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Articles

DEAD AGAIN: THE NONDELEGATION DOCTRINE, THE RULES/STANDARDS DILEMMA AND THE LINE ITEM VETO

BERNARD W. BELL*

I. INTRODUCTION

ARE the rumors, nay, the declarations, of the nondelegation doctrine's death greatly exaggerated? The United States Supreme Court declared a statute unconstitutional on nondelegation grounds for the first and only time in the now-infamous *A.L.A. Schechter Poultry Corp. v. United States*¹ and *Panama Refining Co. v. Ryan*² cases.³ Recently, the doctrine has enjoyed something of a renaissance because of its perceived usefulness in challenging the Line Item Veto Act.⁴ In scholarly circles, the doctrine has

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1. 295 U.S. 495 (1935). The United States Supreme Court held that the President's executive order under the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed 1966), was unconstitutional because it transcended Congress' ability to delegate legislative authority. *See id.* at 541-42.

2. 293 U.S. 388 (1935). The Supreme Court held that section 9(c) of Title I of the National Industrial Recovery Act was unconstitutional because it exceeded the authority of Congress to delegate legislative power to the executive branch of the government. *See id.* at 430.

3. *See* Byrd v. Raines, 956 F. Supp. 25, 36 (D.D.C. 1997) (noting that, since 1935, Supreme Court has upheld sweeping statutory delegations without exception). Even *Schechter* has been reinterpreted so that the flaw that rendered the challenged statute unconstitutional was not the breadth of the delegation, but the recipient of the delegation, namely, a private party. Thus, *Schechter* now stands for the proposition that the Constitution forbids delegation to private parties. *See* Yakus v. United States, 321 U.S. 414, 424 (1944) (stating that *Schechter* was unconstitutional because statute delegated legislative powers to private parties, not to public officials); *Amalgamated Meat Cutters & Butcher Workman v. Connally*, 337 F. Supp. 737, 763 (D.D.C. 1971) (same); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-17, at 368-69 (2d ed. 1988) (same); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 *RUTGERS L. REV.* 331, 373-74 (1998) (same).

The Court has since stated that the nondelegation doctrine should be reserved only for extreme situations. *See Amalgamated Meat Cutters*, 337 F. Supp. at 762 ("These cases express a principle that has validity—reserved for the extremist instance.").

4. 2 U.S.C. §§ 691-692 (Supp. 1996); *see* *City of New York v. Clinton*, 985 F. Supp. 168, 177-81 (D.D.C. 1998) (holding that Line Item Veto Act violated

been undergoing a revival for some time,⁵ thanks in part to the powerful arguments of John Hart Ely, Theodore Lowi and, most recently, David Schoenbrod and Marci Hamilton.⁶ The impulses underlying the doctrine are sound and address issues vital to democracy.⁷ The doctrine, however,

nondelegation doctrine); *Byrd*, 956 F. Supp. at 33 (“[E]ven if Congress may sometimes delegate authority to impound funds, it may not confer the power permanently to rescind an appropriation or tax benefit that has become the law of the United States. That power is possessed by Congress alone, and . . . may not be delegated at all.”). For materials expounding the delegation doctrine’s merits, see *Mistretta v. United States*, 488 U.S. 361, 416-27 (1989) (Scalia, J., dissenting) (suggesting use of nondelegation doctrine); *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 685-88 (1980) (Rehnquist, J., concurring) (same); JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132-34 (1980) (stating that use of nondelegation doctrine would instill statutes with policy direction which is “lacking in much contemporary legislation”); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 63-67 (1982) (suggesting renewed use of nondelegation doctrine because “the idea of a change in constitutional rules governing legislative delegations has acquired a fresh dignity” and it “should inspire a serious dialogue if not imminent action”); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 49-65 (1976) (stating that “rather rough weapon” of nondelegation doctrine may well be “an effective deterrent to congressional abdication of responsibility”); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977) (stating that nondelegation doctrine “could do much to augment the quality—and effectiveness as a check against arbitrary or unauthorized administrative action—of judicial review in the occasional cases in which Congress . . . chooses . . . [to delegate] in order to get a bill enacted”); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1283-90 (1985) (suggesting use of nondelegation doctrine because “[l]imiting the delegation would also . . . [protect] private persons’ liberty”); The Honorable Laurence H. Silberman, Circuit Judge, U.S. Court of Appeals, D.C. Circuit, Speech Before the Federalist Society (Oct. 18, 1997) (stating that courts should test agencies’ claims of expansible legislative authority against nondelegation doctrine).

The Line Item Veto Act permits the President, after signing a bill into law, to subsequently cancel any dollar amount, any item of new direct spending or any limited tax benefit. See 2 U.S.C. § 691(a). The Line Item Veto Act affords Congress an opportunity to override the President’s line item veto by re-enacting a canceled item within 30 days of presidential notification. See *id.* § 691(d).

5. See Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. (forthcoming 1998) (collecting papers discussing advantages and disadvantages of revitalizing delegation doctrine with respect to budget process and substantive legislation).

6. See ELY, *supra* note 4, at 131-34 (noting that nondelegation doctrine may curb administrative and legislative abuses); THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 126, 147-49, 297-300 (1969) (lamenting vagueness and generality of statutes that implicitly delegate power to agencies); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 46 (1993) (noting that nondelegation doctrine can be used as means of curbing administrative and legislative abuses); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 537-40 (1994) (lamenting abdication of legislative duties, which undermines legislation by requiring courts to set limits).

7. See *Panama Refining Co.*, 293 U.S. at 430-33 (asserting that nondelegation doctrine maintains constitutional system of government). The Court in *Panama*

is ultimately unworkable. Its limited potential can best be gauged in the broader context of the debate regarding the comparative value of rules and standards and concerns about the ability of courts to “implement” the United States Constitution.⁸ In any event, challenges to the Line Item Veto Act provide a particularly inapt vehicle for the doctrine’s resurrection.

II. RENEWING JUDICIAL RESTRAINTS ON DELEGATION: THE TRIUMPH OF HOPE OVER EXPERIENCE

The nondelegation doctrine “limits” the power of the United States Congress to delegate its legislative authority.⁹ The Constitution assigns

Refining Co. stated: “[T]he constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, *if our constitutional system is to be maintained.*” *Id.* at 421 (emphasis added). The Court has also noted that limiting congressional delegation is vital to democracy. *See* *Field v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the President” is “universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution”) (emphasis added).

Courts seek to discourage Congress from delegating authority, particularly with respect to sensitive issues, through statutory interpretation. In particular, courts have sometimes refused to construe statutes to provide the breadth of delegation the statutory text might suggest and have required Congress to explicitly confer such broad “lawmaking” power. *See* *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114 n.47 (1976) (construing statute narrowly); *National Cable Television Ass’n v. United States*, 415 U.S. 336, 340-41 (1974) (same); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (holding that statute did not explicitly grant power to withhold passports from immigrants); *see also* SCHOENBROD, *supra* note 6, at 41-43 (noting that courts have often “strained to interpret the statute as not delegating unconstitutionally”). The Court also requires a “clear statement” of congressional intent before it will interpret a statute as infringing upon important rights, and thus, in effect, precludes Congress from delegating such decisions. *See* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can it Be Done in the Post-Chevron Era*, 13 J.L. & POL. 105, 135-37, 150 (1997) [hereinafter Bell, *Using Statutory Interpretation*] (describing judicial statutory construction as means of improving legislative process in cases such as *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

8. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 81-83 (1997) (discussing variance between constitutional principles and doctrines Supreme Court has established to implement those principles).

9. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (“[C]ongress is not permitted to abdicate or to transfer to others the *essential* legislative functions with which it is thus vested.”) (emphasis added); *id.* at 551 (Cardozo, J., concurring) (“The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant”); *Panama Refining Co.*, 293 U.S. at 429-30 (noting that congressional delegations of legislative power to president do not violate Constitution so long as they “*lay down by legislative an intelligible principle* to which the [delegatee of that power] is directed to conform” (quoting *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))) (emphasis added); *id.* at 430 (“Thus, in every case in which the question [of the limitation of congressional

“all legislative powers” of the federal government to Congress.¹⁰ Thus, arguably, the Constitution limits Congress’ power to delegate “legislative” power to noncongressional institutions, such as the President and administrative agencies.¹¹

Perhaps the Supreme Court committed the “original sin” regarding delegation when it permitted the establishment of an alternative lawmaking process unencumbered by the Constitution’s bicameralism and presentment requirements, namely administrative and presidential rulemaking. The initial impetus for permitting the establishment of an alternative lawmaking system was possibly the belief that this “administrative” process was objective and merely involved the application of expertise.¹² Under such a theory, professional mores or objective facts constrained rulemakers to at least the same extent that political accountability constrained Congress.¹³ Indeed, the initial justifications for allowing congressional delegation to executive branch officials reflect such a belief.¹⁴ Initially, the Supreme Court upheld these delegations because it viewed Congress as merely permitting executive agencies to fill

delegation] has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend.”)

10. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

11. See *J.W. Hampton*, 276 U.S. at 409 (holding that delegation is proper if Congress sets forth intelligible principle); TRIBE, *supra* note 3, § 5-17, at 362-63 (discussing separation of powers in context of nondelegation doctrine); see also *Field*, 143 U.S. at 692 (“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”)

12. See *Humphrey’s Executor v. United States*, 295 U.S. 602, 624 (1935) (stating that terms of commissioners on Interstate Commerce Commission should be long enough to give them opportunity to acquire expertise); *Federal Trade Comm’n v. American Nat’l Cellular, Inc.*, 810 F.2d 1511, 1513 (9th Cir. 1987) (finding “no case purporting to limit or overrule” *Humphrey’s Executor*, which upheld FTC’s insulation from presidential control because Congress had created it as “an independent and essentially non-partisan *body of experts* to administer” agency’s enabling statute) (emphasis added); see also MILTON M. CARROW, *THE BACKGROUND OF ADMINISTRATIVE LAW* 8 (1948) (stating that although it was within power of “legislature to exercise the rate making and other regulatory power [assumed by the Interstate Commerce Commission], the task required the existence of a continuously operating body with a *staff of experts capable of collecting and evaluating the data* upon which adequate regulations would be made”) (emphasis added); *id.* at 12 (stating that need for continuity of attention and clearly allocated responsibility, which neither courts nor legislature can provide, and “the requirement in some fields . . . of a highly specialized knowledge which only a specially selected body could provide” have caused government to rely on administrative processes).

13. See, e.g., *Humphrey’s Executor*, 295 U.S. at 624 (stating that Federal Trade Commission is “charged with the enforcement of no policy, except the policy of the law” and that “its members are called upon to exercise the trained judgment of a body of experts ‘appointed by law and informed by expertise’” (quoting *Illinois Cent. R.R. v. Interstate Commerce Comm’n*, 206 U.S. 441, 454 (1906))).

14. See *id.* at 624-26 (stating that nonpartisan body of experts free from hindrance of partisan politics should administer delegated legislative powers of Con-

statutory gaps or to make the factual findings upon which legislative consequences turned.¹⁵ Later, in *Humphrey's Executor v. United States*,¹⁶ the Court relied on the Progressive-Era characterization of agencies as apolitical experts.¹⁷ Each of these three theories suggested that agency lawmaking operated under significant, objective, judicially-enforceable constraints. This view has obviously given way to a view grounded in "legal realism"—because objective factors do not constrain the promulgation of regulations, the political process must do so.¹⁸ Thus, for example, the United States Supreme Court has declared that agencies are more appropriate expositors of vague statutes than courts *because* agencies are accountable to elected officials.¹⁹

Once two alternative lawmaking systems were established—one "legislative" and the other "administrative"—conflict between them inevitably followed.²⁰ By permitting agencies to exercise lawmaking power

gress); *Field*, 143 U.S. at 692; *The Brig Aurora*, 11 U.S. [7 Cranch] 382, 387-88 (1813); *American Nat'l Cellular*, 810 F.2d at 1513 (same).

15. See *United States v. Grimaud*, 220 U.S. 506, 523 (1911) (rejecting defendant's argument that Congress could not delegate to President power to reserve public land for public forest reservations); *Field*, 143 U.S. at 693 (stating that President, by issuing proclamation "in obedience to the legislature," did not exercise lawmaking power); *The Brig Aurora*, 11 U.S. [Cranch] 382, 387-88 (1813) (upholding legitimacy of President's revival of proclamation).

16. 295 U.S. 602 (1935).

17. See *id.* at 624 (stating that "quasi-legislative" and "quasi-judicial" administrative agency should be nonpartisan and act "with entire impartiality"); see also United States Department of Justice Memorandum for Honorable David Stockman [hereinafter Stockman Memo], reprinted in JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 248, 251 (3d ed. 1992) (discussing *Humphrey's Executor*).

18. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (stating that agency may "properly rely upon the incumbent administration's views of wise policy"); *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (noting that "presidential prodding" may influence agency in ways that courts cannot); KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 59-60 (3d ed. 1994) (discussing importance of presidential control over administrative decision making).

This "legal realist" theory has become the predominant view. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 191-92 (1991) (noting legal realism's effects on constitutional doctrines of modern courts); Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1426-35 (1997) (chronicling influence of legal realism on contemporary constitutional law doctrines).

19. See *Chevron*, 467 U.S. at 865 (asserting that agencies are more appropriate than courts to reconcile competing political interests in ambiguous statutes *because* agencies are accountable to President). Presidents have begun to exert more control over agency lawmaking through Office of Management and Budget (OMB) review of prospective regulations.

20. See *Amalgamated Meat Cutters & Butcher Workman v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971) ("There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the legislature."); see also *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring) (stating that existence of alternative lawmaking processes not pre-

without satisfying the constitutional bicameralism and presentment requirements, while requiring Congress to satisfy those requirements when it engaged in lawmaking, the Court created doctrinal anomalies. First, the existence of the two alternative legislative procedures created great difficulty for the Court in addressing the constitutionality of the legislative veto.²¹ In *Immigration & Naturalization Service v. Chadha*,²² the Supreme Court held the legislative veto unconstitutional because it allowed Congress to make law by vetoing agency-produced regulations without the constitutionally-mandated bicameralism and presentment.²³ The Court's reasoning, although formalistic, was largely coherent, until the Court attempted to defend the constitutionality of agency rulemaking. Perhaps not surprisingly, given the weakness of its argument, the Court addressed this challenge in a footnote.²⁴ The Court first applied labels—it labeled the power exercised by agencies “quasi-legislative” while labeling the power exercised by Congress “legislative.”²⁵ This labeling is meaningless, however, because the power exercised by agencies in promulgating rules is not conceptually different from the power exercised by Congress in enacting statutes; both involve the production of legally binding rules of general applicability.

scribed by Constitution engenders problems of Congress' avoidance of bicameralism and presentment requirements for enacting ordinary legislative statutes).

21. See *INS v. Chadha*, 462 U.S. 919, 955-59 (1983) (holding that one-house legislative veto of Immigration & Naturalization Act was unconstitutional); see also *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216, 1216 (1983) (summarily invalidating one-house legislative veto of independent agency rulemaking). A legislative veto is a resolution by either one or both houses of Congress, or a congressional committee, that purports to override completed executive action. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540 (1992) (stating that Supreme Court decisions have invalidated legislative vetoes, which avoid constitutional presentment and bicameralism requirements); Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 207 n.50 (1987) (“A ‘legislative veto’ is a ‘simple’ resolution approved by a majority of one house . . . or a ‘concurrent’ resolution approved by majority votes in both houses . . . that purports to alter or override completed executive action.”); Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 528-29 (1990) (stating that *Chadha* held unconstitutional legislative vetoes, which are “a statutory provision that reserves to Congress or its committees the power to invalidate, without presentment, executive or agency action that is otherwise authorized”).

22. 462 U.S. 919 (1983).

23. See *id.* at 946-51 (holding legislative veto unconstitutional because it allowed Congress to bypass presentment and bicameralism requirements).

24. See *id.* at 953-54 n.16 (rejecting Congress' argument that legislation promulgated by executive officers needs to satisfy presentment and bicameralism requirements).

25. See *id.* at 954 n.16 (noting Court's use of term “quasi-legislative”); see also *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) (establishing terms “quasi-legislative” and “quasi-judicial” to refer to actions of administrative agencies).

The Court then proceeded to explain that the legislation under which an agency promulgates a regulation constrains the agency.²⁶ That may be true, but the Court could have similarly constrained Congress' exercise of the legislative veto. The Court could have declared that Congress could exercise a legislative veto except when its use of that prerogative conflicted with the statute under which the agency proposed its regulation. For example, suppose a statute required the Occupational Safety and Health Administration (OSHA) to eliminate a certain occupational risk regardless of cost. Suppose further that Congress vetoed a regulation mandating the use of the only method capable of eliminating that risk because, for example, it viewed the method as too costly. The Court could rule this particular exercise of the legislative veto an unconstitutional effort to modify the underlying statute without satisfying the bicameralism and presentment requirements.

In short, no coherent, formalistic reason exists for holding agency promulgation of regulations constitutional while holding congressional vetoes of those same regulations unconstitutional.²⁷ At best, one can argue that, given the existence of an alternative lawmaking process not prescribed by Article I, a line must be drawn somewhere to prevent Congress from evading bicameralism and presentment in enacting ordinary statutes.²⁸

The existence of an agency lawmaking system has also increased the significance of questions involving the President's power to terminate agency officials and countermand agency decisions. Ordinarily, the President is entitled to control executive officers, but what about executive officers who exercise legislative power?²⁹ Surely Congress should be able to combat presidential domination of executive officers who exercise legislative power delegated by Congress. Congress' need to proceed by vague standards (rather than precise rules) because of its lack of experience with a problem or the difficulty of framing broad solutions should not require

26. See *Chadha*, 462 U.S. at 954 n.16 (noting that "administrative activity cannot reach beyond the limits of the statute that created it").

27. Distinguishing agency promulgation of regulations from congressional exercise of legislative veto authority, however, has at least one significant practical advantage—the Court can avoid subjecting congressional veto decisions to the equivalent of the intrusive "arbitrary and capricious" review conducted under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994).

28. See *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring) (stating that Congress, its components or its agents may make binding national policy only by enacting legislation in accordance with presentment and bicameralism procedures set forth in Article I of Constitution).

29. See *Humphrey's Executor*, 295 U.S. at 626-27 (distinguishing *Myers v. United States*, 272 U.S. 52 (1926), which held that President had sole power of removal of postmasters appointed by him). *But see Morrison v. Olson*, 487 U.S. 654, 690-91 (1988) (suggesting that officers of quasi-legislative or quasi-judicial agencies should, in general, be less subject to presidential termination than purely executive officers).

Congress to cede to the President unconstrained power to legislate without bicameralism.

The Court has indeed upheld congressional efforts to protect the legislative power delegated to agencies from presidential domination.³⁰ In *Humphrey's Executor*, the Court held that Congress could limit presidential termination of Federal Trade Commission (FTC) members, even though those commissioners are executive officials, because they exercise both quasi-legislative and quasi-judicial power.³¹ Full-scale application of such a doctrine, however, would severely limit presidential control of the Executive Branch because virtually every executive branch official exercises a type of legislative authority that does not differ greatly from that exercised by "independent agencies," such as the FTC.³²

Ultimately, the Court's original sin is not fatal. In fact, it is no sin at all. Analytical consistency is not the sole measure of law, and the anomalies produced by the coexistence of congressional and agency lawmaking

30. See, e.g., *Humphrey's Executor*, 295 U.S. at 625 (holding that Congress may constitutionally limit President's power of removal of commissioner to removal for inefficiency, neglect of duty or malfeasance in office). The *Humphrey's Executor* Court, explaining that the very nature of administrative agencies required Congress to impose limits upon the President's dominion over those agencies, stated that:

The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

Humphrey's Executor, 295 U.S. at 629.

The Court, however, refused to allow Congress to insulate delegated legislative power from presidential domination by reserving for itself a legislative veto. See *Chadha*, 462 U.S. at 958.

31. See *Humphrey's Executor*, 295 U.S. at 628-29 (holding that Congress could limit President's ability to terminate Federal Trade Commission members).

32. See Stockman Memo, *supra* note 17, at 251 (stating that *Humphrey's Executor* Court "did not take account of the fact that Executive Branch and independent agencies engage in rulemaking in a functionally indistinguishable fashion").

Conceptual distinctions between legislative and executive power have been viewed with skepticism. See *Clinton v. City of New York*, 118 S. Ct. 2091, 2123-24 (1998) (Breyer, J., dissenting) (questioning existence of precise conceptual distinction between legislative and executive power). Likewise, the meaningfulness of the formalistic distinction between executive and legislative has been questioned. See *Bowsher*, 478 U.S. at 748-51 (Stevens, J., concurring) (stating that distinguishing definitively between executive and legislative power is unsound); *id.* at 762 n.3 (White, J., dissenting) (stating that modifiers such as "quasi" conceal commingling of executive and legislative power); see also *Morrison*, 487 U.S. at 690 n.28 (noting difficulty in differentiating executive from quasi-legislative power). Distinguishing "quasi-judicial" power that may be insulated from presidential control and the executive power exercised by many administrative agencies is also problematic.

have not proven terribly troubling.³³ The government has long needed a more efficient method of promulgating rules of general applicability than that set forth in Article I of the Constitution.³⁴ Requiring bicameralism and presentment for every rule of general applicability would cripple the government.³⁵ Moreover, legislators cannot avoid some degree of statutory vagueness and delegation inheres in such vagueness. Thus, concerns about decisions made by the executive and judicial branches without bicameralism and presentment would always exist.

The debate over the nondelegation doctrine is not merely a dry academic argument about the original conception of Congress' role. Many view delegation and statutory vagueness, which is really the genesis of delegation,³⁶ as symptoms of a sick democracy and believe that renewed enforcement of the nondelegation doctrine is a prescription to restore our democracy to health.³⁷ Advocates of the nondelegation doctrine consider the general vagueness of contemporary statutes unjustified.³⁸ They argue that the remarkable vagueness of contemporary statutes results from one of two causes: (1) elected representatives' efforts to avoid responsibility so as to ensure their own re-election, which critics view as a political pathology³⁹ or (2) disagreement among a legislative majority, in which case,

33. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 83 (1996) (stating that under- or over-inclusiveness of rule in relation to its underlying philosophical justification does not render it inappropriate); Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 480-81 (1982) (noting that arbitrary legal rules are not necessarily bad).

34. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 57 (1990) (asserting that, in addition to enactment of detailed statutes, “[a] society in as much ferment as ours needs a mechanism for legal change”).

35. See *THE FEDERALIST* NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (recognizing need for effective government as well as governmental restraint). For instance, in *The Federalist No. 51*, James Madison observed: “In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed*; and in the next place oblige it to control itself.” *Id.* (emphasis added).

36. See *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865 (1984) (stating that agencies must fill statutory gaps left by Congress).

37. See *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (asserting that Congress, by enacting clearer statutes, could eliminate much nondelegation litigation); Lowi, *supra* note 6, at 297-300 (suggesting that use of nondelegation doctrine would lead to more meaningful democracy by eliminating overbroad statutory delegations of power to administrative agencies). For a further description of the cases and commentators which state that the nondelegation doctrine will benefit democracy, see *supra* notes 4-7 and accompanying text.

38. See, e.g., Lowi, *supra* note 6, at 297-300 (lamenting statutory vagueness and asserting that invigorated use of constitutional limits on overbroad delegation would be meaningful first step toward “Juridicial Democracy” under guidance of law). Even Lowi acknowledges, however, that “the complexity of modern life forces Congress into vagueness and generality in drafting its statutes.” *Id.* at 155.

39. See ELY, *supra* note 4, at 131-34 (noting that many legislators prefer to let faceless administrators “take the inevitable political heat” and, therefore, legisla-

critics urge, legislation should remain unenacted.⁴⁰ Neither avoidance of responsibility nor the passage of legislation despite fundamental disagreements accord with the principles of liberal democracy.

Contemporary statutes certainly leave much discretion to agencies and courts. Moreover, members of Congress seek to avoid controversy and ensure their own lengthy tenure.⁴¹ This is indeed the theoretical impetus for the term limits movement. Yet, a congressional desire to avoid responsibility is, at most, one of many reasons for statutory vagueness and the attendant discretion conferred upon administrative officials and judges.⁴² This Article suggests that the most important reason reflects a pervasive problem—the difficulty of determining the comparative efficacy of rules and standards.

tors enact vague statutes); Lowi, *supra* note 6, at 126, 148-49, 155 (noting that “political pressure of social unrest” causes vagueness that leads to need for delegation); Schoenbrod, *supra* note 6, at 84-94 (noting that legislators take credit and lay blame by delegating authority to administrative agencies); Hamilton, *supra* note 6, at 537-40 (warning that many legislators delegate to abdicate responsibility to agencies); *see also* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting) (noting that Congress chose to pass different questions to Secretary of Labor to avoid making its own choice); Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 685, 687-88 (1980) (Rehnquist, J., dissenting) (same); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 80 (1991) (describing views of other scholars). *See generally* LEROY N. RIESELBACH, CONGRESSIONAL REFORM: THE CHANGING MODERN CONGRESS 196 (1994) (discussing Congress’ policy of delegation).

40. *See Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 68 (1990) [hereinafter *Statutory Interpretation and the Uses of Legislative History*] (statement of Rep. Buckley) (resolving mark up disagreements by saying “let the courts decide”).

41. *See* SCHOENBROD, *supra* note 6, at 91, 104 (noting proclivity of legislators to delegate if doing so will advance public perception of their performance); GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 15, 56, 72-92, 177-79, 186-87 (1992) (discussing “career legislators” strategy of avoiding politically risky decisions).

42. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 496-99 (1989) (stating that need for flexible government prompted growth of administrative state); Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL’Y 43, 44-49 (1988) (arguing that Congress must steer middle course between generality and specificity in enacting legislation); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. 187, 196 (1992) (stating that ambiguity results from time constraints and “logrolling”); Miriam R. Jorgensen & Kenneth A. Shepsle, *A Comment on the Positive Canons Project*, 57 LAW & CONTEMP. PROBS. 43, 44-46 (1994) (explaining statutes’ vagueness as due to oversight, error, purposeful vagueness and contradicting titles or language); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 383-84, 394-96 (1989) (noting that statutes’ complexity, stability over time, ability of legislature to reach consensus, number and ability of staff and confidence in agency all contribute toward legislature’s allowance of vague statutes).

A. *The Rules/Standards Dilemma*

Standards set forth factors for decisions made on a case-by-case basis. Rules provide precise prescriptions that do not vary greatly according to the situation.⁴³ An example from criminal procedure illustrates the distinction. In the 1950s, the constitutional limits on the interrogation of suspects took the form of a standard. The Supreme Court held that the Constitution prohibited police from coercing confessions from criminal defendants, and that the question of whether such coercion had occurred turned on numerous factors.⁴⁴ In *Miranda v. Arizona*,⁴⁵ the Court converted that standard into the following rule: the Constitution prohibits the police from interrogating suspects without advising them of their right to remain silent, their right to counsel and the potential use of any statements against them, no matter how well the defendants are otherwise treated.⁴⁶

Scholars vigorously debate the relative merits of standards and rules, *i.e.*, the appropriate level of specificity of law.⁴⁷ Rules tend to be both

43. For a more complete account of the distinction, see SCHAUER, *supra* note 18, at 191-92 (discussing adherence to both rules and decisions on case-by-case basis).

44. See *Miranda v. Arizona*, 384 U.S. 436, 506-08 (1966) (Harlan, J., dissenting) (relating 30 Court opinions declaring tests for coercion); *Haynes v. Washington*, 373 U.S. 503, 513-15 (1963) (demonstrating many tests for determining whether coercion occurred). The factors included physical deprivations (such as lack of sleep or food), number and length of interrogations, limitation on access to counsel and friends, length or illegality of detention, and individual weaknesses and incapacities. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-27 (1973) (listing seven factors for determining whether coercion had occurred); *Miranda*, 384 U.S. at 508 (Harlan, J., dissenting) (same).

45. 384 U.S. 436 (1966).

46. See *id.* at 444 ("The prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

47. See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 49-50 (1975) (stating that universal enforcement of rigid rules can lead to anarchic and disruptive results); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 458 (1988) (stating that greater statutory precision has raised cost of drafting by increasing penalties for ambiguities); Hatch, *supra* note 42, at 46 (justifying not putting everything in statutes because Congress must weave path between generality and specificity); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 599 (1994) (asserting that use of general, potentially ambiguous language is necessary to prevent statutes from becoming "impossibly cumbersome or complex"); see also POSNER, *supra* note 34, at 57 (stating that flexible standards may be preferable to rigid rules in context of federal taxation); James G. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes*, 93 MICH. L. REV. 1, 10, 28-30, 39-40, 57 (1994) (noting conflict between rules' requirement of putting defendants on notice and inevitable ambiguity); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 841-42 (stating that "new textualism" has led Congress to draft in too much detail); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 173 & n.59 (same). See generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES*, 15-63 (1987) (discussing pervasive-

over-inclusive and under-inclusive in relation to their rationales.⁴⁸ In other words, rules either cover situations or people that do not pose the harm that the rule is intended to prevent, or they do not cover situations or people that the statute is intended to reach. A change in circumstances can render precise rules ineffective or even harmful.⁴⁹ Also, precise rules allow evasion.⁵⁰ Finally, although rules make law determinate, and thus easy to ascertain by citizens and easy to construe by judges, they may do so by treating dissimilar people similarly.⁵¹

Standards frustrate the rule of law. They undermine citizens' interests in knowing their rights and responsibilities before, rather than after,

ness of tension between rules and standards); SCHAUER, *supra* note 18, at 18-31 (discussing generalization of rules); SUNSTEIN, *supra* note 33, at 27-28, 101-20 (discussing relative merits of rules and standards); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1484 (1985) (noting long-standing debate of rules and standards specificity in torts' reasonableness context); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE. L.J. 65, 75 (1983) (noting that desire to prevent costly litigation may motivate courts to adopt bright-line rules); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (arguing that judicial crafting of law in form of rules rather than standards is essential to concept of "rule of law"); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62-69, 95, 98 (1992) (outlining United States Supreme Court Justices' conflicts over propriety of framing constitutional doctrine in terms of standards or rules).

48. See SCHAUER, *supra* note 18, at 31-34, 100-02 (stating that rules are both over- and under-inclusive if assessed by reference to reasons justifying them); SUNSTEIN, *supra* note 33, at 130-31 (same); Bradley, *supra* note 47, at 1469-70, 1476, 1479-80, 1484 (explaining that precise rules often lead to unpalatable results in Fourth Amendment context).

49. See SUNSTEIN, *supra* note 33, at 131-32 (noting that rules can be "outrun by changing circumstances"). Indeed, the Delaney Clause—barring cancer-causing substances from foods—provides an archetypal example of the problems produced by excessive statutory specificity because it not only prohibits foods containing substances that induce cancer in human beings, but also prohibits all foods containing substances that might cause cancer in laboratory animals. See generally Federal Food, Drug, and Cosmetic Act, ch. 675 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.). As a result, the statute appears to ban many beneficial substances, such as saccharine. See MASHAW ET AL., *supra* note 17, at 122-40 (noting that, in 1977, FDA announced plan to ban saccharine); see also *Public Citizen v. Young*, 831 F.2d 1108, 1123 (D.C. Cir. 1987) (banning one food additive that created 1 in 19 billion chance of contracting cancer and another that created 1 in 9 million chance of contracting cancer).

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.), provides another example of the problems created by undue specificity. See, e.g., Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEG. & PUB. POL'Y 1, 10-12 (1998) [hereinafter Bell, *Metademocratic Interpretation*].

50. See SUNSTEIN, *supra* note 33, at 133 (asserting that precise rules allow evasion by wrongdoers); see also *Securities & Exch. Comm'n v. Chenery*, 332 U.S. 194, 196 (1947) (refusing to prohibit Securities Exchange Commission (SEC) from issuing remedial order merely because no SEC rule specifically prohibited offending conduct of corporate management).

51. See SCHAUER, *supra* note 18, at 42-43, 47-49 (noting that rules are generalized and, therefore, indiscriminate); SUNSTEIN, *supra* note 33, at 132 (asserting that rules may unfairly treat dissimilar groups of people identically).

they act. Moreover, standards create the possibility that similar people will be treated differently.

Should courts require Congress to produce statutes that prescribe precise rules? If not, that is, if statutes that merely establish standards are sometimes appropriate, can courts decide for Congress when rules are more appropriate than standards?

It is hardly surprising that the judiciary cannot resolve these questions for Congress; it cannot even resolve these questions for itself. The judiciary has not adopted a purely rule-based approach with respect to common law⁵² or constitutional doctrines, areas where courts enjoy some quasi-legislative power.⁵³ Issues of breach of duty in negligence actions provide a prime example of open-ended, standard-type inquiries in the common law. In addition, balancing tests and multi-factor standards have become prevalent in constitutional law.⁵⁴ Thus, even the courts have not been able to fashion their own rules to avoid delegation to either lower courts or juries. Even one of the most ardent judicial advocates of rules, Justice Antonin Scalia, sees advantages in a “discretion-conferring” as opposed to a “rule-bound” approach in crafting judicial doctrine.⁵⁵ Justice Scalia acknowledges that the adaptability that standards provide is thought to be the genius of the common law approach.⁵⁶ Furthermore, judicial deci-

52. The classic example of the contest between rules and standards are the two conflicting United States Supreme Court cases, separated by a mere seven years, involving the standards of conduct applicable to drivers negotiating rail crossings. Compare *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66, 70 (1927) (stating rule that when driver cannot otherwise be sure of whether train is dangerously near driver must stop and get out of vehicle), with *Pokora v. Wabash Ry.*, 292 U.S. 98, 106 (1934) (stating that whether driver must stop and get out of his or her vehicle at rail crossings depends on circumstances and this presents jury question). For an argument that standards are generally replacing rules in contemporary tort law, see generally Pearson, *supra* note 33.

53. Indeed, critical legal theorists see the tension between rules and standards as irreconcilable and argue that the tension pervades many areas of the law. See KELMAN, *supra* note 47, at 15, 17, 40-54 (discussing dilemma of choice between rules and standards). For instance, Kelman describes this tension in the law of contracts, criminal law, welfare rights, occupational safety, environmental protection, taxation, torts and property. See *id.* at 17-40 (noting omnipresence of rules/standards dilemma).

54. See T. Alexander Alienikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44, 963-72 (1987) (exploring and evaluating use of balancing in constitutional reasoning).

55. See Scalia, *supra* note 47, at 1177-80, 1185 (stating that advantage of discretion-conferring approach is that “perfect justice can only be achieved if courts are unconstrained by imperfect generalizations”); Sullivan, *supra* note 47, at 78, 82-84, 87 (noting Justice Scalia’s acknowledgment that, if rules are underinclusive, standards may provide fallbacks); see also RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 295 (1997) (noting Justice Scalia’s requirement that clear legal standards define scope of governmental power).

56. See Scalia, *supra* note 47, at 1177 (“[N]ot relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common law system.”). In the article, Justice Scalia also acknowledges that law cannot be entirely rule-bound and that discretion-conferring

sions about when to adopt rules and standards have either been inconsistent or controversial. Courts have disagreed over the appropriate specificity of common law rules. The judicial attitude toward the optimal specificity of common law rules varies greatly depending on the subject area to which the common law rules are to apply.⁵⁷ With respect to constitutional law, Supreme Court Justices regularly disagree among themselves about the appropriate specificity of constitutional doctrine.⁵⁸

The courts have had even less success at resolving the rules/standards dilemma for other branches of government. Litigants sometimes seek judicial review of agency decisions regarding whether to proceed by using standards or rules.⁵⁹ Sometimes private parties seek judicial orders to force agencies to proceed by rules rather than standards and adjudication.⁶⁰ They argue that agencies must proceed by rulemaking rather than adjudication and, thus, cannot declare their conduct a violation of a statute unless the conduct was expressly covered by a regulation implementing the statute.⁶¹ At other times, private parties seek judicial orders to force agencies to proceed by standards and adjudication rather than rules.⁶² They argue that agencies cannot apply general rules to them and

standards are sometimes necessary. *See id.* at 1186-87. He also concedes that determining the appropriateness of rules or standards in a given situation presents a difficult question. *See id.* at 1186-88.

57. *See Diver, supra* note 47, at 106-09 (stating that appropriate level of specificity may depend on subject matter). Diver makes this argument with respect to administrative rules. *See id.* (differentiating between statutory and regulatory schemes).

58. *See Sullivan, supra* note 47, at 83-95, 100-12 (discussing division of Supreme Court on choice between rules and standards). Similarly intense disputes have erupted in common law areas. *Compare* Rowland v. Christian, 443 P.2d 561, 566-67 (Cal. 1968) (abandoning traditional categories in determining landowner liability), *with* Younce v. Ferguson, 724 P.2d 991, 993 (Wash. 1986) (reaffirming use of common law classifications to determine duty of care owed by owner or occupier of land); *compare* Palsgraf v. Long Island R. Co., 162 N.E. 99, 100-01 (N.Y. 1928) (establishing foreseeability rule for proximate cause), *with id.* at 103-04 (Andrews, J., dissenting) (advocating multi-factor standard for making proximate cause determinations). For a further discussion of the rules/standards dilemma in the common law, see *supra* notes 54-56 and accompanying text.

59. *See* DAVIS & PIERCE, *supra* note 18, § 6.8, at 266 (discussing when agencies are required to act by rule).

60. *See* Securities & Exch. Comm'n v. Chenery, 332 U.S. 194, 199-200 (1947) (holding that where SEC was asked to grant or deny effectiveness of proposed amendment to reorganization plan, absence of general rule or regulation does not prevent SEC from determining that statutory standards are inconsistent with proposed amendment).

61. *See id.* at 195 (recognizing that absence of general rule addressing problem did not prevent SEC from otherwise determining question involved within limits of agency's statutory authority).

62. *See* Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960) (dismissing argument that regulation precluding people over 60 years of age from serving as pilots of commercial passenger aircraft was invalid because it deprived individual pilots over 60 of an individualized adjudication of their ability to pilot commercial passenger aircraft).

that agencies must proceed to determine whether, under all the circumstances, they pose the risk the rule was designed to prevent or have suffered an injury that the rule is designed to ameliorate.⁶³ The Supreme Court, while sometimes proclaiming the value of standards⁶⁴ and other times praising rules,⁶⁵ has largely left the decision to administrative agencies and has generally dismissed such claims.⁶⁶ The Court adopted this deferential approach because of the difficulty of articulating judicial standards for determining when an agency should proceed by standards and adjudication rather than by rules.

The Court created another rules/standards dilemma when it pursued the short-lived irrebuttable presumption doctrine.⁶⁷ In *Vlandis v. Kline*,⁶⁸ the Supreme Court held that the Due Process Clauses prevented the government from establishing certain rules that obviated the need for individualized consideration and, thus, that the Constitution sometimes required the use of flexible standards combined with individualized adjudication.⁶⁹ The Court quickly abandoned the doctrine as unworkable.⁷⁰ In particu-

63. See *id.* at 895 (noting argument that administrator should be required to hold hearing and permit each person affected to submit evidence as to their ability to fly).

64. See *Chenery*, 332 U.S. at 201-04 (explaining necessity of adjudication and need for flexibility in rules); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (same). See generally DAVIS & PIERCE, *supra* note 18, § 6.8, at 267-68 (discussing reasons that agencies decline to act by rulemaking).

65. See *Morton v. Ruiz*, 415 U.S. 199, 231-32, 234-36 (1974) (discussing importance of rules for ensuring fairness to individual citizens); *National Petroleum Refiners Ass'n v. Federal Trade Comm'n*, 482 F.2d 672, 681-83, 686-91 (D.C. Cir. 1973) (recognizing that use of rulemaking to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication); *Air Line Pilots*, 276 F.2d at 897 ("The clear public interest in the speedy adoption of rules relating to air safety far outweighs any possible advantage in a multitude of piecemeal and time-consuming hearings brought by each contesting airman."). See generally DAVIS & PIERCE, *supra* note 18, § 6.8, at 268 (discussing reasons that agencies should increase use of rulemaking).

66. See *Chenery*, 332 U.S. at 203 ("[T]he choice made between proceeding by general rule or by individual [adjudication] is one the lies primarily in the informed discretion of the administrative agency."); DAVIS & PIERCE, *supra* note 18, § 6.8, at 272-73 (noting Supreme Court's conclusion that choice between rules and standards lies primarily in informed discretion of administrative agency); MASHAW ET AL., *supra* note 17, at 553-59, 566 (discussing *Chenery's* progeny). Related issues arise when courts are asked to determine whether the appropriate forum for establishing what is admittedly a general rule is an adjudication or a rule-making proceeding.

67. See TRIBE, *supra* note 3, § 16-34, at 1618 (discussing irrebuttable presumption doctrine).

68. 412 U.S. 441 (1973).

69. See *id.* at 451-54 (holding that permanent irrebuttable presumption of nonresidence violated Due Process Clause).

70. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.6 (5th ed. 1995) (discussing history of irrebuttable presumption); TRIBE, *supra* note 3, §§ 16-32, 16-34, at 1609, 1618-25 (discussing irrebuttable presumption doctrine). See generally SUNSTEIN, *supra* note 33, at 133-34, 141-43 (discussing short-lived irrebuttable presumption doctrine).

lar, because all legislation is over- or under-inclusive, requiring individual determination of the propriety of applying the rule under the circumstances of every individual case would require intrusive review of statutes and frustrate majority rule.⁷¹

Courts have had difficulty with the same issue—the appropriate specificity of law—when attempting to determine whether statutes are unconstitutionally vague in violation of the Due Process Clause.⁷² Outside the context of criminal cases and cases implicating the independent constitutional right to freedom of expression, the Court virtually never finds a statute unconstitutionally vague. Here again, the Court, in essence, leaves the decision regarding the appropriate specificity of statutes to legislatures.⁷³

In short, even assuming the accuracy of some commentators' perceptions, courts cannot be expected to set forth the proper scope of delegation or specificity of statutes because courts cannot be expected to craft a

71. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 652 (1974) (Powell, J., concurring) (noting implications of doctrine for traditional legislative power to operate by classification); *id.* at 660 (Rehnquist, J., dissenting) (“All legislation involves the drawing of lines, and the drawing of lines necessarily results in particular individuals who are disadvantaged by the line drawn being virtually indistinguishable for many purposes from those individuals who benefit from the legislative classification.”); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 863-64 (1980) (stating that “irrebuttable presumption doctrine has a voracious appetite for statutes”).

72. See Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 195 (1955) (quoting Justice Frankfurter as stating that doctrine is “indefinite concept”); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 70-71 (1960) (noting habitual failure to express reasoning in “void-for-vagueness” decisions); Christina M. Burkholder, Comment, *Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972-73 Term*, 7 CONN. L. REV. 94, 94 (1974) (noting difficulty in tracking change in use of vagueness doctrine by courts); Jeffrey Merle Evans, Comment, *Void-for-Vagueness—Judicial Response to Allegedly Vague Statutes—State v. Zuanich*, 92 Wn. 2d 61, 593 P.2d 1314 (1979), 56 WASH. L. REV. 131, 140 (1980) (“The void-for-vagueness doctrine is itself, ironically, vague.”); Leon S. Hirsch, Comment, *Reconciliation of Conflicting Void-for-Vagueness Theories by the Supreme Court*, 9 HOUS. L. REV. 82, 85 (1971) (stating that guidelines given by courts to determine vagueness tend to be overly broad).

73. See Joseph E. Bauerschmidt, Note, *“Mother of Mercy—Is This the End of RICO?”—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO “Pat-tern”*, 65 NOTRE DAME L. REV. 1106, 1118-20 (1990) (noting that Supreme Court has found only 12 statutes void due to vagueness since 1960).

Admittedly, some jurists who have expressed concern about the breadth of congressional delegations suggest that the vagueness doctrine should be invoked more frequently and would declare unconstitutional statutes that the Supreme Court has found sufficiently definite. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 254-56 (1989) (Scalia, J., dissenting) (suggesting that portion of RICO statute may be unconstitutionally vague); *Georgia Ass’n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1581-82 (11th Cir. 1983) (Hill, J., dissenting) (stating that Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified in scattered sections of 20 U.S.C.), should be declared unconstitutional). It is not clear, however, that these jurists would demand substantially more precision in statutory drafting than the Supreme Court currently requires.

judicially administrable resolution of the rules/standards debate. Sometimes, the difficulty in crafting a judicially administrable approach to vindicate a constitutional right affects the framing of the contours of that right. Indeed, the difficulty of crafting judicial doctrines to fully, or even significantly, vindicate constitutional principles forms a recurrent theme in contemporary constitutional law and often affects the formulation of substantive constitutional standards.⁷⁴

B. *Agreeing to Disagree*

As noted above, nondelegation advocates also suspect that statutory vagueness reflects irreconcilable policy differences among legislators.⁷⁵ Congress does not resolve issues, but merely ignores them by legislating at a meaningless level of generality.⁷⁶ Congress should not be able to “decide” the controversial issues by delegating them to agencies for resolution.⁷⁷ Legislative inability to resolve critical issues has never been viewed as a justification for legislative delegation.

Before accepting this view, however, the Civil Rights Act Amendments of 1991⁷⁸ must be considered. One controversial issue that divided members of Congress was whether the statute, which legislatively overruled a

74. See Fallon, *supra* note 8, at 62-67 (discussing lack of congruity between constitutional norms and constitutional doctrines or test adopted to implement those norms).

75. For a discussion of the explanation for the current level of delegation and statutory vagueness, see *supra* notes 38-42 and accompanying text.

76. See *United States v. University Hosp.*, 729 F.2d 144, 163 (2d Cir. 1984) (Winter, J., dissenting) (asserting that political temptation to avoid confrontations with issues of moral or prudential controversy is inevitable aspect of legislative deliberations); WILL, *supra* note 41, at 172 (“Many of the ‘laws’ Congress passes actually are less laws than mere expressions of sentiments, values or goals.”); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 233 (1990) (stating that legislature frequently fails to address administrative and political constraints that will block implementation of statute).

77. See SCHOENBROD, *supra* note 6, at 190 (stating that Supreme Court could allow delegation of issues that would not cause significant controversy in Congress); William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 *CHI-KENT L. REV.* 301, 315 (1990) (“[L]egislators should take responsibility for resolving . . . contentious issues in the statutory text . . .”). Under such a view, the Supreme Court should be disturbed by situations in which an issue was not resolved because there was disagreement and the legislators decided to take their chances with agency resolution. Apparently, however, the Court does not view such congressional conduct as problematic. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984) (stating that it is entirely appropriate for agencies to make policy choices that Congress did not resolve). Indeed, in *Chevron*, the Court gives great respect to agency resolutions of controversial issues in such circumstances. See *id.* at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, . . . the challenge must fail.”).

78. Act of Nov. 21, 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat. 1071) 1071.

series of Supreme Court decisions, should apply retroactively.⁷⁹ Theoretically, that controversial issue should have been resolved by Congress, and if it could not be resolved, then the status quo should have remained unchanged. The result of such a failure to agree on the retroactivity issue, however, would have been a continuation of the Supreme Court's holdings, with which an overwhelming majority of members of Congress disagreed.⁸⁰ A bill simply could not have been enacted without some resolution of the question of the statute's temporal scope. Surely, allowing a majority to agree to disagree on this relatively minor issue was neither unconstitutional nor a manifestation of some political pathology.

The Supreme Court has long recognized the power and propriety of legislatures proceeding "one step at a time" in addressing problems. A legislature may legitimately avoid becoming mired in stalemate because its members cannot agree on all facets of a problem.⁸¹ Rather than being required to agree on all issues, a legislature may agree on some and leave the resolution of the remaining issues to other governmental bodies.⁸² Thus, attempting to prevent the use of vague statutory text may frustrate Congress' ability to forge the coalitions necessary for practical government.⁸³ In addition, new problems can often be best addressed incre-

79. Compare 137 CONG. REC. 30,330 (1991) (statement of Sen. Dole) (placing in record memorandum arguing that legislation should not apply retroactively), with *id.* at 30,340 (statement of Sen. Kennedy) (arguing that it should apply retroactively).

80. See Act of Nov. 21, 1991, Pub. L. No. 102-166, § 3(4), 1991 U.S.C.C.A.N. 1071; 137 CONG. REC. 30,340 (statement of Sen. Kennedy) (stating that purpose of Congress' proposed amendments was to reverse several procedural and substantive standards established by Supreme Court); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994).

81. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 468 (1981) (holding that ban on only plastic nonrefundable, nonrefillable milk containers that pose environmental hazards, but not paperboard containers that posed similar problems, does not violate Equal Protection Clause); *City of New Orleans v. Duke*, 427 U.S. 297, 309 (1976) (explaining that legislatures may implement programs step by step, adopting regulations that only partially ameliorate perceived evil and deferring complete elimination of evil to future regulations); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). See generally SUNSTEIN, *supra* note 33, at 35-38 (discussing important social uses of "incompletely specified agreement," *i.e.*, action based on partial agreement); Tim Atkeson, Note, *Reforming the One Step at a Time Justification in Equal Protection Cases*, 90 YALE L.J. 1777, 1778-80 (1981) (providing analytical framework for "one step at a time" justification).

82. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (noting that delegations should be upheld if Congress provides intelligible principle to guide exercise of delegated discretion); *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (same). Some guidance must be provided. Statutes that provide no guidance are unconstitutional delegations of legislative authority. See *Panama Ref. Co.*, 293 U.S. at 430 (stating that Court has recognized limits on delegation for which there is no constitutional authority to transcend).

83. See Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 114-15 (1988)

mentally by prescribing rules of increasing specificity as one gains experience.⁸⁴ Indeed, in other contexts the Court has shown an appreciation of the need to proceed incrementally; in particular, it has recognized the risk of establishing a rule too precipitously.⁸⁵ Requiring detailed rules would frustrate this ability to proceed incrementally.⁸⁶

Here, again, the judiciary cannot be expected to craft a judicially administrable rule to determine when separate components of legislative majorities may agree to disagree. Thus, the federal judiciary, though concerned about the current level of legislative delegation, has been unable to specify any judicially administrable standard for determining the

(discussing vagueness and its necessity to obtain agreement); Marshall J. Breger, *Introductory Remarks*, 1987 DUKE L.J. 362, 365 (stating that Congress' failure to write clear statutes "often reflects a consensual choice for ambiguous draftsmanship[;] [w]hen problems become too sticky, one solution is to leave matters to the courts—each side creating its legislative record as ammunition for the interpretive lawsuit it knows will surely come"); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 636-37 (1987) (noting that sometimes ambiguity of language is only way bill can pass); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 206 (1983) ("Key provisions may purposely be left vague or unsettled, or debate kept to a minimum, to achieve consensus."); see also *Statutory Interpretation and the Uses of Legislative History*, *supra* note 40, at 68 (statement of Rep. Buckley) (noting that mark up disagreements are resolved by saying "let the courts decide").

84. See Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1174 n.151 (1992) (noting that Congress typically legislates incrementally).

85. See *Securities & Exch. Comm'n v. Cheney Corp.*, 332 U.S. 194, 202 (1947) (stating that "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule"); *Pokora v. Wabash Ry.*, 292 U.S. 98, 105-06 (1934) (stating that there is "need for caution in framing standards of behavior that amount to rules of law[;] [t]he need is the more urgent when there is no background of experience out of which the standards have emerged"); OLIVER WENDELL HOLMES, *THE COMMON LAW* 123-24 (1881) ("A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury.").

86. Another concern raised by those who dislike the current breadth of delegations involves legislative dishonesty. See SCHOENBROD, *supra* note 6, at 75 (noting that legislators exploit ambiguity to convey different impressions to different constituencies). Enacting vague statutes and delegating the resolution of details to agencies allows legislators to support a program while working less visibly to undermine it. See *id.* at 59 (stating that legislators hid failure to make hard choices and then pressured agency to ignore goals). Schoenbrod uses as an example legislators who publicly supported tough Clean Air Act standards, but then "proceeded to play economic hero" for their business and labor constituents by opposing the Environmental Protection Agency's (EPA) effort to implement the statute. See *id.* at 67. This is a legitimate concern. Courts can address that concern by interpreting statutes (or requiring agencies to interpret statutes) to honor publicly-stated reasons for statutes rather than secret, privately-held motivations and subjective intentions of legislators. See Bernard W. Bell, *Legislative History Without Legislative Intent: A Public Justification Approach to Statutory Interpretation* (forthcoming 1998) (manuscript on file with *Ohio State Law Journal*) [hereinafter Bell, *Legislative History*].

appropriate extent of congressional delegation and, accordingly, do not seriously enforce the nondelegation doctrine.⁸⁷

C. Schoenbrod's Solution

David Schoenbrod has addressed the concern over the lack of judicially manageable standards.⁸⁸ He argues that three types of delegations should be permitted: (1) congressional delegation that "leaves the courts with discretion within the scope of the powers granted to the judiciary by Article III of the Constitution";⁸⁹ (2) congressional delegation to the President of authority that lies within the "executive power" (as defined by

87. See *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring) (asserting that "[t]he notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies . . . has been virtually abandoned by the Court for all practical purposes"); ELY, *supra* note 4, at 132-33 (stating that notion that Constitution narrowly confines power of Congress to delegate authority to administrative agencies has been virtually abandoned); FARBER & FRICKEY, *supra* note 39, at 78-79 (noting that although there has been only two reversals for violation of nondelegation doctrine, "it would be a mistake to view the doctrine as wholly moribund"). See generally MASHAW ET AL., *supra* note 17, at 75-79 (summarizing contrasting positions on consistency of delegation and liberal democracy).

88. See SCHOENBROD, *supra* note 6, at 180-91 (confronting suggestions that Court could not develop judicially manageable test). Schoenbrod goes on to suggest a judicially manageable test based upon the premise that Congress may not delegate any of the legislative power that Article I grants. See *id.* at 181-82.

89. See *id.* at 186-89. Schoenbrod focuses solely on preserving the judiciary's remedial discretion. He does not suggest that Congress can "delegate" to the judiciary the authority to establish citizens' rights and responsibilities. Such delegation is inevitable, however, given that statutes construed by the judiciary cannot always be precise.

Courts can more closely scrutinize the vagueness of a statute when rights under the statute must be adumbrated by courts rather than agencies. Courts must protect their own institutional integrity. The judiciary may not only ensure that the other branches of government do not encroach upon its legitimate powers, but may also refuse to perform functions that conflict with its judicial role. See *Muskrat v. United States*, 219 U.S. 346, 352-57, 360-62 (1911) (discussing instances in which Court has refused to exercise powers other than those of judicial nature); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 404-15 (1980) ("[T]he Court should retain the power to decide that it has no power to decide."); see also *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410-11 (1792) ("That neither the *Legislative* nor the *Executive* branches, can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.").

The prime example of such a refusal to accept an incompatible role is the letter from the Justices refusing to provide advice to President George Washington. See *Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices to President George Washington, August 8, 1793*, reprinted in 3 H. JOHNSON, *CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 486-89 (1891) (stating that Constitution prohibited Supreme Court from issuing advisory opinions). The Supreme Court has expressed similar concern with respect to the grant of appointment powers to federal courts, precluding judges from making appointments when there is an "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint." *Morrison v. Olson*, 487 U.S. 654, 676-77 (1988) (citing *Ex parte Siebold*, 100 U.S. 371, 398 (1879) (discussing

Article II of the Constitution or otherwise); and (3) congressional delegation of the power to manage federal property (as opposed to the power to regulate the conduct of private individuals). Otherwise, in Schoenbrod's view, no delegation should be allowed.⁹⁰

Perhaps Schoenbrod's proposed standards are judicially manageable. They bear little relationship, however, to the concerns underlying the nondelegation doctrine. These tests do not address the rules/standards dilemma or the need for legislatures to act when there is less than full agreement on every issue. Rules/standards problems and the need for partial resolution of issues occur no less frequently with respect to the general mass of legislation for which delegation would be forbidden than with respect to issues covered by the three categories in which Schoenbrod would allow delegation. In fact, Schoenbrod's approach essentially dismisses, or fails to address, the difficulties created by the rules/standards dilemma and the need for partial resolution of public controversies.⁹¹

cases in which courts have declined to exercise certain duties imposed by Congress)).

Under such a theory, courts can appropriately preclude Congress from burdening courts by granting them excessive discretion in interpreting statutes. Excessively general statutes can require courts to engage in essentially legislative duties, having to set forth standards with little or no guidance from the legislature. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 254-56 (1989) (Scalia, J., concurring in judgment) (stating that RICO may be unconstitutionally vague); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1581-82 (11th Cir. 1983) (Hill, J., dissenting) (stating that Court is not constitutionally entitled to make broad policy decisions Congress refused to make when it enacted Education for all Handicapped Children Act); Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 424-25 (1983-84) ("We are choking, not on statutes in general, but on ambiguous and internally inconsistent statutes[;] . . . [s]tatutory incoherence and vagueness . . . impose enormous burdens on the courts when trying to give life to the legislature's language."); Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 227-28 (1993) (discussing breadth of legislative delegation of lawmaking authority to courts). But see *The Sherman Anti-Trust Act*, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7). The Sherman Act is viewed as an open-text statute that has been very successful. See Theodore J. Stachtaciis, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745, 1749-50 (1994) (stating that Congress wrote Sherman Act in very broad terms, leaving great deal for judicial interpretation).

90. See SCHOENBROD, *supra* note 6, at 180-91 (discussing how courts should define unconstitutional delegation). Schoenbrod's fallback test, for those who believe the three exceptions he proposes insufficient, would prohibit Congress from delegating "controversial" issues. See *id.* at 189-91. This fallback test suffers from conceptual flaws, as noted earlier in the text of this Article; neither is it judicially manageable.

91. See *id.* at 3-21, 135-52, 180-91. In chapters 1 and 2 of his work, Schoenbrod briefly outlines his proposed test. See *id.* at 3-21, 132-52 (discussing "The Nub of the Argument" and that "Congress has Enough Time to Make the Laws"). In chapter 9 of his work, Schoenbrod describes each element of his test, demonstrates that each element accords with the purpose of the Constitution and argues that the test is judicially manageable. See *id.* at 180-91 (describing "How the Courts Should Define Unconstitutional Delegation"). In none of these discussions does

In addition, though less important, control over governmental proprietary activity, which is increasingly pervasive and clearly affects private individuals' liberty,⁹² should be no less subject to democratic control than regulatory action. Congress should be no less able to disclaim responsibility for the use of governmental resources than for the exercise of regulatory authority. In short, Schoenbrod does not provide a solution to the rules/standards dilemma or to the need for partial resolution of public issues.

III. NONDELEGATION AND THE LINE ITEM VETO: "SOMETIMES A CIGAR IS JUST A CIGAR"

As noted in the introduction to this Article, the current resurgence of the nondelegation doctrine is due in part to the controversy surrounding the line item veto. In 1996, after years of effort,⁹³ Congress enacted a line item veto statute that allowed the President to veto particular items in budget bills.⁹⁴ Congress did so in a somewhat unusual way by allowing the President to cancel expenditures shortly after signing appropriations bills, subject to congressional override. From its enactment, the Line Item Veto Act faced the constitutional challenges to which it ultimately succumbed.⁹⁵ One major basis for the challenges was the nondelegation doctrine—the argument that Congress had unconstitutionally delegated

Schoenbrod address the rules/standards dilemma or the need for partial resolution of public controversies.

92. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (discussing replacement of traditional forms of wealth, usually held as private property, by growth of "government largess"). Indeed, much of the controversy in constitutional law today concerns reconciling the government's right to manage its own resources and the coercive effect such decisions may have on the exercise of those rights. This issue is addressed by the "unconstitutional conditions" doctrine. See, e.g., RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 98-103 (1993) (attempting to resolve "unconstitutional conditions" problem); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV L. REV. 1413, 1421-86 (1989) (discussing components of unconstitutional conditions problem and such unconstitutional conditions as coercion, corruption and commodification).

Although Schoenbrod acknowledges this problem, and asserts that prescribing rules requiring the management of government property to induce changes in private conduct should be considered an exercise of the legislative power that Congress cannot delegate, he does not acknowledge the pervasiveness of the problem or that his caveat essentially swallows his proprietary activity exception. See SCHOENBROD, *supra* note 6, at 189.

93. See S. REP. NO. 104-9, at 5-8 (1995), *reprinted in* 1996 U.S.C.C.A.N. 860, 864-67 (discussing historical consideration of feasibility of line item veto, including campaigning for line item veto by 10 Presidents since Civil War).

94. See Line Item Veto Act of 1996, 2 U.S.C. §§ 691-692 (Supp. 1996).

95. See *Clinton v. City of New York*, 118 S. Ct. 2091, 2095 (1998) (invalidating Line Item Veto Act); *City of New York v. Clinton*, 985 F. Supp. 168, 177-82 (D.D.C. 1998) (finding Line Item Veto Act unconstitutional as violative of bicameralism requirement, Presentment Clause and separation of powers doctrine); *Byrd v. Raines*, 956 F. Supp. 25, 35-38 (D.D.C. 1997) (finding Line Item Veto Act unconstitutional due to violation of Presentment Clause).

lawmaking authority to the President.⁹⁶ The nondelegation doctrine, however, has little relevance to the line item veto. Indeed, the concerns underlying the doctrine only marginally *support* the creation of a line item veto.

Sigmund Freud is noted for finding symbolic importance in many aspects of dreams.⁹⁷ Yet, even Freud sometimes concluded that certain aspects of dreams symbolized nothing deeper.⁹⁸ His advice to consider such a possibility is captured by an aphorism attributed to him: "Sometimes a cigar is just a cigar."⁹⁹ Consideration of the line item veto, both by those challenging the statute on delegation grounds and by the Justices of the Supreme Court in resolving the issue, reflects a failure to see the line item veto for what it is—a line item veto; it is a supplementation of the President's veto power that allows him or her to veto a portion of a bill and initiate congressional reconsideration of those disapproved portions. Rather, delegation doctrine devotees and the Justices saw the line item veto as a mechanism for the President to partially repeal appropriations statutes or as a grant of general discretionary power not to expend appropriated funds.¹⁰⁰ When viewed properly, the line item veto has little to do with delegation of legislative power, nor does it offend bicameralism. The real issue is whether the all-or-nothing dilemma facing a President when presented with legislation, is integral to maintaining the Constitution's checks and balances, an issue hardly broached either by those who advocated resolving the case on the basis of the nondelegation doctrine or by the Justices who decided the case.

Over the years, Congress had examined several different approaches to the line item veto, most prominently the separate enrollment and en-

96. See Brief of the Association of the Bar of the City of New York as Amicus Curiae in Support of Appellees, *Clinton v. City of New York*, 118 S. Ct. 2091 (1998) (No. 97-1374), reprinted in 53 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 137, 143-46 (arguing that Line Item Veto Act is unconstitutional attempt to delegate congressional authority); Brief Amicus Curiae of Marci Hamilton and David Schoenbrod in Support of Appellees at 3-10, *Clinton v. City of New York*, 118 S. Ct. 2091 (1998) (No. 97-1374) (arguing that Line Item Veto Act is unconstitutional under Court's nondelegation doctrine).

97. See SIGMUND FREUD, DELUSION AND DREAM AND OTHER ESSAYS 61, 135-36, 142-43 (Philip Rief ed., Beacon Press 1956) (1968) [hereinafter FREUD, DELUSION AND DREAM] (discussing symbolism in dreams); see also SIGMUND FREUD, THE INTERPRETATION OF DREAMS 174-75 (1985) [hereinafter FREUD, INTERPRETATION OF DREAMS] ("The dream-content is . . . presented in hieroglyphics, whose symbols must be translated, one by one, into the language of the dream-thoughts. It would . . . be incorrect to attempt to read these symbols in accordance with their values as pictures, instead of in accordance with their meaning as symbols.").

98. See FREUD, INTERPRETATION OF DREAMS, *supra* note 97, at 240, 247 (cautioning against overestimating importance of symbols in interpreting dreams).

99. See JOHN BARTLETT, FAMILIAR QUOTATIONS 679 (15th ed. 1980) (quoting Freud as saying, "Sometimes a cigar is just a cigar").

100. See *Clinton*, 118 S. Ct. at 2106 ("[W]henver the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment.").

hanced rescission approaches.¹⁰¹ The separate enrollment approach involved enacting an entire appropriations bill and then separately enrolling separate pieces of the overall bill.¹⁰² The enhanced rescission approach involved supplementing the President's power to refuse to spend, *i.e.*, impound appropriated funds.¹⁰³ The Line Item Veto Act follows the enhanced rescission approach.

Under the Line Item Veto Act, once Congress passes an appropriations statute, the President can exercise his or her constitutional power to sign or veto the whole bill. If the President signs the bill, he or she can, within the succeeding five days, "cancel" items of spending or certain limited tax benefits.¹⁰⁴ Congress limited the President's authority to exercise the new cancellation power by requiring that he or she determine that such cancellation will: (a) reduce the federal deficit; (b) not impair "essential Government functions;" and (c) not harm "the national interest."¹⁰⁵ The President must notify Congress of his or her cancellations.¹⁰⁶ The President's message to Congress must identify each specific item of spending or limited tax benefit he or she has canceled, set forth his or her findings demonstrating that the cancellation would reduce the deficit while not impairing essential governmental services or the national interest and present material supporting those findings.¹⁰⁷ In addition, the President's message must state the reasons for the cancellation, the estimated fiscal, economic and budgetary impact of the cancellation and "all facts, circumstances and considerations relating to or bearing upon the cancellation . . ."¹⁰⁸ The Line Item Veto Act provides for expedited congressional consideration of bills to disapprove of the President's cancella-

101. See S. REP. NO. 104-9, at 5-6 (1995) (discussing three statutory approaches developed for line item veto, including "separate enrollment" approach).

102. See *id.* at 6. The process of enrollment involves the formal printing of a bill followed by the presiding officers attesting to the regularity of the relevant legislative proceedings by signing the bill. See *id.*

103. See *id.* ("Enhanced rescission legislation . . . would delegate to the President unilateral authority to rescind budget authority provided in appropriations acts or to repeal tax expenditures in revenue acts."). Rescission is a form of presidential impoundment of funds appropriated by Congress. See generally WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 51-90 (4th ed. 1996) (describing rescissions and federal budget process).

104. See 2 U.S.C. § 691a(a) (Supp. 1996).

105. *Id.* § 691(a). In addition to these requirements, in identifying dollar amounts of budget authority, spending or limited tax benefits for cancellation, the President was required to consider "the legislative history, construction, and purposes of the law" containing the dollar amounts and any "specific sources of information referenced in such law . . ." *Id.* § 691(b).

106. See *id.* § 691a(a) ("For each law from which a cancellation has been made under this [subchapter], the President shall transmit a single special message to the Congress.").

107. See *id.* § 691a(b) (providing for contents of special message from President).

108. See *id.* § 691a (providing for necessary inclusions in special message from President).

tions.¹⁰⁹ Each disapproval bill need only pass by a majority of the members of the House or Senate.¹¹⁰ Upon approval by the House and Senate, the disapproval bill is presented to the President who may again veto it.¹¹¹ At that point, Congress may override the President's veto of the disapproval bill by a two-thirds vote.¹¹²

Both the advocates of the nondelegation doctrine and the Supreme Court majority in *Clinton v. City of New York*¹¹³ treated the Line Item Veto Act as a grant of authority allowing presidential repeal of statutes, rather than as a mechanism to allow Presidents to exercise their veto power with respect to specific aspects of a bill without being constrained by the all-or-nothing requirement of vetoing or signing the entire bill.¹¹⁴ Thus, advocates of the nondelegation doctrine argued that Congress had granted the President the ability to selectively repeal appropriations statutes without significantly constraining the President's discretion in using that power.¹¹⁵ The limitations on the use of that power set forth in the Line Item Veto Act were insufficient to establish an "intelligible principle" to guide the President in the use of that authority.¹¹⁶

109. See *id.* § 691d (providing for expedited congressional consideration of disapproval bills); see also H.R. REP. NO. 104-491, at 26-28 (1996) (describing expedited House and Senate procedures).

110. See 2 U.S.C. § 691d (providing for expedited congressional consideration of disapproval bills); see also *Clinton v. City of New York*, 118 S. Ct. 2091, 2102 (1998) ("A majority vote of both Houses is sufficient to enact a disapproval bill.").

111. See U.S. CONST. art. I, § 7, cl. 2; see also *Clinton*, 118 S. Ct. at 2102 ("The Act does not grant the President the authority to cancel a disapproval bill . . . he does, of course, retain his constitutional authority to veto such a bill.").

112. See U.S. CONST. art. I, § 7, cl. 2; see also *Clinton*, 118 S. Ct. at 2103 ("His 'return' of a bill, which is usually described as a 'veto,' is subject to being overridden by a two-thirds vote in each House.").

113. 118 S. Ct. 2091 (1998).

114. See *id.* at 2103 (describing power to nullify portions of congressional enactment as important difference between President's "return" of bill pursuant to Article I, section 7 of Constitution and President's cancellation authority pursuant to Line Item Veto Act). Even the dissenting Justices viewed the Act's title as a misnomer, for they did not analyze the Act as one granting a line item veto, but rather as a traditional delegation of authority to the President to control the use of appropriated funds.

115. See Brief Amicus Curiae of Marci Hamilton and David Schoenbrod in Support of Appellees at 6-10, *Clinton*, 118 S. Ct. at 2091 (No. 97-1374) (discussing lack of "intelligible principle" with congressional delegation of power to President).

116. See *Loving v. United States*, 517 U.S. 748, 771 (1996) ("Congress as a general rule must also 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928))). Ironically, Schoenbrod's proposed nondelegation approach might allow delegation of power to cancel expenditures. First, controlling the expenditure of federal funds arguably qualifies as the management of government property, and Schoenbrod would allow delegation of authority to manage government property. See *SCHOENBROD*, *supra* note 6, at 186 ("Rather, Congress may allow the executive branch to manage the public domain, including making management rules."). Second, the cancellation authority provided under the Act could easily be characterized as "executive"

This is, of course, an extremely formalist argument because it exalts the form of the Line Item Veto Act over its substance. The President's exercise of the cancellation authority set forth in the Line Item Veto Act is clearly one part of a larger process designed to allow the President to separate items on which he or she and Congress agree from those on which they do not, thus forcing Congress to address those particular issues separately. Under the Line Item Veto Act, the President may not consent to the law as passed by Congress and then change his or her mind sometime thereafter and unilaterally repeal the statute. Rather, the President, in effect, conditionally consents to the statute. More precisely, the President consents to the statute on the condition that he or she is able to exercise his or her veto power with respect to particular items. There is little substantive difference, as a constitutional matter, between the enhanced rescission approach taken in the Line Item Veto Act and the competing separate enrollment approach. The extremely short five-day period that the President has to present his or her cancellations is crucial and serves to distinguish the cancellation authority from some more general authority to repeal appropriations statutes.¹¹⁷ Because the President can only void an expenditure and cannot add or revise items, the granted authority is a type of veto rather than a type of lawmaking.¹¹⁸ The authority granted to the President under the Line Item Veto Act is far different from the authority to nullify a statute that has already been enacted and that either the current President, or some preceding President, had previously assented to in its entirety.

Admittedly, as the Supreme Court ultimately decided, the line item veto process may vary from the process set forth in Article I of the Consti-

authority, as Justices Scalia and Breyer suggested, thus fitting within a second category of decisions that Schoenbrod would allow to be delegated. *See id.* ("In enforcing the delegation doctrine, the Court can uphold statutes leaving the president [sic] with the discretion already within executive power, however defined.").

117. *See* 2 U.S.C. § 691a(c) (1996) (providing for presidential "special message" to be sent to Congress within "five calendar days"). Of course, the extension of the constitutionally prescribed period for the exercise of the veto, from 10 days to, in effect, 15 days may make the Line Item Veto Act constitutionally infirm (for reasons unrelated to the nondelegation doctrine or the bicameralism requirement). *See* J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 Nw. U. L. Rev. 437, 460-61 (1990) (discussing presidential veto power being exercised in absence of 10-day limit in Presentment Clause). On the other hand, the Act placed time-consuming burdens on the President's exercise of a line item veto that would clearly constitute impermissible burdens on his or her traditional all-or-nothing veto power. *See* 2 U.S.C. § 691a (describing burdens placed on President when exercising line item veto). Thus, arguably, granting the President a modest additional period to exercise such a veto should be constitutional.

118. *See* 2 U.S.C. § 691 (describing President's line item veto authority); *see also Clinton*, 118 S. Ct. at 2102 ("The Line Item Veto Act gives the President the power to 'cancel in whole' three types of provisions that have been signed into law . . ."). *But see id.* at 2103 ("In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each.").

tution.¹¹⁹ In fact, it may even violate important separation of powers principles because arguably, one of the handicaps under which the President should labor is the requirement that he or she accept or reject statutes in toto. The line item veto does not, however, implicate the concerns underlying the traditional nondelegation doctrine and provides a poor vehicle for the doctrine's resurgence. More specifically, even with the presence of the line item veto, Congress does not abdicate responsibility for making fundamental policy choices. Before each appropriation bill is presented to the President for his or her signature, Congress has made the broad policy decisions that shape the federal budget; indeed, it has often made budgetary decisions in excruciating, and perhaps even excessive, detail. Moreover, the line item veto significantly increases the probability that specific budgetary decisions will become matters of controversy and, thus, subject to widespread deliberation.

The Framers of the Constitution sought to ensure deliberation on the merits of proposed legislation.¹²⁰ They believed that statutes should result from legislators convincing their colleagues by force of persuasion, rather than from factions trading votes to amass a legislative majority.¹²¹ This was Madison's conception of the optimal legislative process, which he sought to effectuate by arguing for legislative procedures, including bicameralism and presentment, that in effect required the concurrence of a supermajority before Congress could act.¹²²

Members of Congress may have legitimate concerns about the effect of aggregating many items in one bill. In particular, such omnibus legislation is likely to lead to particular individual items escaping scrutiny by the House and the Senate as a whole.¹²³ Indeed, the one-subject rule in-

119. See *Clinton*, 118 S. Ct. at 2103 ("There are important differences between the President's 'return' of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act.").

120. See generally THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961) (arguing that representative democracy is less subject to passions of self-interested factions).

121. See THE FEDERALIST NO. 51, *supra* note 35, at 323-25 (arguing that benefit of large, multifaceted society is difficulty of amassing majority "on any other principles than those of justice and the general good").

122. See THE FEDERALIST NO. 10, *supra* note 120, at 82 (noting that "representatives must be raised to a certain number in order to guard against the cabals of a few"); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-45 (1985) (discussing Madison's and other Federalists' transformation of question of corruption into one of faction). See generally Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 102 (1997) (stating that interaction of House, Senate and President guards against "tyrannical laws . . . or self-interest of one set of political actors").

123. Indeed, many who favor the line item veto cite this diminution of the presidential power to veto as a justification for establishing a line item veto. See ROBERT J. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 123-24 (1988) (stating that Founders would not have found item veto to represent dangerous innovation but, rather, would have welcomed it as essential check and balance); Sidak & Smith, *supra* note 117, at 466-67 (discussing President's diminished ability to exercise veto power in light of size and scope of bills);

cluded in many state constitutions addresses precisely this concern.¹²⁴ Moreover, many states grant their governors line item veto authority because they recognize that appropriations bills cannot be limited to one subject and still serve their purpose of establishing budgetary priorities.¹²⁵

Congressional appropriations bills are theoretically susceptible to the above "pathologies." Individual items of spending can get lost in massive appropriations bills. Appropriations bills are so massive and address so much that many individual projects never undergo public debate.¹²⁶ Most individual projects would never occasion a presidential veto of an entire appropriations bill. Members of Congress may not challenge the projects because of "logrolling" or the need to gain the votes of colleagues to have their own projects financed.¹²⁷ Thus, one commentator has argued that the congressional budget process is particularly nondeliberative.¹²⁸ The

see also HOUSE COMMITTEE ON THE BUDGET, 98TH CONG., THE LINE ITEM VETO: AN APPRAISAL 13-16 (Comm. Print 1984) (presenting arguments for and against institution of presidential line item veto).

124. See *State v. Paulus*, 688 P.2d 1303, 1309 (Or. 1984) (stating that "one-subject rule aims to enhance the likelihood that distinct policies will be judged rationally on their individual merits rather than being packaged to attract support from legislators or constituencies with special interest in one provision and no worse than indifference toward other unrelated ones"); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 553-59 (1988) (discussing state constitutional provisions and dominant tradition in state law against private interest legislation); see also Millard H. Rudd, "No Law Shall Embrace More Than One Subject," 42 MINN. L. REV. 389, 391-96 (1958) (stating that "one-subject rule" facilitates orderly legislative procedure and discussing judicial application of rules).

125. See *Commonwealth v. Barnett*, 48 A. 976, 977 (Pa. 1901) (explaining that line item veto is one method incorporated in Pennsylvania Constitution to restrain legislative "logrolling" in appropriations bills which, by their nature, cannot be limited to one subject). For a more general discussion of state line item veto provisions, see SPITZER, *supra* note 123, at 134-38.

126. See, e.g., Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts From the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 12 (1996) (noting that federal land management appropriations bills are passed with little public debate).

127. See Adrienne G. Threatt, *The Impact of Term Limits on the Congressional Committee System*, 6 GEO. MASON U. L. REV. 767, 773-74 (1998) (defining "logrolling").

128. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1582 (1988) [hereinafter Sunstein, *Republican Revival*] (arguing that appropriations statutes should not be viewed as amending substantive statutes because "the appropriations process is comparatively likely to be dominated by well-organized private groups [and] lack[] visibility"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 474 (1989) [hereinafter Sunstein, *Interpreting Statutes*] (stating that "careful deliberation" on appropriations provisions "is unlikely," thus, courts construe such provisions narrowly); see also Neal Devins, *Regulation of Government Agencies Through Limitations Riders*, 1987 DUKE L.J. 456, 458, 465 (1987) (noting that appropriations process allows proposals to pass that have not been previously considered by committees responsible for substantive legislation).

Indeed, anecdotal evidence suggests that appropriations bills may not be available for study in their final form when members must vote on them. See L. Gordon Crovitz, *Congressional Control of the Administration of Government: Investigations, Over-*

line item veto enables the President to initiate controversy on specific items of spending that otherwise would not become matters of controversy because the items would not conceivably provoke a veto of an entire appropriations bill.¹²⁹ The controversies initiated by the President wielding his or her line item veto authority may well lead to votes for which the electorate can hold Senators and Representatives accountable.¹³⁰ Thus, one major goal of the nondelegation doctrine—that elected legislators, rather than unelected administrative officials, make controversial decisions for which they can be held accountable—is advanced, and not retarded, by the line item veto.¹³¹

Like the delegation doctrine advocates, the Justices of the Supreme Court, in deciding *Clinton*, viewed the Line Item Veto Act as establishing something other than a line item veto, and thus they all inadequately addressed the constitutional issues raised by the statute.¹³² The six-Justice majority, like the nondelegation doctrine advocates, viewed the Act as authorizing the President to unilaterally repeal portions of appropriations statutes.¹³³ The majority held, not surprisingly, that repealing statutes required bicameral approval; it drew heavily, of course, on the rationale of *Chadha*.¹³⁴ For this reason, the Court held that granting the President the

sight, and Legislative History, 68 WASH. U. L.Q. 595, 614-15 (1990) (noting that not one member of 101st Congress read final version of budget bill) (citing Rep. Chris COX, HUMAN EVENTS, Dec. 9, 1989, at 10). This, however, is not a problem unique to appropriations bills.

129. See Sidak & Smith, *supra* note 117, at 457 (arguing that veto makes confrontation possible on “dubious measures passed by Congress”). This is a benefit in a democracy, as it will attract public attention to legislative issues. As Schoenbrod notes, “Nothing attracts a crowd so quickly as a fight.” SCHOENBROD, *supra* note 6, at 103 (quoting E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 1-2 (1975)).

130. See Sidak & Smith, *supra* note 117, at 456-57 (observing that presidential vetoes followed by congressional attempts to override veto foster “public debate and accountability” by ensuring recording of precise nature of inter-branch conflict and informing electorate of that disagreement).

131. See Laura Suzanne Faris, *Private Jails in Oklahoma: An Unconstitutional Delegation of Legislative Authority*, 33 TULSA L.J. 959, 961-68 (1998) (defining delegation doctrine). Moreover, delegation’s central threat to democracy is the allocation of lawmaking power to unelected officials that are not directly accountable to the public. Thus, delegation is most problematic and most weakens democracy when power is delegated to unelected officials. The President, like members of Congress, is also an elected official and, thus, using the nondelegation doctrine in arguing against the enhancement of presidential powers seems peculiarly inapt. See *Clinton v. City of New York*, 118 S. Ct. 2091, 2128 (1998) (Breyer, J., dissenting) (noting that President is elected official).

132. See *Clinton*, 118 S. Ct. at 2102-08 (discussing Line Item Veto Act).

133. See *id.* at 2103 (arguing that under Line Item Veto Act, President, legally and practically, can amend congressional acts).

134. See *id.*; see also *Confiscation Cases (Slidell’s Land)*, 87 U.S. (20 Wall.) 92, 112-13 (1874) (“No power was ever vested in the President to repeal an act of Congress.”).

authority to unilaterally repeal statutes was unconstitutional.¹³⁵ The majority pointedly avoided declaring the Line Item Veto Act an unconstitutional delegation of lawmaking authority, but did address the issue obliquely in rejecting the argument that an old delegation precedent required the Court to uphold the Line Item Veto Act.¹³⁶

Justice Scalia, in dissent, also viewed the title of the statute, "The Line Item Veto Act," as something of a misnomer and colorfully lamented that the statute's title had succeeded in "faking out" the majority.¹³⁷ He, too, did not view the Line Item Veto Act as merely allowing the President to veto portions of large appropriations bills, and thus avoid the dilemma of having to either approve or disapprove an entire bill.¹³⁸ Justice Scalia characterized the Line Item Veto Act as authorizing presidential refusals to spend appropriated funds.¹³⁹ He would have upheld the authority Congress conferred upon the President in the Line Item Veto Act because it did not differ from the discretion that Congress had historically given the President to spend (or, implicitly, not spend) money on particular items.¹⁴⁰ Justice Scalia seemed to view such discretion as a part of the President's authority, under Article I of the Constitution, to execute the laws.¹⁴¹ He embellished his argument with a brief history of statutes that had conferred upon presidents the discretion to spend less than appropriated.¹⁴² Regardless of the merits of Justice Scalia's argument, it fails to

135. See *Clinton*, 118 S. Ct. at 2103 (noting that line item veto allows President to cancel bill after it becomes law).

136. See *id.* at 2105-07 (discussing *Field v. Clark*, 143 U.S. 649 (1892)).

137. See *id.* at 2118 (Scalia, J., concurring in part and dissenting in part) (noting that Line Item Veto Act authorizes President to cancel spending and that Congress has authorized such action since formation of Union).

138. See *id.* at 2115, 2118 (Scalia, J., concurring in part and dissenting in part) (characterizing Line Item Veto Act as giving President power to cancel parts of duly enacted statute and asserting that Line Item Veto Act did not, in fact, create line item veto authority).

139. See *id.* at 2116 (Scalia, J., concurring in part and dissenting in part) ("[T]here is not a dime's worth of difference between Congress authorizing the President to *cancel* a spending item, and Congress' authorizing money to be spent on a particular item at the President's discretion.").

140. See *id.* at 2116-18 (Scalia, J., concurring in part and dissenting in part) (discussing history of presidential authority to refuse expenditure of funds). There is, of course, a difference between individualized grants of discretion with respect to expenditures for particular programs and wholesale grants of discretion covering every future budget. One could legitimately uphold one, while believing the other to be an unconstitutional delegation. Moreover, there is some merit to the majority's view that allowing discretion that is to be exercised in changed or unknown circumstances differs from allowing discretion to nullify appropriations statutes because the President disagrees with the appropriation *ab initio*. See *id.* at 2105-06.

141. See *id.* at 2116 (Scalia, J., concurring in part and dissenting in part) (asserting that Line Item Veto Act "is no broader than the discretion traditionally granted the President in his execution of spending laws").

142. See *id.* at 2116-18 (Scalia, J., concurring in part and dissenting in part) (listing examples of statutes that grant President discretionary power to spend less than is allocated).

consider the following important aspect of the Line Item Veto Act: the Act removes from the President the burden of having to consider appropriations statutes as a whole and, thus, take the bitter along with the sweet, and accordingly confers upon the President the newfound freedom to consider appropriations statutes on a piecemeal basis.

At the heart of Justice Breyer's dissent lies a traditional nondelegation doctrine argument. He argued that the power granted to the President under the Line Item Veto Act lay well within Congress' power to delegate its authority in accordance with the boundaries of that power as defined in the Court's precedents.¹⁴³ Not only did Justice Breyer discuss the nondelegation doctrine explicitly for the last half of his opinion, his attack upon the majority's bicameralism argument paralleled his nondelegation doctrine argument.¹⁴⁴ Justice Breyer argued that the Line Item Veto Act did not give the President the power to repeal statutes in violation of the Article I bicameralism requirement, as the majority suggested, but merely granted the President the power to exercise discretion according to relatively vague, but sufficiently definite, standards.¹⁴⁵ In his discussion of the nondelegation doctrine, Justice Breyer rightly exposed the antiquated nature of the majority's limited nondelegation analysis, which focused on the 106 year-old decision in *Field v. Clark*.¹⁴⁶

Justice Breyer did, however, discuss more than delegation. He argued that use of the power to cancel appropriations did not encroach upon Congress' power or aggrandize the executive branch,¹⁴⁷ thus applying the vague separation of power concepts that had structured the Court's analysis in prior cases.¹⁴⁸ He also noted the unhelpful nature of the formalist inquiry into whether canceling appropriations was a legislative or an executive power.¹⁴⁹ Ultimately, however, Justice Breyer did not rigorously ana-

143. *See id.* at 2121-23 (Breyer, J., dissenting) (performing conventional nondelegation doctrine analysis).

144. *Compare id.* at 2120-23 (Breyer, J., dissenting) (arguing that, in canceling expenditure, President is merely exercising delegated power of type ordinarily conferred in manner consistent with statute and, thus, is not repealing statute without complying with Bicameralism Clause), *with id.* at 2125-31 (Breyer, J., dissenting) (arguing that discretion delegated to President is sufficiently constrained by procedural, "purposive" and substantive limitations to satisfy requirements of nondelegation doctrine).

145. *See id.* at 2123-31 (Breyer, J., dissenting) (discussing nondelegation doctrine in historical context).

146. 143 U.S. 649 (1892); *see Clinton*, 118 S. Ct. at 2128-31 (Breyer, J., dissenting) (criticizing majority's reasoning in finding Line Item Veto Act unconstitutional).

147. *See Clinton*, 118 S. Ct. at 2122-24 (Breyer, J., dissenting).

148. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 693-95 (1988) (upholding statutory tenure protections of independent counsels because there was no "encroachment" or "aggrandizement"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986) (finding no aggrandizement of FTC's exercise of adjudicatory power).

149. *See Clinton*, 118 S. Ct. at 2123 (Breyer, J., dissenting) (criticizing distinction between legislative and executive power and noting that Court does not "carry

lyze whether the all-or-nothing nature of the presidential veto is a crucial part of the constitutional structure; he rejected the notion at the outset of his opinion, almost as an article of faith.¹⁵⁰ Therefore, although Justice Breyer's argument was virtually indisputable in reasoning that the authority delegated to the President in the Line Item Veto Act was more than adequately bounded given the standards established by the governing cases, he failed to focus adequately upon the most serious issue raised by the Line Item Veto Act—an issue that was not resolved merely by Breyer's finding that any delegation of lawmaking authority made by the Act was constitutional.

The central issue presented by the Line Item Veto Act is whether the President must be limited to approving or disapproving bills in toto, rather than being able to disapprove of only portions of bills.¹⁵¹ Although both the majority and the dissenters addressed the issue briefly, it was not central to any opinion and did not produce rigorous analysis. The majority suggested that one of the differences between the constitutionally prescribed presidential veto and the powers granted by the Line Item Veto Act was that “[t]he constitutional return is of the entire bill; the statutory cancellation is of only a part.”¹⁵² As discussed above, Justice Breyer began his opinion by noting his view of the legitimacy of Congress attempting to save the President from the dilemma inherent in the all-or-nothing decision to either sign or veto a bill.¹⁵³

A more cogent analysis of the Line Item Veto Act would have focused on the issue that the Constitution requires that the President be limited to vetoing bills in their entirety. Is there something implicit in the structure of the federal government that requires the President to be placed in such a predicament? The contemplated role of the President as a subordinate player in the legislative process with only a veto to prevent the enactment

out distinction between legislative and executive action with mathematical precision”).

150. *See id.* at 2118-19 (Breyer, J., dissenting) (noting that President can, consistent with Constitution, give effect to some but not all parts of appropriations bills).

151. Indeed, when the Line Item Veto Act is viewed as legislation governing the exercise of the President's veto power, the limits on the discretion of the President to cancel expenditures, viewed by all the Justices as necessary to satisfy nondelegation doctrine requirements, become a constitutional liability. In particular, Congress may be limited in the constraints it can place upon the President's exercise of his or her veto power, even while simultaneously expanding the veto's potency. Surely Congress could not restrain the President in the use of his or her traditionally recognized all-or-nothing veto power. *See id.* at 2102 (recognizing that President retains constitutional veto authority to reject entire bill). Allowing Congress to create an alternative veto power with severe restrictions on its use is problematic and would seem to create a system sufficiently different from the traditionally recognized veto procedure to be constitutionally infirm.

152. *Id.* at 2103.

153. *See id.* at 2118 (Breyer, J., dissenting) (noting legitimacy of Congress' attempt to “provide the President with the power to give effect to some, but not all” budgetary provisions contained within “a massive appropriations bill”).

of legislation and little affirmative power to mold law suggests that the all-or-nothing limitation on the veto power is important.¹⁵⁴ The Framers appear to have viewed the House and the Senate as the primary wielders of legislative power, with the President merely acting as a check on Congress to inhibit enactment of unreasonable or unconstitutional legislation.¹⁵⁵ As noted-historian Gordon Wood has observed, the Federalists argued that the President possessed no “legislative authority” and that what “gives active operation to [statutes is] the will of the senators and representatives.”¹⁵⁶ The Framers described the President’s “qualified negative”¹⁵⁷ as

154. See, e.g., SPITZER, *supra* note 123, at 19-20 (describing current view of presidential power as merely negative block rather than affirmative power). Though we currently consider the veto power as merely a negative power, the Framers may have conceived of it as much more of a revisionary power. See *id.* at 19-20, 124-25 (noting that “stipulations underscore a role for the President in actively shaping legislation by use of the veto”). Nevertheless, the Framers almost certainly viewed Congress as having the preeminent role in crafting legislation, with the President’s role being secondary. See generally Sargentich, *supra* note 122, at 114 (asserting that “one . . . fundamental [constitutional] value is that Congress is the governmental body to make the main judgments about what the law should be”). For a discussion of the balance between presidential veto power and congressional power to have the ultimate decision on legislation, see *infra* notes 155-63 and accompanying text.

155. See Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 90 (1976) (noting “original understanding that the veto would be used only rarely, and certainly not as a means of systematic policy control over the legislative branch, on matters constitutionally indifferent and not menacing to the President’s independence”); THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing “salutary check”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS] (recounting Madison’s statements regarding two purposes of veto—to defend executive rights and to prevent popular injustice); 4 RECORDS, *supra*, at 81 (reprinting Madison’s remarks stating that veto is meant to check unconstitutional laws).

Hamilton claimed the presidential veto was modeled after the veto power of the Massachusetts Governor, which Professor Wood notes was also viewed as a check on the legislature’s exercise of legislative authority. See THE FEDERALIST NO. 73, *supra*, at 446 (noting that presidential veto was modeled on veto power of Massachusetts governor); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 435-36, 452-53 (1969) (noting role of executive to check legislative action); see also SPITZER, *supra* note 123, at 125 (stating that “[t]he historical record is relatively clear that . . . the founders principally feared legislative abuses”).

156. WOOD, *supra* note 155, at 553 (asserting that President was not member of legislature and, as such, possessed no legislative authority). See generally 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 472-73 (2d ed. 1888) [hereinafter DEBATES IN THE STATE CONVENTIONS], reprinted in 2 THE FOUNDERS’ CONSTITUTION 397-98 (Philip B. Kurland & Ralph Lerner eds. 1987) [hereinafter FOUNDERS’ CONSTITUTION] (statement of James Wilson at Pennsylvania Ratifying Convention) (characterizing presidential veto as qualified negative, resulting in requisite two-thirds majority to pass, rather than bare majority).

157. THE FEDERALIST NO. 73, *supra* note 155, at 442, 445-46 (characterizing veto power as qualified negative); see 2 DEBATES IN THE STATE CONVENTIONS, *supra* note 156 at 447-48, 472, reprinted in 2 FOUNDERS’ CONSTITUTION, *supra* note 156, at

merely the power to force congressional reconsideration of bills.¹⁵⁸ The text of the Constitution confirms this view. In particular, Article I, Section 1, the first provision of the Constitution following the preamble, vests *all* legislative powers in Congress, not Congress *and* the President.¹⁵⁹ Indeed, Alexander Hamilton suggests in *Federalist No. 73* that the veto power would be used sparingly—only as a measure to protect the President’s authority and provide additional security against unjust laws.¹⁶⁰

Given the contemplated subordinate role of the President in the legislative process, Congress should be assured of the ultimate power to determine the content of statutes. In the ordinary course of the legislative process established by Article I, Congress has the last word whenever there is conflict; the President only gets the last word when he or she fully assents to the bill enacted by Congress.¹⁶¹ Whenever the President vetoes a

397 (statement of James Wilson at Pennsylvania Ratifying Convention) (referring to President’s role as check on legislative power as “qualified negative”); *see also id.*, at 73-75, *reprinted in* 2 FOUNDERS’ CONSTITUTION, *supra* note 156, at 402 (statement of James Iredell at North Carolina Ratifying Convention) (noting balance between branches of government and role of veto in that balance and concluding that veto power adopted by the Constitutional Convention “is a happy medium between the [President’s] possession of an absolute negative, and the executive having no control whatever on acts of legislation”); SPITZER, *supra* note 123, at 11-13 (summarizing discussion at Constitutional Convention regarding whether veto should be absolute or qualified); II JOSEPH STORY COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 870-907, at 338-365 (1833) (discussing debate among Framers regarding qualified versus absolute veto).

158. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 277 (1996) (reporting statements by one Pennsylvania and one Virginia proponent of Constitution that presidential veto amounted to “no more than a serious duty imposed upon him to request both houses to reconsider any matter on which he entertains doubts or feels apprehensions”); SPITZER, *supra* note 123, at 19-20 (arguing that Framers viewed veto primarily as “a tool for reconsideration and/or revision of legislation”); WOOD, *supra* note 155, at 553 (asserting that will of congresspersons, not will of President, is force behind execution of law and stating that “[President’s] power extends only to cause [bill] to be reconsidered”); *see also* THE FEDERALIST NO. 73, *supra* note 155, at 445 (“A man who might be afraid to defeat a law by his single VETO, might not scruple to return it for reconsideration; subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections.”).

159. *See* U.S. CONST., art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”) (emphasis added).

Indeed, the President even lacks the power to initiate the legislative process. *See* U.S. CONST., art. II, § 3 (permitting President to recommend law). Though the President can recommend that Congress enact legislation, he or she has no power to introduce legislation in either the House or the Senate. *See id.*

160. *See* THE FEDERALIST NO. 73, *supra* note 155, at 444-45 (explaining that, given negative political ramifications of use of veto power, Presidents would use the power only in cases of “extreme necessity”).

161. *See* U.S. CONST., art. I, § 7, cl. 3 (“Every Order, Resolution, or Vote to which Concurrence of the Senate and House . . . may be necessary . . . shall be presented to the President . . . and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House . . .”).

bill enacted by Congress, Congress can always override the veto and enact the bill as initially passed by its members.¹⁶² Thus, no statute goes into effect except in a form ratified by Congress.

Under any form of partial, or line item veto, Congress may be denied the ultimate control over the contents of legislation. The statute that goes into effect could be one that Congress never voted on, and one that members whose votes were initially needed to approve the bill and send it to the President may have opposed. For example, if the President assents to eight sections of a ten-section bill, the statute that becomes law is not the bill Congress enacted, and the deletion of part of the bill could materially change it. Congress' ability to override the President's veto of the two sections excised by the President does not fully address this problem. When the President exercises his or her partial veto authority and the returned portions of the bill in dispute come before Congress, members vote only on the returned portions. This creates two related problems. First, the proponents of the two vetoed sections do not get an override veto on the bill they agreed to. Rather, they merely get an override vote on a new bill that has only the two vetoed sections. This difference is important—other legislators, freed from the necessity of having to support the two provisions at issue in order to get the overall package they like (because the other eight provisions have been signed by the President and become law), can now turn into opponents of the two-section bill. Had the entire bill been returned by the President, such opponents might well have voted to override the President's veto of the ten-section bill because securing the enactment of eight of the sections may have been worth accepting the remaining two sections.

Second, and perhaps more seriously, the meaning of some of the votes of those who voted initially to enact the bill would have been changed after they had cast their vote, and those votes may have been decisive in congressional enactment of the bill. Some members may have voted for the ten-section bill initially because the two disputed sections were included in it. In other words, they might have voted against an eight-section bill that did not include the two disputed sections. The votes of such members might have enabled proponents of the ten-section bill to garner a majority of legislators in the particular legislative chamber. With the President's partial veto, the vote for the ten-section bill would be transformed into a vote that enabled the enactment of the eight-section bill that the legislators would have objected to. The override vote on the two sections vetoed would not solve this problem because many legislators who voted for the ten-section bill may well vote against the two-section bill, given that the eight sections they wanted would have already become law. The partial veto's effect of turning a vote for a ten-section bill into a vote to authorize an eight-section bill that some of the legislators that voted "aye" may have opposed is particularly troubling.

162. *See id.* (establishing two-thirds override by Congress of presidential veto).

In effect, granting the President a partial veto gives the President a strategic advantage and, consequently, confers upon the President much more power in the legislative process than contemplated by the President's subordinate role.¹⁶³ It also relieves Congress of much of its responsibility because the final statute produced by such a process may not be legislation Congress crafted and voted on, but, rather, a presidentially-created mutation. Under the foregoing argument, the line item veto might well have been constitutionally infirm even if Congress had pursued the separate enrollment approach, *i.e.*, established a system in which members vote on the entire appropriations bill and then the House or Senate clerks separately enrolled various portions of the bill for presentment to the President.¹⁶⁴ Even under such an approach, a member's ability to secure an override vote after presidential presentment on the same bill he or she initially supported would be frustrated by a partial veto.

Of course, the principle that Congress should have the last word, or stated differently, that no bill should become law unless the House and Senate vote upon it in its final form, may not be absolute. Perhaps some countervailing considerations could justify a line item veto power in limited circumstances. Much of the impetus for providing the President with line item veto authority was the assistance that this power was expected to provide in reducing the federal deficit.¹⁶⁵ Although deficit reduction is an important substantive goal, disagreement with the substantive policies produced by the Article I process should rarely, if ever, justify congressional modification of that process without amending the Constitution.¹⁶⁶ Moreover, the expectation that the line item veto will result in deficit reduction may not be justified, as this has not been the result of line item

163. See Bell, *Using Statutory Interpretation*, *supra* note 7, at 152-53 & n.240 (asserting that frustration of Congress' right to have last word with respect to statutes is one problem with according weight to interpretations of statutes offered by Presidents at time they sign bills). If the President signs the bill, but sets forth an interpretation of the bill to which a majority of Congress would disagree, Congress has no means to either prevent the bill from going into law without its agreement or modify the bill to address the President's challenge, before it goes into law. See *id.* (discussing interpretative powers that give President tactical advantage because Congress has no method of reinterpreting legislation to comport with its original intent).

164. See Office of Legal Counsel, United States Department of Justice, *Constitutionality of Line Item Veto Proposal*, 9 U.S. OP. OFF. LEGAL COUNSEL 28, 29-30 (1985) (arguing that separate enrollment approach may be incompatible with Article I, Section 7, clause 2, of Constitution).

165. See H.R. REP. NO. 104-491, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 892, 892-93 (stating that granting Presidents line item veto authority may restrain federal spending and reduce federal budget deficit); SPITZER, *supra* note 123, at 128-30 (noting historical support for proposition that veto aims to reduce deficit).

166. See *Clinton v. City of New York*, 118 S. Ct. 2091, 2108 (1998) (Kennedy, J., concurring) ("[F]ailure of political will does not justify unconstitutional remedies.").

veto statutes at the state level.¹⁶⁷ Indeed, Congress might possibly feel less restrained in passing appropriations bills, leaving it to the President to balance the budget by means of the line item veto.¹⁶⁸

The better argument in favor of the line item veto's constitutionality can be grounded in a desire to increase Madisonian deliberation and legislator accountability.¹⁶⁹ Article I's requirements should be interpreted flexibly when Congress seeks to advance accountability and deliberation on particular budget items. This leads to the question of whether the appropriations process is characterized by inadequate deliberation and accountability and whether granting the president line item veto authority is likely to rectify the situation. Although, theoretically, a line item veto might be appropriate to restore deliberation and accountability with respect to significant portions of the budget,¹⁷⁰ in practice, controversy, deliberation and accountability over major budgetary issues already exist. Indeed, much of the history of the 104th Congress was one of conflict over significant policies embodied in appropriations statutes, including the enforcement of environmental laws, federal funding of the arts, federal medical assistance for the poor and aged and the manner of conducting the decennial census.¹⁷¹ Moreover, it is not at all clear that the issues highlighted by the line item veto are the major ones for which separate consid-

167. See SPITZER, *supra* note 123, at 134-36 (noting that line item veto power does not necessarily mean greater budgetary efficiency). States without veto power actually had lower levels of per capita expenditures. The line item veto served more as a political tool to set up spending priorities than as a cure for budgetary excesses. See *id.* at 135.

168. See Roger H. Wells, *The Item Veto and State Budget Reform*, 18 AM. POL. SCI. REV. 782, 786 (1924) (noting that veto and line item veto were ineffective because responsibility for expenditures was divided, which "encouraged extravagance on the part of the lawmaking branch so that it came to rely on the governor to make ends meet"); SPITZER, *supra* note 123, at 135 (same).

169. See, e.g., Lawless, *supra* note 151, at 301-02 (discussing Madison's vision of veto power "as a check on the temporary passions of an elected legislature" that is prone to factions); THE FEDERALIST No. 51, *supra* note 35, at 323-25 (arguing that benefit of large, multifaceted society is difficulty of amassing majority "on any other principles than those of justice and the general good"); RAKOVE, *supra* note 158, at 35-56 (discussing accountability as key check against legislative vices that are inherent in republican political system). See generally THE FEDERALIST No. 10, *supra* note 120 (discussing evil of factions and means of both combating hegemony of factions and ensuring reasoned decisions in common interest).

170. See Lawless, *supra* note 151, at 302-03 (describing legislative vote-trading and compromising, which results in "pork barrel riders" that line item veto could be used to excise). The legislature often packages together legislation that appeals to different interests, which could result in unnecessary or wasteful spending. "[T]he line item veto allows the executive to unpackage the legislation and undo the legislative compromises." *Id.*

171. See generally ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE 232-42, 260, 264 (1996) (discussing points of contention and debate on several appropriations issues in recent Congresses).

eration is particularly important.¹⁷² For instance, the two issues at stake in *Clinton*—a provision setting forth the New York State taxes that served to reduce the amount of payments due to the State of New York to help finance medical care for the indigent and a Tax Code provision allowing owners of certain food processors and refiners to defer recognition of capital gains if they sell their stock to certain farm cooperatives¹⁷³—surely are not the types of major issues that require deliberation independent from the remainder of the budget.

Ultimately, making a detailed, rigorous argument about the constitutionality of granting the President line item veto authority is more than this Article intends to accomplish. It is clear, however, that attempting to resolve the constitutionality of the Line Item Veto Act by reference to the nondelegation doctrine, or using the controversy surrounding the Act to resurrect the doctrine, is inappropriate. If anything, the central concerns of the doctrine—ensuring that elected legislators are accountable to the people for major governmental decisions and that they not be allowed to avoid responsibility—are furthered by giving the President line item veto authority, regardless of the constitutionality or overall merits of the Line Item Veto Act.¹⁷⁴

IV. CONCLUSION

The nondelegation doctrine embodies important concerns about the health of our polity. Members of Congress should make the important legislative decisions and be held accountable to the electorate. We cannot expect the judiciary to allay these concerns, however, as the judiciary has already demonstrated in several different contexts. The degree of specificity in statutes and the appropriateness of decisions to disagree are issues that must, by and large, be resolved by legislative judgment and are not susceptible to judicially enforced formulas.

172. See generally *Line Item Veto Act After One Year: Hearings Before the Subcomm. on Legislative and Budget Process Comm. on Rules U.S. House of Representatives*, 105th Cong., 2d Sess. (1998), available in 1998 WL 11515931 (statement of June E. O'Neill, Director, Congressional Budget Office) (discussing budgetary effects of President Clinton's use of his powers under Line Item Veto Act); CONGRESSIONAL BUDGET OFFICE, 104TH CONG., CBO MEMORANDUM: THE LINE ITEM VETO ACT AFTER ONE YEAR 11-19 (1998) (discussing "small effect" of President's 1997 cancellations and other related actions on total spending or revenue levels).

173. See *Clinton v. City of New York*, 118 S. Ct. 2091, 2095-97 (1998).

174. For a discussion of how presidential line item veto authority furthers a primary goal of the delegation doctrine, see *supra* notes 123-31 and accompanying text. *But see Clinton*, 118 S. Ct. at 2109 (Kennedy, J., concurring) (characterizing line item veto as impermissible cession of congressional power and stating that "[a]bduction of responsibility is not part of the constitutional design").