The Article I, Section 7 Game

WILLIAM N. ESKRIDGE, JR.*
AND JOHN FEREJOHN**

Article I, Section 7, Clause 2 of the Constitution provides 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" who may veto the bill; a vetoed bill can become law only if two-thirds of those voting in both chambers of Congress approve the bill, notwithstanding the President's objections.[1] This provision, together with Clause 3, codify the so-called bicameralism and presentment requirements for statutemaking under the Constitution. For most of our history, bicameralism and presentment played little role in constitutional discourse. That changed in the 1980s. Article I, Section 7 figured prominently in several important constitutional debates in the Supreme Court during the last ten years.

Early in the decade, the Supreme Court in *INS v. Chadha*[2] held that a single-chamber legislative veto of an adjudicative decision violates Article I, Section 7. The Court rested its holding in *Chadha* upon the Framers' "original intent" that "the bicameral requirement and the Presentment Clauses would serve essential constitutional functions" that would be violated by "lawmaking" through action of only one chamber of Congress *or* without presentment to the President.[3] Confirmed by subsequent summary disposi-

---

* Professor of Law, Georgetown University Law Center.

** Patrick Suppes Family Professor in Humanities and Social Sciences, Stanford University; Senior Fellow, Hoover Institution, Stanford University.

We are grateful to Frank Easterbrook, Dan Farber, Jack Knight, Jerry Mashaw, Roger Noll, Andrew Rutten, Edward Schwartz, Peter Strauss, and Barry Weingast for comments on earlier versions of this article.

1. U.S. CONST. art. I, § 7, cl. 2:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, 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. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

2. 462 U.S. 919 (1983).
3. *Id.* at 951. This statement followed the Court's historical analysis of Article I, Section 1,

HeinOnline -- 80 Geo. L.J. 523 1991-1992

tions, this reasoning suggested the constitutional invalidity of two-house legislative vetoes and of legislative vetoes of agency rulemaking. So interpreted, *Chadha* nullified hundreds of federal legislative vetoes. That, in turn, stimulated litigation over whether legislative vetoes are "severable" from the underlying statutes and, hence, whether their invalidity voided the statutes as well. The Court in *Alaska Airlines v. Brock*[4] applied the standard severability test in a way that rendered all or virtually all legislative vetoes severable from their statutes.[5]

Chadha aroused great interest in the bicameralism and presentment requirements of Article I, Section 7, yet the Court's treatment of those requirements both before and after *Chadha* is not entirely consistent with the broad reasoning in that decision. For example, in *Bowsher v. Synar,*[6] the Court invalidated the Gramm-Rudman Act's[7] delegation of budget-cutting authority to the Comptroller General, an official removable by Congress.[8] In light of the reasoning of *Chadha,* the delegation would appear to be invalid as a violation of the required procedures for congressional "lawmaking" under Article I, Section 7.[9] Instead, the Court rested its decision upon the general constitutional structure of separate powers, holding that Congress's action was an effort to usurp executive powers (vested in the President under Article II) by assigning them to an official "controlled" by Congress.[10]

More troubling than the Court's waffle in *Bowsher* is its apparent sacrifice of bicameralism and presentment in *Dames & Moore v. Regan.*[11] There, the Court held that presidential orders suspending federal litigation against the Islamic Republic of Iran had the force of "law"—notwithstanding Congress's failure to authorize such action in the International Emergency Economic Powers Act (IEEPA),[12] which authorizes and regulates presidential actions during foreign affairs emergencies, and further notwithstanding the inconsistency of such a presidential power with the Foreign Sovereign Immunities Act (FSIA),[13] which comprehensively regulates lawsuits brought in

---

Clauses 2-3. *Id.* at 946-50. The historical analysis, in turn, was taken almost entirely from THE FEDERALIST. *Id.*

4. 480 U.S. 678 (1987).
5. *Id.* at 684-87.
6. 478 U.S. 714 (1986).
7. 2 U.S.C. §§ 901-909 (1988 & Supp. 1990).
8. *Bowsher,* 478 U.S. at 736.
9. Justices Marshall and Stevens took this approach in their votes to invalidate the statute. *Id.* at 736, 753-59 (Stevens & Marshall, JJ., concurring in the judgment).
10. *Id.* at 721-26, 732-34 (opinion of the Court). The opinion of the Court, by Chief Justice Burger (who authored *Chadha*), was joined by four other Justices. Justices Marshall and Stevens concurred in the judgment, based upon the *Chadha* analysis. Justices White and Blackmun dissented.
11. 453 U.S. 654 (1981).
12. 50 U.S.C. §§ 1701-1706 (1988).
13. 28 U.S.C. §§ 1601-1611 (1988).

HeinOnline -- 80 Geo. L.J. 524 1991-1992

United States courts against foreign states and their instrumentalities.[14] The Court relied on Congress's "acquiescence" in prior executive agreements settling claims by United States companies against foreign states. Because Congress did not object to this longstanding practice and passed legislation consistent with the practice, the Court held that "Congress has implicitly approved the practice."[15]

This reasoning, similar to that in many of the Court's other constitutional as well as statutory precedents, seems inconsistent with Article I, Section 7, at least as interpreted two years later in *Chadha:* If "law" cannot be made by the vote of a single chamber of Congress (or even by the vote of both chambers, without presentment), how can it be made by the failure of either chamber to act? Another Article I, Section 7 puzzle is presented by Justice White in his *Chadha* dissent: If Article I "law" requires bicameral approval and presentment, why should agency "lawmaking" not be illegitimate for some of the same reasons as the legislative veto?[16]

The Court's apparent response to this concern is that delegation to an agency is valid under Article I so long as the agency is merely administering the "law" and not making it up. Theoretically, this idea is enforced by the nondelegation doctrine, which requires that Congress cannot delegate tasks to agencies without laying down an "intelligible principle" to which the agency must conform.[17] This idea might reconcile broad delegations to agencies with Article I, Section 7, and in the early 1980s a few Justices signaled a willingness to enforce the nondelegation doctrine.[18] In 1988, however, a unanimous Court rejected application of the nondelegation doctrine in *Mistretta v. United States,* with some suggestion that the doctrine is basically unenforceable.[19] This seems anomalous in light of *Chadha*'s commitment of the Court to enforcing bicameralism and presentment as prerequisites to constitutional lawmaking.

The ability of agencies to make "law" might also be reconciled with Arti-

---

14. *Id.* §§ 1604-1605.

15. *Dames & Moore,* 453 U.S. at 680. The Court also relied on the President's "inherent power" to enter into executive agreements. *Id.* at 682. But this argument might not provide much support for the Court's holding that the executive order suspending the lawsuits should be given the force of "law."

16. *Chadha,* 462 U.S. at 984-89 (White, J., dissenting).

17. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (Taft, C.J.); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935).

18. Justice Rehnquist endorsed it in American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring in the judgment). Future Justice Scalia endorsed it by joining the per curiam opinion of the three-judge court in Synar v. United States, 626 F. Supp. 1374, 1383-85 (D.D.C. 1986), *aff'd sub. nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

19. 488 U.S. 361, 371-79 (1989).

HeinOnline -- 80 Geo. L.J. 525 1991-1992

cle I, Section 7 by subjecting agency law to judicial review, ensuring that the agency-made law would reflect the legislative preferences that yielded the legislation. Paradoxically, however, the Supreme Court has gone in the opposite direction, holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*[20] that courts must defer to agency interpretations of statutes they are charged with enforcing, unless the agency interpretation is "manifestly contrary to the statute."[21] Assuming a broad and legal delegation of lawmaking power to the agency, the Court reasoned that aggressive judicial review of the agency's action would be inconsistent with the democratic values underlying Article I.[22]

Decisions in the late 1980s reveal that the Court is even split on the issue of whether it should consult a statute's legislative history when deciding whether an agency interpretation is "manifestly contrary to the statute" under *Chevron*.[23] Indeed, a few Justices argue from Article I, Section 7 that there are constitutional problems with the Court's reliance on legislative history (especially committee reports) as "authoritative" evidence of statutory meaning in any case.[24] Under this line of argument, a court's consideration of legislative history (e.g., committee reports) violates bicameralism because the whole Congress does not vote on the legislative history, and violates presentment because the President is usually not represented in the legislative history and is not presented with it when he or she signs the bill into law.

In spite of—or because of—all this doctrinal debate in the Court's opinions, the import of Article I, Section 7 for lawmaking in the modern administrative state is unclear. The Court does not seem to have a well-developed conceptual framework for Article I, Section 7. The closest the Court has come to such a framework is *Chadha,* where the Court hearkened back to the Framers' reasons for the bicameralism and presentment requirements.[25] But *Chadha*'s conceptual framework is in tension with the results or the reasoning of the Court's practice in other areas: it is strikingly inconsistent with *Dames & Moore*; arguably inconsistent with *Alaska Airlines, Mistretta, Chevron,* and the Court's frequent endorsements of legislative history; and suggests a different analysis than that followed by the Court in *Bowsher*.

More importantly, *Chadha*'s conceptual framework is an unsatisfactory analysis and application of the Framers' original expectations for the creation of law pursuant to Article I, Section 7. It is unsatisfactory in three different ways. First, although *Chadha* adverts to the purposes the Framers

20. 467 U.S. 837 (1984).
21. *Id.* at 844.
22. *Id.* at 865-66.
23. *Id.* at 844.
24. In particular, Justice Scalia has criticized reliance on committee reports. *See infra* Part II.E.
25. 462 U.S. at 946-51.

HeinOnline -- 80 Geo. L.J. 526 1991-1992

envisioned for bicameralism and presentment, its understanding of those purposes is impoverished; the opinion seems unaware of how bicameralism and presentment fit into the overall vision of government, which the Framers saw as a dynamic balance between popular republican governance and "energetic" stable governance. Second, *Chadha* assumes a wooden and unnecessarily formalist operation of bicameralism and presentment, as simply hoops that bills must jump through before they become law. A better way to understand Article I, Section 7 is to view it as setting up a dynamics (rather than a statics) of power, ultimately subserving the constitutional balance just noted. Third, *Chadha*'s reliance on the very specific statements of the Framers is ahistorical, given the vast changes in United States government in the modern administrative state. Those changes engulf the narrow constitutional vision offered by *Chadha* and suggest the superiority of an understanding of the Framers' expectations that is pitched at a more general level.

What we want to do in this piece is to rethink Article I, Section 7 in a way that is both more attentive to the Framers' expectations and goals and more comprehensible in the modern administrative state. Drawing upon formal models developed by positive political theory, Part I analyzes Article I, Section 7 as a sequential game, in which lawmaking is conceptualized as a dynamic interaction between the preferences of the House and Senate (bicameralism) and the President (presentment). The advent of the administrative state, in which much "lawmaking" is accomplished by agencies dominated by the President, has altered the game in an important way. From the perspective of the Framers' original expectations, interpretation of Article I, Section 7 must meet this challenge, adapting the dynamic game to preserve its original value.

Part II applies the Framers' original game, updated to account for agency lawmaking, as a way of evaluating modern constitutional doctrine. Much of it is found lacking, especially *Mistretta*'s apparent abandonment of the nondelegation doctrine, *Chadha*'s invalidation of all legislative vetoes, *Alaska Airlines*' unrealistic approach to severability, *Dames & Moore*'s acceptance of lawmaking by acquiescence, and *Chevron*'s deference to agency decisionmaking. The conclusion of Part II is that if the Court takes the Framers' intent seriously, its reasoning in *Chadha* is flawed and its decisions in other cases incorrect.

Part III steps back and asks whether the Framers' original goals and values have meaning for the modern administrative state. In other words, should our conceptualization of Article I, Section 7 be persuasive to a nonoriginalist, that is, a judge or scholar who does not care what the Framers expected, or who feels that their expectations have been so overtaken by subsequent developments as to be irrelevant today? Rather tentatively, we believe the model does have some value for nonoriginalists because the balance

HeinOnline -- 80 Geo. L.J. 527 1991-1992

sought by the Framers remains normatively attractive today. We develop this insight through reconsideration of the validity of the Supreme Court decisions analyzed in Part II.

I. A GAME THEORETIC MODEL OF THE ORIGINAL CONSTITUTIONAL UNDERSTANDING OF BALANCED LAWMAKING

The plain meaning of Article I, Section 7 is that the Constitution does not contemplate a unicameral parliamentary model of statute creation in which statutes reflect the preferences of the median legislator. Instead, the model is a bicameral presidential one in which statutes simply reflect some accommodation of the preferences of the median legislator in two different chambers and of the President.

This bicameral presidential model of legislation is not in the Constitution by accident. It reflects a carefully considered judgment by the Framers about how lawmaking should be structured.[26] The Framers admired the legitimacy of popular republican decisionmaking, but rejected systems of lawmaking by simple majority votes, either in the form of direct democracy[27] or of a unicameral parliamentary system,[28] because they feared that temporary alliances would establish short-sighted policies not in the public interest. Their decision to require both bicameral approval and presentment of legislation before it becomes law represents the Framers' judgments about the need for balance between republican liberty, in which popular preferences would generate laws, and stability, in which laws would reflect deliberation among many perspectives and would not yield abrupt changes in social policy.[29]

The Constitution's requirements for lawmaking can be modeled as a sequential game, which we dub the "Article I, Section 7 game." The starting point for the game is the status quo, which prevails in the absence of legislation. If the median legislator in both chambers can agree on a similar policy to replace the status quo, the legislature will want to pass a statute implementing the legislative preference. In a parliamentary system, this would be the end of the game. In our presidential system, the President may not prefer the policy preferred by the median legislator to the status quo and, hence, might veto the legislation. The final move would then be that of Congress, to

---

26. This discussion is mainly informed by THE FEDERALIST No. 51 (James Madison), and No. 73 (Alexander Hamilton), especially as interpreted in DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 133-46, 176-79 (1984).

27. THE FEDERALIST No. 10, at 80-82 (James Madison) (Clinton Rossiter ed., 1961).

28. THE FEDERALIST No. 51, at 322-23 (James Madison), No. 73, at 441-47 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

29. THE FEDERALIST No. 37, at 226 (James Madison), No. 70, at 423-24 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see* EPSTEIN, *supra* note 26, at 162-76.

HeinOnline -- 80 Geo. L.J. 528 1991-1992

override the veto, if two-thirds of the legislators in each chamber prefer the median chamber preference to that of the President.

Positive political theory suggests a formal model for this sequential game.[30] For purposes of constructing the model, we assume that information is complete, in that the preferences of the players, the structure of the game, and the rationality of the actors are all common knowledge. We also assume that the players perfectly anticipate the future course of play, that no one is able to commit to future courses of action, and that all the actors in the model prefer that their decisions not be overturned. We employ the following notation:

SQ	=	Existing policy (status quo), the default position if no legislation is enacted to deal with a social problem
H and S	=	Preferences of the median legislator in the two chambers of the bicameral legislature
P	=	Preferences of the President
h and s	=	Preferences of the pivotal legislator in the House and Senate, whose vote is needed for the two-thirds majority needed to override a presidential veto.
x	=	Statutory policy resulting from the game

In determining whether a statute will be enacted, and where policy will be set under our game, the critical factor is the relationship of SQ to P, S, H, h, and s. Consider the following three cases.[31]

Case 1: $P < H, S < SQ$. We start with a case in which the status quo is objectionable from the perspectives of both Congress and the President, and their preferences for changing the status quo run in the same direction, but the President would like to change the status quo more drastically than would either chamber in Congress. Figure 1 maps the relevant preferences:

30. The sequential game model used *infra* is similar to the models used in William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game,* 79 CAL. L. REV. 613 (1991); John Ferejohn & Charles Shipan, *Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy, in* CONGRESS RECONSIDERED 393 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 4th ed. 1989); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases,* 6 J.L. ECON. & ORGANIZATION 263 (1990); Brian Marks, A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell* (1989) (unpublished Ph.D. dissertation, Washington University) (copy on file at *The Georgetown Law Journal).*

31. Please note that these three cases do not exhaust the possible preference alignments, but other variations would be analyzed similarly to one of our three variations. For example, the Framers expected the Senate and President to be much more inclined to the status quo than the House (as in $H < S, P < SQ$). This alignment is similar to Case 1 below, and statutory policy would be set at $x = S$. If the President were particularly protective of the status quo (as in $H < S < P < SQ$), the alignment of preferences would be similar to Case 3, with statutory policy being set at $x = P$. If the House wanted to change the status quo in ways different than the President and the Senate ($H < SQ < S, P$), the alignment of preferences would be similar to Case 2, with no statute being enacted.

HeinOnline -- 80 Geo. L.J. 529 1991-1992

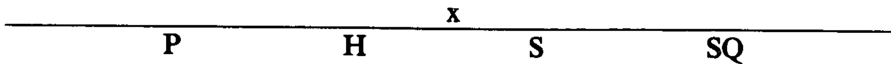

FIGURE 1. Statutory policy $H \leq x \leq S$ when $P < H, S < SQ$.

In such a case there is no problem enacting a statute,[32] since both chambers and the President prefer a range of policies to the status quo. The ultimate statutory policy will fall somewhere between the preferences of the two legislative chambers (*H* and *S*), and the preferences of the President will be irrelevant.[33] Note here the tendency of the game to avoid drastic shifts away from the status quo (*SQ*). The President's preference for a somewhat more significant policy shift will have little if any effect on statutory policy under the circumstances described in Figure 1, for it is Congress that must take the initial action. And the President cannot credibly threaten to veto any bill acceptable to Congress because the President prefers any action moving policy to the left of the status quo.

Case 2: $h < SQ < S$. Consider how the game changes when the actors' preferences for changing the status quo run in different directions. Figure 2 maps one illustration of such preferences:

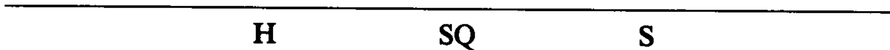

FIGURE 2. No statute when $H < SQ < S$.

If *SQ* is anywhere between *H* and *S*, Congress would be unable to agree on statutory policy because the House would prefer the status quo to any point to the right of *SQ*, and the Senate would prefer the status quo to any point to the left of *SQ*. The Framers expected that such a legislative stalemate would not be uncommon, and the requirement of bicameral approval reflects the constitutional presumption in favor of the status quo. Note that for the game diagrammed in Figure 2, we have left the President out of the Article I, Section 7 game. The President's preferences are irrelevant when Congress cannot agree on a statute changing the status quo.

---

32. We are of course assuming no transaction costs for statutory enactment and frictionless bargaining among the players. We are also for the present assuming away internal congressional barriers such as committees. We take up the role of committees in Part II.

33. That is, even though the President would like to adopt a major shift in policy from the status quo, neither chamber in Congress is willing to adopt a major shift. Since bicameralism requires the consent of both chambers, the two chambers will work out a compromise of their preferences ($H \leq x \leq S$). Presentment does not require the President's consent to legislation, unless his veto can be backed up by more than a third of one chamber. In the configuration described by Figure 1, the President cannot credibly threaten to veto the legislature's preferred policy (*x*), in large part because a successful veto would leave policy at the status quo (*SQ*), which the President hates even more than Congress does.

HeinOnline -- 80 Geo. L.J. 530 1991-1992

Even when Congress can agree on a change in the status quo (as in $SQ < H, S$), it still may be unable to enact a statute, if the President prefers the status quo to any change Congress would like to make. Figure 2A maps one example of such a situation:

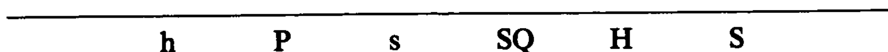

FIGURE 2A. No statute when $h < P < SQ < H, S$.

The same outcome (no statute) results from the game in Figure 2A as in Figure 2, but because of the presentment and not the bicameralism requirement. That is, even though *H* and *S* will agree on a statutory policy located somewhere between their preferences, the President will be able to sustain a veto because *h,* the voters at or near the veto median of the more pro-President chamber, will prefer *SQ* to *x*. If *SQ* is anywhere between *h* and *S,* it is clear that any statutory proposal would have to move policy to the right of *SQ* to satisfy the Senate and that any statute that had this effect would be vetoed by the President. The supporters of the statute would be unable to produce sufficient votes in *H* to override the veto, again because *h* would prefer *SQ* to *x*. Thus, there would be no legislation and policy would remain at $x = SQ$. Again, the Framers anticipated this possibility, approvingly, for they placed the executive veto in Article I, Section 7 to prevent abrupt shifts in policy even when both chambers of Congress desired it.

Case 3: $SQ < h$. The President's ability to block legislation ends, of course, when two-thirds of the legislators in each chamber disagree with the President about how the status quo should be changed. Figure 3 illustrates this situation:

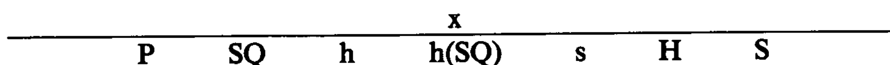

FIGURE 3. Policy set at $x \approx h(SQ)$ when $SQ < h$.

Although the President does not have enough votes in Congress to sustain a veto, the threat of a veto significantly affects the location of statutory policy. The threat of a veto induces the median legislator, *H,* to introduce legislation at about point *h(SQ)*. Recall that *h* represents the pivotal legislator for veto purposes—namely, the legislator whose vote is needed for the two-thirds majority needed to override a presidential veto. For that "veto median" legislator, *h(SQ)* is the point at which she would be indifferent to the choice between the status quo, *SQ,* and the proposed policy, *h(SQ)*. By setting policy just a little to the left of *h(SQ), H* will be able to attract the pivotal voter, *h,* needed to override a presidential veto. If the status quo is located exactly

at the preferences of the pivotal voter of the more pro-President chamber ($SQ = h$), policy will be set at $x = SQ$, and no statute will be passed. The further the status quo is to the left of the veto median, the further to the right Congress will set statutory policy and not risk a veto. Again, the Framers anticipated many Case 3 situations, where the President would oppose Congress's desire to change the status quo. The majority required in each chamber of Congress to override a presidential veto would ensure a more moderate change in the status quo than Congress acting alone would have enacted.

The Framers contemplated the following consequences from the model of lawmaking described above: First, most social and economic problems would not generate legislation at all. The Framers expected the House, Senate, and President to have widely dispersed preferences about the status quo, and therefore the no-statute game (Case 2) was most likely in the short term.[34] Nevertheless, the Framers expected that, if the problem persisted over time, a solution in the common interest would emerge and preferences would realign (from Case 2 to Case 1 or 3) so that a statute could pass.[35] Second, if a social or economic problem were to stimulate legislative action, the structure of the Article I, Section 7 game would militate in favor of moderate rather than radical shifts from the status quo.[36] The games suggested in Cases 1 and 3 push policy away from extreme preferences. Third, once legislation was enacted into law, it would be interpreted over time to reflect the original policy balance.[37] This point requires some elaboration of the Framers' expectations about law implementation (as opposed to lawmaking, explored above).

The Constitution separates lawmaking (Article I) from law implementation (Articles II and III). The Framers believed that Congress would be less likely to pass "tyrannical" laws if there were the possibility that such laws could be applied to members of Congress or their supporters.[38] But the Framers also believed that the policy balance achieved in a given statute would not be disturbed by the President's "execution" of laws or the Court's "interpretation" of laws.[39] The reason for the Framers' belief was their understanding that Congress-with-the-President (the lawmaking process in Ar-

---

34. *See* THE FEDERALIST No. 73, at 443-44 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

35. *See* EPSTEIN, *supra* note 26, at 177-78.

36. *See* THE FEDERALIST No. 63, at 384-85 (James Madison) (Clinton Rossiter ed., 1961).

37. *See* THE FEDERALIST No. 78, at 468-69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

38. THE FEDERALIST No. 47, at 302-03 (James Madison) (Clinton Rossiter ed., 1961); *see* EPSTEIN, *supra* note 26, at 129-30 (tracing idea from Locke and Montesquieu to the Framers, and explaining Madison's probable understanding of Montesquieu to be that "if the legislators cannot ensure a tyrannical execution, i.e., one which favors themselves, they will be less likely to make tyrannical laws for fear that they themselves will be tyrannically ruled by them.").

39. THE FEDERALIST NOS. 70, 78 (Alexander Hamilton).

HeinOnline -- 80 Geo. L.J. 532 1991-1992

ticle I, Section 7) is the constitutionally required process for deliberation and choice regarding statutory policy, and their further understanding that the processes of execution and interpretation would be faithful to the policy choices of the lawmaking process.[40]

II. THE ORIGINAL UNDERSTANDING OF THE ARTICLE I, SECTION 7 GAME AND THE MODERN ADMINISTRATIVE STATE: IMPLICATIONS FOR CONSTITUTIONAL DOCTRINE

The world of the Framers is not our world. The modern administrative state in which we live is much more complicated than the republic envisioned by the Framers. This complexity has engendered an amount of lawmaking and legal regulation inconceivable to the Framers. More important, in the modern administrative state most "lawmaking" is accomplished by agencies under the authority of statutory delegations. Most important, this shift to agency lawmaking has been accompanied by an overall shift of lawmaking authority from Congress to the President.

These modern developments are in tension with the specific as well as general balance sought by the Framers through Article I, Section 7. Specifically, the modern developments have shifted statutory policy away from the compromise among House, Senate, and presidential preferences reflected in the game set up by Article I, Section 7. Since agency heads are appointed by the President and many agencies are located within the executive department, presidential preferences are now much more important to lawmaking than the Framers originally intended. Generally, the modern developments—especially the increased lawmaking power of the President—have unsettled the balance between popular government and stability, to the detriment of both.[41]

If the Court is truly serious about the Framers' original expectations as to the meaning of Article I, Section 7, as the Court claimed to be in *Chadha*,[42] the Court should be more attentive to the ways in which agency lawmaking unsettles those expectations. In the remainder of this Part, we consider the ways in which the game outlined in Part I provides insight into the validity of several constitutional doctrines: the nondelegation doctrine, the legislative

40. THE FEDERALIST NO. 78, at 468-69 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."); *see* EPSTEIN, *supra* note 26, at 173 ("[E]xecution does not really require much deliberation, perhaps because it does not present many choices. To execute well means to execute vigorously whatever laws there are against whatever lawbreakers there are. The choices which require deliberation are apparently made by the legislature.").

41. We reserve to Part III discussion of the practical problems involved with unstable policy in modern society.

42. 462 U.S. 919, 945-51 (1983).

HeinOnline -- 80 Geo. L.J. 533 1991-1992

veto and its severability from the underlying legislation, congressional acquiescence as lawmaking, congressional efforts to control agencies, judicial deference to agency interpretations, and the use of legislative history in interpreting statutes. We emphasize that the normative perspective for this Part's analysis is that of *Chadha,* namely, the original expectations of the Framers. We reserve for Part III discussion of these doctrines from a nonoriginalist perspective.

A. THE NONDELEGATION DOCTRINE AND THE CONSTITUTIONAL DILEMMA POSED BY THE MODERN ADMINISTRATIVE STATE

Modern American government is structurally quite different from the government envisioned by the Framers. A great deal of national lawmaking has been delegated[43] by Congress to administrative agencies, with little or no specific standards to guide the agencies. As a result, most initial efforts at statutory interpretation are now done by agency rulemaking and adjudication, rather than in the context of judicial adjudication.[44] There are numerous reasons for Congress's willingness to delegate significant lawmaking power to agencies, including the institutional advantages agencies have in developing detailed policy prescriptions and the congressional inclination to avoid or defer controversial policy decisions. Whatever the reasons, such delegation is in tension with the original constitutional understanding that lawmaking would be accomplished by Congress-with-the-President, and with the policies underlying that understanding. Specifically, the Framers did not expect the President to have an active role in lawmaking and in changing the law; the executive's role, reflected in the veto power, was only reactive, protecting the presidency against congressional usurpation or the status quo against immediate popular change.[45]

In the federal system, the nondelegation doctrine is, theoretically, supposed to police standardless congressional delegations to agencies. But the nondelegation doctrine has not been invoked by the Supreme Court to strike down legislation since the New Deal.[46] For example, in 1989 a unanimous

---

43. By "delegation," we are mainly thinking of delegation on the face of the statute, to the effect that the agency is affirmatively charged with developing regulations to fill out the framework as well as the details of statutory policy. This is the way delegation is usually used in the legal literature. We would also include statutes that charge an agency with implementing vague statutory mandates, even when there is no formal language delegating lawmaking tasks to the agency.

44. *See* Edward L. Rubin, *Law and Legislation in the Administrative State,* 89 COLUM. L. REV. 369, 372-85 (1989).

45. *See* THE FEDERALIST NO. 73, at 442-43 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (dual purpose of veto is to enable the President to "defend himself against the depredations" of Congress *and* to prevent "the passing of bad laws, through haste, inadvertence, or design").

46. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 473-76 (1988).

HeinOnline -- 80 Geo. L.J. 534 1991-1992

Supreme Court in *Mistretta v. United States*[47] held that Congress could delegate federal sentencing guidelines to a commission made up of seven presidential appointees (three of whom must be federal judges).[48] The Court applied the "intelligible principle" test but prefaced it with observations that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"[49] and that virtually any broad standard has been held to pass the "intelligible principle" test.[50] Justice Scalia's separate opinion, agreeing with the Court on this issue (and disagreeing on every other issue in the case), opined that the nondelegation doctrine is as unenforceable as it is important to the constitutional scheme.[51]

Notwithstanding *Mistretta* and other precedents, an enforceable nondelegation doctrine is not only consistent with but required by any serious effort to respect the original constitutional understanding about lawmaking in our polity. By requiring Congress-with-the-President to set statutory policy (x) on the face of the statute, the nondelegation doctrine curtails the freedom of agencies to move statutory policy, and hence might be a useful means for enforcing the original understanding of Article I, Section 7 in the modern administrative state. This is the first normative lesson of our game theoretic model: when it fails to make clear its policy choices in statutes delegating lawmaking to agencies, Congress has violated a most fundamental rule and policy in Article I of the Constitution. Unpoliced delegation of lawmaking authority to agencies represents a major amendment in the Constitution's procedures for lawmaking, and such an amendment has important consequences for the balance and allocation of national power. Because agencies are influenced or even controlled by the President,[52] the transfer of lawmaking authority from Congress-with-the-President (the Article I, Section 7 structure) to agencies significantly increases the importance of the President's preferences in the lawmaking process.

Consider the alignment of preferences in Case 1 (see Figure 1), in which

47. 488 U.S. 361 (1989).

48. *Id.* at 371-79.

49. *Id.* at 372.

50. *Id.* at 373.

51. *Id.* at 415-16 (Scalia, J., dissenting from the Court's opinion but joining the Court on this single issue).

52. Many agencies are within the executive branch (e.g., the Internal Revenue Service, the Immigration and Naturalization Service) and hence under the direct thumb of the President, who can fire top officials. Other agencies are "independent" of the executive branch (e.g., the Federal Trade Commission, the Federal Communication Commission); although their top officials cannot be fired at will by the President, they are appointed by the President for limited terms. And in the 1980s the Office of Management and Budget took on authority to oversee rulemaking by independent as well as executive branch agencies. *See* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

HeinOnline -- 80 Geo. L.J. 535 1991-1992

the Article I, Section 7 structure for lawmaking would yield a statutory policy falling somewhere between the preferred policies of the two legislative chambers ($H < x < S$). In the modern administrative state, Congress often will not pass a statute setting policy precisely at *x*, but will instead pass a statute delegating the policy-setting function to an agency (*A*), with the expectation that the agency will implement policy at *x*, or thereabouts. In that event, the agency can (perhaps over time) set policy virtually anywhere it wants, unless Congress would be stimulated to override the agency's choice by enacting new legislation. Thus, in Case 1 situations the agency with policy preferences near those of the President can propose any policy, x', at or to the right of the veto median of the more pro-President chamber, and Congress cannot successfully challenge this interpretation. Any attempt to do so would be vetoed and the veto could not be overridden because the pivotal voter for an override, *h*, likes the agency policy, $x = h$, more than any other policy choice. Thus, instead of *x*—the policy that would have been adopted under the Article I, Section 7 procedures—the administrative state produces x′. This is reflected in Figure 1A below:

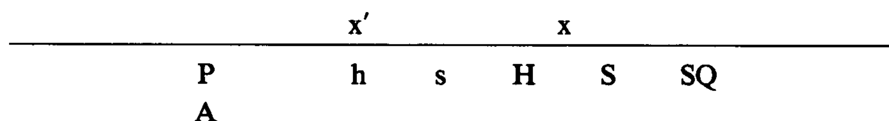

FIGURE 1A. Statutory policy shifts from H < x < S to x′ = h, if Congress delegates lawmaking authority to agency.

Obviously, this represents a substantial shift in policy toward the preferences of the President and away from those of most members of Congress.

A less dramatic story occurs in Case 3.[53] Again, because the starting point for the lawmaking game is the agency's and not Congress's decision, the agency can set statutory policy at the more favorable veto median ($x' = h$) rather than the point ($x = h(SQ)$) that would have prevailed under the original structure for lawmaking. While in Case 3 Congress's position as policymaker induced it to set *x* as far to the right of *h* as it could, Congress will not respond to the agency's moving policy further to the left, because any effort to overrule the agency's interpretation will be met by a presidential

53. Case 2, which did not yield a statute in the first place, does not concern the present analysis. But note that a Presidency with substantial lawmaking power, which might fuel further lawmaking ambitions, can be expected to assert lawmaking authority over areas where there has never been enough political consensus to pass a statute. For example, there will be situations where the President will try to assert his "inherent powers" to cover Case 2 situations. Or the President/agency may try to interpret the jurisdictional limits of related statutes broadly, in order to impose their interpretations into areas essentially covered by Case 2. This is what the President argued, and the Court accepted, in *Dames & Moore.*

HeinOnline -- 80 Geo. L.J. 536 1991-1992

veto that cannot be overridden in one of the chambers. Figure 3A diagrams this version of the game:

	x′	x			
P	h	h(SQ)	s	H	S
A					

FIGURE 3A. Statutory policy shifts from h < x = h(SQ), to x′ = h when Congress delegates lawmaking authority to agency.

The shift in statutory policy here is less dramatic than in Case 1, from $x = h(SQ)$ to $x' = h$, but it is still potentially significant. Indeed, the more Congress originally wanted to change the status quo in Case 3 situations (and therefore the greater the gulf between h and SQ), the bigger will be the movement from x to x'. These are the situations where Article I, Section 7 lawmaking would have reflected a particularly striking compromise of congressional preferences, and delegation of lawmaking authority to an agency makes the compromise more acute.

Thus far, our discussion has assumed that congressional and presidential preferences do not change over time. Of course, those preferences do change, and electoral politics has produced dramatic shifts in presidential preferences in particular.[54] Figure 3B maps the shift in statutory policy in Case 3 statutes when there is a dramatic left-to-right switch in presidential preferences (as there was in 1981):

		x′	x		x*			x*′	
P	SQ	h	h(SQ)	s	H	S	h*	s*	P*
A									A*

FIGURE 3B. Administrative policy moves from x′ = h to x*′ = s* when President shifts from P to P*.

54. *Vide* the dramatic shifts in 1953 from Truman to Eisenhower, in 1961 from Eisenhower to Kennedy, in 1969 from Johnson to Nixon, in 1977 from Ford to Carter, and in 1981 from Carter to Reagan. In contrast, congressional elections have yielded remarkably few abrupt policy shifts during this period. The only dramatic shifts occurred in 1959 (slender Democratic majorities in Congress to substantial Democratic majorities), and 1981 (Democratic Senate to Republican Senate, with working Republican majority in the House on some issues). Less dramatic shifts occurred in 1953 (slim Democratic majorities to slim Republican majorities in Congress), 1955 (switch back to Democratic Congress), and 1987 (Democrats regain control of Senate). Note here that this experience is contrary to the Framers' expectations, which were that the preferences of the popularly elected House of Representatives would fluctuate more dramatically than those of the indirectly elected Senate and President.

HeinOnline -- 80 Geo. L.J. 537 1991-1992

Consider Figures 3, 3A, and 3B as a sequential pattern. The Case 3 statute that should result from lawmaking by Congress-with-the-President (the Article I, Section 7, Clause 2 procedures) already strongly reflects the President's preferences (policy would be set at $x = h(SQ)$), but if an agency is given lawmaking authority, then policy is pushed more strongly toward the President's preferences ($x' = h$). After an election that shifts presidential preferences to P^* (such as the 1952, 1968, or 1980 elections), lawmaking that followed Article I, Section 7 procedures could amend the statute to shift policy to a position like x^*, between H and S, but lawmaking originally delegated to a presidentially controlled agency shifts policy much more dramatically to $x^{*\prime} = s^*$. This sequence suggests that agency lawmaking can sometimes result in drastic shifts in policy from one Presidency to the next (from x' to $x^{*\prime}$)—much more dramatic shifts than would be observed within the framework of the original understanding (from x to x^*).

In our model, the introduction of agencies as delegated lawmakers shifts policy deliberation in our bicameral presidential system away from the original constitutional understanding: not only is it often difficult for one or both chambers of Congress to enact statutes reflecting their preferences (Case 3) as the Framers originally intended, but even when statutes are enacted in situations where congressional preferences ought to be dominant (Case 1), Congress's tendency to delegate ultimate policymaking choices to agencies pushes policy in these situations toward presidential preferences as well (Figure 1A). And over time, the original agency policy choice, wherever situated, is vulnerable to abrupt change in response to shifting presidential preferences (Figure 3B).

Stated another way, the Framers' modest restraints on congressional power to enact statutes reflecting legislative preferences has in the modern state given way to a substantial transfer of legislative power from Congress to the President. Whatever the modern normative justifications for such a transfer of power, this phenomenon is a significant abandonment of fundamental choices made by the Framers regarding lawmaking, as expressed in Article I, Section 7. The failure of the modern Supreme Court to enforce the nondelegation doctrine has significant consequences for the allocation of national power between the branches.

Positive political theory suggests that Congress would try to find ways around the reallocation of lawmaking power outlined above, and Congress has in fact been responding to this phenomenon for the last fifty years. Indeed, once Congress became aware of the constitutional dilemma outlined above, Congress should have factored that problem into its overall willingness to pass statutes delegating lawmaking authority to agencies. For example, we should expect that Congress would not pass general delegation statutes in Case 1 situations unless it had some assurance that the implement-

HeinOnline -- 80 Geo. L.J. 538 1991-1992

ing agency would not immediately seek to move policy from the probable congressional preferences, x, to the veto median, x' (see Figure 1A).

Unfortunately (for Congress), many of the broad delegating statutes were enacted in periods when Congress was either not aware of this phenomenon or had policy preferences similar to those of the President (e.g., the New Deal and the Great Society). Because statutes have an indefinite life, a broad delegation in 1937 (when the preferences of Congress and the President were congruent on many issues) still had important consequences in 1987 (when the political preferences of Congress and the President were very different). Relatedly, Congress may underestimate the erosion of its power over time. Even if Congress and the agency in year one have an understanding about where policy will be set, that understanding does not necessarily bind the agency in year twenty-one (this is one lesson of *Chevron*). This phenomenon creates a long-term constitutional dilemma, in which Congress over time loses lawmaking authority to the President. How might Congress respond to the constitutional dilemma?

The traditional congressional response to the dilemma has been to try to prevent the agency's preferences from reflecting those of the President—in other words, to ensure that $P < A$. To the extent that Congress can pressure the agency to implement the statutory policy as originally agreed, it will do so. Congress is not without means to influence agency preferences. Congress can monitor agencies by oversight hearings, budgetary constraints, and informal contacts. Congress can also structure the agency to reduce the President's power to affect agency preferences; an agency located outside of the executive department (namely, an independent administrative agency) is headed by officials who cannot be easily removed by the President and who may be more responsive to congressional monitoring.[55]

These responses surely have an effect on agency preferences in many (and probably most) instances, but are not a panacea for the constitutional dilemma described here. To begin with, agencies located within the executive branch ought to be less susceptible to congressional monitoring because the President has direct control over the agency: the President can fire its leaders. Thus, when the President has a firm preference on the policy issue, that preference will often exercise a more powerful constraint on the agency than congressional monitoring. Moreover, the congressional monitoring is done not by Congress as a whole, but by its committees. Many committees are not representative of their chamber, and when committee preferences run in the same direction as presidential and agency preferences there will be less effective monitoring. Finally, it is not clear that even vigorous and effective con-

55. Also, the Senate can sometimes affect agency policy by its confirmation power. It can head off presidential nomination of "extreme" agency chiefs. The confirmation power is more useful for controlling independent agencies, whose heads cannot be fired by the President.

HeinOnline -- 80 Geo. L.J. 539 1991-1992

gressional monitoring can move agency preferences all the way to the statutory policy that would have been adopted pursuant to the Article I, Section 7 procedures. In other words, Congress can shift A to the right of P in most cases, but can it shift A all the way to the original statutory equilibrium ($H < A < S$, for Case 1 statutes)? This seems most unlikely, especially for agencies that are part of the executive department.

The problems with congressional monitoring, especially for executive agencies, suggest that a Congress concerned with the constitutional dilemma described in the previous Section would find other ways to correct for this pro-President bias in agency lawmaking. Again, this is what we find, historically. Congress has sought to offset agency bias in at least three other ways—the legislative veto of agency rulemaking, delegation of responsibilities to congressionally-dominated agents, and procedural checks on agency rulemaking, especially the availability of judicial review to correct pro-President agency interpretations. The remainder of this Part will explore the validity of constitutional restrictions the Supreme Court placed on these strategies in the 1980s. The analysis we have introduced in this article makes us more sympathetic to these mechanisms than the Supreme Court has been.

B. THE LEGISLATIVE VETO AS A RESPONSE TO THE CONSTITUTIONAL DILEMMA: *CHADHA*

A legislative veto is a provision that an agency rule or action can be voided by the action of Congress without presentment (two-house veto), or of one chamber of Congress (one-house veto), or of one committee of Congress (committee veto). By avoiding presentment, the legislative veto makes it easier for Congress, or a subgroup, to respond to agency interpretations which push statutory policy toward the President's preferences. In the 1930s, at precisely the time when the modern administrative state was aborning, Congress began to attach legislative vetoes to statutes delegating lawmaking functions to agencies. By 1982 there were hundreds of legislative vetoes in federal statutes,[56] and thousands more in state statutes.[57]

In 1983, the Supreme Court invalidated a one-house veto of an agency adjudication in *Chadha*,[58] and subsequent summary dispositions expanded the holding to two-house vetoes and vetoes of agency rulemaking.[59] As noted in the introduction to this article, *Chadha*'s reasoning rested upon the

56. *See* Joseph Cooper, *The Legislative Veto in the 1980s, in* CONGRESS RECONSIDERED, supra note 30, at 364, 367; *see also* Jacob K. Javits & Gary J. Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455-58, 496 (1977).

57. *See* L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 81-83 (1982).

58. 462 U.S. at 959.

59. *See, e.g.*, Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983) (summary invalidation of one-house veto of independent agency rulemaking); United States

HeinOnline -- 80 Geo. L.J. 540 1991-1992

original intent of the Framers.[60] But *Chadha*'s focus on the original constitutional understanding is unhelpful because it ignores the ways in which delegation of lawmaking power to agencies has already destroyed the original constitutional balance. To the extent that the Court is concerned with protecting—or restoring—some of the original balance of lawmaking influence suggested by Article I, Section 7, the two-house veto is constitutionally defensible, as is the one-house veto under certain assumptions.

In the short term, a legislative veto would have little consequence for the statutes described in Case 3 above, in which $SQ < h$. In these situations, the advent of agency rulemaking shifts statutory policy only slightly toward the President's preferences (from $h < x = h(SQ)$ to $x' = h$).[61] Because a veto of the agency's rule ($x' = h$) would leave Congress with a status quo that it likes even less than the agency's rule ($SQ < h$), Congress would not rationally exercise its veto authority. This scenario reflects a fundamental limitation of the legislative veto as a policy tool: unlike override legislation, which can not only negate the agency's rule but can implement the rule Congress wants, the legislative veto merely negates the agency's rule, leaving the status quo in its place.

The effect of the legislative veto is more readily apparent for statutes described in Case 1, namely, those statutes whose policy direction was supported by all the actors, with the President favoring a more radical change in the status quo than the Congress. Recall Figure 1A, which revealed a dramatic shift in statutory policy from delegation of lawmaking to agencies (from $H < x < S$ to $x' = h$). The introduction of a two-house legislative veto in these statutes would reverse this dramatic shift, though it is doubtful that it would restore policy to the original Article I, Section 7 balance ($H < x < S$). Figure 1B maps the new game introduced by a two-house veto:[62]

		x'	x''				x	
P	A	h	H(SQ)	s	H	S		SQ

FIGURE 1B. Statutory policy shifts from x' = h to x'' = H(SQ) when two-house veto is introduced.

Letting $H(SQ)$ stand for the point that the median member of the House—the chamber closer to the position of the President—regards as indifferent to

Senate v. FTC, 463 U.S. 1216 (1983) (summary invalidation of two-house veto of independent agency rulemaking).

60. 462 U.S. at 945-51.

61. *See supra* Figure 3A.

62. The effect of congressional monitoring of administrative agencies discussed in Part II.A is represented in this and subsequent figures as $P < A$.

SQ, we see that if the agency sets policy at $x'' < H(SQ)$, both chambers of Congress would veto the agency's decision and overturn it in favor of *SQ*. The agency can avoid a two-house veto by setting its rule at the point where the more pro-President chamber is indifferent as to that point and the status quo ($x'' = H(SQ)$).[63] For Case 1 statutes, the introduction of a two-house legislative veto shifts the outcome "weakly" in the direction of the equilibrium position suggested by Article I, Section 7.

The introduction of a one-house veto would yield a more pronounced shift toward the original legislative preferences for Case 1 statutes, in some cases yielding a policy not so distant from the Article I, Section 7 equilibrium position. Consider Figure 1C:

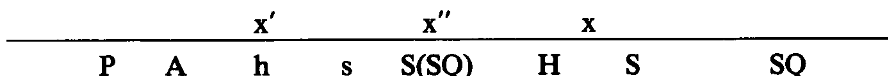

FIGURE 1C. Statutory policy shifts from x′ = h to x″ = S(SQ) when one-house veto is introduced.

Under a one-house veto, the agency would have to set statutory policy at or to the right of the points where both legislative chambers are indifferent between the agency's policy and the status quo ($x'' = S(SQ)$).

Finally, consider the effect of a legislative veto for a Case 1 statute in the longer term. Figure 1D maps the effect of a radical change in presidential preferences compared with a legislative veto for a Case 1 statute:

FIGURE 1D. Statutory policy shifts from x″ = S(SQ) to x* = SQ with legislative veto, when presidential preferences shift globally.

Whereas without a legislative veto, a shift in the President's position from P to P^* would shift policy from $x' = h$ to $x^* = s^*$, with a one-house legislative veto, the outcomes would shift only from $x'' = S(SQ)$ to $x^* = SQ$. Therefore, the change in policy following a large shift in presidential position is generally smaller under a one-house veto than without a veto. Similar reasoning would show that the two-house veto has intermediate effects.

To summarize our argument at this point: The rise of the administrative

63. Note that if *SQ* is sufficiently far to the right, *H(SQ)* will be to the left of *h*. In that event, the agency would set policy at $x'' = h$; it would not set policy to the left of the veto median, *h*, because Congress would then enact veto-proof corrective legislation. For a discussion of how and why this movement occurs, see *supra* Part I, Case 3.

HeinOnline -- 80 Geo. L.J. 542 1991-1992

state has substantially subverted the original constitutional understanding by vesting much lawmaking in agencies. Congressional monitoring of agencies (especially those located in the executive department) is not a completely effective remedy for this constitutional dilemma. The introduction of a two-house legislative veto has the effect of moving policy outcomes back toward those that would occur under the original understanding. These effects are most significant in Case 1 statutes, where the President and Congress both object to the status quo and favor reform in the same direction, but have different preferences about how much the status quo should be changed. The effects are less significant in Case 3 statutes, but often ameliorate the constitutional dilemma there as well. Moreover, the two-house veto's effects hold for both the short term (in which preferences remain the same) as well as the long term (in which the President's preferences change but Congress's remain stable). In all cases, the two-house veto works to offset the President's power to change statutory policy through his control of agencies (especially executive agencies), though it does not completely restore the original statutory compromise.

Under the perspective of the original constitutional understanding adopted in *Chadha,* there are also good arguments for one-house legislative vetoes, because such vetoes can move statutory policy back much closer to the original equilibrium, notwithstanding agency bias. On the other hand, our analysis suggests at least one argument against one-house legislative vetoes. If the preferences of one chamber of Congress change drastically over time, while those of the President and the other chamber remain stable, then the new "outlier" chamber may veto statutory policies that precisely envision the original policy choices, x. We do not consider this a likely scenario, in part because congressional preferences in the post-World War II era do change more slowly than those of the President, and they usually change in conjunction with a change in presidential preferences.[64] But this is a potential drawback to the one-house veto in particular.

In short, although *Chadha* itself was correctly decided, for the reasons set out in Justice Powell's opinion concurring in the judgment,[65] the opinion's reasoning misinterprets the original constitutional understanding, and summary decisions striking down legislative vetoes of agency rulemaking are incorrect, from the perspective of the original understanding.

64. The only time in the post-New Deal era that one chamber of Congress has shifted from one party to another, without a corresponding shift in the other chamber, was in 1980, when President Reagan's coattails pulled in a Republican Senate, with the House of Representatives remaining Democratic (though a little more conservative). The Senate shifted back to the Democrats in 1986.

65. 462 U.S. at 959-67 (Powell, J., concurring). Justice Powell would not have reached the question of the validity of legislative vetoes. Instead he reasoned that the one-house veto in this case was a judicial act beyond the scope of Congress's constitutionally prescribed authority.

HeinOnline -- 80 Geo. L.J. 543 1991-1992

C. CONGRESSIONALLY DOMINATED AGENTS AS A SOLUTION TO THE CONSTITUTIONAL DILEMMA: *BOWSHER* AND *METROPOLITAN WASHINGTON*

A second approach to the constitutional dilemma outlined above would be for Congress to delegate lawmaking power to agencies that the President does not dominate. This is probably one reason for the growth of "independent" agencies. Although independent agencies have been questioned as inconsistent with the Constitution's separation of powers in Articles I-III, they are positively useful in ameliorating the tension between Article I, Section 7 and the extensive delegation of lawmaking responsibilities by Congress, and hence are a constitutionally permissible response to the constitutional dilemma. Such agencies are most useful to Congress when they are not slanted toward the President. Unhappily, that is not necessarily the case. The President's power to appoint and (with statutory qualifications) remove agency commissioners gives the President substantial influence over many "independent" agencies.

Disappointed with the performance of independent agencies, Congress has sometimes delegated important lawmaking responsibilities to agencies that it, rather than the President, could control. This was an important issue in *Bowsher v. Synar,*[66] in which the Court invalidated the Gramm-Rudman Act's[67] plan for eliminating the federal budget deficit over time. Under the Act, the President's Office of Management and Budget and the Congressional Budget Office jointly determine how much the anticipated federal budget must be cut to meet the Act's targets. Then, the Act directs the Comptroller General to decide exactly where budget cuts should be made in order to meet the deficit reduction targets each year. The constitutional challenge grew out of Congress's potential control over the Comptroller General, who is appointed from a list supplied by Congress and can be removed "for cause" by Congress, and not by the President. The Court majority in *Bowsher* invalidated this plan on general separation of powers grounds, as a legislative usurpation of executive powers.[68] Concurring in the judgment, Justices Stevens and Marshall believed the plan violated Article I, Section 7 because it delegated important legislative powers to an agent of Congress.[69]

Justice Stevens recently wrote on this issue for a majority of the Court in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*[70] The case involved a statutory transfer of federal con-

66. 478 U.S. 714 (1986).
67. 2 U.S.C. §§ 901-909 (1988 & Supp. 1990).
68. 478 U.S. at 721-27.
69. *Id.* at 737-41 (Stevens, J., concurring in the judgment).
70. 111 S. Ct. 2298 (1991).

HeinOnline -- 80 Geo. L.J. 544 1991-1992

trol of Dulles and National Airports to a regional authority (the MWAA), conditioned upon its supervision by a board of review having veto power over its decisions and composed of nine members of Congress.[71] The Court held that this statutory scheme was invalid however the board of appeals is described.[72] If its duties were executive, the scheme would violate separation of powers as analyzed in *Bowsher*. If its duties were legislative, the scheme would violate Article I, Section 7 as analyzed in *Chadha*.

Our game theoretic model of the original understanding provides a basis for criticizing the Court's approach and result in *Bowsher* and in *Metropolitan Washington*. The analysis turns on what kind of statute is at stake. *Bowsher* involved a Case 1 statute, in which both Congress and the President very much wanted to change the status quo, but the President wanted a more dramatic change than Congress. The Gramm-Rudman Act reflected congressional preferences to cut the budget deficit (*SQ*), as well as Congress's desire to delegate authority to make specific cuts (because Congress wanted flexibility in the plan but did not want to revisit the issue itself every year). On the other hand, Congress did not want to delegate that authority to the President, because Congress feared that the President would use any budget-cutting authority to delete programs Congress wanted. This created a dilemma for Congress: How could it achieve its goal of reducing the deficit without ceding critical budget policy decisions to the President? Congress's solution was to delegate to the Comptroller General—not the President or an executive agency—the power to make the specific decisions. The President did not like this and objected to it, but he did not veto the law because he preferred the congressional solution to the status quo.

For Case 1 statutes like the Gramm-Rudman Act, Congress's delegation of lawmaking responsibilities to an agent it, rather than the President, controls is responsive to, rather than contrary to, the equilibrium required by Article I, Section 7. Recall Figure 1, which maps the equilibrium policy for Case 1 statutes at a compromise point between House and Senate preferences. Presidential preferences do not figure prominently because the President cannot credibly threaten to veto legislation which moves policy away from the status quo and toward presidential preferences (even if just a little bit). In enacting such a statute, Congress realizes that it cannot anticipate all the hard choices over the years and that it will have to delegate. But Congress in the 1980s was aware of Figure 1A: if it delegates decisionmaking power to the President or an executive agency, statutory policy will shift toward the veto median of the more pro-President chamber. To avoid that result and preserve the original equilibrium, the Gramm-Rudman Act dele-

71. *Id.* at 2301.
72. *Id.* at 2312.

gated to an agent more responsive to Congress, thereby preserving the equilibrium mapped in Figure 1 and suggested by Article I, Section 7. Hence, Justice Stevens was wrong to argue in *Bowsher* that the statute violated Article I, Section 7. Indeed, since the delegation was an effort by Congress to preserve the equilibrium mandated by Article I, Section 7, the *Bowsher* majority was wrong to conclude that the delegation represented a congressional "usurpation" of executive power.[73]

In the short term, for Case 1 statutes, the Court would be faithful to the original dynamics of lawmaking to permit Congress to exercise some control over the agency implementing policy. As with the one-house legislative veto, the main constitutional problem with such an arrangement is that congressional preferences will change over time, and the agent's implementation will change with it, as mapped in Figure 1E:

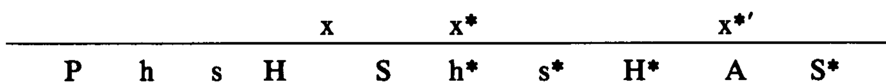

FIGURE 1E. Statutory policy shifts from $H < x < S$ to $H^* < x^{*\prime} < S^*$ when Congress controls agency and congressional preferences shift globally.

If there is a global shift in congressional preferences to the right, congressionally controlled implementation will shift statutory policy ($x^{*\prime}$) far away from the original policy (x), much further away than presidentially controlled implementation (x^*).

This scenario is the only legitimate risk that *Bowsher* prevents, but we doubt it is much of a risk. The reason is that when congressional preferences shift so markedly, the shift has usually been presidentially led—that is, the biggest shifts in congressional preferences have been in connection with landslide victories for similarly minded Presidents (1932, 1948, 1952, 1964, 1980). While off-year elections also yield shifts, usually against the President, they do not tend to be so global and important (1938, 1946, 1950, 1954, 1958, 1966, 1982, 1986). If the President shifts along with Congress, then Figure 1E would show a new Presidential position (P^*) also located along the righthand part of the spectrum. In that event, Congress could reach the new equilibrium point ($x^{*\prime}$) following normal Article I, Section 7 procedures.

Case 3 statutes present a much more favorable field for Justice Stevens's analysis in *Bowsher* and *Metropolitan Washington* because congressional control over the implementing agency would dramatically shift statutory policy from the Article I, Section 7 equilibrium point, as mapped in Figure 3C:

73. *See supra* text accompanying note 68.

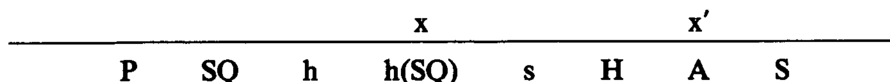

FIGURE 3C. Policy shifts from $x = h(SQ)$ to $H < x' < S$, if Congress delegates lawmaking authority to congressional agent.

This is obviously a dramatic shift in the equilibrium policy, from a point close to the veto median of the more pro-president chamber (*h(SQ)*) to a point reflecting a compromise between the two chambers but ignoring the President's preferences. For Case 3 statutes, the shift in statutory policy represented by delegation to a congressionally dominated agency is more dramatic than the shift represented by delegation to a presidentially dominated agency (compare Figure 3C to Figure 3A above). This is the sort of situation the Court should discourage, and Justice Stevens's analysis seems appropriate for Case 3 statutes.

Unhappily, this same analysis suggests that Case 3 statutes will rarely include a provision for congressionally dominated agencies. Because such a provision would negate the President's preferences in the statute's implementation, the President could successfully veto any bill creating such an agency, thereby forcing Congress to back down in order to obtain a statute. Partly for this reason, it appears that the statute in *Metropolitan Washington* was not a Case 3 statute; the President (having Air Force One and Andrews Air Force Base to land it) had no stake in the ultimate policy equilibrium and probably would have gone along with a wide range of congressional policy choices, including the review board provision. This makes the case look pretty much like *Bowsher;* therefore, Article I, Section 7 was not seriously implicated, contrary to the Court's opinion in *Metropolitan Washington.*

D. JUDICIAL REVIEW OF AGENCY ACTION AS A RESPONSE TO THE CONSTITUTIONAL DILEMMA: *CHEVRON*

In the 1930s, at the same time that legislative vetoes were being introduced into legislation, the legal and political community was also debating the scope of judicial review of agency rulemaking (a debate that long predated the 1930s). One consequence of this debate was the Administrative Procedure Act of 1946 (APA),[74] which assured that agency rulemaking would ordinarily be subject to judicial review. What was not thoroughly addressed by the APA was how scrutinizing courts should be of agency lawmaking, and Supreme Court practice and doctrine has run in many different directions. In 1984, however, the Court clarified its position on review of agency

74. 5 U.S.C. §§ 551-559, 701-706 (Supp. 1989-1990).

HeinOnline -- 80 Geo. L.J. 547 1991-1992

rulemaking[75] in *Chevron U.S.A. Inc. v. National Resources Defense Council.*[76]

In reasoning that the Court has broadly applied since 1984, *Chevron* held that constitutional separation of powers requires courts to defer to any reasonable agency interpretation of statutes it is charged with implementing,[77] and that such deference is not undermined by an agency's changing positions in response to presidential preferences.[78] *Chevron* has been subjected to keen criticism by at least some legal commentators,[79] and we join the critics of *Chevron*. From the perspective of the original constitutional design, aggressive judicial review of agency rulemaking ameliorates the constitutional dilemma, under which the modern administrative state has witnessed a shift of lawmaking power from Congress to the President.

If there is sufficient evidence in the statute or the legislative history for the original policy equilibrium in the statute, and if judges saw their role as enforcing such statutory guidance, then judicial review becomes a powerful mechanism for redressing at least some of the constitutional imbalance. Under these circumstances, the effect of judicial review is obviously beneficial, because courts then become mechanisms for moving usurpative agency-set policy (x') back to the original statutory policy (x) set by Congress-with-the-President. Under these circumstances, it is easy to say that *Chevron* is wrong, or at least should be narrowly read, from the perspective of the original understanding embodied in Article I, Section 7. *Chevron* suggests, however, that for many cases the statutory equilibrium will be unknowable to the Court, and under conditions of uncertainty the agency's preferences are more legitimate than the Court's preferences because the former is more electorally accountable.

But our game theoretic account of the original understanding embodied in Article I, Section 7 suggests that judicial review is valuable even when the statute or its legislative history provide little guidance and when the judge only seeks to read her own preferences into the statutory policy. To explain

75. We distinguish among judicial review of (1) the correctness of agency rulemaking and statutory interpretation, where the inquiry is whether the agency's interpretation of the statute is correct; (2) the correctness of agency adjudications, which focuses on whether a trial-like result is supported to the extent required by the appropriate evidentiary standard but may also evaluate the correctness of agency interpretations of statutes; and (3) agency adherence to proper procedures in either type of proceeding. Although some agencies do their lawmaking only through adjudication (e.g., the National Labor Relations Board), most do it through rulemaking, and we limit our analysis in this Section to rulemaking.

76. 467 U.S. 837 (1984).

77. *Id.* at 842-45.

78. *Id.* at 865-66.

79. *See, e.g.,* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 COLUM. L. REV. 452 (1989).

HeinOnline -- 80 Geo. L.J. 548 1991-1992

this argument, we now include the Court[80] (J) as a player in the Article I, Section 7 game. That is, judges have exogenous preferences about the statutory policy and try to impose them on the statute in place of the agency's preferences, but are willing to compromise their preferences to the extent necessary to prevent being overruled.

The Court's participation as a political player affects the game's equilibrium in different ways, depending upon the location of the Court's own preferences. We shall develop this point by reference to three possible positions for judicial preferences, mapped out for Case 1 statutes.[81]

Variation 1: $J > S$. Figure 4 maps the configuration of preferences where those of the Court, J, are to the right of the chamber median in both the House and Senate ($J > S > H$):

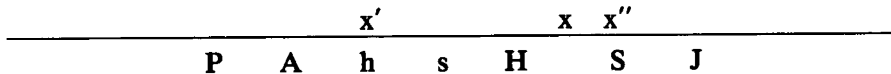

FIGURE 4. Statutory policy shifts from x' = h to x'' = S, with judicial review where J > S.

Judicial review introduces the Court as a decisionmaker that can create a new default position, much as the agency has done in our earlier examples. The agency thereby loses its policymaking advantage. If the agency sets statutory policy anywhere to the left of the Senate median, S, the Court will want to override the agency interpretation with its own preferred policy. Anticipating future moves of the other players, the Court will not set policy to the right of the chamber median, S, because in that event both the House and Senate would favor legislation set at or to the left of the Senate median, S, which the President would sign, because they all prefer S to J. As a result, the Court will override any agency policy set to the left of the Senate median, S. Knowing this could be the result of unconstrained judicial review, the agency will then set policy at the chamber median, S, to avoid a judicial overruling that would be accepted by Congress. The equilibrium result, $x'' = S$, is much closer to the original statutory policy, x, than was the result without judicial review, $x' = h$.

Variation 2: $h < J < S$. If the Court's policy preferences fall between the

80. We are using "Court" to mean any reviewing court, ultimately including the Supreme Court, whose preferences would often govern what we are calling "*J*".

81. We use Case 1 statutes since those statutes represent the most dramatic erosion of the original equilibrium in the modern administrative state. Most of the points made in this section for Case 1 statutes would apply also, but with lesser force, to Case 3 statutes. For a more technical version of this analysis that also considers the role of committees, see William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, J.L. ECON. & ORGANIZATION (forthcoming 1992) (special issue).

Senate median, *S*, and the House veto median, *h*, the introduction of judicial review ameliorates the constitutional dilemma, though not as much as in Variation 1. Consider Figure 4A:

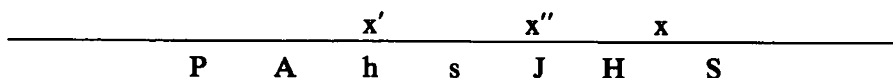

FIGURE 4A. Statutory policy shifts from x' = h to x'' = J, with judicial review where h < J < S.

Under this configuration of preferences, the Court has maximum freedom, for wherever it sets policy (such that $h < x'' < S$), its policy will be protected from override. If the Court's preferences are anywhere between those of the two chambers ($H < J < S$), one of the chambers will always object to any shift away from the new default position, *J*. Bicameralism protects the Court from override. If the Court's preferences are to the left of both chamber medians but not to the left of the veto median of the more pro-President chamber ($h < J < H$), both chambers of Congress might want to override the Court's decision, but the President would veto the override and one or both chambers would not be able to override the veto. Presentment then protects the Court's position from override.

Given these dynamics, and not wanting to be overridden itself, the agency will anticipate the Court's power and will set policy at $x'' = J$. Note here that the extent to which judicial review ameliorates the constitutional dilemma depends upon how close the Court's preferences are to those of the chamber medians.

Variation 3: $J < h$. The final variation locates the Court's preferences at or to the left of those of the veto median of the more pro-President chamber, as in Figure 4B:

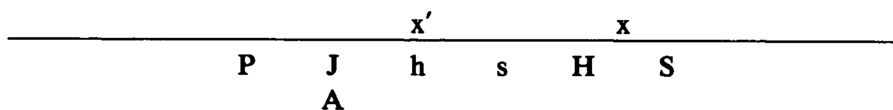

FIGURE 4B. Statutory policy remains at x' = h, with judicial review where J < h.

Under this configuration of preferences, the agency will set statutory policy at the House veto median, *h*, and the Court will affirm on judicial review, because both realize that any policy to the left of the veto median can be overridden by Congress, with veto-proof margins.

The introduction of aggressive judicial review of agency action does ame-

HeinOnline -- 80 Geo. L.J. 550 1991-1992

liorate the constitutional dilemma—sometimes substantially—under all variations, except when the Court's preferences are at or to the left of the veto median, and in that variation the introduction of judicial review has no effect on the dilemma (i.e., it does not aggravate it). Contrary to *Chevron,* aggressive judicial review of agency rulemaking is not countermajoritarian in the context of the Article I, Section 7 game. Instead. it is *Chevron* that may be countermajoritarian under the circumstances of the modern administrative state.

More importantly, this analysis suggests that aggressive judicial review is a better way for congressional preferences to reassert themselves, than is the legislative veto. To the extent that the Court sees itself as enforcing the original statutory "deal" (namely, the original equilibrium result of Article I, Section 7 game), judicial review offers the possibility of enforcing that deal precisely against efforts by agencies to shift statutory policy. Even if the Court sees its role as imposing its own preferences onto statutory policy, its role will tend to push policy back toward the original deal. The Court's independence from presidential as well as congressional pressure suggests a greater randomness of its preferences that will affect the pro-President agency bias, but without the potential pro-Congress bias of the one-house legislative veto (in particular).

E. THE DEBATE OVER THE COURT'S USE OF LEGISLATIVE HISTORY

As emphasized in the prior section, aggressive judicial review of agency decisions works best to restore the Article I, Section 7 equilibrium if the reviewing court has access to information permitting it to locate the original equilibrium point, x. We are here equating "information" with what is conventionally known as "legislative history." However, the Court's longstanding use of legislative history to interpret ambiguous statutes came under intense criticism in the 1980s from within the judiciary itself. The main critics have been Justice Scalia and Judge Easterbrook.[82] Their view is that the Court's traditional use of legislative history is in tension with Article I, Sec-

82. For Justice Scalia, see Antonin Scalia, Speech on Use of Legislative History (delivered between fall 1985 and spring 1986 at various law schools) (transcript on file with *The Georgetown Law Journal)* (role of court to interpret statutory language, not to reconstruct intentions of Congress), and the cases and materials collected in William N. Eskridge Jr., *The New Textualism,* 37 UCLA L. REV. 621, 650-56 (1990) (summary of Justice Scalia's criticisms of the use of legislative history and Justice Scalia's proposed alternative); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process,* 12 CARDOZO L. REV. 1597 (1991). For Judge Easterbrook, see *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) (legislative history "may not be used to show an 'intent' at variance with the meaning of the text."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction,* 11 HARV. J.L. & PUB. POL'Y 59, 62-66 (1988) (courts should "look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."). Their views are the basis for the extensive analysis in U.S. DEP'T OF JUSTICE OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A

HeinOnline -- 80 Geo. L.J. 551 1991-1992

tion 7. "Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President. It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions."[83] Justice Scalia has been particularly critical of the Court's reliance on committee reports as support for a particular statutory interpretation, and he strongly objects to their use to rebut the deference owed to agency rules under *Chevron*.[84] Justice Scalia's views may have had some influence on the Court, which in the last several years has been prone to ignore legislative history in applying *Chevron*'s deference to agency decisionmaking.[85]

Justice Scalia's formalist objection to legislative history in general and committee reports in particular is that the Court's reliance on such materials is tantamount to a *Chadha*-like delegation of lawmaking power to a congressional subgroup (i.e., committees) and therefore suffers from the same constitutional infirmity as the legislative veto. What is correct about Justice Scalia's point is that the Court should not give committee reports the same authority as the statute itself. What is questionable about his point is that he fails to make out a case for ignoring committee reports altogether, as the Court has recently noted in *Wisconsin Public Intervenor v. Mortier*.[86] Justice Scalia himself slavishly relies on dictionaries to interpret statutes, upon the view that the members of Congress and the President would take dictionary meanings as an "unexpressed assumption" of what the bill means.[87] But the participants in the lawmaking process treat committee reports that way, as an "unexpressed assumption" that participants rely on much more than they rely on dictionaries. For this and other reasons, Justice Scalia's attack has

---

RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989) (arguing for narrow role for legislative history).

83. Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring).

84. *See* Eskridge, *supra* note 82, at 650-52.

85. The leading case is K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988) (Kennedy, J.) (to determine consistency of Customs Service regulation with implementing statute, Court looks to particular statutory language at issue and design of statute as a whole). *See also* Sullivan v. Everhart, 494 U.S. 83, 89 (1990) (to determine consistency of Health and Human Services department regulations with implementing statute, look to particular statutory language and language and design of statute as a whole); Sullivan v. Zebley, 493 U.S. 521, 528-29 (1990) (to determine consistency of HHS decision with implementing statute look to statutory language and structure of statute); Mead Corp. v. Tilley, 490 U.S. 714, 723-24 (1989) (rejecting reliance on legislative history of ERISA in favor of plain meaning of statute).

86. "[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent." Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2485 n.4 (1991).

87. *See, e.g.*, Chisom v. Roemer, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting) (dictionary definition of "representative" used to interpret its meaning in Voting Rights Act).

HeinOnline -- 80 Geo. L.J. 552 1991-1992

drawn few allies.[88]

Positive political theory provides an interesting structural argument for Justice Scalia's position. Early positive political theory argued that congressional committees would tend to be populated with "outliers," that is, members of Congress whose preferences are very unrepresentative of those of Congress as a whole.[89] Members from farm districts would cluster around the Agriculture Committee, those with strong union constituencies around the Labor Committee, and so forth. Since most authoritative history is created by committees (through their hearings and reports, and floor statements by key members), this poses a danger that such history is systematically biased and not representative of congressional preferences generally. If important congressional committees are indeed populated by outliers, then Justice Scalia's criticism of committee reports has greater bite.

The Scalia critique can be expressed in the argot of our Article I, Section 7 game, simplified to focus on only one chamber in the context of a Case 1 statute. Consider Figure 5, which includes the relevant committee (C) as a new player in the Article I, Section 7 game.

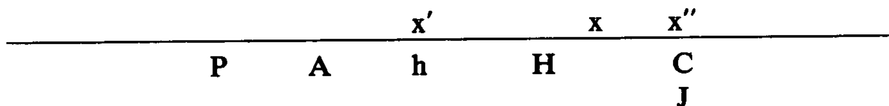

FIGURE 5. Statutory policy shifts to x" = C, where Court follows committee report to overturn agency interpretation of statute.

Justice Scalia's fear is that slavish adherence to committee reports and other legislative history generated by outlier committees will lead the reviewing Court to a position, x'', very far away from the agency interpretation, (x'), without being any closer to the original Article I, Section 7 equilibrium (x). This strikes us as a legitimate concern for any outlier situation, including those where the outlying committee is to the left of the chamber (and aligned with the agency).

Nevertheless, the doctrinal implications of this point are not as harsh as those suggested by Justice Scalia. To begin with, recent positive political theory scholarship suggests that the danger of outlier committees is not as great as once believed. That is, Congress has few incentives to defer decision-making responsibilities to subgroups that will systematically subvert overall congressional preferences. And Congress has not only incentives but effec-

88. Academics have been unimpressed with Justice Scalia's arguments. *E.g.*, Daniel A. Farber & Phillip P. Frickey, *Legislative Intent & Public Choice*, 74 VA. L. REV. 423 (1988); Stephen Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 420-33.

89. The leading work is KENNETH A. SHEPSLE, THE GIANT JIGSAW PUZZLE (1978).

HeinOnline -- 80 Geo. L.J. 553 1991-1992

tive means to monitor and discourage outlying committees. For these reasons, a recent empirical work reports that most House committees are not preference outliers.[90]

Even if congressional committees were preference outliers, it is not clear that legislative history is valueless. The import of Article I, Section 7 is that committee reports themselves are not "law" and are at best one type of evidence to figure out the original statutory policy. To the extent there is an outlier danger, the Court should be reluctant to follow a committee report over an equally clear statutory provision and should seek confirming or rebutting suggestions in the remainder of the legislative history before following the committee report.[91] In other words, the Court should use committee reports "critically," which has been the Court's practice in fact.[92] If the outlier phenomenon supports any theory of legislative history, it supports, not Justice Scalia's harsh exclusionary approach, but "imaginative reconstruction," in which the Court develops a history of the statute from all sorts of evidence and derives a probable answer from the reconstructed policy preferences suggested by the history.[93] The opinions of Justice Stevens are textbook examples of deft and judicious reconstruction of Article I, Section 7 policy equilibria.[94]

F. THE LEGISLATIVE ACQUIESCENCE DOCTRINE: *DAMES & MOORE*

Also controversial in the 1980s has been the Court's legislative acquiescence doctrine. Under this doctrine of statutory interpretation, the Court will often presume that Congress "acquiesces" in settled interpretations of the statute by the Supreme Court, lower court consensus, or administrative

---

90. KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 105-50 (1991) (most congressional committees are not preference outliers and are roughly "representative" of their chambers).

91. For example, the views of the President can be gleaned from the committee hearings, which almost always focus on the views of executive branch officials. Hearings also may reflect early deals that are struck. Floor colloquy represent an opportunity for members objecting to committee report language to set forth their views, and presidential signing statements have been used for this purpose as well.

92. *See* Eskridge, *supra* note 82, at 626-40 (describing the Court's traditional practice).

93. This theory is associated with Judge Learned Hand. *See, e.g.*, Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914), *cert. denied*, 235 U.S. 705 (1915) (statutes such as one so strictly defining the word employee as to work an injustice on an injured contractor, "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them"). It has been further popularized by Judge Richard Posner. *E.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-87 (1985) (in deciding application of statute to case, judge should "put himself in the shoes of the enacting legislators").

94. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511-24 (1989) (Stevens, J.) (interpretation of FED. R. EVID. 609 through thorough examination of history leading to rule's enactment); INS v. Cardoza-Fonseca, 480 U.S. 421, 432-43 (1987) (Stevens, J.) (interpretation of Immigration and Nationality Act through examination of legislative history).

HeinOnline -- 80 Geo. L.J. 554 1991-1992

agencies.[95] The Court invoked the acquiescence doctrine in several notable statutory interpretation cases during the 1980s,[96] and in at least one constitutional case.

In *Dames & Moore v. Regan*,[97] the Court relied on the acquiescence doctrine to hold that the President has authority to enter into executive agreements with foreign states that "suspend" U.S. lawsuits against those states in U.S. courts. Although the Court held that the International Emergency Economic Powers Act[98] does not authorize suspension of lawsuits,[99] the Court held that the Act "invited" presidential initiatives to settle claims and that the President was empowered to suspend lawsuits by "a history of congressional acquiescence in conduct of the sort engaged in by the President."[100] The Court's holding was an amalgam of constitutional and statutory interpretation: the "inviting" character of the statute, the President's prior settlement of foreign claims by shifting them to claims settlement tribunals together with Congress's acquiescence in the President's actions, and the President's own inherent authority to deal with foreign affairs emergencies, combined to persuade the Court that the President had authority to suspend claims without an explicit statutory grant of power.

First suggested by the dissenting and concurring opinions in the Steel Seizure Case,[101] the acquiescence rule as applied in *Dames & Moore* amounts to a constitutional doctrine of adverse possession, through which the President can expand upon his inherent powers by a longstanding practice in which Congress acquiesces. Relying on Article I, Section 7, in the pure statutory interpretation context, Justice Scalia has claimed that "vindication by congressional inaction is a canard."[102] The argument would be that only Congress acting through the Article I, Section 7 procedures[103] can alter ap-

---

95. For a doctrinal and critical account of the acquiescence rule, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71-78 (1988).

96. *E.g.*, Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 629 n.7 (1987) (congressional acquiescence to Title VII ruling); School Bd. v. Arline, 480 U.S. 273, 277-80 (1987) (congressional acquiescence to HHS regulations); Bob Jones Univ. v. United States, 461 U.S. 574, 599-602 (1983) (congressional acquiescence to IRS ruling); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982) (congressional acquiescence to construction of Title IX). *See generally* Eskridge, *supra* note 95, at 125-28 (app.1, collecting relevant cases).

97. 453 U.S. 654 (1981).

98. 50 U.S.C. §§ 1701-1706 (1988).

99. 453 U.S. at 675-76. The Court also held that the "Hostage Act," 22 U.S.C. § 1732 (1988), does not authorize suspension of lawsuits either. 453 U.S. at 676-77.

100. 453 U.S. at 678-79.

101. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 701-04 (1952) (Vinson, C.J., dissenting); *id.* at 593-614 (Frankfurter, J., concurring); *id.* at 634-55 (Jackson, J., concurring).

102. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

103. Or, as in *Dames & Moore*, through Article II, Section 2 procedures for making treaties (proposal from the President, ratification by the Senate).

parent statutory rights.

The Article I, Section 7 game developed here lends support to Justice Scalia's critique of the acquiescence doctrine generally—and in particular with regard to *Dames & Moore*. *Dames & Moore* is a classic Case 1 situation, where the President wants to change the status quo (a dispute with a foreign state) much further than Congress has signified. Based upon the President's prior practice in settling claims, the Court is willing to assume that Congress has "acquiesced" in the President's having that power. But the Article I, Section 7 game suggests that Congress's failure to object means virtually nothing. Recall the game mapped by Figure 1A: the President only has to satisfy the veto median of the more pro-President chamber in order to avoid a congressional reaction to policies set by the President. Thus, even though the President sets policy far away from that which would result from the Article I, Section 7 game envisioned by the Framers, Congress will not respond. This is obviously not legislative acquiescence; it is executive usurpation.

III. THE ARTICLE I, SECTION 7 GAME TODAY: ADAPTING THE FRAMERS' VALUES TO THE MODERN ADMINISTRATIVE STATE

The game played out in this Article seeks to understand the dynamics behind the bicameralism and presentment requirements of Article I, Section 7 as originally understood by the Framers. The main point of our analysis thus far has been to present an originalist theory of Article I, Section 7 that better accounts for the Framers' expectations in the modern administrative state (where there is unpoliced delegation to executive agencies) than the originalist theory adopted by the Court in *Chadha*. We have suggested that our originalist theory is superior to that of *Chadha* because it better accounts for the overall goals of the Constitution in general and of Article I, Section 7 in particular.[104] We have also suggested that the Court itself has not been able to apply *Chadha*'s originalist theory in a coherent way. Our Article I, Section 7 game offers an originalist theory that can be logically applied to various structural constitutional problems, though our game would reverse the approach taken by the Court in a number of important constitutional cases, from *Dames & Moore* to *Bowsher* to *Chadha* itself.

A central problem with our Article I, Section 7 game is that it, like *Chadha*, only seeks to enforce the Framers' original values and expectations. Many constitutional theorists reject originalist theories of constitutional ad-

---

104. And *Chadha* offers no countervailing advantages. The Court and some of its defenders believe that *Chadha* offers the advantage of being faithful to the "plain meaning" of Article I, but that is unsupportable: as Justice White argued in dissent, a legislative veto is part of legislation that is enacted by both chambers of Congress (bicameralism) and presented to the President (presentment), and so satisfies the plain meaning of Article I, Section 7.

HeinOnline -- 80 Geo. L.J. 556 1991-1992

judication, and the Justices themselves invoke such theories selectively. What relevance does the Article I, Section 7 game have for the modern regulatory state in light of current post-New Deal values? This is an important question, to which we now turn.

A. THE DIFFICULTIES OF PURE ORIGINALISM: FROM 1789 TO THE NEW DEAL TO THE ERA OF DIVIDED GOVERNMENT

What ultimately makes our dynamic theory of Article I, Section 7 superior to that in *Chadha* is that it provides a framework within which we can understand the effects of historical change upon the constitutional structure. The result and reasoning in *Chadha* make the most sense if our polity were exactly like the one in 1789 (represented in Figures 1-3): Congress-with-the-President enact statutes, which are applied to specific situations by the executive and judicial branches. In such a polity, the legislative veto would be unnecessary to any nonusurpative congressional policy.

The massive and often standardless delegation of lawmaking power to agencies (recall Figures 1A, 3A, and 3B) both gives rise to the legislative veto as a nonusurpative congressional response and destroys the analytical foundation of *Chadha*-like reasoning. That is, once "lawmaking" in the federal government becomes agency decisionmaking authorized by broad congressional authorization (*Chevron*), or even presidential decisionmaking authorized by congressional acquiescence (*Dames & Moore*), the Article I, Section 7 game changes. No longer is it the simple game assumed by the Framers (Figures 1-3), but it is a more complicated game in which the equilibrium policy adopted by Congress-with-the-President is immediately subject to significant shifts (Figures 1A, 3A, and 3B).

This was the point of Justice White's dissenting opinion in *Chadha*:[105] the New Deal changed Article I, Section 7 and generated the constitutional legitimacy of the legislative veto as a nonusurpative congressional response to the new imbalance created by the President's influence over post-enactment lawmaking. To deal with an enormous crisis, the New Deal Congress willingly delegated—gave away—enormous lawmaking power to agencies. The agency-generated policies generally mirrored those that would have been adopted by the normal Article I, Section 7 procedures because the preferences of the President (Franklin Roosevelt) and Congress (lopsided Democratic majorities, usually very supportive of Roosevelt) were similar on most issues. Since agencies were implementing Article I, Section 7 policy with greater speed and expertise than Congress itself could have done, progressive legal thought found the massive delegation unproblematic. The result was the almost immediate death of the nondelegation doctrine. Few mourned it,

105. 462 U.S. 919, 967-74 (1983) (White, J., dissenting).

HeinOnline -- 80 Geo. L.J. 557 1991-1992

but with its demise was a semipermanent transfer of power from Congress to agencies dominated or influenced by the President.

That transfer of power became more problematic during periods of conflict between the President and Congress, especially after 1968. Since then, our national government has (except for the Carter years) been divided between a Republican President and a Democratic Congress.[106] Not surprisingly, during this period, each institution has been more aggressive about self-consciously protecting its turf. Congress, in particular, found that much of its power had been given away by prior Congresses and sought to avoid or reverse that phenomenon through mechanisms such as the legislative veto, delegation to congressionally controlled agencies, and reliance on judicial review of agency action.

The implications of this historical analysis for *Chadha* are significant: the Court's invocation of a static model of Article I, Section 7 oversimplifies the constitutional problem. Once Article I, Section 7 procedures and policies have been sacrificed—and sacrificed with the Court's constant approval (most recently in *Mistretta*[107])—by the nonenforcement of the nondelegation doctrine, the Court cannot then pretend that the Article I, Section 7 of the Framers' time still exists today. Yet that is what the Court tried to do in *Chadha*.

But only "tried" to do. The Court's results and reasoning in other constitutional cases suggest that the Court itself has not internalized its *Chadha* understanding of Article I, Section 7, even at a formal level.[108] The most telling contrasts are *Alaska Airlines* and *Dames & Moore*. In the former case, the Court held that a *Chadha*-invalidated legislative veto of regulations governing the administration of a plan to aid airline employees dislocated by deregulation was severable from the underlying substantive statute, because Congress "would have enacted" the statute even without the legislative veto.[109] Our Article I, Section 7 game exposes the error in this reasoning. Once Congress becomes aware that the Article I, Section 7 game becomes a progressive diminution in congressional power whenever Congress delegates rulemaking to an agency it does not control (an awareness that is acute by the 1970s), Congress becomes unwilling to delegate unless it can have some assurance that agency policy will not wander away from the original equilibrium. The legislative veto was one such assurance—a clear quid pro quo for legislative delegation to an agency Congress wants to monitor. Without the veto, Congress would certainly want to enact a more specific statute, or no statute at all. On the one hand, therefore, *Alaska Airlines* is almost certainly

106. Or, between 1981 and 1987, a Republican President and Senate and a Democratic House.
107. 488 U.S. 361 (1988).
108. See our analysis in the Introduction to this article.
109. Alaska Airlines v. Brock, 480 U.S. 678, 691 (1987).

wrong in concluding that Congress would have enacted the same statutory delegation, even if there were no legislative veto. On the other hand, because of the obviousness of this flaw in its reasoning, *Alaska Airlines* is a clue as to what *Chadha* itself is all about: *Chadha* is no rigorous formalist effort to enforce Article I, Section 7 as written, for otherwise the Court would have invalidated entire statutes under its traditional severability test. Instead, *Chadha* is the Court's expression of concern that the legislative veto "goes too far" in protecting Congress's interests and creates a new imbalance favoring Congress's preferences.

This hypothesis is also supported by the Court's action in *Dames & Moore*. The President's unilateral suspension of federal lawsuits pursuant to an executive agreement is, if anything, a more significant breach of the formal structures of lawmaking in the Constitution than the legislative veto. The President's action added to presidential powers under IEEPA[110] and amended the FSIA,[111] all without going through the Article I, Section 7 procedures for lawmaking.[112] Yet the Court did not even pause to analyze Article I, Section 7. The reason for the Court's obliviousness is surely that the Court found the President's action justified by the needs of the modern administrative state. Indeed, the point of the Court's acquiescence discussion is that there is a tradition of presidential involvement in settling foreign claims, and that tradition is productive and workable. This suggests *either* that the Court is willing to sacrifice originalist values when they are unworkable in the modern administrative state *or* that the Court does not really believe in *Chadha*'s stringent articulation of those originalist values. We think that both propositions are true.

B. THE ARTICLE I, SECTION 7 GAME, UPDATED FOR THE MODERN ADMINISTRATIVE STATE

The game developed in this article is, we think, superior to the *Chadha* framework for analyzing Article I, Section 7 to effectuate the Framers' original values in the modern administrative state. But, for a nonoriginalist, that hardly makes our Article I, Section 7 game a viable one for the modern administrative state. One key difficulty is that our game adopts several assumptions made by the Framers that are not easily defensible today. Specifically, the Framers sought a balance between popular desires and policy stability across time. The modern regulatory state seeks a balance among at least three things: popular desires, stability, and accommodation of prior policy

110. 50 U.S.C. §§ 1701-1706 (1988).

111. 28 U.S.C. §§ 1601-1611 (1988).

112. The President's action, as enforced by the Court, can in the alternative be viewed as the creation of a "treaty" enforceable as the "law of the land" under the Supremacy Clause, U.S. CONST. art. VI, without obtaining Senate ratification, as explicitly required by Article II.

HeinOnline -- 80 Geo. L.J. 559 1991-1992

choices to changing circumstances and new problems. The modern regulatory state values stability less than the Framers did and introduces dynamic policy evolution as part of the balance.

Moreover, the Framers envisioned a very different Congress and Presidency than the institutions we now observe. For the Framers, the House of Representatives embodied popular desires but threatened stability with its mercurial sentiments. Bicameralism and presentment were mechanisms by which the often volatile House could be restrained by the indirectly elected and longer-termed (and therefore not so responsive to We the People) Senate and President. Today, all three institutions are essentially elected by We the People and might be said to reflect "popular" desires. Indeed, with its overwhelming reelection percentages election after election, the House is the least likely body to reflect popular preference changes, while the Presidency is more likely to reflect such changes.

We are sympathetic to arguments that these changes in twentieth-century America simply render Article I, Section 7 irrelevant to modern constitutional theory, much as the Contracts Clause has been.[113] But we think that our Article I, Section 7 game provides a heuristic method by which the original balance can be understood and updated in light of modern developments. The Framers' notion that lawmaking needs to balance popular desires with stability should be updated to reflect a third value, that of dynamic policy evolution. This third value is critical to the modern acceptance of massive and often standardless delegation of lawmaking responsibilities to administrative agencies, which we endorse. What we urge is that the modern version of the Article I, Section 7 game react to this delegation of lawmaking in such a way as to preserve a balance among the three popularly elected national institutions.

Thus, too, the Framers' specific ideas about Congress need to be reconsidered. For example, their notion that the House is the seat of popular desires needs to give way to the notion that the House, Senate, and President all reflect popular desires, but with different constituencies: the President is the main nationally elected official, Senators hail from the states, and House members are elected from small, internally more homogeneous districts. The different constituencies of the different officials justify the Article I, Section 7 game today: while in 1789 the Article I, Section 7 structure was mainly justified by the need for the more stable institutions (Senate and President) to rein in the House, today that structure is justified by the desirability that no one constituency dominate lawmaking.[114] James Madison's notion that

113. Or, indeed, as Article I, Section 7, Clause 1, the "Origination Clause," has been. Clause 1's requirement that all bills raising revenue originate in the House of Representatives is easily evaded and virtually never enforced.

114. This insight has been supported from various pluralist political perspectives, including pub-

HeinOnline -- 80 Geo. L.J. 560 1991-1992

"ambition must be made to counteract ambition"[115] is still a sound precept for republican governance.

Consider some tentative implications of this updated Article I, Section 7 balance for constitutional doctrine:

1. The Nondelegation Doctrine as a Principle of Statutory Interpretation

Experience suggests that the needs of the modern administrative state have overtaken the nondelegation doctrine. The key reason for extensive congressional delegation is that modern regulation requires both detailed and flexible rules that Congress cannot easily produce on a regular basis.[116] Agencies can do so, and Article I, Section 7 should accommodate agency lawmaking. Although contrary to the Framers' apparent understanding in 1789, we agree with *Mistretta*[117] that the nondelegation doctrine is essentially unenforceable as a constitutional doctrine. Its essential test, that the delegation be accompanied by an "intelligible principle" to which the agency must conform its implementation, is quite elastic and has been applied creatively.

While *Mistretta* correctly considers the nondelegation doctrine to be a largely toothless constitutional instrument, the opinion suggests that it may have some teeth as a precept of statutory interpretation.[118] We endorse and expand upon this suggestion as one way to maintain balanced lawmaking. Our proposed rule of statutory interpretation: when agency rules go beyond the clear commands of the statutory text, the agency has the burden of justifying its rule as one advancing the congressional intent or purpose.

This rule of responsible delegation is inconsistent with the Court's reasoning in *Chevron* and *Dames & Moore,* though not necessarily the Court's result in either case. We would reinterpret *Chevron,* not as a virtual carte blanche for agencies to make policy judgments when Congress has broadly delegated lawmaking to them, but as an invitation for agencies to justify policy initiatives based upon sensitivity to congressional signals and reasoned application of the statutory policies.[119] We would reinterpret *Dames &*

---

lic choice theory. *See* JAMES M. BUCHANAN & GORDAN TULLOCK, THE CALCULUS OF CONSENT: THE LOGICAL FOUNDATIONS OF DEMOCRACY (1962).

115. THE FEDERALIST NO. 51, *supra* note 28, at 322.

116. Congress's experience in producing detailed rules for environmental regulation has not been promising. *See, e.g.,* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL, DIRTY AIR (1981); William M. Eichbaum & Hope M. Babcock, *A Question of Delegation: The Surface Mining Control and Reclamation Act of 1977 and State-Federal Relations,* 86 DICK. L. REV. 615 (1982).

117. 488 U.S. 361, 371-80 (1988).

118. *Id.* at 371-80 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

119. This, by the way, is the way *Chevron*'s author, Justice Stevens, reads the decision. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 445-48 (1987) (Stevens, J.). *But see id.* at 454 (Scalia, J., concurring in judgment) (much stronger reading of *Chevron*).

HeinOnline -- 80 Geo. L.J. 561 1991-1992

Moore, not as a delegation to the President by reason of Congress' inaction and acquiescence, but as a decision that the President has at least some inherent powers to settle claims under Article II of the Constitution.[120]

2. Relevance of Legislative History for Statutory Interpretation

In addition to the rule of responsible delegation, we propose that judicial review of agency action be aggressive and not deferential, that review be particularly scrutinizing when the agency is departing from established prior rules, and that such judicial review consider legislative history as a basis for overturning the agency's policy balance. The first two suggestions are both contrary to the reasoning in *Chevron*, but are justified by the analysis in Part II.D above: according to our Article I, Section 7 game, aggressive judicial review of agency action is not countermajoritarian at all; by creating a new default position, judicial review makes it more likely that congressional preferences will be honored by the agency.

The third suggestion (legislative history) makes it more likely that the reviewing court will be enforcing the policy equilibrium reached in the Article I, Section 7 game, or some updated version of that equilibrium. This is consistent with *Chevron*, which examined the statute's legislative history and found it unilluminating, but inconsistent with subsequent applications of *Chevron* by the Court.

3. Congressional Influence over Agency Rulemaking

Congress already has some influence over agency rulemaking through informal channels such as appropriations pressure, hearings, and the like. This is useful, but we also endorse more formal congressional input into agency rulemaking. The legislative veto was a promising mechanism for such input. We agree with *Chadha* on its facts (no one-house vetoes of agency adjudications) but not in its implications (no legislative vetoes of any sort). Our updated Article I, Section 7 game would allow—indeed encourage—two-house vetoes of agency rulemaking, which would give Congress opportunities to negate agency rules, after deliberation by two different bodies. We consider the validity of one-house vetoes much less clear under modern assumptions, and do not necessarily oppose *Chadha*'s preclusion of them, because of the danger that an outlying chamber will unsettle the stability and continuity of agency policy.

---

120. *Dames & Moore* discusses briefly the President's inherent powers in this area. 453 U.S. 654, 677-78 (1981). Even under such a reinterpretation of the decision's reasoning, we think it is a questionable decision, for it flies in the teeth of two clear federal statutes, with no sufficient justification for the President's not seeking Senate ratification of his action as a treaty entitled to Article VI authority.

HeinOnline -- 80 Geo. L.J. 562 1991-1992

C. CONCLUSION: THE BAIT-AND-SWITCH GAME

Our vision of Article I, Section 7 is, we think, a realistic updating of the Framers' original lawmaking game to the modern regulatory state where most lawmaking is by agencies under legislative grants of authority. In this article we have demonstrated that the Court does not have a vision of Article I, Section 7, and that its main attempt to define a vision—*Chadha*—is an unsuccessful attempt at originalist analysis because it is historically incomplete, ignores the impact of the regulatory state upon the Framers' vision, and has not even been applied consistently by the Court itself.[121]

There is a final line of criticism of the Court's practice that is suggested by our analysis. By invalidating the legislative veto and weakening judicial review of agency interpretations, the Supreme Court in the 1980s was systematically reversing congressional expectations that were necessary parts of dozens and perhaps hundreds of statutory deals in the last several decades. In other words, the existence of legislative vetoes (in some statutes), the possibility of judicial review (in virtually all statutes), and the assumption that reviewing courts would consult legislative history were necessary conditions to Congress's willingness to enact a variety of regulatory statutes. Without those provisions protecting against the movement of statutory policy too much toward the President's preferences over time, Congress would not have been willing to pass those statutes. In this way, the Supreme Court's decisions in *Chadha, Alaska Airlines,* and *Chevron* can be viewed as constitutional "bait and switch." That is, Congress enacts legislation with certain controls on agency lawmaking that the Court has done nothing to discourage, and then later on the Court changes the rules so that the statutes are left in place but with fewer constraints for the implementing agencies.

While Congress is certainly not without means to respond to such a constitutional bait and switch, these decisions represent a perhaps unconscious preference on the part of the Supreme Court in the 1980s to shift lawmaking power from the Congress to the President. Our analysis suggests, normatively, that the Court's action was deeply inconsistent with the Constitution. Our analysis suggests, descriptively, that the Court was itself behaving like

---

121. Justice Scalia has outlined a theory of Article I, Section 7 that might avoid the last pitfall. Justice Scalia accepts the unenforceability of the nondelegation doctrine as a practical matter. "Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation." *Mistretta,* 488 U.S. at 416-17 (Scalia, J., dissenting). Thus, Justice Scalia would stringently enforce what he sees to be the "plain meaning" of Article I, Section 7: legislative vetoes, delegation to congressionally controlled agents, and efforts by members of Congress and committees to influence statutory interpretation through legislative history are all invalid and unconstitutional. Agencies must as a matter of constitutional doctrine be given full discretion to do what they want with statutory policy, so long as they do not violate the plain meaning of the statutory language adopted according to Article I, Section 7.

HeinOnline -- 80 Geo. L.J. 563 1991-1992

an agent of the President in the 1980s. After all, Republicans of varying degrees of conservatism have occupied the White House all but continuously since 1969, and all but one Justice on the current Court have been appointed by those Republican Presidents. Congress, in contrast, has been just as continuously dominated by liberal Democrats. In *Chadha* and *Chevron* the Court has implemented its preference for presidential rather than congressional policymaking.

This is quite rational for the Court to do. Recall Figure 4B, in which a Court with preferences close to those of the President would permit the agency to set policy at the veto median ($x' = h$), far away from the original statutory compromise ($H < x < S$). Figure 4B assumed that the Court was reviewing a single agency interpretation. Figure 4B also models the current Court, in which the ruling is no longer an isolated review of a single agency interpretation but is instead the systemic rules by which lower courts approach agency rulemaking. And x is no longer statutory policy, but constitutional policy, which the Supreme Court of the 1980s has shifted from the Framer's dynamics (x, with the center of lawmaking power in Congress), to the President's dynamics (x', with the center of lawmaking power with the President).

In short, the game played by the Court in the 1980s was in one respect a simple game: the President wins, at the expense of Congress. We believe that this very feature of the Court's game is its greatest weakness, for by contributing to the aggrandizement of presidential power the Court is contributing to unbalanced governance, which was the greatest value animating Article I, Section 7.

HeinOnline -- 80 Geo. L.J. 564 1991-1992