"If the Line Item Veto Act were valid, it would authorize the President to create a different law – one whose text was not voted on by either House of Congress or Presented to the President for signature."—Justice STEVENS

"Failure of political will does not justify unconstitutional remedies."—Justice KENNEDY

"[T]here is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion."—Justice SCALIA

"The Constitution … authorizes Congress and the President to try novel methods in this way."—Justice BRYER

CLINTON v. CITY OF NEW YORK

524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998)

Acting under the Line Item Veto Act of 1996, President Clinton cancelled provisions of the Balanced Budget and Taxpayer Relief Acts. According to the State of New York, the President's first cancellation would have cost the state some $2.6 billion in Medicaid funds. The second cancellation involved a tax benefit for owners of food processing companies who sold their operations to farmers' cooperatives. Affected parties included the City of New York and Snake River Potato Growers, Inc. of Idaho. They filed separate suits to restore the statutory provisions that the President had cancelled for budgetary reasons.

Justice **STEVENS** delivered the opinion of the Court....

IV

The Line Item Veto Act gives the President the power to "cancel in whole" … "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." … [T]he New York case involves an "item of new direct spending" and that the Snake River case involves a "limited tax benefit" as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, § 7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. He must determine, with respect to each cancellation, that it will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision. It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. If, however, a "disapproval bill" pertaining to a special message is enacted into law, the cancellations set forth in that message become "null and void." The Act sets forth a detailed expedited procedure for the consideration of a "disapproval bill," but no such bill was passed for either of the cancellations involved in these cases. A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, see § 691(c), but he does, of course, retain his constitutional authority to veto such a bill.

… With respect to both an item of new direct spending and a limited tax benefit, the cancellation prevents the item "from having legal force or effect." Thus, under the plain text of the statute, the two actions of the President that are challenged in these cases prevented one section of the Balanced Budget Act of 1997 and one section of the Taxpayer Relief Act of 1997 "from having legal force or effect."…

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "[R]epeal of statutes, no less than enactment, must conform with Art. I." INS v. Chadha (1983). There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases. The President "shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient ...." Art. II, § 3. Thus, he may initiate and influence legislative proposals. Moreover, after a bill has passed both Houses of Congress, but "before it become[s] a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. His "return" of a bill, which is usually described as a "veto," is subject to being overridden by a two-thirds vote in each House.

There are important differences between the President's "return" of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. 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. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*. Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

V

The Government advances two related arguments to support its position that despite the unambiguous provisions of the Act, cancellations do not amend or repeal properly enacted statutes in violation of the Presentment Clause. First, relying primarily on Field v. Clark (1892), the Government contends that the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the previously enacted Line Item Veto Act. Second, the Government submits that the substance of the authority to cancel tax and spending items "is, in practical effect, no more and no less than the power to 'decline to spend' specified sums of money, or to 'decline to implement' specified tax measures." Neither argument is persuasive.

In *Field*, the Court upheld the constitutionality of the Tariff Act of 1890. That statute contained a "free list" of almost 300 specific articles that were exempted from import duties "unless otherwise specially provided for in this act." Section 3 was a special provision that directed the President to suspend that exemption for sugar, molasses, coffee, tea, and hides "whenever, and so often" as he should be satisfied that any country producing and exporting those products imposed duties on the agricultural products of the United States that he deemed to be "reciprocally unequal and unreasonable . . ."

[*Field*] identifies three critical differences between the power to suspend the exemption from import duties and the power to cancel portions of a duly enacted statute. First, the exercise of the suspension power was contingent upon a condition that did not exist when the Tariff Act was passed: the imposition of "reciprocally unequal and unreasonable" import duties by other countries. In contrast, the exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed those statutes. Second, under the Tariff Act, when the President determined that the contingency had arisen, he had a duty to suspend; in contrast, while it is true that the President was required by the Act to make three determinations before he canceled a provision, those determinations did not qualify his discretion to cancel or not to cancel. Finally, whenever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute. In contrast, whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment. Thus, … *Field* … does not undermine our opinion that cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7.…

Neither are we persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. The Government has reviewed in some detail the series of statutes in which Congress has given the Executive broad discretion over the expenditure of appropriated funds. For example, the First Congress appropriated "sum[s] not exceeding" specified amounts to be spent on various Government operations. See, e.g., Act of Sept. 29, 1789. In those statutes, as in later years, the President was given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions. It is argued that the Line Item

Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's predecessors could even arguably have been construed to authorize such a change.

VI…

… [A]lthough appellees challenge the validity of the Act on alternative grounds, the only issue we address concerns the "finely wrought" procedure commanded by the Constitution. …

… If the Line Item Veto Act were valid, it would authorize the President to create a different law--one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as "Public Law 105-33 as modified by the President" may or may not be desirable, but it is surely not a document that may "become a law" pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

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.

Justice **KENNEDY**, concurring.

A nation cannot plunder its own treasury without putting its Constitution and its survival in peril. The statute before us, then, is of first importance, for it seems undeniable the Act will tend to restrain persistent excessive spending. Nevertheless, for the reasons given by Justice Stevens in the opinion for the Court, the statute must be found invalid. Failure of political will does not justify unconstitutional remedies.

I write to respond to my colleague Justice Breyer, who observes that the statute does not threaten the liberties of individual citizens, a point on which I disagree. The argument is related to his earlier suggestion that our role is lessened here because the two political branches are adjusting their own powers between themselves. To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. The Federalist [No. 47] states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." …

The principal object of the [Line Item Veto Act], it is true, was not to enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, to

favor one State and ignore another. Yet these are its undeniable effects. 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.

It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design.

Justice **SCALIA**, with whom Justice **O'CONNOR** joins, and with whom Justice **BREYER** joins as to Part III, concurring in part and dissenting in part.

III

I agree with the Court that the New York appellees have standing to challenge the President's cancellation of § 4722(c) of the Balanced Budget Act of 1997 as an "item of new direct spending." The tax liability they will incur under New York law is a concrete and particularized injury, fairly traceable to the President's action, and avoided if that action is undone. Unlike the Court, however, I do not believe that Executive cancellation of this item of direct spending violates the Presentment Clause.

The Presentment Clause requires, in relevant part, that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it." There is no question that enactment of the Balanced Budget Act complied with these requirements: the House and Senate passed the bill, and the President signed it into law. It was only after the requirements of the Presentment Clause had been satisfied that the President exercised his authority under the Line Item Veto Act to cancel the spending item. Thus, the Court's problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes him to "cancel"--prevent from "having legal force or effect"--certain parts of duly enacted statutes.

Article I, § 7 of the Constitution obviously prevents the President from canceling a law that Congress has not authorized him to cancel. Such action cannot possibly be considered part of his execution of the law, and if it is legislative action, as the Court observes, " 'repeal of statutes, no less than enactment, must conform with Art. I.'" But that is not this case. It was certainly arguable, as an original matter, that Art. I, § 7 also prevents the President from canceling a law which itself authorizes the President to cancel it. But as the Court acknowledges, that argument has long since been made and rejected. In 1809, Congress passed a law authorizing the President to cancel trade restrictions against Great Britain and France if either revoked edicts directed at the United States. Act of Mar. 1, 1809 … The Tariff Act of 1890 authorized the President to "suspend, by proclamation to that effect" certain of its provisions if he determined that other countries were

imposing "reciprocally unequal and unreasonable" duties. This Court upheld the constitutionality of that Act in *Field*....

As much as the Court goes on about Art. I, § 7, therefore, that provision does not demand the result the Court reaches. It no more categorically prohibits the Executive reduction of congressional dispositions in the course of implementing statutes that authorize such reduction, than it categorically prohibits the Executive augmentation of congressional dispositions in the course of implementing statutes that authorize such augmentation--generally known as substantive rulemaking. There are, to be sure, limits upon the former just as there are limits upon the latter--and I am prepared to acknowledge that the limits upon the former may be much more severe. Those limits are established, however, not by some categorical prohibition of Art. I, § 7, which our cases conclusively disprove, but by what has come to be known as the doctrine of unconstitutional delegation of legislative authority: When authorized Executive reduction or augmentation is allowed to go too far, it usurps the nondelegable function of Congress and violates the separation of powers.

It is this doctrine, and not the Presentment Clause, that was discussed in the *Field* opinion, and it is this doctrine, and not the Presentment Clause, that is the issue presented by the statute before us here. That is why the Court is correct to distinguish prior authorizations of Executive cancellation, such as the one involved in *Field*, on the ground that they were contingent upon an Executive finding of fact, and on the ground that they related to the field of foreign affairs, an area where the President has a special "degree of discretion and freedom." These distinctions have nothing to do with whether the details of Art. I, § 7 have been complied with, but everything to do with whether the authorizations went too far by transferring to the Executive a degree of political, law-making power that our traditions demand be retained by the Legislative Branch.

I turn, then, to the crux of the matter: whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch. I may note, to begin with, that the Line Item Veto Act is not the first statute to authorize the President to "cancel" spending items. In Bowsher v. Synar (1986), we addressed the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, which required the President, if the federal budget deficit exceeded a certain amount, to issue a "sequestration" order mandating spending reductions specified by the Comptroller General. § 902. The effect of sequestration was that "amounts sequestered . . . shall be permanently cancelled." We held that the Act was unconstitutional, not because it impermissibly gave the Executive legislative power, but because it gave the Comptroller General, an officer of the Legislative Branch over whom Congress retained removal power, "the ultimate authority to determine the budget cuts to be made," "functions . . . plainly entailing execution of the law in constitutional terms." The President's discretion under the Line Item Veto Act is certainly broader than the Comptroller General's discretion was under the 1985 Act, but it is no broader than the discretion traditionally granted the President in his execution of spending laws.

Insofar as the degree of political, "law-making" power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to cancel a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the Founding of the Nation. [Justice

Scalia then lists numerous examples of Congress's authoring particular expenditures at the President's discretion, stretching from the First Congress to the New Deal.**– Eds.**]…

Certain Presidents [e.g., Grant, Franklin Roosevelt, Truman, and Nixon] have claimed Executive authority to withhold [or "impound"] appropriated funds even absent an express conferral of discretion to do so....

The short of the matter is this: Had the Line Item Veto Act authorized the President to "decline to spend" any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead-- authorizing the President to "cancel" an item of spending--is technically different. But the technical difference does not relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which is at issue here, is preeminently not a doctrine of technicalities. The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court. The President's action it authorizes in fact is not a line-item veto and thus does not offend Art. I, § 7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

For the foregoing reasons, I respectfully dissent.

Justice **BREYER**, with whom Justice **O'CONNOR** and Justice **SCALIA** join as to Part III, dissenting.

I

I agree with the Court that the parties have standing, but I do not agree with its ultimate conclusion. In my view the Line Item Veto Act does not violate any specific textual constitutional command, nor does it violate any implicit Separation of Powers principle. Consequently, I believe that the Act is constitutional.

III

The Court believes that the Act violates the literal text of the Constitution. A simple syllogism captures its basic reasoning:

> Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws.
>
> Minor Premise: The Act authorizes the President to "repea[l] or amen[d]" laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law.
>
> Conclusion: The Act is inconsistent with the Constitution.

I find this syllogism unconvincing, however, because its Minor Premise is faulty. When the President "canceled" the two appropriation measures now before us, he did not repeal any law nor did he amend any law. He simply followed the law, leaving the statutes, as they are literally written, intact. …

… Literally speaking, the President has not "repealed" or "amended" anything. He has simply executed a power conferred upon him by Congress, which power is contained in laws that were enacted in compliance with the exclusive method set forth in the Constitution. See Field v. Clark. …

Nor can one dismiss this literal compliance as some kind of formal quibble, as if it were somehow "obvious" that what the President has done "amounts to," "comes close to," or is "analogous to" the repeal or amendment of a previously enacted law. That is because the power the Act grants the President (to render designated appropriations items without "legal force or effect") also "amounts to," "comes close to," or is "analogous to" a different legal animal, the delegation of a power to choose one legal path as opposed to another, such as a power to appoint.

To take a simple example, a legal document, say a will or a trust instrument, might grant a beneficiary the power (a) to appoint property "to Jones for his life, remainder to Smith for 10 years so long as Smith . . . etc., and then to Brown," or (b) to appoint the same property "to Black and the heirs of his body," or (c) not to exercise the power of appointment at all. To choose the second or third of these alternatives prevents from taking effect the legal consequences that flow from the first alternative, which the legal instrument describes in detail. Any such choice, made in the exercise of a delegated power, renders that first alternative language without "legal force or effect." But such a choice does not "repeal" or "amend" either that language or the document itself. The will or trust instrument, in delegating the power of appointment, has not delegated a power to amend or to repeal the instrument; to the contrary, it requires the delegated power to be exercised in accordance with the instrument's terms.

The trust example is useful not merely because of its simplicity, but also because it illustrates the logic that must apply when a power to execute is conferred, not by a private trust document, but by a federal statute. This is not the first time that Congress has delegated to the President or to others this kind of power--a contingent power to deny effect to certain statutory language. [Justice Breyer then cites numerous congressional delegations to deny effect to statutory provisions, delegation to the President and other executive officers, in domestic and foreign affairs.**– Eds.**]

IV

Because I disagree with the Court's holding of literal violation, I must consider whether the Act nonetheless violates Separation of Powers principles-- principles that arise out of the Constitution's vesting of the "executive Power" in "a President," U.S. Const., Art. II, § 1, and "[a]ll legislative Powers" in "a Congress," Art. I, § 1. There are three relevant Separation of Powers questions here: (1) Has Congress given the President the wrong kind of power, i.e., "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?" These three limitations help assure "adequate control by the

citizen's representatives in Congress," upon which Justice Kennedy properly insists. And with respect to this Act, the answer to all these questions is "no."

A

Viewed conceptually, the power the Act conveys is the right kind of power. It is "executive." As explained above, an exercise of that power "executes" the Act. Conceptually speaking, it closely resembles the kind of delegated authority--to spend or not to spend appropriations, to change or not to change tariff rates--that Congress has frequently granted the President, any differences being differences in degree, not kind. …

If there is a Separation of Powers violation, then, it must rest, not upon purely conceptual grounds, but upon some important conflict between the Act and a significant Separation of Powers objective.

B

The Act does not undermine what this Court has often described as the principal function of the Separation of Powers, which is to maintain the tripartite structure of the Federal Government--and thereby protect individual liberty--by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo (1976); Mistretta v. United States (1989). See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers confers on each branch the means "to resist encroachments of the others"). …

[O]ne cannot say that the Act "encroaches" upon Congress' power, when Congress retained the power to insert, by simple majority, into any future appropriations bill, into any section of any such bill, or into any phrase of any section, a provision that says the Act will not apply. Raines v. Byrd (1997) (Congress can "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act"). Congress also retained the power to "disapprov[e]," and thereby reinstate, any of the President's cancellations. And it is Congress that drafts and enacts the appropriations statutes that are subject to the Act in the first place--and thereby defines the outer limits of the President's cancellation authority. Thus this Act is not the sort of delegation "without . . . sufficient check" that concerns Justice Kennedy. Indeed, the President acts only in response to, and on the terms set by, the Congress.

Nor can one say that the Act's basic substantive objective is constitutionally improper, for the earliest Congresses could have, and often did, confer on the President this sort of discretionary authority over spending. Cf. J.W. Hampton & Co. v. U.S. (1928, Taft, C.J.) ("contemporaneous legislative exposition of the Constitution when the founders of our Government and the framers of our Constitution were actively participating in public affairs . . . fixes the construction to be given to its provisions"). And, if an individual Member of Congress, who say, favors aid to Country A but not to Country B, objects to the Act on the ground that the President may "rewrite" an appropriations law to do the opposite, one can respond, "But a majority of Congress voted that he have that power; you may vote to exempt the relevant appropriations provision from the Act; and if you command a majority, your appropriation is safe." Where the burden of overcoming legislative inertia lies is

within the power of Congress to determine by rule. Where is the encroachment?

Nor can one say the Act's grant of power "aggrandizes" the Presidential office. The grant is limited to the context of the budget. It is limited to the power to spend, or not to spend, particular appropriated items, and the power to permit, or not to permit, specific limited exemptions from generally applicable tax law from taking effect. These powers … resemble those the President has exercised in the past on other occasions. The delegation of those powers to the President may strengthen the Presidency, but any such change in Executive Branch authority seems minute when compared with the changes worked by delegations of other kinds of authority that the Court in the past has upheld.

C

The "nondelegation" doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious constitutional obstacle here. The Constitution permits Congress to "see[k] assistance from another branch" of Government, the "extent and character" of that assistance to be fixed "according to common sense and the inherent necessities of the governmental co-ordination." But there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." Or, in Chief Justice Taft's more familiar words, the Constitution permits only those delegations where Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." J.W. Hampton.

The Act before us seeks to create such a principle in three ways. The first is procedural. The Act tells the President that, in "identifying dollar amounts [or] . . . items . . . for cancellation" (which I take to refer to his selection of the amounts or items he will "prevent from having legal force or effect"), he is to "consider," among other things,

> the legislative history, construction, and purposes of the law which contains [those amounts or items, and] . . . any specific sources of information referenced in such law or . . . the best available information . . .

The second is purposive. The clear purpose behind the Act, confirmed by its legislative history, is to promote "greater fiscal accountability" and to "eliminate wasteful federal spending and . . . special tax breaks."

The third is substantive. The President must determine that, to "prevent" the item or amount "from having legal force or effect" will "reduce the Federal budget deficit; . . . not impair any essential Government functions; and . . . not harm the national interest."

The resulting standards are broad. But this Court has upheld standards that are equally broad, or broader. See, e.g., National Broadcasting Co. v. United States (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require); FPC v. Hope Natural Gas Co. (1944) (upholding delegation to Federal Power Commission to determine "just and reasonable" rates); United States

v. Rock Royal Co-operative, Inc. (1939) (if milk prices were "unreasonable," Secretary could "fi[x]" prices to a level that was "in the public interest"). See also Lichter v. United States (1948) (delegation of authority to determine "excessive" profits); American Power & Light Co. v. SEC (1946) (delegation of authority to SEC to prevent "unfairly or inequitably" distributing voting power among security holders); Yakus v. United States (1944) (upholding delegation to Price Administrator to fix commodity prices that would be "fair" and "equitable").

Indeed, the Court has only twice in its history found that a congressional delegation of power violated the "nondelegation" doctrine. One such case, Panama Refining Co. v. Ryan (1935), was in a sense a special case, for it was discovered in the midst of the case that the particular exercise of the power at issue, the promulgation of a Petroleum Code under the National Industrial Recovery Act, did not contain any legally operative sentence. The other case, A.L.A. Schechter Poultry Corp. v. United States (1935), involved a delegation through the National Industrial Recovery Act that contained not simply a broad standard ("fair competition"), but also the conferral of power on private parties to promulgate rules applying that standard to virtually all of American industry. As Justice Cardozo put it, the legislation exemplified "delegation running riot," which created a "roving commission to inquire into evils and upon discovery correct them."

The case before us does not involve any such "roving commission," nor does it involve delegation to private parties, nor does it bring all of American industry within its scope. It is limited to one area of government, the budget, and it seeks to give the President the power, in one portion of that budget, to tailor spending and special tax relief to what he concludes are the demands of fiscal responsibility. Nor is the standard that governs his judgment, though broad, any broader than the standard that currently governs the award of television licenses, namely "public convenience, interest, or necessity." To the contrary, (a) the broadly phrased limitations in the Act, together with (b) its evident deficit reduction purpose, and (c) a procedure that guarantees Presidential awareness of the reasons for including a particular provision in a budget bill, taken together, guide the President's exercise of his discretionary powers.…

On the other hand, I must recognize that there are important differences between the delegation before us and other broad, constitutionally- acceptable delegations to Executive Branch agencies--differences that argue against my conclusion. In particular, a broad delegation of authority to an administrative agency differs from the delegation at issue here in that agencies often develop subsidiary rules under the statute, rules that explain the general "public interest" language. Doing so diminishes the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation. Moreover, agencies are typically subject to judicial review, which review provides an additional check against arbitrary implementation. The President has not so narrowed his discretionary power through rule, nor is his implementation subject to judicial review under the terms of the Administrative Procedure Act.

While I believe that these last-mentioned considerations are important, they are not determinative. The President, unlike most agency decisionmakers, is an elected official. He is responsible to the voters, who, in principle, will judge the manner in which he exercises his delegated authority. Whether the President's expenditure decisions, for example, are arbitrary is a matter that in the past has been left primarily to those voters to consider. And this Court has made clear that judicial review is less appropriate when the President's own discretion, rather than that of

an agency, is at stake. See Dalton v. Specter (1994) (Presidential decision on military base closure recommendations not reviewable; President could "approv[e] or disapprov[e] the recommendations for whatever reason he sees fit"). These matters reflect in part the Constitution's own delegation of "executive Power" to "a President," and we must take this into account when applying the Constitution's nondelegation doctrine to questions of Presidential authority.

Consequently I believe that the power the Act grants the President to prevent spending items from taking effect does not violate the "nondelegation" doctrine.

V

In sum, I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen do not amount literally to the enactment, repeal, or amendment of a law. Nor, for that matter, do they amount literally to the "line item veto" that the Act's title announces. Those means do not violate any basic Separation of Powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the President. Nor, since they comply with Separation of Powers principles, do they threaten the liberties of individual citizens. They represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. Consequently, with respect, I dissent.

Editors' Notes

(1) **Query:** This case turns largely on a factual question regarding what Congress was doing in the Balanced Budget Act: Did the Act delegate spending discretion to the President or did it authorize the President to repeal statutory provisions? Can any interpretive approach aid in deciding how to describe what Congress was doing? How would you describe what the individual justices were doing when deciding how to describe what Congress was doing? Which approach, if any, might have helped them do what they were doing in a responsible way?

(2) Justice Breyer suggests toward the end of his opinion that the Court should take a more permissive view of delegations to the President than to unelected administrative agencies. **Query:** What justifies this suggestion? Can you find parallel suggestions regarding the Court's deference to Congress in the areas of civil liberties and state-federal relations?