otherwise.” It could mean that Congress interfered, through the one-House veto, with established rights or duties; that is, if Congress had not interfered, the rights would *still remain* vested. Or the term can mean simply that the choice is dichotomous: either Congress vetoes the provision or it does not; that is, if Congress had not acted, rights and duties would have *become* vested. The first meaning forms the premise of the Court’s argument, and it may well be the more common understanding of “otherwise,” but the second correctly states the process of the legislative veto: Congress can veto the provision, “otherwise” it becomes law. Speculation on unarticulated steps of the Court’s reasoning, of course, especially when one considers the dynamics of group reasoning,<sup>41</sup> is an uncertain enterprise, but it seems that the Court first recognized that the “otherwise” characterization of the legislative veto included an accurate description of the nature of the legislative veto and then moved unconsciously from the accurate to the common but inaccurate understanding of the term.

This explanation of the Court’s reasoning may not be plausible, but what are the other possibilities? One possibility concerns the issue whether the provision authorizing the legislative veto could be severed from the rest of the statute. The Court gave close attention<sup>42</sup> to this question before it came to the merits of the legislative veto. Having concluded that the rest of the statute could be fully operable without the legislative veto provision and that it

39. 103 S. Ct. at 2785 (footnotes omitted).

40. *Id.* at 2784-85 (emphasis added).

41. *See, e.g.*, W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 37-90 (1964).

42. *See* 103 S. Ct. at 2774-76.

was the intention of Congress for the rest of the statute to stand if the legislative veto provision was found unconstitutional, the Court perhaps regarded the statute as having the legislative veto already severed from it, in which case the Attorney General's decision would have the status of law rather than a mere proposal.

Of course there is no reason to sever the provision unless it is unconstitutional, but if we assume that it is then the Court's conclusion flows smoothly. If the legislative veto is severable and unconstitutional, then the Attorney General's proposal surely is law. And if the proposal is law, there can be no doubt that the legislative veto effected a rescission or alteration of the law without meeting the requirements of bicameralism and presentation! This line of reasoning cannot be accused of merely begging the question—it also employs its answer.<sup>43</sup>

In short, an attractive case can be made that the legislative veto furthers rather than thwarts constitutional ends and does not violate constitutional means—at least as these are commonly articulated<sup>44</sup> and were articulated by the Supreme Court.

## II. THE CASE AGAINST THE LEGISLATIVE VETO

A central though not always express premise of the case for the legislative veto is that it only allows Congress to achieve the same sort of results that it would achieve if it had the time and energy to write and approve the thousands of rules and acts done each year by the administration in the implementation of the law.<sup>45</sup> Reviewing is not quite the same as writing and not all proposals can receive a close review (although the mere threat of the veto is likely, it is said, to keep the administration close to the intent behind the statute), so the results will be somewhat different than if Congress itself legislated in detail, but the difference, according to this theory, is insubstantial.

How sound is this justification? To illustrate the difference between the legislative process with and without the legislative veto, we should first take a simple though abstract example—the

43. Where the provision for the legislative veto was inserted into pre-existing legislation, as when the Congress sought greater control of the Federal Trade Commission (Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21(a), 94 Stat. 374, 393 (codified at 15 U.S.C. § 57a-1) (Supp. V 1981)), the Court's argument has greater plausibility, but no greater reality. When the Congress enacts such a provision it substantially changes the legal authority of the agency so that no proposal should be considered law until the specified period of time passes without a legislative veto.

44. More effective criticisms have been offered by Martin, *supra* note 8, and Watson, *supra* note 8.

45. See, e.g., Abourezk, *supra* note 16, at 328-30.

legislative package. Commonly, legislation will be a compromise whose components have varying sorts and levels of support.<sup>46</sup> Let us assume that there are several components, each of which is opposed, though not vigorously, by a bare majority. In this situation, the legislature might a) oppose the package as a whole (likely if the opposition majorities coincide), b) support the package as a whole (likely if the opposition majorities do not coincide closely and if the sentiment for provisions is more intense than the sentiment against), or c) support the package, *if* legislators know that later they will have the opportunity to block implementation of the offending provision through the legislative veto. The legislative veto would make no difference under the first possibility, but would introduce telling differences under the last two possibilities. If the package as a whole enjoys unconditional majority support in the legislature (b), it will pass with or without the legislative veto. In the implementation stage, however, without the legislative veto, *each* component will be *implemented*, but with the legislative veto, *no* component will be implemented. If the package as a whole enjoys conditional support (c), then the bill would not pass without the legislative veto but would pass with it. Although the bill would pass with the legislative veto, at the implementation stage, the result is the same as if it had failed to pass, for no component would be implemented. There is, however, an important difference: with the legislative veto, Congress has signaled to the public that it has taken action on a problem; without the veto, no such pretense exists.

This example employs some unrealistic assumptions—for instance, that the legislation enjoys a high level of visibility from the time of passage through its implementation, that the options for implementing each component were apparent from the start and brought forward without appreciable deviation by the administration, and that the preferences of the legislators remained constant both in numbers and intensity. And the hypothetical structures of support and opposition are not the most common ones. Nevertheless, it seems safe to conclude that the legislative veto makes legislation easier to pass, but harder to implement—at least in accordance with the intention implied by the terms of the bill.

As we introduce more realistic assumptions, these conclusions are rendered no less sound, but certainly more complex. First, the administrative agency, interested in having its proposals

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46. See, e.g., M. OLSON, THE LOGIC OF COLLECTIVE ACTION; PUBLIC GOODS AND THE THEORY OF GROUPS 43 n. 64, 121 (1965); A. BENTLEY, THE PROCESS OF GOVERNMENT 370-71 (1967).

survive the threat of a legislative veto, is likely to work in concert with Congress early in the development of any proposal.<sup>47</sup> Second, since visibility and interest in the legislation will be lower at the stage of implementation, and since a division of labor within Congress must take place if it is to be effective in its control of the administration, the most consequential work will be performed in the committees and subcommittees.<sup>48</sup> Third, since a major, if not *the* major, incentive for congressmen in the selection of committees and subcommittees is the benefits that the position will allow them to bring to their constituencies,<sup>49</sup> the congressmen most involved with the development and review of the proposals will have disproportionately more than other congressmen to gain or lose. Thus a likely and apparently common occurrence is a significant skewing of the original legislative intent towards the interests of the congressmen on the overseeing committee or subcommittee and the groups and people most responsible for their re-election.<sup>50</sup>

Except in the minority of cases where the committee itself exercises the veto,<sup>51</sup> the committee's threat to veto, of course, has force only to the extent that there is good chance that the rest of the House or Senate will support its decision. There is no guarantee of this, but given the limited time available to Congress and its customary pattern of deference to its committees, the probability is high enough to warrant the serious concern of an administrative agency desirous of having its proposals become law and of avoiding adverse publicity. Less commonly noted, but in some ways more consequential than the threat of the legislative veto, is the promise of committee acquiescence. Its recommendation to veto is ultimately dependent upon the will of its parent body, but as Harold Bruff and Ernest Gellhorn point out in their landmark study, "Whenever [the oversight committee] does *not* report a veto resolution to the floor of a house, the committee, with its narrow

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47. See, e.g., Davis, *Legislative Vetoes in Energy Policy*, in *STUDIES ON THE LEGISLATIVE VETO*, *supra* note 8, at 107, 112. An administrative agency might attempt to develop proposals, in accord with the original legislative intent, entirely aloof from the subcommittee overseeing it, but impasse between the agency and the subcommittee is then likely. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1379 (1977).

48. See R. ARNOLD, *CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE* 66 (1979); Bruff & Gellhorn, *supra* note 47, at 1381-82.

49. See M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 62-67 (1977); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 85-97 (1974).

50. See Holliday, *Export Administration Act: Legislative Veto Provisions*, in *STUDIES ON THE LEGISLATIVE VETO*, *supra* note 8, at 321, 324.

51. E.g., Post Office Department Appropriations Act, 1971. See also J. HARRIS, *supra* note 6, at 217-38.

constituency, wields *all* of Congress' review power."<sup>52</sup> Their empirical study confirms our logical deductions: "the chief effect of the veto power seems to be an increase in the power of congressional committees and in the practice of negotiating over the substance of rules."<sup>53</sup>

The policy process that I describe here, where law is in effect made by an administrative agency, a committee or subcommittee, and the narrow constituency most directly affected by the legislation and best organized to respond to it, is of course the commonly noted iron triangle, or government by subsystem.<sup>54</sup> This development preceded the proliferation of the legislative veto provisions, some descriptions of its operation do not even make reference to the legislative veto,<sup>55</sup> and congressional committees do have other tools for influencing administrative agencies towards their partial concerns. Nevertheless, those who have studied these triangular relations indicate that among the tools available to committees and subcommittees, the power to acquiesce or recommend a veto resolution is probably the most effective.<sup>56</sup> In short, we seem fully warranted in our conclusion that the veto facilitates a significant distortion of the purpose of the law.

Another effect of the veto is to make administrative agencies more responsive to the changing moods of Congress.<sup>57</sup> As mentioned above, the traditional rule is that administrative agencies and courts should interpret and implement legislation in accordance with the intention of the legislature that did in fact pass it.<sup>58</sup> Some advocate a different approach. Guido Calabresi, for example, argues for a "common law" approach to the interpretation of statutes whereby courts would adjust the meaning of statutes to bring them into accord with the rest of the "legal topography"—the accumulation of other statutes, constitutional decisions, and administrative regulations.<sup>59</sup> The Supreme Court has affirmed such an approach taken by the Internal Revenue Service in its decision to withhold tax-exempt status from private schools that

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52. Bruff & Gellhorn, *supra* note 47, at 1418 (emphasis added). *See also* Grimmet, *The Legislative Veto and U.S. Arms Sales*, in *STUDIES ON THE LEGISLATIVE VETO*, *supra* note 8, at 249, 255-59.

53. Bruff & Gellhorn, *supra* note 47, at 1420.

54. *See, e.g.*, L. DODD & R. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* 95-104 (1979).

55. *See, e.g.*, T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979).

56. *See, e.g.*, R. ARNOLD, *supra* note 48, at 66; Bruff & Gellhorn, *supra* note 47; Miller & Knapp, *supra* note 19, at 376; L. DODD & R. SCHOTT, *supra* note 54, at 229-35.

57. Martin, *supra* note 8, at 278-79.

58. *See, e.g.*, E. LEVI, *supra* note 35, at 27-57.

59. G. CALABRESI, *supra* note 34.

discriminate on the basis of race. Whatever the merits of this approach,<sup>60</sup> not even its staunchest advocates contend that administrative agencies should settle for anything less than well-supported, clearly stated, and enduring signals of a changed legislative intent.

What the legislative veto encourages, however, is responsiveness to a changed legislative intent that may be prompted by nothing more profound than a momentary shift in the mood of the public, the proximity to an election, an altered composition of the overseeing committee, the rise of a new and committed interest group—a change of intent that would not be sufficient to stir the passage of a law, but that would be adequate to affect administrative rules under the threat of a legislative veto.<sup>61</sup>

Finally we should note the shift that the veto introduces in a congressman's perspective about passing and implementing legislation. Without the veto, those who are intent upon achieving the passage of legislation must think, and even educate their constituencies to think, in terms of the art of the possible. They must be willing to accept compromises, accommodate divergent interests, make trade-offs. The price of being excessively idealistic or overly committed to an interest is ineffectiveness; and the congressman must take the blame for that consequence. But knowing that they will have the opportunity to protect themselves and their constituencies through the veto, congressmen are more likely to legislate at a highly abstract and general level where compromises need not be made and trade-offs need not be faced.<sup>62</sup>

Equally important to this expanded incentive and opportunity for avoiding trade-offs in the passage of legislation is what David Martin has called "the luxury of being negative"<sup>63</sup> in the implementation of the law. That is, by placing the primary burden on the administrative agencies to put forward proposals, congressmen are free simply to point out what is wrong with any given proposal rather than weighing the costs and benefits of this proposal against other possibilities.<sup>64</sup> This of course is not to say

60. See, e.g., Rabkin, *Behind the Tax-Exempt Schools Debate*, PUB. INTEREST, Summer 1982, at 21.

61. See L. FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 99 (1981).

62. See, e.g., Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG., Nov./Dec. 1979, at 19, 25. According to Louis Fisher "Congress delegates far greater power with the legislative veto than it would without it." L. FISHER, *supra* note 61, at 101.

63. Martin, *supra* note 8, at 267-74.

64. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-34 (1980).

that congressmen invariably succumb to this temptation, but whenever a tough trade-off appears, the veto permits them to declare themselves in favor of virtue and blame the administrative agency for bringing forward its blemished proposal.

In sum, compared to the normal legislative process, the process with the veto eases the passage of laws, especially vague and abstract ones, makes it more difficult to implement them in accordance with the original legislative intent (to the extent that it can be determined), skews the operation of the law in favor of narrow constituencies, makes the administration sensitive to evanescent moods of Congress, and encourages unrealistic moral posturing by congressmen.

In light of this comparison, we should re-examine how well the legislative veto serves the ends of balance, energy, and accountability. Energy, or efficiency, is perhaps more properly spoken of as an end that the legislative veto preserves rather than promotes. That is, the veto is designed to maintain the efficiency of delegation of authority while permitting Congress to regain control. It must be doubted, however, that that control has been or really can be regained without some sacrifice of efficiency. If the administrative agency develops its proposal in isolation from Congress, there is serious danger of prompting a legislative veto and coming to an impasse.<sup>65</sup> On the other hand if the agency works closely with the committee or subcommittee (or its staff), the process of negotiating rules must slow, to some extent, the development of proposals.<sup>66</sup> Even if there is some loss of efficiency, however, this would seem to be a small expense, *if* the gain were a recovering of accountability and balance. But these ends are promoted only if they are understood in a debased sense.

Instead of promoting the idea of accountability to the will of the people in the constitutional sense discussed above, one that combines the virtues of the will of all and the general will, the legislative veto fosters accountability to slender sectors of the electorate and to ephemeral moods. Madison spoke of the legislative process as one in which representatives would "refine and enlarge" raw and narrow interests present in their constituencies.<sup>67</sup> The normal process does tend to do this by forcing compromise and accommodation.<sup>68</sup> But the legislative veto encourages the congressman, by virtue of the electoral advantage it affords, to ca-

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65. See, e.g., Bruff & Gellhorn, *supra* note 47, at 1410-12, 1426, 1432-33.

66. *Id.* at 1414-17.

67. THE FEDERALIST NO. 10, at 82 (J. Madison) (C. Rossiter ed. 1961).

68. *Id.*

ter to the interests as they are given to him. And while Hamilton affirmed "[t]he republican principle . . . that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs," he also emphasized that this "does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive. . . ."69

While the legislative veto may bring about a sort of restoration of the equilibrium between the President and Congress,<sup>70</sup> it is primarily through a power *in* Congress rather than a power *of* Congress. That is, it gives power to subcommittees and individual congressmen, especially in enhancing their electoral possibilities. But only in rare instances can it be said to bring about a balance between Congress as a body and the administration.

Balance, accountability, and energy are intermediate ends, each serving in large part the higher end of liberty.<sup>71</sup> Energy in the government was deemed necessary to protect liberty from social disorder and foreign nations,<sup>72</sup> balance and accountability to protect liberty from the government itself.<sup>73</sup>

The liberty protected by the Constitution has several levels and many aspects. Most commonly one thinks of rights specifically enumerated in the Constitution. But liberal democracies generally and the American polity in particular respect a general right to "natural" liberty deriving from the contract theories of the state.<sup>74</sup> As a threshold condition for the circumscription of this liberty by the federal government, the Constitution mandates, except implicitly for emergency situations,<sup>75</sup> that there be a certain level of agreement and commitment as these are formally indicated by the legislative requirements of bicameral support and presentation to the president. This principle respects individuals both in their capacity as subject and as citizen. It recognizes that as a subject of the state the individual does legitimately fear governmental abuse, doubt the scope of governmental competence, and deserve assurance that his liberty will not be casually circumscribed. The principle also recognizes that as a citizen of the state,

69. THE FEDERALIST NO. 71, at 432 (A. Hamilton) (C. Rossiter ed. 1961).

70. See, e.g., Abourezk, *supra* note 16; Dry, *supra* note 14; Javits & Klein, *supra* note 4.

71. See THE FEDERALIST NO. 47 (J. Madison).

72. See THE FEDERALIST NO. 75 (A. Hamilton).

73. See THE FEDERALIST NOS. 47-51 (J. Madison).

74. See, e.g., 1 W. BLACKSTONE, COMMENTARIES \*123; J. ELY, *supra* note 64, at 134; J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 22 (1690). But see R. DWOR-KIN, TAKING RIGHTS SERIOUSLY 266-78 (1977).

75. See, e.g., A. SCHLESINGER, *supra* note 19, at 7-10.



the individual participates in the selection of those people upon whose authority alone<sup>76</sup> this natural liberty is to be limited. And this authority to circumscribe liberty through law also implies the authority to maintain that law unless it is displaced or altered by an equally authoritative act.

I have used the term "agreement" to emphasize that the formal requirements of legislation cannot be merely formal, but that the framers did expect a meeting of minds as to the proper course of action—not necessarily as to motives, but as to intent.<sup>77</sup> Without this substantive expectation the formal requirements would be without consequence.<sup>78</sup> If "agreement" amounted to nothing more than the identification of a difficult and politically charged problem that the legislature would like someone else to handle—to decide the questions of who will be burdened and who will be benefited, to make the trade-offs, to prescribe the actual rules of conduct—then the carefully constructed procedures for rendering the legislative process accountable to a complex notion of the will of the people would be worthless. The process would protect neither the individual's liberty as a subject of the state nor his authority as a citizen of the state.<sup>79</sup> The Constitution must envision that there will be a discernable content to legislation,<sup>80</sup> an "intelligible principle"<sup>81</sup> to guide the administration of the law.

While "agreement" is a dimension emphasized by virtually all writers who have dealt seriously with constitutional limits to delegation, the constitutional concern for a level of commitment behind legislation is less commonly noted. The framers hoped to ensure that legislation would have behind it a level of commitment strong enough to be constant in abiding by the terms of the agreement. Liberty was not to be circumscribed and released, courses of conduct mandated then altered, burdens imposed then

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76. See, e.g., J. LOCKE, *supra* note 74, at § 141.

77. On the legitimacy and importance of the distinction between intent and motives, see A. BICKEL, *THE LEAST DANGEROUS BRANCH; THE SUPREME COURT AT THE BAR OF POLITICS* 208-220 (1962). But see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1217-22 (1970).

78. This seems to have been the ground of Locke's concern, *supra* note 74.

79. Arguably, citizenship is not affronted when elected lawmakers choose to delegate their tasks to others, as the lawmakers remain ultimately accountable to the people. The point would be valid if citizenship were a matter of democratic sovereignty, for complete sovereignty should logically entail the capacity to alienate authority. But if qualified sovereignty itself arises from an understanding of citizenship that rests upon individual dignity and individual duty and which vests those qualities in the elected representatives of the people, then there is indeed an affront to citizenship in the delegation of essential authority. For the delegation itself violates the qualities of dignity and duty.

80. See, e.g., L. HAND, *THE BILL OF RIGHTS* 48 (1958).

81. *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928).

lifted according to blips of approval and disapproval in “perpetual vibration.”<sup>82</sup> Law was not to be the product, in Burke’s phrase, of a “momentary aggregation,” but to emerge from a partnership “between those who are living, those who are dead, and those who are to be born.” Repeatedly, throughout the *Federalist*, one finds a constitutional commitment to commitment, a concern that a course not be embarked upon unless it is with a seriousness to see it through. This concern with a community through time as well as space is seen in the staggered scheme of representation, with members chosen from three distinct periods over the last six years, and in the relatively lengthy terms of office for senators<sup>83</sup> and the president.<sup>84</sup> These people, by virtue of their terms of office could have both the incentive and the capacity to follow through on a course of action. Indeed some of the most forceful and critical language in the *Federalist* papers is directed towards the “mischiefs of . . . inconstancy and mutability in the laws.” These, Hamilton wrote in *Federalist No. 73*, “form the greatest blemish in the character and genius of our governments.”<sup>85</sup> Madison tells us that “the mischievous effects of a mutable government would fill a volume.” Assuming that there was more than adequate experience with the problem, Madison chose to “hint a few only, each of which will be perceived to be a source of innumerable others.” Two of these are of special relevance here. First, a mutable policy “poisons the blessings of liberty itself,” by making the laws “so incoherent that they cannot be understood.” “Law,” he writes, “is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?”<sup>86</sup> “[T]he most deplorable effect of all,” however, is this:

[T]hat diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable, nor be truly respectable without possessing a certain portion of order and stability.<sup>87</sup>

Madison only “hints” the flow of reasoning, but it follows from this that a government that is wanting in respectability is wanting in authority. This argument does not imply that one has a right of civil disobedience against any law that is passed without the requisite level of commitment, but it certainly implies that a process

82. THE FEDERALIST NO. 9, at 71 (A. Hamilton) (C. Rossiter ed. 1961).

83. See THE FEDERALIST NOS. 62 & 63 (J. Madison).

84. See THE FEDERALIST NO. 71 (A. Hamilton).

85. THE FEDERALIST NO. 73, at 444 (A. Hamilton) (C. Rossiter ed. 1961).

86. THE FEDERALIST NO. 62, at 380-81 (J. Madison) (C. Rossiter ed. 1961).

87. *Id.* at 382.

of law differing from that clearly established by the Constitution which lowers the level of commitment likely to accompany law is a process that should be viewed with suspicion.

When Congress includes a veto provision in legislation, it is actually withholding its legislative authority.<sup>88</sup> The completion of this authority occurs when Congress acquiesces in an administrative proposal, putatively designed to implement the original legislative act. Some commentators have spoken of this as a delegation of authority from Congress to itself,<sup>89</sup> or to a portion of itself. But since the legislative authority never fully leaves Congress until the moment of acquiescence, it seems more accurate to refer to the initial act of including the legislative veto, not as a *delegation* of authority but as a *reservation* of authority.<sup>90</sup>

Advocates of the veto have spoken of this acquiescence as a "condition precedent" to legal effect.<sup>91</sup> And indeed there are numerous examples of legislative authority being "conditioned" upon the occurrence of an event.<sup>92</sup> The favored example is *Currin v. Wallace*,<sup>93</sup> where federal market controls on tobacco farming were to go into effect only if two-thirds of the growers in the affected districts voted in favor of having the regulations apply. If approval by tobacco farmers is an acceptable condition precedent to legal effect, then surely the approval of Congress should be.

But legislative acquiescence is distinct from other conditions precedent to legal effect in the very important sense that in all other cases the will of the Congress is complete.<sup>94</sup> When Congress

88. See, e.g., Abourezk, *supra* note 16, at 338.

89. See, e.g., Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735, 753 (1979).

90. On the basis of this characterization, Edward S. Corwin gave the legislative veto the benefit of his prestige. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957* at 130 (4th ed. 1957); see also Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); and Abourezk, *supra* note 16.

91. See Abourezk, *supra* note 16, at 327, 337; Cooper & Cooper, *supra* note 90, at 473-74; E. CORWIN, *supra* note 90, at 130; Dry, *supra* note 14, at 205, 209.

92. Such as authorization of a schedule of duties on imported goods being conditioned upon "reciprocally unequal and unreasonable" duties laid on American goods by foreign governments. C. PRITCHETT, *THE AMERICAN CONSTITUTION* 154 (3rd ed. 1977).

93. 306 U.S. 1 (1939). See also *Yakus v. United States*, 321 U.S. 414, 424 (1944); *Hampton & Co. v. United States*, 276 U.S. 394, 407 (1928); *Field v. Clark*, 143 U.S. 649 (1892).

94. The *Currin* opinion itself implied an understanding of this distinction, by emphasizing the nonlegislative character of the farmers' vote: "While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution. . . ." 306 U.S. 1, 16 (1939).

Others have pointed to the distinctive character of making congressional action or inaction a "condition precedent" to legal effect, but have criticized it for reasons other than that given here. J. HARRIS, *supra* note 6, at 241, contends that making the "condition

enacts a law with a legislative veto its will is incomplete. It is saying in effect "we will that proposals issued under the heading of this bill become law if at a later time we will that they become law." On a given bill or a given proposal there may be present through these two expressions of will the level of agreement and commitment that the Constitution holds as a minimal condition for the authoritative charting of human conduct; but the logic and evidence of congressional action indicate that frequently that is not the case.

Exactly because there is the chance for a second look, for arresting the implementation of the provision one most dislikes, for checking an implication that one did not initially take time to consider, for pressing the bureaucracy for an implementation most favorable to one's interest—for these reasons and others it takes less agreement and commitment for a proposal to gain the support of both houses.<sup>95</sup> And further, as indicated in the above analysis, the second expression of support *is* mere acquiescence,<sup>96</sup> it is given only on an aspect rather than the whole of the legislation, it is probably given by a Congress of different composition and interests than the one that approved the initial act, and it is likely to be effectively granted by a committee or subcommittee rather than the whole of Congress.<sup>97</sup> What would have prompted a veto of

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precedent" to legal effect an action or inaction of Congress injects the legislative will into the sphere of executive authority, permitting it to "set aside or to reverse executive decisions" in a manner other than that authorized by the Constitution—that is, the normal legislative process. The flaw with this analysis is the assumption that the legislative veto voids something already having the status of law.

David Martin's analysis, *supra* note 8, is based less on formal interference with the executive authority than on functional pathologies. His argument is that when the condition precedent to legal effect is congressional approval, the legislature involves itself so deeply in implementation of the law that it develops a vested interest and thus renders itself less competent to assess the workings of the law—something that does not occur if the condition is an event or the expression of will apart from congressional assent. While this analysis invokes a more accurate characterization of the legislative veto, it misses the essence of the problem. First, whenever Congress enacts law, it is identified with the consequence: involvement with the so-called (but not formally accurate) implementation might increase the identification, but so would the writing of more specific legislation. And surely legislation that is vague cannot be constitutionally preferred to legislation that is explicit. Second, this criticism seems at odds with the rest of Martin's analysis, which stresses that legislative vetoes allow congressmen to distance their initial legislative acts from later administrative proposals.

95. See, e.g., L. FISHER, *supra* note 61, at 101.

96. Silence may be golden in some spheres, but it has never counted for much in legislative interpretation. See E. LEVI, *supra* note 35, at 27-57. And when the Court has attended to the supposed will of a Congress that is "silently vocal," bizarre consequences have sometimes ensued. See Powell, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931 (1938).

97. See, e.g., Fisher & Moe, *supra* note 18, at 316; Bruff & Gellhorn, *supra* note 47, at 1417-20.

the first body may slide past the second, even though it would not have had sufficient support to pass as law.<sup>98</sup> And what not only would have gained the acquiescence of the initial body, but its affirmative approval, may now be vetoed.<sup>99</sup> There will thus be instances where a proposal should have become law, having sufficient agreement and commitment—at least as a part of a larger package or a means to an articulated end in the initial legislative act—but instead was blocked. In such cases the proposal's supporters were cheated of an action to which they were entitled, and the authority of the individual as citizen was diminished. But the even more serious problem is in legislative acquiescence. Too often liberty will be circumscribed, courses of conduct will be authoritatively charted, benefits and burdens will be distributed without the level of support that is the norm under the legislative process without the legislative veto.

We deal, of course, with probabilities. There is no absolute guarantee that legislation passed under the normal legislative process will have behind it more agreement and commitment than legislation passed through a process that includes the legislative veto. But if anything is clear from the structure of the Constitution it is that the legislative process is designed so that there will be a strong probability that the law will have a high degree of agreement and commitment behind it. It is also clear that the legislative process with the legislative veto lowers that threshold requirement of agreement and commitment.

### III. DELEGATION OF AUTHORITY

If there was a single common ground between the majority opinion and Justice White's elaborate dissent in *Chadha*, it was that Congress had authority to delegate vast authority. The majority reasoned that Congress may delegate authority, but "must abide by its delegation of authority until that delegation is legislatively altered or revoked."<sup>100</sup> Justice White argued that since Congress could delegate authority (court-enforced restrictions having disappeared—in his mind appropriately so<sup>101</sup>), "it is most

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98. A possible example is the use of racial quotas in the absence of proven legal or constitutional violations. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 219-55 (1979) (Rehnquist, J., dissenting).

99. Legislative vetoes have the same objectionable effect on the president's veto power. When a bill contains a legislative veto provision, the president cannot fully evaluate the measure because its contents cannot be fully known; they are a mere prediction of what Congress will choose to do.

100. 103 S. Ct. at 2786.

101. See *id.* at 2801-02 (White, J., dissenting).

difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself."<sup>102</sup> Further, he wrote:

If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or "quasi-legislative" in character, I cannot accept that Article I—which is, after all, the source of the non-delegation doctrine—should forbid Congress from qualifying that grant with a legislative veto.<sup>103</sup>

White's reasoning seems to have linked the concepts correctly. If Congress can delegate, it can veto. If Congress can delegate "vast authority," then my analysis, while correctly identifying the fault with the legislative veto, must be said to make too much of it. The analysis is concerned with the mere formalities of legislation. While these formalities in the Constitution and republican government may once have respected a general right to liberty in the way I have maintained, they no longer do; that respect is no longer practicable for the "effective functioning of a complex modern government." If Congress can delegate vast, vague, and essentially standardless authority to the administrative agencies, identifying only the problem to be solved,<sup>104</sup> leaving it up to the administrative agency to determine the sort of liberty that should be circumscribed and the course of human conduct that should be charted, then it is idle to speak of the legislative process maintaining certain standards of agreement and commitment. It would be anomalous to insist upon the unconstitutionality of the legislative veto and to let pass "vast" delegations of legislative authority. If the above analysis is correct, however, then the Court's result in *Chadha* should render suspect such delegation.

Even though the nondelegation doctrine and what might be called the nonreservation doctrine respect the same underlying right to liberty, courts will have to approach the two doctrines differently, for the simple reason that a reservation of authority is easy to identify, while an excessive delegation of authority is not. In resurrecting the nondelegation doctrine then, courts will have to proceed cautiously on a case by case basis, rather than with a single dramatic decision as for the legislative veto.

Nevertheless, the theory proposed in this article does suggest the appropriate starting point: the idea of an "intelligible principle."<sup>105</sup> If government must respect a general right to liberty, so

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102. *Id.* at 2802.

103. *Id.* at 2804.

104. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.05 (1958).

105. *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928).

that only upon a certain level of agreement and commitment can it abridge that liberty, there must be something intelligible to which the representatives are agreeing. The idea of an intelligible principle also finds support in the idea that the duty of Congress is to "make law." If law is to be, as Madison wrote, a "rule of action,"<sup>106</sup> then it must have an intelligible principle. No doubt it is too simplistic today to insist that the legislature's province is to make law and not to make lawmakers.<sup>107</sup> To provide adequate guidance to citizens about what is lawful and what is not, to adapt a principle to varied and rapidly changing environments, to discover and assess the facts that are conditions for the implementation of legislation—all of this requires legislators created by Congress whom we call civil servants or executive officers. But at the same time that Congress creates lawmakers, it is not too much to ask that it also make law, that is, to require that Congress supply "rules of conduct," or "intelligible principles," to direct their lawmaking.

The idea of a conditional general right to liberty also suggests a better route to the revitalization of the nondelegation doctrine than others that have been articulated in recent years. While perhaps the most powerful recent argument in favor of a revitalized rule of nondelegation is based ultimately on a concept of duty,<sup>108</sup> it seems preferable in a liberal democracy to seek ultimate groundings in individual rights, from which, of course, duties should be inferred. The idea of a general right to liberty subject to abridgment upon a certain level of agreement and commitment does this.

This right seems a more plausible ground for supporting the nondelegation doctrine than other justifications based on individual rights which have been brought forward in recent years. Arguments have been constructed from a right to due process<sup>109</sup> and equal protection,<sup>110</sup> but it seems possible to meet these concerns completely without limiting Congress's authority to delegate authority. All that is necessary is that the administrative agency develop clear enough rules to give fair notice about what is lawful

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106. THE FEDERALIST NO. 62, *supra* note 86, at 381.

107. See J. LOCKE, *supra* note 74, at § 141.

108. See S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 36-51 (1975).

109. See Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 32-33 (1938).

110. See Wilson, *Unstructured Delegation of Legislative Power and the Modern Bureaucratic State: Can and Should the Brig Aurora be Safely Brought Back into Harbor?*, presented at the Annual Meeting of the American Political Science Association, Denver, Colo. (Sept. 2-5, 1982).

and what is not and to prevent favoritism in dealing with parties similarly situated.<sup>111</sup>

Finally, the concept of a nondelegation doctrine, arising from a general right to liberty, is compatible with the recent decisions hinting at a sliding scale of permissible delegation, that is, as legislation approaches the frontier of an individual right, the courts have required greater clarity of purpose.<sup>112</sup> If the closer the law approaches a fundamental right, the more specific it must be, then it reasonably follows that some degree of specificity is required before there is abridgment of a general right to liberty.

#### IV. CONCLUSION: SLOUCHING TOWARD CONSTITUTIONAL DUTY

Neither by delegating essential legislative authority nor by reserving it to itself can Congress fulfill its constitutional duty to legislate. By slouching toward rather than performing its constitutional duty, Congress has brought into being a regime so cavalier towards the general right to liberty and the commitments of citizenship, so distinct from the guiding principles of the Constitution, that the most recent edition of a famous inquiry into the nature of public authority in America<sup>113</sup> now concludes that we live under the "Second Republic of the United States." Perhaps overly dramatic, the conclusion, by pointing to the change in regime rather than "social and economic forces," does properly emphasize the role of deliberate human choice.<sup>114</sup>

Although legislative vetoes and delegations of essentially standardless authority are not inevitable responses to modern social and economic circumstances, they have given congressmen such electoral advantages that it would be foolishly sanguine to expect reform to come from Congress itself. Positioned above the ordinary political process, endowed with the tools of a tradition, and charged with constitutional responsibility, it is up to the Court to make the deliberate choices that will bring constitutional form to, and hence make respectable,<sup>115</sup> the currently uncouth legislative process which prevails through delegation and reservation of authority. While the Court chose correctly in *Chadha*, it articulated poorly. Proper reflection on that decision, however, should

111. See K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 217-19 (1969).

112. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

113. See T. LOWI, *supra* note 55.

114. On the "debilitating" effect of attributing problems to an anthropomorphized "society," see E. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC 2-3 (1979).

115. See notes 86-88 *supra* and accompanying text.



lead the Justices to see the logical necessity of revitalizing the doctrine of nondelegation.