PROCEDURAL CHECKS: HOW THE CONSTITUTION (AND CONGRESS) CONTROL THE POWER OF THE THREE BRANCHES

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INTRODUCTION

The Supreme Court's separation-of-powers cases present a number of problems for scholars. The most obvious problem is the absence of a consistent methodology. The Court's opinions appear to wander somewhat aimlessly, without a coherent approach to the structural Constitution.[1] At times, the Court uses a formal and textual analysis hostile to legislative innovations dealing with the structure and powers of the branches.[2] At other times, the Court relies on a more functional balancing analysis that welcomes Congress's legislative creativity about power distribution.[3]

One finds additional inconsistencies in the way the Court has treated the different branches, especially when it comes to statutes that expand the powers of a particular branch. The Court rigorously polices limitations on the powers of the federal courts,[4] and becomes even stricter when the question involves a statutory expansion of Congress's authority.[5] The Court has found it difficult, however, to develop an effective approach to limiting the statutory expansion of presidential power, particularly when expanded through delegations of quasi-legislative power.[6] As a result, many scholars criticize the

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1. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991). The structural Constitution refers to the provisions that ordain and establish the powers of the three branches, particularly Articles I, II, and III.

2. *See infra* text accompanying notes 63–66.

3. *See infra* text accompanying notes 53–56.

4. *See infra* text accompanying notes 57–59.

5. *See infra* text accompanying notes 48–54.

6. *See infra* text accompanying notes 84–93.

Court's separation of powers cases for unduly limiting Congress's ability to redress the shift in power to the executive branch that accompanied the expansion of the administrative state.[7] In these cases, the Court hurts its own cause because explanations for why Congress may not augment its own authority have tended to be superficially textual and overly formalistic.[8]

Although the Court does not explain itself well, it nevertheless captures some important truths about how the Constitution protects against the arbitrary exercise of federal power. The Court's case law on statutory expansions of judicial and legislative power recognizes important procedural checks on the way that power is exercised. By requiring that judicial power be exercised only in the context of a litigated case or controversy, the Court gives effect to the framers' approach to preventing the arbitrary exercise of power by judges who are largely immune from inter-branch checks on their authority.[9] Similarly, cases limiting the power of Congress to expand its own authority require that any congressional exercise of substantive power be exercised only through the mechanism of the Bicameralism and Presentment Clause, that is, passed by both Houses of Congress and sent to the President for his signature or veto.[10] Such a procedural limitation on the exercise of congressional power ensures that the framers' checks on the arbitrary exercise of legislative power may not be circumvented through the imaginative assignment of power to less than the entire Congress.

The only problem with these cases is that the Court has not been able to find an analogous comprehensive constitutional procedural check on the executive branch. There simply is no Article II analogue to the case or controversy requirement of Article III or the bicameralism and presentment requirement of Article I.[11] The Court has mostly been reduced to defining the limitations on statutory enlargement of executive power by defining what it is not—legislative and judicial power. As the toothless non-delegation doctrine

7. *See, e.g.*, E. Donald Elliott, *Why Our Separation of Powers Jurisprudence is so Abysmal*, 57 GEO. WASH. L. REV. 506, 511 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions–A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (arguing that, to permit the President fully to oversee administrative discretion is to allow the President to assume the legislative, executive, and judicial powers).

8. *See infra* text accompanying notes 135–146.

9. *See infra* text accompanying notes 105–134.

10. *See infra* text accompanying notes 147–156.

11. *See infra* Part II.C.1.

demonstrates, however, this approach has not proved to be an effective check on the enlargement of executive power.[12] As a result, the cases concerning statutory expansions of power look decidedly unbalanced, with significant procedural checks on the exercise of judicial and congressional power, but no comprehensive procedural checks on executive power.

As a practical matter, this imbalance is more apparent than real, and it certainly does not warrant rethinking the procedural checks on the judicial and legislative branches. First, when the Court finds an applicable procedural check on the executive branch, it has not hesitated to enforce it, as it did in striking down the line item veto.[13] Second, and more importantly, Congress has stepped in to fill the gap by adopting the Administrative Procedure Act ("APA") and numerous other statutes that effectively create the same kinds of procedural checks on the exercise of power by the executive branch that the case or controversy and bicameralism and presentment requirements impose on the judicial and legislative branches.[14] By requiring the executive branch to make and implement its policy decisions through a set of procedures designed to minimize the chances for arbitrary decision-making and abuses of authority, Congress and the courts (through the judicial review that is authorized by the APA) have corrected the imbalance in the constitutionally imposed procedural checks on the exercise of federal power. If anything, as a policy matter, Congress may have gone too far in imposing procedural checks that have impaired the ability of the executive branch to implement its statutory mandates effectively.[15]

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12. *See infra* notes 157–186 and accompanying text.

13. *See* Clinton v. City of New York, 524 U.S. 417, 421 (1998). "The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line item veto and enhances the President's powers beyond what the Framers would have endorsed." *Id.* at 451.

14. *See infra* text at notes 195–210.

15. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 301, 442 (2002); *see also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1263–65 (1989) ("By transferring vast power to agencies subservient to Congress and unfettered by substantive statutory standards, each member of Congress was well-positioned to become a feudal lord. Moreover, while Congress could take credit for addressing a problem by creating an agency to regulate that area, a legislator could enhance the credibility of promises of favorable agency treatment to constituents by referring to Congress's power to veto an agency action or to remove the agency head."); Patricia Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 528 (1988); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of*

Three significant normative consequences flow from this understanding of the importance of the APA in redressing the imbalance in the Court's separation of powers case law. First, it means that both scholars and the courts should be sensitive to the role of the APA and numerous other procedural statutes as an executive-branch analogue to the case or controversy and bicameralism and presentment requirements. Second, there is little reason to reconsider the Court's imposition of procedural checks on Congress and the federal courts simply because the Court cannot find and implement a comprehensive constitutional analog for the executive branch. Congress has effectively created analogous procedural checks through the APA and other statutes regulating the manner in which the executive branch enforces the law, and if it remains concerned about abuses of power by the executive branch, it retains the ability to add additional procedural checks on executive power. Third, because the legitimacy of the procedural checks on the courts and Congress depends in part on Congress's power to impose similar checks on the executive branch, the courts should be skeptical of presidential arguments that such restrictions unconstitutionally impair the ability of the executive branch to carry out its constitutional functions.

This article proceeds in four parts. In part one, the article lays the foundation for the rest of the paper by discussing the differing approaches taken by scholars and the Supreme Court with respect to the structural Constitution. Some scholars favor formalist approaches that emphasize strictly enforced lines of division between the branches, while others prefer a functionalist interpretation that allows for greater legislative freedom in creating structural innovations as long as they do not disrupt the balance of power among the branches. The Court's apparent wavering between these formalist and functionalist approaches reflects the Court's greater suspicion and greater scrutiny of statutory expansions of authority than of statutory restrictions on how a branch exercises its power.

In part two, the article looks at cases limiting the statutory augmentation of a branch's constitutional power. With respect to the judicial branch, the case or controversy requirement should be seen as a procedural check that is the framers' response to concerns about the absence of significant inter-branch checks on the authority of federal

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Powers and the Requirement of Adequate Reasons for Agency Decisions, 1987 DUKE L.J. 387, 422–25 (1987).

judges. The cases restricting the statutory enhancement of Congress's powers recognize the Bicameralism and Presentment Clause as creating an analogous procedural check on how Congress exercises substantive power. This part then examines the Court's failure to recognize a similar constitutional check on the exercise of executive power, the reasons for this failure, and the ways in which Congress might reinvigorate at least some constitutional protections against the arbitrary exercise of executive authority.

In part three, the article discusses why the apparent imbalance between the constitutional checks on the executive as compared with the legislative and judicial branches is not a cause for significant concern because of Congress's power to impose analogous procedural checks on the executive branch. Finally, in part four, the article concludes by arguing that the effectiveness of these congressionally imposed procedural checks has several important implications for the separation of powers.

I. THE SEPARATION OF POWERS IN THEORY AND PRACTICE

The Supreme Court's separation of powers jurisprudence has grown substantially over the past thirty years and has created a chaotic collection of precedents that defies easy organization and analysis. Scholars have written innumerable law review articles attempting to sort through the growing number of cases and to impose order upon the seeming chaos of the Court's opinions.[16] These articles have explored the Court's underlying methodology in a way that the opinions themselves usually fail to address. The Court has not only failed to enunciate a clear separation of powers methodology, it has usually failed even to acknowledge the need for such a methodology.

16. *See, e.g.*, Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987); Strauss, *supra* note 7.

A. Scholarly Theory

Scholars have found it as difficult as the Court to agree on a methodological approach to the separation of powers, but any discussion of the nature of scholarly disagreement begins with the distinction between formalism and functionalism. Formalist theory emphasizes the importance of separation of the branches and rests on the assumption that executive, legislative, and judicial powers can be clearly distinguished and cabined in their respective branches of government.[17] Formalists believe the text of the Constitution provides discernable answers to questions involving the structural constitution, that those answers are fixed and do not fluctuate over time, and that they should be based on the drafters' original intent.[18] Thus, formalists believe "questions of horizontal governmental structure are to be resolved by reference to a fixed set of rules and not by reference to some purpose of those rules."[19]

By contrast, functionalist theory emphasizes the importance of checks and balances and of preserving the balance between the branches.[20] Functionalists believe that the text of the structural Constitution is indeterminate and that it rarely provides clear answers to difficult questions involving the separation of powers.[21] Under a functionalist approach, a statute is constitutional "as long as the policies underlying the original structure are satisfied."[22] For functionalists, the fluidity of the theory is its strength, and it acts as an antidote to the rigidity of formalism, which "tends to straitjacket the government's ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basis purposes of the constitutional structure."[23] A functional approach

17. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958–61 (2011).

18. *Id.*; *see also* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 6–10 (1995); Rebecca L. Brown, S*eparated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523 (1991); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 859–60 (1990).

19. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law,* 86 VA. L. REV. 1127, 1138 (2000).

20. Manning, *supra* note 17, at 1952; *see also* Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN L. REV. 225, 226 (2007); Sargentich, *supra* note 16, at 433.

21. Manning, *supra* note 17, at 1952; *see also* Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984).

22. Kathleen M. Sullivan, *Comment: Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 93–94 (1995).

23. Brown, *supra* note 1, at 1526.

typically involves some form of balancing test to ensure that the equilibrium of power is maintained.[24]

Finally, it is worth noting a third approach, championed by John Manning, which rejects the notion that the Constitution contains any "freestanding separation of powers doctrine."[25] Manning emphasizes that the Constitution contains no separation of powers clause, but instead is a collection of disparate structural requirements, some specific and some general, which must be read in historical context and each interpreted separately.[26] Under Manning's approach, it is difficult to give the kind of weight formalists insist on giving to very general terms like legislative, executive, and judicial power, but crucial to give effect to more specific clauses such as the Bicameralism and Presentment Clause, the Appointments Clause, and the Impeachment Clauses.[27] As will be developed in Part II, this article's emphasis on the importance of procedural checks to the framers' vision of the separation of powers partakes more of Manning's approach than of either strict formalism or the more permissive functionalist approach.[28]

B. The Supreme Court and The Separation of Powers

For the purpose of briefly discussing how the Supreme Court has addressed separation of powers issues, it is useful to divide the cases into three categories: (1) cases that deal with the inherent power of the branches, neither expanded nor restricted by statute; (2) cases that concern statutes that purport to restrict the inherent power of a branch, and (3) cases that seek to augment the inherent power of a branch. As Justice Jackson's well-known concurring opinion in *Youngstown Sheet & Tube Company v. Sawyer* explains, issues of constitutional power depend on whether a branch is acting on the

24. Manning, *supra* note 17, at 1951. Eric Posner has effectively challenged the idea that courts can effectively apply a balancing analysis to the power of the branches. *See* Eric A. Posner, *Balance-of-Powers Arguments and the Structural Constitution*, 2–5 (Chi. Inst. for Law & Econ., Working Paper No. 622, 2012), available at http://papers.ssrn.com/sol3/papers.cfmabstractid = 2178725.

25. Manning, *supra* note 17, at 1950.

26. *Id*. at 1947–50.

27. *Id*. at 1945.

28. For the purposes of this discussion, the article does not address theories that the Supreme Court should leave separation of powers disputes to be negotiated by the branches and not adjudicated by the courts. *See* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260 (1980); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014).

basis of its own inherent power or with a statutory augmentation of that power or with a statutory restriction on that power.[29]

For example, the inherent power category includes those cases involving the inherent power of the branches without statutory augmentation or restriction. Cases involving the inherent power of the executive branch include *In re Neagle*,[30] *In Re Debs*,[31] and *Youngstown*.[32] In *Neagle*, the Court held that the President has inherent power to protect officials of the federal government without the need for statutory augmentation.[33] In *Debs*, the Court held that the President had inherent power to seek an injunction to stop a railroad strike that threatened to halt transportation of the United States mail.[34] Sixty years later, in *Youngstown*, the Court rejected the President's assertion that he had inherent authority to seize the nation's steel mills when a steel strike threatened to halt steel production necessary to support the Korean war effort.[35] Inherent congressional power includes both express powers, such as the authority to legislate concerning the subjects listed in Article I, § 8 of the Constitution, and the implied powers that flow from express authority, such as the power to subpoena witnesses and documents[36] and the power to imprison for contempt of Congress those who refuse to respond to congressional subpoena.[37] Similarly, the inherent power of the federal courts includes the power of judicial review,[38] the power to initiate prosecutions for criminal contempt of court,[39] and the power to make federal common law in order to resolve disputes between two states.[40]

In these types of cases, the Court has tended to proceed from the constitutional text and ask what powers must necessarily be inferred

29. 343 U.S. 579, 635–38 (1952) (Jackson J., concurring). Of course, Justice Jackson was referring only to the power of the executive branch, but the concept can easily be applied to all of the branches.

30. 135 U.S. 1 (1890).

31. 158 U.S. 564 (1895).

32. 343 U.S. 579 (1952).

33. 135 U.S. at 67.

34. 158 U.S. at 600.

35. 343 U.S. at 585.

36. *See* McGrain v. Daugherty, 273 U.S. 135, 161 (1927).

37. Marshall v. Gordon, 243 U.S. 521, 536–37 (1916); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227–28 (1821).

38. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

39. Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787, 793 (1987).

40. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

from textual powers. Thus, Congress has the express textual power to legislate, and the implied power to compel testimony because the latter power is necessary for the effective implementation of the former power.[41] The Court has most successfully drawn the boundaries between the inherent powers of the branches by determining where the general powers of one branch run into the more specific powers of another branch. Justice Jackson's famous *Youngstown* concurrence persuasively argues that the President's commander-in-chief power did not include the power to seize steel mills to halt a strike that threatened wartime weapons construction because the President's power yielded to the more specific power of Congress to raise and support armies.[42] Justice Jackson's opinion is far more persuasive than Justice Black's opinion for the Court, which rested on the simplistic assertion that the President's commander-in-chief power had to yield to Congress's far more general power to legislate.[43]

The second category of cases deals with Congress's power to restrict the inherent authority of each of the branches through statutory limitations. For example, Congress may restrict the President's inherent authority to remove executive branch officers,[44] or it may attempt to limit the power of the courts by restricting federal jurisdiction as it did in *Ex parte McCardle*[45] and *United States v. Klein*,[46] or by overturning the judgments of the federal courts in specific cases.[47] Not surprisingly, there are no cases involving legislative attempts to restrict the inherent power of Congress.

The Court tends to resolve statutory restriction cases by balancing Congress's need to legislate in order to solve a particular problem against the legislation's impact on the branches ability to perform its

41. *See* McGrain, 273 U.S. at 161.

42. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (Jackson, J. concurring).

43. *See id*. at 586–588.

44. *See* Morrison v. Olson, 487 U.S. 654, 696 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

45. *See* 74 U.S. (7 Wall.) 506, 513 (1869) (holding that, while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act").

46. *See* 80 U.S. (13 Wall.) 128, 147 (1872) ("It is of vital importance that these powers be kept distinct.").

47. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) ("It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'").

inherent constitutional functions. For example, in *Nixon v. Administrator of General Services*,[48] the Court reviewed a statute that restricted the ability of the executive branch to maintain the confidentiality of presidential documents. The Court stated that, in determining whether the statute "disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[49]

The balancing approach taken by the Court in cases involving legislative restrictions on inherent constitutional authority tends to conform to a functionalist approach to constitutional interpretation. Thus, the Court has been relatively accepting of statutory limitations on inherent constitutional power and has employed a balancing test that eschews the creation of strict lines of demarcation between the branches—permitting the modification of a branch's constitutional authority on a case-by-case basis.

Notwithstanding the Court's permissive, functional approach to most statutory restrictions on presidential power, recent Presidents, particularly George W. Bush, have relied on a strongly formalist theory to make controversial claims of presidential immunity from many statutory restrictions. Using a strongly formalist theory of independent executive power, President Bush issued more than a thousand signing statements in which he claimed that he was not obligated to obey statutory provisions that interfered with the President's ability to control the executive branch.[50] In a compilation assembled by Professors Neil Kinkopf and Peter Shane, the authors found that President Bush had issued 1070 signing statements in which he had objected to the unconstitutionality of one or more provisions of a statute, of which 380 objections were based on the

48. 433 U.S. 425 (1977).

49. *Id.* at 443 (citations omitted).

50. *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 228 (2008); Sofía E. Biller, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067 (2008); Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307 (2007–2008); Peter M. Shane, *Presidential Signing Statements and the Rule of Law as an Unstructured Institution*, 16 WM. & MARY BILL RTS. J. 231 (2007–2008).

claim that the provision interfered with the President's authority to direct the executive branch under a unitary executive theory.[51] As will be discussed later, Congress's strong authority to impose procedural checks on the President and the executive branch makes these presidential assertions of power highly suspect.[52]

The Court has been much more skeptical of statutory expansions of a branch's inherent constitutional power and has been particularly strict with respect to Congress's efforts to expand its own powers. Thus, the Court has struck down Congress's attempt to give itself a legislative veto of executive branch action,[53] Congress's attempt to vest itself with the power to appoint members of the Federal Election Commission,[54] Congress's attempt to grant the Comptroller General, a legislative officer, executive authority over certain aspects of the budget process,[55] and Congress's attempt to place its own members on a board with control over Washington area airports.[56] The Court has also overturned legislation that enlarged the power of the judicial branch, including a statute it interpreted to expand the original jurisdiction of the Supreme Court,[57] a statute that required the Court to give extra judicial advice to Congress and the Secretary of War on pension applications,[58] and a statute that gave the federal courts jurisdiction over matters that do not involve a justiciable case or controversy.[59] Finally, the Court has occasionally rejected attempts by Congress to expand the President's inherent constitutional power, such as by granting him a form of line item veto[60] and, at least in certain cases, granting the executive branch quasi-legislative authority without sufficiently clear and intelligible guidelines as to how to exercise it.[61] In these cases, the Court has taken a much more

51. Neil J. Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2009 (Version 2.0)*, SSRN Paper No. 1748474 (2011).

52. *See infra* text accompanying note 235.

53. I.N.S. v. Chadha, 462 U.S. 919, 928 (1983).

54. Buckley v. Valeo, 424 U.S. 1, 143–44 (1976).

55. Bowsher v. Synar, 478 U.S. 714, 736 (1986).

56. Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 277 (1991).

57. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

58. Case of Hayburn, 2 U.S. 408, 410 n.* (1792) ("Neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.").

59. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).

60. Clinton v. City of New York, 524 U.S. 417, 449 (1998).

61. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) ("Those who act under [constitutional] grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."). *Id.* at 528–29; Pan. Ref. Co. v. Ryan,

formalistic approach to the constitutional separation of powers. Instead of balancing the impact on separation of powers values against the need for legislation, the Court has rigidly focused on what it perceived to be the clear textual limitations on Congress's ability to statutorily augment the power of a particular branch.

Notwithstanding the complaints of some scholars about the muddled state of the Court's separation of power's jurisprudence,[62] one can explain the differences in the Court's approach by examining the issues presented by different separation of powers cases. The Court is much more likely to be flexible and functionalist in its approach when the issue is whether a statute inappropriately restricts the power of a particular branch and thus prevents it from accomplishing its inherent constitutional function.[63] It is much more rigid and formalist when a statute purports to expand the power of a particular branch and thus risks aggrandizing a branch with power that might be subject to abuse.[64] This is appropriate given the risks inherent in granting a branch too much power.

There are several potential objections to this analysis of the cases. First, one could argue that there is no real difference between a statute that aggrandizes the power of a branch and a statute that purports to restrict the power of a branch since all power is relative. By restricting the power of one branch, Congress necessarily increases the power of the other branches and, therefore, might be said to create the risk that power may be abused just as easily as when a statute grants power directly to a particular branch. While it is true that a substantial restriction on the power of one branch might so unbalance the relative powers of the branches that it could create the risk of an abuse of authority, such a result is not nearly as likely as it is

295 U.S. 330, 388 (1935).

62. *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 121 (2000); Brown, *supra* note 1, at 1517 ("Unanimity among constitutional scholars is all but unheard of. Perhaps when achieved it should be celebrated. But one point on which the literature has spoken virtually in unison is no cause for celebration: the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle.").

63. *See* Morrison v. Olson, 487 U.S. 654, 696 (1988) (explaining that judicial exercise of the power to appoint is not in any way inconsistent as a functional matter with the courts' exercise of their Article III powers).

64. *See* I.N.S. v. Chadha, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.").

when Congress statutorily augments the power of one of the branches.

This point is neatly illustrated by *Morrison*, where the Court upheld the independent counsel provisions of the Ethics in Government Act.[65] Justice Scalia argued in his dissent that the Act deeply wounded the president "by substantially reducing the President's ability to protect himself and his staff" and that in doing so, it greatly increased the power of Congress.[66] Yet the outcome of the investigation of Ted Olson that gave rise to the Supreme Court decision in *Morrison* itself illustrates the substantial difference between a statute that restricts the authority of a branch and one that aggrandizes a branch by the direct augmentation of the branch's power. Attorney General Edwin Meese initiated the independent counsel investigation of Olson at the behest of the House Judiciary Committee, which claimed that Olson had lied in testifying before the Committee. It was quite clear that the judiciary committee sought the indictment and prosecution of Olson.[67] If the Ethics in Government Act had granted to Congress the power to appoint a prosecutor and supervise the prosecutor's investigation, there is little doubt that Olson would have been indicted and brought to trial for perjury. As it turned out, however, although the independent counsel's investigation stretched over an unusually long period of time, Olson was not ultimately indicted. As a result, he not only avoided the trauma of a criminal trial, but he was also able to obtain reimbursement for almost $1.5 million in attorneys' fees.[68]

The greater danger of a direct aggrandizement of Congress as opposed to a mere limitation on the power of the executive branch to control a prosecution is evident from this example. Limiting the control of the President and Attorney General over an independent counsel creates a loss of accountability and diminishes the ability of the President to ensure that a prosecutor's actions are consistent with the general policies of the Department of Justice. But the independent counsel remains a separate check upon the will of Congress to prosecute a particular individual. Granting the prosecutorial power directly to Congress, however, would have

65. 487 U.S. at 696.

66. *Id*. at 713 (Scalia, J., dissenting).

67. *See* Alison Frankel, *Ted Olson's Five Years in Purgatory*, AM. LAW., Dec. 1988, at 70.

68. *See* 28 U.S.C. § 593(f)(1) (2000). This provision expired on June 30, 1999 along with the rest of the Independent Counsel Reauthorization Act of 1994. 28 U.S.C. § 599.

removed that check and permitted Congress to carry out a political vendetta against anyone who incurred the wrath of a particular committee. Such an aggrandizement of Congress's authority thus poses a far greater risk to individual liberty than does a statutory limitation on the President's supervisory power.[69]

For example, in *Chadha,* the Supreme Court declared that a one-house legislative veto was inconsistent with the Bicameralism and Presentment Clauses of the Constitution.[70] *Chadha* involved a legislative veto of a decision by the Attorney General to suspend the deportation of an illegal alien. The Court determined that the veto of the executive branch action was legislative in nature and, as legislation, was subject to the requirement for bicameral passage and presentment to the President for his signature or veto.[71] The Court's approach, as many have noted,[72] was extremely formalistic and relied on the determinacy of text that is not necessarily clear. Moreover, the Court's conclusion that the legislative veto of the suspension of Chadha's deportation was a *legislative* act because it "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch,"[73] seems dramatically over broad. That definition of legislative action might sweep within it much of the delegated authority exercised by the executive branch as well, including the very suspension of deportation that was at issue in *Chadha*.[74] The stiff and wooden analysis of the Court is apparent from the absence of any discussion concerning why Congress's grant of this authority to itself created an accumulation of power that threatened the underlying principles of the structural separation of powers in the Constitution.

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69. The only way to restrict or enlarge that constitutional authority is through the passage of a duly authorized statute. It is not enough for Congress simply to acquiesce in the exercise of power by another branch; to expand the branch's authority beyond that which is given by the Constitution it is necessary for Congress to adopt a statute. Similarly, a formally adopted statute is the only way to restrict the authority that a branch would otherwise have under the Constitution. Congress can neither expand nor restrict the other branches in any manner other than through the passage of legislation.

70. U.S. CONST. art. I, § 7, cls. 2–3; INS v. Chadha, 462 U.S. 919, 959 (1983).

71. *Chadha*, 462 U.S. at 952–57.

72. *See, e.g.*, Peter L. Strauss, *Was There a Baby in the Bath Water? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 790 (1983) (criticizing *Chadha*); William B. Gwyn, *The Indeterminancy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 476 (1989); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence is so Abysmal*, 57 GEO. WASH. L. REV. 506, 511 (1989); Strauss, *supra* note 7, at 489.

73. *Chadha*, 462 U.S. at 952.

74. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 214–17 (3d ed. 2000).

That conclusion does not mean there are no justifications for the Court's holding. Scholars have subsequently argued that the result in *Chadha* was appropriate,[75] and as will be discussed in greater detail below, this article argues that *Chadha* can properly be seen as part of a consistent series of cases attempting to control the abuse of legislative authority by limiting the procedural mechanism through which Congress can act substantively.[76] At present, it is sufficient to note that we must at least ask the question whether the grant of a legislative veto threatened an aggrandizement of legislative power.[77]

A similar pattern played out in *Bowsher v. Synar* in which the Court considered a constitutional challenge to the Balanced Budget and Emergency Deficit Control Act of 1985 (popularly known as the Gramm-Rudman-Hollings Act).[78] In particular, the Court focused on the statute's assignment of certain duties, including ensuring a balanced budget, to the Comptroller General, the head of the General Accounting Office and an officer of Congress. The Court concluded that

> by placing the responsibility for execution of the . . . Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.[79]

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75. *See* Michael Herz, *The Legislative Veto in Times of Political Reversal: Chadha and the 104th Congress*, 14 CONST. COMMENT. 319, 319–20 (1997); Stanley C. Brubaker, *Slouching Toward Constitutional Duty: The Legislative Veto and the Delegation of Authority*, 1 CONST. COMMENT. 81, 93–94 (1984).

76. *See infra* text accompanying notes 139–156.

77. The importance of focusing attention on the proper question to ask is even more clearly illustrated by Justice White's dissent in *Chadha*. 462 U.S. at 970 (White, J., dissenting). Justice White took a functional approach to the separation of powers and argued that the legislative veto was "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking." *Id*. at 972–73. Significantly, Justice White justified this conclusion by arguing that the legislative veto did not prevent the executive or judicial branches from carrying out their constitutionally assigned duties. *Id*. at 974. The problem with this argument is that it simply misses the point. The issue in Chadha is not whether the legislative veto provision improperly restricts the constitutional authority of the executive or judicial branches. Instead, the question is whether the legislative veto allows Congress to act in an unchecked manner that might be subject to abuses and arbitrary behavior. Justice White is easily able to argue that there is no constitutional problem simply by asking the wrong constitutional question and failing to identify the precise nature of the potential constitutional concern before beginning the analysis of the constitutional validity of a congressional statute.

78. *See generally* 478 U.S. 714 (1986).

79. *Id.* at 734.

Thus, by describing the Comptroller General's actions as "executive" the Court concluded that the statute created an unwarranted aggrandizement of Congress's authority.[80]

The Court has acted in a similarly formalist manner to bar Congress from expanding its own powers through statutes granting congressional officers the power to appoint members of the Federal Election Commission,[81] and even a statute authorizing congressional representation on a board with authority over the Washington, D.C., airports.[82]

In addition, the Court has been equally vigilant with respect to the expansion of judicial power. The Court has consistently resisted any effort to enlarge the authority of the courts beyond traditional cases or controversies, and it has prevented Congress from adding to the original jurisdiction of the Supreme Court.[83]

Distinguishing between aggrandizement cases and statutory restriction cases does not, however, resolve all of the inconsistency of the Supreme Court's case law. The Court has been far more willing to allow statutory expansion of the authority of the executive branch than it has with either the legislative or judicial branches. After some few initial efforts to limit the delegation of legislative authority to the executive branch,[84] the Court has essentially abandoned any serious effort to limit the delegation of legislative authority as an

80. *Id.* at 715. Justice White's dissent in *Chadha* again missed the point by asking the wrong constitutional question. Instead of treating the statute as a possible aggrandizement of Congress, Justice White again insisted that the "court must 'focu[s] on the extent to which [such a limitation] prevents the Executive Branch from accomplishing its constitutionally assigned functions.'" 478 U.S. at 762 (White, J., dissenting) (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 525 (1977)). This approach once again creates a straw man by analyzing the statute as a restriction on the constitutional power of the Executive Branch instead of as an aggrandizement of the legislative branch. As a result, it was easy for Justice White to conclude that the statute "[did] not deprive the President of any power that he would otherwise have or that is essential to the performance of the duties of his office." *Id.* at 763. By asking the wrong question, Justice White never truly grappled with the most significant issues raised by the statute.

81. *See* Buckley v. Valeo, 424 U.S. 1, 118 (1976).

82. *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 255 (1991).

83. *See*, *e.g.*, John C. Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1009 n.89 (1988).

84. *See*, *e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (holding the code-making authority delegated in the National Industrial Recovery Act to be unconstitutional); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

unwarranted aggrandizement of executive power.[85] As a result, when the Court must assess the constitutionality of a congressional delegation of authority to the President, the Court has been able to say only that a statute may not grant to the President a power that is expressly reserved to another branch.[86] This approach has proven tricky when the powers at issue are as amorphous and hard to define as the "legislative power," as in the non-delegation doctrine or the "judicial power," which is at issue in cases involving Article I courts.[87] As Justice Scalia has explained:

> The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that 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.[88]

In spite of numerous scholarly efforts to resuscitate the non-delegation doctrine,[89] the Supreme Court has shown no inclination to revive the non-delegation doctrine as a limitation on Congress's power to delegate so-called legislative power to the executive branch.[90] Consequently, some scholars have questioned whether there is such a thing as a constitutional non-delegation doctrine,[91] while

85. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 425 (1944) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.") (citation omitted); Mistretta v. United States, 488 U.S. 361, 412 (1989) ("[I]n creating the Sentencing Commission-an unusual hybrid in structure and authority-Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches.").

86. For example, Congress could not give the President the power to unilaterally appoint principal officers of the United States without Senate Confirmation. *See* Morrison v. Olson, 487 U.S. 654 (1988).

87. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855 (1986).

88. *Mistretta,* 488 U.S. at 417 (Scalia, J., dissenting).

89. *See* David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Laws*, 26 Har. J.L. & PUB. POL'Y 239, 245 (2003); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Symposium, *Delegation of Powers to Administrative Agencies*, 36 AM. U. L. REV. 295, 295–442 (1987); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 5 (1982).

90. *See* Whitman vs. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 465 (2001) (reversing a Court of Appeals decision that invalidated §109 (b) (1) of the Clean Air Act, which requires the Environmental Protection Agency to set air quality standards that, allowing "an adequate margin of safety" are "requisite to protect the public health").

91. *See, e.g.*, Eric A. Posner and Adrian Vermeule, *Interring the Non Delegation Doctrine,* 69 U. CHI. L. REV. 1721, 1722 (2002) ("In our view there just is no constitutional nondelegation

others have suggested that even if there is such a doctrine, we cannot expect the courts will enforce it.[92] Therefore, the Supreme Court has been unable to impose meaningful restrictions on the statutory expansion of the President's powers on the grounds that such authority is legislative rather than executive, and recent case law seems to confirm that one cannot expect the Court to change its mind in the future.[93]

Similarly, the Court has allowed the delegation of quasi-judicial power to administrative agencies to resolve what might be considered cases or controversies.[94] Although the limits on Congress's power to delegate such quasi-judicial authority have been hotly debated and remain uncertain,[95] it remains clear that Congress has substantial power to delegate such quasi-judicial authority to the executive branch. Although the Court made an initial stab at establishing formalistic rules on the creation of Article I courts,[96] the Court clearly has abandoned that approach for a more functionalist balancing methodology.[97] Any effort to prevent Congress from delegating significant quasi-judicial authority to the executive branch seems

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rule, nor has there ever been.").

92. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 354 (2002) ("A plethora of scholars agree that, even if the Constitution contains some abstract nondelegation principle, it is too indefinite and uncertain to form the basis for constitutional doctrine."); *see also* PETER SHANE & HAROLD BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 129 (2d ed. 2005).

93. *See Whitman*, 531 U.S. at 489 ("It seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is 'legislative.'").

94. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855 (1986) ("Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences."); Crowell v. Benson, 285 U.S. 22, 85 (1932) (finding that the Deputy Commissioner of the United States Employees' Compensation Commission had the duty to determine the quasi jurisdictional fact of whether there existed an employer employee relationship).

95. *See*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 237 n.9 (1990); Frank H. Easterbrook, *"Success" and the Judicial Power*, 65 IND. L.J. 277, 280–81 (1990); Larry Kramer, *The Constitution as Architecture: A Charette*, 65 IND, L.J. 283, 288–89 (1990); Daniel J. Meltzer, *Legislative Courts, Legislative Power and the Constitution*, 65 IND. L.J. 291, 292 (1990); David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 308 (1990).

96. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73–76 (1982) ("[T]o accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.").

97. *See Schor*, 478 U.S. at 857 (finding the assignment of quasi-judicial functions to CFTC to be constitutional).

doomed to failure. It is simply too difficult to determine the point at which executive action becomes an exercise of "the judicial power" to expect the Court to be able to enforce that border effectively. The functional balancing test adopted by the Court in *Schor*[98] is sufficiently loose that it allows Congress to delegate quasi-judicial authority to the executive branch with few substantive limitations.

Unfortunately, the Court seems not to have even appreciated how the assignment of quasi-judicial and executive powers to one executive agency could create aggrandizement issues similar to the ones at issue in the cases involving Congress and the courts. For example, the Court has utterly failed to distinguish between Article I courts that exercise no executive authority on the one hand, and executive branch agencies that clearly perform executive law enforcement functions as well as the adjudicatory functions of an Article I court, on the other. Indeed, the Court chose its review of a statute granting quasi-judicial authority to such an executive branch agency (the Commodity Futures Trading Commission) as the occasion to take a more deferential approach to Congressional delegation of authority than it had previously with respect to the bankruptcy courts, which are entirely separate from the executive law enforcement process.[99] This failure ignores the potential for abusive uses of power when the quasi-adjudicative functions delegated to an Article I court are merged with the executive enforcement functions of a regulatory agency. Madison in the Federalist No. 47 quoted Montesquieu in saying that:

> When the legislative and executive powers are united in the same person or body . . . there can be no liberty because apprehensions may arise lest the *same monarch or senate should enact* tyrannical laws, to *execute* them in a tyrannical manner . . . . Were the power of judging joined with the legislative, the life and liberty of the

98. *See id*. at 851 (stating that factors weighed include: 1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts," 2) "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts" 3) "the origins and importance of the right to be adjudicated," and 4) "the concerns that drove Congress to depart from the requirements of Article III").

99. *Compare Schor*, 478 U.S. at 857 (finding the "limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III"), *with N. Pipeline*, 458 U.S. at 87 ("We conclude that 28 U.S.C. § 1471 . . . of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.").

> subject would be exposed to arbitrary controul, for *the judge* would then be the *legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of an oppressor.[100]

Regulatory agencies to which Congress has assigned both adjudicative and law enforcement functions are the very definition of such a combination of authority.

Not only did the Court fail to recognize this in *Schor*, it looked right at the aggrandizement issue and missed it when it noted:

> Nor does our decision in *Bowsher v. Synar* . . . require a contrary result. Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this litigation is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.[101]

The Court entirely ignored the possibility that the grant of such adjudicative authority to an executive agency would impermissibly aggrandize the executive branch.

The vexing question, therefore, is how the Court could reconcile its cases dealing with the statutory assignment of a quasi-judicial power to the executive branch with its more restrictive precedents limiting the statutory augmentation of the judicial and legislative branches. In this respect, it might help the Court to recall its own admonition in the *Chadha* case:

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.[102]

One way to heed this admonition in the case of delegation of quasi-judicial authority to the executive branch is to require the separation of the quasi-judicial authority from the power to initiate enforcement actions and supervise the operations of the General Counsel who is responsible for the conduct of enforcement litigation.

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100. THE FEDERALIST NO. 47 at 326 (James Madison) (James Cooke, 1961) (emphasis added).

101. *Schor*, 478 U.S. at 856–57.

102. I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

Currently, the Commodity Futures Trading Commission not only decides cases as an adjudicatory body but also is responsible for the initiation and conduct of enforcement litigation. A similar pattern prevails at the Federal Trade Commission, the National Labor Relations Board, the Securities Exchange Commission, the Federal Communications Commission, and numerous other executive branch agencies.

This is not, however, the only model for the delegation of adjudicative authority to the executive branch. The Occupational Safety and Health Act is enforced by lawyers in the Department of Labor, but enforcement cases are adjudicated before the independent Occupational Safety and Health Review Commission. Similarly, the Federal Mine Safety and Health Act is enforced by Department of Labor lawyers within the Mine Safety and Health Administration, but cases are adjudicated before the independent Federal Mine Safety and Health Review Commission. There is no reason why Congress could not insist upon this separation of powers within the executive branch as a means to avoid an unnecessary accumulation of power within one administrative agency.

This is an area where the unbalanced separation of powers Supreme Court precedent could be tipped back more towards equilibrium by Congress. For Congress to do this, however, it must take seriously the need to identify the delegation of adjudicative authority to the executive branch as a potential aggrandizement of executive power and not just a limitation on the power of the federal courts.

The only significant exception to the Court's general deference to congressional expansion of executive branch power is the Court's line item veto case, *Clinton v. City of New York*, where the Court took a clearly formalistic approach, invalidating a statute that granted the President the power to cancel certain items of new spending authority or limited tax benefits within five days of signing a bill into law.[103] *Clinton* is, however, a rare exception in the Court's separation of powers jurisprudence where the Court has enforced a procedural check on the method by which the executive branch exercises its power.

103. 524 U.S. 417, 447–49 (1998) ("If there is to be a new procedure in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.").

For the most part, the Court has looked the other way as Congress continually expands the powers of the executive branch. Because of this imbalance, many scholars have argued that Congress should be free to enlarge its own powers as a counterbalance to the increasing authority of the executive branch.[104] As developed further below, such a response would be a mistake because it would remove a vital procedural check that the framers intended to place on Congress. Instead, as discussed in Part III, Congress has the authority to correct the imbalance by imposing analogous procedural checks on the power of the executive branch.

II. PROCEDURAL CHECKS ON THE COURTS AND CONGRESS

The constitutional checks imposed on the judicial and legislative branches flow from the Court's conclusion that the Constitution limits the procedural form in which the federal courts and Congress may exercise their power. The Supreme Court has repeatedly held that the federal courts may exercise substantive power only in the context of a case or controversy. In the case of the legislative branch, the Court has restricted the exercise of substantive power to the bicameral passage of legislation and presentment to the President for signature or veto. These conclusions flow not from a general theory of formalism or functionalism, but from the specific expectations the framers had for how the two branches would exercise their substantive powers under the Constitution.

A. Procedural Checks on the Federal Courts

The framers restricted the Court's exercise of substantive authority to the context of an adjudicated case or controversy. The constitutional history of Article III explains the importance of this case or controversy requirement as a protection against the abuse of judicial power. As explained below, the framers depended upon the case or controversy requirement to quell concerns about the unchecked power of federal judges.

Although the Constitution expressly grants federal judges tenure during good behavior,[105] many believed that such unchecked power

104. *See, e.g.*, Elliott, *supra* note 7; Strauss, *supra* note 7.

105. U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

would lead to abuses of judicial authority.[106] A number of critics argued that the absence of political checks over the federal judiciary would lead to abuses of authority. For example, the famous anti-federalist pseudonym "Brutus," criticized the new constitution by arguing that:

> They have made the judges *independent,* in the fullest sense of the word. There is no power above them to controul [sic] any of their decisions. There is no authority that can remove them, and they cannot be controuled [sic] by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[107]

The critics of Article III complained both that federal judges would have too much power and that impeachment was an insufficient method of controlling that authority. For example, another critic of ratification, the Federal Farmer, wrote:

> It is an observation of an approved writer, that judicial power is of such a nature, that when we have ascertained and fixed its limits, with all the caution and precision we can, it will yet be formidable, somewhat arbitrary and despotic—that is, after all our cares, we must leave a vast deal to the discretion and interpretation—to the wisdom, integrity, and politics of the judges—These men, such is the state even of the best laws, may do wrong, perhaps, in a thousand cases, sometimes with, and sometimes without design, yet it may be impracticable to convict them of misconduct.[108]

Moreover, the opponents of judicial independence argued that the framers' concerns about the potential power of the legislature led them to underestimate the potential for judicial misconduct and abuse of power. As one opponent noted:

> [W]e are more in danger of sowing the seeds of arbitrary government in this department [the Judiciary] than in any other. In the unsettled state of things in this country, for several years past, it is been thought, that our particular legislatures have, sometimes,

106. *See* Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, *in* ORIGINS OF THE FEDERAL JUDICIARY 284–85 (Maeva Marcus ed., 1992) (noting that 10 states maintained some form of political control over sitting judges and only three states imposed an unqualified good behavior standard). The protections in Article III contrast sharply with the state constitutions, none of which provided protection against reduction in salary and many of which allowed for some provision for removal of judges by the political branches in addition to impeachment. *Id*.

107. THE COMPLETE ANTI-FEDERALIST 438, 473 (Herbert J. Storing ed., 1981).

108. *Id.* at 315.

> departed from the line of strict justice, while the law courts have shewn a disposition more punctually to keep to it. We are not sufficiently attentive to the circumstances, that the measures of popular legislatures naturally settle down in time, and gradually approach a mild and just medium; while the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution, and by laws, from time to time.[109]

Some critics became even more dramatic in expressing their fear of unchecked judicial power:

> To conclude—as the Fox in the Fable, wanting to rob a hen-roost, or do some such like prank, humbly besought admittance and house room only for his head,—his whole body presently followed —. So courts more crafty as well as more craving than that designing animal, have scarce ever gained an inch of power, but they have stretched it to an ell; and when they have got in but a finger their whole train has soon followed.[110]

The Federalist supporters of the Constitution argued that the procedures imposed on the exercise of judicial power would prevent abuse. In particular, they relied on three procedural elements of judicial decision-making to prevent judicial abuse of power: (1) the case or controversy requirement; (2) the intra-branch check of appellate review and (3) the right to a jury trial.

1. The Case or Controversy Requirement

The defenders of Article III relied on the case or controversy requirement because they interpreted it to mean precedent would control the exercise of discretion by federal judges. Alexander Hamilton most vigorously expressed this defense of the Constitutional independence of the courts. Hamilton expressly relied on the power of precedent as a check on judicial power: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ."[111] Thus, in Hamilton's famous words, the courts were not free to exercise their "WILL instead of JUDGMENT," which would result in the "substitution of their pleasure to that of the legislative

109. *Id.* at 316.
110. *Id.* at 210.
111. THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (J. Cooke, ed., 1961).

body."[112] Chief Justice Marshall later echoed that sentiment, while he was presiding in the trial of Aaron Burr, and asserted that even the exercise of judicial discretion must not be dictated by the Court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[113]

The language of Article III does not unequivocally say that federal courts may exercise substantive federal judicial power only in the context of a litigated case and not by prospective rulemaking. Article III, § 2 simply uses the words "cases" (as in "cases arising under the laws of the United States") and "controversies" (as in "controversies involving citizens of different states") as the method of describing the kinds of disputes over which the courts would have jurisdiction. The language alone does not necessarily imply that substantive rulemaking was prohibited. Yet that is clearly how the framers described the powers of the courts and defended Article III against its antifederalist opponents. Moreover, the framers avoided any grant of authority to federal judges that might be exercised outside the context of a case or controversy. Thus, for example, the constitutional convention rejected a proposal to give judges a role on a council of revision that would have the power to veto legislation.[114]

Later justices picked up on the same theme and emphasized that the judge's power was limited by the context in which it was exercised. Justice Cardozo noted "[t]he judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."[115] Justice Frankfurter later put this same principle more succinctly: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[116] As the Supreme Court has recognized, "No principle is more fundamental to the judiciaries [sic] proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[117]

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112. *Id.* at 526.

113. United States v. Burr, 25 F. Cas. 30, 35 (Va. Cir. 1807).

114. *See* MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1789 75, 79 (1937); James T. Barry, III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 253–54 (1989).

115. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

116. Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting).

117. Simon v. E. Ky. Welfare Rights Org. 426 U.S. 26, 37 (1976).

Almost immediately after the ratification of the Constitution, the Supreme Court recognized the procedural limitations on the exercise of judicial power. In *Hayburn's Case*, the members of the Court, sitting as various circuit judges, declined to exercise authority to review wartime pension claims because they were not "properly judicial, and to be performed in a judicial manner."[118] Under Chief Justice John Jay the Supreme Court refused to give President Washington informal advice on legal issues relating to the neutral status of the United States in the European War of 1793.[119] In *Muskrat v. United States*, the Supreme Court reaffirmed that federal judicial power may only be exercised in the context of a case or controversy, which the Court defined to be "the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."[120]

Congress may, of course, grant to the courts the power to make prospective rules in a non-case or controversy context, as long as those rules are purely procedural. For example, under the Rules Enabling Act,[121] the Supreme Court and all courts established by acts of Congress "may from time to time prescribe rules for their conduct of their business,"[122] and the Supreme Court "shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."[123] These rules, however, may not "abridge, enlarge or modify any substantive right."[124] Although the line between substance and procedure is famously blurry in the context of judicial power,[125] it is clear that Congress could not constitutionally grant to the courts the power to create clearly substantive rules in prospective form and that the courts may create such rules only through the procedural mechanism of a case or a controversy.

118. 2 U.S. 409, 410 n.* (1792).

119. Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793).

120. 219 U.S. 346, 357 (1911).

121. Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2012).

122. § 2071(a).

123. § 2072(a).

124. § 2072(b).

125. *See, e.g.,* Gasperini v. Ctr. for Humanities, 518 U.S. 415, 468 (1996) (referring to the "uncertain area between substance and procedure").

2. The Intra-branch Check of Appellate Review

One of the additional benefits of limiting the exercise of judicial power to the context of cases or controversies is that it allows for multiple levels of review of a particular case. The trial courts find the facts and issue initial decisions while the courts of appeals have the power to review the decisions of the trial courts and the Supreme Court retains the ultimate power to correct areas of law. Although the Constitution does not guarantee the right to an appeal,[126] it clearly contemplates an appellate process. Ever since the Judiciary Act of 1789, federal statutes have provided for at least one level of appellate review.[127] Thus, the case or controversy limitation permits the creation of intra-branch checks on the exercise of judicial power that stand in the place of inter-branch checks from which the judiciary is largely protected. In addition, although, in the famous words of Justice Jackson, the Supreme Court may "be infallible only because we are final,"[128] even the Supreme Court is subject to the limitations of a multi-tiered judicial system. In *Marbury v. Madison,*[129] the Court tacitly acknowledged the significance of this multi-tiered system by declaring that Congress could not statutorily grant original mandamus jurisdiction to the Supreme Court, which effectively interpreted the grants of original jurisdiction in Article III to be a ceiling rather than a floor for Supreme Court jurisdiction. Hence, the Supreme Court is largely limited to reviewing cases in which the factual record is made in lower courts, which limits the scope of the Court's power.

3. The Right to a Jury Trial

Finally, the framers expected that the right to a jury trial would prevent abuses of judicial power. Hamilton sought to reassure opponents of the Constitution that the grant of appellate jurisdiction

126. The Supreme Court has described the right of appeal as "not essential to due process, provided that due process has already been accorded in the tribunal of first instance." Ohio *ex. rel.* Bryant v. Akron Metro. Park Dist. For Summit Cty., 281 U.S. 74, 80 (1930); *see also* McKane v. Durston, 153 U.S. 684, 687 (1894) (ruling that appellate review of criminal convictions is not a requirement of due process of law).

127. *See* Judiciary Act of 1789, ch. 20, §§ 11, 22, 1 Stat. 73, 84 (stating that Supreme Court review of "final judgements and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars").

128. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

129. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803) ("Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution.").

to the Supreme Court, both as to matters of fact and law, would not be used to overturn the findings of common law juries.[130] Hamilton argued that appellate jurisdiction over factual issues would extend only to civil law matters and other cases not tried to a jury. Hamilton stated that this interpretation

> puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the supreme court there should be no reexamination of facts where they had been tried in the original causes by juries.[131]

In any event, the Bill of Rights, which guaranteed the right to a jury trial, ultimately addressed the Anti-Federalists' concerns. In suits at common law where the amount in controversy exceeded $20, the Seventh Amendment required that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to rules of the common law."[132] Thus, the framers guaranteed that the jury would continue to serve as a significant public check on the fact-finding power of Article III judges.

Furthermore, the new Congress moved quickly to protect the jurisdiction of common law juries against the intrusions of equity courts. The Judiciary Act of 1789 expressly limited equity jurisdiction in a number of areas to preserve the common law right to a jury trial.[133] In addition, sections 19, 26 and 30 of the Act specifically circumscribed judicial fact-finding.[134] By 1800, the Anti-Federalists' three principal concerns about preserving the right to jury trials were addressed: (1) the Constitution guaranteed the basic right to a jury trial; (2) the Constitution also restricted the courts' ability to review a jury's findings of fact; and (3) statutes expressly restrained the courts' ability to avoid jury trials by expanding equity jurisdiction. For our purposes, the key point is that the jury trial could only check judicial power that was exercised through the procedure of a litigated case or

130. THE FEDERALIST NO. 81, at 549–51 (Alexander Hamilton) (J. Cooke ed., 1961).

131. *Id*. at 552.

132. U.S. CONST. amend VII.

133. Section 16 of the Act restated the general common law rule that suits in equity would not be permitted in any case in which a "plain, adequate and complete remedy may be had at law." Maurice Rosenberg, *Judicial Discretion of The Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (discussing Hamilton's view of the Judiciary Act).

134. *Id*.

controversy and not through the procedure of substantive prospective rule making.

Therefore, the Supreme Court has interpreted the Constitution to protect against the abuse of judicial power by limiting its exercise to the context of a justiciable case or controversy. In that context, precedent, the internal checks of the multi-level court system, and the right to a jury trial ensure that the courts will not abuse their authority.

B. Procedural Checks on the Exercise of Legislative Power

Supreme Court cases that limit Congress's authority to grant itself additional statutory powers rely on a similar procedural limitation. Although the Court has not expressly discussed these restrictions as a control on the form in which Congress exercises its power, the cases certainly accommodate such an understanding. When viewed together, these cases are best read as identifying the bicameralism and presentment requirements of Article I, § 7 as the legislative analog to the case or controversy requirement. If Congress wishes to act substantively to affect the rights and responsibilities of individuals outside the legislative branch, it may do so only through the bicameral passage of a bill and presentment to the President for signature or veto.

In *Chadha*, while reviewing the constitutionality of a one-house legislative veto, the Court stated that they must first "establish that the challenged action . . . is of the kind to which the procedural requirements of Art. I, § 7 apply. Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I . . . . Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect." [135] The Court then proceeded to define legislative authority as "action that had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the legislative branch."[136]

As previously noted, many scholars have justly criticized the Court's characterization of "legislative" action.[137] If the veto of Mr.

135. I.N.S. v. Chadha, 462 U.S. 919, 952 (1983) (internal quotations and citations omitted).

136. *Id.*

137. *See, e.g.,* Elliott, *supra* note 7, at 511 ("In paying literal, even slavish, obeisance to the Framers' intentions on the specifics of governmental organization and structure, the courts

Chadha's deportation suspension was a legislative act then why was the Attorney General's suspension of the deportation not also a legislative act that would have required bicameral passage and presentment to the President as well? As Professor Lawrence Tribe has argued, the difficulty with the Court's definition of legislation

> is that the same observations apply with equal validity to nearly *all* exercises of delegated authority, whether by a House of Congress or by an executive department or an administrative agency. Both through rule-making and through case-by-case adjudication, exercises of delegated authority change legal rights and privileges no less than do full-fledged laws.[138]

The Court might have made a more coherent statement of constitutional doctrine by using the same language not as a definition for the terms legislation or legislative act, but rather as the definition for when Congress acts substantively as opposed to procedurally. Thus, when Congress acts to alter the "legal rights, duties and relations of persons outside the legislative branch," it is exercising substantive authority under the Constitution. The Court then might have drawn the conclusion that whenever Congress acts substantively, it must do so through bicameral passage and presentment to the President.

Such a characterization would place the Bicameralism and Presentment Clause on the same footing as the case or controversy limitation on the exercise of judicial power. Seen in this way, the Bicameralism and Presentment Clause acts as a procedural check on Congress by ensuring that whenever it acts substantively, it acts with the procedural checks and balances that the framers regarded as an essential protection against legislative abuse of power. Thus, it is not necessary to define a legislative act; it is sufficient to say that, just as the courts may exercise their power only in the context of a case or controversy, Congress may exercise its substantive authority only

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violate the deeper, more fundamental spirit of the Framers' vision that power should be divided and balanced creatively to prevent misuse."); Strauss, *supra* note 7, at 522 ("[T]he repetitive making of 'reasonable' choices by Congress will, over time, erode the independence of the judiciary or of the President. The argument is that a series of small steps, each reasonable within its context, provides a means by which Congress may subordinate either or both of these actors. The changes litigation growth has been working in the judiciary's capacity to function, and the resulting spate of proposals to consign new areas to administrative rather than judicial provenance.").

138. 1 TRIBE, *supra* note 62, at 144.

through the passage of a bill by both the House and Senate and presentment to the President.[139]

The same analysis can be applied to the Court's decision in *Bowsher v. Synar*. In *Bowsher*, the Court concluded "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws."[140] Because the duties assigned to the Comptroller General by the Gramm-Rudman-Hollings Act involved functions "plainly entailing execution of the law in constitutional terms" the Court declared the grant of authority to be unconstitutional.[141] Thus, the Court's decision rests upon the assumption that "executive" actions can be clearly defined and distinguished from legislative actions.

The Court did not have to define "execution" of the laws. Instead, the Court could have viewed *Chadha* as establishing the principle that neither Congress nor one of its agents can affect the substantive rights of anyone outside the legislative branch unless Congress utilizes the process of bicameral passage and presentment to the President. The exercise of any such authority by an officer of Congress, like the Comptroller General, is clearly unconstitutional on the basis of that principle. The problem is not that the action taken by the congressional officer is executive, it is rather that Congress is acting to affect substantive rights without following the procedure the Constitution requires. Such a rule may be easily applied any time Congress delegates substantive authority to one of its own.

The Court itself has virtually admitted the futility of attempting to define congressionally controlled actions as either legislative actions or execution of the laws. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, the Court

139. Fortunately, it should prove much easier to distinguish substantive from procedural actions in the context of congressional power than it is in the judicial realm. Private individuals participate in the actions of litigated cases in the judicial branch, so an action regulating those cases could be seen as affecting the legal rights of persons outside the judicial branch. Individuals do not have the same involvement in the legislative arena, so it is much easier to determine when a legislative action alters the "legal rights, duties and relations of persons outside the legislative branch."

140. Bowsher v. Synar, 478 U.S. 714, 726 (1986).

141. *Id.* at 732–33.

addressed the constitutionality of a statute that transferred federal operating control over two airports near the District of Columbia to a newly created regional authority.[142] The statute required the appointment of a nine-member Board of Review that would consist of members of Congress serving "in their individual capacities, as representatives of users of the airports."[143] The Court was not faked out by the structure and concluded that the Board of Review was "an agent of Congress."[144]

The Court then noted that, as an agent of Congress, the Board could not exercise executive authority nor could it exercise legislative authority without complying with the requirements of bicameralism and presentment.[145] Although the Court of Appeals had found the Board's authority to be executive in nature, the Court concluded,

> We need not agree or disagree with this characterization by the Court of Appeals to conclude that the Board of Review's power is constitutionally impermissible. If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7. In short, when Congress "[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," it must take that action by the procedures authorized in the Constitution.[146]

Thus, the Court effectively recognized the futility of trying to define the terms "legislative" and "executive" in order to determine whether Congress may grant itself authority to act substantively. In effect, the Court acknowledged that any substantive action by Congress must be taken through the procedural mechanism of bicameral passage and presentment to the President.

As a matter of constitutional text, such a limitation on the exercise of congressional authority is no less clear and direct than the case or controversy limitations of Article III. It is true that Article I does not expressly state that Congress may act substantively only through bicameral passage and presentment to the President, but neither does Article III state that the courts may exercise substantive power only

142. 501 U.S. 252, 255 (1991).
143. *Id.* at 259.
144. *Id.*
145. *Id.* at 290.
146. *Id.* at 276.

in the context of a case or controversy. Although Section 8, which describes the powers of Congress, nowhere states that these powers may be exercised only through bicameral passage and presentment to the President, it has always been understood that the requirements of the preceding section apply to each of the powers set forth in § 8.[147]

When the framers intended Congress to exercise power in a manner other than through bicameral passage and presentment to the President, they explicitly set forth such authority in the Constitution. Article I, § 2, clause 5 gives the House of Representatives the sole power to initiate impeachments.[148] Article I, § 3, clause 6 gives the Senate the sole power to try impeachments after the House brings charges.[149] Article II, § 2, clause 2 gives the Senate the power to approve or disapprove of presidential appointments.[150] The same provision gives the Senate the power to ratify treaties negotiated by the President.

Recharacterizing the holdings of *Chadha*, *Bowsher*, and *MWAA* as imposing a procedural check on the manner in which Congress exercises substantive authority is consistent with the framers intent to control the potential abuse of power in the branch most responsive to political passion. The framers clearly recognized the potential abuse of power that might arise from the highly political nature of the legislature.[151] Madison argued

> In a representative republic, where the executive magistracy is carefully limited both in the extent and the duration of its power, and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength, which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means by which reason prescribes; it is against the enterprising ambition of this department, that the people ought to

147. *See* INS v. Chadha, 462 U.S. 919, 952 (1983).

148. U.S. CONST. art. I, § 2, cl. 5.

149. U.S. CONST. art. I, § 3, cl. 6.

150. U.S. CONST. art. II, § 2, cl. 2.

151. *See* Sunstein, *supra* note 16, at 435 ("[P]rivate groups, whether minorities or (more likely) majorities, might use governmental authority to oppress others . . . . The separation of powers and the system of checks and balances were intended to reduce that risk. A faction might come to dominate one branch, but it was unlikely to acquire power over all three. The distribution of national powers thus operated to protect minorities from the tyranny of powerful private groups.").

> indulge all their jealously and exhaust all their precautions.[152]

Similarly, during the constitutional debates on the need for a bicameral legislature, James Wilson argued

> Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.[153]

Alexander Hamilton opposed a unicameral legislature on the ground that if the Constitution provided for only one house,

> we shall finally accumulate, in a single body, all the most important prerogatives of sovereignty; and thus entail upon our posterity, one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny, which the adversaries of the new constitution either are, or affect to be solicitous to avert.[154]

Madison summed up the need for a bicameral legislature by arguing that

> In republican government the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them, by different modes of election and, different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.[155]

The framers expressed a similar concern about the need for a presidential veto as an essential check on legislative authority. Hamilton defended the President's veto by arguing

> It establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. . . The primary inducement to conferring the power in question upon the

152. THE FEDERALIST NO. 48, at 333–34 (James Madison) (J. Cooke ed., 1961).
153. FARRAND, *supra* note 114, at 254.
154. THE FEDERALIST NO. 22, at 145 (Alexander Hamilton) (J. Cooke ed., 1961).
155. THE FEDERALIST NO. 51, at 350 (James Madison) (J. Cooke ed., 1961).

> executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community, against the passing of bad laws, through haste, in-advertence, or design.[156]

These checks on legislative authority would be subverted if Congress could affect the rights of those outside the legislative branch by delegating to itself the statutory authority to act without bicameral passage and presentment to the President. Just as the courts' potential abuse of power is controlled by channeling the exercise of their authority through the procedural mechanism of a case or controversy, the Constitution guards against legislative abuse of power by requiring that any exercise of Congress's authority be channeled through the procedural mechanism of bicameral passage and presentment to the President.

Such a limitation does not prevent Congress from conducting its own internal operations through another procedural mechanism whether by action of one house alone, the action of a committee, or the action of an officer of Congress created by statute for the purpose of internal management of Congress's operations. Just as the courts are free to enact rules of procedure through prospective rulemaking outside of the context of a case or controversy, Congress is permitted to regulate its own procedures without regard to the procedural checks imposed on its substantive authority.

By reconceptualizing the Court's definition of legislative action as simply a definition of the line between substantive and procedural authority, it becomes apparent that the Bicameralism and Presentment Clause is the legislative analog to the case or controversy requirement. Substantive action by both the judicial and legislative branches may be exercised only through the procedural mechanisms specified in the Constitution, while procedural regulations may proceed without the need for such strict limitations on the manner in which power is exercised. These constitutional requirements create procedural checks that limit the ability of the legislative and judicial branches to abuse the authority granted to them and protect the public from the arbitrary exercise of governmental power.

C. Procedural Checks on the Executive Branch

Although the Constitution imposes procedural checks on the exercise of substantive authority by the judicial and legislative

156. THE FEDERALIST NO. 73, at 495 (Alexander Hamilton) (J. Cooke ed., 1961).

branches, there is no such comprehensive procedural check with respect to the executive branch. Unlike Article III, with its case or controversy requirement and Article I with its Bicameralism and Presentment Clause, Article II contains nothing to suggest the form in which the executive branch must exercise all of its power. Article II, § 1, clause 1 states that "the executive Power shall be vested in a President of the United States of America."[157] Section 2 contains an enumeration of the specific powers granted to the President, but relatively few of these specific powers contain any procedural mechanism for their execution. The power to make treaties is contingent upon the concurrence of two-thirds of the Senate, and the power to appoint principal officers of the United States is contingent upon the advice and consent of the Senate.[158] Other than that, the President is generally limited only by the checks of statutes enacted by Congress, which may direct him to exercise delegated authority in a particular manner, because the President is generally required to "take Care that the Laws be faithfully executed."[159]

The Supreme Court, however, has identified some additional narrow and specific procedural checks that control the way certain types of executive powers are exercised. As detailed below, these checks include procedural safeguards required by the Due Process Clause, the limitations on how the President may use his veto power, and the requirement that quasi-judicial authority be subject to judicial review by an Article III court. Even with these checks, however, the executive branch is substantially less bound by procedural checks than the other two branches.

1. Procedural Checks Imposed by the Due Process Clause

When the executive branch takes actions that have the potential to deprive a person of a property right, including a vested interest in certain kinds of government benefits, the Due Process Clause of the Fifth Amendment requires that the executive must provide a hearing and other procedural safeguards before the property right is affected.[160] In *Goldberg v. Kelly*, the Supreme Court reviewed a claim brought by a welfare recipient whose benefits were terminated without the benefit of a hearing before the benefits were

157. U.S. CONST. art. II, § 1, cl. 1.
158. U.S. CONST. art. II, § 2, cl. 2.
159. U.S. CONST. art. II, § 3.
160. *See generally* 2 PIERCE, *supra* note 15, at §§ 9.3–9.5.

terminated.[161] The Court determined that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."[162] Thus, for the first time, the Court recognized government benefits as property that triggered the requirements of the Due Process Clause.[163] These requirements included a pre-termination hearing that would include "minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved."[164] After *Goldberg*, the Court addressed many similar issues in which the executive branch was subject to the procedural requirements of the Due Process Clause.[165] For our purposes, it is sufficient to note that the Fifth Amendment imposes substantial procedural checks on executive power when the executive threatens to deprive individuals of vested property rights that include many different kinds of government entitlements.

2. Procedural Checks on the President's Veto Power

Notwithstanding the absence of a comprehensive procedural check on the executive branch, the Constitution does contain certain procedural checks on the President's power. In particular, the President may exercise his veto authority only with respect to an entire bill, passed by both the House and the Senate. Congress may not give the President power to veto only part of a bill in the form of a line-item veto. In *Clinton v. City of New York*, the Supreme Court invalidated the Line Item Veto Act,[166] which authorized the President to cancel three types of provisions in newly enacted statutes: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[167] The Act imposed a number of strict limitations on how the President was to exercise his cancellation authority. First, in identifying items for cancellation, the President was required to consider the legislative history, the purposes, and other relevant information about the items to be

161. 397 U.S. 254 (1970).

162. *Id*. at 262.

163. *See* 2 PIERCE, *supra* note 15, at 571 ("[*Goldberg*] was the first case in which the Court applied the Due Process Clause broadly to government benefits that were previously classified as mere 'privileges,' . . . .").

164. *Goldberg*, 397 U.S. at 267.

165. *See generally* 2 PIERCE, *supra* note 15, at §§ 9.3–9.5.

166. 2 U.S.C. § 691 *et seq*. (1996).

167. § 691(a), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating on the ground that it violated the Presentment Clause of Art. I, §7, cl. 2 of the Constitution).

cancelled.[168] Second, he was required to determine with respect to each cancellation that it would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest."[169] Finally, the statute required the President to transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the cancelled provision.[170] The Act then permitted Congress to adopt a "disapproval bill" in order to nullify the President's proposed cancellations.

The Court concluded that "[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each . . . . There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."[171] The Court distinguished between the veto authority authorized by Article I, § 8, clause 2 and the cancellation authority granted by the Line Item Veto Act, "The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part."[172] The Court viewed these differences with the "single, finely wrought and exhaustively considered, procedure" of Article I, § 7.[173] The Court expressly distinguished line item veto authority from delegated discretionary authority to change tariff duties, a power upheld by the Court in *Field v. Clark*.[174] The Court noted that the power to alter the tariff was "contingent upon a condition that did not exist when the Tariff Act was passed," while the President's line item veto authority "necessarily was based on the same conditions that Congress evaluated when it passed those statutes."[175] Second, the tariff statute at issue in *Field* required the President to make the alterations upon finding that certain conditions existed, while under the line item veto statute the determinations made by the President do not require him to cancel or not to cancel a provision.[176] Finally, the President's suspension of a tariff implemented congressional policy

168. *See* § 691(b), *invalidated by Clinton*, 524 U.S. 417.
169. § 691(a)(3)(A), *invalidated by Clinton*, 524 U.S. 417.
170. § 691(a)(3)(B), *invalidated by Clinton*, 524 U.S. 417.
171. *Clinton*, 524 U.S. at 438.
172. *Id.* at 439.
173. *Id.* at 439–40 (quoting I.N.S. v. Chadha, 462 U.S. 919, 951 (1983)).
174. 143 U.S. 649, 696–97 (1892).
175. *Clinton*, 524 U.S. at 443.
176. *Id.* (citing *Field*, 143 U.S. at 686–87).

while the cancellation under the Line Item Veto Act expressly rejected the policy judgment made by Congress.[177] The Court also distinguished statutes involving discretionary spending authority on the ground that the Line Item Veto Act gave the President "unilateral power to change the text of duly enacted statutes."[178]

Clinton has attracted many comments both praising and criticizing the decision. The decision's supporters argue that *Clinton* effectively implements the non-delegation doctrine in a way that the Supreme Court has never otherwise been prepared to do.[179] Because the line item veto permits Congress to evade responsibility for difficult budget choices and leave that responsibility with the President, the Court's decision correctly rejected that innovation and placed the responsibility back with Congress, where it belongs.[180] Critics have agreed with Justices Scalia, Breyer, and O'Connor that the Line Item Veto Act did nothing more than delegate discretionary authority to the President. Since the Line Item Veto Act did not involve an attempt by Congress to increase its own authority it did not warrant the restrictive formalist approach of *Chadha*. Instead, it granted the President the power to control spending and thus gave the President additional power to regulate an appropriate executive function.[181]

The analogy to *Chadha* is a useful one, but in support for the decision rather than as a critique. The same reasons that warranted the Court's imposition of a procedural check on legislative authority in *Chadha* also support the imposition of an analogous procedural check on the President in *Clinton.* The purpose of the Bicameralism and Presentment Clause is to ensure that basic decisions on matters of

177. *Id.*

178. *Id.* at 447. In dissent, Justice Scalia, joined by Justices O'Connor and Breyer, argued that the "title of the Line Item Veto Act . . . has succeeded in faking out the Supreme Court." *Id*. at 469 (Scalia, J., dissenting). According to Justice Scalia, the executive action authorized by the statute was not a line item veto, but simply an exercise of discretionary spending authorized by statute and no different in effect from numerous other discretionary spending statutes adopted by Congress in the past. *Id.*

179. *See* Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 366–67 (2001); Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605, 1629–31 (1997); Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659, 1660–65 (1997); Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 436 (1992).

180. *See* Rappaport, *id*.; Stearns, *id*.

181. *See generally* Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and The Line Item Veto Act*, 20 CARDOZO L. REV. 871 (1999); Saikrishna B. Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1 (1998).

significant federal policies such as spending and taxation are made by both houses and the President together so that all three remain accountable for these actions and no one has the power to take actions unchecked by the others. The procedural limitations thus impose a significant restriction on the power of either branch to abuse its authority and act arbitrarily.

It is insufficient to argue in response that Congress could have granted discretionary authority to the President to spend all or part of an appropriation based on an assessment of conditions arising after the adoption of the statute. The President is allowed this delegated discretion in order to respond to changing circumstances in a way that, as head of the executive branch, he is much better able to perform than Congress is. In exercising that power, it is, of course, possible for the President to use "changed circumstances" as simply a pretext for a decision that is in fact based upon his disagreement, *ab initio*, with Congress's decision to authorize any expenditure at all for a particular subject, but there is simply no way to determine whether that is what the President is doing.

In the case of the Line Item Veto Act, however, it is quite simple to make that determination because the Act specified a limited time period of only five days after enactment of the statute for the President to cancel items of new spending or special tax provisions. In this instance, it is simply not possible for circumstances to have changed enough to warrant suspension of the expenditure or tax provision, and the only possible basis for the President's decision is his disagreement with the judgment of the House and Senate that these provisions were important enough to enact into law. Thus, the Line Item Veto Act allowed the President to circumvent the constitutional procedures requiring concurrence of House, Senate, and President without the need to justify the departure based on changed circumstances. Such an action clearly contravenes the entire purpose of the Bicameralism and Presentment clause of the Constitution, and it allows the President to take sole responsibility for such spending and tax provisions.

It is, perhaps, surprising that Justice Scalia would not be receptive to this argument since he made an analogous argument in opposing the delegation of legislative authority to the Sentencing Commission in his dissent in *Mistretta v. United States*.[182] Justice Scalia argued

182. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

> The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that 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 decree shall be.[183]

In the case of the Sentencing Commission, its delegated lawmaking function was completely divorced from any responsibility for execution of the law or adjudication of private rights under the law. It is divorced from responsibility for the execution of the law "not only because the Commission is not said to be 'located in the Executive Branch' . . . but, more importantly, because the Commission neither exercises any executive power on its own, nor is subject to the control of the President who does."[184] Thus, Justice Scalia was arguing that delegation is permissible because it is in large part indistinguishable from the exercise of the executive power; when divorced from its association with the executive power it becomes simply a naked authorization to legislate—thus, in effect, making the Sentencing Commission, in Scalia's words, "a junior varsity Congress."[185]

A similar situation exists with respect to the Line Item Veto Act, since delegation of discretionary spending and taxing authority is authorized because it is necessary to allow the President to respond to changed circumstances in an efficient manner. When divorced from that justification by temporally limiting the President's exercise of his delegated power to the same week that the bill became law, the entire justification for such delegations vanishes, and the delegated authority becomes the naked power to change the bargain struck by the House, Senate, and the President. This made the President even more than a junior varsity member, since his decisions under the Line Item Veto Act trumped the authority of the bicameral varsity Congress.

As a result, the Court's decision in *Clinton* seems entirely justified by both the letter and the spirit of the Bicameralism and the Presentment Clauses. It ensures that the President will not be able to alter the legislative bargain struck between himself and both Houses

183. *Id.* at 417.
184. *Id.* at 420.
185. *Id.* at 427.

of Congress based solely on a substantive policy disagreement. This decision is also consistent with the other decisions of the Supreme Court imposing procedural checks on the exercise of power by the federal courts and the Congress. Like *Chadha*, the decision in *Clinton v. New York* cabins the authority of the President by imposing a procedural mechanism to channel and restrain executive power and prevent it from being exercised in an arbitrary and abusive manner. If the President wishes to take an action the only purpose of which could be to change the bargain struck between the House, the Senate, and the President, the President must do so through the procedural mechanisms specified by the Constitution: a veto of the entire bill and not cancellation of individual parts of that bill in a way that creates an entirely new bargain to which neither the House nor the Senate have consented. Thus, *Clinton* is an appropriate example of the Court adopting a procedural check to restrain the power of the President in a manner similar to the procedural checks that are imposed on the other branches.

3. Procedural Checks on the Executive's Quasi-Judicial Power

As previously noted, the Supreme Court has recently taken a permissive, functional approach to the assignment of quasi-judicial power to the executive branch. However, one aspect of the Supreme Court's Article I court jurisprudence seems consistent with the cases imposing procedural checks on the legislative and judicial branches. The Supreme Court has stated that the validity of the assignment of quasi-judicial power to the executive branch depends on "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts."[186] This requirement places an important procedural check on the exercise of quasi-judicial power by executive branch agencies. To the extent that any executive branch adjudication is subject to searching and thorough Article III judicial review, there remains an important check upon the exercise of adjudicative authority by the executive branch that protects against the potential abuse of authority.

This procedural check not only protects the judicial branch and ensures that it may continue to carry out its essential constitutional functions, it also recognizes the significance of a procedural check like the ones imposed on the judicial and legislative branches. Judicial

186. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

review of the executive branch's adjudicative actions is analogous to the requirement that the President must have the option to review legislation passed by both houses of Congress to determine whether he wishes to exercise a veto. These procedural checks ensure that the authority granted by the Constitution will not be abused, and Congress should not be permitted to remove these checks through legislative devices, regardless of the purported need.

III. CONGRESS'S POWER TO IMPOSE PROCEDURAL CHECKS ON THE EXECUTIVE BRANCH

The procedural checks imposed by the Constitution on the executive branch are admittedly limited. They apply to only certain types of executive action, unlike the constitutionally required procedural checks on the legislative and judicial branches. It is, however, possible to find significant procedural checks on the executive branch that channel executive power in such a way as to prevent it from being abused or exercised in an arbitrary fashion. Congress has the power to channel executive branch authority through carefully wrought procedures, and it has done so with the provisions of the Administrative Procedure Act ("APA")[187] and numerous other statutes such as the Freedom of Information Act,[188] the Government in the Sunshine Act,[189] and the Privacy Act,[190] that regulate how the executive branch exercises its substantive authority.

The Necessary and Proper Clause gives Congress the express constitutional authority to establish procedural checks on the manner in which the executive branch carries out authority delegated to it by Congress.[191] The Clause gives Congress the power to enact laws that "shall be necessary and proper" to "carry into Execution" the powers vested in the federal government.[192] As John Manning has noted, the "[C]lause is the one and only provision of the Constitution that directly addresses the establishment of the federal government. It

187. Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06, 1305, 3344, 6362, 7562 (2012).

188. Administrative Procedure Act § 552.

189. Administrative Procedure Act § 552b.

190. Administrative Procedure Act § 552a.

191. *See* U.S. CONST. art I, § 8, cl. 18 ("To 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.").

192. *Id*.

gives the relevant power expressly to Congress, but conditions its exercise upon satisfaction of the requirement that any resulting law be "necessary and proper" for carrying into execution the powers granted by the Constitution."[193] Although formalists and functionalists disagree on the extent to which the clause empowers Congress to change the structure of the federal government,[194] at the very least, the clause gives Congress the power to mandate the procedural safeguards that apply when the executive branch implements a congressional statute.

Congress has stepped in to fill the void left by the absence of procedural checks in Article II and has provided statutory guarantees against the abuse of power by the executive branch. Congress has the authority to impose the same kinds of procedural checks on the exercise of power by the executive branch that the Court has applied to the exercise of power by the courts and Congress, and Congress has used that authority to adopt the APA and other statutes that channel the exercise of executive power through specified procedural mechanisms.[195] For the purposes of this article, it is sufficient to focus on the APA, which becomes the analog for the procedural checks imposed on the judicial branch by the case or controversy requirement and on the legislative branch by the Bicameralism and Presentment Clauses.

When Congress adopted the APA, it imposed a set of procedural requirements on both the administrative rulemaking process and the administrative adjudication process.[196] Section 553 requires that, with specified exceptions, any binding rules issued by the executive branch must be promulgated with "public notice of the proposed rule, receipt and consideration of comments on the proposed rule on issuance of the final rule incorporating the statement of basis and purpose."[197] The APA expressly authorizes courts to set aside agency rulemaking actions if they are "arbitrary, capricious, in abuse of discretion, or otherwise not in accordance with law."[198] Although agencies are generally free to choose between adjudication and rulemaking as the

193. Manning, *supra* note 17, at 1951.
194. *Id*. at 1987–93.
195. 5 U.S.C. §§ 551–59, 701–06, 1305, 3344, 6362, 7562.
196. *See* §§ 553, 554.
197. 1 PIERCE, *supra* note 15.
198. § 706(2)(A); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

method of administrative policy making,[199] most scholars support the general practice of agencies in making policy through the rulemaking process. Professor Richard Pierce notes that commentators have identified at least nine different advantages of rulemaking over adjudication as a source of generally applicable rules.[200] Despite these arguments, however, the Court has not yet shown any sign of requiring agencies to utilize prospective rulemaking.

The APA imposes a number of different notice requirements on agency rulemaking. First, the agency must provide notice of what it proposes to do and the basis for its proposed actions.[201] These requirements are designed to provide any interested members of the public with an opportunity to comment on the agency's proposal. The senate report on the APA stated that this "agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."[202] In addition to this preliminary notice, an agency must publish "a substantive rule . . . not less than 30 days before its effective date, except—(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule."[203] This requirement allows members of the public sufficient time to prepare for the implementation of the rule and insure that they will be in compliance with the rule's requirements.[204] This thirty-day period is a statutory minimum, and courts may require an agency to extend the time to a substantially longer period.[205]

Finally, agencies must make all rules publicly available in order for them to have a binding effect. The APA expressly requires each agency to "publish in the Federal Register . . . rules of procedure . . . substantive rules of general applicability . . . statements of general policy or interpretations of general applicability . . . and . . .

199. *See* SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

200. 1 PIERCE, *supra* note 15, at 368.

201. 5 U.S.C. § 553(b).

202. S. REP. NO. 79-248, at 200 (1946).

203. § 553(d).

204. 1 PIERCE, *supra* note 15, at 424.

205. *See, e.g.,* Nat'l Ass'n. Indep. Television Producers & Distribs. v. FCC, 502 F.2d 249, 254–55 (2d Cir. 1974) (holding that "the effective date of the new rule" is unreasonable because it can cause "unnecessary expense").

each amendment, revision, or repeal of the foregoing."[206] The precise scope of all of these notice requirements is unclear and has given rise to much litigation,[207] but, regardless of the exact scope of the requirements, it is clear that they impose a significant check on arbitrary agency behavior.

The APA also requires an agency "to incorporate in the rules adopted a concise general statement of their basis and purpose."[208] The legislative history of this provision "suggests some duty to discuss the factual basis for a rule and the reasoning process that links the factual predicates to a set of expected effects consistent with one or more statutory goals."[209] As the Senate committee stated in its report on the APA, "the agency must analyze and consider all relevant matter presented. The required statement of the basis and purposes of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule."[210]

When agencies act through the rulemaking process, the courts have interpreted these procedural requirements as mandating that agencies articulate the basis for the policy choices they adopt. For example, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court reviewed a decision by the Secretary of Transportation to authorize federal funding "for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee."[211] The Secretary did not, however, issue a statement of his actual findings on "why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park."[212] Those opposed to the highway argued that, without such formal findings, the Secretary's action was arbitrary and capricious under the APA.[213] The Supreme Court ruled that, even though the Secretary was not required to make formal findings, the post-hoc affidavits

206. § 552(a)(1). *See also* 1 PIERCE, *supra* note 15, at 424.
207. *See* 1 PIERCE, *supra* note 15, at 426–41.
208. § 553(c).
209. *Id.;* 1 PIERCE, *supra* note 15, at 441.
210. S. DOC. NO. 248, 79th Cong. 201, 259 (1946).
211. 401 U.S. 402, 406 (1971).
212. *Id.* at 408.
213. *Id.* Both the Department of Transportation Act and the Federal-Aid Highway Act provided that the Secretary "shall not approve any program or project" that requires the use of any parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park." 23 U.S.C. § 138 (2012).

describing the basis for the Secretary's decision were inadequate and that it was necessary to remand the case to the district court for plenary review of the Secretary's decision based on "the full administrative record that was before the Secretary at the time he made his decision."[214]

Subsequently, the Supreme Court elaborated on the holding of *Overton Park* by requiring an administrative explanation for notice and comment rulemaking. In *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.,*[215] the Court reviewed a National Highway Traffic Safety Administration regulation that rescinded a prior rule requiring automobile manufacturers to install a passive restraint system in all cars.[216] The Court held that an agency rule would be

> arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[217]

The Court then insisted that the agency itself must provide a reasoned basis for its decision in that the "reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given."[218] Therefore, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[219] These cases established a procedural regime under which the agencies must explain the basis for their decision to adopt a particular rule.

This regime has been enforced with increasing vigor by the courts. As Professor Richard Pierce has noted

> No court today would uphold a major agency rule that incorporates only a "concise general statement of basis and purpose." To have any reasonable prospect of obtaining judicial affirmance of a major rule, an agency must set forth the basis and

214. *Overton Park*, 401 U.S. at 419–20.
215. 463 U.S. 29 (1983).
216. *Id.* at 37–38.
217. *Id.* at 43.
218. *Id.*
219. Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

> purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates and the expected effects of the rule, relates the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted.[220]

A number of scholars have criticized the manner in which the courts apply this highly specific and detailed requirement.[221] First, it clearly imposes a great demand on an administrative agency issuing even a modest rule.[222] In addition, some commentators have argued that the test is applied in a manner that is strongly influenced by the political or ideological leanings of the judges who review the agency action.[223] Finally, others have suggested the requirement as elaborated by the courts goes beyond Congress's intent in adopting the APA.[224] Regardless of the criticisms, however, the Court is unlikely to backtrack significantly on the imposition of a significant procedural burden on an agency to explain the basis and purpose of a proposed rule.

These procedural requirements impose a significant procedural check on the executive branch, notwithstanding the increased substantive deference that the Supreme Court has accorded agency interpretations of statutes through *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[225] *Chevron* (which has been cited in more

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220. *See* 1 PIERCE, *supra* note 15, at 442. *See also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1263–65 (1989); Patricia Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 528 (1988); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 422–25 (1987).

221. *See* 1 PIERCE, *supra* note 15, at 444.

222. *See* Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and Nondelegation Doctrine*, 52 ADMIN. L. REV. 63, 94 (2000); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 393 (1986).

223. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1729–32 (1997); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decision*s, 44 DUKE L.J. 1051, 1066–68 (1995).

224. *See* 1 PIERCE, *supra* note 15, at 445 ("The courts have replaced the statutory adjectives 'concise' and 'general' with the judicial adjectives 'detailed' and 'encyclopedic.'"); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 453–54 (1986).

225. 467 U.S. 837 (1984).

cases than any other Supreme Court decision)[226] involved a question of the proper construction of the term "source" under the Clean Air Act Amendments of 1977.[227] There, the Court established a two-step process to be used by courts in evaluating whether an agency properly interpreted the statute it is charged with administering:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute if silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[228]

The Environmental Protection Agency ("EPA") had redefined the statutory term at issue in a way that made it less likely that a company would be required to undergo the elaborate EPA review process. The Supreme Court overturned the D.C. Circuit's decision that the EPA had inappropriately changed its interpretation of the statute. Because the language and legislative history of the statute were unclear, the definition of that term was a policy decision that should have been left to the agency. The Court emphasized that judges "are not part of either political branch of the Government."[229] The Court then went on to note that

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[230]

Thus, the Court left to agencies the responsibility of resolving

226. *See* 1 PIERCE, *supra* note 15, at 140.
227. Pub. L. No. 95–95, 91 Stat. 685.
228. *Chevron*, 467 U.S. at 842–43 (footnote omitted).
229. *Id.* at 865.
230. *Id.* at 865–66.

ambiguous questions of statutory construction. As a result, the courts are now required to give much more substantive discretion to an agency's interpretation of the statute it administers, but the procedural checks imposed by the APA remain in place to be enforced by the courts.

When taken together, these requirements imposed by Congress and the courts create a set of procedural checks on the exercise of executive power that look remarkably similar to the procedural checks that the Constitution imposes on the courts and Congress. Just as the case or controversy requirement and the Bicameralism and Presentment Clause direct the exercise of judicial and legislative power through a "carefully wrought set of procedures," so too does the APA direct the exercise of executive rulemaking authority through a similar set of procedures designed to limit arbitrariness and curb the potential for abuse of authority. Similarly, just as the case or controversy requirement and the Bicameralism and Presentment Clause leave the courts and Congress free to make whatever substantive judgments they believe to be correct in deciding cases or adopting legislation, so do the APA and the Supreme Court's *Chevron* doctrine leave the executive branch substantial room to make substantive policy judgments within the limitations imposed by Congress. The hole left by the absence of any significant constitutional limitations on the procedures by which the executive branch exercises its constitutional functions has been filled by Congress, which successfully created a detailed set of procedures to restrain the exercise of discretion by the executive branch.

Thus, through the enactment of the APA, Congress has redressed the imbalance created by the Supreme Court's cases concerning the ability of Congress to augment statutorily the powers of the respective branches. Congress has matched the Court's strict imposition of procedural checks on the courts and Congress. As a result, executive authority is constrained in a precisely analogous manner to the way in which the Court has restrained the exercise of judicial and legislative authority.

One might ask, however, whether the legislative imposition of procedural checks under the APA is the equivalent of constitutional doctrines regulating the exercise of judicial and legislative authority. After all, notwithstanding the statutory checks created by the APA, the executive branch is still unbound by significant constitutional checks on the exercise of its delegated authority. Congress remains

free to unbind the executive branch in a manner that would be impermissible with respect to either the judicial or legislative branches. As a practical matter, however, this seems like an insignificant risk. We might well worry about the potential for abuse of authority if Congress were given constitutional freedom to augment its own power to act other than through the bicameralism and presentment process. Congress clearly has an incentive to expand its own powers and avoid the procedural checks imposed by bicameralism and presentment. Conversely, however, Congress has little of the same incentive to withdraw the procedural checks imposed by the APA on the executive branch. Although Congress may have some incentive to pass the buck by delegating difficult policy choices to the executive branch, it has good reason to retain the checks imposed by the APA, which help to legitimate executive branch lawmaking.

IV. THE IMPLICATIONS OF CONGRESS'S POWER TO IMPOSE PROCEDURAL CHECKS ON THE EXECUTIVE BRANCH

Congress's power to redress the constitutional asymmetry with respect to the procedural checks on the power of the branches has a number of normative implications for some major issues of statutory and constitutional interpretation. First, it means that both scholars and the courts should be sensitive to the role of the APA as an executive-branch analogue to the case or controversy and bicameralism and presentment requirements. Although early theories of the administrative state focused on the need to enforce procedures to limit the arbitrariness of executive-branch decision-making, later scholarship has focused on the importance of executive accountability in legitimating the administrative decision-making process.[231] Under this approach, ensuring that the President is held politically accountable for agency action should be sufficient to prevent the executive branch from abusing its authority. Accountability alone, however, is insufficient to legitimate the administrative state; the courts must interpret the APA so as to prevent the arbitrary exercise of delegated executive authority.[232] Understanding the importance of

231. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

232. *See id.*; Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'n.*, 87 CORNELL L. REV. 452 (2002); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

the APA as an executive-branch analogue to the constitutionally imposed procedural checks on the arbitrary exercise of judicial and congressional power supports this approach to administrative law and suggests that the courts should be aggressive about ensuring that administrative agencies comply with the procedures designed to protect against arbitrariness.

Second, Congress's power to impose procedural checks on the executive branch means that, as a practical matter, we need not worry about the apparent asymmetry of cases restricting the power of Congress to expand the powers of the branches. It may be true that the Court has, in effect, read the Constitution to impose comprehensive procedural checks on the courts and Congress while leaving the executive branch, with limited exceptions, unrestricted by similar procedural checks. Nevertheless, Congress's power to fill the gap left by the Supreme Court and impose a congruent set of procedural checks on the exercise of power delegated to the executive branch more than adequately addresses any worries about the constitutional asymmetry. These checks operate to constrain the arbitrary exercise of authority by the executive branch in essentially the same way that the case or controversy limitations check the federal courts and the Bicameralism and Presentment Clause check the Congress.

Moreover, where the Constitution may be read to impose limited procedural checks on the executive branch, as in the case of the line item veto, the Court has stepped in to prevent any effort to circumvent those procedural checks. As a result, the asymmetry of procedural checks is more apparent than real. Each of the branches is now required to exercise its authority in accordance with procedures designed to avoid abuses of its authority. The executive branch, no less than Congress and the courts, must live within clear procedural guidelines when exercising its authority under the Constitution and statutes.

Thus, the critics of the Supreme Court's separation of powers jurisprudence[233] have exaggerated the arguments against cases like *Chadha*, *Bowsher,* and *Buckley*. There is no need to abandon the procedural checks on Congress and the courts in order to allow those branches to recapture authority from the executive branch or redress an imbalance in the separation of powers. Congress has delegated

233. *See* Elliott, *supra* note 7; Strauss, *supra* note 7.

substantial regulatory authority to the executive branch, but that authority must be exercised in accordance with procedural checks that accomplish the same objective as the procedural checks imposed by the Constitution on Congress and the courts. Congress itself has redressed the apparent imbalance, and it is unlikely ever to abandon these congressionally imposed procedural checks.

Third, the importance of congressionally imposed procedural checks in redressing the asymmetry of constitutionally imposed checks on the branches has important implications for issues involving the constitutionality of statutes that purport to specify the procedures that must be followed by the executive branch. Because the legitimacy of the constitutionally imposed procedural checks on the courts and Congress depends on the power of Congress to impose analogous checks on the executive branch, Congress must be given wide latitude to determine what are the most appropriate and effective ways in which to regulate the procedures used to implement the power delegated to the executive branch.

This conclusion calls into question the broad claims of those who advocate a unitary executive theory that rejects the legitimacy of congressionally imposed checks on how the President exercises executive power.[234] In particular, it undermines the extreme form of the unitary executive theory adopted by the George W. Bush administration. As noted earlier, the Bush administration routinely issued signing statements in which the President asserted that procedural requirements imposed by a newly enacted statute were inconsistent with the President's powers under Article II.[235] The President's claims of immunity from the congressional imposition of procedural checks on his delegated power are inconsistent with the broad congressional authority that is necessary to redress the asymmetry of constitutionally imposed procedural checks on the powers of the branches. Congress has power under the Necessary and Proper Clause to regulate how the executive branch performs the functions delegated by statute to the executive branch. Without that authority, Congress would be unable to impose the procedural checks

234. *See, e.g.,* Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 604 (2005) (Scholarly debate has focused on whether the Constitution created a 'unitary executive' in which all executive authority is centralized in the President, rather than the 'executive by committee' that existed under the Articles of Confederation.").

235. *See generally* SAVAGE, *supra* note 50; Biller, *supra* note 50; Shane, *supra* note 50; Kinkopf, *supra* note 50.

that are necessary to prevent the arbitrary exercise of executive authority.

CONCLUSION

The conceptual muddle created by the Supreme Court's separation of powers cases can be substantially simplified by reconceptualizing the limitations imposed on Congress's power to augment the inherent powers of the three branches. In cases involving the expansion of the authority of the federal courts, the case or controversy requirement contained in Article III, Section 2, of the Constitution imposes a procedural check on the form in which the federal courts exercise their constitutional authority. Congress may not circumvent these checks by statutorily granting the courts the power to act substantively other than in the context of a genuine case or controversy.

A similar procedural check governs many of the cases dealing with the statutes augmenting Congress's authority. Although the reasoning of the Court's decisions may not expressly identify this procedural check, the effect of the *Chadha*, *Bowsher,* and *Washington Metropolitan Airport Authority* decisions is to ensure that Congress cannot act substantively to affect the rights of anyone outside the legislative branch other than through the procedures set forth in the Bicameralism and Presentment Clause of the Constitution. These constitutionally imposed procedural checks on the exercise of judicial and legislative power provide significant safeguards against the abuse or arbitrary exercise of those powers.

The Constitution does not, however, provide an analogous comprehensive procedural check on the power exercised by the executive branch. As a result, many scholars worry that the Court's separation of powers jurisprudence is dangerously imbalanced. They argue that the procedural checks imposed on Congress in cases like *Chadha* and *Bowsher* are shortsighted because they ignore the need for Congress to readjust the balance of power, tipped too far toward the executive branch, as a result of the massive delegations of authority to the President and his subordinates in the executive branch. For these scholars, the formalistic limitations of *Chadha* and *Bowsher* and *Washington Metropolitan Airport Authority* ignore the realities of the modern administrative state and exacerbate the shift of power in favor of the executive branch.

For a number of reasons, however, this apparent asymmetry should not cause us great concern. First, the Supreme Court has recognized constitutionally imposed procedural checks that apply to at least some areas of executive power. These checks include the Due Process requirements that apply with respect to certain vested government entitlements, the restrictions on the line item veto and the need for Article III judicial review of the decisions of Article I courts in the executive branch.

Second, and more importantly, Congress has stepped in to fill the void left by the Constitution by statutorily imposing procedural checks on the exercise of executive power that are analogous to the constitutionally imposed procedural checks on the federal courts and Congress. The requirements of the APA and similar statutes channel the exercise of executive power through a set of procedures that protect against the arbitrary and abusive exercise of delegated power. As a result, these statutes comprehensively redress the imbalance of constitutionally imposed procedural checks and protect against the abuse of power by the executive branch.

The normative significance of these conclusions is three-fold. First, the conclusions lend support to those who argue for an interpretation of the APA that enhances the protection against arbitrary decision-making. Second, the scholarly critiques of cases like *Chadha* and *Bowsher* no longer carry much weight. Instead, these cases become part of a set of constitutional and administrative law principles that protect against the arbitrary exercise of governmental power through the imposition of procedural checks on the exercise of all governmental authority. Finally, the constitutional importance of Congress's power to impose procedural checks on the executive branch blunts the force of those who argue for a strong unitary executive theory that would preclude Congress from regulation executive branch functions.