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The President’s Veto Power: An Important Instrument of Conflict in Our Constitutional System

CARL MCGOWAN*

In this Article Judge McGowan presents an in-depth analysis of the scope of presidential veto power. The Article reviews the history and debate surrounding the design of the Veto Clauses and highlights the veto’s role in United States political and legal history. The Article then examines contemporary debate over the proper scope of the President’s veto power, including recent judicial treatment of the pocket veto. As this Article explains, the veto power continues to play an important role in the separation of power scheme of our political system.

The United States is the world’s most successful and longest running democracy. We can attribute much of our success to the insight and vision demonstrated by the Framers of our federal constitution. Our federal government is a unique system characterized by a bold separation of powers and an intricate system of checks and balances. The separation of powers in the three branches of government prevents any one branch from capturing an undue portion of power. Reinforcing the separation of powers is a system of checks and balances empowering each branch to defend itself against encroachments by another.

For example, Congress may check the President with the threat (or, in extreme cases, the actual use) of the impeachment power.

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Congress keeps the judiciary in line through its plenary power to control the jurisdiction of the federal courts. The judiciary similarly exercises authority over both Congress and the President through its power to invalidate laws or executive actions. The President influences the federal courts through his power (with the advice and consent of the Senate) to appoint federal judges. Additionally, one of the President's main defensive weapons against an overbearing Congress is his qualified power to veto legislation.

Court cases involving these checks and balances can arise out of rather mundane circumstances. Few cases, however, are more important, since a decision in such a case can have a radical impact on the structure of our government. For example, the United States Supreme Court recently decided the case of a young alien whom the government decided to deport because his visitor's visa had expired. Deportation is a relatively routine matter. But this man's case led to the landmark decision in *INS v. Chadha*, which outlawed the one-house legislative veto. That decision not only upset a long-standing congressional practice, it also cast doubt upon the validity of at least two hundred acts of Congress.

The court on which I sit, the Court of Appeals for the District of Columbia Circuit, has often been the preliminary arbiter of disputes involving these checks and balances. Just last spring, our court decided a case concerning the parameters of the President's veto power. In *Barnes v. Kline*, we examined the scope of the pocket veto in a suit brought by several members of the House of Representatives and joined by the Senate as a body.

In *Chadha*, the Supreme Court focused on one of the most vital aspects of the separation of powers—the division of legislative power between the Congress and the President. This division of power is crucial to any analysis of the presidential veto. The President's explicit role in lawmaking is embodied in the veto power. Yet despite its lengthy exposition in the Constitution, the Framers' attempt to set out the limits of the veto power was incomplete. The scope of the veto is crucial to us as citizens, because every corner of our daily routine is touched by at least one aspect of federal legislation.

This Article is divided into four parts. In the first section, I review the history and debate surrounding the design of the veto clauses. This history is interesting in and of itself; it also illuminates several contemporary (and unresolved) disputes about the proper scope of the presidential veto. The second section highlights the role the veto

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2. Id. at 967 (White, J., dissenting).
has played in the development of our political and legal history. This examination of prominent vetoes demonstrates that the veto is an instrument of conflict that focuses public debate, increases political accountability, and checks congressional overreaching. The third section reviews the contemporary debate over the proper scope of the veto power. Can the President veto a bill for any reason whatsoever? Can the President lawfully exercise a line-item veto? These questions are at the core of the veto’s role in our separation of powers scheme. The analysis of these questions reveals the sensitive political, policy, and legal underpinnings of the veto power. Finally, the last section examines the pocket veto, its evolution in the courts, and the importance of the court’s decisions as examples of enlightened constitutional decisionmaking.

THE HISTORY OF THE PRESIDENT’S VETO POWER

The Early English Rule

Despite its apparent success in our system of checks and balances, Americans cannot claim credit for inventing the veto power. While its early roots can be found in ancient Rome, the veto power embodied in our Constitution originated in England. Through the seventeenth century, the King had plenary power over all aspects of the British government. The King’s power, however, soon began to rapidly erode. Parliament no longer served as merely an advisory body that rubber-stamped the King’s edicts. Indeed, by the late 1600s, Parliament began drafting laws for the King’s assent rather than vice versa. This turnaround had slowly evolved over the centuries. The King, of course, had the power to withhold approval, but even this negative power was quite weak. Royal assent was rarely refused in the early 1700s, at least as to domestic laws. Clearly, the King’s veto power had declined. In fact, commentators stated that the King “would not veto even a bill calling for his own execution.”

British lawmaking followed a dramatically different course in the American colonies. For the colonies, the governmental model of early England still applied—rule by total monarchy. Even in the 1700s, the King retained plenary power to establish colonies. The King thus appointed colonial governors, who could veto any measure

6. Id. at 12-13; C. ZINN, supra note 4, at 2-3.
put forth by the legislature. Moreover, the King could veto a measure even after approval by the colonial governor. Whenever it was to the advantage of the crown, the King's veto power was used quite freely in the colonies. This free use of the veto power incensed the colonists. The explosiveness of this issue is amply evidenced by the fact that it is listed as one of the reasons for revolution in the first sentence of the Declaration of Independence: "[The King] has refused his assent to laws most wholesome and necessary for the public good."

The Constitutional Convention

After the break with England, the colonists steadfastly avoided creating a government with a powerful executive department because the experience with the King was still fresh in their minds. This weakened the newly-founded central government, and was the principal contributor to the short life of the Articles of Confederation. Six years after ratification of the Articles, the states met in Philadelphia to construct a new government with sufficient power to bind the states to a fruitful new union. The Framers envisioned a strong central government, but they had also learned their lesson under the British reign. A strong central government could unify the states into a powerful single entity, but could also overpower the states as members of the new union. The Framers thus took care, in designing this new government, to incorporate the positive aspects of centralized government and to avoid those aspects that had caused the colonists to break away from the British.

The Framers did not incorporate the modern version of the veto power into the federal constitution without hesitation or experimentation. The Framers well remembered their feelings about the King's absolute veto. But participants in the Constitutional Convention feared that the legislative branch could dominate the other branches of the new government, thus rendering their desire to observe a separation of powers a nullity. The veto was, therefore, designed as a limit on congressional power to encroach on the rightful territories of the executive and the judiciary. Despite seemingly widespread agreement on the separation of powers theory, the Framers heatedly debated the appropriate design and scope of the veto.

The first proposal envisioned a council of revision, comprised of the President and federal judges, empowered to review legislation. The council was thought to be necessary because the President

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8. E. MASON, supra note 5, at 17-18.
10. E. MASON, supra note 5, at 19-20.
would never have the political power to oppose Congress alone. Thus, a veto in the hands of both the President and members of the federal judiciary would prevent congressional domination of the fledgling government. James Madison persuasively argued to his colleagues in Philadelphia that the council was a desirable veto format. He felt that without judicial participation in the veto power, the President alone would lack sufficient firmness to resist legislative encroachment. Madison played down the potential for judicial conflict, arguing that the advantage of firm opposition to an overreaching legislature outweighed any perceived disadvantages even if a law that the council had previously debated should later come before one of its judges.\textsuperscript{12}

Opponents objected to the plan on the ground that the judiciary was already sufficiently equipped to defend itself through judicial review. If the law unconstitutionally encroached on the power of the judiciary, the courts could simply declare it unconstitutional. Indeed, in some opponents' views this ability of judges to review laws again after consideration by the council gave the judiciary too much power.\textsuperscript{13} A judge, as a member of the council, could reject a law and, if unsuccessful, he could do so again when the law came before his court. At least one conventioneer thought that the council of revision would encourage judges to "seduce" the President; the chief executive could be more impartial acting alone.\textsuperscript{14} Moreover, the council of revision would permit judges to evaluate not just the constitutionality, but also the wisdom of a law—a duty "foreign to their office."\textsuperscript{15} Some opponents of the council of revision concentrated on the bias and conflict issue: putting judges on such a council would result in impermissible bias should the law later come before them in court.\textsuperscript{16} As the great jurist Joseph Story later wrote:

\begin{quote}
 it would have a tendency to take from the judges a public confidence in their impartiality, independence, and integrity which seems indispensable to the due administration of public justice. Whatever has a tendency to create suspicion or provoke jealousy is mischievous to the judicial department. Judges should not only be pure, but believed to be so.\textsuperscript{17}
\end{quote}

Based upon these opposing arguments, the council of revision propo-
sal was eventually defeated.

Before final agreement on the version we now enjoy, the Convention also rejected an absolute veto—one that cannot be overridden. The absolute veto was seen as vesting too much power in the executive. The Framers feared a reenactment of the Pennsylvania experience, where the governor was reputed to have engaged in a practice of not signing bills into law unless each was accompanied by an appropriation bill designating money for the governor's personal use.\(^\text{18}\) Moreover, some of the drafters saw an absolute veto as somehow unseemly. It allowed one man to reverse "the cool and decided opinions of the legislature."\(^\text{19}\) Indeed, the Framers thought that an absolute veto was "obnoxious to the temper of the country."

The Federalists and the Antifederalists

After rejecting both the council of revision and the absolute veto, the Convention agreed on a qualified veto—a veto subject to a supermajority override. The constitution still needed to pass muster with the American people, and in that forum, the federalists and the antifederalists squared off.

The federalists were represented by James Madison and Alexander Hamilton, two formidable supporters of the proposed constitution. Madison wrote in the *Federalist Papers* that the new constitution truly incorporated the principle of separation of powers by arming each branch with weapons capable of keeping the other branches at bay.\(^\text{21}\) Anticipating the objection that the veto power combined legislative power (as opposed to separating it), Madison also wrote that the separation of powers did not mean that the new government's separate branches "ought to have . . . no ***controul*** over the acts of each other."\(^\text{22}\) Rather, the separation of powers means that, for instance, the whole of the legislative power cannot be "exercised by the same hands which posses the ***whole*** power of another department."\(^\text{23}\) This restriction was faithfully observed in the proposed constitution. The hands that hold the executive power cannot make a law, though they can reject a law the legislature proposes. Rather than violating separation of powers principles, Madison viewed the veto power as a weapon capable of "keeping each

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19. *Id.*
20. The Convention rejected the absolute veto unanimously. I M. FARRAND, *supra* note 11, at 99, 100, 103. It may be that the qualified veto was seen as more of an appeal to the legislature to follow reason than an absolute veto, which looks more like a total rejection of Congress' decision. See 1 J. STORY, *supra* note 17, § 888, at 649.
22. *Id.* at 325 (emphasis in original).
23. *Id.* at 325-26 (emphasis in original).
[branch] in their proper places.\textsuperscript{24} "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving those who administer each department, the necessary constitutional means, and personal motives, to resist the encroachments of the others."\textsuperscript{26} Madison felt that although the constitution itself commanded a separation of the branches, these weapons were necessary because, in his words, "[I]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary . . . . [B]ut experience has taught mankind the necessity of auxiliary precautions."\textsuperscript{26}

Alexander Hamilton followed up on Madison's defense of the veto by arguing that the veto also served the salutary purpose of preventing unwise laws. The President could use the veto to block laws precipitously enacted in the heat of factionalism. The people would be protected against abuse of this power because the President would rarely hazard a test of power with the Congress if not backed by the popular will. This was especially so when the veto could be overridden by the Congress. When the President vetoes an act, he risks public political rejection by Congress. Hamilton apparently feared that this political risk would unacceptably diminish the use of the veto.\textsuperscript{27}

These eloquent federalist defenses of the new constitution were met head-on by antifederalist essays attacking the document. The antifederalists feared an unchecked accumulation of power in the executive office, and the veto was seen as one manifestation of that central problem. One antifederalist thought that when armed with veto power, the President was essentially a king in all but name.

\textsuperscript{24} The Federalist No. 51, at 347-48 (J. Madison) (J. Cooke ed. 1961).
\textsuperscript{25} Id. at 349.
\textsuperscript{26} Id.; see also 1 J. Story, supra note 17, § 884, at 646 ("A mere parchment delineation of the boundaries of each [branch] is wholly insufficient for the protection of the weaker branch.").
\textsuperscript{27} The Federalist No. 73, at 495-97 (A. Hamilton) (J. Cooke ed. 1961).

Hamilton's first defense of the veto power was nakedly jingoistic. He compared the proposed powers of the federal president with those of the much-aborred King of England. This was a good strategy: the more the Framers could show that the proposed government of the United States was unlike that of the country's former oppressors, the more likely the American people were to adopt the new constitution. Hamilton gamely played on this political point. In an unabashed appeal to the citizens of New York, he noted that the veto power of the President of the United States would be more like that which operated in New York than like the King of England's power: "The qualified negative of the President differs widely from [the] absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the Council of Revision of this State . . . ." The Federalist No. 69, at 464 (A. Hamilton) (J. Cooke ed. 1961). Hamilton's knack for statesmanship was already becoming apparent.
Another antifederalist author attacked the veto power as a violation of the separation of powers. "It is . . . a political error of the greatest magnitude," he wrote, "to allow the executive power a negative, or in fact any kind of control over the proceedings of the legislature." The antifederalists maintained their opposition to the veto despite the fact that the Framers designed the veto power to avoid precisely the same evil in the legislative branch. Because they viewed the office of the President as a serious danger to the freedom of the American people, the antifederalists derided the position, describing it as "chief magistrate and generalissimo," "dictator," and "emperor." The thrust of the antifederalists objections are well captured in the following passage of the self-styled Impartial Examiner: "When the spirit of America becomes such, as to ascribe to their president all those extraordinary qualities, which the subjects of kingly governments ascribe to their princes: then, it is presumed, and not till then, he may consistently be invested with a power similar to theirs."

The federalists, however, carried the day, and the Constitution was approved in June of 1788.

THE EARLY EVOLUTION OF THE VETO POWER

The Initial Uses of the Veto

Almost immediately after the first elections, President Washington vetoed an act of Congress. In November of 1791, Congress passed an act apportioning representatives among the states based on the census of 1790. Following the constitutional provision, the act provided for one representative for each thirty thousand persons in the state. The House had trouble deciding how to treat states with populations not evenly divisible by thirty thousand. In response, the Senate adopted an amendment giving representation to these remainders when in excess of 15,000. In solving that problem, however, the Senate inadvertently created another.

President Washington vetoed the act, declaring it unconstitutional. He asserted two grounds for his position. First, the Constitution spe-
specifically limited representatives to no more than one per thirty thousand persons. The Senate's remainder provision, however, effectively gave eight states more than the constitutional limit.\textsuperscript{35} Second, Washington objected to the act because the Constitution required apportionment of the representatives among the states by their respective numbers. Because some states were awarded extra representatives under the remainder provision, they had more than their proportionate share.\textsuperscript{36}

Apparently, the veto was well received. Washington had articulated his reasons for the veto, and they were persuasive. Congress responded by passing a bill that allotted one representative for each thirty-three thousand persons, thus removing the possible constitutional infirmity.\textsuperscript{37}

The veto remained largely untapped through the Adams and Jefferson presidencies, but President Madison renewed its use. Madison vetoed seven bills, two by pocket veto\textsuperscript{38}—the first use of that power. Madison's vetoes were largely based on the purported unconstitutionality of the legislation. For example, he vetoed a bill designed to incorporate a church in the District of Columbia because he believed the law violated the Establishment Clause.\textsuperscript{39} He also vetoed a bill giving land and a building to a Baptist Church in Mississippi on the same ground.\textsuperscript{40}

In a veto with a more lasting practical effect on the daily lives of American citizens of that time, Madison refused his assent to a bill authorizing financing for internal improvements—roads, bridges, canals—because he felt it was passed without the authority of any enumerated power declared in the Constitution.\textsuperscript{41} Madison had proposed in the Constitutional Convention a specific power for Congress to incorporate banks and canal and road companies, but it was rejected.\textsuperscript{42} Moreover, as President, Thomas Jefferson could generate no action from Congress on a constitutional amendment to allow road building and other internal improvements.\textsuperscript{43} After the War of 1812, it became clear to Washington politicians that internal improve-

\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 248.
\textsuperscript{38} See infra text and accompanying notes 131-42.\textsuperscript{39} E. Mason, supra note 5, at 53.
\textsuperscript{40} Id. at 54.
\textsuperscript{41} H. Hockett, supra note 34, at 347.
\textsuperscript{42} Id. at 342, 344-46.
\textsuperscript{43} Id. at 345.
ments were needed. Congress relied on the General Welfare Clause for its authority to pass the internal improvements bill that Madison eventually vetoed. Many members of Congress objected to Madison’s narrow construction of the enumerated powers, but they were unable to muster enough votes for an override.44

President Andrew Jackson—The Populist

The potential of the veto as a political weapon did not become apparent until the election of Andrew Jackson in 1828. Jackson received a tremendous popular vote, and he soon realized that if he could exploit this popular mandate, his vetoes would be more likely to stand. This approach hit the country on a grand scale with Jackson’s veto of the bill to renew the Second Bank of the United States. In 1811, the charter of the First Bank of the United States expired. Congress did not renew the charter, because the public widely opposed the Bank’s deflationary policies. But the War of 1812 followed, and a reconstruction of the country could not proceed efficiently without the financial control of a bank. So Congress chartered the Second Bank of the United States in 1816.46 Its charter was to run for twenty years, but by the beginning of Andrew Jackson’s tenure in 1829, the Bank had again become extremely unpopular. Many citizens complained that the Bank had engaged in a widespread practice of foreclosing on western land. As a President particularly attuned to the wishes of the voters, Jackson knew that a renewal of the charter would be political trouble.46

In 1832, Congress nevertheless sent Jackson a bill renewing the Bank. Jackson vetoed the bill on the ground that the Bank was unconstitutional,47 despite the Supreme Court’s decision upholding the First Bank of the United States in *McCulloch v. Maryland*.48 In Jackson’s view, the three branches of the federal government were coequal to the task of assessing the constitutionality of government actions.49

Jackson was not alone in this view: President Martin Van Buren later argued that if the President had no power to assess the consti-

44. *Id.* at 345-47.
45. For a general history of this conflict, see H. Hockett, *The Constitutional History of the United States 1826-1876* 84-87 (1939) [hereinafter cited as *HISTORY OF THE UNITED STATES 1826-1876*].
47. *Id.* at 70. Jackson’s veto appeared to be more of a popular political instrument than a message to Congress. De Tocqueville hypothesized that the veto was really an instrument for public appeal. See A. De Tocqueville, *Democracy in America* 110 (J. Mayer & M. Lerner eds. 1966).

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tutionality of laws, he would be a "ministerial officer only." Thomas Jefferson had earlier taken the position that "each department is truly independent of the others and has an equal right to decide for itself what is the meaning of the Constitution in cases submitted to its action." President Lincoln attacked the Dred Scott decision on much the same ground.

Congress lashed out at Jackson's veto. It seemed a direct challenge to the Supreme Court's power to declare what the law is, especially in cases requiring constitutional interpretation. For Senator Daniel Webster, the Supreme Court's decision on the constitutionality of the First Bank was conclusive; he stated, "One bank is as constitutional as another bank."

At any rate, Congress did not override the President's veto and Jackson was reelected, both events vindicating at least the popularity of his position on the Bank. The issue was not settled, however, because Jackson used every power he had to interfere with the Bank's remaining four years. For example, he directed the Secretary of the Treasury to withdraw all federal funds from the Second Bank, hoping to cripple it fatally. This was done under authority of a statute giving the Secretary some discretionary powers, despite the fact that Congress had specifically refused to enact a law authorizing the Secretary to withdraw funds. Congress' reaction is perhaps best captured by Senator Henry Clay's response to Jackson's actions:

We are in the midst of a revolution rapidly tending toward a total change of the pure republican character of our government, and to the concentration of all power in the hands of one man. The powers of Congress are paralyzed, except when in conformity with his will, by frequent and extraordinary exercise of the executive veto, not anticipated by the founders of our constitution and not practiced by any predecessors of the Chief

50. Id. at 74-75 (quoting M. Van Buren, Political Parties in the United States 316 (1867)).
51. Id. at 75 (quoting a letter to Judge Spencer Roane, 12 T. Jefferson, Writings 135-40 (Ford ed.)).
53. W. Binkley, supra note 46, at 74.
54. Id. at 71 (quoting 6 D. Webster, Writings & Speeches 174 (1903)). One could view the veto more charitably. McCulloch could have been read to state that some banks, but not necessarily all, are legal. Jackson's veto could thus be seen as a rejection of Congress' attempt to bind him to a broad view of McCulloch. Id. at 73. Indeed, it might appear somewhat unseemly for Congress to attempt to force its view of a disputed legal precedent on the President.
55. Id. at 75-76.
56. The classic treatment of the legality of presidential action in the face of contrary congressional action is found in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
Although President Jackson won that battle, the conflict between Congress and the presidency raged on. President Tyler's veto of a tariff bill led to the first move in our history to impeach a president, ostensibly on a ground strikingly similar to one of the motivations behind the Declaration of Independence: the “high crime and misdemeanor of withholding assent to laws indispensable to the just operation of the government . . . .”

1867: The Tenure of Office Act

Congressional frustration over presidential vetoes reached its zenith during Andrew Johnson's tenure. President Johnson and Congress tangled repeatedly over the proper course of reconstruction after the Civil War. Johnson, a Tennessean, favored leniency toward the southern states, while Congress was bent on strict measures designed to assure no further uprisings. This conflict led to continued attempts by Congress and the President to block each other's programs. In the end, Congress proved more powerful, overriding more than fifty percent of Johnson's vetoes.

One episode is particularly interesting. In an attempt to limit President Johnson's powers, Congress passed the Tenure of Office Act, which blocked the President from removing certain officers of the United States without the assent of the Senate. Appointment to, or acceptance of, an office contrary to the Act was declared a "high misdemeanor." The purpose of the Act is clear—the language used is precisely the formulation in the Constitution's impeachment provision. While the Constitution is silent on the matter, Johnson was sure that the Act unconstitutionally infringed on the executive office, and he vetoed it. Congress promptly overrode the veto.

But that was not the end of the matter. As it happened, Johnson was convinced that one of his cabinet officers had to be removed anyway. During a recess of the Senate, Johnson suspended Secretary of War Edwin Stanton, a holdover from President Lincoln's Cabinet. Johnson found that Stanton, who was sympathetic to congressional

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57. W. Binkley, supra note 46, at 78 (quoting H. Clay, 10 Cong. Deb. 60 (1833)).
58. W. Binkley, supra note 46, at 97.
59. History of the United States 1826-1876, supra note 45, at 325-46.
62. Id.
63. Johnson's position was vindicated in Myers v. United States, 272 U.S. 52 (1926).
64. Presidential Vetoes, supra note 60, at 31.
reconstruction plans, had obstructed the administration and disclosed political secrets to Johnson's enemies. When the Senate reconvened, it rejected the removal. The President removed Stanton anyway, and appointed a replacement, Adjutant General Thomas. Stanton refused to give up the office, and Thomas was arrested for violating the Act. However, Congress soon realized that a trial of Thomas would play right into the President's hands, since Thomas would defend on the ground that the act was unconstitutional. Hence, the prosecution was quickly dropped, and Johnson was impeached by the House instead.65

During the impeachment trial, the prosecution argued that the President's sole duty is to execute duly passed laws, not to decide the constitutionality of laws. Johnson, of course, defended on the ground that the power of removal was constitutionally vested in the President alone, and any act of Congress purporting to change that arrangement was void. Ultimately, Johnson was acquitted, thus setting a precedent against impeachment for political reasons. Johnson's victory, however, was narrow: his conviction failed by one vote.

This episode demonstrates the sometimes volatile relations between the coordinate branches of our government. The veto power in some ways encourages confrontation between the executive and the legislature, and this conflict has a salutary affect on our system of government. It keeps the political branches accountable to their popular mandates and to the Constitution. Our constitutional system is based on a healthy public debate and a tension between the separate branches.

The Johnson impeachment also demonstrates the evolution of the veto. Jackson vetoed the bank bill ostensibly because he thought it unconstitutional. Later, Johnson clashed with Congress more on policy grounds. This shift in the battleground of disputes from the Constitution to policy is due to a change in the nature of our governing law. Prior to the 1850s, the main disputes on the veto centered around the Constitution. After the Civil War, however, we became more a nation of statutes,66 and the veto correspondingly shifted focus from the constitutionality to the expediency of legislation.

This policy-oriented shift culminated with Franklin Roosevelt's presidency. He vetoed 635 bills, over one quarter of the presidential vetoes in our first 200 years.67 In fact, Roosevelt seems to be a

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65. HISTORY OF THE UNITED STATES 1826-1876, supra note 45, at 350-51.
66. E. MASON, supra note 5, at 139.
67. PRESIDENTIAL VETOES, supra note 60, at ix.
recordholder of sorts. Apparently, no legislation escaped his watchful eye. Among his vetoes were bills relating to: Memorial Day observance, credit for beer wholesalers, control of funerals, exemption of religious periodicals, cemetary approaches, shorthand reporting, and even homing pigeons and parking meters.⁶⁸

THE UNCERTAIN SCOPE OF THE VETO POWER

The President's Proper Role in Lawmaking

Despite over 200 years of vetoes, the precise scope of the veto power is still unclear. Politicians, responding to their ideologies and political challenges, have taken opposing positions on this issue throughout our history: Thomas Jefferson felt that the veto power was solely a shield against congressional encroachment on the executive. Jefferson would have deferred to Congress even on a bill that he thought was arguably unconstitutional.⁶⁹ Alexander Hamilton took the opposite view; a bill objectionable on any ground was subject to a veto.⁷⁰ The pendulum has swung back and forth on this issue throughout our short history as the tides of power have ebbed and flowed.⁷¹

In the early 1970s, the restrictive view of the veto power had much currency. The Nixon Administration was seen as pushing executive power to its limit, inspiring political scientists to analyze the "Imperial Presidency."⁷² President Ford systematically stymied congressional economic initiatives.⁷³ Many scholars saw the veto power as an instrumental factor in an alarming expansion of presidential power. Whereas the Framers envisioned congressional encroachment on a weak executive, the 1970s produced the opposite fear. Professor Charles Black, analyzing the use of the veto during these times, asserted that the veto power was designed solely to prevent clearly unconstitutional acts and to protect the executive from legislative encroachment.⁷⁴ Another commentator went further, claiming that all

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⁶⁹ H. HOCKETT, supra note 34, at 248; History of the United States 1826-1876, supra note 45, at 84.

⁷⁰ History of the United States 1826-1876, supra note 45, at 84.

⁷¹ The dispute was by no means limited to Jefferson and Hamilton. Benjamin Harrison advocated sparing use of the veto, while Presidents Tyler and Polk were not hesitant to use the veto to further their policies. The pendulum swung back to the limited use side with President Taylor. L. Fisher, The Constitution Between Friends 87-88 (1978).

⁷² See, e.g., A. Schlesinger, Jr., The Imperial Presidency (1973).

⁷³ Presidential Vetoes, supra note 60, at 449-65.

⁷⁴ Black, Some Thoughts on the Veto, 40 Law & Contemp. Probs. 87, 90 (Spring 1976). Professor Black particularly objected to a systematic veto program designed to effectuate presidential policies. B. Eckhardt & C. Black, Jr., The Tides of
Presidents since Andrew Jackson had used the veto power beyond its constitutional bounds.\(^76\)

But it is not clear that even a purposeful, systematic veto program, designed solely to effect a single policy, would be outside the Framers' intent. For example, despite the fact that the paragraphs describing the veto power are among the longest in the Constitution, there are no words limiting the veto to legislation encroaching on the executive office or to blatantly unconstitutional acts. In fact, if the veto power were limited to unconstitutional acts, the choice of words in the Constitution might seem a little odd. The Constitution directs the President to sign a bill "if he approve[s] . . ." of it.\(^76\) If the President's function were merely to validate the constitutionality of legislation, the Framers probably would have made a different word choice.\(^77\) Approval connotes active policy agreement, rather than condemnation.

Admittedly, the Framers probably did not anticipate the veto as a systematic weapon in day-to-day policy struggles between the President and Congress. But this may be true only because the Framers did not envision the eventual size and pervasiveness of the federal government. The early veto battles centered on the constitutionality of legislation and the confines of that forum excluded major policy battles.\(^78\) Today, the boundaries of general federal power are less undefined and the concomitant flood of admittedly constitutional legislation has changed the very nature of the federal government. For example, on a single day, in 1866, Congress sent President Cleveland 240 private bills granting federal pensions to specified individuals.\(^79\)

Moreover, proponents of a limited presidential veto must confront historical evidence suggesting a broad veto power. During the Convention, the Framers more than once discussed the veto as a protection against improvident legislation.\(^80\) Alexander Hamilton described

\(^{75}\) Pessen, The Arrogant Veto, Nation, Aug. 30, 1975, at 133-37; see also L. Fisher, supra note 71, at 84.

\(^{76}\) U.S. Const. art. I, § 7, cl.2.

\(^{77}\) See, e.g., H. Laski, The American Presidency 147 (1940).

\(^{78}\) E. Mason, supra note 5, at 139.

\(^{79}\) L. Fisher, supra note 71, at 84.

\(^{80}\) See 2 M. Farrand, supra note 11, at 73 (revisionary council could prevent enactment of bad laws); id. at 78 (restraining power essential because legislature will sometimes pass pernicious laws, not just unconstitutional laws); id. at 299 (discussing ¾ requirement for override; higher proportion said to prevent hasty passage of laws, thus reducing the frequency of repeals); id. at 586 (many good laws might not be tried long enough to show merit if veto were overused).
the veto in the *Federalist Papers* as “not only . . . a shield to the executive, but . . . an additional security against the enaction of improper laws.”81 This view is also supported by the early vetoes. President Washington vetoed a bill because of poor draftsmanship.82 Poorly drafted laws are not necessarily unconstitutional now, and probably would not have been invalid in the 1790s. In fact, over the first twenty-eight years of our republic, spanning seven administrations, only one of seven vetoes supports the encroachment theory.83 Adding strength to these arguments, the Supreme Court has recently spoken in favor of the wider view.84

There are also persuasive policy reasons for viewing the veto power as a broad tool of presidential review. At the Constitutional Convention, the Framers discussed and designed the veto as an integral component in our separation of powers scheme. But to be an effective check on the federal legislature, the veto need not and should not be limited to bills encroaching on the executive realm. The legislative branch can overreach without encroaching on the executive. Members of Congress often produce legislation that is the result of pressure employed by special interest groups. Indeed, while

81. THE FEDERALIST No. 73, at 495 (A. Hamilton) (J. Cooke, ed. 1961).
82. E. Mason, supra note 5, at 25. Madison also rejected a bill on the same ground. L. Fisher, supra note 71, at 86.
83. L. Fisher, supra note 71, at 86-87.

Proponents of a narrow veto power must also face the implication that restricting the President to vetoes on constitutional grounds significantly changes the role of the executive in our government. If the President may only veto acts that are clearly unconstitutional or that encroach on his constitutional turf, it must be because the Framers respected the President’s views on the Constitution, *but not on other less important factors* that affect the desirability of legislation. Professor Black’s implied purpose in limiting the veto power is to reduce the President’s role in policymaking related to legislation. See generally Black, supra note 74. But in one sense, limiting the veto power in this way accomplishes an increase in power. Under the narrow view, the President is no longer a general policymaker. Rather, he is elevated to an interpreter of the Constitution. It is more than a little startling to view the President as binding Congress to his personal view of the Constitution but having no power over issues arguably less important. Yet this is the result of the narrow view, since so few vetoes are eventually overridden.

Moreover, if the President’s sole role is to pass on the constitutionality of legislation, what role do the courts play when assessing the constitutionality of congressional action? If courts are to review the validity of legislation *de novo*, then the President’s veto is mere superfluity. Of course, this conclusion is not mandated, since scholars have debated whether the Framers anticipated judicial review. See generally R. Berger, *Congress v. The Supreme Court* (1969); 2 W. Crosskey, *Politics and the Constitution in the History of the United States* (1953).

If the Framers did not anticipate judicial review, then appointing the President a role in passing on the constitutionality of legislation makes some sense. If that is the argument, then judicial review must be squared with the limited veto power. Courts would presumably have to grant the executive some deference when determining the validity of an act passed over the President’s veto. Indeed, the appropriate review might be whether the President’s action was arbitrary and capricious. Professor Black’s proposal has quite sweeping implications for our system of government.
the legislative process is a model of compromise, the final product may be nothing more than an aggregation of narrow, special-interest proposals. There is nothing pejorative in this characterization of our representative democracy. Even the Framers recognized that laws could be enacted in the heat of factionalism. It is both appropriate and desirable that interest groups have access to our lawmakers.

The presidency can be characterized in a similar fashion. All elective officials must necessarily be responsive to interest groups in today's political environment. But the President represents a more national voter constituency, as compared to a single legislator. A presidential veto can moderate legislation for the national good or skew legislation toward the President's personal agenda. Each of these results is desirable. Since the veto clearly contemplates presidential participation in the difficult task of legislating, there is no good reason why the President should don blinders and ignore the full range of his policy, and even political, interests.

A narrow view of the veto power eschews this role for the President somewhat, resting his policy choices instead on execution of the laws. Admittedly, even if the President's role is only to execute the laws faithfully, there is considerable latitude for implementing a political agenda.

But if the President is a representative of all the people, there is no reason to limit his powers to respond to his constituency, at least in the absence of a clear, constitutional mandate to do so. There is certainly no express limitation on the veto power along the lines that Professor Black suggests. Indeed, "the most defective part of the Constitution beyond all question, is that which relates to the executive department. It is impossible to read that instrument without being forcibly struck with the loose and unguarded terms in which the powers and duties of the President are pointed out."  

85. The Supreme Court has recognized this interest. See Chadha, 462 U.S. at 948 (1983) (President "grafts" a national perspective on the legislative process).
86. See generally B. ECKHARDT & C. BLACK, JR., supra note 74, at 58-69.
87. See generally Black, supra note 74.

The President is clearly a partner in the legislative process. It is not an equal partnership, and the precise balance of power will likely never be fully defined. But as our understanding of the legislative/executive relationship progresses, certain actions begin to fall in the clearly legitimate category, or the clearly illegitimate category. For example, President Monroe once told the Congress in advance that he disagreed with pending legislation, and the House of Representatives was enraged. Such an action, it was argued, could prevent the enactment of a bill even though two-thirds of each House agreed with it. See L. Fisher, supra note 71, at 89-90. While that assessment is probably cor-
Of course, it is important to recognize that a broad veto power enables a recalcitrant President to interfere with positive congressional programs. We often view the legislative branch as responsible for designing comprehensive solutions to our nation's problems. Without the support of the President, however, Congress' task can be far more difficult. The potential of a subsequent veto can bog down legislation in Congress, and an actual veto is difficult to overcome. From 1789 to 1976, only ninety-two out of 2360 presidential vetoes were eventually overridden.

While these points most assuredly complicate Congress' task, they are necessary by-products of our political structure and are clearly contemplated by the Constitution. The fact that the President is often supported on veto overrides by his own political party (thus explaining the low override rate) does not cast his veto in a dark light. Rather it validates the political, and possibly popular, acceptance of his position. Moreover, when Congress is populated by a majority of members of the opposite party, it is not defenseless against a systematic use of the veto. At some point, the President's reliance on a negative power in the face of continued congressional initiatives will produce untoward political consequences for the executive. Additionally, the President must work with Congress if he is to achieve his own agenda. Thus, Congress can use its role in other lawmaking to force a President to moderate particular vetoes, just as a President uses his vetoes to moderate Congress.

rect, it does not make the President's preemptive strike unconstitutional. The Constitution provides that the President shall from time to time "recommend [to the Congress] such measures as he shall judge necessary and expedient." U.S. Const., art. II, § 3. If the President is to be a partner in the legislative process, see La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899), there can be no constitutional obstacle to his announcement that he will surely exercise his powers. Indeed, this is now a commonplace.

89. In a dialogue published in 1976, Professor Black and Rep. Bob Eckhardt, a congressmen from Texas, discussed the effects of a systematically employed veto on the daily functions of Congress. B. ECKHARDT & C. BLACK, JR., supra note 74, at 58-69. According to Eckhardt, even the potential of a veto can prevent any new program from being put into effect. Moreover, the shadow of a veto dangling over the Congress puts a drag on congressional initiative. But most significant, it is almost impossible to come up with a "veto proof" Congress. If congressmen from each party are equally likely to defect to the other side in an override vote, then the majority party needs more than two-thirds to be assured of an override. This mathematical problem is exacerbated by the diversity of interests represented in Congress. In a pinch, each congressman is more likely to vote in favor of his constituents, regardless of the party position. Thus, the practical effect of the super-majority required to override is that only seldom will Congress be able to muster the requisite votes. Id. at 60-61.

90. PRESIDENTIAL VETOES, supra note 60, at ix.

91. For a more thorough examination of these defenses, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 276-85 (1980).

I do not mean to intimate in any way that these defensive powers enable the courts to avoid deciding legal questions when they are properly presented. I do not agree that just because a branch can engage in constitutional self-help, the courts should not intervene.
The Line-Item Veto

Perhaps one of the most hotly contested aspects of the veto power, even today, is the extent to which the President may veto only part of a bill. The so-called "line-item" veto would allow the President to sign one part of an act and veto another part simultaneously.

This controversy is by no means new. In 1830, President Jackson signed a bill and simultaneously sent a message to Congress that essentially restricted the reach of the statute. In 1842, John Tyler followed Jackson's precedent and also issued a message restricting the scope of an act he had signed. The House protested, calling the message "a defacement of the public records and archives." In 1920, President Wilson ignored one section of a merchant marine bill and refused to carry it out on the ground that it was unconstitutional. More recently, President Nixon signed a military authorization bill in 1971 but stated that he would treat one of the sections as invalid. That section urged the President to set a final date for withdrawing American troops from Southeast Asia. The President stated: "[That section] is without binding force or effect, and it does not reflect my judgment about the way in which the war should be brought to an end. My signing of the bill that contains this section, therefore, will not change the policies I have pursued . . . ." President Ford followed Nixon's lead in a 1976 defense appropriations bill, stating he would treat the disputed portion as a complete nullity.

Many have concluded that the courts have no role in deciding these disputes between branches. See, e.g., Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), cert. granted, 106 S. Ct. 1258 (1986); J. Choper, supra, at 263. These issues have been rehearsed elsewhere and are beyond the scope of this Article.

92. At the time, Congress was in recess and could not react. But a later Congress deemed the action an attempted line-item veto. H.R. Rep. No. 909, 27th Cong., 2d Sess. 5-6 (1842); L. Fisher, supra note 71, at 90.


94. Id. at 92.

98. The bill provided that certain executive actions required the approval of the Appropriations and Armed Services Committees of both Houses. L. Fisher, supra note 71, at 93.

A related question is how much deference courts should pay to "contemporaneous" construction of a law by a signing President. President Truman signed a bill and sent a message to Congress purportedly construing some of the more ambiguous provision of the act. I concur in Professor Corwin's conclusion that courts cannot normally afford such a message much weight. Otherwise, the President could attribute an entirely different in-
As applied to appropriations bills, the line-item veto was until fairly recently an accepted, if not acknowledged, practice. Prior to the Impoundment Control Act of 1974,\textsuperscript{98} appropriations were generally considered permissive.\textsuperscript{99} Often in public works legislation, the President would choose to carry out some projects and not others. After abuses that led to enactment of the Impoundment Control Act, the President must follow strict procedures that call for either one- or two-house approval if he desires to withhold money.\textsuperscript{100} \textit{INS v. Chadha},\textsuperscript{101} however, casts serious doubt upon the validity of the Act.

A line-item veto statute for appropriations was recently pending in the Senate.\textsuperscript{102} The proposal was, in fact, quite simple. The legislation would have required the Clerk of the House of Representatives to divide up each numbered paragraph or item into a separate bill to be sent to the White House. Thus, each separate paragraph would have become an individual bill subject to an independent veto.

The text of the Constitution gives us little guidance on the constitutionality of such a measure. The Constitution clearly speaks of approval or disapproval of a whole bill at once, not piecemeal consideration of its parts.\textsuperscript{103} A change in "styling" may not be sufficient to
overcome the constitutional difficulties. The Veto Clause is one of the checks and balances in our system of separation of powers. Any change in the nature or effect of the Clause will necessarily implicate separation of powers concerns. These issues do not reside solely in academic playgrounds. They have a very real effect on constitutional decisionmaking in the courts. As the Chadha case teaches, the Supreme Court is very wary of fiddling with the constitutional balance struck between Congress and the President. Chief Justice Burger made this very clear:

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process... These provisions of [Article I] are integral parts of the constitutional design for the separation of powers... It emerges clearly that the prescription for legislative action in Article I, [Sections] 1 and 7 represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.\textsuperscript{104}

As Chadha shows, the Supreme Court has not hesitated to strike down schemes that interfere with the spirit of separation of powers, even though no explicit textual limitation exists. In Myers v. United States,\textsuperscript{105} for example, the Court rejected a statute that constrained the President's power to remove certain executive officers. The Court ruled that the power of removal is an inherent corollary to the power of appointment, at least in some cases.\textsuperscript{106} The Court based the ruling not on the text of the Constitution, but rather on the nature of the executive power. The Myers approach to the separation of powers

\textsuperscript{735} (1973) (arguing that line-item veto violates separation-of-powers policy). The resolution of this question could be crucial should the line-item veto ever reach the courts and be decided on the merits. A decision on this point would go far beyond the line-item veto because it would restrict congressional action on riders as well. For example, a ruling adverse to the line-item veto might prohibit adding a reapportionment rider to a defense-spending bill because, together, the subjects do not constitute a "bill" in the constitutional sense. Congress has attempted to force the President's hand with such nongermane riders. L. FISHER, supra note 71, at 93.

This analysis of the definition of a bill will be informed by congressional practice. It is commonplace that Congress can, through its actions, influence courts' interpretations of constitutional concepts. The line-item veto might be a perfect example. Although the Constitution refers to "bills," a court's main reference for a definition of that term may well be congressional practice. A court cannot define terms in the abstract; rather, it must look to Congress' actions to discern the meaning of this term. This is not to say that the mere fact that a congressional practice exists validates that very practice. Rather, the practice may provide a starting point for a court's analysis.

\textsuperscript{105} 272 U.S. 52 (1926).
\textsuperscript{106} But see Humphrey's Executor v. United States, 295 U.S. 602 (1935).
issue is well established. Thus, the line-item veto will likely survive constitutional scrutiny only if it retains the essence of legislative power in the Congress. This, of course, is the nub of the problem.

Moreover, for constitutional purposes, it makes no constitutional difference that Congress may agree to give up some power to the President in contrast to a presidential encroachment on Congress' powers or vice versa. The separation of powers protects not the three branches of our federal government but the people. The Framers designed the Constitution with three branches in order to avoid an undue concentration of power in the hands of any single entity because concentration of power was thought to lead to tyranny. For purposes of constitutional analysis, it matters not how the power came into a single entity's hands. The Constitution is violated if a single branch, through any means whatsoever, acquires more power than the Constitution gives it.

The line-item veto can be viewed as just such a transference of power. When Congress relinquishes its ability and duty to construct wholesale solutions to our nation's problems, the Constitution's "finely wrought . . . procedure" is at stake. Admittedly, when limited to the appropriations context, the line-item veto does not conjure up visions of impending tyranny. But it is a mistake to view appropriations as a different creature for constitutional purposes. Designating appropriations is a key element of one of the gravest federal problems of recent times—balancing the budget. Just as the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Gramm-Rudman-Hollings" Act) was a congressional attempt to solve this problem, so are decisions on how to spread the wealth throughout the federal budget. Thus, the line-item veto is better analyzed outside the appropriations context.

I do not intend to canvass entirely the legality of the line-item veto legislation. The arguments have been well rehearsed elsewhere. For purposes of this Article, however, the line-item veto legislation raises sharp separation of powers questions. Thus, it is important to explore briefly what ramifications this legislation presents for the delicate balance of power between the executive and legislative branches.

The obvious question raised by the line-item veto is whether it impermissibly transfers the legislative power of article I into article II

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109. Supra note 103 and accompanying text.
hands, thereby upsetting the constitutional scheme. At the nub of this issue is a definition of the legislative power within the meaning of article I. Once we have determined the kernel of legislative power, the issue of improper transfer follows more easily.

Unfortunately, the Supreme Court has never conclusively treated the boundaries of article I vis-a-vis article II. The Court came close, however, in The Steel Seizure Case. When the Nation's steel mills were struck in the midst of the Korean War, President Eisenhower ordered the Secretary of Commerce to seize the mills. The President justified this action as imperative to continue the war effort and incident to his powers as Commander-in-Chief. The Supreme Court rejected the seizure, but the grounds for finding it illegal were varied. It appears that despite the wide-ranging comments of several Justices on the limits of article II, the case was decided on a narrower ground. At least four concurring Justices found the action illegal because Congress, in legislating on labor problems, had expressly considered and rejected giving such a power to the President. Since the Court would not construe the President's military powers to allow this kind of domestic activity, the seizure was struck down. Narrowly construed, The Steel Seizure Case only defines the presidential military power and the limit of implied presidential power in the face of contrary congressional action.

While The Steel Seizure Case restricts presidential power, it cannot be taken as a case delimiting congressional power. There is some language arguably defining Congress' article I powers, but the Court's main concern was the legality of the seizure—an executive action taken contrary to admittedly valid congressional action. Justice Jackson's influential concurrence focuses entirely on executive power in the face of congressional action. He defined three categories of analysis: presidential action pursuant to congressional authorization, where presidential power is at its height; presidential action incompatible with congressional will, where presidential power "is at

115. Youngstown Sheet & Tube, 343 U.S. at 593, 634, 655, 660.
117. Youngstown Sheet & Tube, 343 U.S. at 635-37 (Jackson, J., concurring).
118. Id. at 637.
its lowest ebb.\textsuperscript{119}

The line-item veto might at first glance seem to fall in the first of Justice Jackson's categories, but further analysis demonstrates why \textit{The Steel Seizure Case} does not provide a rule for deciding the legality of the line-item veto. When the President acts pursuant to congressional authorization, his power is at its zenith because he can rely on his own constitutional powers or on powers granted him by Congress. As far as the line-item veto is concerned, however, no one claims that Congress has granted the President inherent power to veto legislation paragraph by paragraph, nor is such a delegation granted by article II. Such an interpretation of article II would run contrary to the long-perceived understanding of article II. Thus, if Justice Jackson's concurrence provides a relevant mode of analysis, presidential authority must emanate from the line-item veto legislation itself. But the question presented by the line-item veto is not the President's authority to execute the line-item veto law. Rather, the validity of the line-item veto legislation itself is at stake. Presidential authority is augmented by legislation granting the executive branch certain powers only when that enabling legislation is itself valid. That is the question under consideration here. To sharpen the point somewhat, no one doubted in \textit{The Steel Seizure Case} that Congress had authority to enact the Taft-Hartley Act. In that act, several Justices found that Congress had considered and rejected seizure as a remedy for labor strife. With the line-item veto, we must overcome this initial question before reaching the issue of how the legislation affects the President's powers.

Nonetheless, the above analysis does raise a related point on the power of Congress to delegate authority to the President. Justice Jackson's concurrence merely states that a valid delegation increases presidential power. In and of itself, this is hardly a startling conclusion. But the delegation doctrine cases do provide arguable support for the validity of the line-item veto legislation. Over the past fifty years, the Supreme Court has not struck down a single delegation of lawmaking authority from Congress to the President.\textsuperscript{120} While some commentators believe that the prospect of the Court ever striking down a single delegation again is nil,\textsuperscript{121} there is a smattering of support on the Court\textsuperscript{122} as well as among the academic community\textsuperscript{123} for the doctrine's continued vitality.

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.} at 673-38.
  \item \textsuperscript{120} \textit{See} 1 K. \textsc{Davis}, \textit{Administrative Law Treatise} \textsection{} 3.1, at 149-50 (1978).
  \item \textsuperscript{121} \textit{See}, e.g., \textit{Id}.
  \item \textsuperscript{123} \textit{See}, e.g., Schoenbrod, \textit{The Delegation Doctrine: Could the Court Give it Substance?}, 83 Mich. L. Rev. 1224 (1985).
\end{itemize}
The doctrine is relevant to the line-item veto because the delegation doctrine allows Congress to pass some of its powers to the executive. At the outset, it is important to note that line-item veto legislation is process-oriented, rather than outcome-oriented. It is undisputed that the delegation doctrine does not allow Congress to delegate to the executive the authority to enact a code of laws on a particular subject without at least an organic act that can be construed to provide standards. Rather than a delegation of power to fill in the interstices of a law, such a delegation would be an abdication of the lawmaking role. An accepted interpretation of the Supreme Court's delegation cases requires Congress to set judicially enforceable standards before it may delegate lawmaking authority to agencies. When such standards are explicitly stated (or at least judicially inferable), Congress has in fact legislated, and the subsequent delegation can be seen as a "necessary and proper" element of the legislative scheme. Moreover, the agency's subsequent interpretation of the organic act can be seen as an execution of the laws pursuant to article II.

The line-item veto legislation stands on slightly different footing. The legislation is not substantive; it is procedural. The procedure affected is the distribution of power between the legislative and executive branches, as defined in article I and article II. The validity of the delegation of power goes to the validity of the line-item veto legislation itself. If articles I and II disable congressional action on the line-item veto, any presidential power exercised pursuant to such a statute is a fortiori invalid. In the typical delegation cases, there is no question that Congress can legislate in the area. Using the delegation doctrine to validate the line-item veto is classic bootstrapping. Moreover, when put to this office, the delegation doctrine validates much greater delegations than just the line-item veto. For example, under this theory Congress could legally delegate the design and enforcement of all federal criminal statutes to the President with

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124. Cf. 1 K. Davis, supra note 120, §§ 3.5-3.7 (arguing that requirement of standards is weak, if not nonexistent).
125. Id. § 3.4, at 159.
127. By referring to article II agencies, I mean only to point up the separation-of-powers problems between the executive and legislative branches. Some agencies are "independent" and hold a precarious theoretical position in our government. See Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984); Note, Incorporation of Independent Agencies into the Executive Branch, 94 Yale L.J. 1766 (1985).
merely an act that executes the delegation. Yet this is precisely the type of concentrated power the Constitution sought to avoid by separating powers. Thus, it is clear that the delegation doctrine has limits and cannot validate shifts in the Constitution's balance of power.

With this limitation in mind, however, it is clear that the delegation cases are still relevant. In a sense, whenever the Supreme Court upholds a delegation, it upholds a shift in the lawmaking power. Agency promulgated rules and regulations have the force of law, yet are not the direct products of Congress. No theory can support this result without allowing some transference of power. The Court has never held that such delegations transfer the legislative power, at least as defined by article I.

The process/substance distinction may be sufficient to distinguish the delegation cases as authority for the line-item veto. But, the delegation cases do admit of a continuum of delegations. Perhaps where Congress has exercised the legislative power of article I on the substance of an issue, delegations to fill in the gaps are necessary and proper and do not implicate the process of legislating itself. But when a delegation of power directly implicates the constitutional balance of power, the calculus has changed. As Chief Justice John Marshall wrote in 1825:

> It will not be contended that Congress can delegate to the courts, or to any other tribunal, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislative may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Ultimately, courts must be wary of validating legislation that alters the internal dynamics of Congress in a way that affects the balance of power between the executive and legislative branches. It is one thing for Congress to decide, on an ad hoc basis, that legislation should be subject to a line-item veto. The separation of powers issues are sharpened, however, when Congress legislates line-item veto treatment for all bills. A particular instance of deference to the President may be seen as a political decision; a legal rule of deference goes beyond the politics of the moment and may change the balance of power for future generations.

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128. See 1 K. Davis, supra note 120, § 3.4, at 159.
My aim here is not to resolve these extremely difficult questions regarding the Constitution's balance of power framework. These perplexing issues do no more than highlight the fundamental role that the veto plays in the separation of powers. The fact that seemingly innocuous legislation can raise such a constitutional storm shows that the subject of the legislation is sensitive and important. The veto power is a key element in the separation of powers because it is an instrument that one branch may use to check another. And such instruments are central to our constitutional scheme. Only through the paradox of sharing and intersecting powers between branches can we achieve the true aim of separated powers—the avoidance of concentrated powers.

Unfortunately, these intriguing questions may never be answered. The line-item veto bill is currently bogged down in the Senate. It may not be these cosmetic questions of constitutional interpretation that eventually sound the death knell for the line-item veto. If I have learned anything in my more than twenty years in Washington, it is that politicians, like most people, are loath to give up power once they have got it. Yet that is precisely what the line-item veto does; it transfers power from Congress to the President.

THE POCKET VETO

No discussion of the veto power would be complete without mention of the pocket veto. Under article I, if the President fails to return a bill within ten working days after presentment, the bill becomes a law. That constitutional rule, however, also contains an exception. The bill does not become a law if, in the language of the Constitution, "the Congress by their Adjournment prevent its Return." This is the pocket veto, and it has significant practical impact on federal legislation. Of the 2,360 vetoes between 1789 and 1976, 993 were pocket vetoes. This number is significant because the pocket veto is an absolute veto. The bill is thus struck down permanently, with no override opportunity. If the President wants to avoid a partisan political fight, or if the President fears an override, a pocket veto presents a golden opportunity.

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133. Id.
134. PRESIDENTIAL VETOES, supra note 60, at ix.
Last year in *Barnes v. Kline*, the court on which I sit decided a question concerning the pocket veto. Congress had passed a bill that required the President to certify that El Salvador was making significant efforts to curb human rights violations before he could send military assistance to that nation. In November of 1983, on the final day of its first session, Congress presented the bill to President Reagan. The President refused to sign it, and he argued that the adjournment of Congress prevented the bill's return, making his action a valid pocket veto.

Representative Michael Barnes, joined by the Senate as a body, sued the President, arguing that the intersession adjournment of Congress did not prevent the bill's return, and it thus became law after ten working days. Our court agreed that the adjournment did not prevent the bill's return, and that it did indeed become law. This decision was not without controversy; Judge Bork dissented on the ground that none of the plaintiffs had standing.

The *Barnes* case espouses a mode of constitutional decisionmaking that I believe is the only way to attack a sensitive issue of separation of powers. The problem that the Pocket Veto Clause addresses is clear. Without such a clause, Congress could pass a multitude of bills at the end of a session and send them all to the President. The President could not possibly review all of the bills within ten days, and some would thus automatically become law. The Framers were careful not to memorialize into the Constitution their particular vision of how Congress would operate. The Clause states that a bill shall not become law if an adjournment prevents its return. It does not say that a bill shall become law automatically if the Congress shall adjourn. Thus, the Framers must have anticipated that some adjournments would not prevent a return, and left the finer details to the courts.

The courts, in turn, have taken a practical view of what circumstances prevent a return, looking to the realities of congressional and executive practice. In *The Pocket Veto Case* of 1929, the Supreme Court tackled the Pocket Veto Clause for the first time. The Court considered a bill that was presented to the President within ten days of the close of the first session of the 69th Congress. The President neither signed it nor attempted to return it. The Court found the bill validly pocket vetoed, since no Congress was in session to accept a

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135. 759 F.2d 21 (D.C. Cir. 1985) (McGowan, J.), cert. granted, 106 S. Ct. 1258 (1986). The United States Supreme Court heard oral argument on November 4, 1986. One issue before the Court was the whole notion of congressional standing. 759 F.2d at 41 (Bork, J., dissenting).

136. *Id.* at 30-41.

137. *Id.* at 41 (Bork, J., dissenting).


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return of the bill at the end of the tenth day. The Court specifically rejected a theory that would have allowed an agent of the Congress to accept the return, because there was apparently no such congressional practice, and such an agent could conceivably hold the bill "for days, weeks or perhaps months, ... keeping the bill ... in a state of suspended animation." The Court found that such uncertainties would be unbearable.

Nine years later, in 1938, the Supreme Court decided Wright v. United States. In that case, the Senate, which had originated the bill, broke for a three-day adjournment less than ten days after the bill was presented to the President. During that break, the President returned the bill to the Secretary of the Senate, who "was functioning and was able to receive, and did receive, the bill." The Supreme Court found that the three-day adjournment did not prevent the bill's return, largely because, in contrast to The Pocket Veto Case, there was no question that the bill would be in purgatory for an indefinite period of time. The Wright decision reflected a practical construction of the constitutional requirements in light of changing congressional practice.

Almost forty years later, our court wrote the next chapter in the history of the pocket veto. In Kennedy v. Sampson, we ruled that a five-day adjournment of both houses was sufficient to prevent return of a bill, especially when the Secretary of the Senate had been authorized to receive veto messages from the President during the recess. The court, speaking through Judge Tamm, noted that modern congressional practices presented neither of the operative hazards recognized in The Pocket Veto Case: long delay and public uncertainty.

In the Barnes case, we faced a slight modification of these cases: a short intersession adjournment. In modern times, intersession adjournments have averaged only four weeks. Congressional staffs operate continuously during this time. Most importantly, congressional officers are authorized to accept a veto message from the President. Thus, we concluded in Barnes that such adjournments do not prevent a bill's return in the constitutional sense.

The significant lesson that these decisions teach is that constitu-
tional interpretation adapts to changes in society. After all, the Constitution is a living document and must be interpreted in light of changed circumstances. Actions that produced unreasonable delay and uncertainty at the time of The Pocket Veto Case, over fifty years ago, now appear perfectly acceptable. The wisdom of this realistic approach to constitutional interpretation cannot be overstated. The separation of powers should not rest solely on theoretical distinctions. It must also rest on the practical, everyday effects of constitutional decisionmaking. Courts often decide cases in the academic stratosphere without so much as a blink at reality. The cases I have just discussed are a breath of fresh air on this score. In these cases, the courts have recognized the importance of theoretical concerns, but have not subjugated the effects of the practical.

Nevertheless, one of the most difficult aspects of judging is reconciling the theoretical with the practical. Striking a balance between interpreting the legal requirements of the Constitution through theory and through practice is challenging and worrisome. The pocket veto cases demonstrate that theory and practice can be coextensive. The line-item veto might not be amendable to such a happy, or at least easy, resolution. A conflict between theory and practice faced the Supreme Court in INS v. Chadha. There, the Court held that theory, which conflicted with accepted practice, must prevail. Regardless of the merits of that particular decision, the Supreme Court is surely right in refusing to subjugate theory to even a long-accepted practice. For denigration of constitutional theory in favor of seemingly accepted practice is but the first step down the road to unrestrained majority rule. Accepted practice is merely another name for the current majority view. The Constitution commands us to reject those shifting majorities when they transgress the ground rules of our society. There is always a danger, however, that the positive will become the normative. Thus, judges must be careful to decide legal issues with an eye toward the realities of our world, but, ultimately, guided by the aspirations of our world.

CONCLUSION

The veto is really but one single check in our separation of powers scheme. As an instrument of conflict, it has many salutary effects on our political system: it focuses the public eye on disputes between the executive and Congress; it provides a check on the legislature's tendency to dominate our tripartite government; and it serves as a countervailing policy tool for the President. The veto does not create conflict simply for conflict's sake. Disputes arising out of the veto keep our government running on an even keel, even though the waters are sometimes rough. For the most part, however, the veto power has admirably performed its function.
In a sense, the Veto Clauses are much like many other sections of the Constitution. They appear simple on first impression, but deeper analysis reveals serious constitutional tensions. The Veto Clauses make the President a partner in the legislative process. But the President also has the undeniable duty to take care that the laws be executed, and to uphold the Constitution. These responsibilities can conflict all at once, producing exceedingly difficult constitutional and political questions. More frequently, the constitutional obligations harmonize, and our system runs perfectly.

The point, however, is that we must always look at the Constitution as a whole to discern its underlying purposes and the interrelationships of its various provisions. Indeed, this is one of the most important aspects of mastering constitutional law. Each article, section, and clause is a piece of the larger puzzle that is constitutional law. I hope that I have shown how one seemingly simple provision, the veto power, has much deeper meaning for our constitutional system than might first appear.