Deviant Executive Lawmaking

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Introduction

In a moment of hyperbole, Senator Ted Stevens boasted that the Line Item Veto Act (the “Act”) would be “the most significant delegation of authority by the Congress to the President since the Constitution was ratified in 1789.” Other supporters of the Act puffed similarly: “Make no mistake about it, [the Line Item Veto Act] will shift a great deal of new power to the President.” Indeed, in the year after the Act took effect, President Clinton canceled a total of eighty-two tax, entitlement, and appropriation provisions that supposedly would have saved $1.9 billion over the following five years.

In a grand experiment, Congress passed the Act to help reduce “runaway federal spending and a rising national debt.” In contrast to familiar delegations that convey authority to issue regulations, the Act facilitated

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3 Id. at S2978 (statement of Sen. Kyl).


The Act was not the first congressional attempt to cede increased control over appropriations to the President. The Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688 (1994), authorizes two types of presidential “impoundments”: deferrals and rescissions of budget authority. “Deferrals” affect the timing of expenditures and result from “withholding or delaying the obligation or expenditure of budget authority . . . provided for projects or activities.” Id. § 682(1). Absent congressional approval, however, the President may not defer budget authority beyond the fiscal year in which he proposed the deferral. See id. § 684(a). “Rescissions” are proposed cancellations of budget authority. If within forty-five days of the President’s proposed rescission, Congress does not ratify the proposal via a rescission bill, the funds must be expended.
presidential "cancellation"10 of three types of provisions of future statutes: (a) specific "dollar amount[s] of discretionary budget authority"; (b) "item[s] of new direct spending"; and (c) "limited tax benefit[s]."11 Within five days of having signed any of the above into law, the President could cancel any such provision if he found that a cancellation would: (a) "reduce the Federal budget deficit"; (b) "not impair any essential Government functions"; and (c) "not harm the national interest."

See id. § 683(a)-(b). Deferrals and rescissions essentially amount to presidential pleas for legislative action.

10 Under the Act, "cancel" meant "to rescind" or to prevent provisions of law "from having legal force or effect." 2 U.S.C. § 691e(4) (Supp. II 1997). One could label the President's action a cancellation, a repeal, or a rescindment because all three words characterize an action that precludes the provision at issue from having at least some future legal effects. Accordingly, this Article uses the three terms interchangeably. But see infra note 210 (discussing Justice Breyer's contention that cancellations were not really repeals at all).


12 Id. § 691(a)(A)-(B). The authority to "cancel" extant statutory provisions is different from both executive impoundment and a true line item veto. Impoundments are unilateral executive decisions to withhold funds in the face of mandatory appropriations statutes. See Louis Fisher, The Politics of Impounded Funds, 15 ADMIN. SCI. Q. 361, 361 (1970). Cancellation power of the type found in the Act, however, results from bilateral decisions (by Congress and the President) that can make appropriations "optional" in some sense and, more significantly, can extend beyond appropriations to other types of laws. A true line item veto differs from the Act's cancellation authority in that a true line item veto would permit the President to alter a bill before signing it into law. See Thomas O. Sargentich, The Future of the Item Veto, 83 IOWA L. REV. 79, 95 (1997). The Act, and cancellation authority generally, however, permit the President to alter the law after a bill has become the law. See 2 U.S.C. § 691(a).

Those who believe in the soundness of unconstrained presidential impoundment of funds should find the presidential cancellation of spending provisions acceptable as well. Because cancellation authority can extend well beyond the appropriations context, however, the propriety of general cancellation authority should be of interest to even defenders of impoundments. For a discussion of the history of presidential impoundments, see Fisher, supra. For a critique of executive impoundments, see David A. Martin, Note, Protecting the Fisc: Executive Impoundment and Congressional Power, 82 YALE L.J. 1636 (1973).

Likewise, even those who insist that the President may selectively veto items in legislation that Congress presents to him (a true and inherent line item veto), see Stephen Glazier, The Line-Item Veto: Provided in the Constitution and Traditionally Applied, in FORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 9, 12 (National Legal Ctr. for the Pub. Interest 1988); Douglas W. Kmiec, OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 CARDOZO L. REV. 337, 353-59 (1993); J. Gregory Sidak & Thomas A. Smith, Four Faces of the Item Veto: A Reply to Tribe and Kurland, 84 NW. U. L. REV. 437, 478-79 (1990), may not believe necessarily that Congress may permit the President to cancel existing laws. The questions are analytically distinct.

As general matters, neither impoundment nor a true line item veto seems constitutional. Impoundment of a mandatory appropriation or entitlement program seems to violate the Take Care Clause. See U.S. CONST. art. II, § 3 (stating that the President "shall take care that the Laws be faithfully executed"). Moreover, the text of the Presentment Clause, U.S. CONST. art. I, § 7, cl. 2, precludes the notion that it sanctions the use of a line item veto. See Nelson Lund, Rational Choice at the Office of Legal Counsel, 15 CARDOZO L. REV. 437, 456 n.46 (1993) (arguing that because the Presentment Clause provides that the President must return an entire bill with objections to Congress in order to veto it, the Clause necessarily precludes arguments that the President may return only parts of a bill). For a critique of the line item veto theory generally, see Michael B. Rappaport, The President's Veto and the Constitution, 87 NW. U. L. REV. 735 (1993).

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We may never know the grand experiment’s true impact on fiscal policy because the Supreme Court “canceled” the Act. In June 1998, the Supreme Court held in *Clinton v. City of New York* that the Presentment Clause implicitly precluded cancellation authority. According to the Court, Congress may not authorize the President to cancel provisions of law unilaterally and thereby bypass bicameralism and presentment.

The Court’s constitutional “cancellation” of the Act was unwarranted and inadvertently jeopardizes numerous other statutory delegations. Using the Act as a foil, this Article contends that cancellation delegations and modification delegations, like generic lawmaking delegations, can be constitutional. Part I describes the Act and the lingering budgetary effects of presidential cancellations. Part II contends that Congress, under the Necessary and Proper Clause, may delegate cancellation and modification discretion. Part II also furnishes frameworks for determining whether particular cancellation and modification delegations are unconstitutional. Part III considers and ultimately rejects objections to the delegation of such authorities. The Constitution simply does not draw a bright line between cancellation and modification delegations on the one hand and the familiar lawmaking delega-

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14 U.S. CONST. art. I, § 7, cl. 2.
15 *See Clinton v. City of New York*, 118 S. Ct. at 2103 (claiming that the Constitution implicitly prohibits “unilateral Presidential action that either repeals or amends parts of duly enacted statutes”).
16 *See id.* at 2106-07.
17 I am chagrined to admit that I previously thought that Congress could not cede line item veto authority. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 609 n.274 (1994). Upon reflection, I came to my earlier view too hastily and without sufficient consideration of the many different forms of line item veto power.

Despite my affinity for examining constitutional questions from an “originalist” perspective, see, e.g., *id.* at 546-47, I have not reconstructed the original meanings of the constitutional terms relevant to the question here. Other scholars have attempted to recover the original intentions of the founding generation regarding the line item veto and have come to differing conclusions. Compare Judith A. Best, *The Item Veto: Would the Founders Approve?*, 14 PRESIDENTIAL STUD. Q. 183, 186 (1984) (contending that the item veto is consistent with the Founders’ intent to give the President effective veto power), with Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 394 (1992) (claiming that the Framers’ intent with respect to a line item veto is unclear). These analyses, however, consider the constitutionality of an inherent item veto, rather than a statutorily granted authority to cancel statutes. To my knowledge, the founding generation did not consider whether Congress could delegate the authority to cancel or modify existing laws.

18 *See infra* notes 251-252 and accompanying text.
19 Throughout this article, the terms “cancellation authority” and “cancellation delegation” refer to an executive officer’s delegated authority to rescind statutory provisions. The terms “lawmaking authority” and “lawmaking delegation” refer to an executive officer’s delegated power to create legal rules or standards through the issuance of regulations. “Modification authority” and “modification delegation” refer to an executive officer’s delegated authority to modify statutory standards.
20 Because this Article examines the propriety of cancellation delegations generally, it does not address every supposed constitutional difficulty posed by the Act, but only those applicable to cancellation and modification authority generally. Thus, this Article does not maintain that the Act is constitutional in all respects.
tions on the other, sanctioning the latter in many circumstances while utterly rejecting the former.\textsuperscript{21}

An uphill struggle lies ahead. Visceral reaction leads many to view cancellation and modification authority with more than a healthy dose of skepticism.\textsuperscript{22} Surely executive repeals or modifications of congressional statutes must violate something in our Constitution. Such actions seem to thwart congressional will, appear to create statutes that Congress never passed, and generally strike many as blending powers in contravention of our Constitution's separation of powers. Moreover, cancellation and modification authority conceivably could extend to all federal laws, including banking, environmental, and foreign affairs laws. Such possibilities may seem frightening. Notwithstanding these understandable reactions, the dubious reader should try to reserve judgment. Prejudices and fears should not blind us to the propriety of cancellation and modification authority.\textsuperscript{23}

\textbf{I. An Outline of the Line Item Veto Act}

Although this Article considers the propriety of executive repeals and modifications generally, a rudimentary understanding of the Line Item Veto Act will prove useful. This Part summarizes the Act's facilitation of cancellation authority, congressional responses to executive repeals, and the budgetary effect of cancellations. This synopsis should help to illuminate why the Act's title, timing, and structure misled the Court, leading the Court to reach the wrong conclusion.

\textsuperscript{21} Assuredly, Congress's ability to delegate has limits. In fact, many scholars argue that the courts should strengthen the nondelegation test. \textit{See, e.g.,} DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 183 (1993) (arguing that Congress should "state the law" so that statutes, rather than administrative agencies or courts, resolve most cases). Even if the courts heeded the many calls for adding teeth to the nondelegation doctrine, however, cancellation and modification authority would remain delegable in some circumstances. \textit{See infra} note 121 and accompanying text.


\textsuperscript{23} Considering the constitutionality of executive repeals in the context of the Line Item Veto Act is particularly perilous. The title of the Act is a liability because it obscures more than it describes. As noted earlier, the Act simply does not delegate true line item veto authority. \textit{See supra} note 12. Moreover, because the Act's rule of construction applies across many statutes, the Act appears to delegate a great deal of authority. In fact, however, the Act does not cede any authority. It merely facilitates the delegation of cancellation authority. \textit{See infra} note 30.
A. Presidential Cancellations

Under the Act, Congress permitted the President to "cancel in whole" certain portions of laws that had been "signed into law pursuant to Article I, Section 7, of the Constitution."24 If a statute became a law through a veto override, however, the President could not have repealed any provisions in that statute because such provisions were not signed into law.25 Likewise, the President could not rescind any provision that became law through the simple passage of time.26

A cancellation could take place only upon presidential findings that it would: (a) "reduce the Federal budget deficit"27; (b) "not impair any essential Government functions"; and (c) "not harm the national interest."28 Further, cancellations were effective only when the President notified both chambers of Congress of the cancellation within five calendar days (excluding Sunday) after signing the law.29

24 2 U.S.C. § 691(a) (Supp. II 1997). One might wonder why Congress structured the Act the way it did. Congress surely could have ceded greater discretion to the President over fiscal matters without authorizing "cancellations." With respect to appropriations, Congress could have granted authority to spend "up to" some dollar limit. Such authority is undoubtedly constitutional. See Clinton v. City of New York, 118 S. Ct. 2091, 2117 (1998) (Scalia, J., concurring in part and dissenting in part). Likewise, Congress might have ceded discretion over tax and entitlement provisions, granting the President the latitude to decline to enforce tax benefits and entitlement changes. The authority to determine spending within a broad range or to decline to enforce entitlement and tax statutes, however, would have been a significantly broader delegation of authority than mere cancellation authority. With cancellation authority, the President faced something approaching an all or nothing choice.

25 See U.S. Const. art. I, § 7, cl. 2 (stating that when Congress overrides a presidential veto, the legislation becomes law notwithstanding the lack of presidential signature). This feature of the Act prevented a President from vetoing an act and then subsequently canceling its provisions if Congress overrode the veto.

26 Ordinarily, a bill automatically becomes a law if the President does not return the bill to Congress with objections within ten days of its presentment to him. See id.

27 "Budget deficit" refers to the amount by which outlays exceed receipts during a fiscal year. See 2 U.S.C. § 622(6) (1994). "Outlays" refers to "expenditures and net lending of funds under budget authority" for a fiscal year. Id. § 622(1). "Receipts" for a fiscal year generally equal the sum of all tax collections from the public and payments into federal social insurance programs such as Social Security. See ACCOUNTING & FIN. MANAGEMENT Div., U.S. GEN. ACCOUNTING OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 27 (rev. ed. 1993).

Because there likely would have been budget surpluses for the foreseeable future, see Martin Crutsinger, Forecast Calls for $1.6 Trillion in Surpluses, SAN DIEGO UNION-TRIBUNE, Sept. 7, 1998, at A5, available in 1998 WL 4029808 (claiming that budget surpluses likely will continue for eleven years), the President would not have been able to make the required deficit reduction finding. Thus, he would not have been able to cancel anything in the future.


29 See id. § 691(a)(B).
Under the Act’s rule of construction, the President was authorized to “cancel in whole” three types of provisions in future laws: (a) “any dollar amount of discretionary budget authority”; (b) “any item of new direct spending”; and (c) “any limited tax benefit.” Recognizing that these terms were rather obscure, Congress defined them.

1. Discretionary Budget Authority

“Any dollar amount of discretionary budget authority” consisted of various types of budget authority. Typically, it included “the entire dollar amount of budget authority . . . specified in an appropriation law.” Thus, if the Defense Appropriations Act provided one billion dollars in budget authority for the development of a tank, the President, pursuant to the Line Item Veto Act, could have canceled the entire tank appropriation after making the requisite findings. The President, however, could not reduce or increase the amount of budget authority. He only could cancel the full amount that Congress appropriated.

Properly understood, the Act itself delegated nothing. The President could not cancel anything merely because of the Act’s passage. He had cancellation authority only when Congress subsequently passed an act containing cancelable items. In other words, the President could use the Act to “interpret” a subsequently enacted statute as sanctioning cancellations of certain provisions, unless that statute provided otherwise. In this way, the Act was a rule of construction in that it colored how to construe future acts of Congress. Cf. Bryan A. Garner, A Dictionary of Modern Legal Usage 487 (1987) (“[A] rule of construction is a guide to the court in interpreting a statute . . . .”). If Congress had wanted to bar cancellations of provisions in a particular bill, it merely had to provide that the President could not cancel any provisions in such bill. See infra notes 275-276 and accompanying text.

With respect to discretionary budget authority, see infra Part I.A.1, “cancel” meant “to rescind.” 2 U.S.C. § 691e(4)(A). With respect to new direct spending or a limited tax benefit, see infra Parts I.A.2-3, it meant to prevent such items of law “from having legal force or effect.” 2 U.S.C. § 691e(4)(B)-(C). As stated earlier, this Article uses the statutory term “cancel” interchangeably with “repeal” and “rescind” because all three terms accurately describe presidential action under the Act. See supra note 10.


See id. § 691e (defining ten terms as used in the Act).

Id. § 691(a)(1).

Id. § 691e(7)(A). Appropriations acts and entitlement statutes make budget authority (the power to incur financial obligations) available to executive officers for use. See 2 U.S.C. § 622(2)(A) (1994). Outlays result from the use of appropriated budget authority. See id. § 622(1). The amount of budget authority appropriated is thus a critical factor in determining outlays. Indeed, Congress does not vote on the outlays of a given year. Rather, outlays depend upon budget authority provided by prior and current year legislation.

Perhaps due to the potential constitutional problems with spending more than Congress appropriated, see U.S. CONST., art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”), the Act did not grant the President a power to supplement an appropriations act. Because the President lacked such statutory authority, he could not have transferred budget authority from one account to another. In practice, however, the Executive Branch may reallocate funds if the congressional committee with jurisdiction approves. See Kate Stith, Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings, 76 CAL. L. REV. 593, 612-13 (1988).

Nor could the President void restrictions on the use of funds. See 2 U.S.C. §691e(7)(B)(iv). Thus, if an appropriations act granted $15 million for medical research, but provided that no funds could be spent on cloning research, the President could not cancel the cloning prohibition after he expended the funds.
2. New Direct Spending

“Direct spending” generally included entitlement authority and budget authority provided by laws other than appropriations. A program that granted subsidies to farmers who refrained from planting certain crops would have been an example of direct spending. “New direct spending” encompassed any provision “estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent [baseline]” for entitlement spending. The Office of Management and Budget (“OMB”) generates this entitlement baseline assuming that Congress will reauthorize entitlement programs in their current form (i.e., that they will be extended as is, even if they are set to expire). Accordingly, if a statute created a new entitlement program or contained a new provision (or provisions) that would result in either increased budget authority or increased outlays above the existing entitlement baseline, the President could have canceled that program or provision.

3. Limited Tax Benefits

“[L]imited tax benefits” encompassed “any revenue-losing provision... providing a federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries,” unless the provision treated all similarly situated persons the same. “Limited tax benefits” also included provisions that provided transitional tax relief to ten or fewer beneficiaries.

Under the Act, Congress would decide whether to include a list of limited tax benefits in a bill, to conclude that a bill contained no limited tax benefits, or to say nothing about limited tax benefits in a bill. If an act contained a list of limited tax benefits, the President could have canceled only those items contained in that list. If an act declared that it contained no limited tax benefits, the President could not cancel any tax provisions, even if, in the President's judgment, the act contained limited tax benefits. The only instance in which the President could have exercised independent

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38 See id. § 691e(5) (defining “direct spending” as (1) “budget authority provided by law (other than an appropriation law”); (2) “entitlement authority”; and (3) “the food stamp program”).
39 See 2 U.S.C. § 907(b) (1994) (establishing the method for calculating the baseline for direct spending and receipts). “For any budget year, the baseline refers to a projection of current-year levels of new budget authority, outlays, revenues, and the surplus or deficit into the budget year and the outyears based on laws enacted through the applicable date.” Id. § 907(a).
42 As the committee report observed, any provision that increased direct spending was cancelable, whether or not it was part of a larger act that reduced overall direct spending. See H.R. Conf. REP. 104-491, at 36 (1996), reprinted in 1996 U.S.C.C.A.N. 892, 913-14.
43 See id. § 691e(9)(A)-(B).
44 See id. § 691e(9)(A)(ii).
45 See id. § 691f.
46 See id. § 691f(c)(1).
47 See id.
judgment regarding the existence of limited tax benefits was if a bill were signed into law without any provision relating to limited tax benefits.\(^{48}\)

**B. The Legislative Response: The Disapproval Bill**

Despite the Act's title, Congress could not override, in a constitutional sense,\(^{49}\) a presidential "line item veto." By statute, Congress had given the President the discretion to cancel portions of existing law. Whatever one called this authority (line item veto, cancellation, or repeal), it was distinct from the constitutional authority to veto proposed legislation.\(^{50}\) Thus, an executive repeal could not be subject to a veto override vote.

Congress, however, could have reversed an executive cancellation with legislation. Under the Act, Congress "empowered" itself to pass a simple "disapproval bill"\(^{51}\) that had the effect of reviving the canceled provisions and their original effective dates.\(^{52}\) A disapproval bill did not require explicitly that the President expend funds or provide tax benefits. Rather, it literally "disapproved" of cancellations made by the President.\(^{53}\) The Act provided a disapproval bill with its intended effect by declaring that cancellations were effective unless rescinded by a disapproval bill.\(^{54}\) A disapproval bill was the only type of bill that the President could not cancel.\(^{55}\)

**C. Effect of Cancellations**

Although the term "cancel" meant either to "rescind" the provision or to preclude the item "from having legal force or effect,"\(^{56}\) canceled items had lingering budgetary effects. To ensure that Congress used the money saved from cancellations to reduce the budget deficit rather than for other purposes, the Act contained "lockbox" mechanisms requiring the OMB to ensure that Congress did not divert the savings from executive repeals to offset increased spending or decreased revenue.\(^{57}\) For cancellations of discretionary budget authority, the OMB made downward adjustments to the discretionary spending cap that is part of the Balanced Budget and Emergency

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\(^{48}\) See id. § 691f(c)(2).

\(^{49}\) See U.S. Const. art. I, § 7, cl. 2 (discussing Congress's authority to overcome the President's veto of a bill).

\(^{50}\) Compare 2 U.S.C. § 691(a) (allowing the President to cancel laws after he signed them), with U.S. Const. art. I, § 7, cl. 2 (allowing the President to veto a bill by refusing to sign it and returning it to Congress).

\(^{51}\) The Act defined "disapproval bill" as "a bill or joint resolution which only disapproves one or more cancellations . . . by the President." 2 U.S.C. § 691e(6). The use of the term "bill" suggests that Congress recognized that in disapproving or nullifying a cancellation, Congress would be legislating anew. After all, "bills" must satisfy bicameralism and be presented to the President. See U.S. Const. art I, § 7, cl. 2.

\(^{52}\) See 2 U.S.C. § 691b(a).

\(^{53}\) See id. § 691e(6).

\(^{54}\) See id. § 691b(a).


\(^{56}\) See id. § 691e(4)(A)-(C).

Deficit Control Act of 1985\(^\text{58}\) ("Gramm-Rudman-Hollings").\(^\text{59}\) Revising the discretionary spending cap downward prevented Congress from using the cancellation savings for more discretionary spending elsewhere. For cancellations of new direct spending and of limited tax benefits, the OMB ensured that any savings from such cancellations were used to decrease the deficit under the pay-as-you-go system for controlling direct spending and tax expenditures.\(^\text{60}\) In other words, OMB prevented Congress from using executive repeals of entitlements or tax benefits to create additional leeway for other tax benefits or entitlement provisions. Accordingly, notwithstanding the statutory definition of "cancel"—to prevent a provision "from having legal force or effect"—rescinded provisions often had lingering fiscal repercussions.\(^\text{61}\)

\section*{II. The Case for Cancellation and Modification Delegations}

Rather than beginning with the many considerable objections to cancellation and modification authority, this Article first examines whether Congress has textual authority for enacting cancellation and modification delegations. Because the federal government enjoys only limited power, merely establishing that the Constitution does not bar such delegations hardly demonstrates their propriety. After all, like any branch of the federal government, Congress only commands the authority that the Constitution confers.\(^\text{62}\)

This Part first asserts that the Necessary and Proper Clause\(^\text{63}\) empowers Congress to enact cancellation and modification delegations because such laws help Congress carry into execution its Article I, Section 8 powers.\(^\text{64}\) Second, this Part considers the current standard for determining whether a particular delegation is "Necessary and Proper"—the intelligible principle test.\(^\text{65}\) Third, this Part introduces a "Cancellation Framework" and a more general


\(^{59}\) See 2 U.S.C. §691c(a)(1), (b). Pursuant to Gramm-Rudman-Hollings, there are overall yearly caps placed on so-called discretionary spending. See 2 U.S.C.A. § 901(c) (West Supp. 1998) (setting out the discretionary spending limits for fiscal years 1997-2002); Stith, supra note 36, at 627. When legislation breaches the caps, there is an across-the-board trimming of discretionary spending accounts. See 2 U.S.C. § 901(a) (1994); Stith, supra note 36, at 632-33.

\(^{60}\) See 2 U.S.C. § 691c(a)(2) (Supp. II 1997). Under the pay-as-you-go system, legislation containing new direct spending or limited tax benefits must contain offsetting decreases in direct spending or increases in tax revenues such that the overall impact on the deficit is neutral at worst. See 2 U.S.C. § 902 (1994). Legislation not containing such offsets may trigger a "pay-as-you-go" sequestration. See id. To ensure that savings from cancellations of new direct spending and limited tax benefits went toward deficit reduction, the Act prohibited the use of such cancellations to offset spending increases or revenue decreases in the same bill. See H.R. CONF. REP. No. 104-491, at 23 (1996), reprinted in 1996 U.S.C.C.A.N. 892, 900-01.

\(^{61}\) When Congress passed a disapproval bill overturning an executive repeal, however, OMB did not make the adjustments discussed above. See 2 U.S.C. § 691c(c).

\(^{62}\) See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

\(^{63}\) Id. art. I, § 8, cl. 18.

\(^{64}\) See infra Part II.A.

\(^{65}\) See infra Part II.B.
“Modification Framework” to judge these types of delegations. Both frameworks are independent of the intelligible principle test and of any particular conception of the limits of delegation.\footnote{See infra Part II.C.} Finally, this Part contends that, from a delegation perspective, one should welcome rather than fear at least some types of cancellation and modification authority.\footnote{See infra Part II.D.} Part III complements Part II by considering numerous reasons why skeptics might find cancellation and modification delegations unnecessary or improper.

A. The Necessary and Proper Clause Permits Delegation of Cancellation and Modification Discretion

No one disputes that Congress may repeal or modify prior acts relating to patents, taxes, and the Post Office, for example. Many doubt, however, that Congress may empower the President to exercise considerable discretion in determining whether to cancel or modify provisions of such laws. After all, Congress has “[a]ll legislative [p]owers” granted by the Constitution,\footnote{U.S. CONST. art. I, § 1.} no other branch or institution has the authority to enact, cancel, or modify laws,\footnote{See Gary Lawson, Federal Administrative Law 108 (1998) (stating that no other branch has general legislative power).} and Congress appears to lack the ability to delegate its powers to another entity.\footnote{Article I of the Constitution generally empowers Congress to enact laws, but does not provide explicitly that Congress may delegate such authority to other entities. Specific constitutional authorities relevant to the Line Item Veto Act are no different. See U.S. CONST. art. I, § 8, cl. 1-2 (ceding to Congress the power to raise taxes, expend funds, and issue debt). None of these clauses explicitly permits Congress to delegate these legislative powers to someone else.} Accordingly, one reasonably might conclude that Article I does not authorize Congress to delegate the authority to enact, cancel, or modify laws.

The lack of explicit power to delegate lawmaking authority might not be surprising given that political philosophers influential to the founding generation\footnote{See John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 Cal. L. Rev. 167, 198-99 (1996) (citing importance of several political philosophers to the Framers).} maintained that a legislature simply could not delegate legislative power. John Locke insisted that “[t]he Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others.”\footnote{John Locke, Two Treatises of Government 380 (Peter Laslett ed., 1960) (Second Treatise).} Montesquieu considered delegation of legislative power to the Executive Branch to be troublesome for another reason: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate enact tyrannical laws, to execute them in a tyrannical manner.”\footnote{Baron de Montesquieu, The Spirit of the Laws 151-52 (Thomas Nugent trans., 1949).} Per-
haps these men influenced the Constitution’s drafters and ratifiers to omit delegations of legislative authority or discretion from the Constitution.

Such arguments, however, overlook the Necessary and Proper Clause. Congress may make all laws “which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Pursuant to the Necessary and Proper Clause, Congress routinely delegates discretion to secure administrative flexibility and to avoid problems arising from a lack of time, expertise, and political will.

Consider, for example, a statute providing for patent rights for inventors. Congress may lay out a standard for the conferral of monopoly rights and a patent term. Must Congress also specify, in minutiae, the procedures for securing a patent? Must it stipulate the time limit within which the Patent and Trademark Office must process the patent applications? Must Congress statutorily approve any proposed patent?

Alternatively, consider a statute authorizing the coining of money. Congress may specify the coins’ denominations and their material, but must it codify their weight, volume, and shape? Must it specify the icons and their

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74 U.S. Const. art I, § 8, cl. 18. Some scholars have argued that the Necessary and Proper Clause might be a source for the delegation of discretion. See Peter M. Shane, Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies, 36 AM. U. L. REV. 573, 592 (1987) (claiming that the Necessary and Proper Clause permits Congress to delegate decisions that it could have made itself, but asserting that such decisions do not involve legislative power because they are not “legislative power[s] to which the Constitution refers”); Harold J. Krent, Delegation and Its Discontents, 94 COLUM. L. REV. 710, 736 (1994) (book review) (arguing that the Necessary and Proper Clause authorizes congressional delegation of decisionmaking authority). Moreover, the Supreme Court has suggested that the Necessary and Proper Clause permits the delegation of decisions that the legislature otherwise should have made. See, e.g., Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) (citing Necessary and Proper Clause in the course of holding that Congress may delegate creation of “subordinate rules within prescribed limits”); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22, 43, 46 (1825) (discussing Congress's ability to delegate certain discretion to the federal judiciary under the Necessary and Proper Clause).

One cannot assert that the Necessary and Proper Clause grants Congress the power to delegate legislative authority or discretion without some trepidation. Many courts and scholars play the Clause as a constitutional “Joker” to trump all limitations on federal authority. Cf. Randy E. Barnett, Necessary and Proper, 44 UCLA L. Rev. 745, 762-63 (1997) (contending that Justice Marshall’s erroneous conception of “necessary” has been used to eviscerate the concept of limited and enumerated federal powers); Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L.J. 267, 285 (1993) (describing as “assuredly mistaken” the view that Congress has unlimited power under the Necessary and Proper Clause). Nonetheless, the Clause is undoubtedly a source of legislative power—it is found in Article I, Section 8—and, more importantly, is the only possible authority for the delegation of discretion. If the power to delegate discretion has a textual basis, it is the Necessary and Proper Clause. See Gary Lawson, Who Legislates?, PUB. INTEREST L. REV. 147, 150 (1995) (book review).

75 U.S. Const. art I, § 8, cl. 18.

76 Under the Constitution, Congress has the power “[t]o promote the Progress of Science . . . by securing for limited Times to Inventors the exclusive Right to their respective . . . Discoveries.” Id. art. I, § 8, cl. 8.

77 The Constitution grants Congress the power to “coin Money [and] regulate the Value thereof.” Id. art. I, § 8, cl. 5.
placement? Congress could decide all these issues and more, but the resulting statute would still cede some discretion relating to when and where to mint the coins. One could continue the exercise, demonstrating that Congress can become increasingly specific, leaving less discretion, but still leaving some discretion.

Given that almost all statutes leave some discretion to the Executive Branch, almost every statute is open to the charge that it delegates legislative authority or discretion. In other words, Congress almost always could have drafted any particular statute with more congressional direction and less executive discretion. Thus, whenever Congress legislates, it faces a spectrum of choices: it can choose to draft more or less detailed statutes leaving either less or more discretion for the Executive Branch. No matter what the level of detail in a statute is, however, it seems inevitable that Congress will cede some leeway in executing the law, allowing the Executive Branch to fill the interstices of the statute with regulations or policies. Accordingly, in order to carry into execution its powers over coinage, patents, weights and measures, and so on, Congress must delegate discretion because Congress generally cannot legislate without ceding some discretion to the Executive.

78 To be sure, Congress sometimes cannot draft more specific statutes. For instance, Congress may not selectively punish individuals. See id. art. I, § 9, cl. 3 (prohibiting bills of attainder). Likewise, Congress may not statutorily appoint executive and judicial officers. See id. art. II, § 2, cl. 2 (giving the President the power to appoint executive and judicial officers whose appointments “shall be established by Law”). In these areas, the President enjoys a sphere of autonomy that Congress may not invade. To the extent the President enjoys other exclusive spheres of autonomy, one might believe that Congress must legislate up to that sphere in order to avoid a delegation of discretion or legislative authority. Speculating about the existence of such an inviolable executive sphere is unnecessary given that most statutes contain some discretion that Congress could eliminate (at least partially) through increased statutory specificity.

Lawson and Granger have argued that “virtually all federal laws” rely upon the Necessary and Proper Clause (the “Sweeping Clause”) because most laws do not merely regulate conduct pursuant to Article I, Section 8, Clauses 1-17, but also provide penalties and institutions to carry congressional power “into [execution].” Lawson & Granger, supra note 74, at 324. If almost every statute contains a delegation of discretion, Lawson and Granger’s argument that most federal laws rely on the Necessary and Proper Clause is correct for another reason. In other words, the Clause justifies most laws both because most laws contain delegated discretion and because most laws provide penalties and magisterial institutions to execute the laws.

79 This view of statutes might find some support in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The Court held that where a statute contains some ambiguity, yet has no explicit delegation of authority, the statute contains an implicit delegation of gap-filling authority to the agency. See id. at 843-44. Because statutes almost always contain some level of ambiguity, Congress almost always delegates discretion.

80 But see Lawson & Granger, supra note 74, at 308 (discussing Andrew Jackson’s claim that Congress could not, under Necessary and Proper Clause, delegate to the Bank of the United States the power to coin money).

81 See Mistretta v. United States, 488 U.S. 361, 372 (1989). This theory of delegated discretion is consistent with Justice Scalia’s common sense discussion in Mistretta: “A certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.” Id. at 417 (Scalia, J. dissenting); see also id. at 415 (Scalia, J., dissenting) (admitting that it must be conceded that “some judgments involving policy considerations[,] must be left to the officers executing the law . . . . [thus turning] the debate over unconstitutional delegation [into] a debate not over a point of principle but over a question of degree?”).
As far as the historical arguments against delegations of legislative authority or discretion are concerned, James Madison and the text of the Constitution provide responses. Madison asserted that Montesquieu was not concerned with a person or group holding a mixture of some executive and legislative powers, but with a situation “where the whole power of one department is exercised by the same hands which possess the whole power of another department.” Clearly, a complete delegation of legislative powers (i.e., ceding unfettered lawmaking discretion) to the President would be problematic because the President would be able to enact and execute tyrannical laws. Our Constitution, however, simply does not permit the concentration of all legislative and executive powers in the hands of one group.

Analogously, delegation of some discretion might not be disturbing at all, given that all legislative and executive powers would not be in the hands of one group or individual. Indeed, the mixed nature of powers held by the three branches indicates that our Founding Fathers did not subscribe to the theory that branches and powers were to be kept completely segregated. The Constitution lodged some legislative powers with the President: the powers to introduce bills, to veto bills, and to convene Congress (and in certain circumstances, adjourn it as well). Conversely, the Constitution mandated that some traditionally executive powers be shared with the legislature: the powers to ratify treaties and to confirm executive and judicial nominees.

Alexander Hamilton defended the Constitution’s mixing of powers using language strikingly familiar: “This partial intermixture [of powers] is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other.” Likewise, one may view delegated discretion as proper and necessary to the effectuation of legislative powers. Such “intermixtures” are not necessary for defensive purposes, however, but instead ensure that Congress can carry into execution its legislative powers.

Thus far, this Article has defended the propriety of delegated discretion generally but not the peculiar delegation of cancellation or modification discretion. The arguments justifying such delegations are similar to those legitimizing delegations of lawmaking discretion. For reasons of time, expertise,

83 See supra notes 72-73 and accompanying text.
84 THE FEDERALIST No. 47, at 301-03 (James Madison) (Clinton Rossiter ed., 1961).
85 See id. at 303.
86 See id. at 301, 308.
87 See U.S. Const. art. II, § 3.
88 See id. art. I, § 7, cl. 2.
89 See id. art. II, § 3.
90 See id. art. II, § 2, cl. 2.
92 One can reconcile John Locke’s claim about the nondelegability of the power to make laws with the reality of delegated discretion, see supra note 72 and accompanying text, if one maintains that when Congress does not delegate too much discretion, it does not delegate legislative power. Cf. Shane, supra note 74, at 592 (presenting the argument that Congress’s delegations of rulemaking authority are not delegations of legislative power because Congress is regulating by “authorizing others to issue rules, subject to congressional revocation of rulemaking authority”).
political will, and administrative flexibility, Congress may find it advantageous to delegate cancellation or modification authority. In the case of the Line Item Veto Act in particular, perhaps Congress recognized that it was having difficulty reducing the deficit on its own, so it sought the President’s assistance to help curb newly enacted tax and spending provisions. In other words, if Congress wants to curb spending and tax benefits (and thus control debt) by enacting laws that empower others to make cancellations, such laws are arguably attempts to carry into execution Congress’s indisputable authority over taxation, expenditures, and debt.

Considering the pervasive nature of delegated legislative authority or discretion and that the Constitution does not cling to the notion that the three types of powers should be segregated and never shared, the Constitution cannot bar all delegations of discretion. Our reliance on the Necessary and Proper Clause for the ability to delegate discretion coupled with Article I’s investiture of all legislative powers with Congress, however, suggests

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93 See supra note 9 and accompanying text.

94 Of course, one might wonder why Congress should be free to employ the Necessary and Proper Clause to delegate authority over fiscal matters when Congress may establish its own tax and spending priorities and thereby eliminate the budget deficit. Whether Congress delegates lawmaking, cancellation, or modification authority, however, it does so because it believes that such delegations are beneficial, notwithstanding that Congress might have established more precise rules itself. In the case of the Act, members of Congress arguably decided to delegate authority to the President to enable him to restrain Congress because they believed that Congress had a proven inability to curb rent seeking and the accompanying deficit spending. Cf. Jonathan R. Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, 74 Va. L. Rev. 471, 481 (1988) (arguing that during ratification of a constitution, individuals agree to constrain rent seeking, recognizing that everyone is better off under such a system).

95 In discussing Gramm-Rudman-Hollings, Justice White argued that Congress, pursuant to the Necessary and Proper Clause, could delegate sequestration power—essentially, cancellation authority—to the Comptroller General to counteract increasing deficits. See Bowsher v. Synar, 478 U.S. 714, 776 (1986) (White, J., dissenting).

96 At times, I have called the statutory discretion ceded by Congress “legislative authority.” In my view, delegated discretion is delegated legislative power, because in most instances, Congress could have withdrawn (at least in part) that discretion. But see supra note 78. The argument, however, does not turn on the label that one places on such authority. Whatever one calls such authority, Congress is delegating, pursuant to the Necessary and Proper Clause, decisions that it could have made.

97 One should not be surprised that the Constitution permits the delegation of legislative authority or discretion. Indeed, the notion of delegation is not at all alien to the Constitution. Clearly, “We the People of the United States” delegated some of our liberties and powers to the federal government. Within the federal government itself, it is obvious that Congress may delegate the Senate’s power to confirm inferior officers to the President, to the courts, or to subordinate executive officers. See U.S. Const., art. II, § 2, cl. 2 (“Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”) Moreover, the Constitution implicitly permits the President to delegate some of his executive functions, particularly the executive power to execute the laws, to his subordinates. See Calabresi & Prakash, supra note 17, at 593-99.

98 I do not suggest that Congress may delegate all of the powers that the Constitution confers. For instance, one might view the impeachment functions, see U.S. Const. art. I, § 2, cl. 5 & § 3, cl. 6, and Congress’s role in presidential contests, see id. amend. XII, as functions that Congress may not delegate. There might be many other authorities that Congress cannot confer. More generally, I certainly do not believe that Congress may use the Necessary and Proper
that there might be a bar against "unnecessary" or "improper" delegations.\footnote{99} The remainder of Part II discusses frameworks for analyzing cancellation and modification delegations and the potential benefits of such delegations. Part III considers whether one should view cancellation and modification delegation as categorically unnecessary or improper.

B. The Intelligible Principle Standard

The "intelligible principle" standard provides the conventional means by which we judge whether delegations are necessary and proper. The Supreme Court has held that if Congress has not laid "down by legislative act an intelligible principle to which the person or body authorized to [take action] is directed to conform," there is an impermissible delegation.\footnote{100} Accordingly, a cancellation or modification delegation without a constraining intelligible principle would be unconstitutional.

Had the Court in \textit{Clinton v. City of New York} judged the Line Item Veto Act using the intelligible principle standard, the Court should have found President Clinton's cancellations constitutional.\footnote{101} Recall that under the Act, the President could cancel only those items that reduced the federal deficit, as long as such cancellations neither impaired any essential government functions nor harmed the national interest.\footnote{102} Admittedly, the last two restrictions were somewhat vague and might not have amounted to intelligible principles. Nevertheless, the requirement that there be a reduction in the federal deficit was an intelligible principle.\footnote{103} Whether the other require-

\footnote{99} Because the Necessary and Proper Clause provides the textual hook for delegating, there is a sound basis for the nondelegation doctrine: delegations are permissible as long as they do not go "too far." \textit{See Lawson, supra} note 74, at 150-53 (claiming that "proper" in the Necessary and Proper Clause is the source of the "nondelegation principle"). More accurately, delegations are permissible if they are "necessary and proper" to carry into effect Congress's legislative power. \textit{See supra} notes 74-82 and accompanying text.

\footnote{100} J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). During the New Deal era, the Supreme Court struck down three federal acts because they impermissibly delegated congressional authority. \textit{See Carter v. Carter Coal Co.}, 298 U.S. 238, 310-12 (1936) (striking down a law delegating the authority to fix minimum hours of labor to a majority of coal producers and miners); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-42 (1935) (striking down a law authorizing the President to approve codes of unfair competition); Panama Ref. Co. v. Ryan, 293 U.S. 388, 414-30 (1935) (striking down a law authorizing the President to prohibit interstate and international transportation of certain petroleum products). Since that era, however, the Supreme Court has not invoked the intelligible principle standard to strike down alleged delegations of legislative power. Nevertheless, the Supreme Court has never retracted the intelligible principle standard.

\footnote{101} Having decided that the Presentment Clause prevented executive repeals, the Court never analyzed whether the Act was infirm on nondelegation grounds. \textit{See Clinton v. City of New York}, 118 S. Ct. 2091, 2108 (1998).


\footnote{103} One might argue that the requirement of a reduction in the deficit really was superfluous because any cancellation would seem to reduce the deficit. Cancellations, however, can have uncertain effects on the deficit. For instance, canceling a capital maintenance provision may save
ments were restrictive was irrelevant, as long as at least one requirement articulated a principle that the President had to follow. Indeed, subsequent history proves that the budget deficit finding requirement was quite restrictive. Projected surpluses for at least a decade starting in fiscal year 1998 would have ensured that the President probably could not have canceled anything for the duration of the Act.

In any event, the Act contained other intelligible principles limiting cancellation authority. The President could not cancel any law, but only discretionary appropriations, new direct spending, or limited tax benefits. The President could not rescind any fiscal provision, but only those that he signed into law within the five days prior to the cancellation. The President could not simply strike any appropriation amount; he could only cancel the full amount. The cancellation of limited tax benefits was subject to even more restrictions.

Contrary to popular perception, the Act’s cancellation authority certainly was not a plenary power to cancel or suspend portions of federal law. Compared to statutes that courts have upheld, such as the President’s power to introduce wage and price controls under implied standards of “broad fairness and avoidance of gross inequity,” and the Secretary of Labor’s ability to develop standards “reasonably necessary or appropriate to provide safe or healthful employment,” one could hardly find that the Act lacked an intelligible principle. Indeed, since the 1930s, the Supreme Court has been extremely reluctant to strike down legislation under the intelligible principle standard, upholding “without exception, delegations under standards phrased in sweeping terms.” Had the Court reached the nondelegation issue in *Clinton v. City of New York*, the Court’s reluctance to strike down legislation, coupled with the Act’s limited cancellation authority, should have led the Court to view the Act as proper under the intelligible principle standard.

money in the short term, but may lead to increased expenditures in the long run (and thus provide the potential for a larger budget deficit later). Moreover, as noted above, when there is no deficit, there can be no cancellations that will shrink the deficit. These considerations make it less obvious that a particular cancellation would reduce the budget deficit. Regardless, the Act should not fail the intelligible principle test merely because Congress was wise enough to structure the Act to ensure that cancellations generally would decrease the budget deficit.

104 All one needs is “an intelligible principle,” not many such principles. *J.W. Hampton, Jr. & Co.*, 276 U.S. at 409 (emphasis added).
105 See supra note 27.
107 See id. § 691(a)(B).
108 See id. §§ 691(a), 691e(7).
109 See id. § 691f; supra notes 45-47 and accompanying text.
112 Loving v. United States, 387 U.S. 1, 771 (1967).
C. Independent Frameworks for Cancellation and Modification Delegations

For those who believe that the intelligible principle standard is too permissive, this section advances standards for cancellation delegations ("Cancellation Framework") and modification delegations ("Modification Framework") that are independent of any particular delegation test. Whatever one's standard for lawmaking delegations, these frameworks help to ascertain the corresponding limits of cancellation and modification delegations. Because the Cancellation and Modification Frameworks are detached from any specific conception of delegation's limits, they suggest that everyone should recognize the propriety of cancellation and modification delegations.

Under the Cancellation Framework, if Congress could have delegated the authority to choose whether to promulgate a particular rule, Congress may establish the rule by statute and permit executive repeal. In other words, if Congress could have delegated the authority to decide whether to promulgate rule X, Congress should be able to codify rule X and permit the executive officer to cancel it. The underlying intuition is that Congress often permits executive officers to determine whether particular regulations are necessary. Agencies may, but need not, issue regulations. Moreover, through such delegations, Congress typically cedes authority to cancel regulations. If Congress may cede discretion to issue and cancel regulations, it should be permitted to establish initial rules and permit executive cancellation of them.

Some concrete examples will help flesh out the Cancellation Framework. If Congress could have passed an act appropriating up to thirty-two million dollars for transportation construction, thereby delegating to the Executive

113 See, e.g., Martin Redish, The Constitution as Political Structure 135-137 (1995) (arguing that the Court has abandoned the limits on delegation and that Congress must make normative decisions to enable voters to hold them accountable); Schoenbrod, supra note 21, at 158 (arguing that the intelligible principle standard has left difficult choices to agencies, rather than forcing Congress to take responsibility for "the controversial implications of its legislation").

114 One might question the need for distinct cancellation and modification frameworks given the "intelligible principle" standard. Because some scholars find the intelligible principle standard inadequate, see supra note 113, it seemed necessary to fashion frameworks that are independent of any particular view of delegation's limits. As a result, one severe limitation of the Frameworks is that they do not provide actual tests for delegations of cancellation or modification authority. Rather, they merely demonstrate how to extend any nondelegation test that is applied to lawmaking delegations to cancellation and modification delegations as well.

115 For instance, in the Internal Revenue Code, Congress granted to the Secretary of the Treasury the authority to adopt "all needful rules and regulations for the enforcement of th[e Code]." 26 U.S.C. § 7805(a) (1994). Clearly, the Secretary of the Treasury need not issue any rules. Congress granted similar authority to the Securities and Exchange Commission. See 15 U.S.C. § 78j (1994) (ceding discretion to issue rules "as necessary or appropriate . . . for the protection of investors" against manipulation and deception).

116 See, e.g., American Trucking Ass'n, Inc. v. Atchinson, Topeka, & Santa Fe Ry., 387 U.S. 397, 416 (1967) (finding that "the [Interstate Commerce] Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practices").
Branch the determination of how much to spend on different projects, then Congress should be able to pass a more detailed act and allow the President to determine if certain line amounts are unnecessary. Accordingly, Congress could decide to provide twelve million dollars for a bridge, five million dollars for road construction, fifteen million dollars for a tunnel, and permit the President to cancel such amounts. Had Congress drafted a less detailed statute and given more discretion (a statute providing thirty-two million dollars for transportation generally), the President clearly could have chosen not to spend such funds on such activities.

Consider other examples. If Congress may delegate the authority to determine whether to set a pollution standard for drinking water, Congress should be able to establish a pollution standard and yet provide the Environmental Protection Agency ("EPA") with the ability to cancel it. Likewise, if Congress may cede the authority to determine whether to set safety standards for the trucking industry, Congress may fix the standards itself but cede authority to eliminate them.

Just as one judges delegations of lawmaking authority not in the abstract but in concrete situations, so must one apply the Cancellation Framework on a case-by-case basis. No blanket assertions about the constitutionality of cancellations should be made because one can always hypothesize extreme cancellation delegations. For instance, suppose Congress had passed only one appropriations act for fiscal year 1998 with four separate amounts listed for entitlements, defense, domestic spending, and debt service. Cancellation of any one of these line items might be problematic, because under most nondelegation standards, Congress could not have passed a single appropria-

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117 Implicit in the decisions during the impoundment controversies of the 1970s was the notion that appropriations acts may grant authority to spend funds without requiring that funds be expended. See, e.g., Train v. City of New York, 420 U.S. 35, 44-46 (1975) (discussing an act in which Congress required expenditure of all amounts appropriated). There would be no reason to discuss, at length, the mandatory nature of an appropriations act if, as a constitutional matter, all appropriations acts must require the expenditure of all funds appropriated. Accordingly, Congress may provide budget authority without requiring that all of it be utilized, leaving it to the Executive Branch to determine what amounts, if any, will be expended. See Clinton v. City of New York, 118 S. Ct. 2091, 2116-18 (1998) (Scalia, J., concurring in part and dissenting in part); Martin, supra note 12, at 1648 (claiming that most appropriations acts have not required expenditure of all funds).  

118 See Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (asserting that "allocation of funds from a lump-sum appropriation is [something] committed to agency discretion"); International Union v. Donovan, 746 F.2d 855, 860-61 (D.C. Cir. 1984) (asserting that "[a] lump-sum appropriation leaves it to the recipient agency . . . to distribute the funds among some or all of the permissible objects as it sees fit"); see also Stith, supra note 36, at 613 (observing that "as a matter of law an administering agency has discretion over how to allocate each lump-sum appropriation; this authority is the converse of the agency's legal obligation to adhere to every statutory line itemization").  

119 Congress even could cede discretion to cancel a statute that itself ceded discretion. For instance, if Congress may allow the President to decide whether to issue pollution regulations, Congress may direct the President to issue a water pollution standard after considering certain factors, but also allow him to cancel that "command." In other words, Congress could not only cede authority to cancel rules, but could also cede authority to cancel statutory discretion. Because one theme of this Article is that almost all statutes contain discretion, see supra Part II.A, this conclusion should come as no surprise.
tions act with only one (or two) line items listed, leaving the rest to executive discretion. On the other hand, suppose Congress specified amounts to be spent on toilet seats, hammers, and bullets. Cancellation of such amounts would hardly be problematic as Congress surely could have appropriated a lump sum for military supplies and ceded the discretion to determine what amounts, if any, the Defense Department would expend on such items. Naturally, the narrower that one's conception of permissible lawmaking delegations is, the more limited the scope of acceptable cancellation delegations will be.

We could test statutes that permit executive modifications under a similar Modification Framework. If Congress may delegate the creation of regulatory details, Congress should be able to set the details and allow the administrator to depart from or change those details, as long as the administrator stays within the scope of discretion contained in the statute that delegates the lawmaking authority. Accordingly, if Congress could authorize the EPA to choose from among pollution standards X, Y, and Z for automobile emissions, then Congress should be permitted to establish Z by statute and allow the EPA to substitute pollution standards X or Y. Likewise, if Congress may delegate the setting of a workplace safety standard to the Occupational Safety and Health Administration ("OSHA") as long as OSHA balances five factors, Congress should be able to set a standard and allow OSHA to modify this standard after OSHA considers the same five factors. Once again, the narrower that one's view of acceptable rulemaking delegations is, the more restrictive the scope of permissible modification delegations will be.

The Cancellation and Modification Frameworks ensure that the constitutionality of a cancellation or modification delegation does not turn on the form of the delegation. Such delegations should not be proper when Congress has drafted a broad lawmaking delegation permitting an agency to issue

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120 Professor Lessig provides another extreme example: May Congress enact a statute permitting the President to declare war by, in effect, canceling a congressional resolution declining to declare war? See Lessig, supra note 22, at 1661. Lessig believes that the cancellation of a congressional resolution providing that "America shall not declare war on Libya" means that America has declared war on Libya. See id. Essentially, the President's cancellation means that the President has declared war unilaterally. If we would sanction a lawmaking delegation to the President to declare war, we should sanction this hypothetical war power cancellation delegation. More likely, however, we would reject the notion that Congress could delegate the power to declare war and therefore, we would reject this cancellation delegation as well.

121 Someone with a very narrow view of the scope of permissible delegations might find the hypothetical delegation of funds for military supplies problematic and therefore will be troubled by cancellation of the more specific provisions. Nevertheless, even a proponent of strict limits on delegations must admit that there always will be some acceptable level of delegated discretion. See supra notes 74-82 and accompanying text. As to these permissible delegations, Congress certainly could draft more specific rules and permit departures from the rules.

122 The Modification Framework more completely captures how and when Congress may delegate authority to depart from statutory rules because cancellations are merely one type of departure from statutory details. Nevertheless, because some may view cancellations as more or less problematic than modifications, this Article discusses the Frameworks separately.

123 As with the Cancellation Framework, some modifications will be problematic. Where Congress could not have ceded lawmaker discretion in the first instance, it will not be able to set a standard and then permit executive modification.
and then cancel or modify regulations, but improper if Congress passed a more detailed statute and also ceded authority to depart from these statutory details.\textsuperscript{124} Indeed, lawmaking, cancellation, and modification delegations can all cede the same measure of discretion. As far as the Necessary and Proper Clause is concerned, there is no obvious reason why the form of a cancellation delegation should trump its substance, i.e., its delegation of discretion.\textsuperscript{125}

D. Cancellation and Modification Authority Compare Favorably to Lawmaking Delegations

Despite the foregoing, many will recoil at the thought of Congress ceding even more discretion to the Executive Branch.\textsuperscript{126} Such reactions overlook the unique possibilities of cancellation and modification delegations. First, cancellation and modification power, properly circumscribed, often will cede far less authority than executive officers currently enjoy. Moreover, Congress can structure cancellation and modification delegations to yield less executive discretion overall. Finally, presidential repeals and modifications actually could lead to less executive lawmaking and greater legislative responsibility. A familiar statute delegating cancellation authority, Gramm-Rudman-Hollings, illustrates some of these benefits and traits. Given these potential benefits and characteristics, it would be ironic and odd to read the Necessary and Proper Clause as categorically prohibiting cancellation and modification delegations.

1. Cancellation and Modification Delegations Often Will Be More Constrained Than Most Lawmaking Delegations

As should be evident from the two Frameworks, cancellation and modification authority often will be far more constrained than lawmaking delegations. For instance, simple cancellation authority of the type found in the Act left the President with only two choices: either cancel the provision or implement it. In contrast, many delegations of lawmaking authority permit the executive to choose from an array of options. An appropriation of up to fifteen million dollars for office furniture, for example, allows the executive to determine how much to spend, and what to purchase, along with a host of other decisions.\textsuperscript{127} Similarly, a statutory power to modify the filing date for a

\textsuperscript{124} In a narrower context, Justice Scalia recognizes this point: “Had the Line Item Veto Act authorized the President to ‘decline to spend’ any item of spending contained” in an act, “there is not the slightest doubt that authorization would have been constitutional.” Clinton v. City of New York, 118 S. Ct. 2091, 2118 (1998) (Scalia, J., concurring in part and dissenting in part); see also id. at 2116 (Scalia, J., concurring in part and dissenting in part) (“[T]here is not a dime’s worth of difference between Congress’s authorizing the President to cancel a spending item, and Congress’s authorizing money to be spent on a particular item at the President’s discretion.”). One similarly could view the cancellation of any statute—the statute could have granted greater leeway in the first instance and thus, from a delegation perspective, there is not a dime’s worth of difference between the two types of delegated authority.

\textsuperscript{125} See infra Part III for a consideration of contrary arguments.

\textsuperscript{126} See, e.g., REDISH, supra note 113, at 142; SCHOENBROD, supra note 21, at 13-14.

\textsuperscript{127} To be sure, not all cancellation delegations merely grant an executive officer the choice between “A” and “not A.” Because “A” may be a statutory delegation of considerable discretion, the executive officer armed with cancellation authority typically may face the choice
tax return hardly seems consequential in comparison to the Secretary of Labor’s sweeping ability to set workplace standards.\textsuperscript{128}

Cancellation authority in particular is less troublesome for another related reason. Because simple cancellation authority can be used only once, such authority cannot revive a canceled statute. Contrast that limitation inherent in simple cancellation authority\textsuperscript{129} with an agency’s rather remarkable ability to issue regulations, cancel them, and issue new regulations.\textsuperscript{130} This familiar and accepted lawmaking authority is far broader than simple cancellation authority of the type found in the Act.

2. Cancellations and Modifications Can Diminish Delegated Discretion

Under certain circumstances, executive repeals will preclude an executive’s future exercise of discretion and thus diminish the total delegation of legislative authority. As noted earlier, in the typical and familiar lawmaking delegation, Congress cedes discretion to “fill in the details” within a rather wide range of possible outcomes.\textsuperscript{131} In contrast, once an executive cancels a provision, an executive can no longer exercise the discretion inherent in the canceled provision. Thus, when an officer repeals a statute containing delegated authority to issue tax regulations, the Executive Branch no longer enjoys the broad power to establish those tax rules. Likewise, when an officer cancels an appropriations provision, she will exercise less discretion in the future because she can no longer decide how to use the appropriation.

To be sure, executive cancellations need not necessarily result in less executive discretion. If Congress is not mindful of the cancellation delegation’s language, executive repeals could remove restrictions meant to constrain executive decisionmaking. For instance, an executive officer conceivably could cancel prohibitions against the use of cost-benefit analysis in the promulgation of particular environmental regulations. Likewise, an executive officer could repeal prohibitions against funding certain defense programs.\textsuperscript{132}

amongst not A and A1, A2, A3, and so on (i.e., the possible policy outcomes stemming from the discretion contained in A). Nevertheless, sometimes the discretion that a cancellation delegation cedes will yield a scope of discretion much more circumscribed than many sweeping lawmaking delegations. Thus, if A is a statute with relatively little discretion, cancellation authority with respect to A is a rather narrow expansion of executive discretion. Accordingly, the resulting scope of discretion with respect to such a statute will be far more narrow than many statutes that grant broad lawmaking authority.

\textsuperscript{128} See Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 639-40 (1980) (holding that the Secretary, before issuing any health and safety standard, must determine only that the standard is “reasonably necessary and appropriate to remedy a significant risk of material health impairment”).

\textsuperscript{129} Of course, one could imagine cancellation authority that included with it the ability to revive the canceled provision.

\textsuperscript{130} See Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968) (stating that agencies typically have the power to “adapt their rules and policies to the demands of changing circumstances”). Once again, modification delegations, properly constrained, can have the same features—they can be more limited than most lawmaking delegations and capable of being used only once.

\textsuperscript{131} See supra note 115.

\textsuperscript{132} Indeed, Congress could delegate to the President, under the right circumstances, the
Congress is nobody's fool and is unlikely to cede the authority to cancel statutory limitations on executive authority. For example, even though the Line Item Veto Act facilitated cancellation authority, it specifically forbade presidential repeal of restrictions found in appropriations statutes. If Congress has the wits to restrain cancellation power, it certainly can structure cancellation delegations to permit only those executive repeals that yield less executive discretion overall. Paradoxically, those who question the extent to which Congress has delegated lawmaking authority should welcome delegation of certain types of cancellation authority.

Modification delegations can possess the same features. Congress can structure them to yield less executive discretion and to prevent modifications that lift statutory restraints on executive discretion. For instance, a modification delegation could provide that an executive may modify statutory rules as long as executive discretion declines as a result of the modification. Thus, an executive might modify a lawmaking delegation ceding tremendous flexibility by adding factors that constrain the executive's discretion. Modification delegations, however, may require heightened congressional attention to ensure that the delegations are circumscribed.

3. Cancellation and Modification Delegations Can Yield Greater Congressional Accountability

Cancellation and modification delegations also set the stage for transforming how Congress legislates, potentially yielding statutes with greater detail and greater congressional accountability. Under current delegation theory, Congress often finds itself on the horns of a dilemma. On the one hand, Congress could establish a specific legislative policy that only it could change through legislation, thus taking responsibility but limiting administrative flexibility. On the other hand, it could delegate broad authority to an executive officer without setting any concrete policy, thereby providing flexibility but also avoiding responsibility. Faced with this choice, Congress often opts for flexibility by setting threadbare, and somewhat conflicting, guidelines that also enable it to avoid responsibility for resulting policies.

power to completely change the meaning of a statute. Suppose a law permitted the President to cancel any word, phrase, or provision of a law. Although there might be instances where such changes would amount to impermissible delegations, there also would be circumstances in which Congress could have given to the President the regulatory authority to adopt the resulting, modified provision itself (i.e., the provision incorporating his changes). But see Glen O. Robinson, Public Choice Speculations on the Item Veto, 74 Va. L. Rev. 403, 405 n.11 (1988) (noting the agreement across states that item veto authority may not be used to distort legislative intent by selective redaction). As discussed below, however, if Congress granted such authority, the use of such cancellation or modification authority would not thwart Congress's will because by authorizing cancellations, Congress itself would have contemplated that executives might take such steps. See infra Part III.C.1.

134 See supra note 113.
135 As discussed earlier, however, even "specific" legislative policies generally will cede some discretion. See supra notes 74-82 and accompanying text.
136 See, e.g., Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring in the judgment) (criticizing Congress for adopting wholly precatory statutes and leaving standard-setting to the Secretary of Labor). Many scholars believe that
Cancellation and modification delegations, however, eliminate the necessity of drafting a broad statute. If executive officers may cancel or modify legal rules, Congress may establish more specific, more precise rules and yet still know that the executive officer enjoys administrative flexibility. Thus, Congress could set standards for imported agricultural produce, accept the responsibility for the standards, and still permit an executive officer to modify or eliminate the standard to take into account changing domestic market conditions. Likewise, Congress may set the term for patent protection, but permit the Patent and Trademark Office to modify the term based on the type of patent.

Of course, the mere power to enact cancellation and modification delegations does not ensure, by itself, that Congress will draft more detailed statutes. Congress may continue to draft rather vague statutes and thereby cede tremendous gap-filling discretion to the Executive Branch. Nevertheless, in a counterintuitive way, delegation of certain cancellation and modification authority makes it possible for Congress to draft more detailed statutes and accept increased congressional responsibility, while still allowing administrative flexibility. Cancellation and modification delegations could give us the best of delegation worlds: congressional direction and responsibility coupled with administrative flexibility.

4. A Familiar Cancellation Delegation Illustrates Some of These Traits and Benefits

These traits of cancellation delegations should not come as a complete surprise. Gramm-Rudman-Hollings gives us a glimpse of some of these cancellation benefits. First, Gramm-Rudman-Hollings cancellation authority cedes much less discretion than is normally accorded to executives in lawmaking delegations. The OMB does not have discretion as to the manner in which amounts are cut across accounts. Gramm-Rudman-Hollings contains exacting specifications. Nor does the OMB determine the composition of the accounts themselves—Congress did that. Second, unlike lawmaking delegations enable Congress to avoid responsibility. See, e.g., Schoenbrod, supra note 21, at 84-95. In reality, because Congress chooses to delegate, it should be held responsible for the decisions that its delegees make and for not making the decisions itself.

137 To be sure, there still might be some confusion regarding responsibility because Congress would have permitted departures from the congressional rule. Still, there will be instances when an executive officer does not repeal or modify the congressional rule. In such cases, it will be easy to pin blame or bestow credit. Even when an executive officer cancels or modifies a congressional rule, however, the existence of an initial statutory rule may underscore that Congress retains ultimate responsibility and should be praised or condemned for any policy resulting from delegated discretion. When individuals see a rule established by a statute and then understand that Congress permitted an executive officer to cancel or modify that rule, these individuals will praise or blame Congress, as they should.


140 Section 901(a)(2) references the “non-exempt accounts” that the OMB must cut. See id. Apparently, “non-exempt accounts” are those “accounts” as defined in section 900(c)(11) that are not listed as “exempt programs and activities” in section 905. See id. §§ 900(c)(11) & 905.
lawmaking delegations, the President may not reverse a sequestration. Finally, Gramm-Rudman-Hollings cancellations reduce executive discretion. The OMB determines whether appropriations statutes breach a discretionary spending cap and then cuts spending across accounts to ensure that spending does not exceed the caps. The OMB also applies the pay-as-you-go rules to sequester direct spending when direct spending or tax legislation increases the budget deficit. When the OMB cuts these accounts, it reduces the amount of future administrative discretion. For these reasons, Gramm-Rudman-Hollings should have familiarized us with some of the benefits and the potentially limited nature of cancellation delegations.

Ultimately, it is not surprising that the same authority that permits Congress to delegate lawmaking authority generally—the Necessary and Proper Clause—arguably sanctions cancellation and modification delegations as well. Given that the same Clause authorizes all three types of delegations, we ought to apply the same nondelegation test to all three. Whether we apply the intelligible principle standard or some more exacting test, some cancellation and modification delegations will survive. Indeed, in many instances, certain delegations of cancellation and modification authority could be far more welcome than many of the lawmaking delegations we now accept without hesitation.

III. The Objections to Cancellation and Modification Delegations

If the Necessary and Proper Clause supposedly enables Congress to delegate cancellation and modification discretion, we must explore the various claims that there is something particularly "unnecessary" or uniquely "improper" about such delegations. Scholars, judges, and the parties challenging the Line Item Veto Act have raised numerous objections to the Act's supposed delegation of cancellation authority, some rather obvious and some more ingenious. Rather than evaluating all such objections, however, this Article examines only those claims that apply to the delegation of cancellation and modification authority generally, thereby avoiding issues that are unique to the Act.

Cancellation and modification authority might be constitutionally suspect in at least four ways. First, particular delegation-based reasons might indicate that Congress may not convey cancellation and modification authority. Second, as the Supreme Court held, executive cancellations or modifications may violate principles implicit in the Presentment Clause. Third, the delegation of such authority might thwart congressional will, upset the Constitution's framework for legislation, or breach tacit "balance of powers"

141 See id. § 901.
142 See id. § 902(b)-(c).
143 Professor Rappaport's intriguing claim comes to mind. He asserts that the Act is unconstitutional because it amounts to a "veto burden" by contemplating cancellation delegations only when the President has signed the underlying bill into law. See Michael B. Rappaport, Veto Burdens and the Line Item Veto Act, 91 Nw. U. L. Rev. 771, 772 (1997). Congress could have satisfied his concern had it granted cancellation authority without regard to how a statute became law.
principles. Finally, one could view presidential repeals or modifications as directly contrary to the Chief Executive's duty to "take Care that the laws be faithfully executed." Notwithstanding these considerable objections, the Constitution simply does not sanction lawmaking delegations while completely barring all cancellation and modification delegations.

A. Delegation Based Reasons Why Congress May Not Delegate Cancellation or Modification Authority

Despite the obvious attraction of subjecting cancellation, modification, and lawmaking delegations to the same nondelegation standard, many skeptics resist the notion that these three types of delegations are really comparable. According to these skeptics, there are several delegation-based reasons why cancellation and modification delegations should be barred entirely.

First, the very novelty of delegated cancellation or modification authority leads some to reject such delegations as unconstitutional. To these critics, the absence of prior delegations is a telling indication that Congress may not convey such authority. Second, although law execution inevitably involves some executive lawmaking, skeptics may point out that law execution never requires executive repeals or modifications. Third, cancellations and modifications may seem particularly legislative in nature because they do not involve the application of law to a particular set of facts. Finally, although executive lawmaking typically "fills in the details" of legislation pursuant to a statutory policy, some argue that cancellation and modification authority permit the nullification of a legislative policy. Although the Supreme Court did not reach any of these nondelegation objections in *Clinton v. City of New York*, many believed that if the Supreme Court had done so, it should have canceled the Act on such grounds.

1. The Novelty of Cancellation and Modification Delegations Suggests That They Are Unconstitutional

In *Byrd v. Raines*, the United States District Court for the District of Columbia described the Act as "revolutionary": "Never before has Congress attempted to give away the power to shape the content of a [federal] statute ...." Likewise, in *Clinton v. City of New York*, the Supreme Court observed that the Act ceded to the President "the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change."

The apparent novelty of cancellation and modification delegations, however, poses no real stumbling block. Cancellation and modification delega-
tions are not as novel as one might think. Congress has enacted numerous statutes authorizing cancellation or modification of statutory provisions of law. Furthermore, Congress often sanctions regulatory modification of statutes. Moreover, agencies regularly modify the law by canceling or modifying regulations. Finally, and most important, even if the cancellation and modification delegations did not exist, mere novelty cannot mean that cancellation authority is improper.

a. Cancellation and Modification of Statutes

As noted, Congress has passed numerous statutes authorizing the cancellation or alteration of statutory provisions of law. Under the Rules Enabling Act, the Supreme Court may set procedural rules to govern lower federal courts, even if such rules conflict with statutory procedural rules. Pursuant to the Controlled Substances Act, the Attorney General may add to or subtract from the list of controlled substances specified in the statute. The power to subtract from this list is no different from the power to cancel provisions of law. Moreover, the power to add to the list constitutes a modification delegation. The Defense Production Act of 1950 permits the President, by proclamation, to “terminate” the Act itself. Other examples abound.

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152 See Brief for Appellants at 47-48, Raines v. Byrd, 117 S. Ct. 2312 (1997) (No. 96-1671), available in 1997 WL 251415 (citing several federal statutes “that currently authorize the Executive Branch to suspend their provisions, grant exemptions from their requirements, or otherwise modify their operation”).


154 See id. § 2072; see also id. § 2075 (providing similar authority with respect to bankruptcy procedural rules). One might distinguish authority delegated to the courts with respect to procedural rules on the grounds that the Judiciary already enjoys the power to set procedural rules pursuant to Article III, Section 1’s investiture of the “Judicial Power.” The inherent authority to set procedural rules, however, does not indicate that the Judiciary also enjoys the ability to alter congressionally established statutory rules. Absent a statutory delegation, the Judiciary may have inherent authority to prescribe procedural rules only when Congress has not already set rules by statute. In any event, as the above discussion makes clear, there are other examples of cancellation authority that cannot be explained by reference to some inherent authority.


157 The plaintiffs in Raines understood that the Controlled Substances Act posed a problem for their claims. They attempted to distinguish the act on the grounds that it permitted the President to “respond to changing circumstances over time, [which was] nothing like the President’s essentially unbounded, and certainly unreviewable, one-time and irreversible . . . power” to strike provisions of law. Reply Brief for Appellees at 16, Raines v. Byrd, 117 S. Ct. 2312 (1997) (96-1671), available in 1997 WL 269313. Cancellations are less problematic precisely because they are irreversible. See supra Part II.D.2.


159 See id. app. § 2166(b)(1).

160 See Agricultural Adjustment Act § 13, 7 U.S.C. § 613 (1994) (providing for cancellation if President finds that agricultural emergency “has been ended”); Middle East Peace and Stability Act § 6, 22 U.S.C. § 1965 (1994) (authorizing President to cancel aid to Middle Eastern nations when President determines peace and security are adequately ensured); Act of June 10, 1933, ch. 55, § 1, 48 Stat. 119 (repealed 1947) (authorizing the President to declare the Recon-
Gramm-Rudman-Hollings is the most noted and relevant example of a cancellation or modification delegation. Gramm-Rudman-Hollings requires that the OMB, on occasion, cancel or modify portions of spending provisions in order to keep discretionary spending and entitlement spending within certain congressionally mandated limits. For example, if the OMB determines that discretionary appropriations exceed their statutory cap for a given year, the OMB must reduce spending across discretionary spending accounts by a certain percentage. In judging whether Congress has breached a cap, the OMB exercises discretion as to whether a so-called sequestration—a partial cancellation—will occur.

The Court tried to distinguish some of these examples in the course of striking down the Line Item Veto Act. Although the Court attempted to differentiate executive cancellations of tax statutes on the grounds that the taxes involved foreign tariffs and thus were a foreign affairs concern, Justice Breyer correctly pointed out that not all of the tax statutes ceding cancellation authority concerned tariffs on imported goods. Justice Breyer also effectively refuted the Court's claim that the tax cancellation provisions left no discretion to the President.

The Court feebly distinguished its power to cancel statutory rules of procedure under the Rules Enabling Act by insisting that the Court itself actually does not cancel the old and conflicting rules of procedure. Rather, "Congress expressly provided that laws inconsistent with the procedural rules promulgated by this Court would automatically be repealed upon the enactment of new rules." Of course, one could describe the Act and cancellation and modification delegations generally in the exact same manner. In the Act, Congress expressly provided that when the President sent a message to both chambers indicating his desire to cancel certain provisions of a newly enacted law, the relevant provisions were canceled. Indeed, with respect to any congressionally authorized cancellation, it is always true that "Congress itself makes the decision to repeal prior rules upon the occurrence of a particular event." In the case of the Rules Enabling Act, that "event" was

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164 See id. at 2106. The Court stated that the President has more discretion in the foreign affairs arena than in strictly domestic affairs. See id.
165 See id. at 2130 (Breyer, J., dissenting) (discussing the power of early Treasury Secretaries to remit statutory penalties for nonpayment of liquor taxes and other examples).
166 See id. at 2129-30 (Breyer, J., dissenting) (discussing discretion ceded by cancelable tax statutes).
167 See id. at 2107 n.40.
168 Id.
170 Clinton v. City of New York, 118 S. Ct. at 2107 n.40.
the Court's promulgation of rules. In the case of the Act, the triggering event was Congress's receipt of the presidential cancellation message.

b. Regulatory Modifications of Statutory Rules

Apart from these cancellation and modification delegations, Congress often establishes a statutory rule or a statutory definition but permits the Executive Branch to issue regulations or directives that depart from this rule. The statute clearly remains the same, but regulations alter the legal rule. For instance, the Tax Code contains several provisions that begin with the phrase "[e]xcept as provided by regulations." Such language permits the Secretary of the Treasury to depart from the statutory rule or definition that follows the phrase. Although the extent of the power to make exceptions may be in doubt, Congress has ceded the power to modify a statutorily established legal rule. In a similar delegation permitting the modification of statutory rules, the Federal Reserve Bank's Board of Governors enjoys the authority to alter the margin requirements established by statute in section 7 of the Securities Exchange Act of 1934. Although the statute sets an initial margin requirement of at least fifty-five percent of the market price, the statute permits Federal Reserve regulations to either increase or decrease this percentage.

In an extremely broad modification delegation, the Securities and Exchange Commission ("SEC") may "conditionally or unconditionally exempt any person, security, or transaction . . . from any provision or provisions of" the Securities Exchange Act of 1934 to "the extent such exemption is necessary or appropriate in the public interest." It is hard to imagine a more open-ended invitation for regulatory modification of statutory rules. Across all of these statutes, the statute always remains constant, but the more meaningful legal rule depends upon regulations that modify the statutory starting point.

171 E.g., 26 U.S.C. § 172(h)(4)(C) (1994) (allowing the Treasury Secretary to relax by regulation the statutory rule requiring consolidated companies to be treated as one taxpayer); Id., § 4461(c)(2) (permitting the Treasury Secretary to vary by regulation the statutory rule for determining when to impose the Harbor Maintenance Tax).

172 Perhaps it would be impermissible to issue regulations that completely undermine the statutory rule or definition. At the same time, however, the statutory language permitting departures from the statutory rule does not read as a power to make limited exceptions. Rather, it creates a rule that applies except as the Secretary otherwise provides. A Treasury Secretary intent on an expansive view of her authority might insist that the statute permitted her to completely undermine or circumvent the statutory rule.


174 See id. § 78g(a)(1), (b). The Federal Reserve Board has used this authority to lower the rate to 50%. See JAMES D. COX, ET AL., SECURITIES REGULATION: CASES AND MATERIALS 1136 (2d ed. 1997).


Regulatory modification of statutes should have been quite familiar to
the Court. Just four years ago, in *MCI Telecommunications Corp. v. American
Telegraph & Telephone Co.*, the Court examined whether the Federal
Communications Commission ("FCC") could eliminate the filing of tariffs by
a large section of the communications industry. The FCC had deployed its
statutory power to "modify any requirement made by . . . [the statute] either
in particular instances or by general order applicable to special circumstances
or conditions." The parties asked the Court if the FCC's action was "a valid exercise of [statutory] authority," not whether the modification au-
thority delegated was constitutional. At the same time, however, no member
of the Court even raised the possibility that the delegated power to modify
statutory rules via regulation might be unconstitutional.

c. Cancellation and Modification of Regulations

When agencies cancel or modify regulations, they cancel or modify the
law itself. Prior to the regulatory cancellation or modification, individuals or
companies had certain rights or responsibilities. Regulatory repeals and
modifications alter those legal relationships. Indeed, the Court has sanc-
tioned such executive repeals and modifications of regulations, asserting that
"[r]egulatory agencies do not establish rules of conduct to last forever" and
that agencies must be given the ability "to adapt their rules and policies to
the demands of changing circumstances." Thus, the Court recognizes that
the law changes after the cancellation or modification of regulations.

More generally, one might contend that most exercises of delegated law-
making authority result in a cancellation or modification of the law. For in-
stance, in the absence of a regulation establishing a pollution standard for a
substance, federal law permits unchecked emission of that substance. After
the EPA promulgates pollution standards, however, the previous legal state
of affairs is no more—the EPA has canceled it and replaced it with a rule
restricting the freedom of polluters. On this view, exercises of lawmaking
power cancel or modify existing legal entitlements, regardless of what label
one places on such delegations.

d. Novelty and the Constitution

Recounting these numerous examples of various types of cancellation
and modification authority hardly establishes the propriety of such delega-
tions. The examples merely refute the claim that such delegations are revolu-
tionary. Nevertheless, even if one clung to the notion that cancellation or
modification authority were exceptional, that would not be a sound reason
for finding both types of delegations unconstitutional. Just because Congress

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178 See id. at 220.
180 *MCI Telecommunications*, 512 U.S. at 220.
181 American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416
(1967).
(and the President) never chose to enact a particular type of legislation before does not mean that Congress lacks the power to enact it. Although it may cause us to be skeptical of certain claims, mere novelty does not offend the Constitution.\footnote{Indeed, we ought not be surprised that Congress generally has not ceded authority to cancel or modify statutes. Having drafted and passed a statute, we might expect that Congress wishes to reserve the authority to repeal or modify it, rather than sharing these authorities with the Executive Branch. Still, an institutional reluctance to delegate cancellation or modification authority arguably reflects nothing more than a desire to retain the power to repeal or modify laws rather than a skepticism towards the propriety of cancellation and modification authority generally.}

For example, suppose that Congress had never created or funded executive officers to assist the President to carry into execution his pardon power.\footnote{See U.S. CONST. art. II, § 2, cl. 1 (giving the “Power to grant... Pardons for Offences against the United States” to the President). Currently, Congress funds pardon assistance for the President. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2441 (1997) (appropriating $70,007,000 “[f]or expenses necessary for the administration of pardon and clemency petitions”).} The absence of such assistance might make it very difficult for the President to effectively utilize his pardon power. Yet it would be wrong to doubt Congress's ability, pursuant to the Necessary and Proper Clause, to create and fund an office dedicated to assisting the President in the exercise of the pardon power. Delegation of the power to cancel or repeal existing statutes should be no different. Notwithstanding the lack of direct authority to delegate cancellation or modification authority and despite the supposed lack of prior cancellation and modification delegations, we should not conclude that Congress lacks such authority under the Necessary and Proper Clause.

2. \textit{Cancellation and Modification Delegations Are Not Truly Necessary} 

Professor Sargentich, in his critique of cancellation authority and the Line Item Veto Act, insists that although executive interpretations of a statute are “a necessary part” of law execution, cancellations are “qualitatively different.”\footnote{Sargentich, supra note 12, at 109.} Admittedly, one cannot imagine a world without delegated law-making.\footnote{See supra note 80 and accompanying text.} The very existence of statutes and their inevitable vagueness and ambiguity ensures at least some implicit lawmaking delegations. By contrast, we have survived for over 200 years without very much delegated cancellation or modification authority.\footnote{But see supra Parts III.A.L.a-c.} To hearken back to the Necessary and Proper Clause, lawmaking delegations are truly “necessary,” while cancella-
tion and modification delegations may seem merely convenient. If one type of delegation is inevitable and the others entirely avoidable, surely one can draw a neat line and permit the necessary while rejecting the merely desirable.

Nevertheless, the fact that lawmaking delegations are inherent in legislation does not mean that particular delegations of lawmaking authority are inevitable. As noted earlier, although delegated discretion is unavoidable as a general matter, the particular lawmaking delegations embodied in statutes are not. Whatever the delegation, Congress always could have chosen to draft a more detailed statute. Because one can always envision increased legislative specificity that would have eliminated the discretion that Congress ceded (at least in part), particular statutory delegations are hardly necessary. In this way, specific delegations of lawmaking, cancellation, and modification authority are similarly situated—one is inevitable in any sense.

3. Cancellation and Modification Delegations Appear To Be More Legislative in Nature Than Lawmaking Delegations

Executive repeals or modifications may seem different from executive lawmaking in another way. When executives enforce the law, they apply the law, and its delegated discretion, to a set of facts. Cancellations and modifications, however, seem very removed from traditional law execution—no law or delegated discretion is applied to specific facts. This distinction resonates because statutory cancellations and modifications seem so uniquely legislative in nature.

Yet we are quite familiar with executive action that lacks the application of law to facts: rulemaking. Rulemaking pursuant to section 553 of the Administrative Procedure Act seems far removed from conventional law execution. Rather, it generates rules, very much like the process for which it is a substitute—the legislative process. If rulemaking is permissible notwithstanding the absence of the application of law to facts, courts should treat cancellation and modification delegations similarly. In all three situations, nothing resembles conventional executive action involving the application of law to facts.

188 See supra notes 78-79 and accompanying text.

189 Admittedly, there will still be a difference between the broad categories themselves. Lawmaking delegations generally must occur, but cancellation delegations are never necessary. Based on such a claim, someone with a narrow view of the Necessary and Proper Clause's scope might believe that lawmaking delegations are acceptable and that law-cancellation delegations are not. But see infra notes 197-199 and accompanying text (asserting that lawmaking and law canceling are both examples of lawmaking generally).

190 But see Clinton v. City of New York, 118 S. Ct. 2091, 2120-21 (1998) (Breyer, J., dissenting) (claiming that the President executed the Line Item Veto Act when he canceled provisions of laws).

191 See Gerhardt, supra note 22, at 239 (asserting that everyone agrees that executive repeals are exercises of "legislative authority"); Sargentich, supra note 12, at 107-109 (asserting that cancellations amount to lawmaking).

4. Cancellation Delegations Leave No Law to Apply

Professor Sargentich raises an intriguing objection to cancellation authority, in particular, based on the absence of underlying statutory authority after executive repeals. He asserts that executive interpretations or executive lawmaking “can normally be revised by the executive, whereas cancellations cannot.” Indeed, as noted earlier, statutes that delegate authority to promulgate regulations typically also cede the implicit authority to cancel such regulations and reissue new ones. The continued existence of an underlying statute after the cancellation of regulations is thus crucial, because the statute must remain on the books so that it may authorize (and constrain) future rulemaking. More important, the statute that implicitly sanctions the cancellation of regulations does not permit its own cancellation.

In sharp contrast, the continued existence of canceled authority is unnecessary precisely because Congress has authorized the cancellation of such authority. Put another way, although lawmaking delegations generally authorize the issuance, cancellation, and reissuance of regulations, simple cancellation authority is meant to be used once. Accordingly, although there is a difference between the two types of delegations, this difference actually serves a vital function. It does not provide a reason for accepting one and rejecting the other. If it did, we would have to prefer a cancellation delegation that also ceded authority to revive canceled provisions—that is, we would have to favor more expansive delegations to the executive. This would be perverse. It oddly suggests that, out of a concern for nondelegation principles, we should prefer broader delegated authority. Instead, as noted earlier, we ought to favor simple cancellation authority precisely because the Executive Branch can use it only once. If the ultimate nondelegation touchstone is the breadth of a delegation to an executive, we hardly can object to a trait of simple cancellation authority that actually constrains the delegation.

In the end, there is one comprehensive answer for all of the concerns discussed above and any additional distinctions between lawmaking, cancellation, and modification delegations. The Constitution simply does not make distinctions amongst different types of delegations. To borrow from *Skinner v. Mid-America Pipeline Co.*, there is nothing in the Constitution or congressional practices that “require[s] the application of a different and stricter nondelegation doctrine” in cases involving cancellation or modification delegations. Given that the Constitution does not permit explicitly delegated discretion, it would be odd to believe that the Constitution somehow distinguished patent lawmaking discretion from tax lawmaking discretion or that it differentiated lawmaking delegations from cancellation or modification delegations. Indeed, when Congress creates, modifies, or re-

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193 Sargentich, supra note 12, at 109.
194 See supra notes 115-116 and accompanying text.
195 See supra notes 115-116 and accompanying text.
196 See supra Part II.D.1.
197 Undoubtedly, one could discern other differences between the two types of delegations.
199 Id. at 222-23 (finding that congressional delegations of discretionary authority under its taxing power are not subject to a higher standard of scrutiny).
peals a statute, we label all such actions "lawmaking." We do not draw constitutional distinctions amongst these categories. We ought to view all types of executive lawmaking similarly.

Accordingly, the answer to the nondelegation inquiry should not turn on the type of delegated authority. Instead, the analysis must turn on some external test applied to the delegation, such as the intelligible principle standard or some more or less strict standard meant to distinguish permissible delegated discretion from impermissible delegations. Of course, there still may be other reasons why one might view executive repeals or modifications as improper, and this Article considers those objections next.

B. The Presentment Clause Prohibits Executive Repeals and Modifications

The Presentment Clause provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it."\(^{200}\) The Clause confirms that bicameralism is necessary, establishes the presentment requirement,\(^{201}\) and indicates that the President must either accept legislation or reject it \textit{in toto}.\(^{202}\)

Recall that the Supreme Court held that the Line Item Veto Act was unconstitutional on "narrow" Presentment Clause grounds.\(^{203}\) Although the Clause on its face does not prohibit executive cancellations, the Court believed that there were "powerful reasons for construing constitutional silence on this . . . issue as equivalent to an express prohibition."\(^{204}\) According to the Court, bicameralism and presentment, the exclusive procedures for the enactment of statutes, were extensively debated at the Constitutional Convention.\(^{205}\) This history suggests that "the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'\(^{206}\)

The Court stated, however, that the law that results from a presidential cancellation is not the law that emerged from bicameralism and presentment.\(^{207}\) Instead, after a presidential repeal, what emerges is a "truncated version[ ]" of the bill signed into law.\(^{208}\) In the words of the Court, the Line Item Veto Act ceded to the President "the unilateral power to change the text of duly enacted statutes."\(^{209}\) More generally, the Court's invocation of

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\(^{200}\) U.S. CONST. art. I, § 7, cl. 2.


\(^{202}\) \textit{See} Lund, supra note 12, at 456-57 n.16 (arguing that if the President disapproves of a bill, he must "return it," which indicates that he returns the whole bill, not just parts of it).

\(^{203}\) \textit{See} Clinton v. City of New York, 118 S. Ct. 2091, 2108 (1998) (twice describing its holding as "narrow").

\(^{204}\) \textit{Id.} at 2103. Senator Robert Byrd, on the other hand, believed that the Act violated "the clear language of the Presentment Clause." Byrd, \textit{supra} note 22, at 320.

\(^{205}\) \textit{See} Clinton v. City of New York, 118 S. Ct. at 2103.

\(^{206}\) \textit{Id.} at 2104-05 (quoting \textit{Chadha}, 462 U.S. at 951). Based on this reasoning, the Court declared in \textit{Chadha} that "[r]epeal of statutes, no less than enactment, must conform with Art[icle] I." \textit{Chadha}, 462 U.S. at 954.

\(^{207}\) \textit{See} Clinton v. City of New York, 118 S. Ct. at 2104.

\(^{208}\) \textit{See id.}

\(^{209}\) \textit{Id.} at 2107.
the Presentment Clause suggests that it would frown on all delegations of cancellation and modification authority.

The Court's opinion suggests that there are two separate but related Presentment Clause arguments against cancellation and modification delegations. First, the Presentment Clause might indicate that any changes in statutory text or the law must satisfy bicameralism and presentment. Second, the Clause's conferral of the modest presidential authority to accept or reject an entire bill may suggest that the President cannot enjoy the broader authority to cancel portions of existing law. Although the Court seemed to rely primarily on the former objection, it may have relied on the latter as well. In the end, however, the Presentment Clause provides no sound reason for barring cancellation and modification authority. The Clause speaks to what Congress must do, not what lawmaking authority Congress may cede to the Executive Branch.

1. Bicameralism and Presentment

As noted, the Supreme Court seemed to assert that bicameralism and presentment are necessary to change statutory text. After all, bicameralism and presentment are procedures for passing statutes. Indeed, the Court seemed to distinguish statutes granting lawmaking discretion from statutes allowing the President to alter statutory terms when it noted that the "critical difference . . . is that . . . this Act gives the President the unilateral power to change the text of duly enacted statutes." There are at least three reasons to reject this argument. First, we do not treat the Presentment Clause as the exclusive means of altering statutory text. Second, we should not treat the Presentment Clause as the exclusive means of changing statutory text. Third, Justice Breyer denied that there was a Presentment Clause problem because the Line Item Veto Act did not really permit the President to "repeal" or "amend" any law. See id. at 2120 (Breyer, J., dissenting). Instead, when the President canceled a law, he actually followed the Act. See id. (Breyer, J., dissenting). Justice Breyer is quite right to argue that when an executive cancels a law, he acts consistently with that law because the canceled law should be understood as containing the authority that permits its cancellation. See id. (Breyer, J., dissenting). Nonetheless, in executing the Line Item Veto Act, the President undoubtedly renders another legal provision inoperative. Executive repeals are no less repeals merely because they are done pursuant to statutory authority.

To be sure, Justice Breyer correctly points out that there are still some Gramm-Rudman-Hollings "lockbox" effects of a canceled provision, see id. at 2122-23 (Breyer, J., dissenting); supra Part I.C, but that does not detract from the fact that cancellations alter legal obligations or entitlements. Indeed, the presence of phantom limb symptoms in the aftermath of an amputation does not mean that an amputation did not take place. Similarly, if we conceive of every appropriation as having two components, one part mandating spending (subject to cancellation) and one part having Gramm-Rudman-Hollings consequences, we understand that when the President cancels an appropriation, there may be lingering effects. These lingering effects of a canceled provision, however, do not detract from the fact that the provision has been canceled and that at least some of the provision's effects will not be felt in the future. The majority perhaps recognized that its arguments were not dependent upon the claim that a canceled provision has no lingering legal effects. See Clinton v. City of New York, 118 S. Ct. at 2107-08 ("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 canceled.").

210 Justice Breyer denied that there was a Presentment Clause problem because the Line Item Veto Act did not really permit the President to "repeal" or "amend" any law. See id. at 2120 (Breyer, J., dissenting). Instead, when the President canceled a law, he actually followed the Act. See id. (Breyer, J., dissenting). Justice Breyer is quite right to argue that when an executive cancels a law, he acts consistently with that law because the canceled law should be understood as containing the authority that permits its cancellation. See id. (Breyer, J., dissenting). Nonetheless, in executing the Line Item Veto Act, the President undoubtedly renders another legal provision inoperative. Executive repeals are no less repeals merely because they are done pursuant to statutory authority.

211 Clinton v. City of New York, 118 S. Ct. at 2107.
even if changes in statutory text must satisfy the bicameralism requirement, cancellations and modifications do not necessarily change statutory text.

a. We Do Not Treat the Presentment Clause As the Exclusive Means of Changing Statutory Text

Contrary to the Supreme Court's assertion, the Presentment Clause does not implicitly preclude changes to statutory text outside of bicameralism and presentment. A sunset provision, for instance, automatically alters statutory text in the same manner that a presidential cancellation does.\(^{212}\) If laws can sunset without bicameralism and presentment because the sunset provision is itself part of the law, laws may be canceled outside of bicameralism and presentment because the cancellation delegation is itself an element of the law—a law that came about through bicameralism and presentment.

Moreover, this Article's earlier review of the claim that cancellation and modification delegations are somehow "revolutionary" demonstrated that Congress already has conveyed the authority to change statutory provisions without satisfaction of bicameralism and presentment.\(^{213}\) Under the Rules Enabling Act, the Supreme Court may repeal statutory procedural rules.\(^{214}\) Likewise, tax, defense, and bankruptcy statutes permit repeal or modification of statutory provisions.\(^{215}\)

As noted earlier, the Court attempted to distinguish these other cancellation statutes from the Act.\(^{216}\) A Presentment Clause claim based on the sanctity of statutory text, however, should not turn on whether legislation deals with foreign affairs. Nor should a Presentment Clause argument turn on whether "Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment."\(^{217}\) Either textual changes must satisfy bicameralism and presentment or not.

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\(^{212}\) See Black's Law Dictionary 1436 (6th ed. 1990) (defining "sunset law" as "a statute or provision in a law that requires periodic review of the rationale for [its] existence" and that will cease to exist absent positive steps by the legislature to continue its existence (emphasis added)).

\(^{213}\) See supra Part II.A.1.a.


\(^{215}\) See supra notes 159-160 and accompanying text.

\(^{216}\) See Clinton v. City of New York, 118 S. Ct. at 2105-07; supra note 163 and accompanying text.

\(^{217}\) Id. at 2106. As noted earlier, the Court curiously claimed that in the Rules Enabling Act, Congress determined that existing rules that conflicted with Court-promulgated rules would be superseded automatically. See id. at 2107 n.40; supra notes 167-168 and accompanying text. The Court, however, should have viewed cancellations under the Act in the same way—Congress provided that when it received the President's cancellation message, the items listed therein would be automatically canceled. In fact, the cancellations were not effective until both chambers receive the President's special cancellation message. See 2 U.S.C. § 691b(a) (Supp. II 1997).
b. We Should Not Treat the Presentment Clause As the Exclusive Means of Changing Statutory Text

Common sense also suggests that we should reject the assertion that changes to statutory text must satisfy bicameralism and presentment. Given the commonplace alteration of the law outside of the Presentment Clause’s strictures, we must suppose that the Clause somehow provides the exclusive means of altering statutory text, but does not constrain the more frequent regulatory changes in law.

Anyone familiar with the regulatory state appreciates that bicameralism and presentment simply are not necessary to make law. Voluminous federal regulations stream forth daily, coercing some and bestowing benefits on others. For instance, prior to the adoption of rules under section 10(b) of the Securities Exchange Act of 1934,218 that section had no legal impact on the securities market.219 Once the SEC issued section 10(b) regulations, however, companies and individuals had to heed such restrictions.

Indeed, while condemning the legislative veto, INS v. Chadha220 also sanctioned the issuance of regulations that alter legal rights and responsibilities outside of the legislative process.221 In Chadha, members of Congress complained that if the Executive Branch could issue regulations and thus make law outside of the bicameralism and presentment process, the legislative veto should be acceptable as well.222 The Court disagreed: “The bicameral process is not necessary as a check on the Executive’s administration of laws because his administrative activity cannot reach beyond the limits of the statute that created it . . . .”223 In other words, executive officers may issue legal rules without satisfying bicameralism and presentment, notwithstanding that such regulations alter legal rights and duties.224

If Chadha and Article I permit executive lawmaking, law cancellation and modification may occur outside the “finely wrought” process as well.225 To paraphrase Chadha, the bicameral process is an unnecessary check on

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218 See 15 U.S.C. § 78j(b) (1994) (prohibiting the use of manipulative and deceptive practices “in contravention of such rules and regulations as the Commission may prescribe”).
219 By its own force, section 10(b) prohibits nothing. See id. The SEC must issue regulations in order for that section to have any effect. Of course, when the SEC issues regulations, it has altered the legal status quo by placing new burdens on traders.
221 See id. at 953-54 n.16.
222 See id.
223 Id.
224 Justice White came to this same conclusion about the import of Chadha. He noted that Congress may delegate lawmaking power to others, including to private parties, see id. at 987 (White, J., dissenting) (citing Currin v. Wallace, 306 U.S. 1 (1939); United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 577 (1939)), but Congress may not delegate to itself (or a subset of itself) the power to “veto” executive actions. See id. (White, J., dissenting). Rather, Congress must legislate (i.e., enact a new bill) to “veto” an executive decision. See id. (White, J., dissenting).
225 Justice Scalia understands this point. See Clinton v. City of New York, 118 S. Ct. 2091, 2116 (1998) (Scalia, J., concurring in part and dissenting in part) (arguing that the Presentment Clause “no more categorically prohibits the Executive reduction of congressional dispositions . . . than it categorically prohibits the Executive augmentation of congressional dispositions . . . generally known as substantive rulemaking”).
executive action because an executive's repeals or modifications cannot reach beyond the statutory delegation of cancellation or modification authority.\textsuperscript{226} To understand \textit{Chadha} and Article I, one must realize that they provide that Congress may not change legal rights and responsibilities except through bicameralism and presentment. In other words, Congress may not empower a subset of Congress or Congress itself to alter legal rules outside of the normal legislative process.\textsuperscript{227}

In any event, one should not construe the Presentment Clause as barring changes to statutory text but permitting wholesale modifications of the law. The supposed exclusive means of changing statutory text would be rather meaningless. As long as the statutory text remained inviolate, Congress could permit wholesale regulatory nullification or modification of statutory rules and thus wholly vitiate the supposed ironclad prohibition against changes to statutory text.

In fact, Congress could duplicate the Line Item Veto Act without the supposed Presentment Clause infirmity. For instance, Congress could permit the President to issue regulations or directives to "suspend" a provision or statute indefinitely. Congress also could require that such regulations or directives be issued within five days of the statute's enactment and provide that such regulations or directives were "irreversible" once made.\textsuperscript{228} Further, Congress could place all of the Act's restrictions on this regulatory authority. As long as statutory text remained intact, however, the Presentment Clause would pose no problem. Yet the effect would be the same as that of the Line Item Veto Act. Surely, the Presentment Clause does not ban the Line Item Veto Act and the cancellation or modification of statutory text generally, and yet somehow permit regulatory cancellation of statutes.\textsuperscript{229}

c. Cancellations and Modifications Do Not Necessarily Change Statutory Text

Notwithstanding these arguments, assume that the Presentment Clause does ban alterations to something called "statutory text" outside of bicameralism and presentment procedures. When the U.S. Code is the law,\textsuperscript{230} legislative and executive repeals or modification of codified provisions presumably may lead to the physical cancellation or excision of such provisions in the

\textsuperscript{226} See \textit{Chadha}, 462 U.S. at 953 n.16.
\textsuperscript{227} One might question why Article I limits congressional lawmaking, but not executive lawmaking. Although the Supreme Court never defended this aspect of its opinion, the answer perhaps lies in the inevitability of executive lawmaking outside of Article I. See supra note 80 and accompanying text.
\textsuperscript{228} For the sake of stability, Congress undoubtedly could permit the President to deploy delegated discretion only once.
\textsuperscript{229} One might claim that if Congress enacted such a delegation, it would be attempting improperly to circumvent the Presentment Clause. Of course, one could make the same claim about any delegation. Whenever Congress chooses to delegate discretion, it circumvents the difficult task of satisfying bicameralism and presentment. In other words, delegation generally could be seen as an evasion of bicameralism and presentment.
\textsuperscript{230} 1 U.S.C.A. XIII (West 1997) (listing titles of U.S. Code that Congress has codified into positive law).
U.S. Code. In other words, the compilers of the U.S. Code may need to remove a repealed provision or rewrite an altered provision.

Most executive or legislative repeals, however, will not lead to something that resembles a change in "statutory text." The official statutory text for most statutes is found only in the United States Statutes at Large and not the U.S. Code. Indeed, most U.S. Code titles are not positive law, but merely prima facie evidence of what the law is. For instance, title 2 of the U.S. Code is not officially the "law." The Statutes at Large, however, never changes, regardless of what happens after a bill becomes law. In other words, its statutes appear just as Congress and the President enacted them into law by Congress and the President. Accordingly, a repeal or modification of an act found in title 2 will not alter any "statutory text" because the Statutes at Large never changes and the U.S. Code for title 2 is not technically law. In other words, one cannot compare language across documents and see any change in statutory language. Rather, the legislative repeal or modification (which will be printed in Statutes at Large) or the executive repeal or modification (which will not) simply supersedes the prior statutory language found in United States Statutes at Large. Indeed, as the Court must have recognized, President Clinton's repeals pursuant to the Act did not alter the Statutes at Large. The proof lies in the fact that the Court cites to the Statutes at Large in order to quote the canceled provisions.

Moreover, only laws of a "general and permanent" nature are even codified in the U.S. Code. Appropriations and other legislation of a special nature never find their way into the U.S. Code because they are not of a "general and permanent" nature. Once again, the cancellation or modification of such provisions cannot alter statutory text. As discussed above, the

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231 See 2 U.S.C. § 285b(1) (1994) (instructing the office of the Law Revision Counsel to prepare and submit to the Judiciary Committee "a complete compilation, restatement, and revision of the general and permanent laws of the United States").

232 I say "may" because it is unclear that the Law Revision Counsel would codify any executive repeals or modifications. Section 285b(1) lacks precise guidelines that deal with this situation. See 2 U.S.C. § 285b(1). Moreover, because the U.S. Code is updated every year by supplement, see Morris L. Cohen et al., How To Find the Law 152 (9th ed. 1989), the Law Revision Counsel may not have codified the unmodified statute prior to the repeal or modification of a provision. If a provision never was codified in the U.S. Code prior to executive repeal or modification, then a subsequent codification incorporating the executive alteration will not change the U.S. Code. Instead, the Counsel probably would codify the provision as modified by the President. In other words, U.S. Code would not change as a result of an executive repeal or modification.

233 See 1 U.S.C.A. XIII (listing only a minority of titles as being codified into positive law).


235 See 1 U.S.C.A. XIII. The text of title 2 of the U.S. Code is prima facie evidence of the law, see 1 U.S.C. § 204(a), but the Statutes at Large supersedes whenever there is a difference. See id. § 112 (1994); see also United States Nat'l Bank v. Independent Ins. Agents of Am., 508 U.S. 439, 448 (1993) (stating that the United States Code is prima facie evidence of the law, but that the Statutes at Large provides "legal evidence of the laws").


subsequent presidential cancellation or modification simply trumps the prior statutory directive.

In the context of the Line Item Veto Act itself, executive repeals certainly did not change statutory text. As noted above, the Statutes at Large will never change after any executive (or legislative) repeal. Nor could there have been any changes to the U.S. Code as a result of a Line Item Veto cancellation. Recall that the Act required the President to cancel provisions within five days of signing them. This short fuse ensured that the compilers of the U.S. Code did not have time to codify the provisions that resulted from bicameralism and presentment prior to presidential cancellations. In other words, before a provision was codified in the U.S. Code, the President would have already canceled the provision if he chose to do so. The resulting law would then be codified. Thus, although cancellations under the Act altered the law, statutory text did not change.

To sum up, the Presentment Clause does not ban changes to statutory text or the law outside of bicameralism and presentment. Even if it did, however, executive cancellations or modifications do not necessarily alter statutory text.

2. Implications of the Constitution's Limited Veto

Because the Constitution does not permit the President to veto particular provisions in a bill, one might think that cancellation and modification authority "circumvent" the veto's implicit limitations by allowing the President to cancel portions of laws. Although not explicitly relying on this potential implication of a limited veto power, the Court cited President George Washington's assertion that a President must "approve all the parts of a Bill, or reject it in toto." Moreover, the Supreme Court has said that "indirect attempt[s]...to accomplish what the Constitution prohibits [one] from accomplishing directly" are improper. One may argue that cancellation and modification authority permit the President to evade the constitutional limitations on his veto authority through indirect means.

One should not construe the conferral of limited veto authority, however, as implicitly providing that Congress may not convey additional authority. To be sure, sometimes the Constitution sets a rule or rules that cannot be augmented. For instance, Congress cannot cede to itself greater legislative authority. Only a constitutional amendment can do that. Likewise, Congress

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238 In truth, as noted earlier, we do not know what the Law Revision Counsel would have done regarding canceled provisions because it is not clear that Counsel should incorporate the changes pursuant to 2 U.S.C. § 285b(1). See supra note 232.
239 See Lund, supra note 12, at 456-57 n.46; Rappaport, supra note 143, at 771.
240 See Sargentich, supra note 12, at 118 (asserting that limits on the President's veto should not be circumvented by granting new veto authority after the President signs a bill into law).
241 Clinton v. City of New York, 118 S. Ct. at 2104 (quoting 33 THE WRITINGS OF GEORGE WASHINGTON 96 (John C. Fitzpatrick ed., 1940)). In truth, Washington's statement goes only to the President's constitutional authority. He did not address whether Congress might accord the President additional authority to use either before or after a bill becomes law. Accordingly, Washington speaks of what was, not what could be.
may not grant to the President the unilateral right to appoint and confirm non-inferior officers.\textsuperscript{243} At other times, however, the Constitution establishes a default rule of sorts and permits statutory departures from it. Some default rules are explicit.\textsuperscript{244} Others are implicit.\textsuperscript{245}

The President’s veto fits more comfortably into the latter category of default rules. Like the statutory creation of executive departments,\textsuperscript{246} and the possible statutory conferral of immunity on the President,\textsuperscript{247} the President’s limited veto and lack of constitutional authority to cancel or modify existing laws do not imply that the Constitution prohibits Congress from furnishing the President with such power pursuant to the Necessary and Proper Clause.\textsuperscript{248}

At most, one should view the Constitution’s veto as implying that Congress may not add to the President’s power over legislation. In other words, Congress might not be able to grant a true line item veto via statute.\textsuperscript{249} A constitutionally circumscribed role concerning unsigned legislation, however, does not mean that the President has a similarly circumscribed role with respect to statutes.

Indeed, the Constitution’s delegation of a limited legislative role to the President cannot mean that the President may not enjoy a broader lawmaking role. As head of the Executive Branch, the President has very robust lawmaking authority. If presidential lawmaking is consistent with the Constitution’s grant of a limited veto and its recognition of a circumscribed, constitutional, legislative role, then presidential law canceling or law modifying should be acceptable as well. Arguments based on the negative implications of the Constitution’s veto misunderstand the President’s truly vigorous lawmaking role. With Congress’s help, the President may enjoy authority over the law beyond the authority conferred in the Presentment Clause.\textsuperscript{250}

\textsuperscript{243} See U.S. Const. art. II, § 2, cl. 2 (providing that Senate must confirm non-inferior officers).

\textsuperscript{244} See id. (establishing the requirement of Senate confirmation for all officers, but permitting Congress, by law, to vest the appointment of inferior officers with the President, heads of departments, and courts); id. art. III, § 1 (refraining from establishing inferior federal courts but explicitly permitting Congress to do so).

\textsuperscript{245} See, e.g., Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980) (explaining that Congress may permit the states to restrict flow of commerce even though the Constitution would otherwise prohibit state regulation).

\textsuperscript{246} See Calabresi & Prakash, supra note 17, at 592-93 (arguing that the Necessary and Proper Clause permits Congress to create executive offices subordinate to the President while noting that Constitution does not create such positions itself).

\textsuperscript{247} Cf. Clinton v. Jones, 117 S. Ct. 1636, 1652 (1997) (stating that Congress could provide the President with some protections from civil suits). Congress could grant such immunity notwithstanding the negative implications of the Constitution’s conferral of limited immunity to members of Congress. See U.S. Const. art. I, § 6, cl. 1 (providing immunity to members of Congress for speeches and debates in Congress).

\textsuperscript{248} But see Byrd, supra note 22, at 320 (asserting that Act granted an “unconstitutional fourth option for the President by effectively allowing him to sign only certain portions of a bill into law”).

\textsuperscript{249} See Sargentich, supra note 12, at 101-03.

\textsuperscript{250} Even if one thought the Constitution’s veto implicitly precluded the delegation of cancellation authority to the President, one might conclude that it poses no obstacles to the delegation of cancellation authority to others.
Given the Supreme Court's reliance on the Presentment Clause, the Act's title undoubtedly played a role in its demise. The Court mistakenly concluded that Congress was playing fast and loose with the Presentment Clause. Cancellation authority delegated by a statute other than the "Line Item Veto Act" probably would appear more akin to the familiar lawmakers delegations. Moreover, the timing of cancellations under the Act (within five days of presidential signing) may have made the Act's cancellation authority seem uncomfortably like an "enhanced" veto. Delegation of lawmakers authority that an executive could exercise only within five days of the underlying act's enactment might have raised similarly unfounded Presentment Clause concerns. Cancellation authority without such temporal constraints and exercised years later would have been less likely to arouse Presentment Clause concerns. When one ponders cancellation or modification authority in such circumstances, one begins to understand that the Presentment Clause poses no obstacle.

More generally, the Court's disappointing discussion of other delegations of cancellation and modification authority leaves a cloud of doubt over such delegations. Recall that the Court vainly tried to distinguish some cancellation and modification delegations from the Act. Given the logic of Clinton v. City of New York, however, statutes like Gramm-Rudman-Hollings and the Rules Enabling Act ought to be considered unconstitutional on Presentment Clause grounds. Undoubtedly, someone will challenge these Acts or similar statutes by citing Clinton v. City of New York.

C. Executive Repeals and Modifications Thwart Congressional Will and Upset the Legislative Framework and the Balance of Power amongst the Branches

One might believe that executive cancellations and modifications thwart congressional will. Congress enacts a statute and expects that it will remain law. When an executive outside Congress cancels or modifies congressional handiwork, however, the executive arguably contradicts the express will of Congress. Thus, executive repeals or modifications might subordinate congressional commands to executive will. Executive repeals and modifications also arguably upset the Constitution's "framework" for legislation. For instance, members of Congress might assume that they are enacting a law that establishes pollution standards for automobiles only to have an executive cancel or modify those standards.

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251 Justice Scalia claimed that the Act's title had "succeeded in faking out the Supreme Court." Clinton v. City of New York, 118 S. Ct. 2091, 2118 (1998) (Scalia, J., concurring in part and dissenting in part).

252 Given the weakness of the Presentment Clause argument, one wonders whether the Court used it as a convenient hook for striking down the Act. Indeed, there might not have been a majority that believed that the nondelegation doctrine or some other ground rendered the Act unconstitutional. The Presentment Clause thus might have served as a way to cobble a majority for an opinion designed to have few repercussions.

253 See Lessig, supra note 22, at 1662-63 (asserting that cancellations are unconstitutional because they amount to a "negation" of congressional policy choice and effectuate "the President's contrary policy will").
Such upset expectations may be problematic because the pollution standards may have been part of a delicate congressional compromise now unraveled by the unforeseen cancellation.\textsuperscript{254}

Finally, presidential cancellation authority might "impermissibly disrupt the balance of powers."\textsuperscript{255} The President has various statutory powers that grant him authority beyond those that the Constitution explicitly grants. One might argue that allowing the President to cancel statutes would be ceding still more power to a constitutional actor that is already too energetic and too dangerous.\textsuperscript{256}

1. Legislative Will

Although the typical delegation permits an executive to "fill in the details" of a statute pursuant to congressional directions, cancellation authority arguably allows an executive to discard congressional commands. In other words, one could argue that cancellations amount to repudiations of congressional policy and congressional statutes, rather than actions in pursuance of legislative ends. As Professor Lessig has asserted, "negation" of congressional commands cannot be consistent with a delegation doctrine that uses congressional will and policy as a yardstick.\textsuperscript{257}

These assertions about legislative will fundamentally misapprehend congressional lawmaking read against the backdrop of cancellation or modification authority. Executive repeals or modifications simply do not yield statutes that negate congressional will. One must never forget that executive lawmaking, repeals, and modifications occur pursuant to legislative sanction. After all, when cancellation authority exists, it is Congress's statutory policy to permit cancellations.\textsuperscript{258} Any seemingly mandatory statute is not obligatory at all, because Congress has also ceded cancellation authority. Accordingly, when President Clinton repealed appropriations, new direct spending, and limited tax benefits,\textsuperscript{259} he was doing so in furtherance of a congressional policy that ceded him such authority and anticipated that he might use it. More generally, when an executive cancels a law pursuant to a congressional delegation, the cancellation is not opposed to congressional policies; the cancellation is in furtherance of them. The very existence of cancellation or modification authority indicates that Congress wishes someone else to decide whether a law should continue to exist in its current form.

\textsuperscript{254} See Gerhardt, supra note 22, at 241-42 n.38 (asserting that a decision to sever an item from a bill "obviously unravels the compromise initially giving rise to its inclusion").


\textsuperscript{256} See generally Martin S. Flaherty, The Most Dangerous Branch, 105 YALE L.J. 1725 (1996) (arguing that the President's powers are already enormous and that increasing those powers will only further erode the balances of power).

\textsuperscript{257} See Lessig, supra note 22, at 1661-62.

\textsuperscript{258} More accurately, it was Congress's policy to permit cancellations when it enacted the cancellation delegation.

\textsuperscript{259} See supra note 39.
2. Legislative Framework

A closely related issue concerns the view of courts that cancellation authority impermissibly changes the Constitution's framework for legislation by upsetting legislative expectations. The district court in City of New York v. Clinton asserted that "[t]he laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and the Senate." Echoing the district court, the Supreme Court complained that cancellations yield "truncated" statutes that Congress never approved. Although the courts made these charges against the Act, any executive repeal or modification (whether or not effected by a President) might similarly upset congressional expectations.

Professor Gerhardt raises an additional concern about legislative framework. According to him, the Act forces Congress to go through two majority votes and one supermajority vote in order to force the President to implement a canceled program. Recall the scenario: Congress passes a bill with several cancelable items and the President cancels one such provision. Because Congress wants the provision to be implemented, Congress passes a disapproval bill. The President then vetoes the disapproval bill, requiring Congress to muster a two-thirds supermajority to override the veto. Surely, placing the onus on Congress to overturn presidential cancellations or modifications with the separate votes turns our Constitution's framework on its head.

The courts' assertions misapprehend the characteristics of legislation. All laws may result in applications or effects that members of Congress did not foresee. For example, Congress may grant the SEC the ability to issue regulations relating to manipulation and fraud in securities transactions and fully expect that the SEC will draft such regulations. Yet the SEC could defeat this expectation by drafting regulations that do not really curb such practices. Likewise, the SEC could draft regulations that reach practices that many members find perfectly acceptable. The SEC could even decide not to issue regulations at all. Dashed expectations do not render delegations, of whatever type, unconstitutional.

More important, cancellations or modifications do not yield statutes Congress never legislated. When Congress passes a law against the backdrop of cancellation or modification authority, members of Congress know that any seemingly mandatory provision is not really mandatory at all. Because

262 See Gerhardt, supra note 22, at 240-41.
263 See id.
265 In effect, the Act's rule of construction merely permitted the President to say "yes" or "no" to certain provisions within a five-day period. Given such binary outcomes, members of Congress could foresee the decision tree: with respect to every act, members knew that a provision might or might not be canceled in whole within a five day period. Thus a provision that seemingly required the expenditure of $10 million for a new federal building did not require the
members know this *ex ante*, they essentially vote for the truncated statute (or the modified statute) and the conventional statute as well, leaving the final choice to someone else.\footnote{266} Given this knowledge, members of Congress can either adjust their legislative logrolls accordingly or decline to accord cancellation authority at all. Members are not fooled\footnote{267} and the Constitution’s legislative framework is not upended.

Professor Gerhardt’s concerns can be answered similarly. First, Congress need never cede cancellation authority. When it does cede cancellation discretion, however, it is improper to count the first passage of some provision that is subsequently canceled as manifesting a congressional insistence on the implementation of the canceled provision. Congress knew its provision was not obligatory and did not demand that the provision be implemented. Second, Professor Gerhardt has identified a trait of delegations generally. As noted earlier, whenever Congress cedes discretion, there is a chance that the Executive Branch will use that discretion in ways that upset Congress. If Congress wants to withdraw that delegation or alter an executive use of discretion, it always faces the daunting prospect of having to vote not once but twice: once to pass legislation overturning executive action or retracting the delegation and once to override a presidential veto. Such difficulties, however, do not call into question the propriety of lawmaking, cancellation, or modification delegations.

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\footnote{266}{As noted earlier, the same phenomena occurs whenever Congress passes a statute that delegates authority. Congress votes for the statute and, in effect, for the myriad regulatory possibilities that might result from executive lawmaking under that statute. Sometimes the executive lawmaking effectively will eviscerate the statute; sometimes the executive lawmaking will expand it beyond the wildest dreams of the statute’s supporters.}

\footnote{267}{When an act cedes cancellation authority as to future statutes (such as the Line Item Veto Act), there is an additional concern about the difficulty of dislodging this rule of construction. That Congress may find it difficult to alter a rule of construction or other statute, however, does not make such laws unconstitutional. Congress always can reclaim any authority that it ceded and the difficulty in retracting such authority does not matter. Thus, a codified *Chevron* presumption would not be unconstitutional merely because it might be hard for future Congresses to repeal this presumption. See Stith, *supra* note 36, at 659-60 (asserting that statutes are not unconstitutional merely because they burden future Congresses by forcing them to repeal the statutes if they do not approve of them).}

Gramm-Rudman-Hollings erected a very similar hurdle to that of the Act. If members of Congress wanted a statute’s appropriations to be spent regardless of the sequestration procedure, members had to include language indicating that the appropriation or entitlement program was to be implemented notwithstanding the breach of a cap. See *id. at* 662 (contending that Gramm-Rudman-Hollings was constitutional notwithstanding that members of Congress had to make clear their desire to have funds expended and not sequestered). Gramm-Rudman-Hollings’s rule of construction—future statutes will be construed to be cancelable in part if the spending caps are breached—changed the dynamics of legislating and outcomes similarly, but did not thereby change unconstitutionally the rules of the legislative game.

In any event, as discussed below, the Act’s rule of construction can be foiled without even passing legislation, thus making the Act particularly easy to circumvent. See *infra* notes 275-277 and accompanying text.
3. Balance of Powers

The assertion that Congress may not delegate cancellation authority to the President because of our Constitution's supposed concern for "balance of power" is rather curious. If a domineering executive is the problem, why must striking down cancellation authority be the solution? Perhaps other delegated powers should be terminated for excessively augmenting the President's powers. Better yet, maybe the President should choose which of his statutory powers he will relinquish in return for retaining the remainder.

Of course, if too much executive power is a problem, we must stand ready to denounce the lawmaking delegations that may take the place of cancellation and modification authority. The Cancellation and Modification Frameworks highlight that Congress could cede the same or a broader scope of authority to the President in the form of a lawmaking delegation. If Congress chooses to enact such lawmaking delegations, the Court should, on this view, strike them down. Moreover, any new lawmaking delegation could throw the balance of power off kilter and thus should be judicially nullified as well. In other words, any new substantial delegation to the Executive Branch will be problematic.

In any event, any constitutional argument founded on the principle that some legislation or action makes one branch or another "too powerful" is unsound. Although one can imagine a judicially enforceable constitutional provision that relies on a notion of balance, our Constitution simply does not prohibit constitutional actors from becoming too influential or dominant. It merely grants powers and places certain restraints on their use.268 No constitutional crisis ensues when Congress embraces the President's budget and legislative agenda. Nor is there cause for concern if a President is especially solicitous of congressional views regarding law execution and appointments. In neither situation does the augmentation of a branch's power and influence vis-à-vis the other branches somehow violate the Constitution.269 There simply is no "balance clause" or "balance principle" to be enforced.270 Accordingly, something is constitutional or not regardless of whether someone or

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268 The Framers may have granted certain powers out of a concern that the branch empowered otherwise would be too weak and the other branches too strong. The President's veto and the salary provisions for the President and federal judges come to mind. Just because many of the Framers wanted to ensure that each branch had adequate support and defense mechanisms, however, does not mean that they constitutionalized a judicially enforceable "balance" principle.

269 To be sure, the Court seems to invoke general separation of powers principles to invalidate statutes. For instance, some might view Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 265-77 (1991) (holding that Congress's creation of a Board of Review composed of congressmen with veto power over the Airports Authority's decisions violated the separation of powers), as an example where the Court found a violation of the Constitution largely on the grounds that Congress was attempting to upset the Constitution's balance. In this instance, Congress, through the use of a Board of Review to oversee the Airports Authority's actions, arguably tried to aggrandize itself at the expense of the Executive Branch.

270 Indeed, at least some Framers knew that absolute balance was not an end of the Constitution. Alexander Hamilton described the Judiciary as the "least dangerous" branch because the Judiciary supposedly has the least capacity to annoy or injure the rights under the Constitution. The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Founders described the legislature, however, as the "impetuous vortex." The Federalist No. 48, at
everyone believes that one branch has become too powerful.\textsuperscript{271} The “balance” in the oft-heard phrase “checks and balances” comes, if at all, from the deployment of constitutional power. The branches use their constitutional powers and defenses and attempt to draw the public to their respective sides.

Even if there were a balance principle, however, executive repeals and modifications do not necessarily increase the President’s power. As noted earlier, cancellation and modification authority often make executive abnegation possible.\textsuperscript{272} In other words, total executive discretion may be meaningfully diminished after an executive repeal or modification. Thus, although cancellation and modification authority augment presidential authority,\textsuperscript{273} they sometimes do so by authorizing the President to curtail his other statutory authority. Given this possible feature of cancellation and modification delegations, it seems odd to assert categorically that such authority necessarily delegates too much discretion to the President. The claim that cancellation and modification delegations cede excessive powers to the President reflects too narrow an understanding of such authorities and, more important, is simply not founded on the Constitution.\textsuperscript{274}

With respect to the Line Item Veto Act in particular, it would be especially odd to charge that it delegated too much authority. The Act empow-

\textsuperscript{271} Had the Constitution codified a balancing test, there would be very little agreement about whether Congress, the President, or the courts should have the upper hand in interbranch struggles. Professor Flaherty finds the Executive Branch too powerful, \textit{see} Flaherty, \textit{supra} note 256, while Professor Paulsen perhaps believes that the Executive Branch should be the most powerful, but that because of errant constitutional tradition, the Judiciary has arrogated to itself the power to say what the law is for all three branches. \textit{See} Michael Stokes Paulsen, \textit{The Most Dangerous Branch: Executive Power to Say What the Law Is}, 83 \textit{Geo. L.J.} 217 (1994). Many others (myself included) believe that the incredible expansion of federal legislative power during this century indicates that the vortex-like Congress has become too powerful. These difficulties bring to mind what Alexander Hamilton said in response to charges that the Senate would be too influential under the Constitution: “Where is the measure or criterion to which we can appeal, for determining what will give the Senate too much, too little, or barely the proper degree of influence?” \textit{The Federalist} No. 66, at 403 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Of course, such disagreements are common to many areas of constitutional law and we could not avoid such arguments even if the Constitution had codified a balancing test.

\textsuperscript{272} As noted earlier, not all cancellations will reduce discretion. \textit{See supra} note 132 and accompanying text. With the proper constraints, however, Congress could ensure that cancellation delegations only had such an effect.

\textsuperscript{273} One simply cannot deny that the Act, and cancellation and modification authority generally, grant the President extra power “over the legislative process.” Lessig, \textit{supra} note 22, at 1663. \textit{Any} delegation, however, (lawmaking or otherwise) cedes the President increased control over policy. Cancellation and modification authority are not unique in this respect and should nor be found unconstitutional on such grounds.

\textsuperscript{274} A related issue concerning balance of “power” concerns control of the Treasury. One might view cancellation authority with respect to fiscal provisions as contrary to the Framers’ expectation that Congress would control the federal government’s mighty power of the purse. \textit{See} \textit{The Federalist} No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The ability to keep money in the Treasury was not what worried the Founders; they were worried about the President (or anyone else) making unauthorized withdrawals of funds. \textit{See} U.S. Const. art. I, § 9, cl. 7 (stating that no funds may be withdrawn from Treasury absent a statutory directive). The frugal executive authorized by Congress poses less of a tyrannical threat than the executive that wantonly raids the Treasury.
ered no one. It merely created a rule of construction. Each subsequent bill, the passage of which was a necessary condition for using the cancellation authority, served as a ready vehicle for undermining the Act’s rule of construction. In any future bill, Congress could have provided that the President could not cancel any provision contained therein. When faced with such a bill, the President would have been trapped between Scylla and Charybdis. If he vetoed the bill, he never would enjoy cancellation authority with respect to the provisions contained in the bill. Any law that might result from a veto override could not be subject to the Act, because the Act’s cancellation authority was limited to statutes signed into law. If he signed the bill, however, he would have lost the ability to cancel it because the newly enacted and signed law explicitly would have denied him that authority. Accordingly, because Congress could have circumvented the Act’s “delegation” without even having to enact a new law, it is hard to see how the Act tilted the balance of power toward the President.

D. Executive Repeals and Modifications Violate the Take Care Clause

To this point, we have searched in vain for an implicit prohibition against executive repeals or modifications. Perhaps we have overlooked the clause that arguably explicitly prohibits such delegations: the Take Care Clause. The President must “take Care that the Laws be faithfully executed.” As the district court in Byrd v. Raines noted, canceling laws hardly seems consistent with faithful execution. Indeed, some have asserted that the Take Care Clause was included in the Constitution to prevent executive suspension or cancellation of statutes.

Despite some surface plausibility, the Take Care Clause claim leads nowhere. If the Take Care Clause were meant to preclude presidential suspension (and there is mixed evidence), it only precludes claims of an inherent executive power to suspend, cancel, or modify statutes. That is to say, the Take Care Clause may have certain negative implications regarding the President’s “executive power” as compared to the English monarch. Because the

275 See supra note 30.
276 Professor Vikram Amar has argued that a delegation of legislative authority ought to be less problematic if Congress can easily retract such authority. See Vikram David Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 Vand. L. Rev. 1347 (1996).
277 Even if one were convinced that presidential cancellation or modification authority somehow violated a “balance of powers” principle, that conclusion would not necessarily mean that Congress could not cede cancellation authority. One might conclude that Congress could delegate cancellation authority to someone other than the President.
278 U.S. Const. art. II, § 3.
281 See Calabresi & Prakash, supra note 17, at 582-85; Saikrishna Bangalore Prakash, Hall to the Chief Administrator: The Framers and the President’s Administrative Powers, 102 Yale L.J. 991, 1000-03 (1993).
Take Care Clause is directed the President, it should not preclude Congress from delegating the power to augment, suspend, modify, or cancel statutes.

Indeed, when the President cancels or modifies a statute, one could argue that the President has faithfully utilized the discretion in one statute by canceling or modifying another. The President need not enforce or execute canceled laws because those provisions are no longer the law. Accordingly, a President who cancels or modifies a tax benefit pursuant to delegated authority is no more being unfaithful to his execution duties than he would have had he written regulations to implement some law or used statutory discretion to decline to enforce a law against an individual. In all these situations, the President is acting pursuant to discretion granted by the law and thus cannot be accused of unfaithful execution of the laws.

In the end, the Take Care Clause argument wins the day only if the canceled law still has the force of law notwithstanding the presidential repeal. In other words, the argument carries weight only if one already has concluded that the Executive Branch may not exercise delegated authority to cancel provisions of law. By itself, the Clause does not provide an independent reason for holding presidential cancellations or modifications unconstitutional.

**Conclusion**

The Line Item Veto Act was born of congressional weakness. Congress sought the President’s help to keep spending and tax cuts in check. Given the background of legislative weakness, cancellation authority does not appear in its best light. One should not judge such authority, however, by reference to the political climate that generated the Act. Congress could delegate other types of cancellation or modification authority to the Executive Branch without any negative connotations. If Congress wishes to convey some flexibility to an executive officer, it is better to delegate such authority after Congress itself has chosen the “default” policy and then permit the Executive Branch to depart from that policy choice. Such a regime is far superior to one in which Congress dodges responsibility by merely drafting a broad delegation because when Congress sets a policy and permits departures, the public can more easily blame or credit Congress. We ought to seize the opportunity to couple increased legislative accountability with administrative flexibility.

Apart from these policy arguments, there are no sound constitutional reasons for treating delegations of cancellation and modification authority differently from lawmaking authority. All three involve delegations of legislative authority and all three should be subject to the same “Necessary and Proper” test. To permit broad executive lawmaking while frowning upon

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283 To echo earlier arguments, even if the Take Care Clause precludes presidential cancellations, it arguably has no implications for what others should be able to cancel. Congress could delegate cancellation authority to someone independent of the Executive Branch and there could be no alleged violation of the Take Care Clause.
even modest executive repeals and modifications is to strike down govern-
mental action based on a constitutional formality not found in the Constitu-
tion. Although constitutional form sometimes matters, it does not matter
here.

There is one unintended and ironic consequence of the Court’s unneces-
sary and improper cancellation of the Act and its repudiation of cancellation
and modification authority generally. In response to *Clinton v. City of New
York*, Congress may draft tax, appropriation, and entitlement statutes that
cede greater discretion in the first instance. In other words, if Congress can-
not delegate cancellation authority but it nonetheless wants to cede more
discretion over fiscal policy, Congress’s only option is to draft statutes grant-
ing broad discretion with Congress making few decisions and accepting very
little responsibility. The Court might have backed Congress into the worst of
all delegation worlds, where Congress establishes little for fear of tying the
executive’s hands. Properly understood, *Clinton v. City of New York* was not
a back-handed blow against excessive delegations; it was a blow against “de-
viant” executive lawmaking.