LEGISLATIVE OVERSIGHT IN THE FEDERAL SYSTEM: WHAT SURVIVES CONSTITUTIONAL SCRUTINY IN NEW JERSEY?

Introduction

In the recent decision of *Immigration and Naturalization Service v. Chadha,*[1] the United States Supreme Court declared that a one house congressional veto statute is contrary to the separation of powers doctrine embodied in the United States Constitution.[2] The Court's opinion immediately generated a plethora of controversy and commentary,[3] and added a significant chapter to the history of the legislative veto in America.

In an analogous decision a year earlier,[4] the New Jersey Supreme Court struck down that State's Legislative Oversight Act.[5] Certain provisions of that statute had permitted the New Jersey Legislature to veto

---

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

[2] *Id.* at 2786-87.

[3] *See, e.g.*, Weltman, *The Life and Times of the Legislative Veto*, 112 N.J.L.J. 589 (1983); *An Epic Court Decision*, TIME, July 4, 1983, at 12; *Congress Considers Choices in Legislative Veto Aftermath*, 41 CONG. Q. 1327 (1983); *High Court Decision Reopens Dispute over Impoundments; Congress Loses Spending Tool*, 41 CONG. Q. 1331 (1983); Yoder, *Legislative Veto is Cut Adrift After Shift in Constitutional Law*, Newark Star-Ledger, Aug. 10, 1983, at 22, col. 1; *Court's Outlawing of Congress' Veto Casts Shadows on State Legislatures*, N.Y. Times, July 22, 1983, at A8, col. 1; *Two Officials Say Ban on Congress Veto Poses Few Problems*, N.Y. Times, July 21, 1983, at A19, col. 1; *Legislative Veto Case Leaves Much Unsettled*, N.Y. Times, July 3, 1983, at E5, col. 1; *Wider Effects of Ruling to Curb Congress Seen*, N.Y. Times, June 29, 1983, at A2, col. 1; *Constitutional Safeguard*, Newark Star-Ledger, June 28, 1983, at 14, col. 1; *Referendums in the Works on Amendments to State Constitution*, Newark Star-Ledger, June 26, 1983, § 1, at 12, col. 1; *Government Power Poised for a Grand Realignment*, N.Y. Times, June 26, 1983, at E1, col. 4; *Veto Battles Set the Stage for '84*, N.Y. Times, June 26, 1983, at E4, col. 3; *A Veto Vetoed*, N.Y. Times, June 26, 1983, at E20, col. 1; *High Court Bars Legislative Veto Used By Congress*, Wall St. J., June 24, 1983, at 2, col. 2; *High Court Jolts Congress By Ending Legislative Veto*, Newark Star-Ledger, June 24, 1983, at 1, col.3; *Supreme Court, 7-2, Restricts Congress' Right to Overrule Actions By Executive Branch*, N.Y. Times, June 24, 1983, at A1, col. 3; *Sharp Shifts in Congress' Practices and Legislative Conflict Predicted*, N.Y. Times, June 24, 1983, at A1, col. 5; *Impact of the Decision*, N.Y. Times, June 24, 1983, at A1, col. 4; *Hoover Was First to Let Congress Veto President*, N.Y. Times, June 24, 1983, at B4, col. 1; *Supreme Court Strikes Down 'Legislative Veto'*, Wash. Post, June 24, 1983, at A1, col. 1; *Decision Alters Balance of Power in Government*, Wash. Post, June 24, 1983, at A1, col. 1; *The Court Vetoes a Veto . . .*, Wash. Post, June 24, 1983, at A16, col. 1; *Court's Veto Ruling Seen as Blow to Business*, Wash. Post, June 24, 1983, at D8, col. 1; *Congressional Veto Power*, Wash. Post, June 23, 1983, at A15, col. 1; *Excerpts of Supreme Court Ruling*, Wash. Post, June 21, 1983, at A4, col. 1.

[4] General Assembly of State of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982).

[5] N.J. STAT. ANN. §§ 52:14B-4.1 to -4.9 (West Supp. 1983-84).

virtually any rule or regulation promulgated by a state administrative agency.[6]

Whether the New Jersey Legislature should enact another oversight statute is an issue worthy of debate and resolution. Sir Winston Churchill once remarked that only by pondering the work of certain artists as though "unfolding a long, sustained, interlocked argument"[7] could he understand their craft. Similarly, constitutional challenges, both state and federal, must be unraveled and analyzed in order to understand how a legislative oversight statute might yet survive in New Jersey. The remainder of this comment discusses federal and state case law relevant to this issue, and concludes with a test under which a properly drawn legislative veto statute might survive judicial scrutiny within the purview of both the New Jersey and United States Constitutions.

Legislative Oversight in New Jersey

In 1981, the General Assembly of New Jersey enacted the Legislative Oversight Act[8] (Oversight Act) in order to permit legislative participation in the review of state administrative agency rules and regulations.[9] The statute was enacted without opposition in either the Senate or Assembly, and both Houses overrode the veto of then Governor Brendan Byrne.[10] The Oversight Act required administrative agencies to notify both the President of the Senate and the Speaker of the General Assembly[11] at least thirty days[12] prior to the adoption, amendment, or repeal of virtually "[e]very rule [t]hereafter proposed by a State agency."[13] The President of the Senate and the Speaker of the General Assembly were then immediately obligated[14] to refer any of these affected rules or regulations to an appropriate standing reference committee in their respective House.[15] Within forty-five days of this referral,[16] the Joint Legislative Oversight

---

[6] *Id.* §§ 52:14B-4.1, 4.3.

[7] W. CHURCHILL, PAINTING AS A PASTIME 19 (1965).

[8] Act of February 9, 1981, ch. 27, 1981 N.J. Sess. Law Serv. 67.

[9] N.J. STAT. ANN. § 52:14B-4.5 (West Supp. 1983-84).

[10] General Assembly of State of New Jersey v. Byrne, 90 N.J. 376, 379-80, 448 A.2d 438, 439-40 (1982).

[11] N.J. STAT. ANN. § 52:14B-4(a)(1) (West Supp. 1983-84).

[12] *Id.*

[13] *Id.* § 52:14B-4(a).

[14] *Id.* § 52:14B-4.1.

[15] *Id.*

[16] *Id.* § 52:14B-4.2.

Committee[17] was required to exercise one of four options: a) recommend approval of the rule by joint resolution of the Legislature;[18] b) recommend disapproval of the rule by joint resolution of the Legislature;[19] c) recommend postponement of any decision by the Legislature for another sixty days;[20] or d) take no action at all within sixty days of the initial referral of the rule to the Committee, in which case the rule would be approved automatically.[21]

On March 11, 1981, Governor Byrne advised the members of his cabinet to disregard the veto provisions of the Oversight Act[22] on the basis of his acting Attorney General's opinion that the Act was unconstitutional.[23] This prompted the legal action subsequently commenced by both Houses of the New Jersey Legislature against the Governor[24] and the Director of the Office of Administrative Law[25] which sought a judicial declaration that the Oversight Act was constitutional and therefore must be enforced by the executive.[26]

In *General Assembly of the State of New Jersey v. Byrne*,[27] the New Jersey Supreme Court declared that the legislative veto provisions of the Oversight Act[28] were in violation of the separation of powers[29] and presentment[30] clauses of the New Jersey Constitution. The court held that the Oversight Act was too broadly drawn,[31] and yielded too much power to the legislature both in making and enforcing law.[32] The court conceded, however, that "appropriate circumstances"[33] existed which, if present, would allow the executive and the legislature to cooperate in the furtherance of a legislative veto scheme. Such a statute could pass constitutional

---

[17] *Id.* § 52:14B-4.5.

[18] *Id.* § 52:14B-4.2.

[19] *Id.*

[20] *Id.* § 52:14B-4.3. *See also* Summary, *Legislative Veto-An Act to Amend and Supplement the Administrative Procedure Act*, 5 SETON HALL LEGIS. J. 209 (1982).

[21] N.J. STAT. ANN. § 52:14B-4.3 (West Supp. 1983-84).

[22] General Assembly of State of New Jersey v. Byrne, 90 N.J. 376, 380, 448 A.2d 438, 440 (1982).

[23] 1981 Formal Op. N.J. Att'y Gen. No. 3.

[24] General Assembly of State of New Jersey v. Byrne, 90 N.J. 376, 381, 448 A.2d 438, 440 (1982).

[25] *Id.*

[26] *Id.*

[27] 90 N.J. 376, 448 A.2d 438 (1982).

[28] N.J. STAT. ANN. §§ 52:14B-4.1 to -4.4. (West Supp. 1983-84).

[29] N.J. CONST., art. III.

[30] *Id.*, art. V, § 1, para. 14.

[31] *General Assembly*, 90 N.J. at 379, 448 A.2d at 439.

[32] *Id.*

[33] *Id.* at 378-79, 448 A.2d at 439.

muster when "necessary to further a statutory scheme requiring cooperation between the two branches, and [when] such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purpose."[34]

In a companion case to *General Assembly, Enourato v. N.J. Building Authority*,[35] the court enumerated circumstances appropriate for legitimate cooperation between the legislative and executive branches.[36] *Enourato* concerned a legislative veto scheme contained in the New Jersey Building Authority Act[37] (Building Act). In the Building Act, the New Jersey Building Authority (Authority) is charged with the financial responsibility of overseeing and administering the construction and operation of all office facilities for the State's executive department.[38] This is accomplished through the Authority's periodic issue of up to $250 million in bonds and notes.[39] The Authority alone is responsible for all legal liability or indebtedness it assumes in carrying out the narrowly drawn provisions of the statute.[40] Moreover, any action taken by the Authority is subject to a gubernatorial veto within fifteen days.[41] The Legislature retained for itself two opportunities to veto actions of the Authority: any action involving a lease agreement with a state agency,[42] and any action involving estimated expenditures in excess of $100 thousand.[43]

Applying the test announced in *General Assembly*,[44] the court upheld the veto provisions in the Building Act as constitutional.[45] The statute's legislative veto provision served "a necessary legislative oversight purpose"[46] with only the slightest potential for abuse.[47] In addition, vesting the power to veto a rule or regulation in the Governor as well as in

---

[34] *Id.* at 387, 448 A.2d at 444; *see also* Enourato v. N.J. Building Auth., 90 N.J. 396, 448 A.2d 449 (1982).

[35] 90 N.J. 396, 448 A.2d 449 (1982).

[36] *Id.* at 403-405, 448 A.2d at 452-53.

[37] N.J. STAT. ANN. §§ 52:18A-78.1 to -78.32 (West Supp. 1983-84).

[38] *Id.* § 52:18A-78.5(i).

[39] *Id.* § 52:18A-78.14(a).

[40] *Id.* § 52:18A-78.14(f).

[41] *Id.* § 52:18A-78.14(i).

[42] *Id.* § 52:18A-78.22.

[43] *Id.* § 52:18A-78.6, -78.8.

[44] *Enourato*, 90 N.J. at 401, 448 A.2d at 451.

[45] *Id.*

[46] *Id.* at 405, 448 A.2d at 453.

[47] The court reasoned that:

First, the Governor's full control over the selection of Building Authority projects makes

the Legislature[48] fostered a nexus of cooperation between two coordinate branches of government in an area of mutual concern.[49] It is reasonable to conclude, in light of the proscriptions articulated in *General Assembly* and *Enourato*, that only a narrowly circumscribed legislative oversight statute can withstand constitutional scrutiny in New Jersey.

Congressional Oversight

The constitutionality of a one house congressional oversight scheme was addressed by the United States Supreme Court in *Immigration and Naturalization Service v. Chadha.*[50] Jagdish Rai Chadha, a male Kenyan domicilied in East India, was lawfully admitted to the United States in 1966 on a British passport as a nonimmigrant student.[51] Following the expiration of his visa in 1972, the District Director of the Immigration and Naturalization Service (INS) ordered Chadha to show cause why he should not be deported.[52] At his appearance before an immigration judge,

---

it impossible for the Legislature to usurp executive authority in ways that were possible under the Legislative Oversight Act. Pursuant to *N.J.S.A.* 52:18A-78.4(i), the Governor has 15 days to veto any Authority decision. The Legislature has absolutely no control over Authority projects unless the Governor first approves them.

. . . .

Second, because the Legislature's veto power is limited to the rejection of discrete projects and leases, it has limited potential to interfere with executive action. One significant constitutional defect in the Legislative Oversight Act was its potential for "allowing the Legislature to control agency rulemaking," 90 *N.J.* at 385. . . .

By contrast, the veto provision here cannot cause any such disruption. The Legislature cannot veto any arbitrary portion of a proposed Authority project. It must either veto the entire project or let the project proceed. . . .

. . . .

Third, even repeated use of the veto would not be likely to alter the legislative intent in ways that require presentment to the Governor under the Presentment Clause. *N.J. Const.* (1947), Art. V, § 1, ¶14. . . .

. . . The potential to interfere with exclusive executive responsibilities or to effectively alter the policy of existing laws without presentment to the Governor, which rendered the Legislative Veto Act in *General Assembly* unconstitutional, is negligible under the limited veto power in the Building Authority Act.

Id. at 405-407, 448 A.2d at 453-54.

[48] *Id.* at 401-402, 448 A.2d at 451-52.

[49] *Id.* at 402-405, 448 A.2d at 452-53.

[50] 103 S. Ct. 2764 (1983).

[51] *Id.* at 2770.

[52] *Id.*

Chadha admitted his deportability, but applied for a suspension of the deportation order.[53] At an administrative hearing held in 1974, an immigration judge adduced, from the evidence presented, that Chadha met the statutory requirements for suspension of his deportation order.[54] In accord with other procedural requirements, the suspension of Chadha's deportation order was reported to the United States Congress.[55]

Under section 244(c)(2) of the Immigration and Naturalization Act[56] (INA), either House of Congress was empowered to pass a resolution "stating in substance that it does not favor such suspension" and compelling the Attorney General to "deport such alien or authorize the alien's voluntary departure" from the United States.[57] In 1975, in an unreported and undebated vote, the House of Representatives exercised its powers under this section, and passed a resolution which vetoed the immigration judge's decision to suspend Chadha's deportation order.[58] The immigration judge then ordered that the decision of the House be implemented and Chadha be deported.[59]

Following an unsuccessful appeal of the House action to the Board of Immigration Appeals, Chadha was joined by the INS in his petition for review before the United States Court of Appeals for the Ninth Circuit.[60] The Court of Appeals held that section 244(c)(2) of the INA violated the separation of powers doctrine embodied in the United States Constitution.[61] Accordingly, the appellate court reinstated the order suspending Chadha's deportation.[62] The United States Supreme Court granted certiorari to address the issue of "whether action of one House of Congress under [section] 244(c)(2) violates strictures of the Constitution."[63]

Before addressing this issue, the Court rejected several procedural challenges to Chadha's appeal.[64] First, the Court determined that the INS, an agency of the United States, was a "sufficiently aggrieved" party

---

[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] 8 U.S.C. § 1254(c)(2) (1982).
[57] *Id.*
[58] H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).
[59] *Chadha*, 103 S. Ct. at 2772.
[60] *Id.*
[61] Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980).
[62] *Id.*
[63] *Chadha*, 103 S. Ct. at 2773.
[64] *Id.* at 2772-80.

to the action, and as such could properly be heard.[65] The Court next concluded that the one house veto provision, on its face, was severable from the remainder of the Act, leaving the balance of the statute unaffected by the Court's determination of the primary issue before it.[66] The Court also rejected challenges based upon Chadha's standing to contest the deportation order,[67] the availability of alternative relief,[68] and its own jurisdiction.[69]

After rejecting the final argument that the matter was not justiciable because it presented a political question,[70] the Court commenced its inquiry into the constitutionality of the one house congressional veto. The Court began its analysis by deferring to the presumptive validity of the statute,[71] but noted that a given law's efficiency, convenience, or usefulness "in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[72]

As its polestar in resolving the congressional veto issue, the majority placed unswerving reliance on certain textual provisions in the Constitution, specifically, the requirement that both Houses of Congress participate in the legislative process,[73] and the requirement that virtually every outgrowth of this process be presented to the President for his approval or disapproval.[74] Beginning with a historical analysis of these provisions, the Court emphasized the Framers' deep concern over the potential for one branch of government to abuse its power delegated by the Constitution.[75] In this regard, the Court noted that both bicameralism and presentment had been carefully and thoughtfully inserted into the Constitution, and were designed to circumscribe an otherwise unrestricted exercise of power by the legislative branch.[76]

The Court reasoned that even though the members of Congress were subject to the vote of the people as the ultimate check on abuses of power,

---

[65] *Id.* at 2772-73.
[66] *Id.* at 2774-76.
[67] *Id.* at 2776.
[68] *Id.*
[69] *Id.* at 2777-78.
[70] *Id.* at 2778-80.
[71] *Id.* at 2780-81.
[72] *Id.*
[73] U.S. CONST. art. 1, § 1.
[74] *Id.* art. 1, § 7.
[75] *Chadha*, 103 S. Ct. at 2782-83.
[76] *Id.*

the Framers were concerned that they might nonetheless enact thoughtless, ill-conceived, or just plain whimsical legislation.[77] These concerns were reflected in the Great Compromise of 1787, under which the idea of a potentially despotic unicameral legislature was rejected in favor of a bicameral legislative system.[78]

Similarly, the presentment clause was designed as one final restraint on a Congress with virtually "no [other] check but its own will."[79] The Court concluded its historical analysis with the observation that "the prescription for legislative action in . . . [the Constitution] represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered procedure."[80]

The Court then embarked on an analysis of the separation of powers doctrine.[81] While the constitution makes no explicit textual reference to the separation of powers, the Court recognized that the responsibilities of the national government are assigned to three separate, co-equal branches of government, each of which is "functionally identifiable."[82] The exercise of power by any one branch "is presumptively ... within its assigned sphere."[83] Notwithstanding this presumption, most actions taken by either House of Congress are exercises of legislative power, and are therefore subject to the procedural requirements of the Constitution.[84] Whether these actions constitute an "exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' "[85]

Four separate grounds were cited by the Court to justify its conclusion that the one house veto action in this case was essentially legislative in character. First, the purpose and effect of the House action clearly altered "the legal rights, duties and relations" of Chadha and others.[86] Second, the House order to the Attorney General mandating Chadha's deporta-

---

[77] *Id.* at 2782.

[78] *Id.* at 2784.

[79] *Id.* at 2783, *quoting* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383-84 (1858).

[80] *Chadha*, 103 S. Ct. at 2784.

[81] *Id.* at 2784-88.

[82] *Id.* at 2784.

[83] *Id.*

[84] *Id.*

[85] *Id.*, *quoting* S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897).

[86] *Chadha*, 103 S. Ct. at 2784.

tion was a colorable legislative act which only could have been achieved, "if at all, . . . by legislation requiring deportation."[87] Third, the Court relied on "the nature of the decision implemented" to buttress its conclusion that the House action was of a legislative character.[88] In this regard, the Court noted that "Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President."[89] As its final ground, the Court noted that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action."[90] The Court found only four such instances in the Constitution,[91] none of which resembled the action taken in this case.

Justice Powell concurred in the judgment of the Court,[92] but cautioned that the majority was overbroad in its determination that a one house veto scheme patently violated the Constitution.[93] Powell felt that the Constitution did not separate the three branches of government in the precise manner articulated by the majority, but rather, on the facts before him, Congress had "exceeded the scope of its . . . prescribed authority" by assuming a function of government which was, on its face, "clearly adjudicatory."[94] Powell believed that the separation of powers doctrine was violated the moment the House engaged in a function which was

---

[87] *Id.* at 2785.

[88] *Id.* at 2786.

[89] *Id.*

[90] *Id.*

[91] The Court identified the following instances:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl.5;

(c) The Senate alone was given final reviewable power to approve or to disapprove presidential appointments. Art. II, § 2, cl.2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl.2.

Id. at 2786.

[92] *Id.* at 2788-92.

[93] *Id.* at 2788.

[94] *Id.* at 2791-92.

obviously outside the scope of its authority. It was therefore unnecessary to reach the broader question of whether the veto scheme employed was itself constitutionally defective.[95]

Justice Rehnquist dissented,[96] stating that the legislative veto provision was not severable from the balance of the Act as the majority had maintained.[97] He chided the Court for failing to consider the complete intent of Congress in enacting a statute with a severability clause.[98] Rehnquist believed that the majority misread the legislative history of the INA, for nowhere had Congress indicated that it would have permitted the executive branch to suspend deportation proceedings in the event the veto section was found unconstitutional.[99] Since Congress never clearly intended the Act to survive severance of the legislative veto, Rehnquist felt the Court overstepped its authority by judicially expanding the statute to allow Chadha's suit to proceed.[100]

Justice White's vitriolic dissent[101] set forth a detailed utilitarian defense of the legislative veto.[102] He lambasted the majority for not heeding the caution of Justice Powell, and for the unnecessary breadth of its decision which "[struck] down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."[103] The Court's action left Congress "faced with a Hobson's choice: either . . . refrain from delegating the necessary [discretionary] authority" to implement the intent of Congress, "or, in the alternative, ... abdicate its lawmaking function to the executive branch" altogether.[104] In White's view, the complexity and growth of contemporary government more than justified congressional reliance upon the legislative veto.[105] White regarded the majority's concern over presentment and bicameralism as ill-founded, since the interests of the President and both Houses of

---

[95] *Id.* at 2792.

[96] *Id.* at 2816-17.

[97] *Id.* at 2816.

[98] *Id.* at 2817.

[99] *Id.*

[100] *Id.*

[101] Following Chief Justice Burger's announcement that the judgment of the Court of Appeals for the Ninth Circuit had been affirmed, Justice White read a rare oral dissent from the bench, in which he called the majority opinion "a destructive action" which was "clearly wrong and unnecessarily broad." N.Y. Times, June 24, 1983, at B4, col. 6.

[102] *Chadha*, 103 S.Ct. at 2792-2811.

[103] *Id.* at 2810-16.

[104] *Id.* at 2793.

[105] *Id.* at 2793-96.

Congress are entirely addressed through the operation of the INA.[106] "The President's approval is found in the Attorney General's action in recommending to Congress that the deportation order for a given alien be suspended. The House and the Senate indicate their approval of the Executive's action by not passing a resolution of disapproval within the statutory period."[107] In essence, White's position is that only "some express provision of the Constitution"[108] can proscribe the enactment of a legislative veto mechanism. Since "[t]he Constitution does not directly authorize or prohibit the legislative veto,"[109] its implementation is permitted by inference.

Legislative Oversight in the Federal System

Justice Louis Brandeis once expressed the view that a preeminent virtue of our federal system of government was "that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[110] Although the legislative veto is arguably a political experiment, Brandeis would be no less pleased with the recent use of the legislative veto among the several states.[111]

As of 1982, thirty-nine states enacted some type of statutory mechanism to oversee the promulgation of rules and regulations by executive agencies.[112] Eleven states require their Governor to participate directly in the process of approving or disapproving the Legislature's veto.[113] Four-

---

[106] *Id.* at 2806-08.

[107] *Id.* at 2806.

[108] *Id.* at 2809.

[109] *Id.* at 2798.

[110] New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[111] When the National Conference of State Legislatures adjourned in 1977, its primary recommendation urged all states to "establish procedures for reviewing agency rules and regulations promulgated with the force of law under authority granted by the [respective] legislature[s]. These review procedures should be as strong as the constitution of each state allows. In establishing these procedures, legislatures will be reasserting their legislative prerogatives and regaining the basic lawmaking authority granted to them under [their] state constitutions." Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 361 (1978), *quoting* THE LEGISLATIVE IMPROVEMENT AND MODERNIZATION COMMITTEE, NATIONAL CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE REVIEW OF ADMINISTRATIVE REGULATIONS 4 (adopted August 5, 1977).

[112] Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 81-83, 113-15 (1982).

[113] *Id.* at 84-85.

teen states confer upon their Legislature plenipotentiary power to veto administrative rules through enactment of a joint or concurrent resolution.[114] Only one state allows a single house of its Legislature to veto administrative agency rules or regulations.[115] At least four legislative oversight statutes have been challenged in their respective state courts.[116] Significantly, not one statute survived judicial scrutiny, including New Jersey's, when examined within the purview of its applicable state constitution.[117]

In 1972, the New Jersey Supreme Court upheld a legislative veto provision contained in a statute which established an executive branch reorganization plan.[118] Given that subsequent decisions of that court have articulated a seemingly contrary position, it is reasonable to ponder whether any basis remains for the survival of a legislative oversight statute in New Jersey.

Careful consideration of the salient principles enunciated in both *General Assembly* and *Enourato* indicates that a carefully drawn oversight

---

[114] *Id.* at 81-83, 113-15.

[115] *Id.* at 81.

[116] *See, e.g., General Assembly*, 90 N.J. 376, 448 A.2d 438; State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

[117] In State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981), the Supreme Court of Appeals of West Virginia condemned the legislative veto at bar, but admitted that some as yet unexplained form of legislative oversight was constitutional. *Id.* at 634-35. The Supreme Court of New Hampshire also left the door open in its advisory opinion which stated that "[w]ith substantial changes, the proposed legislation could be constitutionally enacted." Opinion of the Justices, 121 N.H. 552, 562, 431 A.2d 783, 789 (1981). The major constitutional stumbling block was a "wholesale shifting of legislative power" from the New Hampshire General Court to a standing legislative committee which approved or disapproved all proposed agency rules prior to being considered by the entire Legislature. *Id.* at 559, 431 A.2d at 788. In contrast, the Alaska Supreme Court has held all legislative veto schemes to be a patent violation of the Alaska Constitution. State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 772-75 (Alaska 1980).

[118] Brown v. Heymann, 62 N.J. 1, 297 A.2d 572 (1972), involved a constitutional challenge to a New Jersey statute which required that the executive's government reorganization plan take effect within 60 days unless rejected by concurrent resolution of the Legislature. The veto provision was upheld because the power of the executive branch, the beneficiary of the Legislature's delegation of power, was not so enhanced "as to threaten the security against aggregated power which the separation-of-powers doctrine was designed to provide." *Id.* at 10, 297 A.2d at 577. Moreover, unless it is plainly wrong, the court must defer to the Legislature's own determination that its action is constitutional in creating this particular legislative veto mechanism. Finally, "there is no bar to cooperative action among the branches of government. On the contrary, the [separation of powers] doctrine necessarily assumes the branches will coordinate to the end that government will fulfill its mission." *Id.* at 11, 297 A.2d at 578 (citations omitted).

statute would be upheld by the New Jersey Supreme Court. While the *General Assembly* court, in *dicta*, refers to its "holding [as] invalidating the [entire] Act,"[119] the specific language of the court's holding was far more constrained. The court actually held that only "the legislative veto provision in the Legislative Oversight Act," and not the entire Act, violated the New Jersey Constitution.[120] The *General Assembly* court appears to have left intact those portions of the Legislative Oversight Act providing for (a) a standing reference committee;[121] (b) the participation of the Speaker of the General Assembly and the President of the Senate;[122] (c) the execution of the legislative veto by concurrent resolution;[123] and (d) a legislative oversight committee from both Houses of the Legislature.[124] Indeed, the *General Assembly* opinion openly acknowledged that situations exist in which the Legislature could veto rules or regulations of administrative agencies.[125]

In order to understand how such a New Jersey statute might survive a series of constitutional challenges, one must first unravel the interdependent strands of governmental power which weave the canvas of our federal system. In this system, it is axiomatic that power not delegated to the national government is reserved to the individual states, or to the people.[126] One might envision a horizontal plane separating all powers of government in the federal system; those powers belonging to the national administration appearing above the imaginary demarcation, those below reserved to the states and the people. This binary division is not, however, the sole benchmark of the federal system. The power retained by the states and the people, as well as that delegated to the national government, is further divided among three co-equal entities: the judicial,[127] legislative,[128] and executive[129] branches.

---

[119] *General Assembly*, 90 N.J. at 380 n.2, 448 A.2d at 440 n.2.

[120] *Id.* at 378, 448 A.2d at 439.

[121] *See supra* note 15 and accompanying text.

[122] N.J. STAT. ANN. § 52:14B-4.1 (West Supp. 1983-84).

[123] *Id.* § 52:14B-4.8.

[124] *Id.* §§ 52:14B-4.5 to -4.7.

[125] *See supra* notes 34-35 and accompanying text.

[126] U.S. CONST. amend. X. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 33 (1824); THE FEDERALIST NO. 39, at 245 (J. Madison) (C. Rossiter ed. 1961). *But see* United States v. Darby, 312 U.S. 100, 124 (1941) (Tenth amendment is a truism which does not deprive national government of authority to exercise power).

[127] U.S. CONST. art. III, § 1.

[128] *Id.* art. I, § 1.

[129] *Id.* art. II, § 1.

This second, tertiary subdivision, under both the New Jersey and United States Constitutions, requires the participation of another branch of government to legitimize an exercise of power by any one branch.[130] This doctrine has been more accurately described as a shared "dispersal of decisional responsibility in the exercise of each power,"[131] rather than a truly discrete separation of power.[132] Any system which separates all powers of government in a binary, and further tertiary subdivision, is inevitably faced with the question of what constitutes a legitimate exercise of these independent, yet interrelated powers.

The exercise of governmental power in New Jersey is quite unlike the exercise of power on the national level. This is so because the New Jersey Constitution, unlike the United States Constitution, "is not a grant but a limitation of powers."[133] In New Jersey, the power retained by the people is reposed in their duly elected representatives—a bicameral Legislature consisting of a Senate and General Assembly.[134] This Legislature is permitted to wield its plenary power in combination with any other branch of

---

[130] For example, the Presentment Clauses contained in U.S. CONST. art. I, § 7, require the participation of Congress and the President in enacting legislation into law. In addition, the executive power of appointment is subject to the advice and consent of the Senate. *Id.* art. II, § 2. Similarly, the Presentment Clauses contained in N.J. CONST. art. V, § 1, para. 14, require the participation of the Governor and the Legislature when enacting legislation into law.

[131] Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 436 (1974).

[132] Judge Gibbons elaborated that

> it would be more accurate to refer to two separation of power doctrines. The compromises reached by the delegates to the Constitutional convention in 1787 involved two significantly distinct aspects. The first aspect, which has produced by far the greater body of jurisprudence, was the extent to which the powers of sovereignty in its broadest sense were to be divided between the states and the national government. The second consideration was the manner in which those features of sovereignty ceded to the central government were to be exercised.

Id. at 435.

[133] Gangemi v. Berry, 25 N.J. 1, 7, 134 A.2d 1, 4 (1957).

[134] The New Jersey Supreme Court has found that the

> reserved powers of government repose in the people but are exercised by the Legislature as the representative of the people. *N.J. Const.*, art. IV, § 1, ¶1. As such repository of these reserved powers, the Legislature is free to act except (1) in respect of powers delegated to the federal government by the Constitution of the United States, and (2) as such exercise may be limited by the state constitution. *There are no other restraints upon state legislative power.*

state government, provided it is exercised within the parameters of the New Jersey and United States Constitutions.[135]

The New Jersey Supreme Court is not constrained by the United States Supreme Court's strict interpretation of the separation of powers doctrine implied in the federal Constitution. The New Jersey court can be more expansive in its elucidation of the "plain meaning"[136] of the doctrine's counterpart in the state constitution.[137] When the New Jersey court considers a particular provision of the state constitution, it pronounces the "plain meaning" of that provision by deferring to certain principles of interpretation. Among these principles is the rule that "not all constitutional provisions are of equal majesty."[138] Some constitutional provisions are classified as "great ordinances,"[139] while others are more accurately described as being "of a different and less exalted quality."[140] The court places a highly literal interpretation upon those provisions which announce "no principle of government,"[141] but merely touch upon "the mechanics and administration of government."[142]

The New Jersey Constitution makes explicit reference to the separation of powers doctrine,[143] and provides that power shall be divided "among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others. . . ."[144] This

---

Smith v. Penta, 81 N.J. 65, 74, 405 A.2d 350, 354 (1979) (emphasis added); *accord,* Gangemi v. Berry, 25 N.J. 1, 8-9, 134 A.2d 1, 5 (1957).

[135] *See* Smith v. Penta, 81 N.J. 65, 74, 405 A.2d 350, 354 (1979); Gangemi v. Berry, 25 N.J. 1, 8-9, 134 A.2d 1, 5 (1957).

[136] In State v. Johnson, 68 N.J. 349, 353 n.2, 346 A.2d 66, 68 n.2 (1975), the New Jersey Supreme Court stated its "right to construe our State constitution . . . in accordance with what we conceive to be its plain meaning." *Id.* This opinion was instrumental in the formulation of Justice William Brennan's now famous thesis that state courts should interpret their own constitutions to expand the individual liberties guaranteed by the federal Constitution. *See* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 499 (1977); *see also* Pollock, *State Constitutions as Separate Sources of Fundamental Rights,* 35 RUTGERS L. REV. 707 (1983).

[137] *See supra* notes 81-83 and accompanying text.

[138] Vreeland v. Byrne, 72 N.J. 292, 304, 370 A.2d 825, 831 (1977).

[139] *Id.* (quoting the Court, per Holmes, J., in Springer v. Phillippine Islands, 277 U.S. 189, 209 (1928)).

[140] Vreeland v. Byrne, 72 N.J. 292, 304, 370 A.2d 825, 831-32 (1977).

[141] *Id.* at 305, 370 A.2d at 832.

[142] *Id.*

[143] N.J. CONST. art. III.

[144] *Id.*

provision has been consistently interpreted by the state supreme court[145] as denoting "a symbiotic relationship between the separate governmental parts so that the governmental organism will not only survive but will flourish."[146] This expansive, liberal construction[147] leads to the obvious conclusion that the separation of powers provision is one of the New Jersey Constitution's "flexible pronouncements constantly evolving responsively to the felt needs of the times."[148] It is precisely because this provision of the state constitution is or can be subject to varying interpretation that a future legislative veto initiative could be sustained. Indeed, it is fortunate that the holdings in *Enourato* and *General Assembly* rely upon a method

---

[145] Since 1947, the supreme court has liberally construed the separation of powers doctrine:

> It is important to note that the separation of powers doctrine does not require an *absolute* division of powers among the three branches of government, or as Chief Justice Vanderbilt stated, "division of government into three . . . watertight compartments." The aim of the constitutional provision is not to prevent cooperative action among the three branches of government, but to guarantee a system of checks and balances. This notion of a blending of powers is expressed in various opinions by both this court and the United States Supreme Court, interpreting the State and Federal Constitutions.

State v. Leonardis, 73 N.J. 360, 370, 375 A.2d 607, 612 (1977) (citations omitted), *quoting in part* A. VANDERBILT, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE 50 (1953). *Accord*, In re Salaries Prob. Off. Bergen County, 58 N.J. 422, 278 A.2d 417 (1971) (county judges may act as legislative agents by appointing probation officers and fixing their salaries); *see also* David v. Vesta, 45 N.J. 301, 323-24, 326, 212 A.2d 345, 357-58 (1965):

> [A] strict interpretation of the principle, rigidly classifying all governmental action as legislative, executive, or judicial was never intended by . . . the founding fathers of our federal system, or by the drafters of our State Constitutions.
>
> . . . .
>
> The doctrine of separation of powers must therefore be viewed not as an end in itself, but as a general principle intended to be applied so as to maintain the balance between the three branches of government, [and] preserve the concentration of *unchecked* power in the hands of any one branch. . . .

Id. (citations omitted) (emphasis in original).

[146] Knight v. Margate, 86 N.J. 374, 388, 431 A.2d 833, 840 (1981).

[147] The *Knight* court further observed that

> "[t]he compartmentalization of governmental powers among the executive, legislative and judicial branches has never been watertight." . . . It occasionally happens that an underlying matter defies exact placement or neat categorization; it may not always be possible to identify a subject as belonging exclusively to a particular branch. In those situations responsibility is joint and governmental powers must be shared and exercised by the branches on a complementary basis if the ultimate governmental objective is to be achieved.

Id. at 388-89, 431 A.2d at 840-41, *quoting* In re Salaries Prob. Off. Bergen County, 58 N.J. 422, 425, 278 A.2d 417, 418 (1971).

[148] Vreeland v. Byrne, 72 N.J. 292, 304, 370 A.2d 825, 831 (1977).

of constitutional interpretation which yields a liberal construction of the separation of powers clause.

Despite the expansive, flexible reading of the separation of powers provision, other constitutional hurdles must be overcome before a general legislative oversight mechanism can be expected to survive in New Jersey. The first of these is the principle of bicameralism.[149] This issue never arose in the *General Assembly* decision because the Oversight Act specifically provided for the participation of both Houses of the Legislature.[150] In *Enourato*, however, the one house veto in the Building Authority Act was allowed to stand.[151] The court reconciled its seemingly contrary position regarding bicameralism by noting that "not every action by the Legislature constitutes lawmaking that requires a majority vote of both Houses and presentment to the Governor."[152] A one house veto scheme can survive if it "narrowly circumscribe[s]"[153] those situations in which one house of the Legislature makes a public policy determination without the concurrence of the other house and approval of the Governor.[154] There is no doubt that the general legislative oversight of executive department rules and regulations involves regular public policy determinations and because of this, any such mechanism would have to require the participation of both Houses of the Legislature.

Another constitutional barrier that a future legislative oversight scheme must overcome is the court's mechanical holding that any statute

---

[149] N.J. CONST. art. IV, § 1, para. 1.

[150] *General Assembly*, 90 N.J. at 380, 448 A.2d at 440; N.J. STAT. ANN. §§ 52:14B-4.2 to -4.3 (West Supp. 1983-84).

[151] *Enourato*, 90 N.J. at 409, 448 A.2d at 455.

[152] *Id.* at 401, 448 A.2d at 451.

[153] *Id.* at 408, 448 A.2d at 455.

[154] The *Enourato* court further noted that the

> more limited the grant of power, the more concentrated it can be without violating the Presentment Clause or separation of powers. Here, the delegated authority is narrowly limited. No single house or single legislator is empowered to approve new legislation. No danger of precipitate legislative action is posed. To the contrary, the veto provisions of the Act provide *additional checks* against Building Authority projects which may in the future prove unwise or unduly costly. The presiding officers have power to disapprove the lease agreements only for building projects that the Legislature has already approved. These lease agreements involve no policy determinations whatsoever; they merely establish rental rates sufficient to allow the Building Authority to repay its bondholders. Thus, the Act's veto provisions, despite their failure to conform with the principle of bicameralism, do not offend the Constitution.

Id. at 408-09, 448 A.2d at 455 (emphasis in original).

which effectively permits the Legislature to amend, repeal, or enact a law, absent the Governor's involvement, is a patent violation of the New Jersey Constitution.[155] The *Enourato* court clearly indicated that the Legislature could veto a decision of the Building Authority only because the Governor had a similar opportunity.[156] It is essential to the survival of any future legislative oversight mechanism that the Governor be given the opportunity to exercise the executive veto.

One final factor must be considered when analyzing the constitutional validity of a state legislative veto mechanism. In the federal system of government, it is well within the realm of possibility that a particular excercise of a state legislative veto may implicate one or more rights protected by the United States Constitution. Federal law is arguably supreme; a state legislative veto provision cannot legitimate an action which violates the United States Constitution.[157] Conversely, the ability of one state to implement a novel political experiment should not be restricted when rights protected by the federal Constitution are not infringed upon. If a state legislative veto scheme was challenged on both state and federal constitutional grounds, it would be frivolous to contend that the challenged mechanism must withstand the federal separation of powers analysis undertaken in *Chadha.*[158] It is now well settled that the United States Supreme Court "will not review judgments of state courts that rest on adequate and independent state grounds" if the state court "make[s] clear by a plain statement in its judgment or opinion that the federal cases . . . being used . . . do not themselves compel the result the court has reached."[159] If the New Jersey Supreme Court chooses to read

---

[155] *General Assembly*, 90 N.J. at 378-79, 388, 448 A.2d at 439, 444.

[156] *Enourato*, 90 N.J. at 403, 448 A.2d at 452. *See also* N.J. STAT. ANN. § 52:18A-78.4(8) (West Supp. 1983-84).

[157] U.S. CONST. art. VI.

[158] PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). In that case, the Supreme Court stated that the Constitution was not a bar to adoption by the states of "individual liberties [in their own state constitutions] more expansive than those conferred by the Federal Constitution." *Id.* at 81. Justice Pollock of the New Jersey Supreme Court has interpreted this to mean that the "Court recognized that an analysis based on federal constitutional rights may not yield the complete answer in every [case] . . . ." Pollock, *supra* note 136, at 710. Justice Pollock incisively recognizes the importance of "state courts . . . develop[ing] a rationale to explain when they will rely on their own constitutions" as a separate source of fundamental liberty. *Id.* at 717.

[159] Michigan v. Long, 103 S. Ct. 3469, 3476 (1983).

the separation of powers clause in the state constitution more expansively than the United States Supreme Court reads that doctrine's counterpart in the federal Constitution, a legislative veto scheme, based upon adequate and independent state constitutional grounds, could survive notwithstanding the United States Supreme Court's analysis in *Chadha.*

Conclusion

The constitutionality of the legislative veto in New Jersey is a complex issue, as is evidenced by the preceding discussion. It is undisputed that the Legislature may lawfully delegate lawmaking power to another branch of government. This is the essence of administrative law on both the state and national levels of government.

Several factors must be considered when evaluating a state legislative oversight mechanism. These include (a) the scope of the statute, (b) the participation of both Houses of the Legislature, (c) the participation of the Governor, and (d) potential for interference with a federal right. With the exception of any interference with a federal right, all of these factors could be circuitously avoided by state constitutional amendment. Such an amendment, though recently considered,[160] remains untried in New Jersey.

Even absent a constitutional amendment, a carefully drafted legislative veto statute may yet survive in New Jersey. A statute narrow in scope, and requiring the participation of both Houses of the Legislature and the Governor, would almost certainly withstand constitutional scrutiny.

John J. Henschel

---

[160] *See* S. Con. Res. 133, 200th N.J. Leg., 1st Sess. (1982), sponsored by Senator Zane and 28 senators and filed on July 12, 1983 with the Office of the Secretary of State, to place before the voters of New Jersey a proposed amendment of N.J. CONST. art. V, § 4, para. 6. *See also* Weltman, *The Life and Times of the Legislative Veto,* 112 N.J.L.J. 589 n.2, col. 2 (1983); *Referendums in the Works on Amendments to State Constitution,* Newark Star-Ledger, June 26, 1983, § 1, at 12, col. 1.