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THE LEGISLATIVE VETO IN TIMES OF POLITICAL REVERSAL: *CHADHA* AND THE 104TH CONGRESS

*Michael Herz**

More than a decade after it was decided, the Supreme Court's decision in *INS v. Chadha*¹ had perhaps its greatest impact. The impact is seen in the *absence* of a legislative veto from the Contract With America Advancement Act of 1996.² The Act provides for congressional review of agency rulemaking, but not by a legislative veto. The mechanism is a "joint resolution of disapproval," that is, a resolution that requires approval by both houses and presentment to the President.³ This provision applies to all major rules by all agencies; rules cannot take effect for sixty days after they are issued, during which time Congress has the opportunity to pass the joint resolution.

The reason Congress opted for a "joint resolution of disapproval," of course, is that *Chadha* forecloses the preferable alternative. Had *Chadha* come out the other way, the new law would have contained an across-the-board legislative veto provision rather than the across-the-board joint resolution of disapproval.⁴ Imagining a one-house legislative veto wielded against agency rules by today's Congress highlights a largely overlooked aspect of the veto and shows why *Chadha* was rightly decided.

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1. 462 U.S. 919 (1983).

2. Pub. L. No. 104-121 (1996).

3. Id. § 251, to be codified at 5 U.S.C. §§ 801-808. The new congressional review procedures are described and critiqued in Daniel Cohen and Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 Admin. L. Rev. 95 (1997). Though found in Title II of the Contract With America Advancement Act, these provisions are Subtitle E of the separately titled "Small Business Regulatory Enforcement Fairness Act."

4. See Pantelis Michalopolous, *Holding Back Time to Hold Back Rules*, Legal Times, May 23, 1996, at 25 ("In requiring a joint resolution of the two houses and preserving the president's veto power, the new process was designed to steer clear of the separation-of-powers problem that doomed the one-house veto at issue in" *Chadha*); see also S. Rep. No. 104-90 at 124 (1995) (reassuring reader that review by joint resolution "alleviates any constitutional concerns that might be raised" under *Chadha*).

The arguments for and against the legislative veto, and the meta-arguments about styles of constitutional interpretation and the role of the courts, are now old friends. But just like human friends, these familiar companions can look quite different when the setting in which the friendship arose changes. Recent events might make us wonder how well we really know the legislative veto. In this article, I reconsider *Chadha* in light of the transformation of the national political scene worked by the 1992 and 1994 elections.

Using the example of the 104th Congress's failed regulatory reform proposals, this article imagines how the legislative veto would operate if wielded by today's Congress against rulemaking proposals from today's agencies. This discussion shows that the veto can undermine rather than preserve the Constitution's basic allocation of authority. After decades of almost uninterrupted Republican control of the White House and Democratic control of Congress, 1994 saw the election of an aggressive Congress controlled by what for decades had been the minority party, but still with significant policy divergences between House and Senate, close on the heels of a change of party in the White House. This alignment highlights the fear that the legislative veto would be used in ways inconsistent with decisions made by a prior Congress—in other words, to alter rather than to preserve the status quo, and to do so in a way that Congress could not do through constitutionally prescribed procedures. It is this largely overlooked aspect of the operation of the legislative veto that I explore below.⁵

5. The question has been largely but not entirely overlooked. Well before *Chadha*, Louis Fisher argued that congressional retention of a veto over administrative rulemaking was especially problematic because of "the possibility of constant revision of 'legislative intent' via veto resolutions." Louis Fisher, *A Political Context for Legislative Vetoes*, 93 Pol. Sci. Q. 241 (1978), quoted in Jerry L. Mashaw, et al., *Administrative Law: The American Public Law System* 94 (West Publishing Co., 3d ed. 1992). A few others have echoed this concern. See Stanley C. Brubaker, *Slouching Toward Constitutional Duty: The Legislative Veto and the Delegation of Authority*, 1 Const. Comm. 81, 93-94 (1984) (noting that legislative veto makes administrative agencies more responsive to Congress's changing moods, including shifts in congressional preferences insufficient to stir the passage of a law); Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 Minn. L. Rev. 1237, 1262-63 (1986) (drawing on Brubaker). But with these few exceptions, the literature on the legislative veto has paid scant attention to the possibility of substantive inconsistency between a particular legislative veto and prior enactments.

I. FROM DIRECT TO INDIRECT REGULATORY REFORM

High on the 104th Congress's agenda upon its arrival in Washington was "regulatory reform." This umbrella phrase covers a variety of deregulatory initiatives growing out of the Contract With America. In particular, Republican proposals would impose an across-the-board cost-benefit analysis requirement on all major agency rulemakings. The cost-benefit analysis would in turn rest on risk assessments carried out according to detailed congressional instructions.⁶ To an uncertain degree, these requirements (like, but more forcefully than, the requirements of Executive Orders 12,291 and 12,866) would "supplement" (in the case of the Senate bill) or "supersede" (in the case of the House bill) existing statutes' treatment of costs and benefits.⁷ These proposals reflected the Republican Congress's determination to relieve the regulatory burden on American business and to undo what it perceived as the excesses of Congresses past. These would not have been minor mid-course corrections but a fundamental shift in regulatory policy. The project was sufficiently sweeping to have set scholars to talking about Ackermanian con-

6. The House legislation began as H.R. 1022, 104th Cong., 1st Sess. (1995), which passed the House by a (veto-proof) vote of 286 to 141 on February 28, 1995. 141 Cong. Rec. H2373 (daily ed. Feb. 28, 1995). H.R. 1022 was then incorporated into, and referred to the Senate as part of, H.R. 9. See Cong. Rec. S3743 (daily ed. Mar. 9, 1995). On the Senate side, the key proposal was Senator Dole's S. 343. John Glenn also introduced a Democratic alternative, S. 1001. For a general discussion of the provisions, histories, and potential impacts of the different proposals, see William W. Buzbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 N.Y.U. Envtl. L.J. 298 (1996); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247 (1996).

7. Under the Senate bill, regulations would have to pass a cost-benefit test unless the underlying statute dictated otherwise; if, "applying the statutory requirements upon which the rule is based," a rule could not pass the cost-benefit test, then the agency would have to choose the least costly of the statutorily permissible alternatives. S. 343, 104th Cong. § 624(c)(1), (2) (1995). These requirements "shall supplement, and not supersede, any other decisional criteria otherwise provided by law." *Id.* § 624(a). It is not at all clear what this means. The Senate Report offers as a model the National Environmental Policy Act, which does not require agencies actually to protect the environment and does not change the requirements of any existing statutes, but does require agencies to consider the environmental impact of their actions and gives them authority to act to mitigate that impact. See National Environmental Policy Act, 42 U.S.C. §§ 4332(1), 4332(2)(B), 4335 (1994); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970); Eva H. Hanks and John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230 (1970). The NEPA analogy is drawn in S. Rep. No. 104-90 at 74-75 (1995).

In contrast, under the House bill the cost-benefit requirement "shall supplement and to the extent there is a conflict, supersede the decision criteria for rulemaking otherwise applicable under the statute pursuant to which the rule is promulgated." H.R. 1022, 104th Cong. § 202(b)(1) (1995).

stitutional moments.⁸ In addition to the substantive provisions, the regulatory reform bills in the 104th Congress also included the “joint resolution of disapproval” mechanism for congressional review of major rules.⁹ This was hardly surprising. Congress ought to have been concerned about the enthusiasm or good faith with which agencies would implement the new cost-benefit and risk analysis requirements. These would be significant substantive changes that career staffers might resent, and they reflect a Republican agenda toward which the political appointees in a Democratic administration would be hostile. It would make perfect sense for Congress to enforce the changes through such oversight.

Whatever their merits, the regulatory reform bills had mixed success in the 104th Congress. H.R. 1022 passed quickly and painlessly. However, its Senate counterparts became hopelessly stalled, in part because of a lack of equal fervor in the Senate, and in part because of the threat of a presidential veto. By late summer of 1995 they had been given up for dead.¹⁰

Now imagine a fictional scenario based on these events. Suppose *Chadha* had come out the other way. It seems almost certain that the regulatory reform bills would then have contained at least a two-house legislative veto, and possibly the one-house version. From the Republicans’ point of view, the joint resolution of disapproval is vastly inferior, because the President is unlikely to sign a resolution disapproving regulations from his own agencies, and the Republicans in Congress lack the two-thirds majority necessary to override a veto. So a legislative veto in the regulatory reform bills would sound good to the Republican leadership. But what might sound even better, especially in light of the hard sledding that the proposals actually encountered, would be to enact an across-the-board legislative veto provision, not as part of but *instead of* the regulatory reform bill.¹¹ Such a measure would be easier to get through Congress (which will always be in favor of enhancing its authority) and no harder

8. See Sunstein, 48 Stan. L. Rev. (cited in note 6).

9. S. 343, 104th Cong. § 801(a)(3) (1995).

10. See *GOP Leadership Puts Measure on Ice, but Industry Still Hopeful of Passage*, Chem. Reg. Daily (BNA) (Sep. 11, 1995); Patrice Hill, *Regulatory Reform Unlikely to Pass*, Wash. Times at A7 (Aug. 9, 1995).

11. Of course, had *Chadha* come out the other way, there would be less need for an across-the-board legislative veto; more existing legislation would have such provisions already. In fact, most of the hundreds of legislative vetoes in existence at the time *Chadha* was decided remain on the books, and Congress has added to them since 1983. Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law* 125-28 (West Publishing Company, 2d ed. 1996).

to get by the President; it might also accomplish much of what was hoped from the regulatory reform proposals.

In reality, this imaginary scenario is exactly what happened—to the extent permissible by *Chadha*. Faced with the failure of the direct, substantive effort, Congress carved out the congressional review provisions from the regulatory reform bills and enacted them as part of the Contract with America Advancement Act. Indeed, as is implied by the title of the bill in which they were finally included, these provisions were close to Republicans' hearts. They were included in a number of separate bills and ultimately passed the Senate at least four times and the House at least twice.¹² The anti-regulatory members were enthusiastic and hopeful that the new procedures would have real substantive impact.¹³

The actual potency of the joint resolution of disapproval remains to be seen. What is certain, however, is that a legislative veto, and in particular a one-house veto, would have been a drastically more powerful (and, for the reasons discussed below, problematic) tool to the same end. Requiring presidential approval (or a two-thirds majority vote to override) is hardly a formality. And if the House of Representatives, which easily passed

12. 142 Cong. Rec. H3005 (daily ed. Mar. 28, 1996) (statement of Rep. McIntosh). The complicated history is set out in extension of remarks by Representative Henry Hyde at 142 Cong. Rec. E575 (daily ed. Apr. 19, 1996).

13. Consider the following news report:

Conventional wisdom says the 104th Congress has failed in its efforts to get the federal government off the back of American business.

Why, then, are so many of Capitol Hill's anti-regulation mavens walking tall?

David McIntosh, R-Ind., is praising his colleagues' success in enacting "the most significant change in regulatory law in 50 years." . . .

[He is] talking about a little-noted attachment to a bill that Congress passed, and President Clinton signed, in a rush to raise the debt ceiling and prevent the government from going into default for the first time in history. . . .

Although views differ on the law's potential impact, it was clearly the last and least bold of several attempts by GOP leaders in Congress to pass some type of curb on regulation. . . .

[Under the new law,] Congress will have a chance to review and veto any regulation—not just those affecting small business. It is the first such review process since 1983, when the Supreme Court ruled that legislative veto provisions Congress had written into nearly 100 laws in the 1970s were an unconstitutional violation of the separation of powers doctrine. . . .

Representative McIntosh said in a May 21 address to the U.S. Chamber of Commerce that this was a "revolutionary change" that "no one noticed." He said the goal of the law is to "recreate" the role of Vice President Dan Quayle's Council on Competitiveness (where Mr. McIntosh had served as director). "Congress will now have a chance to reject those rules that are seriously flawed," and under the new law, even policy statements and guidelines are considered rulemakings subject to Congressional review.

Marianne Lavelle, *Why Are Regulation Foes Happy?*, Nat'l L.J. at A14 (July 29, 1996).

its ambitious version of the regulatory reform proposals, could exercise a one-house veto on its own, it would surely do so.

The potency of the legislative veto is not in itself a problem. The point is that given the current political alignment—a newly Democratic White House, Republican Senate, and more strident Republican House—Congress could wield the veto to ensure substantive policy consistent with its radical, but *unenacted and unenactable*, regulatory goals. Unable to amend the health-at-any-cost statutes of the 1970s, Congress might yet, in this quiet, indirect way,¹⁴ achieve much of the substantive agenda it could not accomplish loudly and directly. Correcting the excesses of Congresses past is, of course, exactly what new Congresses are supposed to do. But they can do so only via the same constitutionally prescribed procedures that produced the excesses in the first place.

II. THE LEGISLATIVE VETO AND REVIEW OF AGENCY DECISIONMAKING

The basic justification for the legislative veto is as a mechanism for protecting congressional authority against executive encroachment. Congress having given away the store, the legislative veto counteracts the growth of executive power—indeed, its genesis was as a means for allowing massive concessions of authority to the executive¹⁵—and so merely retains some semblance of the constitutional allocation of policymaking authority to the democratically accountable legislature.¹⁶ This retention of congressional authority argument can take two forms, not always carefully distinguished. On the one hand, the legislative veto can prevent agency initiatives the current Congress deems inappro-

14. See *id.* (quoting sponsor as describing congressional review provisions that were enacted as a “revolutionary change” that “no one noticed”).

15. Justice White explained in his *Chadha* dissent:

[T]he legislative veto . . . has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation’s lawmaker. . . . [T]he Executive has. . . [generally] agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

INS v. Chadha, 462 U.S. 919, 974 (1983) (White, J., dissenting). See also Nathaniel L. Nathanson, *Separation of Powers and Administrative Law: Delegation, The Legislative Veto, and the “Independent” Agencies*, 75 Nw. U. L. Rev. 1064, 1088-89 (1981).

16. See, e.g., Louis Fisher, *Micromanagement by Congress: Reality and Mythology*, in L. Gordon Crovitz and Jeremy A. Rabkin, eds., *The Fettered Presidency: Legal Constraints on the Executive Branch* 139, 146-49 (1989); Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1832-34 (1996); Bernard Schwartz, *The Legislative Veto and the Constitution: A Reexamination*, 46 Geo. Wash. L. Rev. 351 (1978).

appropriate but which are within the bounds of a sweeping delegation of power to the executive. These circumstances involve what is really agency legislation. On the other, the veto is defended as a means of preventing agency decisions that are inconsistent with the congressional delegation—"[a] device to weed out agency action that [Congress] view[s] as inconsistent with its mandates."¹⁷ In this setting, the veto protects not overall congressional authority but particular congressional decisions. These situations are ones in which the agency's power is more truly executive rather than legislative.¹⁸

Opponents of the legislative veto offer two basic arguments for its unconstitutionality. One is the formalist argument to which Chief Justice Burger devoted most of his opinion in *Chadha* itself. The legislative veto is a type of congressional action that qualifies as "legislation,"¹⁹ and as such it can be exercised (by Congress, anyway) only pursuant to the Constitution's requirements of bicameralism and presentment.²⁰ The second, functionalist, argument is that the mechanics of the veto, particularly in a political world dominated by interest groups with unequal access to decisionmakers, mean that it will fail on its own terms, empowering factions and undermining rather than enhancing accountability while having destructive effects on sound and coherent policymaking.²¹

A third justification for the result in *Chadha*, sounding in separation of powers and combining some elements of the prior two, might focus on the role of judicial review. Judicial review enters into Chief Justice Burger's opinion only in an obscure and

17. John H. Garvey and T. Alexander Alienikoff, eds., *Modern Constitutional Theory: A Reader* 338 (West Publishing Company, 3d ed. 1994).

18. The two aspects of this argument are commingled in the Committee Report accompanying S. 343. The report justifies the congressional review provision on the ground that it will "redress the balance, reclaiming for Congress some of its policymaking authority," and that it will allow Congress to "disapprov[e] rules that do not accurately reflect the intent of Congress in enacting the underlying statutory scheme." S. Rep. No. 104-90, at 123 (1995).

19. *Chadha*, 462 U.S. at 952-55.

20. *Id.* at 946-52. At least so stated, this argument has a fatal flaw that many have pointed out: if what is being done truly requires bicameral approval and presentment (because it is legislation), then it would seem flatly unconstitutional for an agency to do it; if those steps need *not* be followed by the agency, then it would seem equally permissible for Congress or a portion thereof to skip them as well. See, e.g., Flaherty, 105 Yale L.J. at 1833 (cited in note 16).

21. See, e.g., Barbara Hinkson Craig, *Wishing the Legislative Veto Back: A False Hope for Executive Flexibility*, in *The Fettered Presidency* at 195, 204-07 (cited in note 16); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 Geo. L.J. 671, 694-97 (1992); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. Rev. 1239, 1249-50 (1989).

tangential way. Having determined that the decision regarding Chadha's deportation amounted to "legislation," the Court was faced with the task of explaining why there was no constitutional barrier to the Attorney General making the decision without bicameral agreement and presentment. For the Court, this was a garden-variety nondelegation question. When the Attorney General does it, it is *not* legislation because (we at least pretend) Congress has made the important background policy decisions, which the Attorney General is merely carrying out in a particular case, and "[t]he courts, when a case or controversy arises, can always 'ascertain whether the will of Congress has been obeyed.'"²²

Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.²³

This argument is relegated to a footnote and offered only defensively. It is severely undercut when contradicted by a later, otherwise unrelated footnote, in which, responding to Justice Powell, the Chief Justice observes that the Attorney General's decision to suspend deportation *will never be* subject to judicial review.²⁴ Nonetheless, in these references to judicial review and its absence where Congress has exercised a veto lie the seeds of an important argument for its result undeveloped by the Court.

Suppose it is true that, as *Chadha's* defenders assert, the legislative veto does not in fact advance accountability. Whether "unaccountable" review of agency decisionmaking is a problem depends entirely on who is doing the reviewing. We value the absence of accountability when the review is performed by the independent judiciary exercising "judgment" rather than "will."

22. *Chadha*, 462 U.S. at 953 n.16 (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)).

23. *Id.* at 953-54 n.16.

24. *Id.* at 957 n.22. Justice Powell contended that the legislative veto in *Chadha* was unconstitutional because it was *adjudication* by one House of Congress, not because it was legislation. Wholly failing to meet Powell on his own terms (under which the decision was adjudicatory because it involved application of a general standard to the circumstances of a particular individual), the Chief Justice argued that it was not "adjudication" in that the House had not supplanted the courts' role in this particular dispute.

The real problem is more complex than simply a lack of accountability. It is the combination, within the committee, or house, or houses exercising a legislative veto, of *partial* accountability, factional capture, and policymaking (“will” rather than “judgment”). As a type of review of agency action, the legislative veto suffers by comparison to judicial review. Put differently, one problem with the veto is not that it displaces *agency* action or substitutes for full *congressional* action; it is that it substitutes for *judicial* action.

The standard understanding of the role of the courts in the administrative state is described by Cynthia Farina as follows:

[T]he Court’s long struggle to reconcile the growth of agencies with the Constitution yielded a solution far more complex than *carte blanche* for Congress to give agencies whatever power it wishes them to have. The administrative state became constitutionally tenable because the Court’s vision of separation of powers evolved from the simple (but constraining) proposition that divided powers must not be commingled, to the more flexible (but far more complicated) proposition, that power may be transferred *so long as* it is adequately controlled.

A crucial aspect of the capacity for external control upon which the permissibility of delegating regulatory power hinged was judicial policing of the terms of the statute. . . . Judge Leventhal expressed the point most succinctly: “Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits.” Whether or not Judge Leventhal correctly interpreted the legislature’s motives, he aptly characterized the course of nondelegation theory in the courts. The constitutional accommodation ultimately reached in the nondelegation cases implied that principal power to say what the statute means must rest *outside* the agency in the courts.²⁵

If one really believes this idealized description, the case for the legislative veto is significantly undercut, for the work that the veto is supposed to do is already being taken care of. Of course, we might not believe this idealized description. This standard

25. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 487 (1989) (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring)). See also Peter L. Strauss, *An Introduction to Administrative Justice in the United States* 218-19 (Carolina Academic Press, 1989); see generally Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. Rev. 1239 (1989).

portrayal of judicial review—which the Court in *Chadha* accepted, though without linking it to the legislative veto as such—makes some rather heroic assumptions. In the classic broad delegation, Congress has given the courts little to work with, and the notion that courts are enforcing a legislatively established intelligible principle is a fiction. Where courts are thus not actually in a position effectively to police agency decisionmaking, and where the nondelegation concerns are at their peak, the case for the legislative veto is at its strongest.

Yet not every statute involves a standardless delegation. Where the agency is carrying out a more precise congressional command, the need for legislative policing is far less compelling, both because the agency has less to do and because the courts are equipped (indeed, better equipped than Congress) to guard against such inconsistency.

A statute survives its enacting coalition and is binding law unless and until amended or repealed.²⁶ We count on courts to respect this principle; we have suspicions as to whether agencies will do so. This difference is a basic premise of, and provides much of the justification for, the model of judicial review outlined above, under which courts ensure that agencies have not “amended” the statute in implementing it. At least in some circumstances, we should also be suspicious about the fidelity that Congress (or parts of Congress) may have to existing statutes. Like an agency, Congress (or its parts) cannot change the statute without going through the Article I, section 7 procedures. A legislative veto of an agency action, no less than the agency action itself, risks inconsistency with the authorizing statute. Unlike an agency action, however, the legislative veto is not subject to judicial review. In short, under the received model of judicial review, not only is the legislative veto unnecessary to cabin agency decisionmaking, but its very defect is that it replaces, and is not itself subject to, judicial review.²⁷ If the received understanding of the

26. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 *Geo. L.J.* 281, 292-93, 308-09 (1989). Even if statutory interpretation is dynamic, it remains interpretation of the statute as enacted, is limited by the language of that statute, and is not the equivalent of polling the current Congress.

27. Abner Greene has made a very similar point. He depicts the basic defect of the legislative veto more broadly, pointing out that it is subject to *neither* Presidential veto nor judicial review. Thus, action that ordinarily requires two branches is performed by one. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 164 (1994). As I read Professor Greene, we are making the same point, although he states it in terms of the absence of judicial review of the veto rather than by describing the veto as a substitute for judicial review. Professor Greene goes on to suggest that a legislative veto might be constitutional if Congress provided for judicial review thereof under the Administrative Procedure Act. He may be right, though the prospect

judiciary as an enforcer of the original legislative decision requires turning a blind eye to many realities, surely so does any claim that a later Congress, or part of it, will perform that role. The implicit claim that Congress knows its laws best rests on a dubious presumption of a single, authoritative, authorial intent and is hugely undercut by the numerous political pressures and gameplaying that affect (or infect) congressional activity and, as we shall see, by changes in Congress's composition. And if there is any value in indulging in the fiction that courts are indeed enforcing a congressionally imposed intelligible principle—a question far beyond the scope of this article—that value is obviously lost if Congress or part thereof takes over the enforcer's role.

III. THE LEGISLATIVE VETO AS A STATUTORY AMENDMENT

Let's return to the regulatory reform effort and the new congressional review provisions. Imagine an existing statute that calls for agency standard-setting and forbids a cost-benefit analysis. The Occupational Safety and Health Act is such a statute;²⁸ numerous examples also exist within the environmental laws.²⁹ We will say that the statute, in keeping with the politics of the day and the then-majority's understanding of the good,³⁰ was passed by a Democratically-controlled Congress—perhaps over the veto of a Republican president. Now also suppose that *Chadha* had come out differently and that in 1996 Congress created an across-the-board legislative veto.

The agency adopts a standard limiting the concentration of a toxic substance; industry will be able to comply but only at great expense. Industry insists that the expense is just not worth it; few lives will be saved and the expense is enormous. If it makes that argument to a court, it will lose: the statute does not call for a balancing of costs and benefits; Congress required that all feasi-

raises difficult questions concerning the standard of review and the problem of to whom a court should defer where an agency disagrees with Congress or a part thereof. In any event, Congress is highly unlikely actually to provide for such review (the 1996 legislation explicitly forecloses it, 5 U.S.C. § 805), and even a judicially reviewed veto would seem to fail under *Chadha*.

28. See *American Textile Manufacturers Inst. Inc., v. Donovan*, 452 U.S. 490 (1981).

29. See, e.g., Clean Water Act, 33 U.S.C. § 1314(b)(2)(A) (1994) (best available technology effluent limitations); Clean Air Act, 42 U.S.C. § 7412(d)(2) (1994) (maximum achievable degree of reduction in emissions of hazardous air pollutants). See generally Daniel A. Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. Ill. L. Rev. 337, 357 (noting that "[v]ery few environmental statutes expressly call for cost-benefit analyses" and "more often, the statutes set environmental goals and then require full implementation limited only by the constraints of economic and technological feasibility").

30. Farber, 1986 U. Ill. L. Rev. at 357 (cited in note 29).

ble steps to protect public health be taken; the standard is therefore valid because consistent with the statute. Indeed, were the agency to accept industry's cost/benefit objections, as these days it might, the court would set aside the regulation. Knowing this, the agency does not do so.

On the other hand, if industry representatives are able to get the ear of someone on the Hill, prospects for a legislative veto of the regulation are good given present Republican control and enthusiasm for cost-benefit analysis. And if the House vetoes the rule, there is nothing the President can do about it, except instruct the agency to issue a new rule, which in turn will only be vetoed. Most importantly, the agency cannot obtain judicial review of the veto. Congress can keep vetoing until the agency finally produces a rule that can be justified in cost-benefit terms. Indeed, because the agency can anticipate these events, it may simply adopt a rule that will survive congressional scrutiny in the first place.³¹

In this scenario, Congress has all but amended the statute. ("All but" in that the agency can redo the regulation if the political climate changes, which it could not do if Congress had actually amended the statute.) In effect, the statute now includes the cost-benefit requirement that the enacting Congress did not see fit to impose, the current Congress tried and failed to enact, and the President would have vetoed. The agency has attempted to adhere to the original statutory bargain and been unable to do so.

The most powerful response to this argument is that judicial review will prevent this outcome. If actual or threatened vetoes do ultimately lead to an agency regulation that is inconsistent with the statute, a court will, in theory, set the regulation aside; the judiciary's authority to correct is exactly congruent with the problem to be corrected. However, judicial review is not a complete solution for three reasons. First, there is a certain amount

31. This is admittedly a huge simplification. All sorts of other political factors will determine whether Congress will veto, whether it will do so repeatedly, whether the agency would cave right away, and so on. Though oversimplified, the scenario has enough of a link with the real world to make the point. Indeed, early rumblings in the House about a possible joint resolution of disapproval with regard to recently proposed air quality standards suggest that these EPA regulations could be a real world example. EPA at least believes that its proposals are mandated by the scientific record and the cost-blind statutory language; Representative David McIntosh (a driving force behind the congressional review legislation) thinks the stricter standards would be a major policy error. See generally *House Opens Probe Into Air Proposals; Specter of Congressional "Veto" Raised*, [Current Developments] 27 *Env't Rep. (BNA)* 1988 (Jan. 31, 1997). Again, he will have an uphill battle in obtaining disapproval under the new procedures; a one-house veto would be a quite different proposition.

of slippage; not every final rule is challenged in court, and among those that do reach it the judiciary will not catch every rule that conflicts with the statute.³² The second shortcoming of relying on judicial review to cure amendment-by-veto is contingent: the efficacy of judicial review would depend on what rules of deference were applied when the legislative veto had produced a rule not preferred by the agency. This is a complex question, and it is impossible to predict to which organ judicial deference would run.³³ It is possible, however, that courts would overvalue the veto. The third and key defect of the judicial review solution, however, is that judicial review of the veto itself is not available. Judicial review is only possible when and if the agency actually issues a final rule. It is no help for the delay or ultimate stalemate, paralysis, and inaction that the veto might cause.

In his *Chadha* dissent, Justice White argued that the legislative veto does not diverge from the essence of the constitutional model because the status quo cannot change without agreement of all three lawmakers—House, Senate, and President. The power of this claim is that it tidily wipes out functionalist arguments for the result in *Chadha*; the reality, just not the form, of bicameralism and presentment *is* provided, and thus all the purposes those requirements serve (which are not actually in dispute) are protected. In many settings, White's claim is true. Such settings will often include the situation where Congress attempts through the veto to limit agency action taken pursuant to an unbounded prior delegation. However, the foregoing scenario indicates that White's assertion is not always true. The current political configuration in Washington highlights the way in which legal standards might change via the legislative veto without three-way concurrence. This reality resurrects the functional argument against the veto or, put differently, it shows that the formalities are not always empty.

Viewed as a means of ensuring agency adherence to congressional commands, the legislative veto is superficially plausible,

32. To be sure, this might not be worse than the situation in the absence of the veto. That is, the same slippage will occur with regard to review of agency rules absent a legislative veto. There is no a priori reason to expect that the judiciary would fail to catch invalid regulations more often in the case of rules that resulted from conflict with Congress than in the case of rules that were purely agency creations. The legislative veto would still raise particular problems if it produced more rules inconsistent with the statute than would be issued in its absence. Whether it would or not is highly speculative and I would not venture a guess.

33. For discussion of the similar issue of to whom a court should defer when the President has forced an interpretation on an agency, see Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 *Cardozo L. Rev.* 219, 256-62 (1993).

even reassuring. But in our system, a different guarantor of such compliance already exists: the judiciary. The judiciary's relative independence, neutrality, and accessibility make it the appropriate choice for ensuring that the commands of a former Congress—an entity that no longer exists and therefore cannot protect itself—are followed. In other words, if the legislative veto is to be justified as a mechanism for ensuring agency consistency with congressional mandates, the response must be first that it is unnecessary for that task and second that the price is too high, since it may also be used to weed out agency action that is *consistent* with Congress's mandates.

IV. CONCLUSION

In 1996, *Chadha*'s impact was greater than at any time since it was decided, forcing the 104th Congress to adopt a system of congressional review via joint resolution rather than via legislative veto. This preserved the basic constitutional allocation of authority and ensured that substantive policy that could not be adopted through the normal legislative process would not be adopted quietly and indirectly through the legislative veto. Because a joint resolution is adopted by both houses and requires presentment to the President, it will, as a practical matter, be available far less often than would a one-house or a two-house veto. Moreover, concerns about factional influence or control, although present,³⁴ are less serious than they would be in the case of a legislative veto.

Much of the focus of the legislative veto debate has been on the situations in which Congress has handed authority to agencies through broad, open-ended delegations. But Congress does make some decisions; agencies must operate within some legislatively established limits. In those cases, the legislative veto might be used to override agency decisions that were *not* discretionary or to force the agency into positions that are inconsistent with the statute. The legislative veto will not always function as a means of protecting the original statutory mandate or as a way of policing gapfilling that conflicts with the enacting Congress's overall vision. The present political setting illustrates how in certain circumstances the veto could be a tool for in effect amending statutes in a way that would be politically impossible to do through the constitutionally required procedures.

34. See Sunstein, 48 *Stan. L. Rev.* at 289 (cited in note 6).

APPENDIX

THE ARTICLE I, SECTION 7 GAME

In *The Article I, Section 7 Game*,³⁵ William Eskridge and John Ferejohn chart the policy positions of the participants in the legislative process and the resulting compromise outcome to show that the legislative veto does indeed function as its defenders argue. That is, it results in policies closer to the preferences of the coalition that enacted the underlying statute than would be adopted were the agency decision not subject to a legislative veto. The absence of bicameralism and presentment poses no constitutional difficulty because, under their models, the legislative veto “mov[es] policy outcomes back toward those that would occur under the original understanding” of governmental authority before that understanding was “subverted . . . by vesting much lawmaking in agencies.”³⁶

I have argued that in some circumstances, Eskridge and Ferejohn’s conclusion does not hold. Charting the current political setting using their graphical representations illustrates the point.

Consider the following sequence of figures, the first three of which are taken from Eskridge and Ferejohn’s article. Figure 1 illustrates the legislative result (policy x) when all three players (President (P), median House voter (H), median Senate voter (S)) agree on the direction in which policy should change, though not on how far to move from the status quo (SQ).

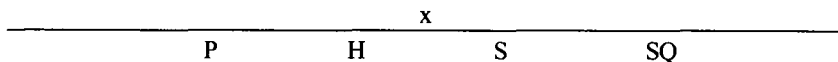
Figure 1.³⁷

Figure 2 shows what happens when Congress delegates the policy decision to an agency (A). In these circumstances, policy shifts to x', which is the substantive position of the veto median of the more pro-President chamber (h and s for the House and Senate, respectively). At this point the President would veto a legislative effort by Congress to impose a different policy than the agency's and Congress would be unable to override the President's veto.

35. William N. Eskridge, Jr. and John Ferejohn, *The Article I, Section 7 Game*, 80 *Geo. L.J.* 523 (1992).

36. *Id.* at 543. While Eskridge and Ferejohn still believe the particular legislative veto at issue in *Chadha* to have been unconstitutional, they reach this conclusion on Justice Powell's reasoning that it amounted to a congressional adjudication and so impermissibly intruded on judicial authority.

37. This is Eskridge and Ferejohn's "Figure 1." *Id.* at 530.



Figure 2.³⁸

Finally, figure 3 shows how the existence of a two-house legislative veto shifts statutory policy back in the direction of what Congress would have imposed had it made the decision itself.³⁹ The agency must issue a rule that is far enough toward median congressional preferences that the median voter in the more pro-President chamber is indifferent between the proposal and the status quo, and therefore would not vote to veto the proposal.

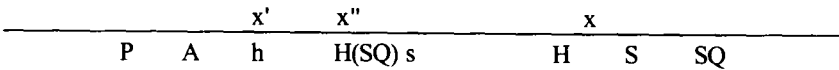


Figure 3.⁴⁰

Eskridge and Ferejohn’s models show exactly what they say they do. But they cover only a limited set of scenarios. Using their methods to model the scenario I have discussed in the body of this article illustrates the legislative veto functioning to move policy outcomes away from those that would occur under the original understanding. First, consider the following situation:

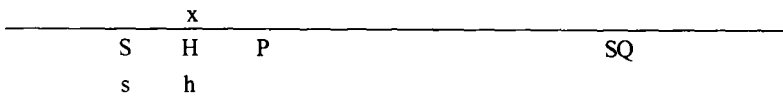


Figure 4.

This might be the configuration for the Clean Air Act of 1970 or the Clean Water Act of 1972. House, Senate, and President all want to change the status quo (no regulation) in the same direction. The (Democratic) Congress wants to go further than the

38. This is Eskridge and Ferejohn’s “Figure 1A.” *Id.* at 536. Although Eskridge and Ferejohn envision a new legislative initiative—a substantive law to alter the agency’s policy—this chart also illustrates the outcome under the joint resolution of disapproval mechanism. Comparing Figures 2 and 3 thus illustrates the difference in effectiveness (from Congress’s point of view) between that mechanism and a two-house legislative veto.

39. Eskridge and Ferejohn are careful to speak of the position that the enacting coalition would have adopted had it actually agreed on a specific policy, not the position that the enacting coalition *did* adopt. On the one hand, this explains why judicial review cannot serve the policing function and why the agency might be so far off in the first place. On the other, however, it begs a normative question about why the hypothetical, *unenacted* preferences of the enacting coalition should trump the real, though also *unenacted*, preferences of today’s Congress or a part thereof.

40. This is Eskridge and Ferejohn’s “Figure 1B.” *Id.* at 541.

(Republican) President. The policy adopted (x) will correspond with the views of the veto median of the more pro-President chamber. (In this case, because the legislation had overwhelming support in both Houses, the veto median (h and s) and the median member (H and S) were in fact essentially in the same place.) Congress *need* go no further toward the President's position, and it *can* go no further away from it because it would be unable to override a veto.

In much of the health, safety, and environmental legislation of the 1970s, this configuration resulted in provisions that forbade the agency to take cost into account in standard setting or at least mandated that the agency require the maximum feasible protection, regardless of whether costs outweighed benefits.

Now fast forward to the present. A Democrat rather than a Republican is in the White House; Congress is controlled by Republicans rather than Democrats. The Republicans in Congress view these provisions as the height of poor policy. Figure 5 maps the outcome if they possess a legislative veto. (Figure 5 includes Figure 4 and adds to it the players' post-November 1994 positions, indicated by asterisks.)

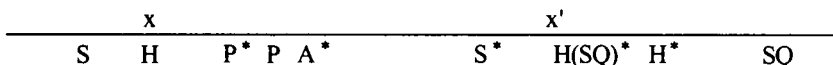


Figure 5.

The President is approximately at or only slightly to the right of the actual enacting coalition.⁴¹ The agency is to the right of the President ($P < A$) in light of congressional monitoring and influence.⁴² Whereas the President has moved leftward on the graph, Congress has moved rightward. To survive a one-house veto, "the agency would have to set statutory policy at or to the right of the points where both legislative chambers are indifferent between the agency's policy and the status quo."⁴³ On this scena-

41. I acknowledge that pinpointing a single spot on a graph to represent President Clinton's firm and specific policy position is fanciful in the extreme. The constraints of this form require it, however.

42. See *id.* at 538-39, 541 n.62.

43. *Id.* at 542. Defining the status quo here becomes complicated. If the agency has never issued a regulation under the relevant statutory provision, then the status quo is no regulation in both figures. If it has issued a regulation, however, which it is now modifying, then the status quo is life under the existing regulation. Stated graphically, $SQ^* < SQ$. That situation complicates the analysis. *Any* change to the regulation that moves policy to the right of SQ^* will be preferable to SQ^* for the median House voter, and so the veto threat becomes quite negligible. (However, it is conceivable that the median member might still veto in the hope that the agency would return with a regulation further away from SQ^* .) If the existing regulation is further to the left than the original

rio, that point (x') is a long way away from the policy that was or would have been established by the enacting coalition (x).

In short, Eskridge and Ferejohn show that the existence of a legislative veto moves agency policy closer to what Congress would have enacted had it made the real decision rather than delegating to an agency. This defense of the veto rests on two critical assumptions that limit its application, however. First, Eskridge and Ferejohn assume that congressional and presidential policy preferences remain constant over time.⁴⁴ Second, they do not consider the case where an agency is implementing a congressional decision rather than making policy in Congress's stead. The legislative veto moves the policy outcome closer to that which the *current* coalition would reach; that is not necessarily the outcome that the *enacting* coalition would have reached or, more importantly, *did reach*.⁴⁵

policy, that is $SQ^* < x$, the possibility of a veto might move x' *closer* to x ; as long as $SQ^* > x$, the veto threat will only move x' further away from x , as argued in the text.

44. In fact, they do model shifts in presidential policy preferences, though not congressional preferences. The change in policy following a large shift in presidential position is generally smaller in the presence of a legislative veto than in its absence. *Id.* (figure 1D).

45. Whether this use of the legislative veto is problematic might be thought to turn on whether statutes are to be interpreted dynamically. Thus far, I have implicitly assumed that statutes are static; if one adopted a super-strong dynamic view my discussion would perhaps prove the *value* of the legislative veto, which can be said to ensure dynamic readings by agencies. But even Eskridge does not equate statutory meaning with the results of an opinion poll of current legislators. My point stands regardless of one's theory of statutory interpretation, for under any such theory there will be times when a current Congress disagrees with existing statutory provisions.