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The Status of Statutes Containing Legislative Veto Provisions After Chadha—Does the EEOC Have the Authority to Enforce the Equal Pay Act and the Age Discrimination in Employment Act?

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THE STATUS OF STATUTES CONTAINING LEGISLATIVE VETO PROVISIONS AFTER *CHADHA*—DOES THE EEOC HAVE THE AUTHORITY TO ENFORCE THE EQUAL PAY ACT AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT?

Immigration & Naturalization Service v. Chadha,[1] the Supreme Court decision invalidating the use of the legislative veto, has opened the door for constitutional attacks on the more than 200 statutes containing legislative veto provisions.[2] The recent proliferation of litigation challenging the authority of the Equal Employment Opportunity Commission (EEOC) to enforce the Equal Pay Act[3] and the Age Discrimination in Employment Act (ADEA)[4] illustrates the disruption and uncertainty engendered by the *Chadha* decision. President Carter transferred enforcement responsibility for these two Acts from the Secretary of Labor to the EEOC in 1978.[5] This transfer was authorized by the Reorganization Act of 1977,[6] a statute containing a legislative veto provision.[7] In suits by the EEOC to enforce the two Acts, defendants are arguing that the presence of the legislative

1. 103 S. Ct. 2764 (1983). The Supreme Court invalidated the use of the legislative veto in a sweeping opinion by Chief Justice Burger. The Court reasoned that legislative vetoes constitute "legislative activity" and must therefore conform to the requirements of article I. *Id.* at 2784–88. Justice Powell concurred only in the judgment. *Id.* at 2788 (Powell, J., concurring). He would have invalidated the specific veto involved in *Chadha* on the narrower ground that it was an unconstitutional exercise of judicial power by Congress in contravention of the separation of powers doctrine. *Id.* at 2789. He would not have reached the broader question of whether all legislative vetoes were unconstitutional under article I. *Id.* at 2788–92. Justice White dissented on the ground that the legislative veto was a constitutional exercise of congressional power. *Id.* at 2792–2816 (White, J., dissenting). Justice Rehnquist, joined by Justice White, dissented on the ground that the legislative veto provision of the Immigration and Nationality Act, 8 U.S.C. § 1254 (1982), was not severable from the remainder of the statute. 103 S. Ct. at 2816 (Rehnquist, J., dissenting).

For commentaries on the *Chadha* decision, see Hutchins, *Legislative Vetoes and the Administrative Process: A Constitutional and Operational Analysis*, 15 TEX. TECH. L. REV. 307 (1984); Strauss, *Was There A Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 (1983); *The Supreme Court, 1982 Term, Separation of Powers*, 97 HARV. L. REV. 70, 185 (1983).

2. Strauss, *supra* note 1, at 789. For a partial listing of statutes containing legislative veto provisions, see appendix 1 to Justice White's opinion in *Chadha*, 103 S. Ct. at 2811–12 (White, J., dissenting).

3. 29 U.S.C. § 206(d) (1982).

4. *Id.* § 631 (1982).

5. Reorganization Plan No. 1 of 1978, 92 Stat. 3781 (codified as amended at 29 U.S.C. §§ 216(c), 217 (1982)).

6. 5 U.S.C. § 901–912 (1982).

7. *Id.* § 906(a).

veto provision in the authorizing statute invalidated the transfer and left the EEOC without enforcement authority.

Applying the *Chadha* decision to invalidate the EEOC's authority to enforce the ADEA and the Equal Pay Act produces highly inequitable results. Such an application seriously undermines the congressional policy against employment discrimination, threatens the EEOC's six years of enforcement efforts, and impairs the rights of the individuals the statutes were designed to protect.

District courts applying *Chadha* in this context have split three ways. First, in *EEOC v. Allstate Insurance Co.*[8] the court held that the legislative veto provision in the 1977 Reorganization Act invalidates the EEOC's authority to enforce the ADEA and the Equal Pay Act.[9] Second, in *Muller Optical Co. v. EEOC*[10] and several other decisions[11] courts have held that the legislative veto provision is severable from the remainder of the Reorganization Act or that Congress has impliedly ratified the transfer by its appropriations of funds. Under either rationale, these decisions upheld the EEOC's authority to enforce the two Acts.[12] Finally, rather than rely on severability or ratification, the district court in *EEOC v. Chrysler Corp.*[13] ruled that the Supreme Court's holding in *Chadha* should not be applied retroactively to invalidate the transfer of enforcement authority.[14]

As the *Muller Optical* and *Chrysler* holdings demonstrate, the *Chadha* decision need not disrupt the enforcement of these employment discrimination statutes. In order to minimize disruption of existing statutory schemes generally, courts applying *Chadha* to statutes containing legislative veto provisions should use the following principles: (1) where possible, the courts should sever an unconstitutional legislative veto provision from the remainder of the statute; (2) where administrative authority to act is suspect because of the presence of a legislative veto provision, the

8. 570 F. Supp. 1224, 1232 (S.D. Miss. 1983).

9. *Accord* EEOC v. Westinghouse Elec. Corp., 7 LAB REL REP (BNA) (33 Fair Empl. Prac. Cas.) 1232, 1232 (W.D. Pa. Jan. 5, 1984) (adopted *Allstate* holding).

10. 574 F. Supp. 946, 951–53 (W.D. Tenn. 1983).

11. *Accord* EEOC v. El Paso Natural Gas Co., 7 LAB REL REP (BNA) (33 Fair Empl. Prac. Cas.) 1837, 1837–38 (W.D. Tex. Jan. 16, 1984); EEOC v. CBS, Inc., 7 LAB REL REP (BNA) (34 Fair Empl. Prac. Cas.) 257, 257–58 (S.D.N.Y. Jan. 13, 1984); EEOC v. City of Memphis, 7 LAB REL. REP. (BNA) (33 Fair Empl. Prac. Cas.) 1089, 1090–91 (W.D. Tenn. Dec. 29, 1983); EEOC v. Cudahy Foods Co., 7 LAB REL REP (BNA) (33 Fair Empl. Prac. Cas.) 1836, 1836 (W.D. Wash. Dec. 28, 1983); EEOC v. Jackson County, 7 LAB. REL REP. (BNA) (33 Fair Empl. Prac. Cas.) 963, 964 (W.D. Mo. Dec. 13, 1983).

12. The only appellate court decision to date also found that the legislative veto provision was severable from the Reorganization Act. EEOC v. Hernando Bank, Inc., 724 F.2d 1188, 1191–92 (5th Cir. 1984).

13. 7 LAB REL. REP (BNA) (33 Fair Empl. Prac. Cas.) 1838 (E.D. Mich. Jan. 23, 1984).

14. *Id.* at 1842–43.

courts should determine if Congress has impliedly ratified the grant and thereby cured the defect; and (3) where possible, the courts should not apply the *Chadha* rule retroactively. By applying these principles in the EEOC litigation, the courts can effectuate the purposes behind the *Chadha* rule without unduly disrupting the statutory scheme for combatting employment discrimination.

After *Chadha,* the constitutional status of unexercised legislative veto provisions, such as the one in the Reorganization Act of 1977, is uncertain. Part I of this Note examines this uncertainty and concludes that unexercised veto provisions should be held unconstitutional. Part II then examines three possibile methods of limiting the *Chadha* decision to avoid invalidating the EEOC's authority to enforce the Equal Pay Act and the ADEA.

I. THE CONSTITUTIONALITY OF AN UNEXERCISED LEGISLATIVE VETO PROVISION

The district courts that have considered the EEOC's authority to enforce the ADEA and the Equal Pay Act have assumed that the legislative veto provision of the 1977 Reorganization Act[15] was unconstitutional even though the reorganization in question was never vetoed. The *Chadha* decision did not directly address the constitutionality of an unexercised veto provision.[16] The Court's holding, however, was broad: legislative vetoes are legislative activity, and all legislative activity must meet the constitutional requirements of bicameralism and presentment.[17] The Court's definition of legislative activity[18] seems to permit congressional invalidation of executive or agency action only through a statute passed by both houses of Congress and signed by the President, or passed by a two-thirds majority of both houses.[19] The breadth of the Court's rationale suggests that all legislative veto provisions are unconstitutional, whether exercised or not.

15. 5 U.S.C. §§ 901, 906(a) (1982).

16. The *Chadha* Court emphasized that the exercise of the veto in *Chadha* was an essentially legislative action because it "had the purpose and effect of altering the legal rights, duties and relations of persons." 103 S. Ct. 2764, 2784 (1983). While the Court's emphasis on the veto as a legislative act by one house might seem to support the conclusion that an unexercised veto would not be unconstitutional legislative action, that conclusion is contradicted by other portions of the *Chadha* opinion and by the policy considerations. *See infra* notes 23–27 and accompanying text.

17. 103 S. Ct. at 2787; *see infra* note 79.

18. The *Chadha* Court indicated that legislative activity is activity having "the purpose and effect of altering the legal rights, duties and relations of persons." 103 S. Ct. at 2784.

19. Indeed it has been argued that the Court's definition of "legislative activity" is so broad that it encompasses much of Congress' business. *See The Supreme Court, 1982 Term, supra* note 1, at 191–92.

The most plausible pre-*Chadha* argument in favor of the constitutionality of the legislative veto was that it is simply reverse legislation.[20] Arguably, the executive or agency action constitutes a proposal for legislation, which Congress then enacts or affirms by failing to veto it. The political branches retain power equivalent to that granted under article I, and, as with the article I process, no legislation is enacted without the consent of both houses of Congress and the President.[21]

The *Chadha* majority, however, unequivocally rejected this argument: "[T]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I."[22] Thus, the majority rejected the enactment of nonvetoed proposals by silence as well as the invalidation of a proposal by the exercise of a legislative veto. The conclusion that the Court intended this result is further evidenced by its failure to limit its holding, even though well aware of the enormous implications for a great number of statutes.[23]

In addition, strong policy considerations support the conclusion that unexercised legislative veto provisions are unconstitutional.[24] The legislative veto has drawn criticism because it changes the relationship between Congress and the executive or agency making a given proposal.[25] The legislative veto gives Congress an extraconstitutional negotiating power, whether or not a veto is ever interposed.[26] One commentator has suggested that a legislative veto provision makes agency action subject to powerful constraints by members of Congress acting as "advisors" not appointed by the executive.[27] This arguably violates the rule against congressional appointment of executive officials.[28] Additionally, because the legislative veto power in reality centers in the congressional subcommittees, it can be a method for concentrating power in the hands of a few

20. Justice White advanced this argument in his *Chadha* dissent. 103 S. Ct. at 2806–10. For a discussion of the reverse legislation argument, see Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 481–86 (1978).

21. The President has proposal power instead of veto power and either house of Congress can block the measure not by failing to pass it (as with conventional legislation) but by vetoing it. There is no equivalent of the President's veto power.

22. 103 S. Ct. at 2788 n.22.

23. The Court's quotation of that portion of Justice White's dissent emphasizing the number of legislative veto provisions inserted in statutes since 1932 demonstrates that the Court was aware of the breadth of its holding. *Id.* at 2781 (quoting *id.* at 2811 (White, J., dissenting)).

24. The Supreme Court noted in *Chadha* that "the long range political wisdom of this 'invention' [the legislative veto] is arguable." *Id.* at 2781 (majority opinion).

25. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA L. REV 253, 267 (1982).

26. Dixon, *supra* note 20, at 445–48.

27. *Id.*

28. *Id.* at 445.

legislators, rather than a tool for reasserting democratic control over the bureaucracy.[29] Therefore, in order to avoid sanctioning a disruption in the constitutionally determined balance of power between the legislative and executive branches, legislative veto provisions should be held invalid whether or not exercised.

II. GUIDELINES FOR THE APPLICATION OF THE *CHADHA* DECISION TO THE TRANSFER OF ADEA AND EQUAL PAY ACT ENFORCEMENT TO THE EEOC

A. The Severability of the Legislative Veto Provision from the Reorganization Act of 1977

The district courts have split on the severability of the legislative veto provision of the 1977 Reorganization Act[30] from the remainder of the statute. Some courts have held that the veto provision is severable from the rest of the Act.[31] Other courts have held that the veto provision is inseverable because Congress intended it to be an integral part of the Act.[32]

Prior to *Chadha* the Supreme Court had issued inconsistent statements on the issue of severability. The most-cited Supreme Court opinion is *Champlin Refining Co. v. Corporation Commission.*[33] In *Champlin,* the Court indicated that an unconstitutional provision may be severed if what is left is fully operative as law and there is no finding that Congress would not have enacted the act without the severed provision.[34] This presumption in favor of severability was modified in *Carter v. Carter Coal Co.*,[35] in which the Court stated that, in the absence of a severability provision, the presumption is that the legislature enacts a statute as a whole and the entire act falls if any of its provisions are held unconstitutional.[36] The *Champlin* and *Carter* decisions seemingly established that: (1) where the legislature inserted a severability provision, there would be a presumption of severability; and (2) in the absence of such a provision there would be a presumption against severability.

The presumption against severability was considerably weakened by *United States v. Jackson.*[37] Despite its earlier reliance on Congress' in-

29. *Id.* at 446.
30. 5 U.S.C. §§ 901, 906(a) (1982).
31. *See supra* notes 10–12 and accompanying text.
32. *See supra* note 8 and accompanying text.
33. 286 U.S. 210 (1932).
34. *Id.* at 234.
35. 298 U.S. 238 (1936).
36. *Id.* at 312.
37. 390 U.S. 570 (1968).

clusion or omission of severability clauses, the Court stated that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause."[38] The Court in *Jackson* rejected *Carter* and reiterated the language of *Champlin,* which created a presumption of severability absent a finding that the legislature would not have enacted the statute without the unconstitutional provision.[39] Furthermore, in the recent case of *Buckley v. Valeo,*[40] and in *Chadha* itself,[41] the Court again quoted *Champlin,* and held the unconstitutional provisions severable from their statutes. Thus, the Court has indicated a preference for the *Champlin* test of severability.

It is unlikely that Congress would have enacted the 1977 Reorganization Act without a legislative veto provision. Congress has consistently inserted legislative veto provisions in Reorganization Acts. In fact, the legislative veto originated in the first Reorganization Act of 1932,[42] and Congress has insisted upon the veto in every Reorganization Act but one since then.[43] Congress placed a veto provision in the 1977 Act even though aware of its possible unconstitutionality.[44] Indeed, in the House report, the veto provision was termed the "key provision" of the bill.[45] Furthermore, even though aware of the constitutional questions surrounding the legislative veto, Congress chose not to include a severability provision in the 1977 Reorganization Act.[46]

38. *Id.* at 585 n.27.

39. *Id.* at 585.

40. 424 U.S. 1, 108–09 (1976).

41. 103 S. Ct. 2764, 2774 (1983).

42. Ch. 314, § 407, 47 Stat. 382, 414. President Hoover requested authority in 1929 to reorganize the executive branch subject to a "power of revision" by Congress. That authority was granted subject to the first legislative veto provision. *See* Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies,* 75 NW. U.L. REV 1064, 1089 n.74 (1981).

43. President Roosevelt was granted reorganization authority for a two-year period under a statute not containing a veto provision, but still subject to the requirement that a proposed reorganization should lie before Congress for 60 days before taking effect. Act of Mar. 3, 1933, ch. 212, § 407, 47 Stat. 1489, 1519. However, when this authority was renewed, a veto provision was inserted. Reorganization Act of 1939, ch. 36, § 5, 53 Stat. 561, 562–63.

The Reorganization Acts of 1939, 1945, 1949, and 1977 all contained legislative veto provisions. Reorganization Act of 1939, ch. 36, § 5, 53 Stat. 561, 562–63; Reorganization Act of 1945, ch. 582, § 6, 59 Stat. 613, 616; Reorganization Act of 1949, ch. 226, § 6, 63 Stat. 203, 205; Reorganization Act of 1977, 5 U.S.C. § 906(a) (1982).

44. Representative Brooks, one of the sponsors of the 1977 Reorganization Act, favored a bill with no legislative veto provision because of the constitutional questions involved. H.R. REP NO 105, 95th Cong., 1st Sess. 36–38 (1977). For remarks by other members of Congress who viewed the veto as unconstitutional, see 123 CONG. REC. 9351 (Rep. Walker) (1977); *id.* at 9351–52 (Rep. Drinan) (1977).

45. H.R. REP NO 105, 95th Cong., 1st Sess. 17 (1977).

46. As the *Allstate* court noted, the only severability provision considered was directed to limiting the courts' power to grant relief to a holding that a single reorganization plan, rather than all plans

The scope of delegation under the 1977 Reorganization Act explains why Congress was so adamant about maintaining legislative veto power. The reorganization authority delegated under the Act was broad, enabling the President to make major changes in the structure and functioning of the executive branch. Additionally, it would have been difficult for Congress to overturn, through legislation, a reorganization by the President. By the time Congress could have mobilized both houses to disapprove a presidential reorganization, and possibly override a presidential veto, the reorganization would likely be a fait accompli. At that point, legislative reversal of the reorganization might involve substantial disruption of the executive branch. With a legislative veto provision, however, Congress could quickly review the President's reorganization without having to balance a decision to disapprove it against such disruption. In short, because Congress was determined to maintain a veto over the President's broad reorganization authority, it probably would not have enacted the 1977 Reorganization Act without the legislative veto provision. Therefore, under *Champlin* and the cases following it, the legislative veto should be held inseverable from the remainder of the Act.

B. Congressional Ratification of the Transfer of ADEA and Equal Pay Act Enforcement to the EEOC

There are two distinct ratification arguments. The first argument, made by Justice White in his *Chadha* dissent, treats Congress' failure to veto an executive or agency action as ratification of that action.[47] This argument was rejected by the *Chadha* majority.[48] The second argument, which appears in *Muller Optical* and the cases in accord with it,[49] treats Congress' subsequent appropriations for the performance of an action as ratification of that action.[50]

The Supreme Court has held that Congress may, through appropria-

formulated under the Reorganization Act, was unconstitutional. EEOC v. Allstate, 570 F. Supp. 1224, 1231 (S.D. Miss. 1983). The discussion of that amendment, which was not adopted, did not even address whether the one-house veto should be severed from the Act. 123 CONG. REC. 9363–65 (1977).

47. *Chadha*, 103 S. Ct. 2764, 2807–08 (1983) (White, J., dissenting). Justice White correctly noted that the Court recently has accorded weight to Congress' failure to act in a given area. *See, e.g.*, Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2033 (1982), which Justice White cited in support of the proposition. His argument, however, is predicated on the "reverse legislation" concept rejected by the *Chadha* majority and thus cannot succeed in light of the *Chadha* holding. *See supra* notes 20–22 and accompanying text.

48. 103 S. Ct. at 2787–88 n.22.

49. *See supra* notes 10–12 and accompanying text.

50. The district courts relied on Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301 (1937), and Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147 (1937).

tions acts, ratify what it might have authorized.[51] The Court has cautioned, however, that the appropriation must plainly show a purpose to grant the precise authority which is claimed.[52] Since the 1978 reorganization, Congress has appropriated money to the EEOC for the enforcement of the ADEA and the Equal Pay Act, giving the EEOC the authority to enforce the two Acts.[53]

Nevertheless, the district courts have split on the question of congressional ratification of the EEOC's authority to enforce the ADEA and the Equal Pay Act. The *Muller Optical* line of cases held that Congress had ratified the President's transfer of ADEA enforcement to the EEOC.[54] In deciding that the authority of the President to transfer the functions of one administrative agency to another could be ratified by Congress' subsequent appropriations, the *Muller Optical* court relied on *Isbrandtsen-Moller Co. v. United States*.[55] *Allstate* and *Chrysler* were among the cases holding against congressional ratification of the enforcement authority.[56] In rejecting the ratification argument, the *Allstate* court relied on *Greene v. McElroy*.[57]

The *Allstate* court did not discuss *Isbrandtsen-Moller* and misapplied *Greene*. In *Greene* the Supreme Court held that congressional authorization of constitutionally suspect action must be expressly given.[58] In con-

51. *Isbrandtsen-Moller*, 300 U.S. at 147.

52. *Ex parte* Mitsuye Endo, 323 U.S. 283, 303 n.24 (1944).

53. Two recent acts appropriated money to the EEOC to enforce the ADEA. Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1874 (1982); Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183, 1192 (1981). The Act of Dec. 21, 1982 also explicitly appropriated money for EEOC enforcement of the Equal Pay Act, Pub. L. No. 97-377, 96 Stat. 1830, 1874 (1982).

54. Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983). *See supra* notes 10–11 and accompanying text.

55. *Muller Optical*, 574 F. Supp. at 953–54. In *Isbrandtsen-Moller*, 300 U.S. 139, 147 (1937), the plaintiff contended that the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce were invalid because not properly authorized by Congress. The Supreme Court held that whatever doubt existed as to the validity of the transfer, and the President's authority to effectuate it, was resolved because Congress recognized the validity of the transfer and ratified the President's action by appropriating funds to the Department of Commerce to carry out the provisions of the Shipping Act. *Id.*.

56. *See* EEOC v. Allstate Insurance Co., 570 F. Supp. 1224, 1232 (S.D. Miss. 1983); EEOC v. Chrysler Corp., LAB REL. REP (BNA) (33 Fair Empl. Prac. Cas.) 1838, 1840–41 (E.D. Mich. Jan. 23, 1984). The *Chrysler* court rejected the ratification argument on the ground that the subsequent legislation did not show a sufficient legislative intent to ratify the transfer.

57. *Allstate*, 570 F. Supp. at 1234 (citing *Greene*, 360 U.S. 474 (1959)).

58. *Greene*, 360 U.S. 474, 508 (1959). The issue considered in *Greene* was whether the Department of Defense had the implied authority to revoke the plaintiff's security clearance, resulting in his loss of employment, in a proceeding in which he had no opportunity to confront and cross-examine those whose statements reflected badly on him. The Court held that the plaintiff's fifth amendment liberty and property rights were implicated, and that authority to take actions within the area of questionable constitutionality must be explicitly delegated by Congress because such action "requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Id.* at 506–07.

trast, EEOC enforcement of the ADEA and the Equal Pay Act raises no constitutional questions, assuming proper congressional authorization. The *Allstate* court's position that the EEOC's original authorization to enforce the Act was constitutionally suspect is clearly question-begging. It is precisely the constitutional infirmity of the Reorganization Act that makes it necessary to take up the ratification question at all.[59] The *Allstate* court failed to recognize that the Supreme Court refused to find an implied authorization in *Greene* because the action for which such authorization was sought was constitutionally suspect. Here, however, the action involved the transfer of administrative functions from one governmental agency to another, does not involve any constitutional questions.[60] Therefore, the courts should uphold the congressional ratification of EEOC enforcement of the Equal Pay Act and the ADEA.

C. Retroactive Application of the Chadha *Rule*

The Supreme Court has formulated a three-pronged test for determining when a holding in a civil case should not be applied retroactively.[61] First, the decision must establish a new rule of law, either by overruling past precedent or by deciding a question of first impression. Second, in light of the purpose and effect of the new rule, the court must determine whether retroactive application would further or retard its operation. Third, the court must consider whether retroactive application of the new rule would produce substantial inequitable results.

When the Supreme Court decides that a law-changing decision will not be applied retroactively, it usually does so by making a general determination applicable to all situations.[62] A general determination of whether or not to apply *Chadha* retroactively, however, would require evaluating its impact on approximately 200 legislative veto provisions. Such an undertaking is beyond the scope of this Comment. Indeed, one court has indicated that because of the difficulty involved in formulating a uniform rule, the *Chadha* decision should be analyzed for retroactive application on a case-by-case basis.[63] The following analysis of the legislative veto provision in the 1977 Reorganization Act[64] indicates that retroactive application is not suitable for the *Chadha* holding in this situation.

59. *Allstate*, 570 F. Supp. at 1233–34.
60. *See Muller Optical*, 574 F. Supp. at 954.
61. Chevron Oil Co. v. Huson, 404 U.S. 97, 107–08 (1971).
62. *See generally* Annot., 65 L. Ed. 2d 1219, 1242–48 (1980).
63. EEOC v. Chrysler Corp., 7 LAB. REL. REP. (BNA) (33 Fair Empl. Prac. Cas.) 1838, 1843 n.4.
64. 5 U.S.C. § 906(a) (1982).

1. The Chadha *Decision Establishes a New Rule of Law*

The first prong of the Supreme Court test requires that, to be applied prospectively only, a holding must establish a new rule of law.[65] *Chadha* clearly establishes a new rule of law. The Supreme Court had not previously ruled on the constitutionality of the legislative veto. There was no consensus among the lower courts that the legislative veto was unconstitutional.[66] The extensive commentary on the veto was split on the question of its constitutionality.[67] Congress, by using the veto for fifty years, indicated its view that the device was constitutional.[68] The Supreme Court has indicated that where the Court invalidates the prevailing statutory norm, as it did in *Chadha*, the "new rule of law" requirement is satisfied.[69]

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65. A decision can establish a new rule of law either by overruling past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971).

66. The first federal court to decide the question upheld the constitutionality of the veto before it. Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). It was not until 1980, after approximately 50 years of use, that a legislative veto provision was held unconstitutional in the federal courts. Chadha v. Immigration and Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), *aff'd*, 103 S. Ct. 2764 (1983).

67. Justice White in his *Chadha* dissent, 103 S. Ct. at 2797 n.12, cited the commentary on the legislative veto. The following are generally favorable to the legislative veto: Abourezk, *Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative*, 52 IND L.J. 323 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH L. REV 467 (1962); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV 455 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND L.J. 367 (1977); Nathanson, *supra* note 42; Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV 565 (1953); Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN L. REV 277 (1975); Rodino, *Congressional Review of Executive Actions*, 5 SETON HALL 489 (1974); Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U. L. REV 1031 (1955).

The following are generally unfavorable to the legislative veto: Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV L. REV. 1369 (1977); Dixon, *supra* note 20; 56 N.C.L. REV. 423 (1978); Ginaane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV L. REV 569 (1953); 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*, 63 CALIF L. REV 983 (1975); Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285; Recent Developments, *The Legislative Veto in the Arms Control Act of 1976*, 9 LAW & POL'Y INT'L BUS. 1029 (1977).

68. The Supreme Court has indicated that congressional judgments as to the constitutionality of a statute are entitled to some weight. In Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court indicated that the fact that Congress chose to vest broad jurisdiction in the bankruptcy courts, after substantial consideration of the constitutional questions involved, was reason to respect the congressional conclusion of constitutionality. *Id.* at 61. The Court, however, held the legislation unconstitutional. *See infra* note 74.

69. See, for example, United States v. Peltier, 422 U.S. 531, 542–43 (1975), where the Court stated that

The only courts to address the retroactivity issue, in the *Chrysler* and *Allstate* decisions, reached conflicting results. The *Chrysler* court correctly held that the *Chadha* decision formulated a new rule of law.[70] Because the *Allstate* court misunderstood the first prong of the retroactivity test, it held that *Chadha* was not a law-changing decision.[71]

The *Allstate* court erred in three respects in formulating its holding. First, it indicated that *Allstate* was not a new rule of law.[72] The question before the court, however, was whether *Chadha,* not *Allstate,* presented a new rule of law. Second, the *Allstate* court suggested that congressional awareness of the constitutional questions surrounding the legislative veto foreshadowed the *Chadha* decision.[73] The Supreme Court has indicated, however, that such congressional awareness should not be considered in determining whether or not a decision has been foreshadowed.[74] Finally, the *Allstate* court understood the Supreme Court's silence on the issue of retroactivity, in the face of the Court's recognition that the *Chadha* decision would have far-reaching effect, as evidence that *Chadha* should be applied retroactively.[75] The court's rationale is faulty. The majority of the Supreme Court's decisions not to apply a case retroactively were reached not in the law-changing case itself, but in a later case.[76] This is true even

since the parties acknowledge that *Almeida-Sanchez* was the first [such] case to be decided by this Court, unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm.

70. EEOC v. Chrysler Corp., 7 LAB. REL. REP. (BNA) (33 Fair Empl. Prac. Cas.) 1838, 1843 (E.D. Mich. Jan. 23, 1984).

71. EEOC v. Allstate Insurance Co., 570 F. Supp. 1224, 1233 (S.D. Miss. 1983).

72. Addressing the first criterion, the *Allstate* court stated:

[T]his is not a case of first impression and the decision of this Court was definitely foreshadowed by prior events. Not only has the Supreme Court acted in *Chadha,* but it has been obvious in a review of the legislative history that Congress was well aware that such a decision might ultimately invalidate their [sic] use of the one-house veto scheme.

570 F. Supp. at 1233.

73. *Id.*

74. In Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court held that the Bankruptcy Reform Act, 28 U.S.C. § 1471 (1982), violated article III. It then held that the decision would be applied prospectively only. The Court attached no particular significance to the fact that the House of Representatives had expressed doubts as to the constitutionality of provisions eventually included in the Act. 458 U.S. at 61 n.12. In fact, the Court indicated that the congressional opinion of constitutionality was entitled to some deference. *See supra* note 68 and accompanying text.

75. *Allstate,* 570 F. Supp. at 1233.

76. In some instances the Supreme Court decided the retroactivity question in the law-changing decision itself. *See, e.g., Northern Pipeline,* 458 U.S. at 88. It has been more common, however, for the court to address the retroactivity issue in a later case. *See, e.g.,* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (denying retroactive application to Rodrigue v. Aetna Casualty & Sur. Co., 395 U.S. 352 (1969)); Stovall v. Denno, 388 U.S. 293 (1967) (denying retroactive appliction to United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967)); Johnson v. New Jersey, 384 U.S. 719 (1966) (denying retroactive application to Miranda v. Arizona, 384 U.S. 436

of decisions with "far-reaching effects."[77] Therefore, the fact that the Court did not address the retroactivity issue in *Chadha* is not evidence that *Chadha* should be applied retroactively.

2. *The Purpose and Effect of the* Chadha *Rule*

The Supreme Court has indicated that the most important criterion for determining the retroactivity question is whether the history, purpose, and effect of the new rule would be better served by prospective-only, or prospective and retroactive application.[78] The Court in *Chadha* clearly delineated the purposes of the rule it formulated.[79] The Court stressed that the article I process for enacting legislation serves important purposes in maintaining the balance of power and separation of powers doctrines which underlie our system of government. The Court indicated that legislative activity must comply with article I to ensure that the checks and balances envisioned by the Constitution are not eroded.[80]

In the context of Reorganization Plan No. 1,[81] the purposes of the *Chadha* rule would not be furthered by retroactive application. When President Carter transferred enforcement authority of the Equal Pay Act and the ADEA to the EEOC, no veto was interposed. Therefore, Congress took no legislative action inconsistent with the requirements of article I. Applying *Chadha* retroactively would have deleterious effects on the stat-

(1966) and Escobedo v. Illinois, 378 U.S. 478 (1964)). For an argument that the Supreme Court should procedurally revamp the way in which it handles the retroactivity issue, see Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1612–25 (1975).

77. Certainly Miranda v. Arizona, 384 U.S. 436 (1966), holding that accused persons must be informed of their fifth amendment rights before any statements may be used against them, was a decision with far-reaching effects. However, the Court did not address the retroactivity issue in *Miranda* itself, but rather in the later case of Johnson v. New Jersey, 384 U.S. 719 (1966).

78. Desist v. United States, 394 U.S. 244, 249 (1969).

79. *Chadha*, 103 S. Ct. at 2782–84. Citing its own prior decisions and writings of the Framers, the Court noted that the presentment clauses, U.S. CONST. art. I, § 7, cls. 2, 3, serve three purposes: First, to circumscribe Congress' power and enable the Executive to defend itself against that power; second, to discourage the passage of bad legislation through haste, inadvertence, or design; and third, to assure that the national perspective of the President as a representative of the people is maintained in the legislative process. 103 S. Ct. at 2782–83. The Court also indicated that the purposes of the presentment clauses are interdependent with the purposes of the bicameralism requirement. U.S. CONST art. I, §§ 1, 7. The Court identified those as: First, to reemphasize the second purpose of the presentment clauses, namely, to encourage that legislation is fully and carefully considered before passage; second, to restrain the legislature in order to avert the threat of despotism; and third, to ensure that neither the larger nor the smaller states impose their will unduly on the other. 103 S. Ct. at 2783–84. The Court concluded that "the prescription for legislative action in Art. I, §§ 1, 7 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." *Id.* at 2784.

80. 103 S. Ct. at 2787–88.

81. U.S.C. § 901 (1982) (transferring enforcement responsibility for the ADEA and the Equal Pay Act).

utory scheme against employment discrimination.[82] The unexercised veto provision has a relatively small impact on the legislative process.[83] Thus, in the context of Reorganization Plan No. 1, prospective-only application of the *Chadha* rule would effectuate the purposes behind the rule without causing unnecessary disruption of the statutory scheme.[84]

3. *Retroactive Application of the* Chadha *Rule Would Be Inequitable*

The third prong of the retroactivity test determines whether retroactive

82. *See infra* notes 88–92 and accompanying text.

83. Even the commentators who have argued that an unexercised veto provision detrimentally affects the legislative process, *see supra* notes 24–29 and accompanying text, find the veto least objectionable in the "reverse legislation" category into which the Reorganization Acts fall. *See supra* notes 20–21 and accompanying text; Dixon, *supra* note 20, at 481–86. One commentator argues that in the Reorganization Act context:

> The Congressional veto . . . does not interfere with the administrative process of executing public law. It merely checks the President's authority to propose what may be regarded as amendments to the existing statute-based structure of the executive branch. . . . [There is not] any tampering with the authorized administrative discretion in a continuous program.

Id. at 484.

84. The courts, however, still need to determine the degree of prospective application. For a discussion of the various degrees of prosepctivity which the Supreme Court has utilized, see Annot., 65 L. Ed. 2d 1219, 1242–50 (1980). There are two possibilities: (1) apply the *Chadha* rule to all cases at a certain stage in the judicial process, *see id.* at 1243–48, or (2) apply the *Chadha* rule to all legislative vetoes enacted or exercised after a certain "cut-off" date, *see id.* at 1248–50. The first possibility is commonly used in criminal cases, where the courts are concerned about the effects of retroactive application of new constitutional rights to those whose convictions are final. *See, e.g.*, Tehan v. United States, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965); Angelet v. Fay, 381 U.S. 654 (1965). These concerns do not apply in the legislative veto context. The second possibility, therefore, should apply to *Chadha*. While the Court has summarily affirmed two lower court decisions invalidating the legislative veto, Process Gas Consumers Group v. Consumer Energy Council, 103 S. Ct. 2556 (1983), *aff'g* Consumer Energy Council v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), this does not preclude the Court from later deciding not to apply the *Chadha* rule retroactively. The issue of retroactivity was not addressed in those cases. The Supreme Court has previously held that the application of a law-changing decision to cases on direct review, with no discussion of retroactivity principles, does not preclude it from later applying the law-changing decision retroactively. United States v. Peltier, 422 U.S. 531, 536 n.5 (1975). Applying *Chadha* prospectively-only would ensure that, in the future, legislative vetoes will not be exercised in contravention of the article I requirements, without implicating the 200-plus existing statutes containing veto provisions. This is not an insignificant effect because Congress has continued to enact legislative veto provisions in the wake of the *Chadha* decision. *See* Granat, *Inside Congress: Legislative Vetoes are Passed Despite High Court Decision*, CONG. Q. WEEKLY REP., Oct. 29, 1983, at 2235.

Of course, vetoes exercised before the "cut-off" date would be unreachable. However, in most situations where a veto was exercised, the executive or agency has resolved the situation by adopting different proposals or regulations more acceptable to Congress. Therefore, the number of exercised vetoes which would be challenged in the courts, even if *Chadha* were granted full retroactive application, is small. Furthermore, were the courts to give effect to a vetoed proposal, Congress would likely either invalidate the proposal by passing a statute to that effect, or refuse to appropriate money for the proposal.

application would impose inequities on any party.[85] Applying the *Chadha* rule to invalidate the transfer of Equal Pay Act and ADEA enforcement to the EEOC would impose serious inequities on the parties protected by these two validly enacted statutes.[86] Additionally, such an application would frustrate Congress' intent to prohibit employment discrimination, would considerably impair governmental enforcement efforts, and would benefit discriminatory employers, who could use the *Chadha* decision to avoid compliance with the Equal Pay Act and the ADEA.

The *Allstate* court stated that "there are no individual cases in which retroactive application of this decision would produce inequitable results. The Equal Pay Act includes a provision for individuals to sue in their own right."[87] The court, however, ignored the fact that, as in *Allstate*, a citizen suit is precluded by the initiation of a government suit.[88] The holding that the EEOC does not have the authority to enforce the Equal Pay Act and the ADEA will mean at the least a substantial delay for any employee who has been precluded from suing by the government suit. More seriously, some plaintiffs may find their claims time-barred if they were precluded from suing during the two-year limitation period[89] by a government suit. A significant delay in, or bar of, the enforcement of a validly created statutory right certainly constitutes an inequitable result.

Similar inequities will obtain in ADEA enforcement if the *Allstate* rather than *Chrysler* decision is followed. For instance, under the ADEA a private party cannot file a suit until sixty days after reporting any violation to the EEOC, and then only if a government suit is not initiated.[90] Thus, the problems of delay and time bar are as significant under the ADEA [91] as under the Equal Pay Act. Furthermore, a government suit cannot be commenced until informal methods of conciliation, conference, and persuasion have been attempted by the enforcing agency.[92] This presents the added problem of enforcing the informal conciliation efforts. The EEOC has conducted such conciliation efforts since 1978

85. Chevron Oil Co. v. Huson, 404 U.S. 97, 108 (1971).

86. The court in EEOC v. Chrysler Corp. found that "[t]he most compelling reason to deny retroactive application [of the *Chadha* decision] is that it would be extremely unfair to the individual claimants in this suit to do so." 7 LAB REL REP (BNA) (33 Fair Empl. Prac. Cas.) 1838, 1843 (E.D. Mich. Jan. 23, 1984).

87. EEOC v. Allstate, 570 F. Supp. 1224, 1233 (S.D. Miss. 1983). The citizen suit provision is 29 U.S.C. § 216(b) (1982).

88. There are three enforcement provisions in the Equal Pay Act: (1) a citizen suit under 29 U.S.C. § 216(b) (1982), (2) a government suit at citizen request under 29 U.S.C. § 216(c), and (3) a government injunctive suit under 29 U.S.C. § 217. Suit by the government under either § 216(c) or § 217 precludes the employee from suing. *Id.*

89. *Id.* § 255(a).

90. *Id.* § 626(d).

91. The ADEA is also subject to a two-year statute of limitations. *Id.* § 255(a).

92. *Id.* § 626(b).

and, logically, if the EEOC had no such authority, employers would be free to repudiate all agreements reached through the EEOC's efforts for the last six years. Such a result would be highly inequitable. Yet, this may be the effect of the *Allstate* holding.

The inequities that would result from invalidating EEOC enforcement of the ADEA and the Equal Pay Act suggest that the courts should not apply the *Chadha* holding retroactively in this context. Furthermore, the *Chadha* decision should be analyzed for prospective-only application in all cases involving unexercised legislative veto provisions.

In the context of the transfer of ADEA and Equal Pay Act enforcement to the EEOC, the *Chadha* decision meets all three of the requirements established by the Supreme Court for prospective-only application. It established a new rule of law, overturning the legislative veto which had been used for fifty years under the prevailing statutory norm prior to the *Chadha* decision. The purpose of the *Chadha* rule, ensuring compliance with the article I process for enacting legislation, would not be furthered by retroactive application in this context because no veto was ever interposed against the transfer of authority to the EEOC. Finally, it would be extremely inequitable to apply the *Chadha* rule retroactively in such a way as to impair the statutory rights of the aggrieved individuals the ADEA and the Equal Pay Act were designed to protect.

III. CONCLUSION

The Supreme Court's holding in *Chadha,* and the relevant policy considerations, compel the conclusion that legislative veto provisions should be held unconstitutional, even where unexercised. The disruption of the statutory scheme caused by such a holding can and should be minimized in several ways. First, the courts should determine whether the unconstitutional veto provision is severable from the statute involved. If not severable, the courts should consider the possibility that Congress has ratified the executive or administrative action, even though the initial authorization was suspect because of the presence of a legislative veto provision. Finally, the courts should analyze the *Chadha* decision for prospective-only application using the principles the Supreme Court has developed. The courts should determine whether prospective-only application would further the purpose and effect of the *Chadha* rule by ensuring future compliance with the demands of article I, without unnecessarily and inequitably disrupting the existing statutory scheme.

Applying these provisions to the EEOC litigation indicates that the EEOC's authority to enforce the ADEA and the Equal Pay Act should nonetheless be upheld. There are two bases for such a holding: Congress

ratified the EEOC's enforcement of the two acts through appropriations; and the *Chadha* rule should not be applied retroactively in this context.

Tracy Pool