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SEPARATION OF POWERS, LEGISLATIVE VETOES, AND THE PUBLIC LANDS

EUGENE R. GAETKE*

The Supreme Court’s decision in Immigration and Naturalization Service v. Chadha1 struck a serious, if not fatal, blow to the constitutional acceptability of the legislative veto.2 In Chadha the Court held that a provision of the Immigration and Naturalization Act,3 which permitted one House of Congress to reverse a decision by the Attorney General not to deport an alien,4 was a violation of the doctrine of separation of powers since it did not comply with the requirements of passage by both Houses of Congress and presentment to the President.5 In light of that decision, the constitutionality of nearly 200 statutes6 utilizing some form of the legislative veto7 is questionable.

The effect this decision may have on the balance of powers between Congress and the executive branch is of obvious significance.8

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1. 103 S. Ct. 2764 (1983). The case is discussed further in the text infra accompanying notes 13-32.
2. A “legislative veto” is a statutory device whereby Congress, through action other than traditional legislation, may disapprove of certain action taken by the Executive Branch. The concept has been implemented in a number of different ways. Typically, the statutes utilizing legislative vetoes require certain administrative agency actions to be placed before both Houses of Congress or before certain committees within Congress. The agency action does not become effective until a specified time has passed. During this period the proposed action may be disapproved by one or both Houses of Congress or, in some cases, by a specified committee within Congress. For further discussion of the variations of the legislative veto as utilized by Congress, see Breyer, The Legislative Veto After Chadha, 73 GEO. L.J. 785, 785-86 (1984); DeConcini & Faucher, The Legislative Veto: A Constitutional Amendment, 21 HARV. J. ON LEGIS. 30, 30-34 (1984); Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 VA. L. REV. 253, 256-57 n.9 (1982). For an excellent historical discussion of the legislative veto, see Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 CALIF. L. REV. 983, 991-1029 (1975).
5. 103 S. Ct. at 2787.
6. Id. at 2788 (Powell, J., concurring), 2792 (White, J., dissenting).
7. Such statutes vary considerably as to the procedure for congressional review of agency actions and as to the congressional action necessary to reverse those actions. For authorities discussing these variations, see supra note 2.
8. The legislative veto has prompted considerable scholarly comment, both before and after the Court’s decision in Chadha. Pre-Chadha discussions of the issue are listed at 103 S. Ct. at 2797 n.12 (White, J., dissenting). Post-Chadha discussions of the Court’s decision are listed in Glicksman, Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions, 36 HASTINGS L.J. 1, 20 n.133 (1984).
For those interested in the power of Congress over the public lands, the implications of the Chadha decision are of particular importance.

Under that portion of article IV of the Constitution known as the property clause, Congress is given the power "to dispose of and make all needful Rules and Regulations respecting" the public lands.9 Utilizing this authority, Congress has frequently reserved the power to review and reject decisions made by agencies delegated the authority to manage the public lands. These reservations of power are often stated in the terms of a legislative veto.10 That device has thus become a prominent feature of public lands legislation.11 If the Court's deci-

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The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Besides its article IV powers, Congress has additional powers over a limited category of federal lands under article I. For a discussion of these powers, see Gaetke, Refuting the "Classic" Property Clause Theory, 63 N.C.L. REV. 617, 619 n.5 (1985); Gaetke, Congressional Discretion Under the Property Clause, 33 HASTINGS L.J. 381, 381 n.2 (1981). This Article, however, is limited to a discussion of Congress' powers under the property clause of article IV.

10. Numerous public lands statutes contain some form of legislative veto. See, e.g., Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982) (the Secretary of Interior has power to grant oil and gas leases to certain submerged lands and to determine the bidding system under which such leases are to be awarded. The bidding systems, however, must be submitted by the Secretary to both Houses of Congress and become effective only if neither House passes a resolution of disapproval within 30 days); 43 U.S.C. § 1337(a)(1),(a)(4)(A) (1982); Outer Continental Shelf Lands Act 43 U.S.C. §§ 1353-1354 (1982) (exports of oil and gas in possession of federal government are subject to concurrent resolution of disapproval by Congress); the Colorado River Basin Salinity Control Act, 43 U.S.C. §§ 1571-1599 (1982) (Congress retained power to veto modifications of project proposed by Secretary of Interior), 43 U.S.C. §§ 1574, 1598(a) (1982); The Act in Implementation of Alaska Native Claims Settlement and Alaska Statehood, 43 U.S.C. §§ 1601-1628 (1982) (no additional congressional review provided but an exception to certain treatment of withdrawals under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1783 (1982) is included, where those withdrawals were approved by concurrent resolution of Congress).

11. The first use of the legislative veto concept may have been in the Northwest Ordinance of 1787, a public lands statute under the Confederation, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334-43 (1787), re-enacted during the First Congress under the Constitution. Act of Aug. 7, 1789, ch. VIII, § 1, 1 Stat. 50-51 (1789). That statute provided for congressional review of all laws of territories carved out of the public lands. See 103 S. Ct. at 2800-01 n.18 (White, J., dissenting). Contra Watson, supra note 2, at 994-95 n.37.

The most notable utilization of the legislative veto device in public land law is the Federal Land Policy and Management Act of 1976. 43 U.S.C. §§ 1701-1783 (1982). This statute reasserted congressional control over the sale of federal lands and their withdrawal from the operation of other public lands legislation. Under the act, numerous actions taken by the Secretary of the Interior pertaining to the public lands are subject to congressional reversal by concurrent resolution. See 43 U.S.C. §§ 1712(e), 1713(c), 1714(c)(1), 1714(k)(1), 1722(b) (1982). For a thorough discussion of the act and its legislative veto provisions, see Glicksman, supra note 8, at 6-16, 33-45.

Furthermore, under the act, if the Committee on Interior and Insular Affairs of either House of Congress determines and notifies the Secretary that an emergency exists relative to certain federal lands and that "extraordinary measures must be taken to preserve values that would otherwise be lost", the Secretary must withdraw the lands in question. 43 U.S.C. § 1714(e) (1982). By this provision, some-
sion in *Chadha* renders unconstitutional such reservations of power under the property clause, considerable statutory revision will be necessary to preserve congressional control over public lands management.\^12

This Article explores the question of whether legislative vetoes enacted under the article IV property clause power of Congress are subject to the same objections made by the Court to the legislation reviewed in *Chadha*. In Part I, this Article will briefly examine the *Chadha* decision and the Court's objections to the legislation involved in that case. Part II of the Article looks at case law that supports an argument that legislative veto provisions found in property clause legislation are not subject to the objections made by the Court in *Chadha*. In Part III, the Article measures the use of legislative vetoes in the property clause context against the purposes underlying the doctrine of separation of powers and concludes that such legislative vetoes may well be constitutional under *Chadha*. Finally, in Part IV, this Article suggests a limitation on that conclusion necessitated by the breadth of the property clause power.

I. THE COURT'S DECISION IN *CHADHA*\^13

The legislative provision under review in *Chadha*\^14 required the
Attorney General to submit to both Houses of Congress executive decisions not to deport aliens found to be deportable under the immigration laws.\textsuperscript{15} By that provision Congress reserved the power to disapprove of such decisions by resolution of either House and, thereby, cause the deportation of the alien involved.\textsuperscript{16} Under the legislation, the congressional veto of the attorney general's action required neither the majority action of both Houses nor presentment of the resolution for possible presidential veto.\textsuperscript{17}

The Court\textsuperscript{18} found the legislative veto provision under review to be a violation of the doctrine of separation of powers.\textsuperscript{19} It perceived congressional action under the provision to be an exercise of congressional "legislative powers"\textsuperscript{20} necessitating compliance with the article I procedural requirements of bicameralism and presentment to the President.\textsuperscript{21} The majority opinion, however, also expressly recognized that not all congressional action requires such bicameral passage and presentment.\textsuperscript{22} According to the majority in \textit{Chadha}, the critical

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\item \textsuperscript{8} U.S.C. § 1254(c)(2) (1982) (emphasis added).
\item \textsuperscript{15} Chadha had overstayed his nonimmigrant student visa. Conceding that he was deportable under the Immigration and Naturalization Act, he applied for suspension of deportation under 8 U.S.C. § 1254(a)(1) (1982), which grants the Attorney General discretion to suspend deportable aliens under certain specified circumstances. The immigration judge granted Chadha's application, ordered his deportation to be suspended, and transmitted a report of the suspension to Congress pursuant to the statute. 103 S. Ct. at 2770.
\item \textsuperscript{16} 8 U.S.C. § 1254(c)(2) (1982).
\item \textsuperscript{17} See supra note 14.
\item \textsuperscript{18} Chief Justice Burger delivered the majority opinion, 103 S. Ct. at 2769, joined by six members of the Court. Justice Powell concurred in the result, 103 S. Ct. at 2788, contending that the legislative veto provision constituted judicial action which was beyond the powers of Congress. \textit{Id.} at 2791-92. Justice White dissented, 103 S. Ct. at 2792, emphasizing that the proper approach to the constitutional question should be to determine whether the legislative veto provision under review complies with the purposes of the presentment and bicameralism requirements. \textit{Id.} at 2798 (White, J., dissenting). Justice Rehnquist also dissented, in an opinion joined by Justice White, but limited his objections to the majority's treatment of the issue of severability. \textit{Id.} at 2816-17 (Rehnquist, J., dissenting).
\item \textsuperscript{19} 103 S. Ct. at 2787.
\item \textsuperscript{20} \textit{Id.} at 2784-87.
\item \textsuperscript{21} \textit{Id.} at 2787. Those procedural requirements are found in \textit{U.S. CONST.} art. I, § 7, cl. 2, 3.
\item \textsuperscript{22} 103 S. Ct. at 2784. The opinion notes four express and unambiguous exceptions to the Article I requirements of bicameralism and presentment: the House of Representatives' power to initiate impeachments (\textit{U.S. CONST.} art.I, § 2, cl. 6), the Senate's power to try impeachments (\textit{U.S. CONST.} art.I, § 3, cl. 5), the Senate's power to approve and disapprove presidential appointments (\textit{U.S. CONST.} art.II, § 2, cl. 2), and the Senate's power to ratify treaties (\textit{U.S. CONST.} art.II, § 2, cl. 2). 103 S. Ct. at 2786. Regarding these exceptions, the majority further notes that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." 103 S. Ct. 2786-87 & n.20. The Court's discussion of these express exceptions might be read as an implicit denial that other exceptions exist to the article I requirements of bicameral passage and presentment to the President. However, the majority also makes reference to an implicit exception to the presentment requirement of article I. \textit{Id.} That implicit exception is the congressional power to propose amendments to the Constitution found in article V. Although article V describes the size of the majority necessary to propose such an amend-
question is whether the congressional action under review is, "in law and fact, an exercise of legislative power."\textsuperscript{23}

Some guidance for determining whether a congressional action is "legislative" for purposes of article I's procedural requirements is provided by the opinion. First, the Court presumed that any action taken by Congress is legislative in character because that is the power delegated to that branch by the Constitution.\textsuperscript{24} The Court then looked to the purpose and effect of the congressional action accomplished by the exercise of the legislative veto.\textsuperscript{25} In this regard, the Court emphasized that the House's action in \textit{Chadha} altered the "legal rights and duties of persons, including the Attorney General, executive branch officials and Chadha, all outside the legislative branch," which reflected the action's legislative nature.\textsuperscript{26} The Court further noted that the legislative veto in \textit{Chadha} effectively constituted an amendment of the immigration statute by requiring the Attorney General to take an action which was discretionary under that statute.\textsuperscript{27} Finally, the Court emphasized that since a delegation of discretion to the Attorney General is a legislative policy decision which could only be accomplished by compliance with article I's procedural requirements, congressional alterations of or restrictions upon that delegation are also legislative policy decisions requiring such compliance.\textsuperscript{28}

It is apparent from the Court's opinion that the focus of an inquiry regarding the application of \textit{Chadha} to any other legislative veto provision must be on whether the character and effect of the action encompassed by the veto is legislative in nature.\textsuperscript{29} The breadth of this approach has caused many to express concern about the constitutional

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\item \textsuperscript{23} 103 S. Ct. at 2784 (emphasis added).
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 2785.
\item \textsuperscript{28} Id. at 2786.
\item \textsuperscript{29} "Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" 103 S. Ct. at 2784 (citing S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)). The Court also notes: Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I.
\end{itemize}

103 S. Ct. at 2787 (emphasis added).
validity of the legislative veto device in any context.\textsuperscript{30}

The Court in \textit{Chadha}, however, expressly addressed only the constitutionality of a legislative veto provision contained in article I legislation.\textsuperscript{31} Whether legislative vetoes in the article IV property clause context would fail under \textit{Chadha}, therefore, would seem to be a question left open by the decision.\textsuperscript{32} If such congressional actions are less “legislative” than the action reviewed in \textit{Chadha}, there may well be reason to uphold legislative vetoes in statutes providing for management of the public lands.

\section{II. The Case Law Implicating Different Treatment}

Certain rather aged Supreme Court case law suggests that the requirement of bicameralism and presentment may not be applicable to all non-article I actions by Congress. This case law may provide a basis for distinguishing legislative vetoes found in property clause enactments from the provision held unconstitutional in \textit{Chadha}.

The Supreme Court addressed the presentment requirement in a non-article I context before the end of the eighteenth century. In the 1798 decision of \textit{Hollingsworth v. Virginia},\textsuperscript{33} a challenge was raised to the application of the eleventh amendment\textsuperscript{34} to suits pending at the time of its adoption.\textsuperscript{35} One objection to the amendment, procedural in nature, was that it was not presented to the President for possible veto after its proposal by the Congress under article V.\textsuperscript{36} The Court rejected this contention in a cryptic fashion, with Justice Chase stating that the President’s veto power applied only to “ordinary cases of legislation.”\textsuperscript{37} The President, Justice Chase declared, “has nothing to do

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\item \textsuperscript{31} The legislation reviewed in \textit{Chadha} was an exercise of congressional power over the subject of naturalization. U.S. CONST. art I, § 8, cl. 4.
\item \textsuperscript{32} See \textit{supra} note 22.
\item \textsuperscript{33} 3 U.S. (3 DalI.) 378 (1798). For further discussion of \textit{Hollingsworth}, see Watson, \textit{supra} note 2, at 993.
\item \textsuperscript{34} That amendment provides:
\begin{quote}

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States.
\end{quote}
U.S. CONST. amend. XI.
\item \textsuperscript{35} 3 U.S. (3 DalI.) at 379, 381.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.} at 382.
\end{itemize}
with the proposition, or adoption, of amendments to the constitution." 38

Hollingsworth, unfortunately, does not elucidate further what was meant by "ordinary legislation" for purposes of the presentment requirement. Certainly proposed constitutional amendments, passed by two-thirds majorities of both Houses of Congress under article V, were not viewed as such legislation.

Other powers of Congress, however, may also be so categorized. For example, the Senate is given the power to try impeachments and to convict upon a two-thirds majority vote. 39 The Senate is given the further power to approve treaties, 40 and certain presidential appointments. 41 The House of Representatives is given the power to impeach. 42 Presumably, each of these congressional actions are other than "ordinary legislation" and, therefore, require no presentment to the President before becoming effective. Indeed, these congressional actions appear not to be "legislation" at all. The power of the House of Representatives to impeach is prosecutorial, and hence, executive in nature. The senatorial power to try impeachment is clearly judicial in appearance. Only the non-article I senatorial power of approval over treaties and certain presidential appointments resembles the "ordinary" work of legislatures, and even it is quite dissimilar to the enactment of statutory law. 43

Congressional actions under the property clause, however, are not so easily classified as extraordinary. To be sure, like the power to propose constitutional amendments reviewed in Hollingsworth, the property clause power is provided outside of article I, at least suggesting that exercise of the power would not be "ordinary legislation." There is in the property clause, however, no express procedural peculiarity, such as unicameral action or exceptional majorities, to indicate that enactments under it are in any way exceptional. Further, the property clause power of Congress has been traditionally implemented precisely by "ordinary legislation"; that is, by bicameral passage and presentment to the President. To the extent that property clause actions might be considered to be exempt from the broad sweep of the Chadha holdings, therefore, the reasons for that exemption must arise out of some peculiar characteristics of property clause enactments.

38. Id.
40. U.S. Const. art. II, § 2, cl. 2.
41. U.S. Const. art. II, § 2, cl. 2.
42. U.S. Const. art. I, § 2, cl. 6.
43. See Breyer, supra note 2, at 790.
The case law regarding separation of powers and the property clause may well provide evidence of such characteristics.

In *United States v. Midwest Oil Co.*, the Supreme Court addressed the issue of separation of powers in the public lands context. The precise issue before the Court in *Midwest Oil* was not the legislative veto. Nevertheless, the Supreme Court's approach to the separation of powers issue under article IV may well be instructive as to the potential application of *Chadha* to legislative vetoes in property clause legislation.

In *Midwest Oil* the Court was called upon to review the constitutionality of certain presidential action regarding the public lands. By statute, Congress had previously declared all public lands containing oil to be open to public exploration and purchase. The resulting development and depletion of oil reserves caused the Secretary of Interior to recommend to the President that certain of the public lands be withdrawn from such entry until such time as corrective legislation could be enacted by Congress in order to ensure adequate supplies of oil for governmental needs. The President followed the Secretary's recommendation and proclaimed the lands temporarily withdrawn "in aid of proposed legislation." Subsequently, developers entered a portion of the withdrawn lands, discovered oil and assigned their interests to others who began production. The United States sought recovery of the land and an accounting for the oil extracted in violation of the proclamation.

The developers argued that the presidential proclamation was

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44. 236 U.S. 459 (1915).
46. "Withdrawal" is a term of art within the field of public lands law. The term typically means that the Executive Branch has taken some action, frequently without any statutory authority, to remove certain public lands from the operation of duly enacted legislation clearly applicable to such lands. See G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW, 197-99 (1981).
47. 236 U.S. at 466-67.
48. Id. at 467. In fact, the proclamation declared that the withdrawal was in "aid of proposed legislation" and only "temporary" in duration. Id. In the public lands context, however, such declarations have quite elastic meanings. For example, a withdrawal was deemed to be "in aid of proposed legislation" and, therefore, appropriate even though it conflicted directly with a nearly contemporaneous statute in *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971). Similarly a withdrawal in aid of proposed legislation was deemed "temporary" even though it had existed for 36 years in *Mecham v. Udall*, 369 F.2d 1, 4 (10th Cir. 1966). The Court in *Midwest Oil* expressly notes that most temporary withdrawals in aid of proposed legislation never result in such legislation. 236 U.S. at 479. Nevertheless, the withdrawals remain effective in precluding the acquisition of private rights in the lands withdrawn until the withdrawal order is revoked by the issuing official or overturned by subsequent legislation. Id. at 476-78. For further discussion of the *Midwest Oil* withdrawal and its history after the Supreme Court decision, see Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, at 290-92 (1982).
49. 236 U.S. at 467.
50. Id. at 467-68.
"absolutely void since it appears on its face to be a mere attempt to suspend a statute—supposed to be unwise." Thus, *Midwest Oil* presented the Court with the question of the constitutionality of a presidential proclamation prohibiting the private acquisition of title to certain public lands which Congress, using its property clause power, had statutorily declared open to such acquisition. Despite article IV's clear designation of Congress as the branch responsible for the disposal and management of the public lands, the Court upheld the presidential withdrawal of the lands from the operation of the statute.

In reaching its conclusion, the Court emphasized the long history of similar executive withdrawals and the absence of any objection to the practice by Congress. The Court noted that such long-standing congressional acquiescence regarding an executive action typically creates a presumption of the validity of the action. In matters pertaining to the public lands the Court perceived this presumption to be particularly strong.

The Court based this perception upon the peculiar character of public lands legislation. Such statutes, the Court emphasized, "are not of a legislative character in the highest sense of the term . . . ‘but savor somewhat of mere rules prescribed by an owner of property for its disposal.'" In regard to the public lands, the Court noted that Congress may act as might a proprietor of private property. Just as

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51. *Id.* at 469.
52. In some respects *Midwest Oil* thus presents the converse of the separation of powers issue reviewed in *Chadha*. In *Chadha*, the issue was the validity of a mechanism (the legislative veto) which effectuated a congressional determination that certain executive action was unwise. In *Midwest Oil*, on the other hand, the issue was the validity of a mechanism (the executive withdrawal in aid of legislation) which effectuated a presidential determination that the application of a congressional enactment was unwise. Justice Day in dissent in *Midwest Oil* stated that the lands at issue "were withdrawn solely upon the suggestion that a better disposition of them could be made than was found in the existing acts of Congress controlling the subject." 236 U.S. at 488 (Day, J., dissenting).
53. 236 U.S. at 483.
54. *Id.* at 469-72, 477-81. The Court relied upon a report of the Commissioner of the Land Office, dated February 28, 1902, which showed that prior to 1910 there had been at least 252 Executive Orders, all of which were made without express statutory authority, withdrawing public lands from the operation of general public lands legislation. *Id.* at 469-71. The practice dated back to at least 1850. Dubuque & Pac. R.R. v. Litchfield, 64 U.S. (23 How.) 66 (1859) (discussed in *Midwest Oil*, 236 U.S. at 476-77). *See also* Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 371 (1867) (presidential withdrawal dated November 5, 1850). Some of the early history of withdrawals in aid of legislation is presented by the Court in *Midwest Oil*. See 236 U.S. at 476-81.
56. 236 U.S. at 474-75.
57. *Id.*
58. *Id.* at 474-75. The Court noted that under the property clause, "Congress not only has a
a private proprietor might authorize an agent to act on its behalf and define the agent's power relative to the property, Congress, as principal, may impliedly authorize its agent, the President, to act in a particular manner relative to the public lands. This authorization may be express or implied and may be upheld even if it is contrary to express directions that were previously given to the President in the form of duly enacted legislation.

The Court's analogy of Congress's power to the power of a private proprietor in *Midwest Oil* thus defines the constitutional relationship between Congress and the President regarding the public lands. Under article IV, Congress possesses the powers of ownership and is therefore treated as the "principal." The President, however, as a result of various express and implied delegations of authority, is the "agent in charge" of the public lands. In *Midwest Oil*, the Court reasoned that since the "agent in charge" had, on numerous prior occasions, withdrawn lands from the operation of property clause legislation with the knowledge of and without objection by its principal,

59. After referring to an earlier decision, Buford v. Houtz, 133 U.S. 320 (1890), in which the Court found that an implied license to graze cattle on the public lands had resulted from the practicing of such for many years without objection by Congress, the Court noted further that if "private persons could acquire a privilege in public land by virtue of an implied congressional consent, then for a much stronger reason, an implied grant of power [to the President] to preserve the public interest would arise out of like congressional acquiescence." 236 U.S. at 475.

The Court emphasized several times that Congress was aware of the presidential practice of such withdrawals and had never objected prior to the order at issue. Id. at 475, 479, 480, 481. Congress subsequently enacted legislation which expressly authorized such withdrawals but required a report of such action to be filed with Congress. Id. at 481-83.

60. 236 U.S. at 470-71, 474-75. Justice Day, dissenting in *Midwest Oil*, certainly perceived the withdrawal to be in conflict with the earlier statute. Id. at 492, 504 (Day, J., dissenting). The majority, however, perceived the statute, which opened the public lands to oil exploration and development, to be general in nature. Id. at 474. Even though the statute's purpose apparently conflicted directly with the effect of the President's withdrawal, the majority concluded the statute did not preclude the President from making specific withdrawals of land from its operation when the public interest so required. Id.

61. Id. at 474-75.

62. Id. See also Butte City Water Co. v. Baker, 196 U.S. 119 (1905), in which the Court described the congressional powers over the public lands as follows:

The Nation is an owner, and has made Congress the principal agent to dispose of its property. . . . While the disposition of these lands is provided for by Congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term. . . .

Id. at 126.

63. 236 U.S. at 475.

64. Id. at 474, 475, 482. Other "agents" have also received congressional delegations of power over the public lands. See Butte City Water Co. v. Baker, 196 U.S. at 126 ("as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands.").
Congress, that acquiescence must be regarded as an implied ratification of the past withdrawals and authorization of similar future actions. The President's action, therefore, must be valid.

The constitutionality of the President's withdrawal of the lands in *Midwest Oil*, therefore, was explicitly analyzed in terms of private agency law. That approach is the result of the Court's adherence to the principle that article IV vests in Congress, not only governmental powers but all the powers of property ownership as well. That principle is a fundamental theme in public land law which, by the twentieth century, had been firmly entrenched in Supreme Court case law involving other property clause issues. The application of private agency law in *Midwest Oil* was merely an extension of this fundamental principle to the issue of separation of powers. The result, however, is an exceedingly lenient view of the executive's power over the public lands in the face of the clear designation of Congress as the manager of those lands in article IV.

The lenience of the Court's approach in *Midwest Oil* is all the more remarkable when one considers that at the time the case was decided issues of separation of powers in other contexts were treated noticeably more strictly.

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65. 236 U.S. at 475.
66. The Court's summary of its conclusion is indicative of this approach. The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time and affecting vast bodies of land, in many States and Territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen. 236 U.S. at 475 (emphasis added).
67. 236 U.S. at 474-75.
68. The Court has relied upon this principle to uphold a broad range of exercises of the property clause power. Such exercises include disposing of the public lands, United States v. City and County of San Francisco, 310 U.S. 16, 29 (1940); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840); regulating the use of the public lands, United States v. Grimaud, 220 U.S. 506 (1911) (grazing); United States v. Briggs, 50 U.S. (9 How.) 351 (1850) (logging), and protecting the public lands from harm, Hunt v. United States, 278 U.S. 96 (1928) (killing deer over-browsing the public lands); United States v. Alford, 274 U.S. 264 (1927) (prohibiting careless use of fire near public lands).
69. Not only may Congress broadly delegate its authority over the public lands by express legislation; under *Midwest Oil*, a delegation of power to the President under the property clause that is implied by mere Congressional silence may be read so expansively as to permit the President to negate the effect of express legislation.
70. See Glicksman, supra note 8, at 62.
far from its restrictive view regarding delegation of powers, prevalent in the late nineteenth century, that such delegation was generally inappropriate\(^71\) and toward its more liberal view of the 1940s and subsequently, that such delegation is a necessary and acceptable fact of modern government.\(^72\) At the time Midwest Oil was decided, the Court was willing to uphold delegations by Congress which left to the President only the power "to ascertain and declare the event upon which its expressed will was to take effect"\(^73\) and delegations which merely left to the executive the "power to fill up the details."\(^74\)

The Court's separation of powers approach in Midwest Oil, however, is dramatically different. Certainly the Court's private agency law analysis permitted delegations to the President which were of the kinds generally approved at the time. Additionally, however, that approach authorized broad, standardless, express delegations to the President of the expansive authority to determine which public lands should be excluded from the operation of public lands statutes.\(^75\) Furthermore, the Midwest Oil approach expressly upheld a similarly broad, but implicit, delegation to the President arising out of the mere silence of Congress.\(^76\) The only possible explanation for the distinctive treatment of delegations under the property clause is the peculiar proprietary quality of such legislation.\(^77\)

The Court's view of the proprietary nature of property clause legislation in Midwest Oil is critical when speculating as to the application of Chadha to legislative vetoes in the public lands context. The Court in Chadha expressly stated its focus to be the determination of the "legislative" quality of the action constituted by the legislative veto.\(^78\) In Midwest Oil, the Court expressly found that property clause legislation was of a fundamentally different quality than traditional ar-

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75. The Pickett Act is an example of such an express delegation. It provided: The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847, repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-576 § 704(a), 90 Stat. 2743, 2792 (1976) (emphasis added).
76. See supra notes 60, 65-67, and accompanying text.
77. See supra notes 57-70, and accompanying text.
78. 103 S. Ct. at 2784.
article I legislation. The Midwest Oil opinion suggests two conclusions about property clause legislation relevant to the property clause applications of Chadha. First, as to the character of property clause legislation, the Court found such legislation merely to be an ordering of the relationship between Congress as “principal” and the President as “agent in charge” of the public lands. Second, the Court noted that the effect of such legislation is generally not viewed as injurious to legitimate private or public interests.

These conclusions may well indicate that the purpose and effect, and thus the “legislative” quality, of legislative vetoes in the property clause context may be distinguishable from the purpose and effect of the legislative veto at issue in Chadha. In Chadha, the Court placed

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79. 236 U.S. at 474 (citing Butte City Water Co. v. Baker, 196 U.S. 126 (1905)). For the Court’s description of property clause legislation as being “not of a legislative quality in the highest sense of the term,” in Butte City Water Co., see supra note 62. The Court in Midwest Oil, of course, only addressed the quality of property clause legislation for purposes of the separation of powers issue before it. Care must be taken in transposing the Court’s private agency law analysis to other constitutional questions suggested by the property clause. Some scholars, for example, have maintained that property clause legislation is without preemptive effect due to the Court’s characterization of such legislation in other contexts as proprietary in nature. See, e.g., Engdahl, infra note 109 at 303-04, 309-10. For a listing of other authorities so contending, see Gaetke, Refuting the “Classic” Property Clause Theory, supra note 9, at 620 nn.13-15. This author has argued elsewhere, on the other hand, that property clause legislation is not of lesser quality for purposes of questions of federalism and preemption. See Gaetke, Refuting the “Classic” Property Clause Theory, supra note 9; Gaetke, Congressional Discretion Under the Property Clause, supra note 9.

80. 236 U.S. at 474-75.

81. Id. at 471, 475.

82. The assertion that property clause legislative vetoes, because of their proprietary quality, might warrant different constitutional treatment than the provision invalidated in Chadha has been raised in at least two cases. Both involved that provision of the Federal Land Policy and Management Act of 1976 which authorizes a committee of Congress to order the emergency withdrawal of certain public lands from the operation of public lands legislation by mere resolution. 43 U.S.C. § 1714(e) (1982).

In Pacific Legal Foundation v. Watt, 529 F. Supp. 982 (D.Mont. 1981), modified, 539 F. Supp. 1194 (D.Mont. 1982), decided prior to the Court’s decision in Chadha, the plaintiffs challenged a withdrawal order of the Secretary of Interior made in response to the declaration of such an emergency by the House Committee on Interior and Insular Affairs. 529 F. Supp. at 985. One contention of the plaintiffs was that the statutory provision violated the constitutional requirements of bicameralism and presentment. Id. The court read the provision narrowly so as to avoid the constitutional issue. Id. at 1004, 1005; 539 F. Supp. at 1198-99. In dictum, however, the court opined that § 1714(e) was unconstitutional as violative of the requirements of bicameralism and presentment if it permitted the congressional committee to order withdrawal by the Secretary and to determine the duration of that withdrawal. 529 F. Supp. at 1004, 539 F. Supp. at 1198-99.

In National Wildlife Federation v. Watt, 571 F. Supp. 1145 (D.D.C. 1983), the same statutory provision was at issue. There the Secretary of Interior had failed to withdraw certain lands from the mineral leasing laws when ordered to do so by the House Committee on Interior and Insular Affairs under § 1714(e). Id. at 1147. The plaintiffs challenged the refusal as unlawful, but the Secretary defended on the ground that the provision was unconstitutional under the Supreme Court’s decision in Chadha. Id. at 1147, 1154. In passing upon the likelihood of the plaintiffs prevailing on the merits for purposes of their preliminary injunction motion, the court expressed the opinion that § 1714(e) was distinguishable from the legislative veto provision invalidated in Chadha because of its proprietary
considerable importance upon the effect of the legislative veto on persons outside of the legislative branch, including Chadha himself and members of the executive branch. This effect largely demonstrated to the Court the “legislative” quality of Congress’s action vetoing the Attorney General’s decision to suspend the deportation of Chadha.

The court found as well, however, that a duly promulgated regulation of the Department of Interior required the Secretary to withdraw the lands when ordered to do so by the proper congressional committee. Id. at 1147. In the court’s opinion that regulation, regardless of the constitutionality of § 1714(e), required the Secretary to so withdraw the lands. Id. at 1156-57. The preliminary injunction was thus granted. Id. at 1159. The court’s subsequent holding for the plaintiffs on the merits was based on this non-constitutional conclusion. National Wildlife Federation v. Clark, 577 F. Supp. 825, 827-28 (D.D.C. 1984). For further discussion of these cases, see Glicksman, supra note 8, at 45-51.

The court’s suggestion in National Wildlife Federation v. Watt that § 1714(e) is constitutional under Chadha because it is a property clause provision is criticized in Goplerud, Federal Coal Leasing and Partisan Politics: Alternatives and the Shadow of Chadha, 86 W. VA. L. REV. 773, at 792-93 (1984). Professor Goplerud, however, concludes that all property clause legislation is primarily governmental rather than proprietary. Id. at 793. Certainly that is true for some property clause legislation. See text accompanying notes 111-15 infra. It is clearly not true, however, for all such legislation. Id. It is possible to categorize property clause legislation as either proprietary or governmental in nature. See text accompanying notes 108-15 infra. Thus Professor Goplerud’s rejection of the distinction between property clause legislative vetoes and the provision invalidated in Chadha appears unnecessarily broad.

In a fine work on the legislative veto, Professor Watson makes short work of the contention that property clause legislative vetoes might be treated more leniently than that in Chadha. See Watson, supra note 2, at 993-95. Professor Watson notes that in United States v. California, 332 U.S. 19 (1946), the Court concluded that a joint resolution by Congress, vetoed by the President, granted no title to certain off-shore lands to the State of California despite its clear property clause origin. In so concluding, the Court stated that “the resolution does not represent an exercise of the constitutional power of Congress to dispose of public property under Article IV, § 3, Cl2.” Id. at 28. Professor Watson infers from this statement that Congress may effectuate its property clause powers only through article I legislation. Watson, supra note 2, at 993-95.

That inference, however, may not be justified. The question to which the Court’s statement was addressed was the authority of the Attorney General to maintain the action against the State of California. 332 U.S. at 26. The state argued that the joint resolution purportedly granting title of the lands to the state reversed earlier statutes which expressly granted the Attorney General broad authority to institute legal proceedings to protect national interest. Id. at 27. To this extent, therefore, the state was asserting that an exercise of the proprietary powers of Congress could, by implication, override article I enactments of Congress. Such an assertion, however, is far broader than a contention that Congress, in its capacity as a proprietor, may order its relationship with the executive regarding the public lands so as to permit legislative review via devices other than traditional article I legislation. Furthermore, since Congress had acted in United States v. California by joint rather than concurrent resolution, 332 U.S. at 28, it was intended by that body that the President should be able to exercise his veto power regarding the matter. See Martin, supra note 2, at 256 n.8. Thus it is understandable that the Court viewed the vetoed resolution as not legally binding. See National Wildlife Federation v. Watt, 571 F. Supp. 1145, 1157 (D.D.C. 1983). For further discussion of United States v. California, see Glicksman, supra note 8, at 53-57.

83. 103 S. Ct. at 2784-85. The Court’s analytical starting point in Chadha is a presumption that any congressional action is legislative because that is the power delegated by the Constitution to that Branch. Id. at 2784. That presumption would, of course, also apply to property clause legislative vetoes. The Court’s further look at the character and effect of the action constituted by the legislative veto, however, suggests that the presumption might be overcome by evidence that a legislative veto in another context is not “legislative” in nature.

84. Id. at 2784.
The private agency law analysis of *Midwest Oil*, however, suggests that in the context of property clause legislation, retention of legislative veto power might be regarded as less "legislative" in nature than the veto in *Chadha*. Although members of the executive branch would be affected by such a legislative veto to the extent that it overturned some prior action taken or decision made by them in regard to the public lands, such an effect would be the result of Congress acting only in its proprietary rather than in its governmental or legislative capacity. That is, such a legislative veto would be an exercise of the ownership powers of Congress, as a principal disaffirming the action taken by the executive as its agent.

Furthermore, while such a legislative veto might also affect private parties in a practical sense, under the *Midwest Oil* analysis their complaints would typically be unjustified since they would have no legitimate and protectible right or interest. In fact, the effect upon private parties would in most situations be indistinguishable from the mere disappointment resulting from any private seller’s disaffirmance of an agent’s conditional agreement to sell.

The Court in *Chadha* also emphasized that the legislative veto under review was "legislative" in quality because it attempted to alter the discretion of the Attorney General. Since that discretion, the Court reasoned, could only be delegated by legislation that followed the procedural requirements of article I, it could only be altered by such legislation. *Midwest Oil*, however, recognized that discretion regarding the public lands may indeed be delegated to the executive

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85. For example, a prospective purchaser of certain public lands under the Federal Land Policy and Management Act of 1976 might see the Secretary of Interior’s decision to sell overturned by the legislative veto provision of 43 U.S.C. § 1713(c) (1982).

86. 236 U.S. at 471, 475. The Court noted:

And in making such (withdrawal) orders, which were thus useful to the public, no private interest was injured. For prior to the initiation of some right given by law the citizen had no enforceable interest in the public statute and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people’s lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.

*Id.* at 471.

87. That is, in a private sale of real property, if an owner has delegated authority to an agent to make a sale conditional upon the owner’s subsequent approval, the failure to obtain that approval will necessarily affect the interests of the purchaser. At a minimum, one would expect disappointment on the part of the purchaser. However, the disappointed buyer would have no right of action against the seller since the sale was conditional. A legislative veto in a public lands statute, such as that found in the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(c) (1982), which serves as a mechanism for the expression of disapproval of an Executive proposal to sell certain public lands, would seem to have the same, but no greater, effect.

88. 103 S. Ct. at 2785-86.

89. *Id.*
branch by means other than traditional legislation. Because of the proprietary nature of the property clause power, such discretion may be delegated by implication from mere congressional inaction, certainly a form of congressional expression not complying with the procedural requirements of article I. Under this analysis presumably the proprietary powers of Congress would permit delegated discretion under the property clause to be altered or restricted by congressional means other than traditional legislation as well.

What is crucial to the application of Chadha to legislative vetoes in the public lands context is the Court's view of the proprietary nature of legislation under the property clause. In Midwest Oil this view is the critical factor in defining the constitutional relationship between Congress and the President pertaining to the control of article IV lands. Additionally, however, this view permeates other aspects of public land law and has done so throughout our constitutional history. Any review of the constitutionality of legislative vetoes in the public lands context must be done in the light of this consistent and long-standing view regarding the unique character and effect of property clause enactments. An extension of Chadha to prohibit such property clause legislative vetoes would appear to require the rejection not only of a regular congressional practice but of a well-settled tenet of public land law as well.

III. PROPERTY CLAUSE LEGISLATIVE VETEOS AND THE CONCERNS OF CHADHA

In Chadha the Court approached the separation of powers issue by directing its inquiry at the requirements of bicameral passage and presentment to the President. The purposes to be served by those requirements, however, when considered in light of the Court’s view of property clause legislation in Midwest Oil are not advanced by a broad...
ban on legislative vetoes in the public lands context. In fact, the underlying purposes of these requirements suggest that such legislative vetoes should generally be excluded from the reach of Chadha.

The Court perceived two primary reasons for the inclusion of the presentment requirement in the Constitution. First, presentment of legislation for possible veto permits the President to protect against legislative infringement upon the prerogatives of the Executive Branch. Second, presentment provides a check against unwise action by the legislature.

The bicameralism requirement, on the other hand, was intended to ensure careful deliberation on legislative matters. By necessitating separate legislative proceedings and majority assent by two distinct, separately elected bodies, the requirement works as a check against emotional, impatient, and ill-considered actions which might be expected from a single legislative body.

In terms of these requirements, however, property clause legislation can be distinguished from other types of legislation because of its peculiar proprietary character. The Court’s extension of this concept of ownership to the separation of powers context in Midwest Oil suggests that at least some legislative vetoes within property clause legislation might also be viewed as merely proprietary acts. Thus, Congress in reserving a legislative veto power in a property clause statute would be virtually identical to a private proprietor defining the terms of another party’s agency status with regard to the owner’s property. That is, the enactment of property clause legislation vesting discretion in the President as Congress’s “agent”, would be a conditional grant of authority, the exercise of which would be subject to the review and potential express disaffirmance by Congress, as “princi-

97. Justice White, in dissent in Chadha, preferred to use such a functional analysis in reviewing the validity of the legislative veto provision at issue there rather than the axiomatic approach of the majority. See 103 S. Ct. at 2798, 2798-99. See also Glicksman, supra note 8, at 29 (the Court failed to use a functional approach); Spann, Spinning the Legislative Veto, 72 GEO. L.J. 813, 813 (1984) (the majority opinion’s “tone is glib; its reasoning is superficial; and its analysis is linguistic rather than functional in nature”).
98. Id. at 2782.
99. Id. at 2782-83.
100. Id. at 2783-84.
101.
102. For a discussion of this characteristic of property clause legislation, see supra text accompanying notes 57-69. In his thorough discussion of the constitutionality of the legislative veto provisions of the Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701-1783, Professor Glicksman notes the proprietary nature of much property clause legislation, Glicksman, supra note 8, at 59-63, but concludes that the purposes served by the requirements of bicameralism and presentment are also applicable to property clause legislative vetoes. Id. at 63-64. His work does not address in any detail, however, the separation of powers implications arising from Midwest Oil and their relevance to the application of Chadha to such legislative vetoes.
"through exercise of the retained legislative veto power.\textsuperscript{103}

When property clause legislative vetoes are viewed in this way, the concerns addressed by the constitutional requirement of presentment seem inapposite. The fear of legislative encroachment upon the power of the Executive Branch is particularly inapplicable. According to the Court's opinion in \textit{Midwest Oil}, the President's powers over the public lands are generally merely proprietary\textsuperscript{104} and are derived, either expressly or by implication, from the action or inaction of Congress. Thus, a typical legislative veto in the public lands context would merely result in congressional correction of an exercise of proprietary discretion previously conditionally vested in the President. Since the proprietary power of the President is derivative only, there would be no infringement upon his article II powers.\textsuperscript{105}

The further purpose of the presentment requirement, to provide a check upon unwise legislative action, also seems peculiarly ill suited to property clause legislative vetoes if the constitutional relationship between the President and Congress is defined by the principles of private agency law. That is, if the President is deemed to be merely the "agent in charge" of the public lands, deriving his proprietary authority only by the express and implicit dictates of Congress, it would be incongruous to assert that Congress as principal must have the consent of that agent before it can overturn objectionable discretionary actions of the agent. The requirement of presentment in the public lands context would thus permit the agent to check the wisdom of the principal's wishes, which would directly conflict with the private agency law approach of \textit{Midwest Oil}.

On the other hand, the purpose underlying the bicameralism requirement, to ensure careful deliberation of legislative nature, appears more consistent with the peculiar proprietary aspects of property clause legislation. That is, to the extent that bicameral passage protects the public from hasty and ill-considered legislative acts in general, it would have the same effect in the public lands context. One might conclude, therefore, that the bicameralism requirement would prohibit the exercise of property clause legislative vetoes except


\textsuperscript{104} Some property clause powers delegated by Congress to the President may not be merely proprietary. For further discussion of this issue, see infra text accompanying notes 108-16.

\textsuperscript{105} But see infra text accompanying notes 113-16 for the proposition that some property clause legislative vetoes might, nonetheless, infringe upon the article II powers of the President.
through majority passage by both Houses.106

Even bicameralism, however, might be subject to more lenient treatment, given the Court's proprietary view of property clause matters in Midwest Oil. If the property clause gives Congress the discretionary powers of a private proprietor, one might speculate that Congress possesses the power to delegate some or all of that authority to a sub-portion of itself. That is, a legislative veto power being granted to a single House or, indeed, to a committee of a single House, would appear to be within the permissible scope of conduct of a principal under private agency law and, therefore, within the property clause authority of Congress under Midwest Oil.107 Such a legislative veto would merely be another form of structuring the agency relationship between Congress and the President that would be acceptable for a private proprietor under general agency principles.

IV. A SUGGESTED LIMITATION

It appears that a plausible argument can be constructed to distinguish property clause legislative vetoes from the provision found unconstitutional in Chadha. But a finer line may need to be drawn. The property clause powers of Congress include both those of disposal of the public lands and of regulation of conduct pertaining to their use.108 In disposing of the public lands Congress is perceived to have all of the powers of any private proprietor.109 Therefore, the private agency law approach of Midwest Oil seems quite applicable to legislative vetoes contained in legislation directed toward that disposal.110

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106. A concurrent resolution, for example, might be constitutionally permissible. This type of resolution is frequently employed as the mechanism of congressional disaffirmance in the legislative veto provisions of the Federal Land Policy and Management Act of 1976. See 43 U.S.C. §§ 1712(e), 1713(c), 1714(c)(1), 1714(l)(1) (1982). But see United States v. California, 332 U.S. 19 (1947) (joint resolution of Congress vetoed by the President, held, not a valid exercise of property clause power). This case is discussed further at supra note 82.


108. The clause empowers Congress both "to dispose of" the public lands and to "make all needful Rules and Regulations respecting" them. U.S. CONST. art.IV, § 3, cl. 2.

109. See supra note 68. For further discussion of the breadth of the dispositional power of Congress over the public lands, see Engdahl, State and Federal Power Over Federal Property, 18 ARIZ. L. REV. 283, 362-70 (1976); Gaetke, Congressional Discretion Under the Property Clause, supra note 9, at 384-86, 391-93.

110. In fact, it was the property clause dispositional power of Congress which was delegated by congressional silence in Midwest Oil. See 236 U.S. at 469-72.

Numerous public lands legislative vetoes are exercises of the dispositional power of Congress. See,
The regulatory power of Congress under the property clause, however, is more expansive than the power of disposal. As might be expected, it includes all the power necessary to regulate the use of property that is inherent in private ownership. Legislative vetoes in such regulatory legislation can be analogized to a private proprietor's arrangement with its agent regarding the principal's affirmance or disaffirmance of the agent's regulation of the use of the principal's property. Such an arrangement would be entirely consistent with the principles of agency articulated in Midwest Oil.

Congress's property clause regulatory power, however, also extends beyond the regulatory powers possessed by private proprietors. It also encompasses authority that is governmental in nature and not attributable to mere ownership. Unlike a private proprietor, Congress may, for example, permit to occur on the public lands conduct prohibited by state law. Additionally, Congress may utilize its property clause regulatory power to control conduct acceptable under state law occurring outside the physical boundaries of federal lands. Regulatory legislation under the property clause that exceeds the restrictions that a private proprietor may lawfully impose upon the use of his or her property appears indistinguishable from traditional arti-

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111. Like any property owner, for example, Congress may regulate conduct on the public lands which it perceives to be harmful to those lands. See, e.g., McKelvey v. United States, 260 U.S. 353, 359 (1922). Similarly, Congress may designate a particular use of the public lands and prohibit any conduct which conflicts with that designated use. For example, Congress, as a mere proprietor, has established the national parks, wilderness areas and wildlife refuges. See, e.g., Yellowstone National Park Establishment Act, 16 U.S.C. §§ 21-43 (1982); Wilderness Act, 16 U.S.C. §§ 131-36 (1982); National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd (1982).

112. For example, Congress might statutorily empower the Secretary of the Interior to determine when hunting should be permitted on certain public lands but require such determinations to be forwarded to Congress for possible legislative veto. Such an arrangement would seem well within the power of a private proprietor to designate an agent to make such decisions while reserving an express mechanism for the review and possible disaffirmance of them.

113. For further discussion of this governmental regulatory power under the property clause, see Gaetke, Congressional Discretion Under the Property Clause, supra note 9, at 386-95; Gaetke, The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Nonfederal Property Under the Property Clause, supra note 9, at 166-74.

114. See, e.g., Hunt v. United States, 278 U.S. 96 (1928) (federally authorized deer hunting on federal lands despite prohibition by state law).

cle I legislation. It is governmental rather than proprietary action and is, therefore "legislative" in its character and effect. Since this type of legislation lacks the proprietary quality inherent in other property clause matters, the analogy to private agency law relied upon to resolve the separation of powers issue in Midwest Oil seems inapplicable. As a result, any legislative veto power retained in such legislation would seem indistinguishable from the veto power held unconstitutional in Chadha.

The approach to the separation of powers issue in Midwest Oil suggests that Chadha should not be extended to invalidate the use of legislative vetoes in property clause legislation, except where Congress is acting in its governmental rather than proprietary role in respect to the public lands. Whether the Court chooses to agree depends upon the current vitality of the rationale underlying Midwest Oil, about which we may only speculate. The critical issue is whether the Court will continue to adhere to its long-standing position that the property clause grants to Congress all of the powers of a private proprietor as well as governmental powers. In other property clause contexts the Court appears committed to this historical principle.\textsuperscript{116} Using the rationale of Chadha to invalidate property clause legislative vetoes, would constitute a break with that commitment.

V. Conclusion

It would appear that the correlative roles of Congress and the President regarding the public lands are unique among the powers distributed by the Constitution. They are defined, so far as Supreme Court case law goes, in terms of private property and agency law rather than in terms more common to separation of powers issues. These principles may well suggest that legislative vetoes contained in much property clause legislation warrant different constitutional treatment than that accorded the article I legislative veto power reviewed and found unconstitutional in Chadha. Most property clause enactments, being merely proprietary in nature, differ in quality from traditional legislation. They regulate the agency relationship of the President and Congress but do not affect the rights of persons outside the government. Furthermore, the concerns underlying presentment and bicameralism, as expressed in Chadha, would not be served by a broad ban on legislative vetoes in the public lands context. In fact, those article I procedural requirements appear in direct contradiction

\textsuperscript{116} In its most recent pronouncement regarding the extent of the property clause power, the Supreme Court adhered to its conviction that such power is "without limitations." Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).
to the private property and agency law approach to separation of powers issues in the public lands context. At a minimum, therefore, when Congress is exercising its property clause power in a manner consistent with the powers of a private proprietor, the use of a legislative veto appears constitutionally distinguishable from the veto power invalidated in *Chadha*.