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ARTICLES

THE SUPREME COURT'S AVOIDANCE OF THE NONDELEGATION DOCTRINE IN *CLINTON V. CITY OF NEW YORK*: MORE THAN "A DIME'S WORTH OF DIFFERENCE"

Steven F. Huefner[*]

The D.C. Circuit's recent decision in *American Trucking Ass'ns, Inc. v. EPA*,[1] which invalidated certain Environmental Protection Agency (EPA) national ambient air quality standards,[2] is but the latest of several prominent cases over recent decades to provide courts an opportunity to revive the nondelegation doctrine.[3] Judicial consideration of something akin to the nondelegation doctrine, which in its original form professed to prohibit Congress from delegating its legislative powers to the executive branch,[4] traces at least to 1813.[5] The Supreme Court, however, has used the doctrine to strike down statutory delegations as unconstitutional only twice, both times in 1935.[6] In the ensuing six decades, the doctrine has come to be seen as "moribund" as a tool for enforcing a proper separation of legislative and executive power,[7] and to function only as a tool

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1. 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), *petitions for cert. filed*, 68 U.S.L.W. 3570 (U.S. Mar. 7, 2000) (Nos. 99-1257, 99-1263, & 99-1265).

2. *See id.* at 1033-34, 1057.

3. *See infra* Part II.D.

4. *See* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127 (1977). A variant of the doctrine that is beyond the scope of this Article also prohibits delegating legislative authority to the private sector. *See* Carter v. Carter Coal Co., 298 U.S. 238, 316-17 (1936).

5. *See infra* notes 24-26 and accompanying text.

6. *See infra* Part I.D.

7. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring in the result); *see also* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 448 n.82 (D.C. Cir. 1982) ("[The nondelegation doctrine] has often

of statutory construction, according to which courts interpret statutory delegations of authority narrowly to avoid constitutional problems.[8]

In this latter role of limiting the construction that agencies may place upon their authority, the doctrine still possesses great power, as dramatically evidenced in *American Trucking*.[9] But this widely reported and controversial decision,[10] in which the D.C. Circuit remanded the EPA's national ambient air quality standards with instructions that the agency narrow its construction of the Clean Air Act,[11] also raises the question whether the nondelegation doctrine may soon reclaim a yet larger role. As the dissent in *American Trucking* described, the decision "threatens to strike down section 109 of the [Clean Air] Act as an unconstitutional delegation of congressional authority unless" on remand the EPA can sufficiently circumscribe its delegated authority.[12]

For several decades, a variety of legal scholars and judges have been urging or contemplating just such a revival of the nondelegation doctrine. Over twenty years ago, Judge McGowan of the D.C. Circuit declared (with perhaps a hint of frustration) that lawyers have grown reluctant even to raise the nondelegation doctrine as a constitutional challenge to a statute.[13] Nevertheless, he queried whether the Supreme Court might again embrace the doctrine "when the issue is raised in the right case."[14] In this regard, *American Trucking* has sent shock waves of both hope and alarm throughout the legal community.

Yet if ever there was a "right case" to fulfill the aspirations of those seeking a reinvigoration of the nondelegation doctrine, it was not *Ameri-*

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been declared deceased.").

8. *See* National Cable Television Ass'n, Inc. v. United States, 415 U,S. 336, 341-42 (1974); International Union, UAW v. OSHA, 938 F.2d 1310, 1316 (D.C. Cir. 1991); *see also* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 72-73 (3d ed. 1994). For earlier examples, see *Kent v. Dulles*, 357 U.S. 116, 128-30 (1958), and *Stoutenburgh v. Hennick*, 129 U.S. 141, 149 (1889).

9. *See* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

10. *See A Reach on Regulation*, WASH. POST, May 19, 1999, at A22; *Bad Decision on Clean Air*, N.Y. TIMES, May 19, 1999, at A22; *Clean Air Gets Murky*, SALT LAKE TRIB., May 31, 1999, at A10; John J. Fialka, *EPA Plans to Appeal Air-Quality Ruling*, WALL ST. J., May 17, 1999, at B2; John J. Fialka, *Professor Seeks to Limit Congress Ability to Delegate Tasks to Federal Agencies*, WALL ST. J., May 20, 1999, at B12; Randolph J. May, *D.C. Circuit Decision Draws Needed Spotlight to Nondelegation Doctrine*, LEGAL TIMES, June 21, 1999, at 20; Joby Warrick & Bill McAllister, *New Air Pollution Limits Blocked*, WASH. POST, May 15, 1999, at A1.

11. *See American Trucking*, 175 F.3d at 1033-40.

12. *Id.* at 1057 (Tatel, J., dissenting).

13. *See* McGowan, *supra* note 4, at 1128.

14. *Id.* at 1130.

can Trucking. Rather, it was *Clinton v. City of New York*,[15] in which the Supreme Court invalidated the Line Item Veto Act of 1996, which had given the President the authority to cancel certain items of federal spending.[16] Despite the fact that this Act was ripe for invalidation under the nondelegation doctrine as an abdication of congressional responsibility, the Court explicitly eschewed the opportunity to do so, and instead invalidated the Line Item Veto Act for noncompliance with the lawmaking requirements of the Constitution's Presentment Clause,[17] as most of the Act's detractors had urged.[18] This Clause requires that both Houses of Congress and the President agree on the precise text of each statute (unless Congress enacts the statute over a presidential veto).

Although the Presentment Clause analysis of the Line Item Veto Act has superficial appeal, it ultimately does not withstand scrutiny. This Article argues that the nondelegation doctrine provided a superior basis for invalidating the Line Item Veto Act, despite the fact that many of the Act's supporters had relied heavily upon the nondelegation doctrine to *defend* the Act. The Act's defenders were hoping that the Court's per-

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15. 524 U.S. 417 (1998).

16. *See id.* at 421, 436.

17. U.S. CONST. art. I, § 7, cl. 2; *see* 524 U.S. at 448.

18. *See, e.g.*, Senator Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 320-21 (1998) (arguing that the "Act violates the clear language of the Presentment Clause" by permitting unilateral repeals); Michael J. Gerhardt, *The Bottom Line on the Line-Item Veto Act of 1996*, 6 CORNELL J.L. & PUB. POL'Y 233, 233, 237-40 (1997) (arguing that the Act is unconstitutional under Article I, and suggesting that the nondelegation doctrine test is the proper standard only when Congress delegates "to administrative agencies or inferior bodies"); H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171, 1172 (1998) (acknowledging that to most observers, the Act appears to violate the Presentment Clause); Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 104-18 (1997) (arguing that the Act is invalid under Article I for the same reasons as a statutory attempt to give the President true item veto power would be invalid); The Committee on Federal Legislation, *Revisiting the Line-Item Veto*, 50 REC. ASS'N B. CITY N.Y. 321, 325-29 (1995) (arguing that the line-item veto violates bicameral and presentment requirements); *infra* notes 351-354 and accompanying text (describing the Presentment Clause challenges made in *City of New York v. Clinton*). *But see* Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659, 1660-63 (1997) (arguing that the Line Item Veto Act "pushes delegation too far" and will be found unconstitutional under the nondelegation doctrine); Paul R.Q. Wolfson, Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 845-52 (1987) (arguing that various proposed item vetoes are improper under the nondelegation doctrine).

For a lively and engaging analysis of the pros and cons of both the Article I and nondelegation doctrine arguments against the Act, see Powell & Rubenfeld, *supra*, at 1172-96. Also see Catherine M. Lee, Note, *The Constitutionality of the Line Item Veto Act of 1996: Three Potential Sources For Presidential Line Item Veto Power*, 25 HASTINGS CONST. L.Q. 119, 136-48 (1997), for both nondelegation doctrine and Article I arguments against the Act.

missive construction of the doctrine since 1935 would create a safe harbor for the Act.[19] Indeed, Justice Scalia partially vindicated this hope when he proclaimed in his dissent that "there is not a dime's worth of difference" between the Act's grant of authority to the President to cancel spending items and the long-accepted congressional practice of authorizing expenditures of particular sums subject to the President's discretion.[20] This Article concludes, however, that there was more than a dime's worth of difference between the Line Item Veto Act and the myriad of previously accepted delegations, and that the Court therefore should have struck down the Act under a limited application of the nondelegation doctrine, rather than under the Presentment Clause. While the Supreme Court need not and should not have announced any wholesale reinvigoration of the doctrine, thereby threatening the basis for the modern administrative state, it should have employed a narrow application of the doctrine to invalidate the Act.

The Supreme Court's refusal to embrace any version of the nondelegation doctrine to strike down the Line Item Veto Act, and its decision instead to use the Presentment Clause to develop what ultimately is an unsatisfying basis for invalidating the Act, has several implications. Principally, the Court's failure to seize this opportunity suggests that this Court remains unprepared to disturb the currently moribund construction of the nondelegation doctrine. In addition, by bypassing the nondelegation doctrine in *Clinton v. City of New York*, the Court demonstrated its occasional willingness to use alternative rationales to accomplish the same result as would a more robust nondelegation doctrine rationale. Indeed, the Court's decision to employ an alternative, Presentment Clause rationale to invalidate the Line Item Veto Act may ultimately be more significant than the actual result it reached, because in theory this same rationale could threaten a variety of heretofore accepted delegations to the executive.

This Article explores the status of the nondelegation doctrine in light

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19. *See, e.g.*, Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, But a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 43-52 (1997) (arguing that the Act's grant of authority to the President to cancel limited tax benefits does not violate either Article I or the nondelegation doctrine); Powell & Rubenfeld, *supra* note 18, at 1188-98 (analyzing and rejecting the nondelegation doctrine arguments, as well as the Presentment Clause arguments, against the Act); Michael G. Locklar, Comment, *Is the 1996 Line-Item Veto Constitutional?*, 34 HOUS. L. REV. 1161, 1187 (1997) (arguing that the Act is constitutional and does not violate the nondelegation doctrine); *see also infra* text accompanying notes 376-82 (describing the nondelegation doctrine defense made by the proponents of the Act in *Clinton v. City of New York*).

20. Clinton v. City of New York, 524 U.S. 417, 466 (1998) (Scalia, J., dissenting).

of the Court's approach to the line item veto in *Clinton v. City of New York*.[21] Part I presents a history of the nondelegation doctrine. Part II discusses suggestions that the Court rejuvenate the doctrine, coupled with a review of the most recent nondelegation cases. Part III then describes the Line Item Veto Act, its potential vulnerability to a nondelegation doctrine challenge, and the nondelegation arguments made against the Act in the Supreme Court by parties and amici. How and why the Supreme Court left this potential untapped, by embracing an unsatisfactory Presentment Clause rationale, is the focus of Part IV. Part V concludes that although the decision in *Clinton v. City of New York* may operate as an alternative constraint upon permissible delegations, the irony of the decision is that it has left the nondelegation doctrine at least as impotent as before. In fact, where Congress' spending authority is concerned, the Court may be willing to condone some delegations even more permissively, notwithstanding its refusal to uphold the Line Item Veto Act. In any event, the Supreme Court's avoidance of the nondelegation doctrine in *Clinton v. City of New York* is telling, for if the Court does desire to reinvigorate the nondelegation doctrine, it will be hard pressed to find a better opportunity than the Line Item Veto Act presented.

I. A HISTORY OF THE NONDELEGATION DOCTRINE

The doctrine of nondelegation of legislative authority is merely one manifestation of the constitutional separation of powers. Quoting Montesquieu, James Madison wrote in *Federalist 47*: "'When the legislative

21. For other journal articles which analyze or describe the Supreme Court's invalidation of the Line Item Veto Act, see Leon Friedman, *Line Item Veto and Separation of Powers*, 15 TOURO L. REV. 983, 983 (1999), reflecting upon the Court's separation-of-powers jurisprudence and summarizing the Line Item Veto Act litigation; Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 873 (1999), arguing that the Court misapplied the Presentment Clause in its analysis and should have upheld the Act under the nondelegation doctrine; Lars Noah, *The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference?*, 56 WASH. & LEE L. REV. 235, 236, 246 (1999), criticizing the Court's Presentment Clause analysis by comparing the Act's cancellation authority with the judiciary's power to sever statutory provisions; Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgment of "National Security Rescission"*, 47 AM. U. L. REV. 1273 (1998), arguing that the Act was much less likely to have been invalidated if the President had restricted cancellations to provisions implicating national security; and Courtney Worcester, Note, *An Abdication of Responsibility and a Violation of a Finely Wrought Procedure: The Supreme Court Vetoes the Line Item Veto Act of 1996*, 78 B.U. L. REV. 1583, 1606-08 (1998), criticizing the Court's conclusion that the Act violated the Presentment Clause, and suggesting that the Act did not violate principles of separation of powers.

and executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.'"[22] Thus, the purpose of the nondelegation doctrine is to restrain Congress from voluntarily surrendering to the executive branch those lawmaking powers that the framers deliberately reposed out of the executive's reach.

Perhaps the classic judicial statement of the nondelegation doctrine remains the Supreme Court's 1892 pronouncement in *Field v. Clark*:

> 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 . . . .
>
> "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."[23]

Nevertheless, this "true distinction" is at one level merely a tautology, requiring a consideration of what constitutes a nondelegable "lawmaking" power, and whether Congress has bestowed such a power on the executive branch.

A. Nineteenth-Century Origins of the Practice of "Contingent Legislation"

Explicit Supreme Court examination of these questions traces at least to the 1813 case of *The Brig Aurora*, in which the appellant argued that "Congress could not transfer the legislative power to the President."[24] At issue was an act providing for the revival of certain restrictions on imports to the United States from either France or Great Britain, contingent upon the President's certification that one of these countries had

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22. THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961). John Locke similarly expressed that "[t]he legislative cannot transfer the power of making laws to any other hands . . . nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 74-75 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

23. 143 U.S. 649, 692-94 (1892) (quoting Ohio Supreme Court Judge Ranney's opinion in *Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners*, 1 Ohio St. 77, 88 (1852)).

24. 11 U.S. (7 Cranch) 382, 386 (1813).

not modified its edicts so as to "cease to violate the neutral commerce of the United States."[25] The Court concluded that the legislature, not the President, had revived the restrictions and had merely made the restrictions subject to a contingency that was up to the President to ascertain.[26] Thus, Congress did not transfer any legislative power to the President.

Eight decades later, the Supreme Court developed this theme of "legislating in contingency" at some length in *Field v. Clark*.[27] There, the Court upheld a delegation of authority to the President to suspend certain duty-free provisions of the McKinley Tariff Act of 1890 if he determined that an importing country's tariffs were "reciprocally unequal."[28] The Court described with approval over a dozen examples of statutes enacted during the previous hundred years that had authorized the President to suspend or repeal import laws, or otherwise to regulate foreign commerce, upon satisfaction of congressionally specified conditions.[29]

The most common contingency was a change in a foreign country's trade regulations. For instance, in 1817, Congress prohibited foreign vessels from importing plaster of Paris from any country that refused to permit U.S. vessels to carry it, but allowed the President to discontinue this prohibition with respect to any country that subsequently removed its own restrictions.[30] A similar, and even earlier, delegation of authority was an 1815 act providing for the contingent *repeal* of certain import duties, "[s]uch repeal to take effect . . . whenever the President of the United States shall be satisfied" that the exporting country's countervailing duties have been abolished.[31] A yet earlier and broader delegation, but one still conditioned on a foreign country's specific behavior, was Congress' 1798 grant of authority to the President "to remit and discontinue" certain commercial restrictions between the United States and France, provided that the President determined that France had refrained from aggressions against U.S. vessels and had acknowledged the United States' neutrality "in the present European war."[32]

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25. Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605, 606.

26. *See The Brig Aurora*, 11 U.S. at 388.

27. 143 U.S. 649 (1892).

28. *Id.* at 692-93.

29. *See id.* at 683-92.

30. *See* Act of March 3, 1817, ch. 39, 3 Stat. 361, 361-62.

31. Act of March 3, 1815, ch. 77, 3 Stat. 224; *see also* Act of May 31, 1830, ch. 219, 4 Stat. 425 (authorizing the President to suspend certain import duties contingent upon the absence of the foreign nation's corresponding duties); Act of May 24, 1828, ch. 111, 4 Stat. 308 (same); Act of Jan. 7, 1824, ch. 4, § 4, 4 Stat. 3 (same).

32. Act of June 13, 1798, ch. 53, § 5, 1 Stat. 565, 566.

Yet not all of the delegations described approvingly in *Field v. Clark* depended upon a particular action of a foreign nation,[33] and some delegations permitted the President to take specific actions affecting foreign commerce solely on his own judgment. For example, several months after the 1798 act, in its continuing response to the war in Europe, Congress employed the almost unlimited contingency of authorizing the President "to remit and discontinue" the prohibitions of an act further suspending trade with France "if he shall deem it expedient and consistent with the interest of the United States."[34] Similarly, in one of its earliest delegations, Congress in 1794 authorized the President to embargo vessels and ports "whenever, in his opinion, the public safety shall so require."[35] Congress, however, limited this embargo authority to periods when Congress was not in session, and any embargo laid by the President during such period automatically terminated fifteen days after Congress reconvened.[36] A decade later Congress empowered the President to extend by approximately six months a congressional suspension of certain import prohibitions on goods from Great Britain "if in his judgment the public interest should require it."[37]

Nevertheless, the subject matter of all of these delegations—U.S. import restrictions—was plainly narrow, even if some of these delegations may have given the President almost unfettered discretion to change those restrictions. Furthermore, most of these delegations merely allowed the President a binary choice between implementing or suspending some congressionally specified import restriction. One notable exception, however, was an 1884 statute that allowed the President to *modify* the amount of import duties to be collected on vessels from certain foreign ports by adjusting rates so that they matched the duties being imposed on U.S. vessels entering those ports.[38]

After observing this pedigree, the Supreme Court in *Field v. Clark* upheld section 3 of the McKinley Tariff Act, which stated:

> That with a view to secure the reciprocal trade with countries producing the following articles, and for this purpose, on and af-

33. For instance, in 1866, Congress authorized the Secretary of the Treasury to suspend the prohibition on the importation of "neat cattle" from any country if the Secretary determined that the importation of such cattle would not introduce or spread disease among domestic cattle. *See* Act of March 6, 1866, ch. 12, 14 Stat. 3, 3-4; *see also* Tariff Act of 1890, ch. 1244, § 20, 26 Stat. 567, 616.

34. Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613, 615.

35. Act of June 4, 1794, ch. 41, §1, 1 Stat. 372, 372.

36. *See id.* §§ 1-2.

37. Act of Dec. 19, 1806, ch. 1, § 3, 2 Stat. 411, 411.

38. Act of June 26, 1884, ch. 121, § 14, 23 Stat. 53, 57.

> ter the first day of January eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the Government of any country producing and exporting [specified commodities], imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such [specified commodities] into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such [specified commodities, produced by] such country, for such time as he shall deem just.[39]

The Court explained that "in the judgment of the legislative branch . . . it is often desirable, if not essential for the protection of the interests of our people . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations."[40] The Court opined that the President, in exercising his delegated authority under the Act, was merely enforcing the policy established by Congress of permitting free imports of specified commodities only when United States goods received reciprocal treatment abroad.[41]

Two Justices dissented from this rationale, explaining that a statutory provision allowing the President to reinstate import duties whenever "he may deem [a foreign country's duties] to be reciprocally unequal and unreasonable," and "for such time as he shall deem just," effectively "extends to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making department."[42] The dissenters dismissed the many examples cited by the majority because those examples did not involve the delegation of such sweeping authority as did section 3 of The McKinley Tariff Act, nor had the Court had occasion to review those earlier examples, with the one exception of *The Brig Aurora*, which the dissenters viewed as an approval of a much narrower delegation of wholly executive authority.[43]

Nevertheless, *The Brig Aurora* and *Field v. Clark* serve as judicial bookends to almost a century of the practice of "legislating in contin-

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39. McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612.

40. *Field v. Clark*, 143 U.S. 649, 691 (1892).

41. *See id.* at 693.

42. *Id.* at 699-700 (Lamar, J., with Fuller, C.J., concurring in the result but dissenting from the opinion).

43. *See id.* at 698-99 (Lamar, J., with Fuller, C.J., concurring in the result but dissenting from the opinion).

gency," by which Congress delegated to the executive branch the authority to shape the actual contours of federal law, subject to the executive's determination of the occurrence of congressionally established conditions. Although in the nineteenth century this contingent legislation, or "fact-finding" delegation, occurred almost exclusively in the area of foreign trade, it found somewhat wider application with the rise of the administrative state in the twentieth century, in conjunction with a second form of congressional delegation, that of "interstitial rulemaking."

B. Nineteenth-Century Origins of the Practice of "Interstitial Rulemaking"

The Supreme Court's approval of a second form of delegation, in addition to the practice of contingent legislation, can be traced at least to the 1825 case of *Wayman v. Southard*.[44] There, the Court explicitly condoned the practice of delegating interstitial rulemaking authority.[45] At issue in *Wayman* was legislation giving courts the power to regulate their proceedings and establish their own rules. The Supreme Court distinguished between "those important subjects, which must be entirely regulated by the legislature itself,"[46] and lesser subjects, for which Congress could enact a general provision giving power "to those who are to act under such general provisions to fill up the details"[47] about the organization and operation of a coordinate branch of government. The fact that Congress was thereby sharing a power that it could itself exercise, but had chosen not to, was decidedly unimportant to the Court.[48]

Though by no means nonexistent, other contested delegations of interstitial rulemaking authority remained comparatively rare during most of the nineteenth century.[49] Of course, with the creation of the Interstate Commerce Commission (ICC) and the advent of the administrative agency in 1887, Congress unleashed a new era of delegation.[50] Yet, not

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44. 23 U.S. (10 Wheat.) 1 (1825) (Marshall, C.J.).

45. *See id.* at 698-99.

46. *Id.* at 43.

47. *Id.*

48. *See id.*

49. *See, e.g.*, Smith v. Whitney, 116 U.S. 167, 181 (1886) (holding that Secretary of the Navy's regulations affecting the conduct of courts martial have the force of law); *Ex Parte* Reed, 100 U.S. 13, 22 (1879) (same); Aldridge v. Williams, 44 U.S. (3. How.) 9, 29 (1845) (discussing the Treasury Secretary's authority to establish regulations to secure accurate appraisals of value and quantity of imports); *see also* United States v. Eliason, 41 U.S. (16 Pet.) 291, 301-02 (1842) (describing the executive's power to establish, modify, and repeal army regulations).

50. *See* Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383; THEODORE J. LOWI, THE END OF LIBERALISM 128-31 (1969)

until the early part of the twentieth century did the ICC begin to find its delegated authority seriously called into question.[51] Instead, for several more years the principal delegation issues to reach the Supreme Court concerned more traditional executive functions.

In one notable refinement upon the Supreme Court's general approval of interstitial regulation, the Court in 1887 voided an order of the Secretary of the Navy that a particular training vessel was not to be considered "at sea," at least insofar as this order would affect its officers' entitlement to compensation for sea service.[52] The Court explained that the Navy Secretary lacks authority to declare something shore duty that the statute requires the Navy to treat as sea duty.[53] The Court stated that the Secretary only has authority to "establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers," and concluded that the "contrary has never been held by this court."[54]

A contrasting pair of cases near the end of the nineteenth century involved the authority of the Commissioner of Internal Revenue to promulgate regulations regarding the sale of oleomargarine, a violation of which warranted criminal punishment. In 1892, the Supreme Court in *United States v. Eaton*[55] invalidated a criminal indictment for failure to keep required records of oleomargarine sales, on the basis that, although the Commissioner's record-keeping requirements were valid, insufficient statutory authority existed to render noncompliance with them criminal.[56] In contrast, in *In re Kollock*[57] five years later, the Court upheld the criminal conviction of a retail dealer for violating the Commissioner's regulations regarding required labels and containers.[58] The statute under which these regulations were issued, unlike the statute at issue in *Eaton*, explic-

51. *See* St. Louis, Iron Mountain & Southern R.R. Co. v. Taylor, 210 U.S. 281, 287 (1908) (rejecting the claim that there was an unconstitutional delegation of authority to the ICC to promulgate safety standards); ICC v. Goodrich Transit Co., 224 U.S. 194, 214-15 (1912) (upholding, against an unlawful delegation claim, ICC authority to prescribe reporting and accounting requirements for common carriers); Intermountain Rate Cases, 234 U.S. 476, 486-89 (1914) (upholding ICC authority to exempt rail carriers from the operation of the long- and short-haul clause of the Interstate Commerce Act); New York Central Sec. Corp. v. United States, 287 U.S. 12, 24-25 (1932) (sustaining the ICC's delegated authority to authorize control of one rail carrier by another if it is in the "public interest").

52. United States v. Symonds, 120 U.S. 46, 48-49 (1887).

53. *See id.* at 49.

54. *Id.*

55. 144 U.S. 677 (1892).

56. *See id.* at 688.

57. 165 U.S. 526 (1897).

58. *See id.* at 533.

itly criminalized failure to package and label oleomargarine in conformance with the Commissioner's regulations.[59] Furthermore, given the statute's primary purpose of levying taxes, the Court concluded that:

> the designation of the stamps, marks and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer.[60]

Here then was another classic statement of the principle that authority to fill statutory gaps may lawfully be delegated.

C. Twentieth-Century Evolution of the Requirement that Congress Establish the Policy

From 1825 to the early twentieth century, the theory of interstitial rulemaking developed essentially independently of the legislating-in-contingency principle, which was first introduced in 1813 in *The Brig Aurora* and given full voice in 1892 in *Field v. Clark*.[61] In 1904, in the case of *Buttfield v. Stranahan*,[62] the Supreme Court began to tie these theories together. At issue in *Buttfield* was the Treasury Secretary's interstitial rulemaking authority, under section 3 of the Tea Inspection Act of 1897, to "establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States."[63] In approving this delegation of gap-filling authority, the Supreme Court explicitly relied upon "the principle of *Field v. Clark*," on the basis that the Tea Inspection Act gave the Secretary "the mere executive duty to effectuate the legislative policy declared in the statute."[64]

Although the *Buttfield* Court apparently relied on *Field v. Clark* because both cases dealt with administrative power over foreign commerce,[65] the Court here nevertheless seems to have envisioned both the contingent-legislation and interstitial-rulemaking strands of the nondelegation doctrine as serving a common purpose of ensuring that Congress is setting the policy to guide the executive.[66] The Court explained that

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59. *See id.* at 532.
60. *Id.* at 536.
61. *See* 7 U.S. (3 Cranch) 382 (1892); 143 U.S. 649 (1891).
62. 192 U.S. 470 (1904).
63. Act of Mar. 2, 1897, ch. 358, § 3, 29 Stat. 604, 605.
64. *Buttfield*, 192 U.S. at 496.
65. *See id.*
66. A more result-oriented view is "[t]hat the Court abandoned the 'named contin-

the Tea Act:

> does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.[67]

From this point on, the Supreme Court analyzed whether Congress was unconstitutionally delegating its legislative power by determining whether Congress had sufficiently declared the legislative policy behind the delegation. For instance, in 1907 the Court upheld the Secretary of War's authority, under section 18 of the River and Harbor Act of 1899,[68] to require bridge owners to make alterations in order to preserve unobstructed navigation, under penalty of criminal punishment.[69] After a restatement of the law of nondelegation, in which the Court summarized the four major precedents to date (*The Brig Aurora*, *Wayman*, *Field v. Clark*, and *Buttfield*), the Court upheld the delegation in the River and Harbor Act with the following explanation:

> It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways . . . . That such an object was of common interest and within the competency of Congress, . . . everyone must admit . . . . [Congress] stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power.[70]

Neither important to nor apparent in this decision is whether the Court viewed the River and Harbor Act's delegation primarily as an interstitial authority to fill gaps by evaluating the navigational obstructions of "each particular bridge," or rather as a contingent authority to ascertain the existence of the congressionally-specified "unreasonable obstructions" to

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gency' test in the first case in which its application would have required the Court to hold a statute unconstitutional," and substituted the named contingency test for a test of whether Congress set sufficient standards. 1 DAVIS & PIERCE, *supra* note 8, § 2.6, at 70.

67. *Buttfield*, 192 U.S. at 496.

68. Act of Mar. 3, 1899, ch. 425, § 18, 30 Stat. 1121, 1153-54.

69. *See* Union Bridge Co. v. United States, 204 U.S. 364, 387-88 (1907); *see also* Monongahela Bridge Co. v. United States, 216 U.S. 177, 192-94 (1910) (reiterating the same conclusion as *Union Bridge*).

70. *Union Bridge*, 204 U.S. at 385-86.

navigation.[71] Elements of both strands of these doctrines arguably can be found at work here.[72]

Using the test of whether Congress had sufficiently articulated its legislative policy, the Supreme Court upheld broader and broader delegations as the twentieth century progressed, delegations that did not always lend themselves to easy description as either narrow interstitial rulemaking or mere contingent legislation. For instance, in *United States v. Grimaud*,[73] the Court upheld a criminal prosecution for a violation of the Secretary of Agriculture's regulations controlling sheep grazing on forest reserves.[74] The Secretary promulgated the regulations pursuant to provisions of the Forest Reserve Act of 1891, which criminalized the violation of "such rules and regulations" as the Agriculture Secretary might promulgate to govern the use and preservation of the reserves.[75] This "interstitial" authority was plainly much broader than the authority to determine the particular types of containers and labels required for oleomargarine that the Court had approved fourteen years earlier in *In re Kollock*.[76] The Court justified the delegation in *Grimaud* on the basis that "[i]n the nature of things it was impracticable for Congress to provide general regulations" to cover all forests and conditions, but Congress defined "[t]he subjects as to which the Secretary can regulate" and established the underlying policy of protecting the forests "from depredations and from harmful uses."[77]

Similarly, in *Mahler v. Eby*[78] the Court upheld a 1920 immigration act delegating to the Secretary of Labor the authority to deport, from among broad classes of deportable aliens, those whom the Secretary determined were "undesirable residents."[79] Rejecting the contention that this authority "furnishes no standard" and was "so uncertain and indefinite" as to be an invalid delegation,[80] the Court explained:

With the background of a declared policy of Congress to ex-

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71. *Id.*

72. Subsequent cases continued to combine both rationales. *See, e.g.*, Opp Cotton Mills, Inc. v. Department of Labor, 312 U.S. 126, 144-46 (1941); United States v. Rock Royal Co-op., Inc., 307 U.S. 533, 574 (1939).

73. 220 U.S. 506 (1911).

74. *See id.* at 522-23.

75. *See id.* at 519-21; *cf.* United States v. Eaton, 144 U.S. 677, 685-89 (1892) (finding insufficient statutory authority to declare the violation of a regulation a criminal offense).

76. *See supra* notes 57-60 and accompanying text.

77. *See Grimaud*, 220 U.S. at 516, 522.

78. 264 U.S. 32 (1924).

79. *Id.* at 36.

80. *Id.* at 38.

> clude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression "undesirable residents of the United States" is sufficiently definite to make the delegation quite within the power of Congress. . . . Our history has created a common understanding of the words "undesirable residents" which gives them the quality of a recognized standard.[81]

This was a wide and powerful discretionary authority, upheld because of the Court's willingness to trust that the Secretary shared, and would adhere to, this "common understanding."

The Court took a similar approach to the delegation of authority at issue in *New York Central Securities Corp. v. United States*.[82] *New York Central* presented the Court with a challenge to the provision of the Interstate Commerce Act that allowed the ICC to approve and authorize one railroad to control the operations of another, subject only to the ICC's determination that such common control was "consistent with the public interest."[83] The Court clarified that this criterion was not "a mere general reference to public welfare without any standard to guide determinations," but rather was a term to be given meaning from the context of its enactment and the historical function of the ICC.[84] The Court explained that "the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities."[85]

The most important case synthesizing the contingent and interstitial rationales, however, came four years before the *New York Central* opinion.

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81. *Id.* at 40; *see also* Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 245-47 (1915) (upholding a state statute delegating authority to the censorship board to approve only "educational, moral, amusing or harmless" films because these terms "get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct").

82. 287 U.S. 12 (1932).

83. Interstate Commerce Act § 5(2), ch. 91., tit. IV, 41 Stat. 474, 481 (1920) (currently codified at 49 U.S.C. § 11344(c) (1994)).

84. *New York Central*, 287 U.S. at 24.

85. *Id.* at 24-25; *see also* National Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding the "public interest, convenience, or necessity" standard for regulation of broadcast licenses); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) (describing the "public convenience, interest, or necessity" standard, when interpreted in context, as not "so indefinite as to confer an unlimited power").

In *J.W. Hampton, Jr., & Co. v. United States*,[86] the Supreme Court stated what was to become, at least for the rest of the twentieth century, the litmus test for acceptable delegations. This decision, in a direct outgrowth of *Field v. Clark*, upheld the Flexible Tariff Act of 1922, which authorized the President to adjust import tariffs to protect domestic companies.[87] After noting with approval the value of congressional delegations for purposes both of filling in the details and of meeting future contingencies, the Court set forth this new standard: "If Congress shall lay down by legislative act an intelligible principle [to govern exercise of the delegated authority], such legislative action is not a forbidden delegation of legislative power."[88]

Yet the force of this "intelligible principle" test as a limit upon Congress was almost immediately called into question, proving to be no help to the appellants in *New York Central* four years later, who argued in vain that the Interstate Commerce Act's standard of "in the public interest" was "no definite standard, nor any intelligible principle."[89] Thus, by the time of the New Deal, the nondelegation doctrine appeared to permit almost any statutory delegation that provided the delegatee some guiding principle, even if that principle was extremely broad or only implicitly stated, as long as it sufficed to govern the exercise of the delegated authority and showed that Congress had made the essential policy decisions.

D. Two New-Deal Invocations of a Restrictive Nondelegation Doctrine

In fairly short order the Supreme Court then struck down two acts of Congress as unconstitutional delegations of legislative power. On January 7, 1935, in *Panama Refining Co. v. Ryan*,[90] the Court invalidated section 9(c) of the National Industrial Recovery Act (NIRA). Then on May 27, 1935, the Court invalidated section 3 of NIRA in *A.L.A. Schechter Poultry Corp. v. United States*.[91]

Enacted in 1933, NIRA formed the core of President Roosevelt's legislative program to bring the nation out of the depression.[92] It delegated

86. 276 U.S. 394 (1928).
87. *See id.* at 409-10.
88. *Id.* at 406-07, 409.
89. *New York Central*, 287 U.S. at 16.
90. 293 U.S. 388 (1935).
91. 295 U.S. 495 (1935).
92. *See* National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). After the Supreme Court held that section 3 of the NIRA was unconstitutional in *Schechter Poultry*, Congress modified the Act in 1935, and then repealed it in 1966.

a variety of authorities to the President to regulate domestic and foreign commerce, including the power to create new agencies,[93] to approve or prescribe codes of fair competition within industries,[94] to require business licenses in any industry affecting interstate commerce,[95] and to prohibit interstate transportation of petroleum products exceeding state limits.[96] Congress' policies behind the Act included removing obstructions to the free flow of commerce, advocating the organization of industry to encourage cooperative action among trade groups, effecting united action of labor and management, eradicating unfair competitive practices, reducing and relieving unemployment, and conserving natural resources.[97]

In *Panama Refining*, the Court considered the President's authority under section 9(c) of NIRA to prohibit interstate transportation of petroleum produced or withdrawn from storage in excess of state limits.[98] The Court described its task as determining "whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; . . . [and] whether the Congress has required any finding by the President in the exercise of the authority [delegated]."[99] In a decision now frequently regarded as irreconcilable with its precedents,[100] Chief Justice Hughes wrote for the Court that neither section 9 itself, nor NIRA as a whole, including section 1, declared a policy or established a standard of action with respect to the interstate transportation of excess petroleum production.[101] Rather, the Court concluded that section 9(c) "left the matter to the President without standard or rule, to be dealt with as he pleased."[102] The Court held that in section 9(c) it had at last encountered a delegation exceeding the limits upon permissible delegations that its previous cases had consistently acknowledged to exist.[103]

Although the Court did not view *Panama Refining* as undermining its prior decisions upholding a variety of congressional delegations, the deci-

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93. *See* National Industrial Recovery Act § 2(a), 48 Stat. at 195.

94. *See id.* § 3(a), (d), 48 Stat. at 196.

95. *See id.* § 4(b), 48 Stat. at 197-98.

96. *See id.* § 9(c), 48 Stat. at 200.

97. *See id.* § 1, 48 Stat. at 195.

98. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

99. *Id.* at 415.

100. *See, e.g.*, 1 DAVIS & PIERCE, *supra* note 8, § 2.6, at 71; DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 39 (1993).

101. *See* 293 U.S. at 415-19.

102. *Id.* at 418.

103. *See id.* at 430.

sion in *Panama Refining* is hard to reconcile, for instance, with the decision in *Mahler v. Eby*,[104] at least as a matter of jurisprudence.[105] Justice Cardozo shared this view, dissenting from the decision on the basis that the Act as a whole provided a sufficient standard to govern the President's exercise of his authority: namely, that the President was to prohibit petroleum shipments "when he believes, in the light of the conditions of the industry as disclosed from time to time, that the prohibition will tend to effectuate the declared policies of the act."[106]

A few months later, the Court in *Schechter Poultry* addressed the validity of the President's approval, under section 3(a) of NIRA, of a code of fair competition adopted by the live poultry industry.[107] Under NIRA, a violation of this code was both a misdemeanor and an unfair method of competition under the Federal Trade Commission Act.[108] Chief Justice Hughes again began by setting out the Court's task: "[W]e look to the statute to see whether Congress . . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."[109] Although *Schechter Poultry* reviewed and analyzed the same standards as *Panama Refining*—namely, the statutory policies expressed in section 1 of NIRA—*Schechter Poultry* addressed the question anew in the context of the specific subject matter of this delegation.[110] *Schechter Poultry* first acknowledged that the delegation at issue in *Panama Refining* was limited to the particular subject of interstate transportation of petroleum, and then queried what, if any, subject matter limits were contained in the delegation of authority to establish codes of "fair competition."[111] The Court concluded that section 3 was almost limitless,

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104. *See supra* notes 78-81 and accompanying text.

105. Some commentators have offered more pragmatic explanations in terms of the Court's hostility to the exploding role of the federal government during the New Deal. *See, e.g.*, SCHOENBROD, *supra* note 100, at 39; Peter H. Aranson, et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 10 & n.35 (1982). Other commentators have explained that the delegation led to an "unedifying spectacle" because the law at issue was nowhere officially published but remained "hidden in an administrator's desk." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 612 n.154 (1984); *see also* Louis L. Jaffe, *An Essay on Delegation of Legislative Power II*, 47 COLUM. L. REV. 561, 571 & n.38 (1947); 1 DAVIS & PIERCE, *supra* note 8, § 2.6, at 71.

106. *Panama Refining*, 293 U.S. at 435 (Cardozo, J., dissenting).

107. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1934).

108. *See* 48 Stat. 195, 198 (1934).

109. *Schechter Poultry*, 295 U.S. at 530 (1934).

110. *See id.*

111. *See id.* at 530-32.

and "sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one."[112]

This time Justice Cardozo concurred, writing that section 3(a) amounted to "delegation running riot," essentially giving the President "a roving commission to inquire into evils and upon discovery correct them."[113] He explained that unlike the delegation in section 9(c), in which the President had discretion only as to *when* (if at all) to prohibit the interstate and foreign transportation of petroleum, section 3(a)'s delegation of power to promulgate codes of competition allowed the President vast authority to determine *what* to do "for the betterment of business," constrained only by the extent of the federal commerce power.[114] Others have agreed that *Schechter Poultry* presented the Court with among the most sweeping of congressional delegations, encompassing the entire economy and sharing legislative power with private entities.[115] Perhaps because of this extreme nature of the delegation involved, *Schechter Poultry* has had little impact on subsequent cases.

E. Consistent Approval of Congressional Delegations Since the New Deal

Since *Schechter Poultry* and *Panama Refining*, the Supreme Court has consistently upheld every challenged congressional delegation to the executive branch. The cases are legion.[116] A few notable examples will suffice to finish setting the stage for a consideration of the vulnerability of the Line Item Veto Act of 1996; other cases will be discussed in subsequent portions of the Article. Although some cases lend themselves to easy description as either "interstitial" or "contingent" delegations, many continue to fuse these two original categories. All use as their touchstone for acceptable delegations the presence of a sufficient standard or "intelligible principle" to guide the use of the delegated authority.

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112. *Id.* at 541.

113. *Id.* at 551, 553 (Cardozo, J., concurring).

114. *Id.* at 553.

115. *See, e.g*, American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1037 (D.C. Cir. 1999) (citing *Schechter Poultry* for the proposition that a delegation affecting the whole economy requires a more precise standard); 1 DAVIS & PIERCE, *supra* note 8, § 2.6, at 71-72 (describing *Schechter Poultry* as "the most sweeping congressional delegation of all time"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987) (stating a general opposition to the revival of the nondelegation doctrine but conceding that "extreme measures, like that in *Schechter Poultry*, should be invalidated").

116. For examples, see *Synar v. United States*, 626 F. Supp. 1374, 1383 n.9 (D.D.C. 1986), citing numerous cases. See also the treatments of the nondelegation doctrine in THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 73-89 (Johnny H. Killian & George A. Costello eds., 1996), and 1 DAVIS & PIERCE, *supra* note 8, § 2.6, at 66-85.

Two years after invalidating sections 3(a) and 9(c) of NIRA, the Supreme Court echoed the interstitial theme that it had first articulated in 1825 in *Wayman*, this time in the context of executive authority over spending, rather than over rulemaking. In *Cincinnati Soap Co. v. United States*,[117] the Court rejected a claim that a revenue measure whose entire proceeds were to go to a United States dependency, the Philippines, "with no direction as to the expenditure thereof, constitutes an unlawful delegation."[118] The Court explained:

> That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitutionality of this delegation of authority has never been seriously questioned.[119]

Several years later, the Court subtly but substantially expanded upon the idea of interstitial rulemaking authority that it had first approved over one hundred years previously. At issue was an act empowering the Supreme Court to prescribe the rules of the federal district courts.[120] Significantly, while the Act provided that "[s]aid rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant," the Act further provided that "all laws in conflict [with such rules] shall be of no further force or effect" once the Supreme Court had promulgated contrary rules.[121] In upholding this delegation of rulemaking authority in *Sibbach v. Wilson*,[122] the Court explicitly stated that the exercise of this power could result in the implicit "repeal" of conflicting laws.[123] Both *Sibbach* and *Cincinnati Soap* became important precedents in defense of the Line Item Veto Act, as discussed below.

Yakus v. United States[124] provided another example of the Court's syn-

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117. 301 U.S. 308 (1937).

118. *Id.* at 312.

119. *Id.* at 321-22; *see also* Gratiot v. United States, 45 U.S. (4 Wheat.) 80, 114 (1846) ("A specific appropriation could not be diverted from its object, but general appropriations necessarily implied an application according to the discretion of the department. . .").

120. Act of June 19, 1934, ch. 651, 48 Stat. 1064. This was a predecessor of the Rules Enabling Acts, 28 U.S.C. § 2072(a)-(b) (1994) and 18 U.S.C. § 3771 (1982) (repealed 1998).

121. Act of June 19, 1934, § 1, 48 Stat. at 1064.

122. 312 U.S. 1 (1941).

123. *See id.* at 10; *see also* Davis v. United States, 411 U.S. 233, 241 (1973) (recognizing that the result of the use of authority delegated in the Rules Enabling Acts is that a "prior inconsistent statute [is] deemed to have been repealed").

124. 321 U.S. 414 (1944).

thesis of the "contingent legislation" and "interstitial rulemaking" strands of the nondelegation doctrine.[125] To stabilize commodity prices during World War II, Congress in the Emergency Price Control Act of 1942 established the Office of Price Administration, headed by a Price Administrator.[126] The Act gave the Administrator temporary authority to fix prices that "in his judgment will be generally fair and equitable," whenever in his judgment prices "have risen or threaten to rise" to an extent inconsistent with the Act's defined policies.[127] The Court concluded that Congress had

> laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. . . .
>
> It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.[128]

Having thus described both contingent and interstitial elements to the delegation, the Court then restated the theme that

> the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends . . . upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.[129]

A second theme recurrent in the Supreme Court's twentieth century delegation cases has been the impact of society's growing complexity upon "the inherent necessities of the governmental co-ordination" among the branches of government.[130] For instance, on this basis the Court in *American Power & Light Co. v. SEC*[131] upheld Congress' grant to the Securities and Exchange Commission of authority to require the dissolution of utility holding companies whose corporate structure the SEC deemed unduly complicated or whose existence distributed voting

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125. *See id.* at 423-25.

126. *See id.* at 419; *see also* Emergency Price Control Act of 1942, § 201(a), 56 Stat. 23, 29.

127. *See* 56 Stat. at 24.

128. *Yakus*, 321 U.S. at 423-25.

129. *Id.* at 425.

130. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

131. 329 U.S. 90 (1946).

power inequitably.[132] The Court concluded that the delegation "is a reflection of the necessities of modern legislation dealing with complex economic and social problems," and that where it would be "impracticable to compel Congress to prescribe detailed rules," it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[133]

A number of cases have relied upon similar justifications to uphold congressional delegations.[134] More recently, in *Synar v. United States*,[135] a three-judge district court including then-Judge Scalia considered a non-delegation challenge to the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act.[136] Among other features, the Act gave the President authority to cancel permanently a *pro rata* portion of all congressional appropriations subject to the Act whenever total appropriations exceeded specified limits.[137] Relying again on Congress' need to leave certain factual determinations to the executive branch in our increasingly complex society, the district court rejected the plaintiffs' claim that the Act provided insufficient standards to guide the executive's use of the delegated authority.[138] The district court also rejected the plaintiffs' claim that this delegation was "*per se* invalid because it allows administrators to 'nullify' or 'override' laws," explaining that:

> The Supreme Court previously has upheld delegations which permit officials to determine when, if ever, a law should take effect. . . . In such cases, the Court classifies Congress' action as legislating in contingency. . . . Viewed in this context, the authority delegated by the Act does not differ in kind from that approved in prior cases.[139]

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132. *See id.* at 104.

133. *Id.* at 105.

134. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 785 (1948) (stating that Congress need not create specific formulas for regulation of programs where the essence of the delegation was to allow for flexibility and adaptation); National Broad. Co. v. United States, 319 U.S. 190, 219-20 (1943) (finding that Congress acted based on its experience when it created a broad area of regulation for the FCC and set the standards for its regulation of radio); Opp Cotton Mills, Inc. v. Department of Labor, 312 U.S. 126, 145-46 (1941) (determining that the Constitution does not require Congress to research independently each fact upon which it bases legislation).

135. 626 F. Supp. 1374 (D.D.C. 1986) (three-judge court) (per curiam), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

136. *See id.* at 1377.

137. Pub. L. No. 99-177, § 252(a)(4), 99 Stat. 1038, 1074 (1985) (codified as amended in scattered sections of 2 U.S.C., 31 U.S.C., 42 U.S.C.).

138. *See Synar*, 626 F. Supp. at 1387-89.

139. *Id.* at 1387.

On appeal, the Supreme Court did not address the nondelegation issue but disposed of the case on other grounds.[140]

The district court's opinion in *Synar* also contained a third theme (in addition to the importance of finding a guiding policy, and the need to accommodate the complexities of modern society) found in a number of nondelegation doctrine cases. After reviewing the precedents, the court observed that nondelegation doctrine analysis was highly fact-specific, relying "substantially upon factual comparison of the delegation under challenge with delegations previously adjudicated."[141] Essentially, this was a concession that line drawing in the nondelegation area is difficult, a sentiment echoing similar expressions found in other decisions.[142] It was also a concession that *Field v. Clark*'s promise of a clear distinction between law-making power and law-executing power[143] remained unfulfilled.

Yet, given that since 1935 the Supreme Court has been unwilling to find any delegations impermissible, one could also have cynically observed that line drawing in fact was quite easy, and indeed no longer even seemed necessary, when the courts could find nothing to place on the other side of the line. Thus, it is important to assess the continuing validity of the nondelegation doctrine as an effective constraint on permissible delegations.

II. LATE TWENTIETH-CENTURY PURSUITS OF A RENEWED NONDELEGATION DOCTRINE

Despite its name and avowed purpose, the nondelegation doctrine has almost universally been used to uphold, rather than to preclude, congressional delegations, provided only that courts can find somewhere a sufficient "intelligible principle" or other meaningful standard to guide the exercise of the delegated authority.[144] Reflecting that fact, the doctrine

140. *See* Bowsher v. Synar, 478 U.S. at 736.

141. *Synar*, 626 F. Supp. at 1384-85.

142. *See, e.g.*, Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 245 (1915) (stating that while administration and legislation are separate powers, it is difficult to find the line separating them); United States v. Grimaud, 220 U.S. 506, 517 (1911) (recognizing the difficulty in defining the line between legislative power and administrative authority); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) ("The line has not been exactly drawn which separates [delegable and nondelegable powers]"); *see also* Printz v. United States, 521 U.S. 898, 927 (1997) ("This Court has not been notably successful in describing the [line that separates proper congressional conferral of executive power from unconstitutional delegation of legislative authority]; indeed, some think we have abandoned the effort to do so.").

143. *See supra* note 23 and accompanying text.

144. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2, at 151 (2nd

today is often termed the *delegation* doctrine, rather than the nondelegation doctrine.[145] Nevertheless, in recent decades, a number of scholars and judges, including the recent D.C. Circuit majority in *American Trucking*, have encouraged or hoped for a reinvigoration of a robust form of the doctrine, which might actually result in the invalidation of some congressional acts.[146] Alternatively, others have advocated a refined form of the essentially permissive version of the doctrine, which would continue to permit Congress to make sweeping statutory delegations while demanding greater clarity and uniformity in congressional or *administrative* standards developed to guide the uses of the delegated authority.

A. Modern Cynicism Toward the Nondelegation Doctrine

Varying degrees of cynicism about (or even enthusiasm for) the impotence of the nondelegation doctrine in the modern administrative state have accompanied, if not inspired, suggestions for reinvigorating the doctrine. Just over two decades after the *Schechter Poultry* and *Panama Refining* decisions, Professor Kenneth Davis observed that "[i]n [the] absence of palpable abuse or true congressional abdication, the nondelegation doctrine to which the Supreme Court has in the past often paid lip service is without practical force."[147] This opinion has remained the prevailing scholarly view.[148] In the 1978 revision of his administrative law treatise, Professor Davis more cynically expressed a similar sentiment that "[s]ince 1935 the nondelegation doctrine has had no reality in the holdings," and "has failed in the federal courts," despite the fact that "remnants of the doctrine persist in judicial verbiage."[149]

Meanwhile, courts and judges have also at times expressed the view

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ed. 1978) (1958) (describing the transformation of the nondelegation doctrine into a permissive doctrine that facilitates delegation).

145. *See, e.g.*, Aranson, *supra* note 105, at 7; Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 400 (1987); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224 (1985); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324 (1987).

146. *See* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034, 1038, 1057 (D.C. Cir. 1999).

147. DAVIS, *supra* note 144, § 2.01, at 76.

148. *See, e.g.*, Aranson, *supra* note 105, at 5 (noting that "most contemporary commentators regard the doctrine as dead, even though the Court refuses to bury it"); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999) (opposing revival of "robust" nondelegation doctrine); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2111 & n.190 (1990) (describing the "downfall" of the nondelegation doctrine).

149. DAVIS, *supra* note 144, §§ 3.1-3.2, at 150.

that the nondelegation doctrine no longer acts as much of a limit on Congress' ability to share its legislative authority. Relying on Professor Davis' treatise, Justice Marshall in 1974 wrote:

> The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes, at least in the absence of a delegation creating "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms." This doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary—if not more so.[150]

Likewise, the D.C. Circuit wrote in 1982 that the doctrine "has often been declared deceased."[151] Judge Skelly Wright, in a review of Professor Davis' work, wrote that "most scholars rank the delegation doctrine together with substantive due process, nullification, and common law forms of action as arcane notions which inexplicably fascinated an earlier generation but which were given the decent burials they deserved long ago."[152]

One source of cynicism, at least in the D.C. Circuit, may have been the 1971 decision of D.C. Circuit Judge Harold Leventhal in *Amalgamated Meat Cutters v. Connally*.[153] Writing for a three-judge district court, Judge Leventhal upheld Congress' delegation to the President of what the opinion acknowledged was broad authority "'to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries.'"[154] Despite the fact that this delegation left the policy decision of whether to impose wage and price controls entirely to the President, the court concluded that, "in a context of historical experience with

150. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring in the result). The footnote omitted from this quote cites extensively to Kenneth C. Davis' *Administrative Law Treatise*, *supra* note 144. *See* 415 U.S. at 353 n.1.

151. *See* Consumer Energy Council v. FERC, 673 F.2d 425, 448-49 n.82 (D.C. Cir. 1982). At the same time, the D.C. Circuit acknowledged the existence of "evidence that the Supreme Court has not written [the delegation doctrine] off," but the circuit court itself declined to "pronounce a revival of the delegation doctrine." *Id.*

152. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582 (1972) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)); *see also* McGowan, *supra* note 4, at 1127-28 & n.35 (describing the "almost total demise" of the nondelegation doctrine).

153. 337 F. Supp. 737 (D.D.C. 1971).

154. *Id.* at 745 (quoting Economic Stabilization Act of 1970, Pub. L. No. 91-379, tit. II, § 202, 84 Stat. 799, 799-800).

anti-inflation legislation," it could not find "that this delegation was unreasoned, or a mere abdication to the President to do whatever he willed."[155]

For some, the Supreme Court's more complaisant approach since 1980 to questions of delegation has only heightened this cynicism. In particular, in the *Benzene* case,[156] the Court reviewed the Occupational Safety and Health Act's delegation to the Secretary of Labor of authority to promulgate safety standards "which most adequately assure[], to the extent feasible, . . . that no employee will suffer material impairment of health."[157] In his concurrence, Justice Rehnquist lamented the Court's failure to find this delegation unconstitutional, concluding that the Court had passed up a choice opportunity "to reshoulder the burden of ensuring that Congress itself make the critical policy decisions."[158] In the *Cotton Dust* case the following year, Justice Rehnquist, now joined by Chief Justice Burger, again lamented the Court's failure to find unconstitutional this same statute's delegation of authority to set health standards "to the extent feasible," which he described as "no standard at all."[159] Professor Davis described these cases as marking the arrival of a "new era" of the nondelegation doctrine, in which Congress was no longer even required to make the guiding policy decisions.[160]

Nevertheless, to others, Justice Rehnquist's, and then Chief Justice Burger's, continuing interest in the nondelegation doctrine provided hope for a revival of the doctrine. In this regard, Justice Rehnquist's opinions in the *Benzene* and *Cotton Dust* cases echoed similar expressions by other Justices whose opinions had on occasion cheered those seeking to reinvigorate the nondelegation doctrine. For instance, in 1974 Justices Brennan and Douglas expressed the view that the Bank Secrecy Act unconstitutionally delegated to the Treasury Secretary the authority to prescribe bank record keeping and reporting requirements.[161]

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155. *Id.* at 751, 762.

156. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).

157. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6(b)(5), 84 Stat. 1594.

158. 448 U.S. at 687 (Rehnquist, J., concurring).

159. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting).

160. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES § 3:1, at 54 (1989). The Court's subsequent opinions have not adopted Professor Davis' description literally, but have continued to insist upon an "intelligible principle." *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372, 379 (1989).

161. *See* California Bankers Ass'n v. Schultz, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting); *id.* at 90-91 (Douglas, J., dissenting) (agreeing with Justice Brennan).

Encouraged by these and other judicial pronouncements,[162] several prominent scholars have suggested that the courts should revitalize the doctrine to again invalidate statutory delegations.[163] Others more sanguinely have proposed that the doctrine instead should be reconstituted as a theory for a more careful judicial policing of agency actions taken pursuant to presumptively valid statutory delegations of authority.[164]

B. Ambitious Suggestions for "Reinvigorating" the Nondelegation Doctrine

A decade before Justice Rehnquist's *Benzene* and *Cotton Dust* opinions, D.C. Circuit Judge Skelly Wright advocated the revival of a vigorous form of the nondelegation doctrine. In his review of Professor Davis' book *Discretionary Justice* in 1972, Judge Wright shared Professor Davis' concern that administrative discretion in the United States had grown so untrammeled and unreviewable as to have become "intolerable."[165] Yet he did not share Professor Davis' optimism that agencies could bear the burden of voluntarily reforming this situation. Rather, he believed that it was time to demand that Congress reassert control over the setting of national policy.[166] Furthermore, he believed that the courts would have to shoulder the primary burden of precipitating such a result, largely by resuscitating the nondelegation doctrine.[167] Although he acknowledged some potential difficulties, principally the problem of how to define or standardize the amount of congressional control required,[168] he thought that a revived nondelegation doctrine was not out of reach, and he discounted those who had abandoned hope in the doctrine. He wrote: "There is every reason to believe that, with a slight nudge from the courts, Congress would eagerly reassume its rightful role as the author of meaningful organic charters for administrative agencies."[169]

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162. *See, e.g.*, United States v. Robel, 389 U.S. 258, 272-77 (1967) (Brennan, J., concurring in the result) (describing as an unconstitutional delegation the Defense Secretary's authority to identify "defense facilities" at which members of communist organizations were criminally prohibited from employment); Arizona v. California, 373 U.S. 546, 603, 626 (1963) (Harlan, J., dissenting in part, with Stewart and Douglas, JJ., joining) (describing the delegation to the Interior Secretary of the authority to apportion the waters of the Colorado River as raising the "gravest constitutional doubts").

163. *See* discussion *infra* Part II.B.

164. *See* discussion *infra* Part II.C.

165. Wright, *supra* note 152, at 576.

166. *See id.* at 578-81.

167. *See id.* at 581.

168. *See id.* at 586-87.

169. *Id.* at 584.

Judge Wright supported his plea for the revival of the nondelegation doctrine by critiquing the observation sometimes used to defend broad delegations to agencies, that Congress often lacks the ability or the will to fashion specific, narrow standards, and hence entrusts this power to agency expertise. To Judge Wright, this observation demanded not the abandonment but the reaffirmance of the nondelegation doctrine:

> An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy. . . . The whole reason we have broadly based representative assemblies is to require some degree of public consensus before governmental action occurs. To be sure, we pay a price for awaiting such consensus. . . . But . . . there is a price to be paid for congressional abnegation as well.[170]

Several years later, Judge Carl McGowan, Judge Wright's colleague on the D.C. Circuit, refined this critique. Writing in 1977, Judge McGowan suggested a distinction between those congressional delegations that result purely from "internal political maneuver or as an escape from having to stand up and be counted" and those that occur because "Congress, in an increasingly complex and changing world, is called upon to deal with subject matter that is novel and imprecise, and for which it is frequently ill-equipped to do more than to paint with a broad brush."[171] He explained that only in the latter situation was Congress' practice of "leaving the details to be filled in by less unwieldy and more technically expert administrative authority" appropriate.[172] With respect to the former situation, he argued that Congress was subverting democratic decision-making. He therefore hoped that the Supreme Court might find a suitable case to revive the nondelegation doctrine and remind Congress of the constitutional limits on its ability to delegate.[173]

Approaching the question from a somewhat different angle, in 1977 Professors Lawrence Tribe and Philip Kurland both opined before a congressional subcommittee that proposed executive branch reorganization authority, which would have authorized the President to consolidate agencies or entirely abolish their functions, would delegate such unprecedented control over the nation's laws as to be flatly unconstitutional, even under the Supreme Court's lax application of the nondelega-

170. *Id.* at 585 (footnote omitted).
171. McGowan, *supra* note 4, at 1128-29.
172. *Id.* at 1128.
173. *See id.* at 1129-30.

tion doctrine.[174] Acknowledging that the Supreme Court had employed narrowing interpretations to uphold otherwise "quite broad delegations of power," Professor Tribe distinguished the proposed reorganization authority as "inherently open ended" and "subject to no special procedural checks."[175] Professor Kurland similarly concluded that while the practice of delegating authority was generally acceptable, the bill before the committee was not constitutional because it contained nothing but an unbounded delegation: "none of the statutes which have come before the Court has had in it *only* such a delegation provision, which is what you have here . . . nothing but that delegation without any substantive provisions, rules, or principles" to guide the agency.[176] In response to these hearings, Congress ultimately enacted a modified version of the reorganization legislation that incorporated several limiting principles suggested by Professor Tribe, including prohibitions on using the reorganization authority to abolish any independent regulatory agency, any enforcement function, or any statutory program.[177]

Meanwhile, other scholars preceded Judges Wright and McGowan in the view that the nondelegation doctrine might, or in any event should, again be given real force. Writing in 1969, Theodore Lowi observed that, despite the oft-heard justification for congressional delegations—that the complexities of modern society did not lend themselves to clear legislative standards—"three quarters of a century's experience with the problems of modern industrial practice" made such standards "both necessary and desirable today, except for those who wish to see the power of the democratic state drained away."[178] He declared: "The Court's rule must once again become one of declaring invalid and unconstitutional any delegation of power to an administrative agency that is not accompanied by clear standards of implementation."[179] He recognized that following such a rule would be dramatic, but argued that the status quo alternative involved the Court in repeated acts of judicial "legislating" in the course of adopting sufficiently narrow constructions of otherwise unbridled con-

174. *See Providing Reorganization Authority to the President, Hearings on H.R. 3131, H.R. 3407, and H.R. 3442 Before the Legislation and Nat'l Sec. Subcomm. of the House Comm. on Gov't Operations*, 95th Cong. 76-89, 134-44 (1977) (statements of Laurence H. Tribe and Philip B. Kurland).

175. *Id.* at 80 (statement of Laurence H. Tribe).

176. *Id.* at 142 (statement of Philip B. Kurland) (emphasis added).

177. *See* Reorganization Act of 1977, Pub. L. No. 95-17, §905, 91 Stat. 31 (codified at 5 U.S.C. § 905).

178. THEODORE J. LOWI, THE END OF LIBERALISM 146, 154-55 (1969).

179. *Id.* at 298; *see also* Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295, 303-04 (1987).

gressional delegations.[180]

In *Democracy and Distrust* a decade later, John Hart Ely similarly decried the modern practice which effectively allowed elected representatives to leave many law-making functions to unelected administrators.[181] He, too, rejected as a defense for this practice the explanation that Congress often lacks the will to take a specific stand on controversial issues, instead regarding this state of affairs as "precisely the reason *for* a nondelegation doctrine."[182] Professor Ely seemed not too expectant, however, that the courts would actually reinvigorate the doctrine.

Striking only a slightly more optimistic note shortly after Justice Rehnquist's *Benzene* and *Cotton Dust* opinions, in 1982 professors Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson argued for a renewed nondelegation doctrine, predicated primarily upon a concern for reducing what they described as the regulatory production of private benefits.[183] Their critique of the practice of delegation amounted to an economic analysis of the problem of Congress' reluctance to "stand up and be counted."[184] They concluded that an impotent nondelegation doctrine facilitated the creation of private-interest legislation that did not command a consensus or create a public good, while also allowing Congress to shift to agencies much of the costs of settling political conflicts and yet keep for itself the ability to claim credit.[185] They acknowledged, however, that courts might be reluctant to provide that "nudge" which Judge Wright had described as necessary to reinvigorate the nondelegation doctrine, given that broad delegations inherently provided the courts with greater interpretive power as well.[186]

Encouraged not only by Justice Rehnquist's opinions in the *Benzene* and *Cotton Dust* cases, but also by the Supreme Court's decision in *INS v. Chadha*[187] invalidating the legislative veto as an improper exercise of lawmaking power, Professor David Schoenbrod became a forceful pro-

180. *See* LOWI, *supra* note 178, at 298.

181. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 131-34 (1980).

182. *Id.* at 133.

183. *See* Aranson, *supra* note 105, at 63, 67 (explaining that despite the difficulty of reviving the nondelegation doctrine, the idea "has acquired a fresh dignity"). Professor Gellhorn reiterated this argument several years later. *See* Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 352 (1987).

184. Aranson, *supra* note 105, at 63-64; *see* McGowan, *supra* note 4, at 1128-29.

185. *See* Aranson, *supra* note 105, at 63-64.

186. *See id.* at 67.

187. 462 U.S. 919 (1983). One commentator has described the legislative veto as an instance of congressional "self-delegation." *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 711, 715-17 (1997).

ponent of a revived nondelegation doctrine. Harking back to *Field v. Clark*'s[188] classic statement of the nondelegation principle,[189] he argued first in 1985[190] and then in a 1987 symposium,[191] a 1993 book,[192] and again in a 1999 symposium[193] that courts should prohibit any delegation of "legislative power," as he sought to define that term. Professor Schoenbrod explained that a workable, meaningful nondelegation doctrine should be formulated first by differentiating between "rules statutes" and "goals statutes."[194] He then argued that, in regulating private conduct, Congress should be obligated to enact rules statutes and should be prohibited from using goals statutes to delegate to executive agencies what amounted to legislative power.[195] He was willing, however, to allow broader delegations of authority concerning the management of public resources and the conduct of foreign affairs, on the basis that in these areas Congress was not necessarily delegating its own Article I *legislative* powers, but rather was sharing powers also arising under Article IV and Article II, respectively.[196] In these areas, he explained, it was permissible for Congress to rely upon goals statutes, rather than rules statutes.[197] He argued that this view obviated "many of the classic examples of the impossibility of government" under a vigorous nondelegation doctrine."[198]

In no small part because of the work of Professor Schoenbrod, Cardozo Law School convened a symposium in March 1998, in the midst of the litigation of the Line Item Veto Act, to discuss the nondelegation doctrine. Although entitled *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*,[199] contributors did not exactly argue that the doctrine was "rising." Instead, participants debated whether the doctrine should be reinvigorated, with several participants joining Professor Schoenbrod, in varying degrees, to urge such a reinvigoration.[200]

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188. 143 U.S. 649 (1891).

189. *See supra* text accompanying note 23.

190. *See* Schoenbrod, *supra* note 145, at 1227.

191. *See* David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 358-359 (1987).

192. *See* SCHOENBROD, *supra* note 100, at 3.

193. *See* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999).

194. Schoenbrod, *supra* note 145, at 1252-53.

195. *See id.* at 1254-60.

196. *See id.* at 1260-71.

197. *See id. at* 1276.

198. *Id.*

199. Symposium, 20 CARDOZO L. REV. 731 (1999).

200. *See* Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20

C. More Limited Suggestions for "Reconstituting" the Nondelegation Doctrine

Others have remained skeptical of either the advisability or the promise of reviving a vigorous nondelegation doctrine. For instance, in 1975, Professor Richard Stewart asserted that while in some cases courts *through statutory construction* might "more carefully limit broad legislative delegations," nevertheless "any large-scale enforcement of the nondelegation doctrine would clearly be unwise."[201] He worried not only about the need for administrative expertise to respond to the complexity of contemporary conditions, but also about Congress' institutional inability to legislate in sufficient detail.[202] A decade later, in partial response to Professor Schoenbrod and others, and while acknowledging that "the temper of the times also seems favorable" for a reinvigorated nondelegation doctrine, Professor Stewart nevertheless continued to oppose such a development.[203] He proposed that the doctrine be used as a tool to require agencies to create standards where Congress had failed to do so. He described this as "the possibility of a more modestly conceived judicial role in policing legislative delegation" through "a policy of narrow construction of statutory delegations."[204]

Professor Kenneth Davis has been the principal advocate of this sort of modest reformulation of the nondelegation doctrine, in contrast to those advocating its reinvigoration in its traditional sense. At the same time that he was describing the doctrine as a "failure" in the courts, Professor Davis was proposing that the doctrine be "reconstituted" and "given new life."[205] He argued that the focus should no longer be upon the sufficiency of Congress' declaration of policy, but on whether administrators themselves had developed and implemented their own standards to

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CARDOZO L. REV. 989, 989-90 (1999); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 808 (1999); William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority Over Regulations*, 20 CARDOZO L. REV. 939, 939 (1999); Paul Craig Roberts, *How the Law was Lost*, 20 CARDOZO L. REV. 853, 853 (1999); Nadine Strossen, *Delegation as a Danger to Liberty*, 20 CARDOZO L. REV. 861, 861 (1999).

201. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 (1975).

202. *See id.*

203. Stewart, *supra* note 145, at 324.

204. Stewart, *supra* note 201, at 1697. The Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 864-66 (1984), to defer to an agency's reasonable construction of its own statutes, and in particular to permit an executive agency to base such constructions on its own policy choices, obviously greatly empowers agencies to establish standards where Congress has not. *See* DAVIS, *supra* note 160, at 54, 67-70.

205. DAVIS, *supra* note 144, §3.1, at 150.

guide their exercise of delegated authority.[206] Conceding the modern administrative state's need for congressional delegations of quasi-legislative power, Davis saw this reformulated nondelegation doctrine as the more appropriate way to protect against an arbitrary exercise of delegated power.[207] In part, he favored this approach because the alternative effectively permitted "unelected judges [to] decide major questions of policy in ways that elected legislators have no power to reverse," whereas if unelected administrators were to decide those same policy questions, Congress would "have full authority to reverse."[208]

Courts have occasionally embraced this approach. For instance, in *International Union, UAW v. OSHA*,[209] the District of Columbia Circuit considered whether OSHA's construction of a provision of the Occupational Safety and Health Act was sufficiently limited to withstand a nondelegation challenge.[210] Although the court concluded that the agency's construction was unreasonably broad, it also concluded that narrower constructions were possible, and remanded the case to the Secretary of Labor to give OSHA an opportunity to adopt a construction both "reasonable and consistent with the nondelegation doctrine."[211] The agency then adopted a construction that the circuit court approved.[212]

The District of Columbia Circuit's May 1999 opinion in *American Trucking* is the most recent opinion to follow loosely in this model. Before the court were provisions of the Clean Air Act requiring the EPA to set air quality standards at the level "requisite to protect the public health" with an "adequate margin of safety."[213] The court concluded that these provisions, which the dissent observed had withstood repeated court review for almost three decades,[214] did not provide a standard for determining how much of certain pollutants was too much.[215] Nevertheless, the court declined to invalidate the statute, in order "to give the agency an opportunity to extract a determinate standard on its own."[216] The court also intimated that the EPA might have difficulty in articulat-

206. *See id.* § 3.15, at 206-07.
207. *See id.*
208. DAVIS, *supra* note 160, at 58.
209. 938 F.2d 1310 (D.C. Cir. 1991).
210. *See id.* at 1312-13.
211. *Id.* at 1313.
212. *See* International Union, UAW v. OSHA, 37 F.3d 665, 668-69 (D.C. Cir. 1994).
213. American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999); *see also* 42 U.S.C. § 7409(b)(1)(1994) (directing the EPA to establish air quality standard).
214. *See American Trucking*, 175 F.3d at 1057 (Tatel, J., dissenting).
215. *See id.* at 1034.
216. *Id.* at 1038.

ing a satisfactory "intelligible principle," and invited the agency in such a case to report so to Congress, to seek a legislative solution.[217]

In reaching this result, the court admitted that it was not serving a key (and historically the most important) purpose of the nondelegation doctrine, namely, ensuring that Congress make important choices of social policy.[218] Instead, the court relied upon two other rationales for the nondelegation doctrine: reducing arbitrary uses of delegated authority, and enhancing the possibility of meaningful judicial review.[219] The court concluded that serving these two purposes was sufficient, in view of what it described as the Supreme Court's apparent lack of interest in a "strong form" of the nondelegation doctrine.[220]

Is *American Trucking* evidence that the more modest reform proposals of Professors Davis and Stewart have supplanted the more ambitious calls for a reinvigoration of the nondelegation doctrine? Or might the District of Columbia Circuit instead be tempting the Supreme Court to revive a strong form of the doctrine? Professor Lawrence Lessig has described the Court's 1995 decision in *United States v. Lopez*[221] as an example of judicial cycling in constitutional interpretation.[222] While in *Lopez* this cycling occurred in the area of federalism, specifically the limits of the Commerce Clause (limits that also had lain dormant since 1936 and had therefore sometimes been described as "dead" or otherwise meaningless),[223] the question arises whether and when a similar cycling might occur in the area of separation of powers, specifically the limits of Article I's vesting of all legislative powers in Congress.[224] Before turning to the

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217. *See id.* at 1038, 1040.

218. *See id.* at 1038.

219. *See id.*

220. *See id.*

221. 514 U.S. 549 (1995).

222. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 127-29.

223. *See, e.g.*, Richard A. Epstein, *The Proper Scope of The Commerce Power*, 73 VA. L. REV. 1387, 1387 (1987) (noting that "too much water has passed over the dam" to expect reinvigoration of meaningful Commerce Clause jurisprudence); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674-75, 698 (1995) (describing the prevailing pre-*Lopez* view that the Commerce Clause provided no limit to congressional power).

224. Judge McGowan described this cycling, specifically in the area of separation of powers, as judicially administering a "shock treatment" to Congress. McGowan, *supra* note 4, at 1120, 1130. The Supreme Court's recent "hostility" toward congressional enactments generally, *see* Suzanna Sherry, *Some Targets Were Larger Than Others*, WASH. POST, July 4, 1999, at B4, only highlights the possibility that the Court would consider administering such a "shock treatment." Professor Richard Stewart has described the possibility of such a cycling concerning the nondelegation doctrine as "a return to constitutional fundamentalism," Stewart, *supra* note 145, at 323-24, while Professor Sunstein has de-

import of *Clinton v. City of New York* upon these questions, it will be useful to review four principal nondelegation cases of the past decade, in which the Supreme Court also declined the invitation to revitalize the nondelegation doctrine.

D. Contemporary Nondelegation Cases

When the District of Columbia Circuit in *American Trucking* described "current Supreme Court cases" as not "applying the strong form of the nondelegation doctrine,"[225] the circuit court's sole reference was to the Supreme Court's 1989 decision in *Mistretta v. United States*.[226] In *Mistretta*, the Court upheld, against an excessive delegation challenge, the *Federal Sentencing Guidelines* promulgated by the United States Sentencing Commission under the Sentencing Reform Act of 1984.[227] The Act directed the Commission to develop categories of criminal offenses and defendants, and sentencing ranges for each category, consistent with federal criminal law.[228] Among other constraints, Congress specified multiple factors for the Commission to consider in structuring both the offense categories and defendant categories,[229] and charged the Commission with three goals: to meet criminal sentencing's multiple purposes of deterrence, retribution, public protection, and rehabilitation; to provide "certainty and fairness" while permitting individualized sentences; and to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."[230]

Acknowledging that "the Commission enjoys significant discretion," the Court nonetheless "harbor[ed] no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements."[231] It explained that its previous cases "do not at all suggest that delegations of this type may not

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scribed expansive post-New Deal delegations as having granted "legislative, or at least discretionary, power far beyond what was contemplated by the original Constitution," Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 6 (1995).

225. American Trucking Assn's, Inc. v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (per curiam).

226. *See id.*

227. *See* Mistretta v. United States, 488 U.S. 361, 379, 412 (1989).

228. *See* 18 U.S.C. §§ 3551-3559 (1994 & Supp. III 1997) (authorizing sentence provisions); 28 U.S.C. §§ 991-998 (1994 & Supp. II 1996) (establishing the United States Sentencing Commission).

229. *See* 28 U.S.C. § 994(c)(1)-(7), (d)(1)-(11).

230. 28 U.S.C. § 991(b)(1); 18 U.S.C. § 3553(a)(2).

231. *Mistretta*, 488 U.S. at 374, 377.

carry with them the need to exercise judgment on matters of policy."[232] Rather, "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."[233] Justice Scalia dissented, not on the basis that the delegation lacked sufficient congressional standards,[234] but on the basis that the authority was being given to a body having absolutely no executive or judicial branch responsibility for enforcing the laws.[235] He explained that lawful delegations had previously always been ancillary to a delegatee's executive (or adjudicatory) duties, whereas here the Sentencing Commission amounted to "a sort of junior-varsity Congress," created out of whole cloth solely to take up Congress' law-making duties where Congress chose to leave off.[236]

Later that year, the Court decided *Skinner v. Mid-America Pipeline*.[237] At issue was a delegation to the Secretary of the Treasury of authority to impose safety user fees on operators of natural gas and hazardous liquid pipelines.[238] The Court easily concluded that Congress' guidelines for the imposition of these fees "satisfy the constitutional requirements of the nondelegation doctrine as we have previously articulated them," and turned to the central contention of the case: that because Congress' taxing power was at issue, the Court should employ more stringent nondelegation standards.[239] After reviewing previously approved delegations arising out of the Constitution's Taxing Clause, the Court rejected this invitation.[240] The same standard applies to delegations of authority involving Congress' power to tax as to delegations of authority involving other congressional powers.[241]

The Supreme Court's two most recent cases considering the nondelegation doctrine also involved, like *Mistretta*, delegated authority to determine criminal sanctions. At issue in *Touby v. United States*[242] was

232. *Id.* at 378.

233. *Id.* at 379.

234. *See id.* at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

235. *See id.* at 420-21 (Scalia, J., dissenting).

236. *Id.* at 416-22, 426-27 (Scalia, J., dissenting).

237. 490 U.S. 212 (1989).

238. *See* 49 U.S.C. § 60301(a)(1994).

239. *Skinner*, 490 U.S. at 220.

240. *See id.* at 220-23.

241. *See id.* at 223.

242. 500 U.S. 160 (1991).

power delegated to the Attorney General under the Controlled Substances Act to decide, pursuant to specified procedures, what substances to include on the Act's five "schedules" of drugs whose manufacture, possession, and distribution the Act criminalized.[243] As in *Skinner*, the central issue here also became not whether Congress had provided a sufficient intelligible principle to guide the Attorney General's delegated authority, but whether some heightened standard nevertheless should be required, in this case because it involved criminal sanctions.[244] While the Court left this question unresolved, it concluded, in light of the detailed procedures and specified determinations required by the Act, that the Act "passes muster even if greater congressional specificity is required in the criminal context."[245]

Finally, in *Loving v. United States*,[246] decided two years before *Clinton v. City of New York*, the Court faced the question of whether the President could prescribe "aggravating factors" in military capital homicide cases, for use in determining (under the capital punishment standards of *Furman v. Georgia*[247]) whether the death penalty was permissible. The Court found that Congress could delegate this authority to the President,[248] and that the "intelligible principle" test was satisfied by the mere fact that the delegation was within "the traditional authority of the President," who as Commander-in-Chief had an independent duty "to take responsible and continuing action to superintend the military, including the courts-martial."[249] Accordingly, the Court was willing to permit the President to specify aggravating factors "without further guidance" from Congress.[250] The Court concluded that "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes."[251]

Thus, at least in these cases, the Court was unresponsive to invitations that it again use the nondelegation doctrine to invalidate broad congressional grants of authority. Indeed, in *Loving* the Court acknowledged

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243. *See id.* at 162.

244. *See id.* at 165-66. Justice Brennan had suggested that delegations of authority concerning criminal sanctions merit additional scrutiny. *See* United States v. Robel, 389 U.S. 258, 272 (1967) (Brennan, J., concurring).

245. *Touby*, 500 U.S. at 166.

246. 517 U.S. 748 (1996).

247. 408 U.S. 238 (1972).

248. *See Loving*, 517 U.S. at 759-71.

249. *Id.* at 771-72.

250. *Id.* at 773.

251. *Id.*

that for over sixty years it had approved "sweeping" delegations,[252] and for at least some types of cases seemed even to back away from a requirement that Congress must establish the policy behind the delegation. Even before *Loving*, Professors Davis and Pierce had wondered "why the Justices abandoned so quickly the interest in a reinvigorated nondelegation doctrine they expressed in the opinions in *Benzene* and *Cotton Dust.*"[253] They postulated three reasons: the difficulty of articulating a standard for distinguishing between constitutional and unconstitutional delegations, the Court's "more realistic perspective on the legislative process," and a recognition "that agencies *are* politically accountable" themselves.[254]

These reasons were not enough, however, to dishearten the nondelegation doctrine faithful. The theoretical difficulty of line drawing was not a new issue after *Cotton Dust*, but had long been recognized not only by opponents of a strong nondelegation doctrine but even by those who had hopes for a revitalized nondelegation doctrine.[255] Nor is it apparent why the Court should have developed any "more realistic" perspective on the legislative process. As for the Court's "recognition" of agencies' political accountability, in *Chevron U.S.A. v. Natural Resources Defense Council* the Court did observe that:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration of the statute in light of everyday realities.[256]

Yet, for purposes of dampening the hopes of nondelegation doctrine supporters, the import of this passage was not much different from the seventy-year-old principle of *J.W. Hampton*, that the extent of acceptable delegation must be judged in light of the "inherent necessities" of gov-

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252. *See id.* at 771.

253. 1 DAVIS & PIERCE, *supra* note 8, § 2.6, at 76; *see also* RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS 54 (2d ed. 1992) (noting that *Mistretta* "strongly indicated [the Supreme Court's] lack of interest in reviving the nondelegation doctrine").

254. 1 DAVIS & PIERCE, *supra* note 8, § 2.6, at 76.

255. *See, e.g.*, Schuck, *supra* note 148, at 791 (describing the line-drawing problem as "insuperable," in opposing a strong nondelegation doctrine); Wright, *supra* note 152, at 586-87 (acknowledging the need for "systematic thinking" about how to draw lines, in supporting a revitalized nondelegation doctrine).

256. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984).

ernmental co-ordination.[257]

Mistretta and subsequent cases therefore failed to extinguish the ardor of those desiring to revive a strong form of the nondelegation doctrine.[258] On the cyclical model, these decisions were but eddies in the ebb and flow of the Court's constitutional analysis. In fact, to Professor Schoenbrod, "the Court's discussion of delegation in *Loving*," as well as the Court's actual invalidation of acts of Congress in *Lopez* and the 1997 cases of *City of Boerne v. Flores*[259] and *Printz v. United States*,[260] were a "signal that the Court is now embracing its constitutional duty to provide meaningful boundaries to the limited powers accorded Congress by the Constitution."[261] He continued to believe that the time was right for the same sort of change of cycle in the separation-of-powers area that Professor Lessig had described *Lopez* as having precipitated in the federalism area.

Yet if *Loving* may have suggested that the Court was not yet interested in inaugurating a new phase in a nondelegation doctrine cycle, *Clinton v. City of New York* trumpets this conclusion. Whereas in *Loving*, *Touby*, *Skinner*, and *Mistretta*, the Court had ultimately approved the delegations at issue, the Court's consideration of the Line Item Veto Act in *City of New York* is significantly different because the Court in fact invalidated the challenged delegation. What therefore is portentous to the long-term force of the nondelegation doctrine is that despite the Court's disapproval of the Line Item Veto Act and the Act's amenability to a nondelegation doctrine challenge, the Court refused to use the doctrine to invalidate the Act, and instead went out of its way to find another, less satisfactory, rationale to do so.

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257. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928). Moreover, this rationale facially does not apply to independent agencies, nor is it clear that even executive branch agencies are (or even should be) always accountable to the President.

258. In particular, Professor Schoenbrod has remained a vocal advocate, *see* SCHOENBROD, *supra* note 100, ultimately appearing with Professor Marci Hamilton as amici curiae on both occasions when the Supreme Court reviewed the Line Item Veto Act, *see infra* text accompanying notes 366-75.

259. 521 U.S. 507, 511 (1997) (invalidating the Religious Freedom Restoration Act of 1993 as exceeding Congress' enforcement power under § 5 of the 14th Amendment).

260. 521 U.S. 898, 933 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act, which mandated that state law enforcement officers conduct background checks on prospective handgun purchasers, as violative of federalism's "dual sovereignty").

261. Brief for Amici Curiae Marci Hamilton and David Schoenbrod at 23, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374) [hereinafter Hamilton/Schoenbrod Brief].

III. THE LINE ITEM VETO ACT AND ITS VULNERABILITY TO THE NONDELEGATION DOCTRINE

Passed with great fanfare in April 1996 by the 104th Congress in fulfillment of the Republican Party's Contract with America, the Line Item Veto Act gave the President authority to cancel congressional appropriations and other federal spending measures in order to reduce the federal budget deficit.[262] Specific statutory standards in the Act conditioned the President's ability to exercise this cancellation authority. To effect a cancellation, Congress required the President to submit, within five days after signing into law the measure to which the cancellation applied, a special message identifying the cancelled item and specifying a number of findings related thereto. Each cancellation was then subject to congressional disapproval through enactment of overriding legislation, under expedited legislative procedures established by the Act.

Heralded as providing the President with authority akin to the true item veto powers possessed by the governors of forty-three states,[263] the Act did not, in actuality, give the President authority to veto items in proposed legislation. A real item veto would have allowed the President to strike portions of a bill presented to him by Congress before giving his approval under the Presentment Clause, thereby allowing only the remaining portions of the measure presented to him actually to become law. The Presentment Clause provides that every bill that has passed both houses of Congress "shall, before it becomes a Law, be presented to the President," who "[i]f he approve" shall sign the bill, "but if not, he shall return it, with his Objections to that House in which it shall have originated," for congressional reconsideration.[264] Most commentators (and many in Congress) shared George Washington's view that a true item veto would have been unconstitutional because it would violate these lawmaking requirements of Article I by letting the President return or "veto" only a portion of a bill, rather than the entire bill presented for approval.[265] Accordingly, the Line Item Veto Act provided the President

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262. *See* Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200; CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 23, 29-31 (Ed Gillespie & Bob Schellhas eds., 1994); Ann O'Hanlon, *The Contract with America: Scorecard*, WASH. POST, Mar. 27, 1995, at A17.

263. *See* Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175 & n.13 (1993).

264. U.S. CONST. art. I, § 7, cl. 2.

265. *See* Letter from George Washington to James Madison (Sept. 23, 1793), *in* 33 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, at 96 (John C. Fitzpatrick ed., 1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or re-

discretionary authority to cancel specific spending and revenue items only from measures *already enacted into law* pursuant to Article I's formal lawmaking requirements.[266] The Act thus posed no technical violation of the lawmaking procedures of Article I. Rather, it amounted to a legislated delegation of power to change the consequences of enacted appropriations and other spending measures, for the avowed purpose of letting the President eliminate wasteful "pork-barrel" spending that Congress lacked the will to excise itself.[267]

The principle that Congress cannot delegate its legislative power would have seemed an obvious rationale to invalidate such a law, were it not for the impotence of the nondelegation doctrine. Still, the Act readily drew a nondelegation-doctrine challenge from its opponents.[268] As next discussed, while features of the Act were amenable to the defense that Congress had established a policy and provided a sufficient "intelligible principle" to guide the President's use of his cancellation authority, the Act lacked other limiting features that left it more vulnerable to the nondelegation doctrine. The Act's challengers nevertheless mounted their nondelegation attack on the statute only secondarily, arguing first and foremost that the Act was unconstitutional because it violated the Constitution's Presentment Clause.

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ject it in toto."); *see also The Line-Item Veto: A Constitutional Approach: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 104th Cong. 36 (1995) (statement of Walter Dellinger, Asst. Att'y General); Brief for Appellant United States at 34, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374) [hereinafter DOJ Brief]; Brief for the United States Senate as Amicus Curiae at 18, *City of New York* (No. 97-1374) [hereinafter Senate Brief]; Transcript of Oral Arg. at 5, 7, *City of New York* (No. 97-1374); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 736 (1993); Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 82, 95-97, 101-03 (1997). *But see* J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line Item Veto?*, 9 J.L. & POL. 39, 39 (1992); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe & Kurland*, 84 NW. U. L. REV. 437, 437 (1990).

266. The Act's cancellation authority applied only to laws resulting from bicameral congressional action and presidential approval, and did not apply to measures that became law without the President's signature, either through his inaction after presentment during the constitutionally prescribed period, or through a congressional override of a presidential disapproval ("veto") of a bill. *See* 2 U.S.C. § 691(a)(1997).

267. *See Legislative Line-Item Veto Proposals: Hearing Before the Senate Comm. on the Budget*, 103rd Cong. 60 (1994) (statement of Louis Fisher); 142 CONG. REC. S2929-32, S2955-57 (daily ed. Mar. 27, 1996) (statements of Act co-sponsors Sen. McCain & Sen. Stevens); Editorial, *Line-Item Veto: A Tool for Saving, But No Panacea*, L.A. TIMES, Apr. 11, 1996, at B8; John F. Harris, *Clinton Signs Law for Line-Item Veto*, WASH. POST, Apr. 10, 1996, at A1.

268. *See infra* text accompanying notes 355-75.

A. Legislative Background of the Line Item Veto Act

Congress enacted the Line Item Veto Act of 1996 as an amendment to the Impoundment Control Act of 1974.[269] A brief description of that Act, and the factors leading to Congress' decision to amend it, will be helpful in understanding the operation of the Line Item Veto Act.

The Impoundment Control Act was Congress' response to President Nixon's assertion of an inherent presidential authority to "impound," or refuse to spend, appropriated funds.[270] This Act sought to control two forms of impoundments: deferrals, or spending delays over the course of a single fiscal year, and rescissions, or determinations permanently to withhold funds. As originally enacted, the Impoundment Control Act authorized presidential deferrals, subject to Congress' retention of a legislative veto, and permitted the President only to *recommend* to Congress the permanent rescission of other spending items.[271] After the *Chadha* Court invalidated the legislative veto mechanism, Congress amended the Impoundment Control Act to narrow the President's deferral authority, allowing unilateral presidential deferrals only "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or as otherwise specifically authorized by law.[272]

Rising federal deficits in the 1980s led Congress to consider additional methods for controlling spending. In 1985, Congress enacted the Gramm-Rudman-Hollings Act, which authorized the President to issue a "sequestration" order canceling appropriations *pro rata* across the board when total appropriations exceeded specified deficit reduction targets.[273] Although the Supreme Court in *Bowsher* struck down this mechanism because of the role played by the Comptroller General in the sequestration process,[274] Congress quickly reenacted similar sequestration authority, this time to be exercised solely by the executive branch.[275] Despite

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269. *See* Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681 *et seq.* (1994)).

270. *See, e.g.*, EPA v. City of New York, 420 U.S. 35, 35 (1975) (holding that the appropriation in question required that funds withheld by the Nixon administration be spent for the purpose specified by Congress); LOUIS FISHER, PRESIDENTIAL SPENDING POWER 175-201 (1975) (discussing Nixon administration impoundments).

271. *See* Impoundment Control Act §§ 1013, 1017, 88 Stat. at 334-35, 337.

272. *See* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 754, 785-86 (codified at 2 U.S.C. § 684(b) (1994)).

273. *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, § 252, 99 Stat. 1038, 1072-78.

274. *See supra* note 140 and accompanying text.

275. *See* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987

this authority, however, the deficit targets proved unattainable.

As a result, by 1991 Congress was considering additional amendments to the Impoundment Control Act. One proposal, termed "enhanced rescission," was to make some presidential rescissions automatic, subject only to potential legislative disapproval.[276] Another proposal, called "expedited rescission," was to streamline the processes by which Congress considered whether to approve the President's proposed rescissions.[277] Meanwhile, some Members of Congress renewed longstanding proposals to amend the Constitution to give the President a true line-item veto.[278] Alternatively, others proposed adopting "separate enrollment" procedures for presenting each individual spending provision to the President as a separate bill, for approval or veto pursuant to the Presentment Clause.[279]

After extensive consideration of these alternatives during much of the 104th Congress, in the Line Item Veto Act the Senate and the House ultimately settled upon a type of "enhanced rescission," dressed up as an item veto in order to fulfill a term of the Contract with America. The Act's potential constitutional infirmities were apparent to both its opponents and its sponsors. Opponents, for instance, expressed their conviction that the Act was unconstitutional because it "purports to create a third way by which laws can be made,"[280] and publicized their "serene confidence that [the Act] is constitutionally doomed."[281] Sponsors and supporters, meanwhile, described the Act as "a major change in the balance of Government power,"[282] which would "chang[e] the fundamental powers of the Presidency."[283] The sponsors' inclusion of a provision providing for expedited Supreme Court review was a tacit concession that

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§ 102, 101 Stat. at 764-72.

276. *See, e.g.*, S. 206, 104th Cong. § 2 (1995); H.R. 78, 102nd Cong. § 2 (1991).

277. *See, e.g.*, H.R. 2164, 102nd Cong. § 3 (1991).

278. *See, e.g.*, H.J. Res. 6, 104th Cong. (1995); H.J. Res. 4, 103rd Cong. § 1 (1993). Similar proposals date back to the latter nineteenth century. *See, e.g.*, 9 MESSAGES AND PAPERS OF THE PRESIDENTS 4189, 4196 (James D. Richardson ed., 1897) (reproducing President Grant's 1873 Fifth Annual Message containing a request that Congress propose a constitutional amendment to create the line-item veto power).

279. *See, e.g.*, S. 238, 104th Cong. § 1101 (1995); S. 137, 104th Cong. § 2 (1995).

280. 142 CONG. REC. S2963 (daily ed. Mar. 27, 1996) (statement of Sen. Levin). Senator Byrd expressed an additional concern about the Act's potential impact on judicial independence. *See id.* at S2942-44 (statement of Sen. Byrd); *see also* Robert Destro: *Whom Do You Trust, Judicial Independence, the Power of the Purse & the Line Item Veto*, FED. LAW., Jan. 1997, at 26, 28; Louis Fisher, *Judicial Independence and the Line Item Veto*, JUDGES' J., Winter 1997, at 18, 19, 53.

281. 142 CONG. REC. S2972 (daily ed. Mar. 27, 1996) (statement of Sen. Moynihan).

282. *Id.* at S2957 (statement of Sen. Stevens).

283. *Id.* at S2959 (statement of Sen. Gramm).

the Act would be under a "constitutional cloud" until the Supreme Court passed on its constitutionality.[284] Nevertheless, having been told by the Supreme Court's *Chadha* decision that it could not grant the President impoundment authority while retaining a measure of control in the form of a legislative veto, Congress opted to try another approach in the Line Item Veto Act, giving the President a unilateral impoundment authority that Congress could control only through legislative action.

B. Congressional Policies and Limits Embodied in the Line Item Veto Act—An Explanation of How the Act Operated

Expanding upon the Impoundment Control Act, the Line Item Veto Act authorized the President himself permanently to cancel three types of deficit-increasing items from newly-enacted legislation: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit," as the Act defined those terms.[285] The Act defined a "dollar amount of discretionary budget authority" as the entire amount of "budget authority" specified for one purpose in an appropriation law or in an associated authorizing law or accompanying committee report.[286] In other words, the Act authorized the President to cancel any single item in what commonly are referred to as "discretionary appropriations," or spending priorities for which Congress must make a discretionary choice to appropriate funds year to year (as distinguished from spending for federal entitlement programs). As long as the particular dollar amount of discretionary budget authority appropriated for a specific purpose was determinable, the President could cancel spending for that purpose.

The second type of cancelable item consisted of "new direct spending," defined as any provision resulting in "an increase in budget authority or outlays" for entitlements and other programs not funded through annual appropriations.[287] In essence, the Act authorized the President to cancel items that would increase the cost of current entitlements, or that would

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284. 141 CONG. REC. S4244 (daily ed. Mar. 21, 1995) (statement of Sen. Exon). Several congressional hearings during the 104th Congress focused extensively on the constitutional issues raised by various proposals to give the President authority akin to an item veto. *See generally S.4 and S.14, Line-Item Veto: Hearing Before the Senate Comm. on Governmental Affairs*, 104th Cong. (1995); *The Line-Item Veto: A Constitutional Approach: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 104th Cong. (1995).

285. 2 U.S.C. § 691(a) (Supp. 1999).

286. *Id.* § 691e(7)(A). For the Act's definition of "budget authority," see 2 U.S.C. § 622 (1994).

287. *Id.* § 691e(8).

fund new entitlement programs, but did not authorize the President to terminate or reduce existing levels of federal entitlements.

The third type of cancelable item was a "limited tax benefit," which Congress defined as a "revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries" under the tax code, unless available to all similarly-situated taxpayers, as well as any provision that provides "transitional relief for 10 or fewer beneficiaries."[288] The Act directed Congress' Joint Committee on Taxation to review all proposed tax bills and advise Congress of the presence therein of any limited tax benefits.[289] Congress then had the option of including in the bill the Joint Committee's identification of any limited tax benefits, in which case the President could cancel only provisions so identified.[290] If the bill did not include the Joint Tax Committee's identification of the bill's limited tax benefits, the President could cancel any provision that he concluded met the Act's definition.[291]

Congress established three policy goals that had to be met by any exercise of the Act's cancellation authority. The Act required the President to determine that a cancellation would: "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest."[292] The Act also required that, in selecting items to cancel, the President "consider the legislative history, construction, and purposes of the law" to which the cancellation applied, "any specific sources of information referenced in such law," and "the best available information" outside the law.[293]

The Act required that cancellations occur within five days (excluding Sundays) after the President signed a measure into law,[294] and that within that time the President send Congress a "special message" identifying the cancelled items.[295] The President's message was to contain six specifica-

288. *Id.* § 691e(9)(A).

289. *See id.* § 691f(a).

290. *See id.* § 691f(b), (c)(1).

291. *See id.* § 691f(c)(2).

292. *Id.* § 691(a).

293. *Id.* § 691(b).

294. *See id.* § 691(a). The Act denied the President cancellation authority with respect to measures that became law without his signature. For an argument that this feature of the Act, by conditioning presidential power on the manner in which a bill became a law, was independently unconstitutional (though severable), see Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771-77, 789, 794-96 (1997); Brief for Senators Robert C. Byrd, *et al.* as Amici Curiae in Support of Appellees, at 23, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374) [hereinafter Brief for Senators Byrd, *et. al.*].

295. *See* 2 U.S.C. § 691(a).

tions: (1) the statutory determinations justifying the cancellation, (2)"any supporting material" for the cancellation, (3) "the reasons for the cancellation," (4) "the estimated fiscal, economic, and budgetary effect of the cancellation," (5) "all facts, circumstances and considerations relating to" the cancellation, including "the estimated effect of the cancellation upon the objects, purposes and programs for which the cancelled authority was provided," and (6) the effect of the cancellation on the budget sequestration process mandated by the Gramm-Rudman-Hollings Act.[296] Each message canceling an item of spending also had to identify the States and congressional districts affected by that particular cancellation and by all cancellations that year.[297]

Congress included in the Line Item Veto Act several other significant limitations upon the President's authority to cancel spending or taxing items, limitations that could have helped the Act receive favorable treatment under an impotent nondelegation doctrine. First, the President had no authority to reduce items partially, but could only cancel "the entire dollar amount" of a particular cancelable item.[298] Congress therefore required the President to chose to forgo an item in its entirety, and not merely to scale back the amount of government funding that an item would receive. Furthermore, the President could not cancel any provisions setting forth restrictions or conditions on the expenditure of funds, but could only cancel the expenditures themselves.[299] Thus, the President could not "modify or alter any aspect of the underlying law."[300] As an additional constraint, the President could not hold his cancellation authority in abeyance, to be exercised at any time during the fiscal year, but had to "use it or lose it" within five days.

The Act established expedited procedures allowing Congress to enact a new law disapproving the President's cancellations. Under these procedures, a disapproval bill could be introduced in either House within five calendar days after receipt of a special message, and could be considered on a privileged basis during the next thirty days of congressional session.[301] In particular, the Act limited amendments and debate on disapproval bills, facilitating Congress' ability to complete timely action on

296. *Id.* § 691a(b)(1).

297. *See id.* § 691a(b)(2)(B)-(C).

298. *Id.* § 691(a); 142 Cong. Rec. S2930 (daily ed. Mar. 27, 1996) (statement of Act cosponsor Sen. McCain).

299. *See* 2 U.S.C. § 691(a).

300. 142 Cong. Rec. S2930 (daily ed. Mar. 27, 1996) (statement of Sen. McCain).

301. *See* 2 U.S.C. § 691d(b), (c)(1).

disapproval legislation.[302] In turn, items in enacted disapproval bills were *not* subject to cancellation by the President under the Act.[303]

Cancellations were effective upon Congress' receipt of a special message from the President, unless and until Congress enacted a disapproval law. For cancelled appropriations items, the Act dictated that the cancellation "rescinded" the budget authority.[304] For cancelled entitlement spending or tax benefits, the Act provided that the cancellation prevented the provision "from having legal force or effect."[305] If Congress subsequently enacted a disapproval law, either with the President's approval or, more likely, over his veto of a disapproval bill, the Act provided that the original cancellation "shall be null and void" and that the underlying provision "shall be effective as of the original date provided in the law to which the cancellation applied."[306]

The Act did not permit the President to use cancelled funds for any purpose but deficit reduction.[307] To assure that cancelled funds were not redirected to other purposes, the Act included a "lockbox" procedure, which required the Office of Management and Budget (OMB) to calculate the anticipated deficit reduction from a cancellation. These savings then are "locked in" in the deficit calculations that OMB is required to submit to Congress under the Gramm-Rudman-Hollings Act,[308] and these calculations in turn govern the amounts that may be spent on other priorities. By preventing OMB from treating cancelled items as if the unspent funds were available for other priorities, the Act made the President choose between spending funds for their particular specified purpose or devoting them solely to deficit reduction. Once cancelled, neither the President nor Congress could redirect those funds elsewhere. Therefore, even cancelled items continued to have a real-world consequence that they would not have had if they had been truly "vetoed" (or never enacted).

The Act thus had an overriding purpose of reducing the federal deficit, a purpose that the Act's defenders argued[309] amounted to a sufficient "in-

302. *See id.* § 691d(d)-(f).

303. These procedures furthered one of the purposes that Professor Davis had identified as important to legitimate delegations, namely, allowing Congress an opportunity to review and correct the delegatee's exercise of the delegated authority. *See supra* note 208 and accompanying text.

304. *See* 2 U.S.C. § 691e(4)(A).

305. *Id.* § 691e(4)(B)-(C).

306. *Id.* § 691b(a).

307. *See id.* §§ 691b(b), 691c.

308. *See id.* § 691c(a)-(b).

309. *See infra* notes 376-82 and accompanying text.

telligible principle" to sustain the Act under the existing nondelegation doctrine, at least when buttressed by the Act's other limits, including requiring the President to make and report specified findings to Congress. As described above, Congress arguably had further narrowed the Act's delegation by requiring that the President exercise his cancellation authority "now or never," rather than continually threatening to cancel funding in order to gain leverage over Congress. It further narrowed the Act's delegation by forcing the President to choose between zero-funding an item or leaving it fully funded, rather then simply weakening or scaling back a particular project or program. Yet, these same features were problematic because they caused the operation of the Act more closely to resemble an actual item veto.[310] Had Congress included a few other limiting principles to offset these all-or-nothing, now-or never features to further distinguish the Act from a true item veto, it could have enhanced the possibility that the Supreme Court would have upheld the Act as a permissible delegation. Their omission left the Act vulnerable to even the moribund nondelegation doctrine.

C. Policies and Limits Lacking in the Line Item Veto Act

Eager to fulfill the terms of the Contract with America, Congress enacted the Line Item Veto Act without incorporating a few relatively minor adjustments that could have significantly reduced the Act's exposure to constitutional challenge. Foremost among these would have been a statutory limitation on the amount of federal appropriations or other expenditures that the President could cancel, either in any fiscal year or for any particular spending measure. Such a limit would have indicated both that Congress sought a particular amount of deficit reduction, and that the President did not have the free-ranging authority of a true item veto. For instance, the Act could have provided that the President could not cancel any single item costing over one billion dollars, or that total cancellations could not exceed one, two, or even five percent of the total appropriations (or alternatively some percentage of the federal budget) for a given fiscal year.[311]

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310. *See* Brief of Appellees Snake River Potato Growers, Inc., et. al. at 46, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374) [hereinafter Snake River Brief]; Brief of Appellees City of New York Brief at 37-38, *City of New York* (No. 97-1374) [hereinafter City of New York Brief]; *see also* Transcript of Oral Arg. at 7, *City of New York* (No. 97-1374).

311. Concededly, the mechanics of such a limit would be complicated by the need to account for cancellations of multi-year or no-year appropriations, whose savings would not be assignable to any single fiscal year, as well as by the issue of whether to account for each of the three categories of cancelable items (appropriations, new direct spending, and

While going a long way toward distinguishing the Act's power from a true item veto, this type of limit would not meaningfully have constrained the President's actual authority in any practical way. In fact, even without any such limit, the President's use of the cancellation authority during the one federal budget cycle that occurred before the Supreme Court struck down the Act was quite modest. After signing the thirteen annual appropriations bills presented to him for signature for fiscal year 1998, the President cancelled seventy-eight items of discretionary budget authority[312] (not including a cancellation subsequently nullified as not authorized by the terms of the Act itself[313]). These cancellations in total would have saved a little under $500 million for the fiscal year, or less than one tenth of one percent of total appropriations for that year.[314] Additionally, the President cancelled one item of new direct spending (the Medicare provision that gave rise to the case of *Clinton v. City of New York*), as well as two limited tax benefits (one of which gave rise to the case of *Rubin v. Snake River Potato Growers*, the companion case to *City of New York*). These three cancellations' estimated savings were approximately $615 million over five years.[315] No single cancellation was expected to save more than $317 million, with the exception of the President's cancellation of an "open season" for federal employees to change retirement plans. Although this cancellation's estimated savings

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limited tax benefits) separately, using individual limits appropriate for each type of spending, or together, using a single combined limit of some sort.

312. *See* Department of Transportation and Related Agencies Appropriations Act, 1998, 62 Fed. Reg. 59,769-71 (1997) (canceling three items from Transportation Department appropriation); Department of the Interior and Related Agencies Appropriations Act, 1998, 62 Fed. Reg. 62,682-83 (1997) (canceling two items from Interior Department Appropriation); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, 62 Fed. Reg. 64,130 (1997) (canceling one item from Commerce, Justice, and State Appropriation); Military Construction Appropriations Act, 1998, 62 Fed. Reg. 52,452-69 (1997) (canceling fourteen items from Department of Defense appropriation); Energy and Water Development Appropriations Act, 1998, 82 Fed. Reg. 54,564-68 (canceling eight items from Energy Department appropriation); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, 62 Fed. Reg. 59,766-69 (1997) (canceling seven items from VA/HUD appropriation); Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 1998, 62 Fed. Reg. 62,683-86 (1997) (canceling five items from Agriculture Department appropriation).

313. *See* Treasury and General Government Appropriations Act, 1998, 62 Fed. Reg. 54,338 (1997) (canceling one item from Treasury Department appropriation); National Treasury Employees Union v. United States, Civ. No. 97-2399 (D.D.C. Jan. 6, 1998) (order invalidating cancellation of Treasury Department appropriation item as not authorized by Line Item Veto Act); *infra* text accompanying note 348.

314. *See Clinton's Line-Item Vetoes Show Light Touch*, CQ MONITOR, Dec. 6, 1997, at 7.

315. *See* Cancellation Pursuant to Line Item Veto Act, 62 Fed. Reg. 43,262-67 (1997).

was approximately $850 million over five years,[316] it was subsequently nullified as not authorized by the Act itself. In total, all exercises of cancellation authority would have saved close to $1.9 billion over five years, "real money" but nevertheless only about .02% of the $9 trillion of total federal expenditure anticipated over that same time.[317]

In the late 1960s and early 1970s, Congress had granted the President the power to achieve much more impressive spending reductions, without producing any complaints that the President's resulting discretionary authority to limit expenditures was unconstitutional. Beginning with fiscal year 1969, Congress imposed statutory ceilings upon total spending requiring the President to keep actual federal expenditures some $6 billion—or several percent—below appropriated levels.[318] Congress precluded the President from reducing amounts appropriated for the Vietnam War, for veterans' benefits, for social security benefits, and for debt service, but otherwise authorized the President to reduce or eliminate any expenditure as he saw fit.[319] In giving the President this power to reduce spending, Congress indicated that amounts the President saved "are hereby rescinded."[320] Using this authority, President Nixon saved billions of dollars from dozens of federal programs.[321] Congress provided the President with similar authority for fiscal years 1970 and 1971 as well.[322]

Of course, it would have been politically difficult for Congress similarly to have capped the cancellation authority that it gave to the President in the Line Item Veto Act, precisely because such a cap would have further distinguished the Act from a true item veto. The Contract with America had promised a line item veto, and it was more important to deliver on this promise than to give the President a constitutionally sustainable power to restrain pork barrel spending. Thus, even though it was highly unlikely that a President would ever find occasion unilaterally to cancel large spending items, Congress insisted on giving him this sym-

316. *See* 62 Fed. Reg. 54,338.

317. *See* Alan Fram, *President Clinton Has Completed His First Year. . .*, AP, Dec. 3, 1997, *available in* 1997 WL 2566369.

318. *See* Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, §§ 202-03, 82 Stat. 251, 271-72. In addition to reducing actual *outlays*, the President also was required to keep the government's incurrence of new *obligations* $10 billion below authorized levels. *See id.*

319. *See id.*

320. *Id.* § 203.

321. *See* 115 CONG. REC. 21,277-78 (1969) (Joint statement of David M. Kennedy, Secretary of the Treasury, and Robert P. Mayo, Director of the Bureau of the Budget).

322. *See* Second Supplemental Appropriations Act, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 376, 405-07 (1970); Second Supplemental Appropriations Act, Pub. L. No. 91-47, § 401, 83 Stat. 49, 82-83 (1969).

bolic power as well. Furthermore, to have capped the cancellation authority would have been to admit that the Act was not likely to make a meaningful dent in the deficit. The Act's supporters would not have wanted to concede this rhetorical weapon,[323] even though from the outset most thoughtful observers had been confident that the Act's deficit reduction impact would be minor.[324]

Another obvious difference between the late 1960s spending ceilings and the Line Item Veto Act was that the former *required* the President to achieve specified savings, while the latter merely authorized the President to cancel items subject to the Act. Indeed, a number of nondelegation doctrine precedents had sustained the delegated authority in part because the President or administrative body was required to act when congressionally specified conditions occurred.[325] The Line Item Veto Act could easily have been redrafted to require that the President cancel items subject to the Act whenever he determined that the national interest was better served by devoting the savings to deficit reduction than by spending the funds for their designated purpose. In practice, such a requirement also would not meaningfully have narrowed the President's discretion to determine what items to cancel. Yet, at the same time, it would have somewhat dissipated the Act's opponents' ability to argue that Congress had left the essential policy choices to the President.[326]

Also lacking from the Act was much evidence of a common understanding about the kind of items that Congress expected the President to cancel as unnecessary pork-barrel or private-interest spending. Previous

323. In fact, Senator McCain, among others, expressed disappointment that the President had not used the Act's cancellation authority more aggressively. *See* Fram, *supra* note 317.

324. *See, e.g*, Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605, 1606-07 (1997) (predicting Act's budgetary impact to be "far less consequential than either supporters or opponents let on"); Editorial, *A Veto Veto*, WASH. POST, Feb. 13, 1998, at A24 (arguing that if upheld, the Act's long-term effect will not be fiscal, but political); Editorial, *supra* note 267, at B8 (reporting skeptics complaining that Act "would not do much to cut federal spending"); Robert D. Reischauer, *Line-Item Veto Won't Offer Big Bite*, NEWSDAY, Apr. 17, 1996, at A45 (arguing Act will not reduce spending but merely produce different expenditures); Harris, *supra* note 267, at 41 (attributing to Senator McCain the view that Act would not itself sharply curb total spending); Peter M. Shane, *Line-Item Veto's Political Web*, CHRISTIAN SCI. MONITOR, Apr. 19, 1996, at 20 (arguing Act "may undermine Congress's already questionable fiscal discipline" and result in few spending cancellations).

325. *See, e.g.*, Lichter v. United States, 334 U.S. 742, 787 (1948) (noting that the delegatee was "required to act" upon specified circumstances); Field v. Clark, 143 U.S. 649, 693 (1892) (determining that the President "had no discretion in the premises" but had "duty" to act upon ascertaining specified conditions).

326. *See infra* notes 373, 391-92, and accompanying text.

delegations had been sustained on the basis that they built upon a shared "sense and experience"[327] of the meaning of certain statutory limits, or presumed a "common understanding"[328] of how the delegated authority should be exercised.[329] But the Line Item Veto Act's statutory purpose of reducing the federal budget deficit, without impairing any essential government function or harming the national interest, was accompanied by little such shared background, other than a generalized sense that federal spending measures had become too larded up with unnecessary pork. Nor did Congress make much effort to supplement this lack, either in the Act itself or through its legislative history. Although the Act did further require that the President consider "the legislative history, construction, and purposes" of the particular law from which he desired to cancel an item, and that he consider the cancellation's impact on the federal programs and states and congressional districts affected,[330] Congress did not clarify, either in the Line Item Veto Act or its legislative history, precisely what use the President was to make of these considerations.

Not surprisingly, therefore, once the President began using his authority, some Members of Congress who in principle had supported the Line Item Veto Act discovered that they were not so enamored with it in practice. For instance, Senator Robert Bennett forthrightly confessed that, despite having "enthusiastically voted for the line item veto," he now regretted having done so, having watched the Act become "the source of mischief."[331] Although the President's cancellations were squarely within the literal terms of the types of spending items whose cancellation Congress had authorized, others also began to complain that the President's implementation of the Act was not true to Congress' intention. The special message generating the greatest such criticism was that containing the President's cancellations of thirty-eight items in the 1998 Military Construction Appropriation Act.[332] In response, Congress passed its sole disapproval bill, which the President then vetoed, and which Congress then enacted notwithstanding the veto.[333] While to some

327. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 246 (1915).

328. Mahler v. Eby, 264 U.S. 32, 40 (1924).

329. *See supra* notes 78-85 and accompanying text.

330. *See supra* notes 293-97 and accompanying text.

331. 144 CONG. REC. S698 (daily ed. Feb. 12, 1998) (statement of Sen. Bennett).

332. *See* Pub. L. No. 105-45, 111 Stat. 1142 (1997).

333. *See* Pub. L. No. 105-159, 112 Stat. 19 (1998). The process of enacting this law began with the passage of House Bill 2631. *See* H.R. 2631, 105th Cong. (1997). Pursuant to the Presentment Clause, the President returned this bill to Congress without his approval on the final day of the first session of the 105th Congress, *see* 143 Cong. Rec. H10942 (daily ed. Nov. 13, 1997), and Congress then overrode this veto during the second session

this sequence showed that the Act was functioning exactly as it should,[334] others nevertheless remained concerned that Congress had not provided the President more guidance about the types of items that it wanted to permit him to cancel.[335] This was but another omission, partially exploited by the Act's opponents,[336] that left the Act exceptionally vulnerable to a nondelegation challenge.

D. Overview of Litigation Challenging the Line Item Veto Act

By its terms, the Line Item Veto Act became effective on January 1, 1997.[337] On January 2, 1997, six Members of Congress who had voted against the Act commenced a lawsuit alleging that it was unconstitutional.[338] They relied on the Presentment Clause (rather than on the nondelegation doctrine),[339] presumably not only because of the weakness of a nondelegation doctrine argument before the district court, but also because as Members of Congress they had little interest in reviving a strong nondelegation doctrine, which could threaten many other measures they had helped enact.

After rejecting the government's defense that these plaintiffs lacked standing, the United States District Court for the District of Columbia found the Act unconstitutional.[340] The defendants then directly appealed to the Supreme Court, pursuant to the Act's expedited judicial review provision.[341] In June 1997, in *Raines v. Byrd*,[342] the Supreme Court con-

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of the 105th Congress, *see* 144 CONG. REC. S999-S1000 (daily ed. Feb. 25, 1998). Several other disapproval bills were introduced but not acted upon. *See* S. 1157, 105th Cong. (1997); H.R. 2444, 105th Cong. (1997); S. 1144, 105th Cong. (1997); H.R. 2436, 105th Cong. (1997).

334. *See, e.g.*, 144 CONG. REC. H359-60 (daily ed. Feb. 5, 1998) (statement of Rep. Solomon); 144 CONG. REC. S963 (daily ed. Feb. 25, 1998) (statement of Sen. McCain); *id.* at S966 (statement of Sen. Hutchison); *id.* at S996-97 (statement of Sen. Stevens).

335. *See, e.g.*, Darlene Superville, *House Overrides Clinton Veto of 38 Military Projects*, ASSOCIATED PRESS POL. SERVICE, Feb. 5, 1998, *available in* 1998 WL 7383166; 144 CONG. REC. H359 (daily ed. Feb. 5, 1998) (statement of Rep. Packard); *id.* at H360 (statement of Rep. Bereuter); *id.* at H360-61 (statement of Rep. Stenholm); 144 CONG. REC. S969 (daily ed. Feb. 25, 1998) (statement of Sen. Domenici).

336. *See infra* notes 355-65 and accompanying text.

337. *See* Line Item Veto Act, Pub. L. No. 104-130, § 5, 110 Stat. 1200, 1212 (1996).

338. *See* Byrd v. Raines, 956 F. Supp. 25, 27 (D.D.C. 1997) (noting that the suit was filed immediately after Act took effect). Even earlier, on the day of the Act's April 1996 enactment, the National Treasury Employees Union had filed a suit challenging the Act's constitutionality, which the district court promptly dismissed for lack of standing. *See* National Treasury Employees Union v. United States, 101 F.3d 1423, 1425 (D.C. Cir. 1996).

339. *See Byrd*, 956 F. Supp. at 27, 33-35.

340. *See id.* at 30-31, 38.

341. *See* 2 U.S.C. § 692(b) (Supp. 1999).

342. 521 U.S. 811 (1997).

cluded that the Member plaintiffs lacked standing, and therefore vacated the district court's judgment.[343] Justice Stevens not only dissented on the standing question, but also disclosed that had the Court reached the merits, he would have found the Act unconstitutional.[344]

Shortly thereafter, the President began exercising the Act's cancellation authority. Three separate lawsuits followed, each challenging a particular cancellation. The first was brought by the City of New York and several health care organizations, challenging the President's cancellation of an item of new direct spending that would have guaranteed federal reimbursements to New York State for certain Medicare costs.[345] Another lawsuit was brought by the National Treasury Employees Union, challenging the President's cancellation of an appropriation provision providing federal employees an open season to change retirement plans.[346] The third lawsuit was brought by the Snake River Potato Growers Cooperative, challenging the cancellation of a limited tax benefit that allegedly would have made it easier for the Cooperative to purchase agricultural processing facilities.[347] These three cases then were consolidated before the United States District Court for the District of Columbia.

Prior to the district court argument, the parties settled the second of these three lawsuits when the government conceded that the President's cancellation of the federal employees' retirement plan open season had exceeded the authority granted to him by the Line Item Veto Act.[348] After hearing argument on the remaining two cases, the district court again concluded that the Act was unconstitutional, both because it violated the Presentment Clause, and alternatively because it "impermissibly crosse[d] the line between acceptable delegations of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and pack-

343. *See id.* at 830.

344. *See id.* at 835, 838 (Stevens, J., dissenting).

345. *See* City of New York v. Clinton, Civ. No. 97-2393 (D.D.C. filed Oct. 16, 1997).

346. *See* National Treasury Employees Union v. United States, Civ. No. 97-2399 (D.D.C. filed Oct. 16, 1997).

347. *See* Snake River Potato Growers, Inc. v. Rubin, Civ. No. 97-2463 (D.D.C. filed Oct. 21, 1997).

348. *See* National Treasury Employees Union v. United States, Civ. No. 97-2399 (D.D.C. Jan. 6, 1998) (order granting plaintiffs partial summary judgment). Although the President had relied upon his power to cancel "discretionary budget authority," the administration conceded that the open season provision did not fit within this category. *See id.*

age legislation."[349] This, the district court concluded, was a "nondelegable" legislative authority.[350] The government then again took a direct appeal of the consolidated cases to the Supreme Court. The result was Justice Stevens' opinion for the Court in *City of New York* affirming the district court, to be discussed in Part IV below after reviewing the arguments made against the Act.

E. Arguments Made Against the Line Item Veto Act in Clinton v. City of New York

Following the lead set by the plaintiffs in *Raines v. Byrd*, the challengers of the Line Item Veto Act in *City of New York* did not base their argument that the Act was unconstitutional primarily on the nondelegation doctrine, but instead on the lawmaking requirements of Article I. For instance, the Snake River plaintiffs prefaced the merits argument of their Supreme Court brief with the assertion that the nondelegation doctrine was not even the applicable standard "because the Act does not delegate a discretionary power to the President" to execute the laws, but rather "conveys to him, acting alone, part of the power to shape the law itself . . . ."[351] They then claimed that "[t]he fundamental constitutional point on which this case turns was stated . . . in *Field v. Clark*: '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.'"[352] Yet, this was not a nondelegation *doctrine* argument that Congress had delegated power without a sufficient intelligible principle. Rather, it was a nondelegation argument from first principles, measured against the "single, finely wrought and exhaustively considered, procedure" for making laws established by Article I,[353] that Congress had tried to give away a nondelegable power. A similar assertion—that the Act impermissibly gave the President power to make and repeal laws in violation of Article I—was at the

349. City of New York v. Clinton, 985 F. Supp. 168, 178-79, 181 (D.D.C. 1998).

350. *See id.* at 181.

351. Snake River Brief, *supra* note 310, at 18.

352. *Id.* at 39 (citation omitted); *see supra* note 23 and accompanying text.

353. INS v. Chadha, 462 U.S. 919, 951 (1983); City of New York Brief, *supra* note 310, at 28; Snake River Brief, *supra* note 310, at 2, 29. As Snake River expressed it in responding to the government's jurisdictional statement, the President's cancellation of a limited tax benefit had "removed" that provision from the tax code "as completely as if [it] had never been enacted." Memorandum of Appellees Snake River Potato Growers, Inc., et al. in Response to Jurisdictional Statement at 3, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374).

core of the argument made by the City of New York plaintiffs.[354]

Nevertheless, both these parties and their supporting amici also argued in the alternative that even if the nondelegation *doctrine* were the applicable standard, the Act also would contravene the doctrine because "the Act sets forth no 'intelligible principles' constraining presidential exercise of the cancellation power . . . ."[355] Both the Snake River plaintiffs and the City of New York plaintiffs dismissed the Act's three required determinations that cancellation reduce the deficit, not impair essential Government functions, and not harm the national interest.[356] They deemed the deficit reduction requirement tautological, because by definition any spending cancellation would reduce the deficit, provided that a deficit then existed.[357] They also condemned the other two requirements as merely negatives, which provided no affirmative guidance and "no basis for anyone other than the President to judge whether an item should be vetoed . . . ."[358] In this regard, both sets of plaintiffs also made the point that the Act "makes no serious pretense of providing any 'check'"[359] of the sort that the Supreme Court envisioned in *Chadha*, when it wrote that executive action pursuant to a lawful delegation "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded is open to judicial review . . . ."[360] The Snake River plaintiffs then concluded, in a tacit concession of the weakness of the current nondelegation doctrine, that "[i]f the delegation doctrine imposes any continuing limits on congressional transfer of power to the President, they have been exceeded here."[361]

Four separate groups of amici curiae, including the congressional plaintiffs found to have lacked standing in *Raines*, also filed briefs challenging the Act's constitutionality.[362] They argued variously that the Act

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354. *See* City of New York Brief, *supra* note 310, at 8-9, 31-33.

355. Snake River Brief, *supra* note 310, at 18; City of New York Brief, *supra* note 310, at 37-38 (arguing that the "President is guided by no standard" in making cancellations).

356. *See* Snake River Brief, *supra* note 310, at 45-46; City of New York Brief, *supra* note 310, at 38-39.

357. *See* Snake River Brief, *supra* note 310, at 45; City of New York Brief, *supra* note 310, at 38.

358. Snake River Brief, *supra* note 310, at 45-46; *see* City of New York Brief, *supra* note 310, at 38 & n.25.

359. Snake River Brief, *supra* note 310, at 45; *see* City of New York Brief, *supra* note 310, at 38-39 & n.26.

360. *INS v. Chadha,* 462 U.S. 919, 953 n.16 (1983). Accordingly, the Act arguably vested in the President a "power . . . that could reasonably be characterized as arbitrary." Union Bridge Co. v. United States, 204 U.S. 364, 387 (1907).

361. Snake River Brief, *supra* note 310, at 48.

362. *See* Clinton v. City of New York, 524 U.S. 417, 420 (1998).

gave the President an irreversible authority to alter substantive law without any real congressional limits;[363] was an attempt to circumvent Article I's bicameralism requirements by leaving all policy decisions to the President;[364] and amounted to an "unprecedented attempt" to delegate the "basic legislative function" of repealing laws, without providing any intelligible principle.[365]

More interesting for purposes of this Article, however, was the amicus brief filed by Professors Marci Hamilton and David Schoenbrod, urging, as they had for more than a decade, a reinvigoration of the nondelegation doctrine.[366] These professors also had filed an amicus curiae brief in the Supreme Court in *Raines*, arguing that the district court's reasoning in that case "eviscerates [the Supreme] Court's nondelegation doctrine even though it reaches the right result" of striking down the Act.[367] Again arguing one year later in *City of New York* that the Act was unconstitutional, Professors Hamilton and Schoenbrod similarly prefaced their brief with the claim that "the district court's reasoning unnecessarily complicates this Court's nondelegation doctrine."[368] Although they then described the existing nondelegation doctrine as "adequate to analyze and invalidate the Line Item Veto Act," they also maintained that the doctrine "has lost sight of its constitutional moorings."[369] They urged the Court to use the Line Item Veto Act to rediscover those moorings:

> [T]he time has come for this Court to return to the Framers' and this Court's original understanding and application of the nondelegation doctrine.
>
> Whether this Court embraces its existing nondelegation doctrine or begins to craft a doctrine truer to its constitutional origins, the Line Item Veto Act is unconstitutional.[370]

In particular, Professors Hamilton and Schoenbrod claimed that the district court erred when it chose not even to apply the "intelligible principle" test to the Line Item Veto Act on the basis that "the Act delegates 'non-delegable legislative authority' by empowering the President to

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363. *See* Brief for Amici Curiae Representatives Henry A. Waxman, *et al.* at 26-28, *City of New York* (No. 97-1374) [hereinafter Brief for Representatives Waxman, *et al.*].

364. *See* Brief for Senators Byrd, *et al.*, *supra* note 294, at 22-28.

365. Brief for Amicus Curiae The Bar Association of the City of New York at 10, 13, *City of New York* (No. 97-1374).

366. *See generally* Hamilton/Schoenbrod Brief, *supra* note 261.

367. Brief for Amici Curiae David Schoenbrod and Marci Hamilton at 1, Raines v. Byrd, 521 U.S. 811 (1997) (No. 96-1671).

368. Hamilton/Schoenbrod Brief, *supra* note 261, at 1.

369. *Id.*

370. *Id.* at 2-3.

'make permanent changes to' a law."[371] They argued that the permanence of the President's action was irrelevant to the propriety of the delegation,[372] and that what mattered instead was that the delegation allowed the President to "*negate* a legislative policy determination."[373] In their view, the nondelegation doctrine, even in its present condition, provided a straightforward basis for invalidating the Act.[374] They also urged the Court to refashion the nondelegation doctrine "on a more internally consistent and less political plane" by abandoning the intelligible principle test in favor of Professor Schoenbrod's proposed rule flatly prohibiting the delegation of legislative powers, as he had defined them.[375]

F. The Most Promising Nondelegation Doctrine Challenge

The most promising nondelegation doctrine argument for striking down the Line Item Veto Act, however, was an argument that the challengers' briefs touched upon, but did not articulate forcefully. To capture this argument first requires a fuller discussion of the nondelegation doctrine arguments made *in defense* of the Act, and the responses thereto.

Defenders of the Act, including the Justice Department, the United States Senate (appearing as amicus curiae), and several House Members (also appearing as amici curiae), had each employed the permissive nondelegation doctrine precedents to argue that Congress could and repeatedly did permit executive branch officials to make discretionary policy choices, including choices that would negate or nullify prior law.[376] They also argued that in the Line Item Veto Act Congress had provided the President with "criteria that are at least as 'intelligible' as those previously approved by this Court."[377] They relied heavily on Congress' historical delegation of discretionary control over revenue and appropria-

371. *Id.* at 6-7 (quoting City of New York v. Clinton, 985 F. Supp. 168, 181 (D.D.C. 1998)).

372. *See id.* at 7. "Indeed, the danger to liberty may be even greater when the agency willy-nilly can change its regulatory laws. . . . Thus, the power [to cancel] may be marginally better than the power to make a series of changes." *Id.* at 8.

373. *Id.* at 7.

374. *See id.* at 4-6, 9.

375. *Id.* at 20-21; *see supra* text accompanying notes 190-98; *see also* SCHOENBROD, *supra* note 100, at 157-58, 180-81.

376. *See* DOJ Brief, *supra* note 265, at 36-38 & n.23, 40; Senate Brief, *supra* note 265, at 23-25, 29-30; Brief for Representatives Dan Burton, *et al.*, at 8-11, 14-15, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374).

377. DOJ Brief, *supra* note 265, at 46-47; *see* Senate Brief, *supra* note 265, at 25-28.

tions,[378] coupled with the Supreme Court's recognition of the latitude that Congress enjoyed in "prescribing details of expenditures."[379] In this light, they hoped that the Act's deficit-reduction purpose and the Supreme Court's permissive approach to congressional delegations over the past sixty years,[380] capped by the Court's recent refusals to employ the nondelegation doctrine in cases such as *Mistretta* and *Loving*,[381] would sustain the Line Item Veto Act.[382]

In seeking to respond to these arguments, the Act's challengers continued to distinguish between the two types of delegated authority that the Supreme Court had first approved in the early nineteenth century, those involving "interstitial rulemaking" and those involving "contingent legislation."[383] Even though for most of this century the Court had essentially collapsed these two lines of cases into the single question of whether Congress had sufficiently established the policy to guide the delegation,[384] both the *City of New York* plaintiffs and the *Snake River* plaintiffs found value in separating these two categories. They could then seek to reject the Line Item Veto Act as implicating neither the sorts of delegated gap filling or fact finding that these two categories had permitted.

For instance, the *Snake River* plaintiffs argued that the delegation cases cited by the Line Item Veto Act's defenders

> generally involved delegations to the President and administrative agencies to "fill up the details" of general provisions of law. . . . To be sure, the gaps to be filled are sometimes wide, as in the statute giving the FCC the power to grant radio licenses "if public convenience, interest, or necessity will be served thereby." But even such delegations are constrained by the historical context and policies of the substantive statute, and do not permit the delegate to overrule or to cancel what Congress

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378. *See* DOJ Brief, *supra* note 265, at 2-6, 42-44; Senate Brief, *supra* note 265, at 3-17.

379. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); *see supra* notes 117-19 and accompanying text.

380. *See supra* notes 116-43 and accompanying text.

381. *See supra* notes 226-51 and accompanying text.

382. Even after the decision in *City of New York*, one commentator has relied on these same arguments to suggest that the Act's authority to cancel discretionary appropriations, which was not explicitly at issue in the case, may have survived the decision, and if so, should pass muster under the nondelegation doctrine. *See* Garrett, *supra* note 21, at 891-903. Professor Garrett also argues that, although it is a closer question, the Act's authority to cancel tax benefit provisions also should have been upheld under the doctrine. *See id.* at 903-12.

383. *See supra* Parts I.A.-B.

384. *See supra* Part I.C.

has specifically prescribed.[385]

Similarly, the *City of New York* plaintiffs argued that interstitial delegations are permitted only to allow the President "to implement federal law, . . . not . . . to extinguish it."[386] The Act's challengers thus sought to distinguish interstitial rulemaking authority as different in kind from the Act's delegated authority to nullify or cancel the effect of a statute. Of course, this distinction ignored the fact that the idea of interstitial rulemaking had served as the predicate for the Supreme Court's decision in *Sibbach* upholding the predecessor of the Rules Enabling Acts, which had authorized the Supreme Court to promulgate procedural rules for lower federal courts that could wholly nullify conflicting statutory provisions.[387]

Nevertheless, the Line Item Veto Act's challengers could fairly describe the Act's cancellation authority as closer to the types of contingent authority to repeal or nullify federal tariff laws that the Court had approved in *Field v. Clark*[388] and *J.W. Hampton.*[389] The *City of New York* plaintiffs then sought to distinguish these cases as

> merely uphold[ing] the congressional practice of "legislating in the contingency," where Congress exercises its Article I power to prescribe the conditions under which a law will cease to exist or to be operative, and the President exercises his Article II powers to determine whether the prescribed conditions are satisfied and to implement the will of Congress accordingly.[390]

The Act's challengers argued that such contingent delegations were "upheld . . . precisely because they did *not* vest the President with *discretion* to repeal or otherwise extinguish federal laws."[391] Rather, it allowed him only to execute the expressed will of Congress, as delimited by whatever specific contingency Congress had required the President to ascertain before exercising the delegated authority. In contrast, they argued that in canceling items under the Line Item Veto Act, "the President exercises his own will, not Congress'."[392]

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385. Snake River Brief, *supra* note 310, at 47-48 (citations omitted).

386. City of New York Brief, *supra* note 310, at 42-43; *see also* Snake River Brief, *supra* note 310, at 47-48 & n.41.

387. *See supra* notes 120-23 and accompanying text.

388. 143 U.S. 649, 692 (1892).

389. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 404 (1928).

390. City of New York Brief, *supra* note 310, at 9.

391. *Id.* at 34 (emphasis added); *see also* Snake River Brief, *supra* note 310, at 42-44.

392. City of New York Brief, *supra* note 310, at 9, 34-37, 43; *see* Snake River Brief, *supra* note 310, at 41-45. The *Snake River* plaintiffs also sought to distinguish these cases as limited to foreign affairs, in which nondelegation doctrine limits might be weaker. *See id.*

One weakness in this argument was that at one level, Congress' will—re-expressed by definition whenever Congress enacted a measure without exempting its spending items from the cancellation authority of the Line Item Veto Act—was that the President have a discretionary choice between spending the appropriated sum either for the specified item or, through exercise of the Act's cancellation authority, for deficit reduction. In other words, the Act's authority could fairly be analogized to a statute appropriating x dollars, to be spent at the President's discretion either for purpose z or for deficit reduction. It would be hard to argue that such a statute was any worse, on nondelegation principles, than a lump-sum appropriation[393] that did not specify how it should be spent. In addition, such a statute arguably no more nullified the will of Congress than the sort of delegation of "policymaking responsibilities" that the Supreme Court had described with approval in *Chevron* as occurring whenever Congress has been "unable to forge a coalition on either side of the question, and those on each side decided to take their chances" with the agency.[394]

Another weakness with this argument was that it ignored the Rules Enabling Acts,[395] as well as the wage-price controls at issue in *Amalgamated Meat Cutters*,[396] both of which also could have been described as delegating discretionary power to implement not Congress' will but the delegatee's. Furthermore, statutes permitting the President to repeal a provision upon the occurrence of a specified contingency have often, in fact, given the President substantial discretion to determine whether that contingency has occurred, notwithstanding characterizations to the contrary. For example, a statute giving the President authority to render a

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at 44 n.39.

393. Congress' authority to make lump-sum appropriations has always been accepted. *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (discussing an agency's traditional discretion in allocating lump-sum appropriation); Emergency Relief Appropriation Act of 1937, ch. 401, tit. I, § 1, 50 Stat. 352, 353 (appropriating $1.5 billion (roughly one fifth of federal budget) for use at the President's discretion); 3 ANNALS OF CONG. 889-90 (1793) (debating the wisdom of making aggregate appropriations).

394. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

395. The *Snake River* plaintiffs included a curious footnote asserting that the Rules Enabling Acts "have no bearing" on the Line Item Veto Act because they concerned the relationship between Article I and Article III, rather than between Article I and Article II, and also incorrectly asserting that the constitutional questions concerning the Rules Enabling Acts have never been adjudicated. *See* Snake River Brief, *supra* note 310, at 44 n.38. As previously discussed, the Supreme Court upheld the predecessor of the Rules Enabling Acts in *Sibbach*. *See supra* notes 120-23 and accompanying text. A more promising distinction of the Rules Enabling Acts is suggested *infra* note 402.

396. *See supra* notes 153-55 and accompanying text.

provision of the Foreign Assistance Act of 1961[397] "of no further force and effect" upon his determination "that the resumption of full military cooperation with Turkey is in the national interest of the United States"[398] obviously gave the President unilateral, policy-making discretion, as did an early nineteenth century statute authorizing the President to suspend a customs law "if in his judgment the public interest should require it."[399]

Thus, the Line Item Veto Act's supporters were able defensibly to claim that no particular feature of the Act was unprecedented in the annals of approved congressional delegations: Congress previously had delegated discretionary authority to nullify a statutory provision (*e.g.*, *Sibbach*); to do so permanently and irreversibly (*e.g.*, *Synar*[400]); to make independent policy decisions contemporaneously with a congressional delegation of authority, without requiring an intervening occurrence of a specified contingency (*e.g.*, *Amalgamated Meat Cutters*); and to implement the President's own policy preferences, rather than Congress' (*e.g.*, *Chevron*, *Loving*[401]).

What the Supreme Court had not previously upheld, however, was the delegation of an irreversible authority to effectuate the equivalent of a repeal where the delegation contemplated no subsequent change in circumstance, such that at the time of the delegation Congress was fully capable of making precisely the policy judgments that it was delegating.[402]

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397. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961).

398. Pub. L. No. 95-383, § 13(a), 92 Stat. 729, 737 (1978).

399. Act of Dec. 19, 1806, ch. 1, 2 Stat. 411. Similarly, as Professor Schoenbrod acknowledged, even the particular statute at issue in *Field v. Clark* "was of no practical help in determining" whether another country's tariffs were "reciprocally unequal." SCHOENBROD, *supra* note 100, at 33-34.

400. *See supra* notes 135-40 and accompanying text.

401. *See supra* notes 246-52 and accompanying text.

402. Arguably, the closest any court had come to this issue was the district court decision in *Amalgamated Meat Cutters*, 337 F. Supp. 737 (1971), discussed *supra* notes 153-55 and accompanying text, upholding the President's delegated authority to impose wage and price controls. This authority allowed the President unfettered discretion to make a policy judgment (albeit not one that negated a congressional decision) and to exercise that discretion immediately after Congress gave it to him, in the face of precisely the same circumstances then known to Congress. Yet Congress arguably had to delegate this type of authority, rather than exercise it itself, because to be effective it had to be exercised without warning. Congress obviously lacked the ability to act with the required dispatch to prevent businesses from responding preemptively to adjust prices in anticipation of a congressional price freeze.

The Rules Enabling Acts, discussed *supra* notes 120-23 and accompanying text, arguably also were different because their delegated ability to nullify conflicting procedural laws did anticipate, although did not require, circumstances of which Congress was not necessarily aware. Because this authority was part of what Congress had determined

Rather, the Court had upheld delegations permanently to repeal or nullify congressional enactments only when predicated upon a change in conditions after the time of the delegation, thus permitting Congress to delegate the responsibility only for determining whether a specified contingency had occurred. Although these delegations often left the President with wide-ranging discretion,[403] it was typically in the area of foreign affairs or in matters for which Congress was otherwise less well suited to make specific decisions. While the Court also had specifically upheld Congress' power to delegate decisions that Congress itself was fully capable of making, with or without any such intervening change in circumstance,[404] no such delegation had authorized the irreversible nullification of a statutory provision, but rather had authorized only the filling of gaps.

In contrast, the Line Item Veto Act presented the Supreme Court with a delegation of immediately exercisable authority permanently to nullify law. Viewed in this light, the most effective means of distinguishing the Line Item Veto Act from its nondelegation doctrine precedents would have been to focus not on Congress' legislative *will*,[405] but on its "essential legislative *function*."[406] Congress' decision to permit the President to decide whether or not to cancel was problematic not because it violated Congress' legislative will, but because it suggested that Congress simply *lacked* legislative will. In the words of Judge McGowan, the Act arguably was an attempt to "escape from having to stand up and be counted," rather than an effort "to deal with subject matter that is novel and imprecise, and for which [Congress] is frequently ill-equipped to do more than to paint with a broad brush."[407] Or, to quote Justice Cardozo, this was "delegation running riot."[408] Each time Congress enacted a measure subject to cancellation, Congress at that moment was able to know every

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should be the Supreme Court's continuing ability to determine, at least in the first instance, the rules of proceedings for lower federal courts, the authority was reversible. Despite their potential to render conflicting provisions of existing law of "no further force or effect," the Rules Enabling Acts therefore are best described as an example of gap-filling authority, rather than as an example of contingent authority.

403. *Cf.* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 976-77 (1999) (collecting examples of delegations with great executive discretion).

404. *See* Loving v. United States, 517 U.S. 748, 758 (1996); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

405. *Cf.* Yakus v. United States, 321 U.S. 414, 425 (1944) ("only concern of courts is to ascertain whether the will of Congress has been obeyed").

406. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) (emphasis added); *see also Yakus*, 321 U.S. at 424.

407. *See* McGowan, *supra* note 4, at 1128-29.

408. *See Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring).

fact relevant to the President's potential exercise of cancellation authority, yet had chosen to abdicate its role.[409] It had done so not to allow an administrative agency (or the Supreme Court, as with the Rules Enabling Acts) to develop a detailed record and employ its expertise to continually fine-tune the interstices of a law, but to allow the President to nullify a law.

From this perspective, the strongest articulation of a nondelegation doctrine challenge to the Line Item Veto Act would have been to observe that the Court had never upheld the delegation of an irreversible power to repeal or nullify that could be exercised *contemporaneously* with the delegation. In their efforts to differentiate the Court's contingent legislation precedents from the Line Item Veto Act, both the *City of New York* plaintiffs and the *Snake River* plaintiffs approached this argument, pointing out that prior delegations of the equivalent of repeal authority had been approved only where Congress had specified the conditions that would trigger the repeal.[410] But again, the Line Item Veto Act's defenders could respond that Congress in fact had specified such conditions in the Act, and the debate then came down to whether these conditions were sufficient. What was missing from the challengers' argument was a direct invitation for the Court to rule that a delegation of authority permanently to nullify the force of laws should be invalid when not predicated upon some change in circumstance subsequent to the delegation.[411] Rather, in invoking the nondelegation doctrine, the Act's challengers continued to focus on whether the delegated authority furthered or nullified the congressional purpose. Given the Court's permissive nondelegation doctrine precedents, it was too easy to respond to this question in the Act's favor by reference to Congress' deficit reduction purpose, as well as by reference to the various other conditions and limits imposed upon the cancellation authority.

Nevertheless, the Act's challengers prevailed in their effort to invali-

409. Although a similar authority arguably was at issue in *Amalgamated Meat Cutters*, there Congress simply could not itself have practicably imposed wage and price controls, as discussed *infra* text accompanying notes 528-29. Here, an argument about the "impracticability" of Congress itself making the decisions it had instead delegated to the President in the Line Item Veto Act did not apply. Indeed, Congress already had specifically focused its attention on each item cancelable under the Act, and, without any loss of effectiveness, could have itself determined to devote the funds to deficit reduction.

410. *See* City of New York Brief, *supra* note 310, at 42; Snake River Brief, *supra* note 310, at 42-44.

411. The amicus brief of Representatives Henry Waxman and colleagues came closest to making this point in arguing that although precedents might be found for any one of the Line Item Veto Act's challenged features, no single previous delegation had contained all of these features. *See* Brief for Representatives Waxman, *et al.*, *supra* note 363, at 29.

date the Act, persuading the Supreme Court not of their secondary claim that the Act violated the nondelegation doctrine, but of their primary argument that the Act was inconsistent with the Presentment Clause. As explained in Part IV, however, the Supreme Court's explanation of this result was demonstrably inferior to the preceding nondelegation doctrine rationale available to it.

IV. THE SUPREME COURT'S AVOIDANCE OF THE NONDELEGATION DOCTRINE IN *CITY OF NEW YORK*

In his dissenting opinion one year earlier in *Raines*, Justice Stevens had conclusively opined that the Line Item Veto Act was unconstitutional because it violated the lawmaking processes of the Presentment Clause of Article I.[412] In *City of New York*, he was given the opportunity to explain this conclusion, now on behalf of a six-Justice majority that deliberately avoided addressing the alternative nondelegation arguments. Three dissenters not only found this conclusion misguided, but also would have sustained the Act as consistent with prior delegations of authority.

A. The Majority's Conclusion that the Line Item Veto Act Violates Article I

After rejecting arguments that both the *City of New York* plaintiffs and the *Snake River* plaintiffs lacked standing to challenge the Line Item Veto Act,[413] Justice Stevens turned to the merits of their attack on the Act's constitutionality. At the outset, he described as "undisputed" the fact that each of the two provisions whose cancellation was before the Court—the Medicare reimbursement provision for New York state, and the limited tax benefit for agricultural cooperatives that purchased processing facilities—"had been signed into law pursuant to Article I, § 7, of the Constitution."[414] His analysis then proceeded to describe the Act's processes by which the President had cancelled these provisions, and the statutory result: that the cancellations, by definition, prevented these two provisions "from having legal force or effect."[415]

Following this description of the Act, the opinion then proceeded immediately to its determinative sentence: "In both legal and practical ef-

412. *See* Raines v. Byrd, 521 U.S. 811, 838 (1997) (Stevens, J., dissenting); *supra* notes 342-44 and accompanying text.

413. *See* Clinton v. City of New York, 524 U.S. 417, 430-36 (1998).

414. *Id.* at 436.

415. *Id.* at 436-38 (citation omitted).

fect, the President has amended two acts of Congress by repealing a portion of each."[416] Thus, the simple core of the Court's analysis was that by preventing a measure already enacted in full compliance with Article I from thereafter having legal force or effect, cancellation was tantamount to a repeal.

With this perspective of the Act's operation, the Court sped on to its inevitable conclusion. Because "'[r]epeal of statutes, no less than enactment, must conform with Art. I,'"[417] the Court held that the Line Item Veto Act was unconstitutional. "What has emerged . . . from the President's exercise of his statutory cancellation powers . . . are truncated versions of two bills that passed both Houses of Congress."[418] Without amending the Constitution, the Act had established a new procedure for repealing portions of statutes,[419] not in conformance with the "'single, finely wrought and exhaustively considered'" lawmaking procedures of Article I.[420]

En route to this conclusion, the Court briefly detoured to respond to a straw-man argument. After stating that "no provision in the Constitution . . . authorizes the President to enact, to amend, or to repeal statutes,"[421] the Court remarked that the Constitution also "is silent on the subject of unilateral Presidential action that either repeals or amends *parts* of duly enacted statutes."[422] The Court then described "powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition,"[423] including the fact that "[o]ur first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.'"[424] Yet none of the Act's defenders had argued (as in fact some commentators had[425]) that the Presentment Clause contained within it an implicit yet unrecognized item veto power. Nor had they argued that "constitutional silence" should be interpreted as allowing the President unilaterally to repeal parts of a statute. Rather, the proposition that the

416. *Id.* at 438.
417. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 954 (1983)).
418. *Id.* at 440.
419. *See id.* at 448-49.
420. *Id.* at 439-40 (quoting *Chadha*, 462 U.S. at 951).
421. *Id.* at 438.
422. *Id.* at 439 (emphasis added).
423. *Id.*
424. *Id.* at 440 (quoting 33 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, at 96 (John C. Fitzpatrick ed., 1940); *see also supra* note 265.
425. *See* Sidak & Smith, *supra* note 265, 84 NW. U. L. REV. at 479.

Constitution prohibited the President from unilaterally repealing enacted laws (or portions thereof) was entirely noncontroversial. At issue instead was a simple question of perspective: whether or not to view cancellations under the Act as unilateral repeals.

The Line Item Veto Act's defenders had defensibly argued that cancellations should not be classified as repeals in part because of the Act's "lockbox" mechanism. They observed that as a result of the lockbox, "a cancelled provision does retain real, legal budgetary effect. It removes the [cancelled] . . . amount of money[,] under Gramm-Rudman-Hollings and the Budget Enforcement Act[,] from Congress' ability to spend that equivalent amount of money."[426] The Court rejected this argument because regardless of any lingering budgetary impact, the cancelled provisions were "entirely inoperative as to appellees. . . . The cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not cancelled."[427]

The Act's defenders had also argued that cancellations should not be classified as repeals because the Court had sustained other statutes that had delegated equivalent authority to deprive a provision of legal force and effect. The Court sought to distinguish these precedents from the cancellation authority of the Line Item Veto Act, focusing principally on *Field v. Clark* and related tariff statutes.[428] It explained its view that, unlike the Line Item Veto Act, these precedents were made "contingent upon a condition that did not exist when the . . . Act was passed,"[429] imposed a duty on the President to act, and involved the President in "executing the policy that Congress had embodied in the statute."[430] Having concluded that the Line Item Veto Act was not akin to these nondelegation doctrine precedents, the Court then emphasized that it had no occasion to reach the challengers' alternative argument that even under the nondelegation doctrine the Act lacked a sufficient intelligible principle.[431] Instead, the Court wrote that "the only issue we address concerns the 'finely wrought' procedure commanded by the Constitution," and con-

426. Transcript of Oral Arg. at 10, *City of New York* (No. 97-1374).

427. *City of New York*, 524 U.S. at 441.

428. *See id.* at 442-46. At oral argument, the Court also had distinguished between merely repealing the effect of a prior statute and actually repealing the statute itself, and had suggested that the Line Item Veto Act was an example of the latter. *See* Transcript of Oral Arg. at 9-10, *City of New York* (No. 97-1374).

429. *City of New York*, 524 U.S. at 443.

430. *Id.* at 443-44. The Court also distinguished many examples as "relat[ing] to foreign trade," where the President has an extra " 'degree of discretion and freedom.' " *Id.* at 445 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

431. *Id.* at 447.

cluded that the defenders' extensive discussion about Congress' ability to delegate "does not really bear on the narrow issue that is dispositive of these cases," namely the Presentment Clause.[432]

B. Weaknesses in the Court's Presentment Clause Analysis

Were the Court's Presentment Clause analysis convincing, its decision to avoid reaching the nondelegation doctrine would be unassailable. However, the Presentment Clause analysis contained several significant flaws.

The Presentment Clause, one of several of the "precise rules"[433] of Article I, ensures that the three constitutional actors in the lawmaking process—the House, the Senate, and the President—each have agreed to exactly the same statutory text. Concededly, all three of these actors had agreed both to the text of the Line Item Veto Act, as well as to the text of every subsequent measure containing items subject to the Line Item Veto Act. Precisely because the Framers had established such "a single, finely wrought and exhaustively considered, procedure" for making laws,[434] literal compliance with this precise procedure, without more, should have fulfilled the Framers' purpose of making sure that all three actors each have understood and agreed to the same text before it becomes law. The Court itself had previously suggested as much, explaining in *Chadha* that any subsequent presidential action pursuant to an enacted law is by definition *executive* action, which can be tested both against the limits of the particular statutory measure, to which all three actors have agreed, as well as by the adequacy of those limits themselves, evaluated under the nondelegation doctrine:

> When the Attorney General performs his duties pursuant to [a statute], he does not exercise 'legislative' power. . . . The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7.[435]

The *Chadha* opinion then explained that the constitutionality of executive action *pursuant to a validly enacted statute* "involves only a question of delegation doctrine," not of compliance with Article I.[436]

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432. *See id.* at 447-48.

433. Loving v. United States, 517 U.S. 728, 757 (1996).

434. INS v. Chadha, 462 U.S. 919, 951 (1983).

435. *Id.* at 953 n.16 (citation omitted).

436. *Id.* Justice White, in dissent, reinforced this principle by observing that "Art. I does not require all action with the effect of legislation to be passed as law." *Id.* at 985

The Line Item Veto Act presented precisely this question. Accordingly, for purposes of the Supreme Court's Article I analysis of the Line Item Veto Act, the Act's literal compliance with the Presentment Clause should have sufficed. Nevertheless, in *City of New York* the Court felt compelled to require more than literal compliance with Article I. After having acknowledged that the terms of the Presentment Clause had been strictly followed when the two cancelled measures were enacted,[437] the Court could find a Presentment Clause violation only by then identifying some post-enactment action as inconsistent with the spirit of the Article I lawmaking requirements. The only possibility was to describe a cancellation as a unilateral repeal. Yet the Court's equation of a cancellation under the Act with a statutory repeal was essentially an unsupportable *ipse dixit*.[438]

For several reasons, cancellations were not best viewed as the functional equivalent of a repeal. First, the text of a repealed provision is no longer "on the books." Presumably with this in mind, the Court's opinion therefore asserted that the "critical difference" between the Line Item Veto Act and other delegations of nullification authority was that cancellations under the Act "change the text of duly enacted statutes."[439] Yet, this simply was not true. The Act did not empower the President to excise words from the *Statutes-at-Large*. Rather, like numerous prior delegations,[440] it only authorized him to change the *effect* of an enacted law. For instance, cancellation of the Medicare reimbursement provision for New York State did not mean that any part of the provision's text had been changed or repealed. It simply meant that the President had declared, pursuant to his authority, that the provision would no longer entitle New York to reimbursement, and that instead the enacted provision would be used for deficit reduction. As Justice Breyer, joined by Justices O'Connor and Scalia, wrote in his dissent, "[w]hen the President 'cancelled' the two appropriation measures now before us, he did not *repeal* any law nor did he *amend* any law. He simply *followed* the law, leaving the statutes, as they are literally written, intact."[441]

Nothing about the Act's cancellation processes resulted in any textual change to enacted laws, any more than the actual statutory text of the rules of court procedure was changed whenever the Supreme Court

(White, J., dissenting).

437. *See City of New York*, 524 U.S. at 436.

438. For similar critiques of the reasoning that sustains the majority opinion, see Garrett, *supra* note 21, at 885-91, and Powell & Rubenfeld, *supra* note 18, at 1174-89.

439. *City of New York*, 524 U.S. at 446-47.

440. *See supra* part I.A.

441. *City of New York*, 524 U.S. at 474 (Breyer, J., dissenting).

promulgated inconsistent rules pursuant to the Rules Enabling Acts. The Court attempted to distinguish the Rules Enabling Acts on the basis that in those Acts "Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court."[442] Yet no less could it have been said with respect to the Line Item Veto Act that Congress itself had made the decision to repeal particular spending items, also contingent upon the occurrence of a particular event, namely the cancellation of those items by the President. Under this view, the Act merely established a new default rule making certain items of federal spending now optional. It is hard to imagine the Court striking down as violating the Presentment Clause a statute that appropriated x dollars, either for purpose z or, if the President notified Congress, for deficit reduction.

In addition, a true repeal, no matter how partial, would have rendered the repealed element inoperative for all purposes. That is not the best description of the effect of a cancellation under the Act. The Act's lockbox feature necessarily meant—indeed, this was the purpose of the Act—that enacted provisions which the President cancelled did continue to have binding legal effect.[443] The Court's opinion essentially admitted this, yet nevertheless baldly asserted that "[s]uch significant changes do not lose their character [as functionally equivalent to a partial repeal] simply because the cancelled provisions may have some continuing financial effect on the Government,"[444] an effect that they could not have had were they actually repealed (or never enacted).

Finally, cancellations under the Act were no more "repeals" than were a multitude of precedents. For instance, the executive branch's exercise of statutory authority to create exemptions in provisions of federal law also renders those provisions "entirely inoperative" with respect to the exempt class, yet the Court had not previously treated exemption authority,[445] or countless other analogous delegated powers,[446] as equivalent to a true repeal. As Justice Scalia, joined by Justices O'Connor and Breyer, observed in his dissent, while it may have been arguable "as an original matter" that the Presentment Clause should be applied to pro-

442. *Id.* at 446 n.40.

443. Unfortunately, the parties struggled with various degrees of misunderstanding of the lockbox effect. *See, e.g.*, Transcript of Oral Arg. at 49-51, *Clinton v. City of New York*, 524 U.S. 417 (1998) (No. 97-1374); *City of New York*, 524 U.S. at 440-41 & n.32.

444. *City of New York*, 524 U.S. at 441.

445. *See, e.g*, Intermountain Rate Cases, 234 U.S. 476, 486-89 (1914) (upholding ICC authority to exempt rail carriers from provisions of the Interstate Commerce Act).

446. *See, e.g.*, examples discussed *supra* notes 30-37, 117-23 and accompanying text (describing examples of approved delegations).

hibit the delegation of authority to nullify a law, "that argument has long since been made and rejected."[447] Nevertheless, with respect to the two cancelled provisions at issue in *City of New York*, the Court treated a cancellation as equivalent to a genuine repeal because the cancelled provision was "entirely inoperative" as to its specific beneficiary.[448] Although this statement provides no basis for distinguishing the impact of a cancellation under the Act from the impact of countless other previous executive nullifications of existing law, the Court chose to treat cancellation alone as equivalent to repeal.

Justice Stevens had once observed, in a concurring opinion in *Bowsher v. Synar*,[449] that "governmental power cannot always be readily characterized with only one . . . label[]."[450] But in *City of New York*, the Court was quick to characterize the power at issue in the Line Item Veto Act as a *legislative* authority to repeal, despite sound reasons alternatively to label it as an (albeit sweeping) *executive* authority. For purposes of Article I, therefore, the Court had found no supportable basis for its premise that the Act's cancellation authority effectively authorized the President unilaterally to repeal or amend statutes. While purporting to distinguish the Act from prior delegated authorities to change the effect of laws, the Court ultimately could sustain its premise that the Line Item Veto Act amounted to an unprecedented power to repeal *only because the Court had chosen to so label it.*

C. Two Dissenting Views of the Act's Constitutionality

In two separate dissenting opinions, Justices O'Connor, Scalia, and Breyer criticized the majority's Article I analysis. All three Justices joined both in Justice Breyer's expression that "one cannot say that the President's exercise of the power the Act grants is, literally speaking, a 'repeal' or 'amendment,'"[451] as well as in Justice Scalia's observation that "[a]s much as the Court goes on about Art. I, § 7, . . . that provision does not demand the result the Court reaches."[452] Instead, the dissenting Justices explained that the dispositive issue was whether the Line Item Veto Act conformed with the nondelegation doctrine, and argued that the

447. *City of New York*, 524 U.S. at 464 (Scalia, J., concurring in part and dissenting in part); *see also supra* note 42 and accompanying text (discussing the argument to this effect made by dissenting Justices in *Field v. Clark*).

448. *See City of New York*, 524 U.S. at 441.

449. 478 U.S. 714 (1986).

450. *Id.* at 749 (Stevens, J., concurring).

451. *City of New York*, 524 U.S. at 479 (Breyer, J., dissenting).

452. *Id.* at 464 (Scalia, J., concurring in part and dissenting in part).

majority's proffered distinctions between the Act and the delegations sustained in cases such as *Field v. Clark* merely confirmed this:

> These distinctions have nothing to do with whether the details of Art. I, § 7 have been complied with, but everything to do with whether the authorizations went too far by transferring to the Executive a degree of political, lawmaking power that our traditions demand be retained by the legislative branch.[453]

Each of the two dissenting opinions then went on to explain why these three Justices would have upheld the Act, or at least portions of it, on nondelegation doctrine grounds.

For Justice Breyer, this first required considering what he described as two other separation-of-powers issues: whether Congress had "given the President the wrong kind of power, *i.e.*, 'Non-Executive' power," and whether Congress had "given the President the power to 'encroach' upon Congress' own constitutionally reserved territory."[454] Only thereafter did he address the nondelegation doctrine, which he described as "an added constitutional check upon Congress' authority to delegate power to the Executive Branch."[455] Yet even in the analysis of his first two separation-of-powers questions, nondelegation doctrine precedents figured prominently in his view of the Line Item Veto Act's constitutionality, just as the Act's supporters had hoped they would.

With respect to the first question, Justice Breyer asserted that the Act's cancellation power is executive because "an exercise of that power 'executes' the Act. . . . The fact that one could also characterize this kind of power as 'legislative,' . . . is beside the point."[456] He explained that many government powers admitted labeling as both legislative and executive, and described several such delegated powers that the Court had sustained.[457] He then described the Line Item Veto Act's cancellation power as "far easier *conceptually* to reconcile . . . with the relevant constitutional description ('executive') than in many of these cases."[458]

Justice Breyer next disposed of his second separation-of-powers question, concluding that the Line Item Veto Act had neither encroached upon congressional power nor aggrandized executive power. Because Congress was always free to exempt any provision from the operation of the Line Item Veto Act, and more generally to draft in whatever way it

453. *Id.* at 465 (Scalia, J., concurring in part and dissenting in part).
454. *Id.* at 480 (Breyer, J., dissenting).
455. *Id.* at 484 (Breyer, J, dissenting).
456. *Id.* at 480 (Breyer, J., dissenting).
457. *See id.* at 480-81 (Breyer, J., dissenting).
458. *Id.* at 481 (Breyer, J, dissenting).

chose those provisions that would be subject to the Act's cancellation power, he concluded that Congress always retained the power to "define[] the outer limits of the President's cancellation authority."[459] He also noted that while the power to spend or not spend (or to permit or not permit limited tax benefits to have effect) "may strengthen the Presidency, . . . any such change in Executive Branch authority seems minute when compared with the changes worked by delegations of other kinds of authority that the Court in the past has upheld."[460]

Justice Breyer then turned his attention to the final separation-of-powers issue, engaging in a full-dress analysis of the Act's validity under the nondelegation doctrine. Stating that this doctrine posed "a more serious constitutional obstacle" to the Act, he began searching for an "intelligible principle" sufficient to uphold it.[461] He described the Act as "seek[ing] to create such a principle in three ways":[462] procedurally, in terms of the considerations that the Act required the President to take into account in selecting items for cancellation; purposively, in terms of eliminating wasteful spending and promoting fiscal accountability in the government; and substantively, in terms of the required determinations that cancellation reduce the deficit, not impair essential government functions, and not harm the national interest.[463]

Despite the evident breadth of these standards, Justice Breyer concluded that "(a) the broadly phrased limitations in the Act, together with (b) its evident deficit reduction purpose, and (c) a procedure that guarantees Presidential awareness of the reasons for including a particular provision in a budget bill, taken together," provided a constitutionally sufficient guide for the delegated authority.[464] In particular, he explained that the Line Item Veto Act compared favorably with other nondelegation cases. Like the authority upheld in *National Broadcasting Company v. United States*[465] to regulate broadcast licenses as the "public interest, convenience, or necessity" require, and unlike the authority struck down in *Schechter Poultry* to regulate the entire economy,[466] the Act was "aimed

459. *Id.* at 482 (Breyer, J., dissenting); *see also* Neal E. Devins, *supra* note 324, at 1624 ("Congress can easily blunt this power by specifying appropriations priorities through unofficial and informal documents, by bundling disparate programs into a single item, and by financing programs indirectly through nonappropriation bills.").

460. *City of New York*, 524 U.S. at 483 (Breyer, J., dissenting).

461. *Id.* (Breyer, J., dissenting) (emphasis omitted).

462. *Id.* at 484 (Breyer, J., dissenting).

463. *See id.* at 484-85 (Breyer, J., dissenting).

464. *Id.* at 486 (Breyer, J., dissenting).

465. National Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943).

466. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935); *see*

at a discrete problem," namely wasteful spending among a particular subset of federal expenditures.[467] Furthermore, the power given to the President to determine whether or not to spend a particular amount "does not readily lend itself to a more specific standard," and was "'sufficiently definite and precise to enable . . . the public to ascertain . . . conform[ity]'."[468] Justice Breyer also noted that numerous delegations to the President since the first Congress of authority to spend or not spend appropriated sums meant that the Act's power to cancel dollar amounts of discretionary budget authority and items of new direct spending occurred in "an area where history helps to justify," as well as to provide guiding context for, the Act's delegated authority.[469]

He acknowledged greater difficulty with respect to the Act's authority to cancel limited tax benefits, but ultimately reached the same conclusion, partly on the strength of the Court's precedent that "'the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges.'"[470] Justice Breyer also concluded that *Field v. Clark* and *J.W. Hampton* "resemble today's Act more closely than one might at first suspect" because they also involved revenue-raising measures with vague delegated standards.[471] He then rebutted the majority's attempt to distinguish *Field v. Clark* and related examples. Contrary to the majority's claims, he explained that not all these examples imposed a "duty" on the President, but often left him with substantial discretion; that delegations of taxing authority have not been limited to matters of foreign affairs; and that, in fact, it could fairly be said of the Line Item Veto Act that the President was executing, not rejecting, congressional policy.[472] Thus, while observing that the Act "skirts a constitutional edge," Justice Breyer nevertheless concluded that it should have been

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also supra note 115 and accompanying text.

467. *City of New York*, 524 U.S. at 487 (Breyer, J., dissenting).

468. *Id.* at 487-88 (Breyer, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)); *see also* Buttfield v. Stranahan, 192 U.S. 470, 496 (1904) ("Congress legislated . . . as far as was reasonably practicable"); American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (noting that detailed rules are not required where "impracticable"); *supra* notes 67 & 133 and accompanying text.

469. *See City of New York*, 524 U.S. at 488 (Breyer, J., dissenting).

470. *Id.* at 492 (Breyer, J., dissenting) (quoting Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 221-23 (1989)); *see also supra* notes 237-41 and accompanying text.

471. *City of New York*, 524 U.S. at 492-93 (Breyer, J., dissenting).

472. *See id.* at 493-94 (Breyer, J., dissenting); *see also* Epstein & O'Halloran, *supra* note 403, at 948 (describing the majority opinion as ignoring many delegations of "real policy making discretion").

upheld in its entirety.[473]

For Justice Scalia, joined by Justice O'Connor, the issue was easier because of their conclusion that the *Snake River* plaintiffs lacked standing to challenge the cancellation of a limited tax benefit provision whose advantage would have accrued directly to a third party, rather than to the *Snake River* plaintiffs.[474] As a result, Justice Scalia did not reach the constitutionality of the Act's delegation of authority to cancel limited tax benefits, and addressed only the constitutionality of the Act's delegated authority to cancel new direct spending, the issue raised by the *City of New York* plaintiffs. After also concluding that the Presentment Clause had no bearing on this issue, Justice Scalia explained that the Act's authority to cancel spending should be tested against the limits on Congress' ability to authorize "Executive reduction or augmentation" of congressional enactments,[475] limits established "by what has come to be known as the doctrine of unconstitutional delegation of legislative authority."[476]

Justice Scalia based his analysis of this issue largely upon Congress' historical practice "since the Founding of the Nation" of "authorizing money to be spent on a particular item at the President's discretion."[477] He identified both the budgetary tool of lump-sum appropriations, initiated in the first Congress, as well as abundant historical examples, approved of in *Cincinnati Soap*,[478] of making specific appropriations subject to the discretion of the President.[479] Echoing *Cincinnati Soap*, he observed that "[t]he constitutionality of such appropriations has never seriously been questioned."[480] Given the historically shared responsibilities of Congress and the President for controlling federal spending, Justice Scalia concluded that "[i]nsofar as the degree of political, 'law-making' power conferred upon the Executive is concerned, there 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."[481]

Justice Scalia also noted that "the Line Item Veto Act is not the first

473. *City of New York*, 524 U.S. at 496-97 (Breyer, J., dissenting).

474. *See id.* at 456-63 (Scalia, J., concurring in part and dissenting in part).

475. *Id.* at 465 (Scalia, J., concurring in part and dissenting in part).

476. *Id.* (Scalia, J., concurring in part and dissenting in part).

477. *Id.* at 466 (Scalia, J., concurring in part and dissenting in part).

478. *See supra* notes 117-19 and accompanying text.

479. *City of New York*, 524 U.S. at 466-67 (Scalia, J., concurring in part and dissenting in part).

480. *Id.* at 467 (Scalia, J., concurring in part and dissenting in part).

481. *Id.* at 466 (Scalia, J., concurring in part and dissenting in part).

statute to authorize the President to 'cancel' spending items," but that the sequestration authority of the Gramm-Rudman-Hollings Act also had provided that amounts sequestered by the President "'shall be *permanently cancelled.*'"[482] In 1986, then-Judge Scalia had upheld this authority, while invalidating the Gramm-Rudman-Hollings Act on other grounds.[483] He likewise would have upheld the Line Item Veto Act's authority to cancel items of direct spending (and presumably its authority to cancel appropriation items as well), finding this authority "no different from what Congress has permitted the President to do since the formation of the Union."[484]

Most interesting about Justice Scalia's dissent was that, unlike Justice Breyer, he found no need even to consider whether the Act's particular delegation of authority over spending contained a sufficient "intelligible principle." Instead, while Justice Breyer was relying upon the combination of a host of congressionally specified conditions to conclude that each of the Act's three types of cancellation authority was sufficiently constrained, Justice Scalia found an alternative basis to uphold just the Act's two types of spending cancellation authority, without reaching its authority to cancel limited tax benefits. His view seemed to be that where the simple expenditure of appropriated funds for lawful purposes was concerned, Congress could grant the President complete and unguided discretion over whether and how much to spend. In essence, this was a view that executive control over spending fell within one of those "categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'"[485] Thus, while explaining that the Act's delegated authority to cancel spending items should be tested under the nondelegation doctrine, Justice Scalia also was suggesting that for some categories of delegations, Congress need not even specify an intelligible principle. At least in his and Justice O'Connor's view, delegation concerning federal spending apparently was once such category.

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482. *Id.* at 465-66 (Scalia, J., concurring in part and dissenting in part) (quoting the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 902(a)(4)).

483. *See supra* notes 135-40 and accompanying text.

484. *City of New York*, 524 U.S. at 469 (Scalia, J., concurring in part and dissenting in part).

485. Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (quoting Franklin v. Massachusetts, 505 U.S. 788, 817 (1992) (Stevens, J., concurring in part and concurring in judgment)). The Department of Justice had made exactly this argument as part of its defense of the Act, relying upon Congress' ability to make lump-sum appropriations to argue that "no constitutional infirmity would exist" in precisely such an unlimited discretionary authority over spending. *See* DOJ Brief, *supra* note 265, at 45-46.

D. Explaining the Decision

In determining that the Line Item Veto Act effectively had given the President unprecedented and unconstitutional authority to make (or unmake) law, the majority in *City of New York* relied solely upon the Presentment Clause. Yet for over one hundred years, the nondelegation doctrine had existed, at least in theory, to assist courts in making precisely such a determination, by distinguishing between those impermissible delegations of "power to make the law, which necessarily involves a discretion as to what it shall be," and those permissible delegations of "authority or discretion as to its execution, to be exercised under and in pursuance of the law."[486] This doctrine, therefore, would have seemed an ideal basis for evaluating (and also, at least for a Court willing to put some teeth back into the doctrine, for invalidating) the Line Item Veto Act. Why then did the six-Justice majority in *City of New York* choose to analyze the Act under the procedures of Article I instead?

One possible answer, of course, is that the Presentment Clause provided a better tool of analysis. But as discussed above,[487] the Presentment Clause analysis was seriously compromised, because the President's exercise of the Act's cancellation authority did not in fact literally repeal the provisions at issue. And as also previously discussed, the Supreme Court in *Chadha* had declared that the constitutionality of congressional delegations of executive authority would involve "only a question of delegation doctrine," not of whether the Presentment Clause had been violated.[488] Yet, in *City of New York* the Court chose to require more than literal compliance with the terms of Article I, adding a new gloss on the Presentment Clause that in fact was inconsistent with a number of precedents that had approved analogous powers effectively to repeal existing provisions.[489]

A related answer might be, as Justice Scalia wrote, that "[t]he title of

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486. Field v. Clark, 143 U.S. 649, 693-94 (1892).

487. *See supra* Part IV.B.

488. INS v. Chada, 462 U.S. 919, 953 n.16 (1983); *see also supra* notes 434-36 and accompanying text.

489. A potential factor in reaching this result may have been the fact that in his dissent in *Raines* one year earlier, Justice Stevens had concluded that the congressional plaintiffs there did have standing on the simple force of the argument that the Line Item Veto Act had changed the dynamic of the legislative process in such a way as to deprive Members of Congress of their Article I powers. *See* Raines v. Byrd, 521 U.S. 811, 835-36 (1997) (Stevens, J., dissenting). Having then gone on to opine that for the identical reason the Act was unconstitutional, *see id.*, it would be natural for him in *City of New York* to seek to persuade his colleagues now to join him in his view that Article I provided the correct rationale for invalidating the Act.

the Line Item Veto Act . . . has succeeded in faking out the Supreme Court."[490] Yet even if not literally "faked out" by the Act's title, the Court essentially may have decided to take Congress at its word, holding Congress accountable for what it was purporting to do, regardless of the technicalities of how it did so. And to the extent that the Court perceived the Act's cancellation power as essentially identical to a true item veto power—a power widely acknowledged Congress could not grant by statute *because it would violate the lawmaking requirements of Article I*[491]—the Act's title could only reinforce the Court's visceral feeling that the Act somehow ran afoul of the Presentment Clause. This explanation would suggest that the Court's ruling was more impressionistic than analytic, however, assessing the statute at the level of its purpose rather than its textual meaning. Such an explanation would mark a departure from what some commentators had seen as the recent Court's formalism, "central to the rationale of *Chadha* and *Bowsher*," in which everything "after the formal Article I lawmaking process is concluded" was treated as an Article II executive power.[492]

Another possible answer is that the Court may have believed that, had it reached the nondelegation doctrine issue, it would have had difficulty striking down the Act. This, of course, was why the Act's defenders hoped the Court *would* analyze the Act under the nondelegation doctrine. Given the Court's disdain for the Line Item Veto Act, perhaps it was persuaded that analyzing the Act under the "moribund" nondelegation doctrine would have complicated, or even compromised, its ability to strike down the Act. After all, as the dissenters, particularly Justice Breyer,[493] forcefully observed, the Court ultimately did fail to come fully to terms with the nondelegation doctrine precedents that supported the Act.

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490. *City of New York*, 524 U.S. at 469 (Scalia, J., concurring in part and dissenting in part). Justice Scalia suggested that the title "was perhaps designed to simplify [the Act] for public comprehension, or perhaps merely to comply with the terms of a campaign pledge. . . ." *Id.*; *see also* Garrett, *supra* note 21, at 872-73, 885 (arguing that the Act's title "misled" the Court and resulted in an "incomplete understanding" of the Act).

491. *See supra* note 265 and accompanying text.

492. Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 181-82 (1997); *see also* Powell & Rubenfeld, *supra* note 18, at 1184 (describing *Chadha* as embodying "an adherence to formal processes"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493-94 (1987) (describing the recent reemergence of "constitutional formalism" in cases such as *Chadha* and *Bowsher*); *cf.* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (discussing various inconsistent approaches to separation-of-powers questions taken by the Supreme Court).

493. *See supra* notes 461-73 and accompanying text.

Alternatively, precisely because the Court had not fully distinguished these precedents, it may have feared that reviving the nondelegation doctrine to invalidate the Line Item Veto Act would have opened the flood gates for countless other challenges to a variety of accepted delegations of administrative authority. Perhaps the Court agreed with Professor Peter Schuck that the problem of how to draw lines between permissible and impermissible delegations was "insuperable."[494] In other words, were the Court to hold that the Act's delegated authority to cancel items of spending lacked a sufficient intelligible principle, the Court might eventually find itself hard-pressed not to strike down, for instance, such time-tested and accepted delegations of authority as the FCC's power to regulate the airwaves for "the public convenience, interest, or necessity."[495] Indeed, an exchange at the oral argument in *City of New York* had suggested that some Justices did not see much difference between the FCC standard and the constraints upon the Line Item Veto Act.[496] Thus, rather than tackle the line-drawing problem of how to invest new life in the nondelegation doctrine without unleashing a parade of horribles, the Court may have found in the Presentment Clause an attractive alternative that, regardless of its own shortcomings, would at least allow the Court to avoid the nondelegation doctrine altogether.[497]

Of course, this would suggest that the Court was persuaded not to resuscitate a strong form of the nondelegation doctrine, and may instead have desired to preserve its ability to continue to condone many congressional delegations of authority.[498] Nevertheless, as argued above,[499] the Court also avoided the opportunity to develop a refined nondelegation doctrine—consistent with its precedents and without unleashing an avalanche of challenges to a variety of delegations of regulatory and other executive authorities—by which it could narrowly have struck down the Line Item Veto Act. Indeed, if nothing else, the Court's proffered dis-

494. Peter H. Schuck, *supra* note 148, at 791.

495. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933).

496. *See* Transcript of Oral Arg. at 27-28, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374).

497. Indeed, some concern that its decision not be interpreted as involving the nondelegation doctrine plainly is evident in the Court's emphasis at the end of its opinion that it had found this doctrine "unnecessary" to its decision. *See City of New York*, 524 U.S. at 447-48.

498. *Cf.* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 280 (1998) (stating that "all actors understand the deep truth that the Court would not dare disrupt the deeply entrenched features of the post-New Deal order[,]" including extensive administrative delegations).

499. *See supra* notes 402-411 and accompanying text.

tinctions for entirely *avoiding* the nondelegation doctrine precedents[500] could also have been proffered just as easily in order to reach a different result *under* the doctrine.

In the author's view, the Court, rather than relying on the Presentment Clause, should have invalidated the Act by holding that a delegation of authority permanently to nullify the force of laws violates the nondelegation doctrine unless the authority is predicated upon a specified subsequent change in circumstance. The Court thereby could readily have shown some inclination not to give up on the nondelegation doctrine, without threatening the heart of the modern administrative state. The Act therefore presented the Court with a manageable way to demonstrate that the doctrine still had some content, had the Court desired to do so.

V. RESULTING PERSPECTIVES ON PRINCIPLES OF NONDELEGATION

The Supreme Court's approach to the Line Item Veto Act allows us to draw at least five interrelated conclusions about the content and vitality of the nondelegation doctrine. First, the opinion establishes that, independent of the nondelegation doctrine, an alternative nondelegation principle inheres in Article I itself. Second, this alternative has the potential to swallow the nondelegation doctrine, at least in theory if unlikely in practice, and in any event threatens eventually to put the Court to the hard question that it has so far avoided of defining precisely what is nondelegable legislative power. Third, the majority's approach suggests that for the time being the Court nevertheless remains committed to a lenient nondelegation doctrine, under which it has little intention of radically transforming today's accepted forms of administrative delegation. Fourth, the Court's decision meanwhile sheds light upon the type of future case, if any, likely to convince the Court to reinvigorate the nondelegation doctrine. Finally, Justice Scalia's opinion, although a dissent, augurs the possibility that, at least where less flagrant efforts to circumvent the Presentment Clause are at issue, the Court may find reason to give at least some delegations of spending discretion a still wider berth than it would even under today's permissive nondelegation doctrine.

A. The Presentment Clause as a New-Found Limit Upon Permissible Delegations

Historically, the nondelegation doctrine has not been the only judicial constraint upon Congress' ability to delegate its powers. Over the years,

500. *See supra* notes 428-32 and accompanying text.

principles of unconstitutional vagueness, as well as due process, also have occasionally been invoked to preclude Congress from effectively abdicating its legislative responsibility. For instance, in *United States v. L. Cohen Grocery Co.*,[501] the Court struck down a 1919 statute that criminalized the making of "any unjust or unreasonable rate"[502] for certain goods, on the basis that the statute was unconstitutionally vague and "forbids no specific or definite act."[503] Without explicitly invoking the nondelegation doctrine, the Court reflected that to uphold such a standardless criminal provision would have been tantamount to declaring "that [Congress] was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution."[504]

Thus, in *City of New York*, the *Snake River* plaintiffs had argued that the nondelegation doctrine "is only an instance" of the "'fundamental precept . . . that the lawmaking function belongs to Congress.'"[505] In striking down the Line Item Veto Act, the Supreme Court effectively agreed, in the process creating yet another application of this fundamental precept. It found that impermissible abdications of lawmaking powers to the executive branch could occur not only through direct violations of the nondelegation doctrine, but now also through circumvention of the Presentment Clause of Article I.

The Supreme Court had foreshadowed the possibility that the re-

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501. 255 U.S. 81 (1921).

502. *Id.* at 89.

503. *Id.*

504. *Id.* at 92. Professor Schoenbrod describes this case as an ignored third instance of the Court striking down a statute on the ground that it delegated legislative power. *See* SCHOENBROD, *supra* note 100, at 34-35 & n.28. For other "void for vagueness" examples, see *Smith v. Goguen*, 415 U.S. 566, 575 (1974), and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-70 (1972).

In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Court invalidated on due process grounds a Civil Service Commission regulation barring resident aliens from federal employment. Although the Commission defended its regulation on the basis of its authority "to establish standards with respect to citizenship" for admission to the civil service, the Court concluded that the interests the Commission argued were served by its regulation (such as facilitating the President's negotiation of treaties) were outside of the Commission's proper domain. *See id.* at 104-05, 111-12 (citation omitted). The Court thus concluded that, given Congress' determination to admit the aliens to residency status, the Commission could not deprive them of their liberty interest in federal employment opportunities, except upon reasons "which are properly the concern of" the Commission. *Id.* at 116. In dissent, Justice Rehnquist observed that the Court had not previously grafted a due process requirement upon an agency's exercise of delegated authority. *See id.* at 122 (Rehnquist, J., dissenting).

505. Snake River Brief, *supra* note 310, at 39 (quoting Loving v. United States, 517 U.S. 748, 758 (1996)).

quirements of Article I could themselves operate as an independent nondelegation principle. In particular, when the Court in *Chadha* relied upon the Presentment Clause to invalidate the one-house veto, it did so essentially on the basis that the legislative veto mechanism was an attempt to delegate to each House the independent power to make law.[506] Similarly, Justice Scalia opined a few years ago, as part of the contemporary debate about textualism in statutory interpretation, that the lawmaking requirements of Article I precluded Congress from delegating to its committees the responsibility to develop the details of its enactments through legislative history.[507]

Yet a recent article by John Manning, prior to *City of New York*, describing *Chadha* and *Bowsher* suggests that Article I's primary role in constraining delegations had been to limit the practice of "self-delegation," or Congress' effort to give itself or its agents lawmaking powers to be exercised not in conformance with the Presentment Clause.[508] Indeed, after asserting that "for *Chadha* to make sense in light of the modern realities of agency lawmaking, there must be more to it than meets the eye," Professor Manning explains *Chadha's* "subtler and more precise constitutional message": Congress cannot both "delegate power *and* retain control over the delegatee."[509] Article I's "single, finely wrought and exhaustively considered, procedure,"[510] more than the traditional nondelegation doctrine, is better suited to prevent this type of self-delegation (which Professor Manning's article addresses primarily in the form of the practice of empowering congressional committees to create legislative histories[511]). The problem with using the traditional nondelegation doctrine in this area is that it makes little sense to ask whether Congress has established a sufficient intelligible principle to constrain itself.

The decision in *City of New York* therefore marks a dramatic change. The Court has now employed the procedures of Article I not just to test

506. *See* INS v. Chadha, 462 U.S. 919, 952-56 (1983); *id.* at 986-89 (White, J., dissenting); Dorf & Sabel, *supra* note 498, at 280; Manning, *supra* note 187, at 717; *Schoenbrod*, *supra* note 145, at 1226 n.15; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1238 (1995).

507. *See* Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring).

508. *See* Manning, *supra* note 187, at 706-737; *see also* Powell & Rubenfeld, *supra* note 18, at 1205-06 (arguing that "formalist separation of powers vigilance" should be employed only to limit Congress' efforts to give itself power, as in *Chadha* and *Bowsher*).

509. *See* Manning, *supra* note 187, at 716-17 (citations omitted).

510. *Chadha*, 462 U.S. at 951.

511. *See* Manning, *supra* note 187, at 675, 710-19.

delegations to congressional actors, but also to test delegations to other branches. Previously, Article I's only constraint upon the executive branch was to prohibit it from taking action *without* congressional authorization, as discussed most famously in *The Steel Seizure Case*.[512] In light of *City of New York*, the concrete potential now also exists for regularly employing the precise procedures of Article I to test a variety of executive actions that occur *pursuant to* congressionally delegated authority.

The obvious questions become: in what other circumstances will the Court use the technical lawmaking requirements of Article I to invalidate a delegation to the executive branch of essentially legislative authority; and whether Article I may even become a "backdoor"[513] to strike down a wide array of delegations that have survived challenge under the lenient standards of the nondelegation doctrine. Although the next section suggests that, at least in the short-run, this Court seems willing to continue to permit sweeping delegations, in the long-run these issues may ultimately devolve to the question of what other delegations the Court will perceive as sufficiently "law-making" to deprive them of the lenient treatment they otherwise would receive under the nondelegation doctrine.

How the Court will answer this last question is not clear.[514] To date, the Court has largely managed to avoid directly confronting whether or not a particular delegated authority was "legislative," and instead has essentially finessed this issue by using as a proxy whether Congress has established a sufficient "intelligible principle" to guide the delegatee. But in light of *City of New York*, it now seems more likely that the Court eventually will need to answer this question, as the Court's basis for invalidating the Line Item Veto Act, if carried to its logical conclusion, would imply that truly legislative authority can never be delegated. After all, the Court justified its decision primarily on the basis that "[t]here is no provision in the Constitution that authorizes the President to enact,

512. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952).

513. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 124 (1976) (Rehnquist, J., dissenting) (explaining, in objecting to using due process to test otherwise proper delegation, that the fact of delegation "does not provide a back door through which to attack a policy which would otherwise have been immune from attack").

514. For instance, long before *City of New York*, Justice Scalia had made clear his views that while legislative power is absolutely nondelegable, "a certain degree of . . . lawmaking, *inheres* in most executive or judicial action," Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting), and that congressional assignment of responsibility for such action generally is "no delegation at all," Loving v. United States, 517 U.S. 748, 777 (1986) (Scalia, J., concurring).

to amend, or to repeal statutes."[515] With this as its determinative premise, the Court's rationale for invalidating the Line Item Veto Act could be used to invalidate as many other delegations as the Court is willing to describe as authorizing the "amendment" of a statute. Yet as Justice Scalia pointed out, many heretofore accepted delegations could, as an original matter, just as easily have been described as violating Article I.[516] *City of New York* therefore may eventually force the Court to confront head-on the issue, left unresolved since *Field v. Clark*,[517] of what amounts to nondelegable legislative authority. Thus, to the extent that the Court avoided the nondelegation doctrine in *City of New York* out of a fear about how to draw clearer lines between permissible and impermissible delegations,[518] it may only have succeeded in postponing its day of reckoning.

B. The Persistence of An Otherwise Permissive Nondelegation Doctrine

At least in the short term, however, the decision in *City of New York* is not likely to lead to a widespread judicial reassessment of the administrative state. On the contrary, the Supreme Court's choice to rely upon the Presentment Clause to invalidate what it saw as an unconstitutional delegation of lawmaking authority ironically may have further entrenched today's permissive nondelegation doctrine, as the decision suggests that the Court as a body may not have been interested in revitalizing even a more subtle and nuanced form of the doctrine. Had sufficient members of the Court been interested in doing so, they could easily have found that the nondelegation doctrine, more than the Presentment Clause, spoke directly to the purpose of ensuring that Congress not voluntarily give away a nondelegable "lawmaking" power. For a Court interested in breathing new life into the nondelegation doctrine, or even just into a more discriminating version of it, the Line Item Veto Act provided a choice opportunity to do so.

Of course, one wrinkle in this analysis is the possibility that some members of the *City of New York* majority *were* interested in reinvigorating some form of the nondelegation doctrine, while others were not, and that avoiding the doctrine altogether was part of a compromise position on which the six Justices who desired to strike down the Act could

515. Clinton v. City of New York, 524 U.S. 417, 438 (1998).

516. *See City of New York*, 524 U.S. at 464 (Scalia, J., concurring in part and dissenting in part).

517. *See supra* note 23 and accompanying text.

518. *See supra* notes 494-500 and accompanying text.

agree.[519] In particular, if three or four members of the majority did desire to reinvigorate the doctrine, but could not persuade more of their colleagues, *and if at the same time* one or both of dissenting Justices Scalia and O'Connor were unpersuadable not out of any generalized opposition to a vigorous nondelegation doctrine, but only because they concluded that, where spending authority alone was concerned, Congress should have special latitude to delegate,[520] then, in a future case not involving spending authority, these Justices could realign themselves to revive the nondelegation doctrine. Indeed, the Supreme Court's explicit reminder at the conclusion of *City of New York* that it had not reached the nondelegation doctrine[521] could suggest that the Court wanted to leave itself free to invoke the nondelegation doctrine in the future to invalidate some other delegated executive authority.

Given this possibility, the Court's treatment of the Line Item Veto Act may still provide some sense of the sort of delegation that the Court might find most vulnerable under a reinvigorated nondelegation doctrine. Especially at risk would be delegations that, like the authority of the Line Item Veto Act, were not predicated on changed circumstances, imposed no duty to act in any particular fashion, and did not otherwise convincingly demonstrate that the executive action was advancing a particular congressional policy. These were all factors that the Court in *City of New York* relied upon, even if incorrectly, to distinguish the Line Item Veto Act from previous delegations *in order to avoid* analyzing it under the doctrine.[522] These same factors therefore are likely to be important features, especially in combination, of some future delegation that the Court might choose to strike down *under* the nondelegation doctrine.

Nevertheless, discounting the possibility that a hidden majority stands ready to reinvigorate the nondelegation doctrine in a future case, the Court as a body has now shown even greater reluctance to do so than ever before. Furthermore, it also seems unlikely that this Court will use *City of New York* to begin the widespread Article I reexamination of administrative delegations that its rationale could theoretically justify. In

519. *Cf.* Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 17, 20-21 (1996) (identifying the "difficulty of achieving consensus among six diverse Justices" as a possible cause of theoretical weaknesses in *Romer v.Evans*, 517 U.S. 620 (1996), and describing the Court's use of "incomplete theories" and "modest rationales" to resolve cases in which not all Justices can agree on a complete theory).

520. *See supra* notes 477-85 and accompanying text. In contrast, Justice Breyer's dissent made clear his satisfaction with an impotent nondelegation doctrine. *See supra* notes 464-73 and accompanying text.

521. *See City of New York*, 524 U.S. at 447-48.

522. *See id.* at 442-47; *supra* notes 429-30 and accompanying text.

particular, to the extent that this Court was concerned that a reinvigorated nondelegation doctrine would threaten a variety of delegated rulemaking authorities, such as that given to the FCC,[523] it also would not be likely to view the delegation of such authority as conveying a nondelegable legislative power, in violation of the Presentment Clause. As a result, delegations of what are accurately describable as interstitial rulemaking authorities *to complete the law*, including the EPA's authority to establish national ambient air quality standards at issue in *American Trucking*,[524] are likely to remain safe.

In contrast, some delegations of what are better described as contingent authority *to alter the law* may become more vulnerable, especially if the Court is not satisfied with Congress' reasons for giving away this power. Delegations of *irreversible* authority seem particularly at risk, although where spending alone is concerned, such irreversible authority as the 1969 spending ceilings[525] or the sequestration authority of the Gramm-Rudman-Hollings Act[526] may involve unique considerations, as described below.[527] But the primary risk to such delegations is not that the Court will find them to have violated the nondelegation doctrine. Rather, it is that the Court may now come to view them as more analogous to the Line Item Veto Act, and hence conclude that they too have violated the Presentment Clause of Article I.

Even here the risk is not great, however, because in most cases the Court likely will be persuaded to distinguish such delegations from the Line Item Veto Act as long as it can find a sufficient congressional justification for the delegation, such that it is willing to characterize the resulting power as the type of authority that the executive properly may exercise, rather than concluding that Congress has abdicated its legislative power. For instance, one historical delegation that might seem to be more vulnerable if reevaluated in light of *City of New York* is the authority to impose wage and price controls upheld in 1971 in *Amalga-*

523. *See id.* at 447-48; *supra* notes 494-97 and accompanying text.

524. *See* American Trucking Assn's, Inc. v. EPA, 175 F.3d 1027, 1038-40 (D.C. Cir. 1999); *supra* notes 213-17 and accompanying text. The delegated authority in *American Trucking* is interstitial, predicated upon a variety of statutory standards, and implemented by an agency with recognized expertise and an accepted history of interpreting its governing statutes. It therefore does not seem a particularly good candidate for a nondelegation doctrine challenge.

525. *See* Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, §§ 202-03, 82 Stat. 251, 271-72 (1968); *supra* notes 318-22 and accompanying text.

526. *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-77, tit. II, § 252, 99 Stat. 1038, 1072-78 (1985); *supra* notes 273-75 and accompanying text.

527. *See infra* Part V.C.

mated Meat Cutters.[528] From one perspective, the unfettered power to determine whether or not to freeze wages or prices involves the exercise of a fundamentally legislative policy judgment, not the implementation of a congressional directive. When the President makes this decision, the President arguably is making the law. Yet from another perspective, Congress simply cannot make this decision effectively itself, because imposing a meaningful price control requires a precise timing of its impact upon economic conditions, coupled with a certain element of surprise. The processes of executive implementation are well-suited to impose such a control effectively, while the deliberative processes of legislation are ill-suited.[529] By focusing on these aspects, the Court might well conclude that such a power was in essence more interstitial than contingent, or in any event might insist on evaluating the power under the permissive "intelligible principle" standard of the nondelegation doctrine, rather than under the Presentment Clause.

Or, to take another potentially vulnerable recent delegation, consider the President's authority to suspend indefinitely, six months at a time, the civil liability provisions of the LIBERTAD Act of 1996.[530] The Act authorized the President to suspend these provisions, which exposed foreign firms to lawsuits for the confiscation of American property in Cuba, if suspension was "necessary to the national interests" and would "expedite transition to democracy in Cuba."[531] Yet despite the obvious policy judgment involved in determining whether to recognize a person's right to commence a lawsuit, the Court would be likely to continue to treat such a decision as properly executive, given the Court's ongoing recognition that in foreign affairs "the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'"[532] For the same reason, the Court is also likely to continue to tolerate delegated authority even *permanently* to repeal provisions of trade law, just as it first approved of such delega-

528. *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 764 (D.D.C. 1971); *supra* text accompanying notes 153-55.

529. *See supra* notes 403-04.

530. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified in 22 U.S.C. § 6085 (1996)).

531. 22 U.S.C. § 6085(c)(2) (1996). The President exercised this authority repeatedly. *See* 32 WEEKLY COMP. PRES. DOC. 1265-66 (July 22, 1996); 33 WEEKLY COMP. PRES. DOC. 3-4 (Jan. 6, 1997); 33 WEEKLY COMP. PRES. DOC. 1078-79 (July 16, 1997); 34 WEEKLY COMP. PRES. DOC. 81-82 (Jan. 16, 1998); 34 WEEKLY COMP. PRES. DOC. 1397-98 (July 16, 1998); 35 WEEKLY COMP. PRES. DOC. 63-64 (Jan. 14, 1999).

532. Clinton v. City of New York, 524 U.S. 417, 445 (1998) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)); *see also* Field v. Clark, 143 U.S. 649, 691 (1892).

tions more than a century ago.[533]

Thus, *City of New York* may not directly limit Congress' accepted ability to delegate "sweeping"[534] degrees of both interstitial and contingent authority, provided Congress can structure its delegations to avoid the appearance that it is seeking to circumvent the Presentment Clause. To this end, Congress may want to include, where possible, such features as making a delegation contingent upon subsequent developments, giving the delegatee a duty to act in furtherance of a congressional policy, and allowing the delegatee to reverse course. But even where Congress omits such features, the Court's lenient nondelegation doctrine precedents may easily continue to provide the mode of analysis for almost any delegation that the Court is not ready to describe as having caused a permanent change in the text of enacted laws.

In his concurring opinion in the *Benzene* case, Justice Rehnquist lamented the Court's failure to find the delegation at issue unconstitutional, concluding that the Court had passed up an ideal opportunity "to reshoulder the burden of ensuring that Congress itself make the critical policy decisions."[535] Of course, the Court went on to pass up similar opportunities in subsequent cases such as *Mistretta* and *Loving*. At one level, the Court finally took up this burden in *City of New York*, finding that Congress had not made the critical policy decisions in the Line Item Veto Act. But in the eyes of those hoping for a reinvigoration of the nondelegation doctrine, *City of New York* presumably is an even more disappointing missed opportunity, precisely because the Court invalidated the delegation at issue without relying on the nondelegation doctrine. Instead, by retreating from its "new formalism,"[536] the Court was able to rely upon the very premise (namely, that the procedures of Article I themselves prohibited unilateral presidential lawmaking) that in *The Steel Seizure Case* it had relied upon *precisely because* the authority at issue in the seizure case had *not* been delegated.[537] And by avoiding the issues of the nondelegation doctrine, the decision in *City of New York* leaves congressional delegations in general even more secure from judicial invalidation.[538] Meanwhile, as next described, most executive

533. *See supra* notes 29-32 and accompanying text.

534. Loving v. United States, 517 U.S. 748, 771 (1996).

535. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring); *see also id.* at 672-75, 685-88 (Rehnquist, J., concurring).

536. Farina, *supra* note 492, at 181.

537. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-86 (1952).

538. At the same time, the doctrine obviously retains its role, highlighted in *American Trucking* and acknowledged by the Supreme Court in *Mistretta*, of "giving narrowing constructions to statutory delegations that might otherwise be thought unconstitutional."

spending authority may ultimately merit even less nondelegation scrutiny.

C. The Potential of Even More Lenient Treatment of Delegations of Spending Authority

Despite the Supreme Court's invalidation of the Line Item Veto Act's particular delegation of spending authority, the decision in *City of New York* will not necessarily prevent Congress from continuing to give the President widespread discretion over federal spending. Not only is a permissive nondelegation doctrine likely to continue to be the standard by which most executive branch delegations are tested, but also Justice Scalia's dissent suggests that Congress may give the President still broader discretion where spending is concerned. Of course, such discretion must not amount to the functional equivalent of an item veto, but once this hazard has been avoided, Congress may find that it retains tremendous flexibility concerning how it shares its power of the purse with the executive branch.[539]

For instance, Justice Scalia expressed "not the slightest doubt" that an act authorizing the President to decline to spend any item of spending would be constitutional.[540] He predicated this assumption not on an analysis of the Court's nondelegation doctrine precedents *per se*, but rather on the degree of discretionary control over spending that Congress "since the Founding of the Nation" has given to the President, whether through lump-sum appropriations, discretionary individual appropriations, or explicit authority to withhold or impound funds.[541] In view of this established historical practice, Justice Scalia, joined in this part of his dissent by Justices O'Connor and Breyer, seemed to suggest

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Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

539. Professor Elizabeth Garrett has suggested that Congress may retain tremendous flexibility concerning spending *whether or not* it avoids this hazard, on the basis that the Line Item Veto Act's authority to cancel dollar amounts of discretionary spending in fact may have survived *City of New York*. *See* Garrett, *supra* note 21, at 891-92. Her argument is that because *City of New York* did not explicitly address this form of cancellation authority, for which cancellation was defined as to "rescind," *see supra* note 304 and accompanying text, but addressed only the Act's authority to cancel new direct spending and limited tax benefits, for which cancellation was defined as to prevent from "having legal force or effect," *see supra* note 305 and accompanying text, the former authority may remain intact. *See* Garrett, *supra* note 21, at 873-74, 891-92. Most commentators, however, and the Justice Department, have concluded that *City of New York* invalidated the Line Item Veto Act in its entirety.

540. Clinton v. City of New York, 524 U.S. 417, 468-69 (1998) (Scalia, J., concurring in part and dissenting in part).

541. *Id.* at 466-69 (Scalia, J., concurring in part and dissenting in part).

that a permissible delegation of spending authority would not even require an intelligible principle. Rather, paralleling the lenient treatment that the Court in *Loving* had granted the President's authority over military courts, he appeared willing to uphold traditional delegations of spending authority "without further guidance" from Congress.[542]

Although the possibility exists that this view is limited to Justices O'Connor, Scalia, and Breyer, it also is possible that other members of the Court also subscribe to it, despite having voted to strike down the Line Item Veto Act. As argued above, the Court's invalidation of the Act may be best explained not as the result of a rigorous analysis of the cancellation authority itself, but as the product of hostility to the Act's end-run around the Presentment Clause. If so, a majority of the Court might be willing to uphold an otherwise similar spending delegation not encumbered by the offending trappings of an "Item Veto," and might even be willing to join Justice Scalia in doing so without applying the intelligible principle test. For example, even after *City of New York*, the Court might be reluctant to conclude that the authority given to President Nixon by the 1969 spending ceilings,[543] or the sequestration authority of the Gramm-Rudman-Hollings Act,[544] violated Article I. Although the Constitution precludes the expenditure of funds without a congressional appropriation,[545] it does not mandate that appropriated funds be spent. Rather, "Congress may confer discretion upon the Executive to withhold appropriated funds."[546] Justice Scalia's analysis suggests not only the continuing validity of the principle of *Cincinnati Soap* that "Congress has wide discretion" to make appropriations "to be allotted and expended as directed by designated government agencies,"[547] but also that, in light of the Executive's historic stewardship over appropriated funds, such delegations generally merit judicial deference regardless of whether accompanied by an intelligible principle. Although the Line Item Veto Act was unable to exploit this history successfully, both the Court and Congress nevertheless may now have sharpened their awareness of this traditional flexibility.

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542. *See supra* notes 249-50 and accompanying text; *see also* Transcript of Oral Arg. at 18, Clinton v. City of New York, 524 U.S. 417 (1998) (No. 97-1374).

543. *See supra* notes 318-22 and accompanying text.

544. *See supra* notes 273-75 and accompanying text.

545. U.S. CONST., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

546. *City of New York*, 524 U.S. at 468 (Scalia, J., concurring in part and dissenting in part); *see also* Train v. City of New York, 420 U.S. 35, 46 (1975).

547. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-22 (1937).

VI. CONCLUSION

Despite its determination that in the Line Item Veto Act Congress had delegated part of its legislative power, the Supreme Court was unwilling to rely upon the nondelegation doctrine to invalidate the Act. Instead, at some sacrifice, it settled for the facially appealing yet flawed explanation that the Act was a circumvention of the lawmaking requirements of the Presentment Clause, and that the Act violated those requirements just as much as a true item veto would have. In doing so, the Court passed up a promising opportunity to demonstrate, for the first time in almost sixty-five years, that the nondelegation doctrine retains some force as a constraint upon congressional grants to the executive of quasi-legislative powers. Time will tell whether the Court will find an equivalent opportunity to resuscitate the nondelegation doctrine, but for now the doctrine continues to appear moribund, and perhaps even less likely to provide any meaningful constraints upon Congress' ability to delegate to the executive.

City of New York thus is important more for its rationale than for its result. Because the Supreme Court could have used what it had identified as significant differences between the Line Item Veto Act and previously sustained delegations to justify invalidating the Act under the nondelegation doctrine, its refusal to do so suggests that the current Court found trouble in reviving the nondelegation doctrine or in subjecting the constitutionality of myriad congressional delegations to greater judicial scrutiny. Furthermore, the rationale of *City of New York* may ultimately make a real difference in the sense that it may heighten the need for the Court to articulate a more precise definition of Congress' nondelegable lawmaking powers. The Court chose to invalidate the Line Item Veto Act for violating the Presentment Clause of Article I because it viewed the Act as delegating precisely such a power. Whether the Court in the future will similarly strike down particular delegations for violating Article I, or instead will sustain them under the impotent nondelegation doctrine, may depend entirely on the label that the Court chooses to apply to the delegated power.