CONSTITUTIONAL LAW—SEPARATION OF POWERS—LEGISLATIVE OVERSIGHT ACT VIOLATES SEPARATION OF POWERS DOCTRINE—*New Jersey General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982); NEW JERSEY BUILDING AUTHORITY ACT'S VETO PROVISION COMPLIES WITH SEPARATION OF POWERS DOCTRINE—*Enourato v. New Jersey Building Authority*, 90 N.J. 396, 448 A.2d 449 (1982).

The legislative veto is a statutory method of obtaining legislative oversight and control of agency rulemaking.[1] Since the source of the Executive's power to promulgate rules emanates from statutes passed by the legislature,[2] the statutory legislative veto affords the legislature an opportunity to examine those rules in order to determine whether they conform to the legislature's intent. This capacity to review rules devised by the executive branch has been widely disparaged as a violation of the separation of powers doctrine.[3] Conversely, the legis-

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[1] Legislative oversight is the review of the administrative effectuation of legislation in order to ascertain that agencies are functioning in accordance with statutory guidelines. Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415, 417-18 (1976). Oversight can assume a number of different forms including a legislative veto, which is the most controversial. Larsen, *Legislative Delegation and Oversight: A Promising Approach from Oregon*, 14 WILLIAMETTE L.J. 1, 12 (1977). The legislative veto has been defined as a "statutory mechanism which renders the implementation of executive proposals, advanced in pursuance of statute, subject to some further form of legislative consideration and control." Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962).

Alternative methods to accomplish oversight such as oversight committees, more precise statutes, and various forms of sunshine and sunset laws are also recognized. Larsen, *supra*, at 8-12. Oversight subcommittees work in close conjunction with their corresponding legislative committees to ensure effectuation of statutory policy. *Id.* at 9. Increased precision in drafting statutes has also been suggested as a means of clarifying legislative intent. *Id.* at 8. Sunshine laws allow for public scrutiny of legislation and provide for the disclosure of proposed rules in order to give affected interest groups an opportunity to be heard. *Id.* at 11. Sunset laws allow for the expiration of an agency over a set period of time should its usefulness decline. *Id.* For a complete discussion of the various methods for legislative oversight, see *id.* at 6-14.

[2] *See* Cooper & Cooper, *supra* note 1, at 482, stating that "the decision power exercised by the president as chief executive is dependent upon, limited by, and subject to the decisionmaking power of Congress."

[3] *See, e.g.*, Bruff & Gellhorn, *Congressional Control of Administrative Regulation*, 90 HARV. L. REV. 1369 (1977); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 65 CALIF. L. REV. 983 (1975).

Opponents of the legislative veto argue that since regulations have the force of law, exercise of the legislative veto results in a change in the law without following constitutional procedures. Henry, *supra*, at 740-41. The Executive is not afforded an opportunity to veto the legislature's decision and accordingly there is a usurpation of executive authority in violation of the separation of powers doctrine. *Id.*; *see also* Comment, *The Legislative Veto: Is it Legislation?*, 38 WASH. & LEE L. REV. 172, 175 (1981). This veto power also permits the legislature to disapprove

lative veto has been vigorously defended as the pragmatic solution to a lack of agency accountability.[4] Recently, in *New Jersey General Assembly v. Byrne*[5] and its companion case *Enourato v. New Jersey Building Authority*,[6] the New Jersey Supreme Court delineated the state constitutional limits of legislative oversight,[7] holding in *General Assembly* that a "broad and absolute legislative veto provision . . . is both an excessive intrusion into executive enforcement of the law and an unconstitutional mechanism for legislative policy making beyond the Governor's control."[8]

The *General Assembly* court invalidated the Legislative Oversight Act[9] which the legislature had passed following three prior efforts[10] to amend the Administrative Procedure Act.[11] The Legisla-

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a controversial regulatory scheme without having to devise a superior alternative. Martin, *supra* note 3, at 268. If, however, the legislature is forced to annul regulations by statute, the legislative action would possibly be more constructive. *Id.* at 273. Opponents of the veto also contend that a series of vetoes by the legislature may leave an agency unsure of the rules it must devise in order to survive legislative review. *Id.* at 280; *see* New Jersey General Assembly v. Byrne, 90 N.J. 376, 387, 448 A.2d 438, 443 (1982) (noting that legislature is not compelled to explain its veto decision, thus agency is given no enforcement guidance).

The separation of powers doctrine contemplates that the legislative, judicial, and executive functions will be vested in three separate branches of government, each having distinct repositories of power that cannot be usurped by another. *See* Fitzgerald, *Congressional Oversight or Congressional Foresight: Guidelines from the Founding Fathers*, 28 AD. L. REV. 429, 438 (1976); *see also* THE FEDERALIST No. 37 (J. Madison).

[4] *See, e.g.*, Cooper & Cooper, *supra* note 1; Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978).

Proponents of the legislative veto contend that efficient government operation often demands a broad delegation of authority to agencies and set forth several reasons for implementing the veto. Larsen, *supra* note 1, at 2. First, if the legislature delegates authority, it should retain some control to ensure the effectuation of statutory policy. *See id.* at 6. Second, the legislature is often forced to make broad grants of power to an agency and later can review the rules along with the information gathered by the agency's experts. Martin, *supra* note 3, at 265-66. Third, the primary aim of the separation of powers doctrine is not to separate rigidly each branch of government but to blend power to prevent one branch from usurping the authority of another. *Id.* at 262. Fourth, the legislative veto reestablishes the balance of power and accountability to the public. *Id.* at 265-66. It counterbalances the broad delegation of power by the legislature which gives the Executive more power than the framers of the Constitution intended. *Id.* at 263. This delegation of power weakens accountability to the public, because legislative decisions are being made by unelected agency officials. Finally, since a legislative body could potentially strip agencies of all power by passing very narrow statutes, there should be no objection "to the less intrusive procedural check of the legislative veto." *Id.* at 266.

[5] 90 N.J. 376, 448 A.2d 438 (1982).

[6] 90 N.J. 396, 448 A.2d 449 (1982).

[7] See *supra* note 1 for a discussion of legislative oversight.

[8] 90 N.J. at 379, 448 A.2d at 439.

[9] N.J. STAT. ANN. §§ 52: 14B-4.1 to -4.9 (West Cum. Supp. 1982-1983).

[10] 90 N.J. at 379, 448 A.2d at 439-40.

[11] N.J. STAT. ANN. §§ 52:14B-1 to -15 (West 1970 & Cum. Supp. 1982-1983).

tive Oversight Act provided for legislative review of almost every rule proposed by state agencies[12] through the establishment of a standing reference committee which was to receive proposed rules from the President of the Senate and the Speaker of the General Assembly.[13] The committee was required to give an evaluation of the rules to the entire membership of the legislature within forty-five days.[14] Disapproval of the rules, which would result in their annulment, could be effectuated through the adoption of a concurrent resolution by both Houses within sixty days.[15] Inaction by the legislature would result in automatic approval of the rules.[16]

Governor Byrne vetoed the three prior attempts to implement legislative vetoes applicable to all state agencies as an unconstitutional infringement on the power of the executive branch.[17] The fourth attempt proved to be no exception. Both Houses of the legislature passed the Legislative Oversight Act by a unanimous vote.[18] Governor Byrne, in accordance with his prior stance, vetoed the bill.[19] The legislature succeeded in overriding the Governor's veto by attaining the required two-thirds vote of both Houses.[20] Relying upon the Attorney General's opinion[21] that the Act was unconstitutional, Governor Byrne advised his cabinet officers to disregard its rulemaking requirements.[22]

Following the passage of a concurrent resolution authorizing the commencement of legal action, the General Assembly and the Senate individually instituted actions in the Law Division of the Superior Court of New Jersey against Governor Byrne and Howard Kestin, Director of the Office of Administrative Law, seeking a declaratory judgment that the Legislative Oversight Act was constitutional.[23] These cases were consolidated and transferred to the appellate division.[24] Before any decision was rendered, the Supreme Court of New Jersey granted defendants' motion for direct certification.[25]

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[12] 90 N.J. at 380, 448 A.2d at 440.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 379, 448 A.2d at 439-40.

[18] *Id.* at 379-80, 448 A.2d at 439.

[19] *Id.* at 380, 448 A.2d at 439.

[20] *Id.*, 448 A.2d at 440.

[21] Op. Att'y Gen. No. 3 (Mar. 10, 1981).

[22] 90 N.J. at 380, 448 A.2d at 440.

[23] *Id.* at 381, 448 A.2d at 440.

[24] *Id.* "The cases were consolidated pursuant to N.J. Ct. R. 4:38-1(a) and transferred to the appellate division in accordance with N.J. Ct. R. 2:2-3(a)." 90 N.J. at 381, 448 A.2d at 440.

[25] 90 N.J. at 381, 448 A.2d at 440.

Justice Pashman, writing for the majority in *General Assembly*, held that the Legislative Oversight Act contravened the doctrine of the separation of powers because it both interfered with the Executive's mandate to execute the law and permitted the legislature to alter or repeal existing laws in a manner that eliminated participation by the Governor.[26] The Act was also deemed to violate the presentment clause[27] because it abrogated the role of the Governor in changing legislative policy.[28] In examining the constitutional complexities involved, the court in *General Assembly* perceived the legislative veto mechanism to be overly broad, and accordingly, expressed its overwhelming opposition.[29]

The United States Supreme Court was first confronted with the issue concerning the legitimacy of legislative vetoes in *Buckley v. Valeo*.[30] The Court did not pass on the constitutionality of the congressional veto provision which permitted rules promulgated by the Federal Election Commission to be invalidated, because it held that the provisions of the Federal Election Campaign Act governing Commission membership violated the appointments clause.[31] Justice White argued in his dissent, however, that had members of the Commission been validly selected, the veto provision would have passed constitutional muster.[32]

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

[27] N.J. CONST. art. V, § 1, para. 14.

[28] 90 N.J. at 379, 448 A.2d at 439.

[29] *Id.* at 396, 448 A.2d at 449. Five justices participated in the decision. Chief Justice Wilentz and Justice Handler joined in the opinion delivered by Justice Pashman, while Justices Clifford and Schreiber concurred in the result.

[30] 424 U.S. 1 (1976).

[31] U.S. CONST. art. II, § 2, cl. 2.

Similarly, the United States Court of Appeals for the District of Columbia avoided deciding the legislative veto's constitutional validity in Clark v. Valeo, 559 F.2d 642 (D.C. Cir.), *aff'd mem. sub nom.* Clark v. Kimmett, 431 U.S. 950 (1977), holding that the unicameral veto provision for rules promulgated by the Federal Election Commission was not ripe for decision because the veto had not been exercised.

[32] Justice White maintained that:

> Nothing in the Constitution would prohibit Congress from empowering the Commission to issue rules and regulations without later participation by, or consent of, the President or Congress with respect to any particular rule or regulation or initially to adjudicate questions of fact in accordance with a proper interpretation of the statute. . . . The President must sign the statute creating the rulemaking authority of the agency or it must have been passed over his veto, and he must have nominated the members of the agency in accordance with Art. II; but agency regulations issued in accordance with the statute are not subject to his veto even though they may be substantive in character and have the force of law.

424 U.S. at 284 (White, J., dissenting) (citations omitted). Justice White, in developing his argument that a legislative veto does not encroach on presidential power, pointed out that absent

Atkins v. United States[33] is one of the few federal cases which squarely addressed the constitutionality of a narrowly drawn legislative veto. Federal judges filed suit in *Atkins* challenging the Salary Act[34] which made presidential recommendations regarding judicial salary increases subject to a unicameral legislative veto.[35] The attack upon the veto provision included allegations that the veto violated the principle of bicameralism,[36] the presidential veto power,[37] and the doctrine of separation of powers.[38] The *Atkins* court carefully limited its decision to the facts and emphasized that its determination was not to be regarded as precedent for legislative vetoes employed in other contexts.[39] In upholding the constitutional validity of the provision by a narrow majority, the court of claims found no contravention of the principle of bicameralism.[40] It also decided that there was no violation

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congressional disapproval, the regulation would become effective by nonaction and that "this no more invades the President's powers than does a regulation not required to be laid before Congress." *Id.*

[33] 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

[34] 2 U.S.C. §§ 351-361 (1976).

[35] A unicameral provision permits either House of Congress to annul a regulation. At issue in *Atkins* was § 359 (1)(B) of the Salary Act which provides that presidential recommendations shall be effective automatically as long as "neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations." Pursuant to the Salary Act, the Commission on Executive, Legislative and Judicial Salaries had recommended an increase of approximately 25% in the salaries of federal judges. *Atkins*, 556 F.2d at 1041. The President, however, recommended that judicial salaries be increased by 7.5% per year over the next three years. *Id.* The increase was disapproved by the Senate. S. Res. 293, 93d Cong., 2d Sess. 120 CONG. REC. 5508 (1974).

[36] Bicameralism is embodied in the United States Constitution which provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.

It was argued in *Atkins* that the unicameral veto provisions in the Salary Act violated the principle of bicameralism which requires that both Houses of Congress participate in the lawmaking process. 556 F.2d at 1062. The court dismissed this argument and held the unicameral provision to be a legitimate form of supervision in this context. *Id.* at 1063; *see infra* note 40 and accompanying text.

[37] The plaintiffs argued that the one House veto provision permitted Congress to effect a change in the law without presentment to the President. 556 F.2d at 1063. The court found this argument unpersuasive and held that the one House veto functioned to preserve the status quo. *Id.* The court held that the wage recommendations of the President do not have the force of law. A veto, therefore, only invalidates a proposal and does not result in the repeal of a law. Accordingly, the court concluded that the recommendations only have the force of law if neither House disapproves of them within thirty days.

[38] *Id.* at 1066-67.

[39] *See infra* note 57 and accompanying text.

[40] 556 F.2d at 1028. In support of this conclusion, the court cited other exceptions to the requirement of bicameral action in fulfilling the legislative function. For example, impeachment, approval of appointments, and treaties, as well as a determination of its own rules are constitutional grants of authority made to one House. *Id.* at 1062. Additionally, the court

of the separation of powers doctrine under the maxim that a certain amount of blending of power among the three branches is necessary in order to govern effectively.[41] Finally, in dismissing the attack on the provision as a violation of the presentment clause,[42] the court observed that other provisions of the Salary Act gave the President an opportunity to participate in the wage recommendation process and therefore concluded that the clause's purpose had been preserved.[43]

Two years later, in *Chadha v. Immigration & Naturalization Service*,[44] the Ninth Circuit invalidated the House of Representatives' veto of an executive decision made by the Immigration and Naturalization Service under the Immigration and Nationality Act[45] to suspend an alien's deportation.[46] In *Chadha*, the court focused on whether Congress had interfered with either the Executive's mandate to execute the law or the judicial power to review cases and controversies in violation of the separation of powers doctrine.[47] The court rejected three possible justifications for the one House veto provision. First, the court stated that the use of the veto to correct an erroneous decision by the Immigration and Naturalization Service allowing Chadha to stay in the United States interfered with the judiciary's

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maintained that Congress can pass resolutions which are exempt from a presidential veto even though this power is not expressly included in the Constitution. *Id.* In accordance with these exceptions to bicameralism, the *Atkins* court found the unicameral veto provision of the Salary Act constitutional. *Id.*

[41] *Id.* at 1066-67. The court found the provisions not to be an interference with a power it had delegated to the Executive; rather it found that "in exercising delegated functions, the executive officer merely acts as an agent of the legislative branch of Government." *Id.* at 1068.

[42] U.S. CONST. art. I, § 7, cl. 3, the presentment clause, provides in pertinent part:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

[43] 556 F.2d at 1065.

[44] 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 87 (1981).

[45] 8 U.S.C. §§ 1101-1503 (1976).

[46] 556 F.2d at 411. This case involved Jagdish Rai Chadha, a native of Kenya, who was of deportable status. An inquiry officer of the executive branch of Government had determined that Chadha should be permitted to stay in the United States in order to avoid "extreme hardship," a statutory exception to deportation provided for in the Immigration and Nationality Act. *See* 8 U.S.C. § 1254(a)(1)(1976). Subsequently, the House of Representatives adopted a resolution pursuant to the veto provision, *id.* § 1254(c)(2) (1976), which disapproved the suspension of deportation proceedings. Chadha was unsuccessful in appealing to the Board of Immigration Appeals and sought redress in the courts. 556 F.2d 411.

[47] 556 F.2d at 421.

central function of review.[48] Second, the court determined that Congress' effort to share in the implementation of the statute undermined the power of the Executive to execute the law.[49] Third, the court dismissed an attempt to validate the veto as an exercise of residual legislative power since such action by the legislature would unnecessarily disrupt the operation of the coordinate branches.[50] While conceding that Congress does have the power to deport all aliens, the court concluded that this does not encompass the power to deport an individual alien by means of a legislative veto because the mechanism interfered with the right to a fair hearing.[51] The court therefore held that a veto of the agency's decision permitting Chadha to stay in the United States violated his due process rights.[52]

The Court of Appeals for the District of Columbia held in *Consumer Energy v. Federal Energy Regulatory Commission*,[53] that a one House veto provision incorporated into the Natural Gas Policy Act[54]

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[48] *Id.* at 431. The court found that Congress should not be permitted to revise agency rulings since this responsibility is normally conferred upon the judicial branch. *Id.*

[49] *Id.* The court concluded that the legislature had invalidated a reasoned executive decision without specifying how the Executive had failed in its responsibility to effectuate legislative policy. The court determined that such action was "both disruptive and unnecessary to the sound administration of the law." *Id.* at 432.

[50] *Id.* at 434. The executive branch had decided that deportation of Chadha would result in undue hardship on the alien. *Id.* at 432. The judicial branch had the authority to review this decision under the Administrative Procedure Act. *Id.* at 431 n.32. Any subsequent veto by the legislature, therefore, would diminish the power of these coordinate branches. *Id.* at 434.

[51] *Id.*

[52] The court maintained that because of the disapproval mechanism,

> [a]liens are no longer guaranteed the constraints of the articulated reasons and stare decisis in the interpretation of the Immigration and Nationality Act. Adjudications they have obtained in the judicial branch may be set aside for any reason, or no reason at all, so that judicial decisions may be for naught. This effect, the potential nullification of judicial attempts to require uniform application of the statute by the Executive, has an indirect effect upon all aliens who must rely on an administrative application of the statute in the first instance.

Id. at 431.

In the hierarchy of reasons used to invalidate the one House veto of Chadha's deportation suspension, therefore, a deep concern for the abrogation of Chadha's due process rights is of the highest order. Comment, *Limiting the Legislative Veto:* Chadha v. Immigration and Naturalization Service, 81 COLUM. L. REV. 1721, 1730 (1981). Consequently, the holding in *Chadha* has been interpreted to be relevant only in situations where a legislative veto's implementation could affect due process interests. *Id.*; Martin, *supra* note 3, at 261 n.22.

[53] 673 F.2d 425 (D.C. Cir. 1982).

[54] 15 U.S.C. §§ 3301-3432 (Supp. IV 1980). In accordance with the Act, the Federal Energy Regulatory Commission (FERC) was to promulgate rules to implement an incremental pricing program which would place part of the increased price resulting from deregulation of natural gas on industrial users instead of residential consumers. *Id.* § 3342(b)(1), (2). The Act further required that FERC submit the rules to Congress, *id.* § 3342(c)(1), where a majority of either House could disapprove the rules by resolution. *Id.* § 3342(c)(1). In *Consumer Energy*, the House

was unconstitutional.[55] The court found both *Atkins* and *Chadha* to be of minimal assistance in reaching its decision[56] because it determined that these cases were limited to their facts and thus should be viewed as inappropriate precedent for future determinations regarding the validity of legislative veto provisions.[57] The *Consumer Energy* court rejected the argument that the provision could be validated under the necessary and proper clause,[58] noting that although Congress had the power to enact such a veto provision, it was not "proper" because it contained other constitutional defects.[59]

The first defect found by the court in *Consumer Energy* was a violation of article I, section 7 of the United States Constitution which describes the formal requirements of the lawmaking process.[60] The

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of Representatives disapproved FERC's rules. 673 F.2d at 433. The Consumer Energy Council of America then filed suit seeking to have the veto provision invalidated. *Id.* at 433-34.

[55] 673 F.2d at 434.

[56] *See id.* at 451.

[57] For example, the *Atkins* court maintained that "[o]ur consideration must center then, on this specific mechanism in this specific statute . . . and there will be no attempt to suggest or forecast the fate of other situations or other statutes." 556 F.2d at 1059.
Similarly, the court in *Chadha* said:

> [W]e are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.

634 F.2d at 433 (footnotes omitted).

[58] U.S. CONST. art. I, § 8, cl. 18 gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[59] 673 F.2d at 455. In Consumers Union v. Federal Trade Commission, 691 F.2d 575 (D.C. Cir. 1982) (en banc), the United States Court of Appeals for the District of Columbia decided that a legislative veto provision included in the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified in scattered sections of 15 U.S.C. (Supp. IV 1980)), was unconstitutional. 691 F.2d at 577-78. Sitting en banc, the circuit court adopted the rationale of *Consumer Energy* to support its conclusion. The Act provided that the Federal Trade Commission must submit proposed rules to Congress for review. 15 U.S.C. § 57a-1(a) (Supp. IV 1980). The rule would be effective after 90 days unless Congress passed a concurrent resolution of disapproval. *Id.* § 57a-1(d). The FTC promulgated a rule which required dealers to place stickers on used cars disclosing whether a warranty was being offered and listing any important mechanical defects of which the dealer was informed. *See* 46 Fed. Reg. 41,328-78 (1981); 47 CONSUMER REPORTS 385 (1982). Heavy lobbying by the Political Action Committee of the National Automobile Dealers Association ensued. *Id.* When the FTC submitted the rule pursuant to the Act, Congress vetoed the rule. *See* S. Con. Res. 60, 97th Cong., 2d Sess., 128 CONG. REC. S 5402 (daily ed. May 18, 1982).

[60] 673 F.2d at 457. The Constitution describes the lawmaking process in two clauses of article I. One clause provides that: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. . . ." U.S. CONST. art. I, § 7, cl. 2. The other clause provides that: "Every Order, Resolution, or Vote, to which the Concurrence of the Senate and the House of Representatives

court determined that regulations have the force of law[61] and that if the law is to be altered, constitutional procedures must be followed.[62] The one House veto provision violated this process since it circumvented the requirement of presentation to the President and operated in contravention of the principle of bicameralism.[63] The second flaw discovered by the court was the provision's interference with the separation of powers doctrine because it resulted in a shared administration between the legislative and executive branches.[64] The court therefore concluded that the unicameral veto of the Federal Energy Regulatory Commission regulations operated as an unconstitutional change in the law.[65]

Like the federal courts, state courts have denounced the validity of legislative vetoes under their own constitutions.[66] The holdings in *State v. A.L.I.V.E. Voluntary*[67] and *State ex rel. Barker v. Manchin*[68] are indicative of this trend. In *State v. A.L.I.V.E.*, the Alaska Supreme Court rendered unconstitutional a statute permitting the legislature to annul any regulation of an agency or department by concurrent resolution.[69] The court rejected the argument that the legislature could reserve a portion of the power it had delegated to state agencies, and concluded that the conditional grant of power was unlawful.[70] The majority also found unpersuasive the contention that legislative

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may be necessary . . . shall be presented to the President of the United States. . . ." U.S. CONST. art I, § 7, cl. 3.

[61] 673 F.2d at 465; *see also* State v. Atlantic City Elec. Co., 23 N.J. 259, 270, 128 A.2d 861, 867 (1957); Rutgers Council v. New Jersey Bd. of Higher Educ., 126 N.J. Super. 53, 312 A.2d 677 (App. Div. 1973).

[62] 673 F.2d at 465.

[63] *Id.* at 464-65.

[64] *Id.* at 474.

[65] *Id.* It was argued that the agency rule was merely a proposal which could be subjected to a one House veto in the same way that proposed legislation can be rejected by one House. The court found this argument untenable, however, since it concluded that the veto actually changed the law. The veto, reasoned the court, prevented a regulation from taking effect and thus diminished the breadth of the FERC's discretion. *But see Atkins* 556 F.2d at 1063 (one House legislative veto does not change law but rather preserves status quo).

[66] *See* State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Ala. Sup. Ct. 1980); Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950) (provision allowing disapproval of Governor's reorganization plans by concurrent resolution held violative of New Hampshire Constitution's enactment procedures and presentment clause); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. Sup. Ct. App. 1981). *But see* Watrous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950) (en banc) (concurrent legislative resolution approving highway funds does not require presentment to Governor).

[67] 606 P.2d 769 (Ala. Sup. Ct. 1980).

[68] 279 S.E.2d 622 (W. Va. Sup. Ct. App. 1981).

[69] 606 P.2d at 770.

[70] *Id.* at 777. The court stated: "The fact that it [the legislature] can delegate legislative power to others who are not bound by [state constitutional enactment procedures] . . . does not

oversight could promote government efficiency and held that efficiency is no reason to suspend constitutional requirements.[71] *State ex rel. Barker v. Manchin* also dealt with a broadly applicable legislative veto provision. In *Manchin*, the West Virginia Supreme Court of Appeals invalidated a statute which created a legislative rulemaking review committee empowered to review any regulations promulgated by state agencies.[72] The court held that the provision violated the separation of powers principle since it permitted the legislature to exercise power belonging to the Executive.[73] The court, adopting the *A.L.I.V.E.* rationale, concluded that the legislature was in effect giving itself the power to devise regulations having the force of law without following state constitutional enactment procedures.[74] The court in *Manchin*, however, pointed out that its invalidation of the statute in question did not mean that all legislative review of agency rules is unconstitutional.[75] It only required that the method be constitutional.[76]

The *General Assembly* decision comported with prior determinations which held the legislative veto unconstitutional. Justice Pashman initially focused on the historical purposes of the separation of powers doctrine and the presentment clause.[77] In discussing separation of powers, he noted that the doctrine emphasized that a "concentration of governmental power increases the potential for oppression, and that fragmentation of power helps ensure its temperate use."[78] In support of the latter contention, the court stressed that the separation of powers was incorporated into the Federal Constitution to ensure

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mean that it can delegate the same power to itself, and in the process escape from the constraints under which it must operate." *Id.* (footnotes omitted).

[71] *Id.* at 778-79.

The *A.L.I.V.E.* dissent strenuously objected to the majority's holding that agency regulations are equivalent to laws. *Id.* at 780 (Boochever, J., dissenting). Justice Boochever noted that the constitutional requirements for the enactment of laws are not applicable to regulations. He stated:

> In my opinion, the majority reasoning is fallacious in equating regulations with laws passed by the legislature. The litany of constitutional requirements outlined in the majority opinion is indeed mandated for the passage of a bill into law. The constitution, however, makes none of those requirements applicable to regulations.

Id. The dissent, therefore, found it anomalous that agency regulations could only be invalidated in the same manner as laws. *Id.*

[72] 279 S.E.2d at 626-27.

[73] *Id.* at 633.

[74] *Id.* at 633-34.

[75] *Id.* at 634.

[76] *Id.* at 635.

[77] 90 N.J. at 381, 448 A.2d at 440.

[78] *Id.*

that one branch of Government would not encroach on another.[79] Despite this creation of three separate branches of Government by the framers of the Constitution, the *General Assembly* court stated that the separation of powers did not require each branch to completely sever all ties with its coordinate branches.[80] Justice Pashman also found that the role of the courts in this system was to monitor any interplay among the branches and to prevent the abuse of one branch by another.[81]

The *General Assembly* court noted that the New Jersey Constitution expressly incorporated a provision for the separation of powers[82] that paralleled the structural divisions in Government embodied in the Federal Constitution.[83] The court observed that the framers were particularly concerned that the legislature would use its law making power to undercut the authority of coordinate branches.[84] Justice Pashman stated that the separation of powers doctrine requires that the courts preclude legislative overreaching in two ways. First, the courts must enforce constitutional restraints on the legislature's ability to make laws, and second, the courts must ensure that the legislature does not encroach upon the Executive's duty to execute the law.[85]

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[79] *Id.* (citing Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (W. Peden ed. 1955)); *see* THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossitor ed. 1961), which states that the "accumulation of all power, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." For a complete discussion regarding the separation of powers doctrine and its origins in the Federal Constitution, see Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435 (1974).

[80] 90 N.J. at 382, 448 A.2d at 440 (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976); *In re* Salaries Probation Officers, 58 N.J. 422, 425, 278 A.2d 417, 418 (1971)).

[81] *Id.*

[82] N.J. CONST. art. III, § 1 provides: "The powers of the government 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, except as expressly provided in this Constitution."

[83] 90 N.J. at 382, 448 A.2d at 441.

[84] *Id.* at 383, 448 A.2d at 441; *see* THE FEDERALIST No. 48, at 309-10 (J. Madison) (C. Rossitor ed. 1961) which states:

> The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . . Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.

Id.

[85] 90 N.J. at 383, 448 A.2d at 442.

The separation of powers doctrine, according to the court, also embodies the Executive's power to veto legislation.[86] In examining the purpose of an executive veto, the *General Assembly* court found that it prevented the legislature from exercising excessive lawmaking power and that it precluded interference with the executive branch.[87] Justice Pashman reviewed the history of the New Jersey Constitution's presentment clause,[88] in which the Executive veto is contained, and noted that the clause's development reflected an increase of the Executive's veto power.[89] Therefore, he reasoned that a violation of the presentment clause occurred whenever the Governor's option to veto legislation was circumvented.[90] Nevertheless, Justice Pashman stated that the countervailing principle of cooperation among the coordinate branches mandated a consideration of the practical effects of the Legislative Oversight Act on enforcement of the law and lawmaking to determine its constitutionality.[91]

The *General Assembly* court first addressed the ways in which the Legislative Oversight Act interfered with the Executive's enforcement of the law and determined that the Act permitted the legislature to control agency rulemaking, thereby disrupting agencies in their execution of the law.[92] The very purpose of allowing agencies to promulgate rules, observed the court, was to ensure that legislation was effected through coherent regulatory schemes.[93] Justice Pashman indicated that once the legislature delegates power to the Executive it

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[86] *Id.* at 384, 448 A.2d at 442.

[87] *Id.*; *see* THE FEDERALIST No. 73 (A. Hamilton).

[88] 90 N.J. at 384, 448 A.2d at 442. The presentment clause of the New Jersey Constitution provides:

> Every bill which shall have passed both houses shall be presented to the Governor. If he approves he shall sign it, but if not he shall return it, with his objections, to the house in which it shall have originated . . . . If . . . two-thirds of all the members of the house of origin shall agree to pass the bill, it shall be sent, together with the objections of the Governor, to the other house, by which it shall be reconsidered and if approved by two-thirds of all the members of that house, it shall become a law . . . .

N.J. CONST. art. V, § 7, para. 14.

[89] 90 N.J. at 384, 448 A.2d at 442. The New Jersey Constitution originally did not contain an executive veto provision. *See* N.J. CONST. of 1776. The 1844 Constitution contained an executive veto provision, N.J. CONST. art. 5, § 7 (1844) (amended 1947), which was broadened to its present form in the 1947 Constitution to increase executive authority. *See* 5 PROCEEDINGS: NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 66, 461.

[90] 90 N.J. at 385, 448 A.2d at 443.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 386, 448 A.2d at 443.

is precluded from interference in the exercise of that power[94] since such interference could destroy the cohesiveness of a regulatory scheme.[95] Further, he noted that the Legislative Oversight Act permitted the legislature to nullify either segments of or an entire regulatory scheme.[96] The *General Assembly* court determined that nullifying parts of a regulatory scheme could result in the remainder of the statute operating in contravention of its initial goals or without any rational purpose at all.[97] Additionally, since the legislature was not required to explain its decision, the court found that the agency would have no guidelines for establishing alternative regulatory programs.[98] Justice Pashman decided that legislative interference with the Executive's implementation of the law also could force agency officials to abandon their duties, since repeated exercise of the veto would paralyze an agency.[99] He surmised that this would encourage agencies to engage in rulemaking aimed at appeasing the legislature thereby further usurping executive power.[100] Concluding his analysis of the legislative veto's practical effect upon law enforcement, Justice Pashman held that the decision did not preclude every use of a legislative veto. Its condemnation was confined to the broad veto contained in the Legislative Oversight Act.[101] Since the veto in the Act was applicable

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[94] *Id.* (citing Cooper & Cooper, *supra* note 1, at 488). It should be noted, however, that Cooper and Cooper continued with an analysis of this argument and rejected it, stating that:

> [T]he argument is that apart from whether power is inherently executive or legislative, once Congress has delegated by law a task to the executive, it cannot interfere subsequently in the performance of that task. This argument becomes less than convincing when two points are remembered. The first is that nothing happens substantively or qualitatively to the power given to the executive which renders it improperly legislative just because it has been given to the executive. There is nothing sacred about the fact that certain decision-making powers have been given to the executive; the decisions involved remain proper subjects for legislative action whenever the legislature chooses to exercise the power once more. Second, when compared with Congress' other oversight weapons, the veto is not basically distinguishable on procedural grounds. It cannot be condemned either because it interferes in the administrative process or because the interference it institutes differs in kind or effect from Congress' other oversight mechanisms.

Cooper & Cooper, *supra* note 1, at 488 (footnote omitted).

[95] 90 N.J. at 386, 448 A.2d at 443.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 387, 448 A.2d at 443.

[99] *Id.*, 448 A.2d at 444.

[100] *Id.*

[101] *Id.* "In other contexts legislative cooperation or sharing of powers may be essential to further a statute's purpose. *Id.* The court cited its decision in Enourato v. New Jersey Bldg. Auth., 90 N.J. 396, 448 A.2d 449 (1982), as an example of a constitutionally permissible exercise of veto power.

to every state agency, Justice Pashman found it to be an exercise of executive power by the legislature on a routine basis, and thus a patent violation of separation of powers.[102]

In the second part of its analysis of the practical effects of the Act's legislative veto, the court considered the use of the veto as a mechanism for the legislature to exceed its constitutional lawmaking power.[103] Justice Pashman found that the veto allowed the legislature to block rules authorized by statute, and therefore, effectively resulted in the amendment or repeal of legislation without presentment to the Governor.[104] He held that this violated both the separation of powers and the presentment clauses.[105]

The court, citing a New Jersey case, *In re New York Susquehanna & Western Railroad*,[106] reasoned that absent presentment to the Governor, legislative power was limited.[107] The *Susquehanna* court found that passage of a legislative resolution announcing a policy against the discontinuance of rail service while the Board of Public Utility Commissioners considered the railroad's application to suspend service, did not have the effect of a law since it had not been presented to the Governor. Thus, it operated solely as an expression of opinion.[108] Applying this rationale, the *General Assembly* court decided that the concurrent resolution in the Legislative Oversight Act operated to change the law by nullifying agency rules in violation of the constitutional requirement of presentment.[109]

Justice Pashman next reviewed the case law outside of New Jersey finding support for his position in *Consumer Energy v. Federal Energy Regulatory Commission* in which the Court of Appeals for the District of Columbia invalidated a congressional veto of Federal Energy Commission rules.[110] He pointed out that the *Consumer Energy* court rejected the argument that the veto operated as a congressional refusal to enact proposed legislation, and therefore was a valid exercise of lawmaking power.[111] Justice Pashman found further support

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[102] *General Assembly*, 90 N.J. at 388, 448 A.2d at 444.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] 25 N.J. 343, 136 A.2d 408 (1957).
[107] 90 N.J. at 388, 448 A.2d at 444.
[108] 25 N.J. at 348, 136 A.2d at 411.
[109] 90 N.J. at 389, 448 A.2d at 445.
[110] *See Consumer Energy*, 673 F.2d at 434.
[111] 90 N.J. at 390, 448 A.2d at 445.

for his rejection of the veto in the state court decisions of *Manchin*[112] and *A.L.I.V.E.*[113] Justice Pashman noted that these decisions found broad legislative vetoes violative of constitutionally established procedures for lawmaking.[114]

The court also discounted the argument that the Legislative Oversight Act was constitutional because it passed in compliance with the requirements of the presentment clause.[115] Justice Pashman commented that a government could not act in a manner which allowed it to ignore constitutional lawmaking procedures in the future.[116] Applying this rule to *General Assembly*, he concluded that "the Legislature cannot pass an act that allows it to violate the Constitution."[117] Although the *General Assembly* court concluded that the veto gave the legislature excessive lawmaking power it noted that some uses of the veto in the Legislative Oversight Act would encourage the executive and legislative branches to work together to further statutory schemes.[118] While recognizing the principle of cooperation, the court held that this did not render the act constitutional since it had other flaws. The court reiterated its position that the broad veto power of the Legislative Oversight Act gave the legislature the potential to intrude on the executive branch in violation of the separation of powers and presentment clauses.[119]

The court next examined the prevalence of administrative agencies in modern government. The court observed that "[m]any agency regulations differ little in their scope and effect from legislative commands."[120] It further recognized that every administrative agency derives its power from the legislature, hence the legislature possesses the power to restrict or abrogate the agency's authority.[121] If the legislature decides not to take away the agency's authority, the *General Assembly* court indicated that there were other ways to control agency activity in order to prevent the abuses which the Legislative Oversight Act sought to correct.[122]

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[112] 279 S.E.2d 622 (W. Va. Sup. Ct. App. 1981).

[113] 606 P.2d 769 (Ala. Sup. Ct. 1980).

[114] 90 N.J. at 391, 448 A.2d at 446.

[115] *Id.*

[116] *Id.* (citing Inganamort v. Borough of Fort Lee, 72 N.J. 412, 371 A.2d 34 (1977)).

[117] *Id.*

[118] *Id.* at 392, 448 A.2d at 447.

[119] *Id.*

[120] *Id.* at 393, 448 A.2d at 447.

[121] *Id.*

[122] *Id.* at 393-94, 448 A.2d at 448. The court specifically mentioned oversight committees as one method of controlling agencies.

Justice Pashman again indicated that this decision did not totally foreclose use of the legislative veto.[123] He pointed out that the court's decision in *Brown v. Heymann*[124] upheld the constitutionality of the Executive Reorganization Act which contained a veto provision. That Act provided that an executive reorganization plan prepared by the Governor would be deemed effective unless a concurrent resolution disapproving the plan was passed within sixty days.[125] The *General Assembly* court found that, unlike this case, the court in *Brown* had been primarily concerned with the question whether the power of the Executive was unconstitutionally increased rather than decreased by this delegation of authority to the legislature.[126] Justice Pashman also noted that on the federal level, control over appropriations challenged in *Atkins*, which were subject to a legislative veto, have also been held to be valid.[127]

While the *General Assembly* court did not preclude every exercise of a legislative veto provision, it pronounced the Legislative Oversight Act to be excessively broad.[128] The court indicated, however, that given the appropriate context, legislative participation in the execution of the laws would be permissible.[129] It concluded that when "legislative action is necessary to further a statutory scheme requiring cooperation between the two branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes, legislative veto power can pass constitutional muster."[130]

This line of reasoning was borne out in the companion case, *Enourato v. New Jersey Building Authority*,[131] where the court upheld the constitutionality of legislative veto provisions applicable to projects proposed by the New Jersey Building Authority (Authority).[132] The New Jersey Building Authority Act[133] created the Authority for the express purpose of constructing and maintaining offices for state agencies.[134] The Act provided two checks on all actions of the

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[123] *Id.* at 394, 448 A.2d at 448.
[124] 62 N.J. 1, 297 A.2d 527 (1972).
[125] 90 N.J. at 394, 448 A.2d at 448.
[126] *Id.*
[127] *Id.* at 394 n.4, 448 A.2d at 448 n.4.
[128] *Id.* at 395, 448 A.2d at 448.
[129] *Id.*
[130] *Id.*
[131] 90 N.J. 396, 448 A.2d 449 (1982).
[132] *Id.* at 399, 448 A.2d at 450.
[133] N.J. STAT. ANN. §§ 52:18A-78.1 to .32 (West Cum. Supp. 1982-1983).
[134] 90 N.J. at 399, 448 A.2d at 450.

Authority: first, the Authority had to receive the approval of the Governor before taking any action,[135] and second, the act contained two legislative veto provisions.[136] One provision permitted a legislative veto of the Authority's projects which exceeded a projected cost of $100,000[137] and another required all leases between the Authority and a state agency to be approved by the Speaker of the Assembly and the President of the Senate.[138]

Pursuant to the Act, the Authority obtained legislative approval to undertake various building projects. Completion of the project could eliminate the need for the state to continue to rent from certain land owners. Albert Enourato, a property owner, whose land had been leased to the state[139] brought suit challenging the constitutionality of the required legislative approval for any project in excess of $100,000 and the power to veto lease agreements by the presiding officer of each House of the legislature.[140] Enourato contended that the option of the legislature to strike down these projects violated the separation of powers provision, the presentment clause, and the debt limitations clause[141] of the New Jersey Constitution.[142]

Enourato commenced the action one day prior to the anticipated execution of a contract for the sale of $135,000,000 worth of bonds for a particular building project. The trial court dismissed the action finding no constitutional violations.[143] Following affirmation by the appellate division,[144] the Supreme Court of New Jersey granted and accelerated Enourato's appeal.[145]

Before examining the constitutionality of the veto provisions contained in the Building Authority Act, Justice Pashman in his majority opinion reiterated the holding in *General Assembly*.[146] He determined that the veto provision in *General Assembly* contravened the separation of powers because it gave the legislature the authority to rescind most agency rules and thus interfered with the Executive's power to

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[135] *See* N.J. STAT. ANN. § 52:18A-78.4(i) (West Cum. Supp. 1982-1983).

[136] 90 N.J. at 399, 448 A.2d at 450.

[137] N.J. Stat. Ann. § 52:18A-78.6 (West Cum. Supp. 1982-1983).

[138] *Id.* § :18A-78.9.

[139] 90 N.J. at 399-400, 448 A.2d at 450.

[140] *Id.* at 398, 448 A.2d at 450.

[141] N.J. CONST. art. VIII, § 2, para. 3. For a discussion of the court's disposition of this argument, see *infra* note 169.

[142] 90 N.J. at 398-99, 448 A.2d at 450.

[143] *Id.* at 400, 448 A.2d at 451.

[144] *See* Enourato v. New Jersey Bldg. Auth., 182 N.J. Super. 58, 440 A.2d 42 (App. Div. 1981), *aff'd*, 90 N.J. 376, 448 A.2d 438 (1982).

[145] 90 N.J. at 400, 448 A.2d at 451.

[146] *Id.*

enforce the law.[147] That veto violated both the separation of powers and the presentment clauses because it gave the legislature the power to change the law without presentment to the Governor.[148] The *Enourato* court emphasized, however, that *General Assembly* did not preclude all legislative input into the Executive's enforcement of the law and did not mandate conformance with the presentment clause for actions that were not lawmaking.[149] Based on this premise, the majority held that the Building Authority Act incorporated an appropriate method for the legislature to oversee acts of the Executive, and thus was constitutional.[150]

The *Enourato* court initially focused on the veto provisions contained in the Building Authority Act and decided that they advanced the implementation of coherent regulatory schemes for two reasons.[151] First, Justice Pashman noted that exercising the option not to veto a project in its preliminary phases would provide the legislature with a strong incentive for the continuance of monetary appropriations in the future.[152] Second, he indicated that use of the veto facilitated cooperation between the legislative and executive branches and assured that the Authority would exercise "fiscal prudence" in the selection of costly projects.[153] The court found that under the present circumstances an approval of a building project or lease "lock[ed] the legislature . . . into making continued appropriations"[154] while projects of other agencies could be more easily discontinued by the legislature.[155]

Justice Pashman then discussed the limited effect of the Building Authority Act's veto provisions on the separation of powers principle and found them to be distinguishable from the *General Assembly* veto in three ways.[156] First, he decided that the Governor's complete power over the initial choice of projects precluded usurpation of executive power because the legislature would only obtain the opportunity to

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[147] *Id.*

[148] *Id.* at 400-01, 448 A.2d at 451.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 403, 448 A.2d at 452.

[152] *Id.*

[153] *Id.*, 448 A.2d at 452-53.

[154] *Id.* at 404, 448 A.2d at 453.

[155] *Id.* For this reason the majority disagreed with the dissent's argument that the Building Authority Act's veto provisions would apply to any executive agency which required continuing legislative appropriations.

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

veto a project after it had been approved by the Governor.[157] The majority found that the Building Authority Act could be distinguished from the Legislative Oversight Act, because it permitted more extensive executive participation.[158]

The second distinction discovered by the court was that the veto power was limited to disapproval of individual building projects and leases, and therefore had a reduced ability to disrupt acts by the Executive.[159] Justice Pashman noted that the Building Authority Act's veto provisions gave the legislature the power either to veto a whole project or to allow it to continue, but did not permit the legislature to nullify portions of regulatory schemes, thus keeping disruption to a minimum.[160] He also stated that although the legislature could reduce action by the Authority through the frequent use of vetoes, it could not force the Authority to put forth projects on exclusively legislative terms since the Executive could veto any agency action.[161]

The final distinguishing factor noted by the *Enourato* court was that using the veto many times would not change "legislative intent in ways that require presentment to the Governor."[162] The majority found that the veto provisions served the purpose of retaining "tight control" over the initiation of building projects and leases.[163] Justice Pashman decided that although the legislative veto allowed the legislature to disapprove of a project that a prior legislature might have approved, this action is not the same as nullifying an existing law.[164] The court determined that the remote potential for continuous use of the veto provisions which might disable the Authority from beginning any project, did not warrant the invalidation of vetoes which "served an important governmental purpose."[165]

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[157] *Id.* This procedure, which allows the Governor to submit to the legislature only proposals which he approves, is termed "reverse legislation." Watson, *supra* note 2, at 1072. The technique is viewed as an acceptable mechanism since the Executive has retained his veto power in determining which proposed rules will be submitted for approval by the legislative body. *Id.*

[158] 90 N.J. at 405, 448 A.2d at 453. The court cited Brown v. Heymann, 62 N.J. 1, 297 A.2d 572 (1972), in support of this proposition. Justice Pashman also noted the constitutional irrelevance of the dissent's efforts to distinguish *Brown* because it involved the legislature's use of the veto to thwart acts of the Executive rather than allowing the Executive to act only after legislative approval. In both cases, reasoned the court, the ability of the legislature to block executive actions is the same. 90 N.J. at 406 n.1, 448 A.2d at 454 n.1.

[159] 90 N.J. at 406, 448 A.2d at 454.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 407, 448 A.2d at 454.

[163] *Id.*

[164] *Id.*

[165] *Id.*, 448 A.2d at 454-55.

The *Enourato* majority expressed concern that the unicameral and one person veto provisions in the Building Authority Act could violate the "principles of bicameralism."[166] The court noted that only one House of the legislature was required to veto proposed building projects and that individual officers of each house could veto lease agreements, thereby increasing the concentration of legislative power.[167] In spite of this, Justice Pashman asserted that "[t]he more limited the grant of power, the more concentrated it can be without violating the Presentment Clause or the separation of powers."[168] Since the power given in this case was strictly confined to providing "*additional* checks" on Authority actions, he concluded that the veto provisions in question were constitutional.[169]

Justice Schreiber, in a dissenting and concurring opinion,[170] maintained that the veto provisions in the Building Authority Act were unconstitutional under the test outlined in *General Assembly*.[171] He gave three reasons for this conclusion. First, the dissent found that the veto provisions impermissibly interfered with the Executive's mandate to execute the law in violation of the separation of powers doctrine.[172] Second, Justice Schreiber decided that the one House veto

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[166] *Id.* at 408, 448 A.2d at 455; *cf.* Opinion of the Justices, 431 A.2d 783, 788 (N.H. S. Ct. 1981) (shifting of legislative power to such small groups in either house cannot fairly be said to represent legislative will).

[167] 90 N.J. at 408, 448 A.2d at 455.

[168] *Id.* at 409, 448 A.2d at 455.

[169] *Id.*, 448 A.2d at 455. Justice Pashman also dismissed the plaintiff's contention that debts of the Authority were debts of the State and thus the debt limitations clause of the New Jersey Constitution had been contravened. *Id.* at 409, 448 A.2d at 455. He decided that since the projects and lease agreements were a debt of the Authority, no liability of the State would ensue if the Authority defaulted on payments and thus the debt limitations clause did not apply. *Id.* at 410, 448 A.2d at 455. In pertinent part the court stated: "The Authority's bonds and notes are not a debt of liability of the State. They state on their face that the State does not pledge its faith and credit to their payment . . . [and therefore] [t]he Authority's creditors have notice that their only remedy lies against the Authority." *Id.*, 448 A.2d at 456.

[170] Justice Clifford joined in the concurring and dissenting opinion.

[171] 90 N.J. at 411, 448 A.2d at 456-57 (Schreiber, J., dissenting and concurring).

[172] *Id.*, 448 A.2d at 456 (Schreiber, J., dissenting and concurring). Drawing on the majority opinion in *General Assembly*, Justice Schreiber reiterated the twofold test of a violation of that doctrine: "'unwarranted legislative interference with the executive branch and excessive legislative law making power.'" *Id.* at 413, 448 A.2d at 458 (Schreiber, J., dissenting and concurring). Applying this test to the Building Authority Act veto provisions, he found that they violated the separation of powers in two ways. First, the dissent noted that the vetoes at issue in *Enourato* resulted in extensive legislative control of the Authority's purpose for existence since even though the Authority had the power to determine the feasibility of a proposed project, no plan could proceed without legislative approval. *Id.* at 414, 448 A.2d at 458 (Schreiber, J., dissenting and concurring). Second, Justice Schreiber decided that the legislature's option to discontinue financing the Authority failed to justify an interference with executive function through the veto

provision was a contravention of the principle of bicameralism.[173] Finally, he determined that the vetoes allowed the legislature to effect a change in the law without presentment to the Governor, in violation of the presentment clause.[174] Justice Schreiber decided, however, that the veto provisions were severable from the remainder of the statute, and hence the Authority was competent to go forward with its activities.[175]

The *General Assembly* court found the Legislative Oversight Act unconstitutional because its broad scope both interfered with executive functions in violation of the separation of powers clause and empowered the legislature to annul rules without presentment to the Governor in contravention of the presentment clause.[176] The court stressed, however, that its determination did not preclude the use of legislative vetoes in all contexts[177] and formulated a test for determin-

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provisions since current legislative approval did not "'lock the Legislature, for all practical purposes, into making continued appropriations'" in the future. *Id.* at 414-15, 448 A.2d at 458. (Schreiber, J., dissenting and concurring) (quoting *id.* at 404, 448 A.2d at 453).

[173] *Id.* at 411, 448 A.2d at 456 (Schreiber, J., dissenting and concurring). Because either house had the power to veto proposed projects costing in excess of $100,000, the dissent maintained that the constitutional requirement that both houses approve all bills was contravened. *Id.* at 416, 448 A.2d at 459 (Schreiber, J., dissenting and concurring). Justice Schreiber also objected to the provision in the Act requiring that every lease agreement between the Authority and a state agency be approved by the Senate President or the Speaker of the Assembly since neither House had the ability to delegate its authority to legislate to such a "smaller body." *Id.* Thus, he concluded that "[n]either house of the Legislature may create effective legislation alone nor . . . delegate essential executive or legislative duties to" legislative officials. *Id.* at 417, 448 A.2d at 459 (Schreiber, J., dissenting and concurring).

[174] *Id.* at 411, 448 A.2d at 456-57 (Schreiber, J., dissenting and concurring). The dissent found that the two purposes of the presentment clause were to preclude legislative overreaching of executive power and to prevent hurried or unwise legislation. *Id.* at 417, 448 A.2d at 460 (Schreiber, J., dissenting and concurring). The dissent found that the legislative review mechanism in this case mandated the use of the presentment clause in order to be constitutionally valid, but that prior approval of a project by the Governor before submission to the legislature failed to fulfill this requirement, since the Constitution required that the Governor act *after* the legislature. *Id.* at 418, 448 A.2d at 460 (Schreiber, J., dissenting and concurring).

Justice Schreiber criticized the Act's requirement that the legislature affirmatively approve projects costing in excess of $100,000. *Id.* at 420, 448 A.2d at 461 (Schreiber, J., dissenting and concurring). He contrasted this measure with the validation of the Executive Reorganization Act in Brown v. Heymann, 62 N.J. 1, 297 A.2d 572 (1972), where legislative inaction resulted in automatic approval of the Govenor's reorganization plans and affirmative action by the legislature in the form of a concurrent resolution was only required if the legislature decided to disapprove the plan. 90 N.J. at 420, 448 A.2d at 461 (Schreiber, J., dissenting and concurring). Justice Schreiber commented, however, that other constitutionally acceptable mechanisms were available which would allow legislative oversight. *Id.*

[175] *Id.* at 421, 448 A.2d at 461 (Schreiber, J., dissenting and concurring).

[176] *Id.* at 395, 448 A.2d at 448.

[177] *Id.* at 379, 448 A.2d at 439; *see, e.g., Enourato* 90 N.J. at 408, 448 A.2d at 455.

ing the constitutionality of legislative vetoes. Although the Legislative Oversight Act contained constitutional flaws, a number of factors emerge which indicate that a legislative veto mechanism broader than that validated in *Enourato* should be found constitutional and should be preserved as an effective means of oversight.

Efficient government operation requires the legislature to make broad delegations of power to the Executive.[178] This necessary delegation of power has been validated because the separation of powers doctrine permits some blending of power among the branches of government to facilitate effective operation.[179] Despite this constitutionally permissible delegation, the legislature cannot totally shift its responsibility of lawmaking but must provide sufficient standards for the Executive to implement the law.[180] It is undesirable, however, for the legislature to enact narrow statutory schemes because agencies are better equipped to gather information and to seek the counsel of experts in formulating comprehensive regulations in compliance with the legislature's enunciated standards.[181]

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[178] *See* Sunshine Anthracite Coal v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility"); *General Assembly*, 90 N.J. at 392, 448 A.2d at 447; Ward v. Scott, 11 N.J. 117, 123-24, 93 A.2d 385, 388 (1952). *See generally* Cooper & Cooper, *supra* note 1, at 498; Larsen, *supra* note 1, at 2; Schwartz, *supra* note 4, at 353.

[179] *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976) ("a hermetic sealing off of the three branches of government from one another would preclude the establishment of a Nation capable of governing itself effectively"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (observing that Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity"); Atkins v. United States, 556 F.2d 1028, 1066-67 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (Constitution allows flexibility in apportionment of power among branches of government); Knight v. Margate, 86 N.J. 374, 388, 431 A.2d 833, 840 (1981); State v. Leonardis, 73 N.J. 360, 370, 375 A.2d 607, 612 (1977) (separation of powers doctrine does not bar cooperative action among branches of government) Brown v. Heymann, 62 N.J. 1, 11, 297 A.2d 572, 578 (1972) ("the [separation of powers] doctrine necessarily assumes that branches will *coordinate* to the end that government will fulfill its mission") (citations omitted and emphasis added). *See generally* Cooper & Cooper, *supra* note 1, at 506; Schwartz, *supra* note 4, at 374.

[180] Mount Laurel Township v. Department of the Public Advocate, 83 N.J. 522, 416 A.2d 886 (1980) (legislative delegation of power to government agency must have standards); Cammarata v. Essex County Park Comm'n, 26 N.J. 404, 410, 140 A.2d 397, 400-01 (1958).

[181] *See, e.g.*, Boller Beverages, Inc. v. Davis, 38 N.J. 138, 151, 183 A.2d 64, 71 (1962) (recognizing that "public interest is better served by delegating a large part of detailed lawmaking to the expert administrator, controlled by policies, objects and standards laid down by the legislature, rather than by having all the details spelled out through the traditional legislative process"); Cammarata v. Essex County Park Comm'n, 26 N.J. 404, 410, 140 A.2d 397, 400 (1958).

When the legislature delegates rulemaking power to an agency, it is empowering the agency to function in a legislative capacity.[182] If this sharing of legislative power is consonant with the separation of powers doctrine, then the legislative veto should be valid for the same reason.[183] Therefore, correctly designed to preclude interference with power that belongs exclusively to the Executive, a veto provision could restore control over a broad delegation of legislative power.

The Legislative Oversight Act failed in this respect because it obliterated executive authority in the administration of the law. The Act allowed the legislature to gain complete control in both lawmaking and law enforcement, thereby unconstitutionally increasing legislative power. The executive branch was foreclosed from performing an integral role in the administration of the law and the Executive's power was impaired when the presentment clause was circumvented.

The way to eliminate this constitutional impediment is to "add" the Executive back into the Legislative Oversight Act.[184] The New

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[182] *See Atkins*, 556 F.2d at 1068 (executive officer merely acts as agent of legislature in carrying out delegated powers); Boller Beverages, Inc. v. Davis, 38 N.J. 138, 151-52, 183 A.2d 64 (1962) ("Administrative rule-making remains in essence, however, the enactment of legislation of general application prospective in nature"); Consolidation Coal Co. v. Kandle, 105 N.J. Super. 104, 113, 251 A.2d 295 (App. Div.), *aff'd*, 54 N.J. 11, 252 A.2d 403 (1969) (observing that "[i]n its rulemaking capacity, an administrative agency is nothing more than a minor legislative body considering proposed legislation under a grant of power"); Terry v. Harris, 175 N.J. Super. 482, 420 A.2d 353 (Law Div. 1980) (when acting under grant of power to deal with proposed regulations, administrative agency is considered minor legislative body). *But see Consumer Energy*, 673 F.2d at 474 (rulemaking is executive function, therefore, Congress is prohibited from substantial interference in rulemaking process).

[183] Cooper & Cooper, *supra* note 1, at 503; Schwartz, *supra* note 4, at 374. At least one state supreme court justice takes this position. *See* State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 780 (Ala. Sup. Ct. 1980) (Boochever, J., dissenting).

[184] Of course, one solution to the dilemma created is the passage of a state constitutional amendment affording the legislature veto power over agency regulatory schemes. An amendment would take the responsibility for determining the constitutionality of legislative veto provisions on an *ad hoc* basis out of the hands of the judiciary. In fact, on July 22, 1982, the day the decision in *General Assembly* was rendered, Senator Zane introduced a proposed amendment to the New Jersey Constitution which would validate the use of a legislative veto to annul agency rules. *See* S. Con. Res. 133, 200 Leg., 1st Sess. (1982). The proposed amendment states:

> No rule or regulation made by any department, officer, agency or authority of this State, except such as relates to the organization or internal management of the State Government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law. The Legislature shall provide for the prompt publication of such rules and regulations. *In accordance with such rules as it may adopt, the Legislature may invalidate any rule or regulation, in whole or part, and may prohibit any proposed rule or regulation, in whole or in part, by a majority of the authorized membership of each House.*

Id. (italicized portions indicate proposed amendment to N.J. CONST. art. V, § IV, para. 6.)

Jersey Supreme Court's test set forth in *General Assembly* delineates that "[w]here legislative action is necessary to further a statutory scheme requiring *cooperation* between the two branches, and such action offers no substantial potential to interfere with *exclusive* executive functions or alter the statute's purposes, legislative veto power can pass constitutional muster."[185] A statutory veto mechanism applicable to more than one agency[186] which would allow for increased participation by the Executive should be found constitutional. Drawing from the *General Assembly* test, the revised act will require that the Executive first have an opportunity to veto proposed rules.[187] If the Executive approves of the rules, he would submit them to the legislature along with a written statement setting forth his reasons for approval. The legislature could then review the regulations and the considerations set forth in the Governor's statement. Disapproval could be expressed through a concurrent resolution. If the legislature disapproved the regulations, it would prepare a statement setting forth its reasons for disapproval. This statement could afford the judiciary a basis for review of the legislature's activity to ensure that the legislature continues to act in accordance with original statutory intent.[188] The proposed amendment to the statute should read as follows:

Similar action has been taken by the Michigan Legislature, which adopted an amendment that permits a legislative committee to review proposed agency regulations. MICH. CONST. art. IV, § 37. Accordingly, MICH. COMP. LAWS ANN. § 24.245 (West 1981) provides for a joint committee on administrative rules which can either approve or disapprove of a rule. *Id.* § 24.245(5), (6). If the committee expresses disapproval or reaches an impasse, this suspends the implementation of the rule unless the committee subsequently approves the rule or the legislature adopts a concurrent resolution approving the rule within 60 days. Approval by either the joint committee on administrative rules or adoption of a concurrent resolution of approval by the legislature, permits the agency to adopt the rule. *Id.* § 24.245(9).

[185] 90 N.J. at 395, 448 A.2d at 448 (emphasis added).

[186] *Enourato* permits statutory veto provisions applicable to individual agencies. In drafting such veto provisions, the legislature should consider the guidelines of *Enourato*. If the statutory veto permits the Governor an ample opportunity to express his views, is limited to a particular project, and its repeated use is unlikely to nullify legislative intent, the veto will be valid. *Id.* at 405-07, 448 A.2d at 453-54. The validation of the legislative veto in a narrow context permits the legislature to achieve review in a piecemeal fashion. Accordingly, pursuant to *Enourato*, the legislature may implement the veto in areas where it perceives that the need for oversight is great.

[187] *Cf. Enourato*, 90 N.J. at 405, 448 A.2d at 453 (noting that Governor's initial approval of projects guaranteed executive control).

[188] Thus, the judiciary would serve as a check upon irrational or unwarranted use of the legislative veto. Since agency regulations are presumptively valid, *see, e.g.*, New Jersey Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 79, 415 A.2d 1147, 1153 (1980); Cole Nat'l Corp. v. State Bd. of Examiners, 57 N.J. 227, 231, 271 A.2d 421, 423 (1970), and the courts will be bound by this rule when reviewing regulations, the legislature will be deterred from misusing the veto power. If the legislature's sentiments have changed since the legislation at issue was passed, and

> In those instances where the legislature delegates broad rulemaking power to an agency, the agency's rules shall first be approved by the Executive. Following submission to the legislature with a statement of reasons for approval, a rule shall be deemed approved unless within 60 days of the submission thereof, the Senate and General Assembly adopt a concurrent resolution of disapproval. The legislature shall then prepare a statement of reasons for disapproval, and submit same to the agency.[189]

Because the above proposed statutory amendment preserves the Executive's active participation in the rulemaking process, it conforms with the separation of powers doctrine. Interference with the executive branch is minimized, since the legislature has no opportunity to review rules unless they are first approved by the Executive.[190] The integrity of the presentment clause is also preserved through the active participation of the Executive in preparing a statement setting forth the reasons which he considers important to merit the validation of the proposed regulations.

An important concern in the implementation of a legislative veto is the legislature's capacity to disapprove of any part of a regulatory scheme.[191] Since under the proposed amendment, however, the legis-

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it attempts to make policy changes through the veto power rather than by amendment, judicial review may force the hand of the legislature to make the appropriate amendment by finding the regulation valid. Thus, judicial review would provide a check upon unwarranted aggrandizement of power by the legislature under the proposed act. *See generally* Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review* 1982 WIS. L. REV. 208.

[189] In contrast, N.J. STAT. ANN § 52:14B-4.3 (West Cum. Supp. 1982-1983) was drafted as follows:

> A rule shall be deemed approved unless within 60 days of the submission thereof, the Senate and General Assembly adopt a concurrent resolution disapproving the rule, in whole or in part, or providing that the rule not take effect during the 60 days following the date of the adoption of the resolution, during which time they may nevertheless adopt a concurrent resolution disapproving the rule. No action may be taken by the Legislature under this section until after 1 calendar day from the date of the standing reference committee's report.

[190] For example, in *Enourato*, the court noted with approval that "the Governor's full control over the initial selection of Building Authority projects makes it impossible for the legislature to usurp executive authority in ways that were possible under the Legislative Oversight Act. The legislature has absolutely no control over authority projects unless the Governor first approves them." 90 N.J. at 405, 448 A.2d at 235.

[191] This aspect of the veto's application to agency rulemaking is troubling. Commentary, however, indicates that the argument is not significant in light of the consideration that most legislative activity has the potential to disrupt agency schemes. Cooper & Cooper, *supra* note 1, argue that:

> Basically all oversight interferes with execution; indeed, it cannot avoid doing so. When Congress passes a piece of amendatory legislation, reduces an appropriation, conducts an investigation, formally or informally requires prior reporting, criticizes administrators on the floor or contacts them on behalf of constituents, it involves

lature must prepare a statement of reasons for disapproval, this could be reviewed by the judicial branch which would deter the legislature from arbitrarily disapproving any part of a regulatory scheme.[192] Another safeguard against disruption is the amendment's limited scope. The statute would apply only to future rulemaking. This prevents the annulment of individual rules that are contained in coherent regulatory schemes already in operation. Additionally, the proposed statutory veto would only apply to regulations passed pursuant to broad enabling statutes. This ensures that the legislative veto will only be operative in circumstances where the executive branch has been delegated broad legislative power.

A second approach to the implementation of a legislative veto is to require that the legislature disapprove of a proposed rule by a two-thirds majority of each House. This proposed amendment to the Act is no different from the foregoing proposal except that it will require more than a majority concurrence to annul regulations. A rule would first be subjected to Executive approval and then to a two-thirds majority of each House to invalidate it. Since the device makes it more difficult for the legislature to express disapproval, it ensures that any interference with the execution of the law will only occur when the legislature has serious objections to the rule as a means of effectuating statutory policy. Increased executive participation combined with the requirement that the disapproval be adopted by a two-thirds majority of each House preserves the purpose of the presentment clause. This proposal allows the executive branch to continue its essential role of administration of the law without aggrandizing the power of the legislature. Thus, the separation of powers goal—that the branches coordinate to the extent necessary to govern effectively—is advanced.

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> itself in the administrative process and interferes with what has been going on or what would go on if it had not stepped into the process.

Id. at 493.

The authors further argue that:

> [I]nterference in the administrative process is the price of legislative oversight and the veto is not so different in this regard, either in terms of the kind or effect of its interference, to be singled out as unconstitutional. The fact that the veto can provide more effective control in certain areas does not mean that its effect in terms of tying an administrator's hands is basically different from what is accomplished through a weapon such as appropriations.

Id. at 498.

[192] *See supra* note 188.