

# Separation of Powers, the Political Branches, and the Limits of Judicial Review\*

JONATHAN L. ENTIN\*\*

The term "separation of powers" appears nowhere in the Constitution. Nevertheless, the division of federal authority among three distinct but interdependent branches is one of the defining features of the American governmental system. Although designed to promote both liberty and efficiency, this structure affords ample opportunity for interbranch conflict. Perhaps because, as de Tocqueville presciently observed, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,"<sup>1</sup> the Supreme Court recently has addressed an unusually large number of disputes concerning the respective powers of Congress and the President.<sup>2</sup> This has occurred even though the New Deal apparently had transformed the seemingly arcane subject of separation of powers into a topic of primarily antiquarian interest.<sup>3</sup>

The renewed attention to the problem of government structure was largely stimulated by three cases that arose from the Watergate affair. The first, *United States v. Nixon*,<sup>4</sup> upheld the validity of the special prosecutor's subpoena to the President for tape recordings of White House conversations relating to

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\*\* Associate Professor of Law, Case Western Reserve University.

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1. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (P. Bradley ed. 1945).

2. The relationship between Congress and the President has not been the only aspect of government structure that has occupied the Court's attention during this period. Two other problems also have generated significant litigation. The first relates to the constitutionality of assigning the power to adjudicate legal claims to tribunals whose members lack the tenure and salary protections enjoyed by article III judges. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court, with three dissents and no majority opinion, invalidated a statutory provision conferring jurisdiction over all matters arising under the bankruptcy laws upon article I judges. In *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), the Court upheld the assignment of a limited class of disputes under the Federal Insecticide, Fungicide, and Rodenticide Act to mandatory arbitration, subject to judicial review only for "fraud, misrepresentation, or other misconduct," 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). The *Thomas* decision was unanimous, although the opinion of the Court attracted only a bare majority of the Justices. And in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), a seven-member majority subscribing to a single opinion upheld an administrative regulation permitting adjudication of state law counterclaims in agency reparation proceedings. See generally Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988); Saphire & Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U.L. REV. 85 (1988).

Another line of cases addresses the problem of federalism and the role of the states in our constitutional system. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court ruled that the tenth amendment prevented Congress from applying federal wage and hour regulations to public employees at the state and local level who were engaged in traditional government functions. After less than a decade during which the Court steadily narrowed the reach of this principle, the decision was overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). See generally Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 10-22 (1988); Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1712-33 (1985).

3. See Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437-52 (1987).

4. 418 U.S. 683 (1974).

the illegal entry into the headquarters of the Democratic National Committee in June 1972, a ruling that led ineluctably to Mr. Nixon's resignation from office two weeks later. The next case, *Buckley v. Valeo*,<sup>5</sup> held unconstitutional the process for selecting members of the Federal Election Commission, an agency created as part of the statutory reforms passed in the wake of perceived fund-raising abuses in President Nixon's 1972 reelection campaign. The third, *Nixon v. Administrator of General Services*,<sup>6</sup> rejected a facial challenge to the constitutionality of a statute depriving Mr. Nixon of control of his presidential papers.

Separation of powers disputes have continued to occupy a central place on the Court's docket during this decade. Among the more notable cases have been those invalidating the legislative veto<sup>7</sup> and the central feature of a highly publicized effort to reduce the federal deficit,<sup>8</sup> and another upholding the independent counsel provisions of the Ethics in Government Act.<sup>9</sup> Although these decisions have generated controversy, they have not provoked constitutional and political crises.<sup>10</sup>

Nevertheless, this line of cases has left us in an unsatisfactory position. The Court has failed to articulate a consistent methodology for analyzing separation of powers disputes involving the legislative and executive branches. Sometimes it follows a formal approach analogous to the "strict" in theory and fatal in fact" scrutiny in equal protection cases.<sup>11</sup> At other times it uses a more functional approach focusing upon checks and balances. During the 1980s, the selection of the analytical method has determined the outcome of every legislative-executive controversy. The inconsistencies in outcomes and methodology are hardly unique to separation of powers problems,<sup>12</sup> but they suggest the need for greater analytical clarity than the Court thus far has demonstrated.

At a more fundamental level, the quest for ultimate judicial resolution of constitutional turf battles between Congress and the President has undesirable consequences for the nation as a whole. Separation of powers disputes implicate fundamental questions respecting the role of government, questions that rarely receive detailed attention in Supreme Court opinions. Excessive reliance upon

5. 424 U.S. 1 (1976) (per curiam).

6. 433 U.S. 425 (1977).

7. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); see also *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam), *aff'd mem. sub nom. United States Senate v. FTC*, 463 U.S. 1216 (1983); *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983).

8. *Bowsher v. Synar*, 478 U.S. 714 (1986).

9. *Morrison v. Olson*, 108 S. Ct. 2597 (1988). The relevant portions of the Ethics in Government Act are codified at 28 U.S.C. §§ 591-599 (Supp. V 1987).

10. See Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

11. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

12. A notable illustration in a more contentious area involves the display of religious symbols on public property. Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (allowing crèche with secular decorations) with *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086 (1989) (disallowing unadorned crèche but permitting menorah). See generally Marshall, "We Know It When We See It"[:] *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

the Court deceives us into thinking that these disputes are purely constitutional in nature and that only the Justices can resolve them. Demanding judicial resolution improperly diminishes the role of the political branches in interpreting the Constitution, and emphasizing the constitutionality of a proposal diverts attention from its often dubious wisdom.

The limited utility of judicial review in legislative-executive conflicts has been demonstrated numerous times. For example, the courts played no role in the controversy over the Tenure of Office Act,<sup>13</sup> probably the most severe separation of powers problem in our history. Indeed, congressional concerns about the constitutionality of that statute contributed to the acquittal of Andrew Johnson in the only presidential impeachment trial ever conducted by the Senate.<sup>14</sup> The Act was amended in 1869 during the first weeks of the Grant administration and repealed, after perfunctory debate, in 1887 by a Congress which recognized the unfortunate experiment as the great national embarrassment that it was.<sup>15</sup>

Similarly, the judiciary has served as a bystander throughout the controversy over the War Powers Resolution.<sup>16</sup> That measure was passed in 1973 to prevent a repetition of what was widely regarded as the unilateral executive commitment of American military forces to the war in Southeast Asia.<sup>17</sup> No President has accepted its validity, although several have submitted reports to Congress in apparent compliance with its terms.<sup>18</sup> At the same time, the legislative branch has scrupulously avoided invocation of the Resolution in every situa-

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13. Ch. 154, 14 Stat. 430 (1867), amended by Act of Apr. 5, 1869, Ch. 10, 16 Stat. 6, repealed by Act of Mar. 3, 1887, Ch. 353, 24 Stat. 500. The Supreme Court retroactively condemned the Act as unconstitutional approximately 40 years after its repeal. *Myers v. United States*, 272 U.S. 52, 176 (1926).

14. The votes of seven Republican Senators, otherwise opponents of the President, were essential to Johnson's acquittal. These Senators voted to acquit at least in part out of concern that the Tenure of Office Act violated the Constitution. E. FONER, *RECONSTRUCTION* 336 (1988); H. TREFOUSSE, *ANDREW JOHNSON* 330-31 (1989).

15. See Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 Ky. L.J. 699, 722-23 (1987).

16. 50 U.S.C. §§ 1541-1548 (1982).

17. In fact, Congress approved presidential action in the region when it passed the Tonkin Gulf Resolution in August 1964. H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964), repealed by Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055. Thereafter the executive branch asserted that the Resolution served as the functional equivalent of a congressional declaration of war. See, e.g., Office of the Legal Adviser, Department of State, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1102-06 (1966).

18. See HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., *THE WAR POWERS RESOLUTION* 169-254 (Comm. Print 1982) [hereinafter HOUSE STUDY]; Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 104-07 (1984); Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1260 & nn.14-15 (1988); Comment, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U.L. REV. 141, 160-62 (1988).

tion in which it seemed to apply.<sup>19</sup> Court rulings have neither undermined this measure nor stimulated recent proposals to amend it.<sup>20</sup>

Finally, Watergate itself suggests the limits of judicial review in separation of powers disputes between the political branches. It is true that the Supreme Court decision in the Nixon tapes case led directly to President Nixon's resignation from office. That decision was not the only factor in that process, though. Simultaneously, the House Judiciary Committee was conducting an inquiry that culminated in the voting of three articles of impeachment against the President. While members of Congress might have preferred to await the Court's ruling, the impeachment process probably would have led to the same denouement even in the absence of the parallel judicial proceeding.<sup>21</sup>

The emphasis upon the limited utility of judicial resolution of separation of powers disputes between the political branches is addressed primarily to elected officials, lawyers, and citizens. It suggests that less reliance upon litigation could promote more intelligent public policymaking by creating incentives for reasonable accommodation of conflicting viewpoints. Following the course recommended in this Article would not be a panacea. This approach involves the creation of necessary, not sufficient, conditions for more effective governance and politics.

At the same time, the discussion has implications for courts called upon to resolve interbranch separation of powers disputes. Some commentators, most notably Dean Choper, have suggested that the judiciary refrain from deciding constitutional conflicts between Congress and the President.<sup>22</sup> This approach would require substantial revision of the political question doctrine<sup>23</sup> and would uphold interbranch accommodations that contravened express textual provisions of the Constitution. A less extreme analysis would defer to arrangements devised by Congress and the President provided that those arrangements were consistent with the constitutional text. The goal would be to discourage litigation by persuading the political branches that resort to the judicial process would rarely succeed. This in turn might create incentives for the legislature and the executive to assess the stakes of their disputes more realistically and to

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19. See HOUSE STUDY, *supra* note 18, at 224, 227, 234-36, 242-43, 252-53; Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1380-81 (1988). On occasion, the legislative and executive branches have negotiated a compromise to avoid invocation of the Resolution. For example, a 1983 joint resolution, rather than the procedures specified in the War Powers Resolution, authorized the deployment of U.S. Marines in Lebanon for up to 18 months. Multinational Force in Lebanon, Pub. L. No. 98-119, 97 Stat. 805 (1983) (codified at 50 U.S.C. § 1541 note (Supp. V 1987)). See also Sofaer, *The War Powers Resolution: Fifteen Years Later*, 62 TEMP. L. REV. 317, 326 (1989).

20. See Ely, *supra* note 19, at 1383-85; Comment, *supra* note 18, at 171-73.

21. See Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974).

22. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980); see *id.* at 260-379.

23. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 621 n.194 (1984). Such a development seems undesirable for the reason stated in the text. For a contrary view, see Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 162-75 (1988).

fashion workable solutions that would promote both free and responsible government.<sup>24</sup>

This Article proceeds as follows. Part I reviews the allocation of powers in the Constitution, surveying both the text and the historical reasons for that allocation. Part II examines the jurisprudence of separation of powers, with particular reference to the legislative-executive conflicts of the past fifteen years. This discussion focuses less upon finding the "correct" approach in such cases than upon the inherent difficulties with any unitary formula. Part III considers the consequences of the recent separation of powers debate and explores the limitations of judicial review in this field.

## I. THE ALLOCATION OF POWERS IN THE CONSTITUTION

The principle of separation of powers may be said to "define the very character of the American political system,"<sup>25</sup> but giving precise content to this principle has not proved easy. For Justice Brandeis, the concept afforded an essential safeguard against tyranny: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."<sup>26</sup> For Justice Jackson, it facilitated responsible governance: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."<sup>27</sup> Ironically, these judicial statements serve as premises for legal conclusions that might seem counterintuitive to the casual reader.<sup>28</sup> That fact should caution against reliance upon mechanistic formulas in this field.

24. The recommendation against reliance upon judicial resolution of separation of powers disputes between Congress and the President does not necessarily apply to other constitutional issues. The rationale for the recommendation in this context is that the legislative and executive branches generally have ample resources with which to protect themselves. That is not true, for example, in individual rights cases, in which the party asserting a constitutional violation frequently lacks meaningful access to the political process as a means of self-defense.

Similarly, this rationale may not apply in federalism disputes. To be sure, the Supreme Court has suggested that the structure of federal politics protects state interests and therefore obviates the need for judicial enforcement of the tenth amendment. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-55 (1985). Numerous critics have pointed out that this reasoning exaggerates the extent to which the states are protected against federal encroachment. *See, e.g., id.* at 564-67 (Powell, J., dissenting); *id.* at 587-88 (O'Connor, J., dissenting); Merritt, *supra* note 2, at 15-17. Even if these criticisms understate the protection that the states enjoy in national politics, *see* Hero, *The U.S. Congress and American Federalism: Are 'Subnational' Governments Protected?*, 42 W. POL. Q. 93, 103 (1989), it remains true that the states do not directly participate in the federal government. By contrast, Congress and the President are the principal actors in a broad array of federal activities.

25. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 151 (1969). Indeed, the principle of separation of powers was "the characteristic that distinguished our system from all others conceived up to the time of our Constitution." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 507 (1977) (Burger, C.J., dissenting).

26. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment).

28. The quotation from Justice Brandeis occurs in the final paragraph of a 55-page opinion rejecting a separation of powers argument. The quotation from Justice Jackson comes near the beginning of a 22-page opinion upholding a separation of powers challenge to a presidential emergency action taken during wartime. The two statements are less inconsistent than the text implies, however. Both suggest that the President lacks unfettered inherent authority in the performance of his duties.

Understanding the concept of separation of powers requires consideration both of the text of the Constitution and of its background. The next sections survey the circumstances that prompted dissatisfaction with the Articles of Confederation, examine the distribution of federal powers among the branches, and review the reasons that led the framers to that distribution.

#### A. *The Central Government Under Confederation*

The Constitutional Convention culminated years of dissatisfaction with government under the Articles of Confederation. From the time that the Articles were ratified in 1781, the national government lacked the power to deal with fiscal, diplomatic, and related challenges to its sovereignty. The absence of coercive authority contributed significantly to the demise of that regime. Indeed, unhappiness with the Articles existed almost from the beginning and proposals for reform were advanced within months of their adoption.<sup>29</sup>

The Confederation faced critical financial problems throughout its existence. Shortly after the ratification of the Articles, the Continental Congress passed an impost to raise enough money to pay its expenses. The Congress could not compel the states to accept this levy, and by the fall of 1782 several had rejected it.<sup>30</sup> With the Revolutionary War effectively over but peace negotiations languishing, the army went unpaid and became increasingly disaffected. Congress thereupon adopted another unsuccessful impost, although enough money came in to give the troops one month's pay in cash and three in certificates. That incomplete payment mollified the armed forces for the moment.<sup>31</sup>

The wolf remained close to the door, however. By 1786, the new nation faced bankruptcy. Three years after passage of the last impost, such leading states as New York were continuing to refuse to pay levies for purposes that they could not control.<sup>32</sup> Tax revenues barely sufficed to meet current expenses, and debt service payments exceeding a million dollars annually loomed on the horizon.<sup>33</sup>

The Confederation faced equally daunting challenges on the diplomatic and military fronts. Several states ignored their obligations under the Treaty of Paris to respect British claims against American debtors and property. Some, notably New York, also passed discriminatory laws against former Tories. Faced with the new nation's apparent inability to comply with the Treaty, England refused to surrender its military outposts in the Northwest Territory.<sup>34</sup> In addition, the British government continued to impose restrictions upon American navigation. The Continental Congress sought authority to respond to those restrictions but divisions among the states prevented an effective, timely, and

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29. A. McLAUGHLIN, *THE CONFEDERATION AND THE CONSTITUTION 1783-1789*, at 119, 121 (Collier Books ed. 1962).

30. A. COX, *THE COURT AND THE CONSTITUTION* 32-33 (1987); Elkins & McKittrick, *The Founding Fathers[;] Young Men of the Revolution*, 76 *POL. SCI. Q.* 181, 207 (1961).

31. A. McLAUGHLIN, *supra* note 29, at 50-58; Elkins & McKittrick, *supra* note 30, at 207.

32. A. McLAUGHLIN, *supra* note 29, at 63-64; Elkins & McKittrick, *supra* note 30, at 207.

33. F. McDONALD, *NOVUS ORDO SECLORUM* 94-95 (1985); A. McLAUGHLIN, *supra* note 29, at 64-66.

34. A. COX, *supra* note 30, at 33; Elkins & McKittrick, *supra* note 30, at 208-09.

unified response.<sup>35</sup> Simultaneously, the new nation faced potentially hostile claims from Spain in Florida and along the Mississippi River, as well as from Britain, which was still securely ensconced in Canada. Nevertheless, the states frequently refused to recognize or be bound by the efforts of Congress' designated representatives to protect American commerce through diplomatic channels.<sup>36</sup>

This lack of centralized authority crippled the national government under the Confederation and demoralized the Continental Congress. The absence of a quorum frequently prevented Congress from transacting business; when a quorum did exist the objections of a single state delegation often blocked significant changes.<sup>37</sup> By 1786, the new government found itself on the brink of collapse.<sup>38</sup>

These difficulties were not the only ones facing the Confederation.<sup>39</sup> Problems also proliferated at the state level. Commercial warfare had broken out among the states,<sup>40</sup> and class warfare seemed imminent to mercantile and propertied interests in some jurisdictions.<sup>41</sup> For many, the last straw was Shays's Rebellion, during which the Massachusetts authorities temporized and seemed barely capable of preserving order.<sup>42</sup> In short, within five years of Yorktown widespread sentiment supported reform of the Articles of Confederation to promote a more effective government.<sup>43</sup> The Constitutional Convention met against this background.

### B. *The New System of the Constitution*

While concern over governmental ineffectiveness and irresponsibility prompted much of the dissatisfaction with the Confederation, preventing tyr-

35. A. McLAUGHLIN, *supra* note 29, at 60-61, 66-68.

36. A. COX, *supra* note 30, at 33; A. McLAUGHLIN, *supra* note 29, at 70-81, 123.

37. A. McLAUGHLIN, *supra* note 29, at 68; Elkins & McKittrick, *supra* note 30, at 209.

38. F. McDONALD, *supra* note 33, at 177-78; G. WOOD, *supra* note 25, at 464; Elkins & McKittrick, *supra* note 30, at 208.

39. For much of this period, these problems of the central government seemed rather less important to those who viewed the former colonies as separate states than they did to those who viewed the states as parts of a new nation. State governments in the early 1780s appeared to be working tolerably well. A. COX, *supra* note 30, at 33; G. WOOD, *supra* note 25, at 464; Elkins & McKittrick, *supra* note 30, at 208. That perception changed later in the decade and helped to generate support for reform of the Articles of Confederation. *See infra* text accompanying notes 40-43.

That most Americans at this time viewed themselves as citizens of sovereign states rather than of a larger country should not be surprising. The decision of Robert E. Lee and many Southern-born army officers to fight for their states rather than for the Union during the Civil War disappointed but did not astonish federal officials. J. MCPHERSON, *BATTLE CRY OF FREEDOM* 280-81 (1988). The outcome of that war effected a fundamental transformation of public consciousness. From that time, Americans much more readily conceived of themselves as citizens of the nation than of sovereign states. *Id.* at 859.

40. Concern over interstate economic conflicts led to the abortive Annapolis Convention of 1786. A. COX, *supra* note 30, at 34; Elkins & McKittrick, *supra* note 30, at 209.

41. A. COX, *supra* note 30, at 33; G. WOOD, *supra* note 25, at 465-66; Elkins & McKittrick, *supra* note 30, at 208.

42. A. COX, *supra* note 30, at 33; A. McLAUGHLIN, *supra* note 29, at 116-17.

43. G. WOOD, *supra* note 25, at 360-63, 465-67; Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 513 (1925).

anny and protecting liberty remained preeminent values in the new nation.<sup>44</sup> As the 1780s wore on, Americans increasingly viewed the idea of separation of powers as "the most important attribute of the kinds of governments they had fought for."<sup>45</sup> Thus, the framers who met in Philadelphia during the summer of 1787 faced an apparent choice between efficiency and freedom as they struggled to give content to this idea.<sup>46</sup>

The Constitutional Convention evaded this dilemma, if one may so characterize the situation, by means of a novel attempt to accommodate both goals. The delegates rejected the "pure doctrine" of separation of powers, under which each branch is assigned a unique function and may not intrude upon the function of any other branch,<sup>47</sup> in favor of a more ambiguous system of checks and balances, under which each branch was given a limited control over the exercise of the functions of the other branches.<sup>48</sup>

The framers established a government of separated powers assigned respectively to legislative, executive, and judicial branches.<sup>49</sup> The legislature was divided into two chambers—a House of Representatives elected by the people and apportioned more or less according to population<sup>50</sup> and a Senate chosen indirectly under a formula guaranteeing each state equal representation.<sup>51</sup> The executive branch would have one person, the indirectly elected President, at the helm.<sup>52</sup> The judiciary would not be elected at all and would have tenure and salary guarantees to insulate it from most external pressure.<sup>53</sup>

44. Opponents of the Convention's handiwork "accepted the broad outlines of the picture painted by the friends of the Constitution." H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 26 (1981). They differed in the extent to which they viewed the problems under Confederation as stemming from the weakness of the central government and in their assessment of the desirability and likely success of the new charter. *Id.* at 28.

45. G. WOOD, *supra* note 25, at 453. See M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 153-54 (1967); G. WOOD, *supra* note 25, at 449-53. If the practices of early state governments can serve as a guide, Americans in the first years after 1776 had a rudimentary concept of separation of powers principles. These charters often were more concerned with avoiding repetition of the manipulation of the courts and legislatures by colonial governors than with providing for meaningful division of governmental authority. M. VILE, *supra*, at 153-57.

The divergence between theory and practice resulted more from the difficulties of governing under extraordinary conditions than from conscious repudiation of principle, however. *Id.* at 132-47. Even opponents of the Constitution accepted the basic premise of separation of powers; the Anti-Federalists generally did not defend the lack of "any differentiation of functions or internal checks" under the Confederation. H. STORING, *supra* note 44, at 55.

46. In fact, as many as five different theoretical justifications for the concept of separation of powers existed when the Constitutional Convention assembled. W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 127-28 (1965). In addition to the rationales of efficiency, see *id.* at 31-35; Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 718-22 (1984); and liberty, see W. GWYN, *supra*, at 18-23, 40-43; M. VILE, *supra* note 45, at 61-63; others included the rule of law, see W. GWYN, *supra*, at 52-58, 71-76, 104-13; official accountability, see *id.* at 60-64, 85-87; and balancing powers within the government, see *id.* at 55-56, 85-87.

47. M. VILE, *supra* note 45, at 13-18.

48. *Id.* at 18. For discussion of the English antecedents of balanced government, see *id.* at 53-75.

49. U.S. CONST. art. I, § 1 (legislative); art. II, § 1, cl. 1 (executive); art. III, § 1 (judicial).

50. *Id.* art. I, § 2, cl. 1, 3.

51. *Id.* § 3, cl. 1. As a practical matter, the states are guaranteed equal representation in the Senate in perpetuity because no state may have its delegation in that chamber reduced without its consent. *Id.* art. V.

52. *Id.* art. II, § 1, cl. 1-3.

53. *Id.* art. III, § 1. The Supreme Court was the only judicial institution created by the Constitution. Congress was given discretion to create inferior courts, discretion which it exercised in the Judiciary Act of 1789, ch.



This new scheme thus directly addressed two of the major problems of the Confederation. First, the Constitution gave the federal government explicit authority to tax<sup>54</sup> and to regulate interstate and foreign commerce.<sup>55</sup> Second, the new charter created a unitary executive.<sup>56</sup> These features suggest that considerations of efficiency played an important part in the drafting process. At the same time, the federal government was given only enumerated powers.<sup>57</sup> These restrictions upon central authority suggest an effort to reduce the prospect of tyranny. Thus, the Constitution created a structure that seemed to address both of the principal concerns arising from the experience under the Articles of Confederation.

Consistent with their rejection of the pure separation theory, the drafters of the new charter blended the responsibilities of the branches. Accordingly, the Constitution also provided for a complex set of checks and balances to structure interbranch relationships. A few familiar examples illustrate those interactions. Congress received the power to legislate, but the President was given a qualified veto over bills approved by both the House and the Senate, which could in turn override an executive disapproval by a supermajority vote in each chamber.<sup>58</sup> Similarly, the President was designated as Commander in Chief of the armed forces,<sup>59</sup> but only Congress could declare war.<sup>60</sup> The President gained the power to make treaties, but only with the advice and consent of a supermajority of the Senate.<sup>61</sup> The President also would appoint officers of the United States, including judges, but the Senate once again had to give its advice and consent.<sup>62</sup> In addition, Congress could limit the jurisdiction of the federal courts.<sup>63</sup>

Two features of the constitutional scheme are worthy of comment. First, the rejection of the pure separation theory allowed opponents of the new charter

20, §§ 2-4, 1 Stat. 73, 73-75. Members of both the Supreme Court and the lower courts were to enjoy identical tenure and salary protection. U.S. CONST. art. III, § 1.

54. U.S. CONST. art. I, § 8, cl. 1. This power was limited by the uniformity clause in the same provision that gave the federal government the authority to levy taxes. *See also id.* § 9, cl. 4 (restricting direct taxation).

55. *Id.* § 8, cl. 3.

56. *See* E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 3-30 (1957); Strauss, *supra* note 23, at 599-602.

57. This feature is most noticeable in the provisions dealing with the lawmaking function. Those provisions begin by stating that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I, § 1. Later, Congress is explicitly granted certain authority, *see id.* § 8, and forbidden to undertake other actions, *id.* § 9.

58. *Id.* § 7, cl. 2.

59. *Id.* art. II, § 2, cl. 1.

60. *Id.* art. I, § 8, cl. 11.

61. *Id.* art. II, § 2, cl. 2.

62. *Id.*

63. The precise contours of the congressional powers to establish exceptions to the jurisdiction of article III tribunals and to abolish the lower federal courts that have been created are matters of some scholarly controversy. *See, e.g.,* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). Resolution of these controversies is beyond the scope of this Article.

to argue that the excessive blending of the branches threatened liberty by granting inordinate power to the federal government.<sup>64</sup> More modern commentators who are less troubled about the activist state claim that the Constitution created less a system of "separated powers" than "a government of separated institutions sharing powers."<sup>65</sup>

This observation, whether made in the eighteenth century or the twentieth, mistakenly assumes that power is an undifferentiated concept that can be allocated more or less randomly to any governmental institution. A more accurate assessment of the constitutional allocation of powers recognizes that governments perform different functions and that those functions are appropriately performed by institutions having different characteristics. Each branch, under this view, has superior but not exclusive authority with regard to its functions.<sup>66</sup> For example, the making of policy that reflects popular will is most appropriately undertaken by the legislature, a comparatively large institution that represents a broad array of interests, holds public sessions, and follows procedures that foster deliberation. Yet because no legislator, however chosen, has a national constituency, the qualified presidential veto can block improper, unwise, or unduly parochial proposals.<sup>67</sup>

Second, the blending of powers in the Constitution greatly enhanced the possibilities of interbranch conflict, especially between Congress and the President. This feature was not accidental. The framers recognized and accepted human frailty, most notably in Madison's famous comment that "[i]f men were angels, no government would be necessary."<sup>68</sup> They therefore established a system designed to prevent overreaching by one branch at the expense of another

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64. See H. STORING, *supra* note 44, at 15-21, 28. Madison responded directly to this criticism by arguing that separation of powers, properly understood, "did not mean that these departments ought to have no *partial* agency in, or no *control* over the acts of each other." THE FEDERALIST No. 47, at 302 (J. Madison) (C. Rossiter ed. 1961). Rather, he contended, tyranny impended only "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department." *Id.* at 302-03.

A related objection to the Constitution focused upon the absence of a bill of rights. See THE AMERICAN CONSTITUTION: FOR AND AGAINST 17-18, 40-43 (J. Pole ed. 1987). Hamilton rebutted this criticism in three ways. He began by showing that the charter explicitly protected some individual rights. THE FEDERALIST No. 84, at 511 (A. Hamilton) (C. Rossiter ed. 1961); see *The Individual Liberties Within the Body of the Constitution: A Symposium*, 37 CASE W. RES. L. REV. 589-861 (1987). Next, he maintained that a bill of rights would be "unnecessary" and perhaps "dangerous" because it would serve as a pretext for the government to claim more powers than had been granted. THE FEDERALIST No. 84, *supra*, at 513. Finally, he contended that "the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights." *Id.* at 515 (emphasis omitted); see Rossum, *The Federalist's Understanding of the Constitution as a Bill of Rights*, in *SAVING THE REVOLUTION* 219, 221-28 (C. Kesler ed. 1987).

65. R. NEUSTADT, *PRESIDENTIAL POWER* 26 (rev. ed. 1980) (emphasis and footnote omitted). The first edition of this classic work in political science appeared in 1960, when the dominant approaches in that discipline discounted the significance of legal and constitutional factors in politics. Some scholars viewed these factors as irrelevant, while others rejected them as undesirable obstacles to effective national leadership. See generally Bessette & Tulis, *The Constitution, Politics, and the Presidency*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 3, 4-6 (J. Bessette & J. Tulis eds. 1981).

66. See H. STORING, *supra* note 44, at 60; J. TULIS, *THE RHETORICAL PRESIDENCY* 41 (1987).

67. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 947-48 (1983); R. SPITZER, *THE PRESIDENTIAL VETO* 16, 17 (1988); J. TULIS, *supra* note 66, at 42-43.

68. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961). One of Madison's coauthors added that government was instituted "[b]ecause the passions of men will not conform to the dictates of reason and justice without constraint." THE FEDERALIST No. 15, at 110 (A. Hamilton) (C. Rossiter ed. 1961).

and of liberty.<sup>69</sup> Instead of relying upon rigid functional boundaries,<sup>70</sup> the Constitution sought to provide officials of each branch with "the necessary constitutional means and personal motives to resist encroachments of the others."<sup>71</sup> To prevent overreaching, therefore, "[a]mbition must be made to counteract ambition."<sup>72</sup> These ground rules would structure interbranch conflict, and would do so in ways that increased the likelihood of beneficial outcomes.<sup>73</sup>

The President's qualified veto power, which already has been mentioned, illustrates this concept. Wary of pre-Revolution abuses of the royal prerogative by the British crown, Americans hesitated to allow the President any power to disapprove legislation.<sup>74</sup> Nevertheless, many supported some such right as a means of protecting the executive from legislative encroachment.<sup>75</sup> Because the President might refrain from exercising an absolute veto for fear of being labeled a despot,<sup>76</sup> the framers provided for a qualified presidential negative that would give Congress an opportunity to reconsider and give effect to a vetoed proposal if it attracted an unusually large measure of support. This seemingly less extreme authority, they reasoned, was simultaneously more likely to be used and less likely to offend, and therefore would serve as a potent weapon in the new government.<sup>77</sup>

Strikingly absent from these discussions of the benefits of interbranch political conflict as a mechanism for promoting effective, nontyrannical government is any mention of the judiciary as umpire of constitutional disputes between Congress and the President.<sup>78</sup> We shall consider whether this omission has significance in Part III. For now, suffice it to say that these matters have not been exceptions to de Tocqueville's observation quoted in the first paragraph of this

69. D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 137-38 (1984); M. WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 97-98 (1987).

70. The framers rejected the definitional approach because they viewed it as unworkable. As Madison explained:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

THE FEDERALIST No. 37, at 228 (J. Madison) (C. Rossiter ed. 1961). See also D. EPSTEIN, *supra* note 69, at 127; M. WHITE, *supra* note 69, at 103.

71. THE FEDERALIST No. 51, *supra* note 68, at 321-22.

72. *Id.* at 322. It bears emphasis that "ambition" in this context does not imply that officials necessarily act with corrupt purposes when they seek excessive powers. M. WHITE, *supra* note 69, at 98.

73. H. STORING, *supra* note 44, at 61; J. TULIS, *supra* note 66, at 43-45.

74. L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 141 (1985); R. SPITZER, *supra* note 67, at 8-12, 21-22.

75. Without some veto power, absolute or qualified, the President "might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands." THE FEDERALIST No. 73, at 442 (A. Hamilton) (C. Rossiter ed. 1961). Even some opponents of the Constitution accepted this reasoning. R. SPITZER, *supra* note 67, at 21; H. STORING, *supra* note 44, at 61.

76. It also was recognized that an absolute veto might be used too readily in extraordinary circumstances, thereby increasing the risk of executive aggrandizement or presidential tyranny. See THE FEDERALIST No. 51, *supra* note 68, at 323; R. SPITZER, *supra* note 67, at 12.

77. THE FEDERALIST No. 73, at 444-46 (A. Hamilton) (C. Rossiter ed. 1961); R. SPITZER, *supra* note 67, at 17-20.

78. D. EPSTEIN, *supra* note 69, at 140.

Article. The following discussion examines the recent work of the Supreme Court in this field.

## II. SEPARATION OF POWERS JURISPRUDENCE IN THE 1980s

The past decade has witnessed numerous constitutional challenges to institutions exercising federal authority. These challenges have afforded the Supreme Court the opportunity to clarify the appropriate division of functions among the branches. The results of this enterprise have produced some illumination and considerable confusion. Sometimes the Court has applied a formal approach emphasizing the separateness of the branches, while other times it has taken a more pragmatic perspective focusing upon their interdependence. Although the choice of methodology has determined the outcome of every case, the opinions consistently have failed to articulate how or why the Court has selected its analytical approach.

This Part focuses upon cases involving the respective powers of Congress and the President.<sup>79</sup> It begins with a brief look at three rulings spawned by aspects of the Nixon presidency that have come to be subsumed under the label of Watergate, then proceeds chronologically through the 1980s to consider the legislative veto, the Gramm-Rudman-Hollings Act, the Ethics in Government Act, and two cases from the 1988 Term presenting issues under the delegation doctrine. The discussion emphasizes both the contrasting analytical approaches used in these cases and the empirical and logical difficulties inherent in these approaches.

### A. *The Watergate-Related Cases*

The June 17, 1972, burglary of the Democratic National Committee's headquarters in the Watergate office complex set in motion a series of investigations of White House involvement in unlawful and unethical activities. Eventually a special prosecutor was appointed to direct the criminal investigation. The special prosecutor obtained a subpoena directing President Nixon to produce various tape recordings, papers, and other materials relating to a pending crimi-

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79. These decisions represent only the tip of the iceberg. Numerous lower court cases during this period also have challenged the constitutionality of federal activities. *E.g.*, *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681-82 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1172 (1989); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987); *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875, 881-87 (3d Cir.), *on reh'g*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988); *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 305-06 (D.C. Cir. 1982) (*per curiam*); *Friedlander v. United States Postal Serv.*, 658 F. Supp. 95, 99-102 (D.D.C. 1987). A rough statistical survey recently found a marked increase in the number of federal cases since 1960 in which the court discussed the concept of separation of powers, an increase that persisted even with modest controls for growth in the size and output of the judiciary. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 402-04 (1989). *See also supra* notes 2 & 24 (discussing recent Supreme Court rulings on other aspects of governmental structure).

nal trial.<sup>80</sup> A unanimous Court upheld the validity of the subpoena against a claim of executive privilege in *United States v. Nixon*.<sup>81</sup>

In reaching its conclusion, the Court rejected a rigid view of separation of powers. Without disputing the President's contention that the executive branch has exclusive authority over prosecution,<sup>82</sup> the opinion emphasized the need for effective governance.<sup>83</sup> Thus, there was no "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."<sup>84</sup> Rather, the constitutional inquiry should focus upon the extent to which enforcing the subpoena for specific presidential materials that were "demonstrably relevant" to a particular criminal trial<sup>85</sup> would interfere with the performance of essential executive functions such as protecting the national security. Because President Nixon had failed to show such interference in this case, his claim of privilege failed.<sup>86</sup>

Within two weeks, the White House released transcripts of some of the tape recordings sought by the special prosecutor. Those tapes confirmed that soon after the Watergate break-in, the President had had detailed discussions with his aides about concealing the administration's involvement. Three days later, Nixon resigned.<sup>87</sup> His departure set off a dispute over the ownership and control of his official papers, a dispute that returned to the Supreme Court three

80. Leon Jaworski, the special prosecutor who sought those materials, was in fact the second person to hold that position. The first, Archibald Cox, had been discharged and his office abolished several months earlier over his efforts to obtain nine specific recordings of presidential conversations. Attorney General Richardson resigned and Deputy Attorney General Ruckelshaus was fired after refusing orders to dismiss Cox. The intense public reaction to these events led to the reestablishment of the special prosecutor's office and the appointment of Jaworski. For a contemporaneous account of these events, see E. DREW, *WASHINGTON JOURNAL* 4-5, 17, 21, 46-67, 75, 76-77, 85, 91 (1975).

81. 418 U.S. 683 (1974) [hereinafter *Nixon I*]. The case arose from the President's unsuccessful motion to have the district court quash the subpoena. The Supreme Court heard the case under a rare procedure that bypassed proceedings in the court of appeals. *Id.* at 689-90. See generally Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 SUP. CT. REV. 259.

82. *Nixon I*, 418 U.S. at 693. This would be the central issue in the litigation over the independent counsel provisions of the Ethics in Government Act. See *infra* Part II.D.

83. The opinion observed that

the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" . . . .

*Nixon I*, 418 U.S. at 707.

84. *Id.* at 706.

85. *Id.* at 712.

86. *Id.* at 707-13.

Before addressing the merits, the Court rejected the argument that the controversy was a nonjusticiable intrabranch dispute. The regulations establishing the special prosecutor's office assured the special prosecutor of substantial independence in the performance of his duties. Because they also had the force of law so long as they remained in force, the case did not present a simple squabble between superior and subordinate. *Id.* at 694-97. The Court did not allude to any constitutional infirmity in the provision that the special prosecutor could be removed only for "extraordinary improprieties" and then only with the consensus approval of the party leaders and top-ranking members of the relevant committees in both houses of Congress. See *id.* at 694-95 n.8. But cf. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that Congress may not participate in the removal of officials exercising executive power, except if the removal occurs through the process of impeachment expressly provided in the Constitution); see *infra* Part II.C.

87. See E. DREW, *supra* note 80, at 389-416.

years afterward in *Nixon v. Administrator of General Services*.<sup>88</sup> This decision upheld the constitutionality of the provisions of the Presidential Recordings and Materials Preservation Act<sup>89</sup> directing the head of the General Services Administration to take control of Mr. Nixon's official papers and records and to preserve them from destruction.<sup>90</sup>

In rejecting Mr. Nixon's claim that the Act was facially invalid because it impermissibly encroached upon the chief executive's authority, the Court again abjured a rigid view of separation of powers in favor of a perspective emphasizing checks and balances. Relying upon the ruling in the Watergate tapes case, the majority reasoned that "the proper inquiry focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions."<sup>91</sup> In the event that a statute did interfere with the performance of executive functions, the measure still might pass muster if "that impact [were] justified by an overriding need to promote objectives within the constitutional authority of Congress."<sup>92</sup> Finding no undue disruption of the executive (based in part upon the assignment of control over the presidential materials to an executive branch agency), the Court held the Act constitutional on its face.<sup>93</sup>

The Court's adoption of a "pragmatic, flexible approach"<sup>94</sup> in these cases left undefined the precise nature of the unjustified disruption of executive functions that would violate the Constitution.<sup>95</sup> Perhaps the unique historical circumstances of the demise of the Nixon presidency made this problem less urgent at the time.<sup>96</sup> As we shall see, however, the 1980s demonstrated the difficulty of giving content—in particular, judicially manageable content—to the checks-and-balances perspective.

Meanwhile, the Court was addressing the principal statutory reform that came out of the problems uncovered by the various Watergate investigations. Among other changes, the Federal Election Campaign Act Amendments of 1974<sup>97</sup> created a six-member Federal Election Commission to administer and

88. 433 U.S. 425 (1977) [hereinafter *Nixon II*].

89. Pub. L. No. 93-526, 88 Stat. 1695 (codified at 44 U.S.C. § 2107 note (1982)).

90. The Act also directed the Administrator to promulgate appropriate regulations for public access to these materials, a task that had not been completed when the litigation took place. *Nixon II*, 433 U.S. at 430. This statute was passed to supersede an agreement with the Administrator that recognized the former President's sole ownership of these materials, gave him effective control over access to them, required the destruction of tape recordings of White House conversations within ten years, and allowed him to remove "any or all" of the other materials three years after the agreement was made. *Id.* at 431-32.

91. *Id.* at 443.

92. *Id.*

93. *Id.* at 443-45. Two Justices, in separate opinions, also placed some weight upon President Ford's having signed the Act into law and President Carter's submission through the Solicitor General that the Act benefited rather than harmed the executive branch in the performance of its duties. *Id.* at 491 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 498, 501-02 (Powell, J., concurring in part and concurring in the judgment).

94. *Nixon II*, 433 U.S. at 442.

95. See *id.* at 511-12 (Burger, C.J., dissenting); *id.* at 548 (Rehnquist, J., dissenting).

96. See *Nixon II*, 433 U.S. at 472 (upholding legislation specifically addressing Mr. Nixon's official records because he constituted "a legitimate class of one"); *id.* at 486 (Stevens, J., concurring) (observing that Mr. Nixon "resigned his office under unique circumstances"); *id.* at 493-94 (Powell, J., concurring in part and concurring in the judgment) (emphasizing the "extraordinary events that led to [Mr. Nixon's] resignation and pardon").

97. Pub. L. No. 93-443, 88 Stat. 1263 (codified as further amended in scattered sections of 2, 5, 18, 26 & 47 U.S.C. (1982)).

enforce the new political ground rules. Two commissioners were to be appointed by the President and two each by the President pro tempore of the Senate and the Speaker of the House; all six were to be confirmed by majority vote of both congressional chambers.<sup>98</sup>

The Court in *Buckley v. Valeo*<sup>99</sup> held that the procedure for selecting members of the FEC violated the appointments clause, which requires that "officers of the United States" be nominated by the President and confirmed by the Senate but also permits "inferior officers" to be chosen unilaterally by the President, the courts, or the heads of governmental departments.<sup>100</sup> The Court reasoned that the powers of the Commission involved its members in "exercising significant authority pursuant to the laws of the United States."<sup>101</sup> This in turn made the commissioners "officers of the United States" who must be chosen in conformity with the appointments clause.<sup>102</sup> Further, the omission of Congress from the list of those allowed to appoint inferior officers disqualified the leadership of the legislative branch from selecting members of the Commission.<sup>103</sup>

Of particular importance, the Court explicitly rejected a rigid demarcation of the three branches. Its substantive discussion not only emphasized that "the Constitution by no means contemplates total separation of each of [the] three essential branches of Government,"<sup>104</sup> but also recognized both the value of dispersing power to safeguard liberty and the need for sufficient interaction of the branches to promote effective government.<sup>105</sup> Finally, although the opinion em-

98. The Secretary of the Senate and the Clerk of the House also served as nonvoting members of the Commission. *Id.* § 310(a)(1).

99. 424 U.S. 1 (1976) (per curiam).

100. U.S. CONST. art. II, § 2, cl. 2:

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

101. *Buckley*, 424 U.S. at 126.

102. *Id.* at 138-41.

103. *Id.* at 126-27. A more parsimonious basis for this result would have emphasized that nothing in the appointments clause authorizes the House to vote to approve the selection of either officers of the United States or inferior officers. Because all parties agreed that members of the FEC fell into one or the other of these categories, *see id.* at 126 & n.162, the Court technically did not have to determine whether the Commissioners were "officers" or "inferior officers."

The opinion also failed adequately to address the claim that the disputed role of Congress in selecting members of the Commission was justified by concerns that a body appointed solely by the President might be subject to White House manipulation during the chief executive's reelection campaign. The Court recognized the legitimacy of those fears but dismissed them as "not by themselves warrant[ing] a distortion of the Framers' work." *Id.* at 134. This response was incomplete at best. A fuller answer would have emphasized the purposes underlying "the Framers' work." The appointments clause itself addressed the point at issue by giving the Senate the power, indeed the duty, to scrutinize nominees proffered by the President and to refuse to confirm any who lack the character to resist manipulation of their agency. This senatorial prerogative represents one of those necessary constitutional means and personal motives by which the framers expected ambition to counteract ambition. *See supra* text accompanying notes 71-72.

104. *Buckley*, 424 U.S. at 121.

105. The Court explained:

The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

phasized that Congress (and, by necessary implication, congressional appointees) may not control the enforcement of the law, it did not assert that this was a purely executive function over which the President must have unfettered control.<sup>106</sup>

In short, these cases reflected a largely pragmatic approach to conflicts between Congress and the President over the allocation of governmental powers. When it found specific constitutional text bearing upon the matter, the Court attempted to give effect to that language. When it did not, the Court sought to strike a reasonable balance of competing interests. In none of these cases did the Court seek permanently to resolve all aspects of the interbranch conflict before it. At times during the 1980s, the Justices have been more ambitious. The next sections consider these more recent cases.

## B. *The Legislative Veto*

Beginning with the Reorganization Act of 1932,<sup>107</sup> Congress included provisions in numerous statutes allowing either or both houses, or in some instances a committee, to disapprove executive or administrative actions.<sup>108</sup> Although the so-called legislative veto originated as a political accommodation to facilitate structural reform in the executive branch, the device eventually spread into numerous substantive areas of both domestic and foreign policy.<sup>109</sup> Presidents consistently opposed these provisions as intrusions upon executive power but often accepted them as the price for obtaining broad delegations to undertake initiatives for which legal authority was otherwise lacking.<sup>110</sup>

*Id.*

106. For example, at the outset of its substantive discussion, the Court emphasized the "three essential branches of Government." *Id.* Later, however, it characterized the departments whose heads may be granted the power to appoint inferior officers as "[being] in the Executive Branch or at least hav[ing] some connection with that branch." *Id.* at 127 (emphasis added). The italicized phrase implicitly recognized the existence of so-called independent agencies which are not "in" any of the three branches.

In addition, the opinion suggested that the Commission's rulemaking functions cannot be exercised by a congressionally controlled agency. *Id.* at 140. This is curious because rulemaking traditionally has been viewed as "the result of a delegation of legislative power." Strauss, *supra* note 23, at 618. For present purposes, this point simply underscores the *Buckley* Court's unwillingness to follow a rigid approach to separation of powers questions. The implied hostility to congressional control over administrative rulemaking ultimately was manifested in decisions invalidating the legislative veto. See *infra* Part II.B. In this case, however, the Court avoided resolution of the constitutionality of a one-house veto of FEC regulations. See *Buckley*, 424 U.S. at 140 n.176.

107. Ch. 314, § 407, 47 Stat. 382, 414-15.

108. Scholars differ on the precise number of these provisions, although the figure is substantial. One writer reports that 318 legislative veto provisions were included in 210 statutes between 1932 and 1982. G. BRYNER, *BUREAUCRATIC DISCRETION* 76 (1987). Two others cite studies showing that 295 such provisions appeared in 196 statutes between 1932 and 1975 and that 78 more were adopted between 1979 and 1982. W. ESKRIDGE, JR. & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 496 (1988) (citing C. NORTON, *CONGRESSIONAL REVIEW, DEFERRAL AND DISRUPTION OF EXECUTIVE ACTIONS: A SUMMARY AND INVENTORY OF STATUTORY AUTHORITY* 8-12 (1976), and Cooper, *The Legislative Veto in the 1980s*, in *CONGRESS RECONSIDERED* 364, 367 (L. Dodd & B. Oppenheimer 3d ed. 1985)). Resolving the statistical discrepancy would not affect the analysis of this Article.

109. See generally CONGRESSIONAL RES. SERV. FOR THE SUBCOMM. ON RULES OF THE HOUSE OF THE HOUSE COMM. ON RULES, 96TH CONG., 2D SESS., *STUDIES ON THE LEGISLATIVE VETO* (Comm. Print 1980).

110. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 968-74 (1983) (White, J., dissenting); L. FISHER, *supra* note 74, at 164-70; Fisher, *Congress and the President in the Administrative Process: The Uneasy Alliance*, in *THE ILLUSION OF PRESIDENTIAL GOVERNMENT* 21, 26-28 (H. Hecla & L. Salamon eds. 1981); Karl, *Executive Reorganization and Presidential Power*, 1977 SUP. CT. REV. 1, 3-7; Nathanson, *Separation of*



The constitutional controversy came to a head in the somewhat anomalous setting of *Immigration and Naturalization Service v. Chadha*.<sup>111</sup> The setting was anomalous because that case did not involve the rulemaking or reorganization powers over which the primary debates on the legislative veto had raged. Instead, it concerned the deportation of Jagdish Chadha, an East Asian born in Kenya who had overstayed his student visa.<sup>112</sup> The Immigration and Naturalization Service determined that Chadha qualified for suspension of deportation because he would suffer "extreme hardship" if he were required to leave this country.<sup>113</sup> Pursuant to the one-house veto provision of the Immigration and Nationality Act,<sup>114</sup> the House of Representatives passed a resolution disapproving the suspension of Chadha's deportation. The resolution was neither printed nor available to Representatives; it passed by voice vote without debate at virtually the last possible moment.<sup>115</sup>

The Supreme Court, in striking contrast with its approach in the Watergate-related cases, wrote a sweeping opinion invalidating not only the statutory provision under which the House had disapproved the INS's decision favoring Chadha, but also striking down every legislative veto of whatever kind. Underlying its ruling were an explicit rejection of the importance of governmental efficiency and an assumption that each branch has uniquely defined responsibilities.

The Court began its substantive analysis by stating that "the fact that a given . . . procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives . . . of democratic government . . ." <sup>116</sup> Indeed, the preservation of democratic government required constant vigilance to resist "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives."<sup>117</sup> To that end, each branch ought to be seen as "presumptively exercising the power the Constitution has delegated to it"<sup>118</sup> and must act in strict compliance with the constitutional requirements applicable to that branch. Because the action in question in

*Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 Nw. U.L. Rev. 1064, 1088-89 & n.74 (1981).

111. 462 U.S. 919 (1983).

112. Ironically, Chadha had come to the United States to study as a result of conversations two decades earlier with several Peace Corps volunteers. One of those volunteers was Michael Davidson, who as legal counsel to the Senate would argue the case against Chadha. B. CRAIG, CHADHA 4-5 (1988).

113. Chadha's difficulties arose from ethnic tensions between blacks and Asians in his native Kenya. Although he held a British passport, the United Kingdom earlier had restricted nonwhite immigration severely. *Id.* at 5-7.

114. 8 U.S.C. § 1254(c)(2) (1982).

115. See *Chadha*, 462 U.S. at 926-27. The Act required the INS, whenever it suspended a deportation, promptly to file a report summarizing the facts of the case and the reason for the suspension. Either house of Congress could pass a resolution disapproving that action during the same or the immediately following legislative session. 8 U.S.C. § 1254(c)(1)-(2) (1982). The INS filed the required report on Chadha's case in August 1974. B. CRAIG, *supra* note 112, at 21. The House failed to act on it until three days before the end of its 1975 session, the end of the period within which the suspension order could have been disapproved. *Chadha*, 462 U.S. at 964 n.6 (Powell, J., concurring in the judgment).

116. *Chadha*, 462 U.S. at 944.

117. *Id.* at 951.

118. *Id.*

*Chadha* was taken by Congress, it was legislative in nature and therefore had to follow the "[e]xplicit and unambiguous provisions of the Constitution" governing legislation: passage by both houses with presentation to the President for approval or veto.<sup>119</sup>

This reasoning is troublesome for several reasons. First, it conflates the nature of the action with the identity of the actor. Under this approach, all congressional actions that "ha[ve] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch"<sup>120</sup> are legislative and must be taken in strict conformity with the bicameralism and presentation requirements. This implies, however, that the longstanding practice of rulemaking by administrative agencies, which also has the purpose and effect of altering the legal rights of persons outside the legislature, is unconstitutional for failure to satisfy those requirements.<sup>121</sup>

Further, the Court simply asserted that, before the House passed its resolution, *Chadha* had a legal right to remain in this country.<sup>122</sup> In fact, the statute could plausibly have been read as giving him that right only if: (1) the INS suspended his deportation order and (2) neither congressional chamber passed a resolution of disapproval within the specified limitations period.<sup>123</sup> The opinion failed to explain why *Chadha's* legal rights were not defined by the provisions of the Act that created them.<sup>124</sup>

The Court might have suggested that this interpretation came distressingly close to the "bitter with the sweet" theory that had aroused so much controversy in the procedural due process field,<sup>125</sup> but that theory would not be formally interred until two years later.<sup>126</sup> Nevertheless, that insight might have led

119. *Id.* at 945; *see id.* at 946-51.

120. *Id.* at 952.

121. *See* Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 795. The Court attempted to remove the cloud that its reasoning seemed to cast over the legitimacy of much commonplace activity in the administrative state by proclaiming agency rulemaking to be "quasi-legislative" in character." *Chadha*, 462 U.S. at 953 n.16 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935)); *cf.* *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) ("The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to cover a disordered bed.").

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

123. Justice White made precisely this point in dissent. *Id.* at 993-94 (White, J., dissenting). *See also* Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 134-37; Strauss, *supra* note 121, at 796.

124. Yet another difficulty with the Court's analysis arises from its presumption that any congressional action altering the legal rights of persons outside the legislative branch must comply with the bicameralism and presentation requirements. In exercising its oversight and investigatory responsibilities, Congress may compel the appearance of nonlegislators before its committees and attach legal consequences for their failure to do so. For example, the controversy that culminated in *Morrison v. Olson*, 108 S. Ct. 2597 (1988), began with a dispute over the allegedly improper withholding of executive-branch records from a congressional committee. *Id.* at 2605-06; *see infra* Part II.D. Yet the Court did not suggest that routine committee oversight and investigations require bicameral approval and presentation to the President. Elliott, *supra* note 123, at 133-34; Strauss, *supra* note 121, at 795-96. For an explanation of this exception to these requirements, *see* Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1276 & n.99 (1988).

125. This theory posited that the government could, without violating constitutional guarantees of due process, confer a substantive liberty or property interest in a statute that provided limited or informal procedures for vindicating that interest. *Arnett v. Kennedy*, 416 U.S. 134, 152-54 (1974) (plurality opinion).

126. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

the Court to focus less upon the identity of the actor than upon the character of the action in question. This was, in fact, the approach taken by Justice Powell in a concurring opinion. He emphasized that, instead of prescribing a general rule of future effect applicable to a more or less general class, Congress had determined for itself that a specific individual failed to satisfy particular statutory standards.<sup>127</sup> Such a decision involved the performance of a typically judicial function and was made in this instance with none of the procedural protections and other checks against arbitrary action that inhere in adjudication. The absence of those protections rendered this specific legislative veto provision unconstitutional but would not necessarily invalidate others.<sup>128</sup>

This approach has the virtue of recognizing the different contexts in which legislative vetoes can arise. Nevertheless, it is not entirely free from difficulty. One cannot confidently assert that Congress lacks constitutional authority to pass on decisions to suspend deportation because, before the procedure at issue in *Chadha* was adopted, the legislature itself resolved such cases through private bills.<sup>129</sup> Moreover, the Constitution gives Congress express authority over immigration,<sup>130</sup> and one of Madison's statements in the Constitutional Convention strongly implies his belief that the legislature had power over individual naturalization cases.<sup>131</sup> Thus, focusing more narrowly upon the nature of the action at issue in *Chadha* would not necessarily have required invalidating the legislative veto provision of the Immigration and Nationality Act.<sup>132</sup>

The difficulties of a contextual perspective do not end here. As remarked earlier, the pre-*Chadha* debate had focused primarily upon the use of the legislative veto in connection with rulemaking and reorganization. Some commentators have suggested contrasting analyses of the veto in these varying settings. They believe that legislative vetoes can be justified in reorganization and similar statutes because government reorganization, salary adjustment, and impoundment decisions—some typical examples of so-called nonregulatory vetoes—are essentially matters of Washington housekeeping appropriate for rough and ready political accommodation between the White House and Capitol Hill.<sup>133</sup> Legislative vetoes of administrative rules—so-called regulatory vetoes—are said to divert congressional attention from fundamental policy concerns toward the

127. *Chadha*, 462 U.S. at 964-65 (Powell, J., concurring in the judgment).

128. *Id.* at 960, 965-67.

129. The opinion of the Court emphasized this historical fact in explaining why the suspension decision was legislative in nature and therefore subject to the bicameralism and presentation requirements. *Chadha*, 462 U.S. at 954.

130. The legislative branch is given power "[t]o establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

131. Madison objected to a proposal to require that members of the Senate have been citizens for 14 years "because it will put it out of the power of the Nat[ional] Legislature even by special acts of naturalization to confer the full rank of Citizens on meritorious strangers." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 236 (M. Farrand rev. ed. 1937).

132. Supporters of the legislative veto nevertheless concede that the use of the veto in deportation cases raises important constitutional questions. See Dry, *The Congressional Veto and the Separation of Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER, *supra* note 65, at 195, 222-23.

133. E.g., Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 470-71 (1978); Strauss, *supra* note 121, at 805-06; Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 314 (1989).

minutiae of administration, give inordinate weight to sophisticated or well-connected interest groups, enhance the role of committee staffs, destabilize the policymaking process by increasing the likelihood of stalemate arising from conflicts between agencies and Congress unmediated by presidential participation, and complicate judicial review of regulations that are not vetoed by the legislature.<sup>134</sup>

The distinction between regulatory and nonregulatory vetoes may have less significance than its advocates suppose, however. First, it is by no means obvious that the reorganization, budgetary, and salary questions subsumed under the "nonregulatory" label are purely housekeeping matters, as the public outcry over the proposed 1989 federal pay raise attests.<sup>135</sup> More importantly, a regulatory veto typically prevents the government from taking action against private parties.<sup>136</sup> To the extent that the legislative veto of an agency rule prevents the government from harming private interests, the device might be said incrementally to promote liberty, one of the core values in our constitutional scheme.<sup>137</sup>

Opponents of the legislative veto might respond that this particular mechanism, by advantaging well-organized or powerful private interests, aggravates the problem of faction, the avoidance of which was another cardinal principle for the framers of the Constitution.<sup>138</sup> Perhaps this concern, coupled with the difficulty of meaningfully distinguishing among the varieties of legislative vetoes, prompted the Court to paint with so broad a brush in *Chadha*. Whatever the explanation, within days of that ruling the Justices summarily affirmed two lower court rulings invalidating one- and two-house regulatory vetoes.<sup>139</sup>

One difficulty with this admittedly potent response is that it proves too much. Even without the legislative veto, Congress retains numerous alternative devices to prevent administrative overreaching.<sup>140</sup> The details of regulation typi-

134. See, e.g., Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 221-22 (1984); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1381-82, 1409-20 (1977); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 267-85 (1982).

135. See L. FISHER, *supra* note 74, at 167; Hook, *How the Pay-Raise Strategy Came Unraveled*, 47 CONG. Q. WEEKLY REP. 264 (1989); Nathanson, *supra* note 110, at 1090.

136. It was in this sense that the factual setting in *Chadha* was anomalous. The legislative veto exercised by the House of Representatives in that case burdened Jagdish Chadha by requiring him to leave the United States for an uncertain fate.

137. See Nathanson, *supra* note 110, at 1089-90.

138. Sunstein, *supra* note 3, at 435-36. See THE FEDERALIST No. 10, at 77-84 (J. Madison) (C. Rossiter ed. 1961).

139. *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983), *aff'g* *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (1-house veto); *United States Senate v. FTC*, 463 U.S. 1216 (1983), *aff'g* *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (2-house veto).

140. Among these are limiting agency jurisdiction, see, e.g., Levitas & Brand, *Congressional Review of Executive and Agency Actions After Chadha* [sic]: "The Son of Legislative Veto" Lives On, 72 GEO. L.J. 801, 803 (1984); placing restrictive riders on appropriations measures, see, e.g., Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456; Fisher, *supra* note 110, at 28-29; enacting "report and wait" provisions that delay the effective date of regulations until Congress has had an opportunity to pass legislation preventing them from taking effect, see, e.g., L. TRIBE, *CONSTITUTIONAL CHOICES* 77 (1985); and adopting procedural devices that closely approximate but do not exactly replicate the legislative veto, see, e.g., Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 792-95 (1984). See generally R. PIERCE, JR., S. SHAPIRO & P.

cally concern low-visibility matters of intense concern to a few but of much less concern to the public at large. These are precisely the kinds of issues as to which sophisticated, well-organized private interests are likely to enjoy disproportionate advantages throughout the political process.<sup>141</sup> Perhaps the legislative veto poses unique risks of aggravating the problem of faction. No reliable evidence supports this proposition, however. The principal empirical study of the operation and effect of the veto failed to examine programs in which regulations were not subject to legislative vetoes.<sup>142</sup> At most, then, we can conclude that powerful special interests might find it marginally more difficult to prevail under different procedural devices, but many of the harmful effects of the legislative veto have been documented in congressional oversight of administrative regulation that is not subject to such a veto.<sup>143</sup>

In other words, the debate over the legislative veto concerns "matters of degree" rather than of kind.<sup>144</sup> Separation of powers problems may involve "effects at the margin,"<sup>145</sup> but in a field in which distinctions are often evanescent one might pause before attributing constitutional significance to small differences. The legislative veto may well promote inefficient policies and reward strategic behavior by rent-seeking private interests, a point to which we shall return in Part III.<sup>146</sup> Nevertheless, if "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"<sup>147</sup> it seems unlikely that article I incorporates Arrow's Impossibility Theorem<sup>148</sup> or any other tenet of public choice theory.

VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 75-78 (1985); Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 ADMIN. L. REV. 239, 243-70 (1984).

141. See M. HAYES, *LOBBYISTS AND LEGISLATORS* 99-101, 103-04 (1981); K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 314-17, 395-98 (1986); Evans, *PAC Contributions and Roll-Call Voting: Conditional Power*, in *INTEREST GROUP POLITICS* 114, 116-22 (A. Cigler & B. Loomis 2d ed. 1986); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 885-87 (1987); see also Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48-49, 52-53, 59-64 (1985).

142. Professor Bruff and Dean Gellhorn examined only the five programs that had provided "[m]ost of the current federal experience with legislative veto of rulemaking." Bruff & Gellhorn, *supra* note 134, at 1371. The omission of any program in which substantive rules were not subject to legislative veto prevents reliable inferences about the distinctive impact of the veto upon the programs that were studied. See, e.g., D. CAMPBELL & J. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* 6-7 (1963).

143. Bruff & Gellhorn, *supra* note 134, at 1382 n.45, 1386-87, 1389, 1422-23; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 201-02 (1978).

144. Bruff & Gellhorn, *supra* note 134, at 1420.

145. Martin, *supra* note 134, at 294.

146. Much recent legal commentary on the legislative process draws upon the economic theory of legislation, which posits that legislators act only out of self-interest. For a critical summary, see Farber & Frickey, *supra* note 141, at 890-901. Although many commentators have rested their criticisms of the legislative veto on noneconomic grounds, Professor Bruff explicitly invoked public choice theory as an important part of his analysis. Bruff, *supra* note 134, at 214-18. Dean Gellhorn, his sometime coauthor, see G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* (3d ed. 1986); Bruff & Gellhorn, *supra* note 134, has relied upon that theory in his writing on other separation of powers issues. See, e.g., Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

147. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

148. See generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

### C. *The Deficit, the Comptroller General, and the Removal Power*

The next conflict between Congress and the President to reach the Supreme Court concerned the validity of the central feature of the Gramm-Rudman-Hollings Act.<sup>149</sup> That statute, passed in response to widespread concern over persistent and unprecedentedly large federal deficits,<sup>150</sup> called for a phased elimination of the annual budget shortfall over a six-year period. It did so by imposing automatic, across-the-board spending cuts if the projected deficit at the beginning of the fiscal year exceeded the statutory maximum for that year. The cuts, under a process called sequestration, would become effective unless legislation embodying some alternative way to reduce the deficit to the statutory limit were adopted.<sup>151</sup> In essence, the threat of sequestration was intended to loom large enough to force the political branches to reduce the deficit but small enough to discourage them from repealing or otherwise avoiding the law's requirements.<sup>152</sup>

The ensuing litigation ultimately centered upon the role of the Comptroller General in implementing Gramm-Rudman-Hollings. Under this legislation, the Comptroller had the authority both to calculate the projected deficit in case the independent figures of the Office of Management and Budget and the Congressional Budget Office differed, and to implement a sequestration order if that became necessary.<sup>153</sup> In *Bowsher v. Synar*,<sup>154</sup> the Supreme Court held that the assignment of these responsibilities to the Comptroller violated the separation of powers doctrine because, under certain circumstances, he could be removed from office by the unilateral action of Congress. As in *Chadha*, the Court emphasized the importance of insulating the branches from each other, even at the expense of governmental efficiency.<sup>155</sup>

The reasoning underlying the *Bowsher* ruling ran as follows: (1) An officer controlled by Congress may not constitutionally exercise executive power; (2) Gramm-Rudman-Hollings vested the Comptroller General with executive power; (3) the procedures for removing the Comptroller rendered him sub-

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149. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037, 1063, *as amended by* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (codified as amended at 2 U.S.C. §§ 901-922 (Supp. V 1987)).

150. In both absolute and relative terms, the deficit had reached previously unknown levels for the peacetime economy. By 1985, the deficit exceeded \$200 billion, a figure larger than the entire federal budget only 15 years earlier. Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 596 (1988). As a percentage of gross national product, the deficit between 1980 and 1986 was more than 10 times as large as it had been in the 1950s. See Ellwood, *The Politics of the Enactment and Implementation of Gramm-Rudman-Hollings: Why Congress Cannot Address the Deficit Dilemma*, 25 HARV. J. ON LEGIS. 553, 553 n.2 (1988). One contemporaneous official estimate projected that, under plausible budgetary and economic assumptions, the national debt would more than double between 1985 and 1990. Entin, *supra* note 15, at 706 n.28.

151. For detailed explanations of the operation of the Act, see Entin, *supra* note 15, at 706-09; Stith, *supra* note 150, at 625-29.

152. Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 519 (1989); Stith, *supra* note 150, at 624 & n.191.

153. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 251, 99 Stat. 1037, 1063 (amended 1987).

154. 478 U.S. 714 (1986).

155. The Court concluded its opinion in *Bowsher* by quoting its observation in *Chadha* that the efficiency, convenience, and utility of a given procedure was irrelevant to its constitutional validity. *Id.* at 736. See *supra* text accompanying note 116.

servient to Congress; so (4) the Comptroller General could not perform the functions assigned to him under the Act.<sup>156</sup> For present purposes, the important questions are the definition of the functions assigned to the Comptroller General and the significance of the removal procedure.

Defining executive power, the Court emphasized that the Comptroller General would "[i]nterpre[t] a law enacted by Congress to implement the legislative mandate," which was "the very essence of 'execution' of the law."<sup>157</sup> In one sense, this definition is consistent with the view of executive power in *Chadha*, which stressed that Congress could not participate in implementing one of its laws except by passing a new statute.<sup>158</sup> In another, however, it departs from the *Chadha* approach by focusing upon the character of the action performed rather than upon the identity of the actor performing it.

More troubling than this methodological inconsistency is the definition itself. After all, interpreting a law and applying it to a particular set of facts describes adjudication at least as clearly as it does execution.<sup>159</sup> Further, defining the responsibilities of the Comptroller General under Gramm-Rudman-Hollings as executive might imply that Congress would violate the Constitution by reducing expenditures for specific federal programs in order to lower the deficit.<sup>160</sup>

Assuming that the Act conferred executive powers upon the Comptroller General, however, the conclusion that the removal procedure rendered that official subservient to Congress raises additional problems. At the most basic level, the Constitution has very little to say about removal. The one explicit reference to the subject states that all civil officers may be removed through impeachment.<sup>161</sup> That solitary provision might implicitly exclude all other methods of removal, but political practice from the First Congress onward rejected so narrow a view.<sup>162</sup>

Not until this century did the Supreme Court attempt to impose constitutional ground rules in the area. In *Myers v. United States*,<sup>163</sup> the Court invali-

156. *Bowsher*, 478 U.S. at 721-34.

157. *Id.* at 733.

158. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954-55, 958 (1983).

159. See *Crowell v. Benson*, 285 U.S. 22, 56-57 (1932); Elliott, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317, 325 (1987); Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 482 (1989).

160. A separate aspect of the *Bowsher* decision shows that such congressional action would not violate the Constitution. Gramm-Rudman-Hollings contained a fallback provision that established special procedures for promulgating a sequestration order by joint resolution if the primary mechanism were invalidated. *Bowsher*, 478 U.S. at 718-19. The existence of the fallback provision persuaded the Court to invalidate the Comptroller General's role in implementing the statute rather than strike down the removal procedure. *Id.* at 735-36. For Justice Stevens, the existence of these alternative methods of implementing the statute suggested that the duties at issue had a "chameleon-like quality." *Id.* at 750 (Stevens, J., concurring in the judgment). For further discussion of these problems, see Entin, *supra* note 15, at 756-58, 782-84.

161. U.S. CONST. art. II, § 4: "The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

162. See Entin, *supra* note 15, at 712-27.

163. 272 U.S. 52 (1926). For detailed analyses of this decision, see E. CORWIN, *THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION* (1927); J. HART, *TENURE OF OFFICE UNDER THE CONSTITUTION* (1930); Entin, *supra* note 15, at 728-38.

dated a statute that required the advice and consent of the Senate as a prerequisite to the dismissal of most local postmasters. Underlying this ruling was the proposition that the President possessed unfettered power to remove those non-judicial appointees who assisted in the performance of his constitutional obligation faithfully to execute the laws.<sup>164</sup> The subsequent ruling in *Humphrey's Executor v. United States*<sup>165</sup> upheld a cause requirement for the removal of members of the Federal Trade Commission. In so doing, the Court limited the rule of *Myers* to "purely executive" officers.<sup>166</sup>

The statute creating the position of Comptroller General specified that the incumbent could be removed, other than by impeachment, only for cause and only through the passage of a joint resolution.<sup>167</sup> Because a joint resolution is subject to the bicameralism and presentation requirements applicable to a bill,<sup>168</sup> Congress has the initiative over the process of removing the Comptroller and could oust that official over the determined opposition of the President. The Court in *Bowsher* therefore viewed the statute as authorizing the legislative branch alone to dismiss the Comptroller.<sup>169</sup> Because the power to remove was the power to control, this procedure rendered the Comptroller "subservient to Congress."<sup>170</sup> It followed that this subservience precluded the Comptroller from exercising the executive functions conferred upon him by Gramm-Rudman-Hollings.<sup>171</sup>

The Court virtually apologized for the inconvenience of this conclusion, which it regarded as following inexorably from fundamental constitutional premises.<sup>172</sup> In a purely formal sense, the reasoning in *Bowsher* does follow from *Myers* and *Humphrey's Executor*, whatever the infirmities of those opinions. A system that values adherence to precedent should attach some weight to this fact. Yet a closer look suggests that the procedure for removing the Comptroller General posed few separation of powers risks.

To begin with, while the officials in those earlier cases actually had been dismissed, the Comptroller has remained securely in place both before and since the *Bowsher* litigation. More fundamentally, the real significance of the power to remove has been greatly exaggerated. Presidents can control their appointees

164. *Myers*, 272 U.S. at 117.

165. 295 U.S. 602 (1935). The scholarly reaction to this opinion has been almost uniformly negative. See, e.g., Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar*, 55 GEO. WASH. L. REV. 441, 459-61 (1987); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 92-94; Nathanson, *supra* note 110, at 1100-01; Strauss, *supra* note 23, at 611-12. See generally Entin, *supra* note 15, at 738-49.

166. *Humphrey's Ex'r*, 295 U.S. at 628. The Court later held that presidential appointees exercising adjudicatory functions enjoyed protection against arbitrary discharge. *Wiener v. United States*, 357 U.S. 349 (1958). For further discussion of this case, see Entin, *supra* note 15, at 749-52.

167. 31 U.S.C. § 703(e)(1) (1982). The statutory grounds include permanent disability, inefficiency, neglect of duty, malfeasance, and conduct involving moral turpitude. The middle three grounds are identical to the provisions justifying the removal of members of the Federal Trade Commission that were upheld in *Humphrey's Executor*. 15 U.S.C. § 41 (1982).

168. *United States v. California*, 332 U.S. 19, 28 (1947); 7 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 333-34 (1977).

169. *Bowsher v. Synar*, 478 U.S. 714, 728 & n.7 (1986).

170. *Id.* at 730; see also *id.* at 726.

171. *Id.* at 732.

172. See *id.* at 722, 736.



more effectively by means other than dismissing or threatening to dismiss them. Removals have costs as well as benefits, a fact that makes the importance of who may discharge officials and on what grounds a matter more of symbolic than of substantive significance.<sup>173</sup> Further, even if the President had the sole and unfettered power to remove, Congress retains a broad array of theoretically less drastic but empirically more useful controls over the salary and working conditions of officials exercising executive power, controls that could effectively force such officials to resign even when the President earnestly desired them to remain.<sup>174</sup>

This does not mean that direct congressional participation in the removal of executive officers is entirely benign, as the experience under the Tenure of Office Act<sup>175</sup> demonstrates. Nevertheless, when *Bowsher* was decided no Comptroller General had been removed or even threatened with removal in the sixty-five years since the position was created.<sup>176</sup> Moreover, a broad array of institutional factors—including the Comptroller's right to a pretermination hearing, the difficulty of mustering the two-thirds vote in both houses to oust him over presidential opposition, and his ineligibility for reappointment—militate against the notion that the Comptroller is subservient to Congress and therefore might trim his sails in performing his duties under the deficit-reduction law.<sup>177</sup>

173. Entin, *supra* note 15, at 777-81. *But see* Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1080 n.4 (1988).

From the President's standpoint, the political cost of removals and the availability of less drastic alternative controls help to explain the low incidence of actual dismissals. From the perspective of a presidential appointee, the paucity of removals reduces the effectiveness of even the threat of discharge as a means of deterring conduct that might warrant removal from office. This reasoning would follow by analogy to the idea of a link between effective enforcement and deterrence in the criminal law. *See* H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 286-88 (1968); F. ZIMRING & G. HAWKINS, *DETERRENCE* 160-61 (1973). *But see* PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, NATIONAL RESEARCH COUNCIL, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 4-8, 22-59 (1978) (demonstrating the difficulty of proving a causal link between risk of noncapital sanctions and deterrence of criminal behavior); *id.* at 8-9, 59-63 (analyzing the difficulty of determining the deterrent effect of capital punishment). Of course, especially risk-averse presidential appointees might be deterred from doing anything that presents even a remote risk of removal. *Cf.* S. KADISH & S. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 151 (5th ed. 1989) ("certainty of punishment is important only as it contributes to the appearance of certainty"); F. ZIMRING & G. HAWKINS, *supra*, at 161-63 (emphasizing the importance of subjective as well as objective judgments in assessing deterrent effects).

174. Entin, *supra* note 15, at 760. All of these devices are entirely consistent with the reasoning of *Myers*. *See id.* at 734. In addition, Chief Justice Taft's opinion for the Court in that case recognized that Congress could defeat the President's unfettered prerogative to remove many of his nonjudicial appointees by the simple expedient of denominating their inferior officers chosen by department heads rather than by the chief executive. *See Myers v. United States*, 272 U.S. 52, 126-27 (1926); *see also* W. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 70-71 (1916) (suggesting that the President be required to appoint only cabinet members and a single undersecretary in each department, with all other offices filled by civil servants having permanent tenure).

175. Ch. 154, 14 Stat. 430 (1867), amended by Act of Apr. 5, 1869, ch. 10, 16 Stat. 6, repealed by Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

176. *Bowsher*, 478 U.S. at 778, 784 (Blackmun, J., dissenting); Entin, *supra* note 15, at 760 & n.263.

177. *Bowsher*, 478 U.S. at 770-73 (White, J., dissenting); *id.* at 784-85 & n.4 (Blackmun, J., dissenting).

At the same time, the Comptroller traditionally has enjoyed a close relationship with Congress. The Court correctly remarked that both the legislative branch and various Comptrollers have commented upon that relationship, *Bowsher*, 478 U.S. at 731-32, one reflected in the wide range of other functions which that official performs for Congress, *see id.* at 741-45 (Stevens, J., concurring in the judgment). This raises the possibility that the Comptroller might show excessive sensitivity to the perceived wishes of the legislature in performing his duties under Gramm-Rudman-Hollings, notwithstanding the countervailing factors discussed in the text. Any uncertainty over the Comptroller's incentives might have suggested that litigation concerning his subservience was pre-

Unfortunately, the Court's single-minded focus upon the abstract details of the removal provision obscured a more significant separation of powers issue raised by Gramm-Rudman-Hollings. This statute effectively enabled elected officials charged with making fundamental judgments about the size and shape of government to avoid their responsibilities by delegating those judgments to appointed officials who are not directly accountable to the electorate. This view suggests that the budget occupies so important a place in our system that the political branches may not delegate their responsibility to make budgetary decisions of the magnitude contemplated by Gramm-Rudman-Hollings.<sup>178</sup> Although the Act was attacked on more traditional delegation grounds, the Court did not discuss the merits of this claim.<sup>179</sup>

Resolving this issue would have posed real difficulties. Indeed, acceptance of the notion that the political branches may not delegate fundamental budgetary decisions might have called into question the validity of other aspects of the administrative state. The existence of precedents on removal provided a conventional, if unsatisfying, basis for the result in *Bowsher*.<sup>180</sup> Nevertheless, the implausibility of the assumptions underlying the Court's removal jurisprudence suggests that these decisions embody an enormous legal fiction. Still, many commentators view the resolution of the debate over the removal power as essential to the preservation of a unitary executive and the maintenance of liberty under a regime of separated powers.<sup>181</sup> Perhaps this view is correct, but the limited empirical significance of this power makes it a small tail to wag so large a dog.<sup>182</sup>

mature. See Elliott, *supra* note 159, at 332-36. The Court, however, dismissed the ripeness question in a footnote. *Bowsher*, 478 U.S. at 727 n.5.

178. For further discussion of this point and of the difficulty of drawing principled distinctions between those functions that are delegable and those that are not, see Entin, *supra* note 15, at 784-90.

179. See *Bowsher*, 478 U.S. at 736 n.10. The dissenters dismissed this claim in footnotes. *Id.* at 764 n.5 (White, J., dissenting); *id.* at 778 n.1 (Blackmun, J., dissenting). The district court rejected the delegation argument on the merits. *Synar v. United States*, 626 F. Supp. 1374, 1385-89 (D.D.C. 1986) (3-judge court).

180. For efforts to construct a less troublesome rationale for the result in *Bowsher*, see Strauss, *supra* note 10, at 498-500, 519-21; Sunstein, *supra* note 3, at 496.

181. E.g., Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 34-36; Miller, *supra* note 165, at 58-63, 96-97.

This view is not confined to academics. The arguments in *Bowsher* implicitly raised questions concerning the constitutionality of so-called independent agencies. It will be recalled that *Humphrey's Executor* upheld the validity of for-cause removal provisions for members of the FTC. That ruling provided a judicial imprimatur for such agencies. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779, 781-82. In *Bowsher*, the Solicitor General hinted that he shared those constitutional doubts but did not expressly urge the overruling of *Humphrey's Executor*. Brief for the United States at 46 n.32, *Bowsher*, 478 U.S. 714 (No. 85-1377). The implications of the Solicitor General's position elicited extensive discussion at oral argument, see Gramm-Rudman-Hollings Act — Separation of Powers, 54 U.S.L.W. 3709, 3710 (1986), and prompted the Court to include a footnote disavowing any intention to cast doubt on the constitutionality of independent agencies, *Bowsher*, 478 U.S. at 725 n.4.

Despite the Solicitor General's diffidence, other executive-branch officials have expressed hostility toward the idea of such agencies. See Miller, *supra* note 165, at 47-48; Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1319 n.471 (1986); Verkuil, *supra*, at 788-90.

182. Some analysts have urged increased presidential participation in coordinating and implementing policy based upon conceptions of executive power in which the removal question occupies a distinctly secondary place. E.g., Strauss, *supra* note 23, at 599-602, 653-67; Sunstein, *supra* note 3, at 452-63.

#### D. *The Independent Counsel and the Control of Prosecution*

As the discussion of *Buckley* indicated, the legacy of Watergate included legislation designed to remedy campaign fund-raising abuses. That scandal also prompted passage of a measure requiring the appointment of an independent counsel in any future case involving credible allegations of criminal misbehavior by persons in or close to the White House. The independent counsel provision was an important part of the Ethics in Government Act of 1978,<sup>183</sup> which was adopted out of concern that the Department of Justice had not dealt adequately with Watergate-related matters.<sup>184</sup> In essence, this provision sought to insulate the Department from politically sensitive cases on the theory that the executive branch cannot be trusted to investigate itself.<sup>185</sup>

The Court upheld the constitutionality of this arrangement in *Morrison v. Olson*.<sup>186</sup> The reasoning supporting this conclusion differed conspicuously from the approach taken in *Chadha* and *Bowsher*. Rather than emphasizing the essential separateness of the branches, the opinion focused upon whether the independent counsel system unduly interfered with the performance of executive functions.<sup>187</sup> As in the earlier cases taking this tack, *Morrison* did not define how much interference would violate the Constitution. Perhaps more strikingly, it gave only cursory attention to the purposes of the separation of powers doctrine and the justification for the disputed statute. The Court's essentially ad hoc balancing approach elicited a passionate dissent from Justice Scalia, who lamented what he saw as the demise of "our former constitutional system."<sup>188</sup>

The constitutional objection to the independent counsel law rested upon the proposition that law enforcement is a quintessentially executive function and that the Ethics Act impermissibly deprives the President of control over that function. The argument emphasized that the Constitution vested "[t]he executive power" in the President,<sup>189</sup> who also was given the duty to "take Care that the Laws be faithfully executed."<sup>190</sup> The constitutional infirmity arose because the statute conferred the power to appoint an independent counsel upon a special court<sup>191</sup> and limited the grounds upon which such a counsel could be re-

183. Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867-73 (1978) (current version codified at 28 U.S.C. §§ 591-599 (Supp. V 1987)).

184. The Ethics Act also imposed substantive restrictions upon the activities of high-level executive officials after they leave government. Those provisions are beyond the scope of this discussion but they present important questions in their own right. See, e.g., *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989).

185. See *In re Sealed Case*, 838 F.2d 476, 527 (D.C. Cir.) (Ruth Bader Ginsburg, J., dissenting), *rev'd sub nom.* *Morrison v. Olson*, 108 S. Ct. 2597 (1988); cf. Sunstein, *supra* note 3, at 467 (checks on abuse of authority are justified in part because "foxes should not guard henhouses").

The Act applies to cases involving the President and Vice-President as well as to persons holding cabinet and subcabinet rank and to top officials of the President's campaign organization. 28 U.S.C. § 591(b) (Supp. V 1987).

186. 108 S. Ct. 2597 (1988).

187. *Id.* at 2620-22.

188. *Id.* at 2631 (Scalia, J., dissenting).

189. U.S. CONST. art. II, § 1, cl. I.

190. *Id.* § 3. Although Justice Scalia did not rely upon this provision, the lower court emphasized this presidential duty as an important basis for invalidating the independent counsel provisions of the Ethics Act. *In re Sealed Case*, 838 F.2d 476, 488-89 (D.C. Cir.), *rev'd sub nom.* *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

191. See 28 U.S.C. § 49 (1982 & Supp. V 1987).

moved.<sup>192</sup> Accordingly, this arrangement was said to contravene the teachings of both *Buckley* and *Myers* by conferring duties exercisable only by an officer of the United States upon someone chosen in violation of the constitutionally mandated procedure for selecting such officials, and by limiting the grounds upon which a person performing purely executive functions could be dismissed.

Although it conceded that the independent counsel performed executive functions,<sup>193</sup> the *Morrison* opinion rebuffed these objections. The selection procedure complied with constitutional strictures because an independent counsel is an inferior officer having limited duties, jurisdiction, and tenure, and subject to removal for cause by the Attorney General.<sup>194</sup> The removal provision was no more troublesome even though an independent counsel might be thought to hold a "purely executive" office. Despite apparently contrary language in *Humphrey's Executor*,<sup>195</sup> the Court stated its "present considered view"<sup>196</sup> that for-cause limitations upon removal should pass muster unless "they impede the President's ability to perform his constitutional duty."<sup>197</sup> Under this flexible standard, neither the removal limitation nor the statute taken as a whole "unduly trammel[ed] on executive authority."<sup>198</sup>

The formalist objection to this analysis gains some force from the elliptical quality of the majority opinion. If investigation and prosecution of possible violations of the criminal law are quintessentially executive functions, the prospect of an independent counsel appointed by a court and subject to only limited presidential control appears deeply problematical in a government with a supposedly unitary executive.<sup>199</sup> The Court's reliance upon a relatively indeterminate balancing approach, coupled with its somewhat diffident treatment of the concerns over the possible conflict of interest inherent in having the Attorney General

192. An independent counsel is removable "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* § 596(a)(1). The decision to discharge an independent counsel is subject to review by the special court. *Id.* § 596(a)(3).

193. *Morrison*, 108 S. Ct. at 2619.

194. *Id.* at 2608-09. This conclusion is less than obvious, but neither is it implausible. See Blumoff, *supra* note 173, at 1156-60. The Ethics Act confers upon an independent counsel the "full power" of the Attorney General and the Department of Justice in all matters within the counsel's jurisdiction. 28 U.S.C. § 594(a) (Supp. V 1987). In that sense, an independent counsel is not truly subordinate to anyone in the executive branch and thus might be viewed as an officer of the United States rather than as an inferior officer. See *Morrison*, 108 S. Ct. at 2631-35 (Scalia, J., dissenting). At the same time the Court has characterized as inferior officers some officials who lacked any clearly identifiable superiors. *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880) (commissioners appointed to oversee congressional election). Hence, subordinateness may not be a necessary attribute of an inferior officer.

195. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627-28 (1935).

196. *Morrison*, 108 S. Ct. at 2618.

197. *Id.* at 2619.

198. *Id.* In assessing the Ethics Act as a whole, the Court emphasized that the executive branch retains "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties" with respect to law enforcement. *Id.* at 2622.

199. See *Morrison*, 108 S. Ct. at 2626-28, 2629-31, 2636-37 (Scalia, J., dissenting); see also Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 108-16 (1988); Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U.L. REV. 313, 314-17, 352-58 (1989).

supervising investigations of the administration of which he is part,<sup>200</sup> might contribute to the difficulty.

A more complete argument based upon both the conflict-of-interest problem and the values served by the separation of powers might have proceeded along the following lines. The Constitution sought to diffuse power, among other purposes, to prevent the accumulation of unchecked authority that could lead to oppression and tyranny. The prospect of the executive branch investigating itself poses a risk of self-interested decisionmaking that could result in unjustified failures to pursue wrongdoing by government officials. Although the President has the duty to "take Care that the Laws be faithfully executed,"<sup>201</sup> that duty restricts his discretion to dispense with or refuse to enforce applicable laws.<sup>202</sup> Meanwhile, Congress may "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested" in the federal government or any federal officer, including the President.<sup>203</sup>

On this reasoning, Congress could, as it did in the Ethics Act, pass a statute conferring limited authority upon a court to appoint and supervise an independent counsel, particularly when the Attorney General alone determines whether an independent counsel will be appointed at all<sup>204</sup> and the Attorney General's recommendation provides the basis for defining the counsel's jurisdiction.<sup>205</sup> The removal procedure, under which the Attorney General may dismiss but only for cause, recognizes the executive branch's authority while protecting against the arbitrary discharge of an official occupying a potentially vulnerable position.<sup>206</sup> Moreover, the statute can be said to minimize the risk of congres-

200. The Court discussed conflict-of-interest considerations only in connection with the challenge to the method of selecting an independent counsel. After concluding that an independent counsel may properly be characterized as an inferior officer, the majority found no unconstitutional "incongruity" in the provision empowering the special court to make the appointment. The language of the appointments clause did not preclude judicial appointment of an official performing executive functions, and "the most logical place to put [the appointing authority that Congress was unwilling in this instance to entrust to the President] was in the Judicial Branch." *Morrison*, 108 S. Ct. at 2611.

201. U.S. CONST. art. II, § 3.

202. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees"*, 30 WM. & MARY L. REV. 375, 380 (1989); Sunstein, *supra* note 3, at 476; Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59, 90 (1983).

203. U.S. CONST. art. I, § 8, cl. 18.

204. An independent counsel may be appointed only upon the request of the Attorney General. 28 U.S.C. §§ 592(a)-(d), 593(b)(1) (Supp. V 1987). The special court may not appoint an independent counsel on its own initiative, and the Attorney General's decision not to seek such an appointment is immune from judicial review. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984).

205. The special court defines, and may expand, an independent counsel's jurisdiction. 28 U.S.C. § 593(b)-(c) (Supp. V 1987). An independent counsel may not obtain jurisdiction over any matter or individual in the face of objections by the Attorney General, however. *Id.* § 593(c)(2)(B); see also *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987).

206. See *Wiener v. United States*, 357 U.S. 349 (1958) (inferring protection against arbitrary discharge for officials performing adjudication from statute under which officials were appointed despite absence of provision relating to removal); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 253 (2d ed. 1988); Tiefer, *supra* note 202, at 96-97.

The Ethics Act authorizes the special court to review the Attorney General's decision to remove an independent counsel. 28 U.S.C. § 596(a)(3) (1982 & Supp. V 1987). This provision does not seem troublesome, although the prospect of judicial review might well deter the Attorney General from removing an independent counsel. A substantial body of statutory and case law now exists that any executive official might invoke in an effort to obtain judicial review of his ouster. *E.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Board of Regents v.*

sional aggrandizement by conferring authority upon a court rather than the legislature. Thus, the independent counsel provision encroaches only minimally upon executive autonomy in an area where unfettered executive authority presents foreseeable risks to the rule of law.

This conclusion gains additional vitality from an important historical fact: The practices of the states and the early federal government raise serious doubts that law enforcement really is a quintessentially executive function. Perhaps due to the arguments presented in the *Morrison* litigation, it was generally accepted that the powers at issue were executive.<sup>207</sup> Those arguments, in turn, might have been shaped by the many judicial statements to this effect.<sup>208</sup> In fact, however, both at the time the Constitution was ratified and for decades thereafter, several states provided for the appointment of prosecutors by courts or legislative bodies.<sup>209</sup> At the national level, the executive branch, in the person of the Attorney General, did not gain centralized control over litigation involving the federal government until 1870.<sup>210</sup> Before then, most federal litigation was conducted on a part-time basis by private practitioners who had little contact with the President or other executive officials.<sup>211</sup> In England during the late eighteenth century, private prosecution of criminal cases was common, a practice undoubtedly known to the framers.<sup>212</sup> For many years after the ratification of the Constitution, private citizens played an important role in enforcing federal criminal laws,<sup>213</sup> and Congress assigned numerous law enforcement responsibilities to state officials who were not subject to plenary presidential control.<sup>214</sup> This

Roth, 408 U.S. 564 (1972); *Shurtleff v. United States*, 189 U.S. 311, 317-18 (1903); *Reagan v. United States*, 182 U.S. 419, 426 (1901).

207. See *supra* text accompanying note 193. Judge Ginsburg, dissenting in the court of appeals, also viewed prosecution as "indisputably an executive task" but questioned whether it was a "core" function of that branch. *In re Sealed Case*, 838 F.2d 476, 526 (D.C. Cir.) (Ruth Bader Ginsburg, J., dissenting), *rev'd sub nom. Morrison v. Olson*, 108 S. Ct. 2597 (1988).

208. See, e.g., *United States v. Nixon*, 418 U.S. 683, 693 (1974); *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1869); *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied sub nom. Cox v. Hauberg*, 381 U.S. 935 (1965).

209. Gwyn, *supra* note 159, at 494-99; Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 603-05 (1989).

210. P. KURLAND, *WATERGATE AND THE CONSTITUTION* 101 (1978); Tiefer, *supra* note 202, at 91.

211. *Sealed Case*, 838 F.2d at 526-27 (Ruth Bader Ginsburg, J., dissenting); L. WHITE, *THE FEDERALISTS* 406-11 (1948); Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 558 (1988); Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U.L. REV. 275, 286-90 (1989). The lack of centralized executive direction is reflected in the refusal of Attorney General William Wirt to respond to an inquiry from a federal district attorney. 1 Op. Att'y Gen. 608, 609-11 (1823), *cited in* Krent, *supra* note 124, at 1319 n.273.

212. Gwyn, *supra* note 159, at 500-01; Krent, *supra* note 211, at 290-92; Shane, *supra* note 202, at 379; Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U.L. REV. 754, 758 (1976).

213. See Krent, *supra* note 211, at 292-303.

Even today control over federal criminal prosecution is not completely centralized. The Supreme Court has recently upheld the validity of judicial appointment of private attorneys to prosecute cases of criminal contempt. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793-801 (1987). In addition, United States Attorneys retain considerable autonomy in the conduct of litigation despite their nominal subservience to the Attorney General. Bruff, *supra* note 211, at 558-59. Further, many federal agencies have the right to go to court without clearance from the Department of Justice. Tiefer, *supra* note 202, at 91-92.

214. Krent, *supra* note 211, at 304-06, 308-10; see also Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 551-75 (1925).

historical record, if it does not refute the formalist objections to the Ethics Act, at least weakens them considerably.

However those objections are resolved, a more subtle, and to many modern minds more troubling, argument also has been advanced against the independent counsel mechanism. An independent counsel focuses upon a specific individual. The counsel, by virtue of her independence, does not operate under the constraints that affect prosecutors subject to presidential supervision and the traditions of the Department of Justice which operate to temper excessive zeal. Thus, the independent counsel's professional isolation, lack of political accountability, and need to justify the existence of the office pose severe threats to the due process rights of officials subject to the Ethics Act.<sup>215</sup>

One might respond to this concern in three ways. First, this due process argument implies that overzealous independent counsel will single out accused officials for unreasonably harsh treatment. Yet the Supreme Court generally has reacted skeptically to claims of selective enforcement<sup>216</sup> and prosecutorial vindictiveness.<sup>217</sup> Thus, whatever the cogency of the due process argument, this objection cannot justify facial invalidation of the independent counsel provisions of the Ethics Act.

Second, experience under the Act suggests that these concerns are at least premature. Several investigations by independent counsel have concluded without indictment, even in situations in which the counsel elected as a matter of discretion not to proceed despite evidence of statutory violations.<sup>218</sup> Indeed, in at least one case the target of allegations of wrongdoing actually requested the appointment of an independent counsel to clear the air.<sup>219</sup> The record to date is not conclusive, of course, and one conviction obtained by an independent counsel has been overturned on appeal.<sup>220</sup> These due process questions nevertheless raise legitimate concerns. At this point, though, the validity of those concerns remains unclear.

Third, these due process objections might prove too much. Any special prosecutor appointed to investigate alleged wrongdoing by executive officials will function outside the framework and institutional traditions of the Department of Justice. Thus, all of the due process vices inherent in the Ethics Act would apply to a special prosecutor appointed by the President or Attorney General. Yet Justice Scalia, who so strenuously denounced the Ethics Act, accepted the legitimacy of special prosecutors chosen in response to political pressure on the executive branch.<sup>221</sup> This apparent inconsistency does not destroy

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215. These objections are distilled from the final section of Justice Scalia's opinion in *Morrison*. See *Morrison v. Olson*, 108 S. Ct. 2597, 2637-40 (1988) (Scalia, J., dissenting).

216. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607-10 (1985); *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979).

217. See, e.g., *Alabama v. Smith*, 109 S. Ct. 2201 (1989); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1972). But see *Blackledge v. Perry*, 417 U.S. 21, 24-29 (1974).

218. The most celebrated example to date involves the decision of independent counsel James McKay not to seek indictments against former Attorney General Edwin Meese. See Report of Independent Counsel *In re Edwin Meese III* at 51-52, 73-76, 95-99 (D.C. Cir. Indep. Couns. Div. July 5, 1988).

219. See *Deaver v. Seymour*, 822 F.2d 66, 67 (D.C. Cir. 1987).

220. *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.), cert. denied, 110 S. Ct. 564 (1989).

221. *Morrison*, 108 S. Ct. at 2629 (Scalia, J., dissenting).

the objection to the Ethics Act, but it does suggest that perhaps a deeper fault in the statute arises from the scope of its coverage and the threshold for its invocation rather than from the procedures for selecting and removing an independent counsel. These concerns, however, may go more to the wisdom of the Act than to its constitutionality. We shall return to this issue in Part III.

### E. Sentencing, Taxing, and Delegation

The final set of cases to be discussed arose last Term and presented challenges to federal statutes on delegation grounds. One concerned the constitutionality of criminal sentencing guidelines promulgated by a special commission, the other the validity of user fees promulgated by the Secretary of Transportation. Although the Court rejected those challenges, the cases are significant nonetheless because they could encourage the belief that political decisions are too important to be left to elected officials.

The first decision, *Mistretta v. United States*,<sup>222</sup> upheld the constitutionality of the United States Sentencing Commission, a seven-member body empowered to issue legally binding guidelines that establish maximum and minimum sentences for federal crimes.<sup>223</sup> Sentencing judges may deviate from the guidelines in certain circumstances but must specifically explain such deviations.<sup>224</sup> Failure to comply with the guidelines or adequately to explain deviations from them are grounds for appellate reversal.<sup>225</sup>

In a straightforward application of modern delegation analysis, the Court found that Congress had provided "sufficiently specific and detailed" standards for the Commission's work.<sup>226</sup> In particular, the legislature had articulated three goals and four purposes for the new sentencing system,<sup>227</sup> and directed the Commission to develop a range of sentences for different categories of offenses and various types of offenders according to general criteria prescribed in the statute.<sup>228</sup> Having done this much, Congress "especially appropriate[ly]" delegated the "intricate, labor-intensive task" of developing proportionate sanctions for hundreds of crimes and thousands of offenders "to an expert body."<sup>229</sup>

222. 109 S. Ct. 647 (1989).

223. The Commission is located in the judicial branch. Its members, three of whom must be article III judges, are appointed by the President subject to Senate confirmation; they are subject to presidential removal from the Commission only for cause. 28 U.S.C. § 991 (Supp. V 1987). Although the Court devoted most of its opinion to the location, composition, and independence of the Commission, see *Mistretta*, 109 S. Ct. at 661-75, those questions relate only secondarily to the problem of separation of powers conflicts between Congress and the President. For that reason, they will receive little direct attention here. For more comprehensive discussions of these issues, see Krent, *supra* note 124, at 1311-16; Pierce, Morrison v. Olson, *Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1, 35-38; Student Essay, *The Constitutionality of the U.S. Sentencing Commission: An Analysis of the Role of the Judiciary*, 57 GEO. WASH. L. REV. 704, 712-30 (1989); Note, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1376-88 (1987).

224. 18 U.S.C. § 3553 (Supp. V 1987).

225. *Id.* § 3742.

226. *Mistretta*, 109 S. Ct. at 655.

227. *Id.* at 655-56 (discussing 18 U.S.C. § 3553(a)(2) and 28 U.S.C. § 991(b)(1) (Supp. V 1987)).

228. *Id.* at 656-57 (discussing 28 U.S.C. § 994 (Supp. V 1987)).

229. *Id.* at 658.



This conclusion should have come as no surprise. Although numerous judicial statements aver that Congress may not delegate the legislative power,<sup>230</sup> the Court has actually found an unconstitutional delegation only twice.<sup>231</sup> Moreover, the cases have used a variety of tests to avoid striking down legislative delegations.<sup>232</sup> Since the New Deal, the focus has changed from rhetorical condemnation toward a search for standards and procedures to prevent arbitrary administration and promote accountability, with particular emphasis upon the availability of judicial review.<sup>233</sup> As a practical matter, the delegation doctrine is moribund as a device for invalidating federal legislation.<sup>234</sup>

Although the lack-of-standards challenge succumbed without difficulty, the duties assigned to the Sentencing Commission raised an alternative concern that the Court did not address. Congress alone has the power to declare federal crimes.<sup>235</sup> Congress alone, therefore, may determine the permissible sentences

230. Perhaps the classic statement of this position came in *Field v. Clark*, 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

231. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (suggesting the unconstitutionality of delegations to private groups); but cf. *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 577-78 (1939) (upholding validity of a delegation to private parties).

232. Among these have been the "named contingency" test, see *Field v. Clark*, 143 U.S. 649, 693 (1892) (upholding a statute allowing the President to suspend duty-free importation of goods from any nation that did not accord reciprocally fair treatment to U.S. goods); *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 383 (1813) (upholding statute permitting President to lift trade embargoes against England and France when those nations "ceased to violate the neutral commerce of the United States"), the "legislative standards" test, see *Mahler v. Eby*, 264 U.S. 32, 40 (1924) (finding ambiguous statutory standards for deportation of undesirable aliens to derive meaning from "common understanding"); *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (upholding preservation regulations for national forests, the violation of which was a criminal offense, as an exercise of executive power to "fill in the details"); *Buttfield v. Stranahan*, 192 U.S. 470, 496-97 (1904) (approving delegation authorizing Secretary of the Treasury to establish uniform standards for importation of tea in circumstances when "named contingency" test could not have been met), and the "intelligible principle" test, see *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (upholding delegation to President to adjust tariff rates to equalize differences in cost of production of foreign and domestic products).

233. The leading example of this approach is *Yakus v. United States*, 321 U.S. 414 (1944). The *Mistretta* decision relied heavily upon *Yakus* in its discussion of the delegation issue and quoted at length from the opinion in that case as the basis for resolving that issue. See *Mistretta v. United States*, 109 S. Ct. 647, 655, 658 (1989).

234. Perhaps the most striking illustration of this development is *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (3-judge court), which upheld a delegation to the President "to issue such orders and regulations [implementing wage and price controls] as he deems appropriate," based upon a "common lore" of earlier price control regimes and the availability of judicial review of the orders and regulations actually issued.

The delegation doctrine is not entirely dead, however. The Court occasionally invokes the doctrine as a justification for narrowing the scope of seemingly broad statutory delegations. *E.g.*, *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965); *Arizona v. California*, 373 U.S. 546, 583-85 (1963); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958); see also *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645-46 (1980). In addition, some separate opinions have relied upon delegation arguments. *E.g.*, *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685-87 (1980) (Rehnquist, J., concurring); *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring).

Finally, in its decision invalidating the legislative veto, the Court distinguished rulemaking performed by administrative agencies from congressional action subject to the bicameralism and presentation requirements in part on the basis that rulemaking was subject to the delegation doctrine. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 953 n.16 (1983). Despite the implications of this statement, the cases discussed in the text of this section demonstrate that the delegation doctrine has not enjoyed a recent revival.

235. There are no federal common law crimes. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); see *W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW* § 2.1(c), at 66 & n.17 (2d ed. 1986).

for federal crimes, a task which implicates fundamental moral judgments appropriately made only by officials who are directly accountable to the people in whose name those judgments are made.<sup>236</sup> The sentencing guidelines, like the sequestration process created by Gramm-Rudman-Hollings, transferred important decisions from elected, politically accountable officials to appointed experts. Accordingly, even if the intricacy of the task required the assistance of specialists, Congress and the President should have taken the ultimate responsibility for fixing allowable sentences for persons convicted of federal crimes by formally adopting the guidelines through the legislative process.<sup>237</sup>

This objection to the sentencing guidelines comes close to suggesting that determining the acceptable magnitude of criminal sanctions is a nondelegable function. As an initial proposition, this argument was unpromising because the Court long ago had approved the delegation to an executive department of authority to promulgate regulations the violation of which would give rise to criminal liability.<sup>238</sup> In a different setting, however, the Court more recently had implied that Congress could not delegate the taxing power.<sup>239</sup> Analogous reasoning might have led to the conclusion that the political branches could not wholly delegate the responsibility for determining the range of permissible criminal sentences. Last Term's other delegation decision cast doubt upon any such implication.

In *Skinner v. Mid-America Pipeline Co.*,<sup>240</sup> the Court unanimously rejected the argument that delegations of the taxing power are subject to more stringent requirements than are other delegations. *Mid-America Pipeline* concerned the constitutionality of a statute directing the Secretary of Transportation to impose user fees upon pipeline operators to cover the cost of administering pipeline safety programs.<sup>241</sup> The challenge maintained that the user fees were really taxes essentially because, without the fees, the safety programs would have been supported by taxpayer funds. The Court found nothing in the language or structure of article I suggesting special hostility to delegations of the taxing power and pointedly remarked that from the First Congress onward the legislature has delegated considerable discretion to the executive under the tax laws.<sup>242</sup> Because the statute at issue contained ample standards under tradi-

236. See, e.g., *Whalen v. United States*, 445 U.S. 684, 689 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958); *Ex parte United States*, 242 U.S. 27, 42 (1916).

237. Alternatively, the power to promulgate the sentencing guidelines involved a delegation of purely legislative power, not of the ancillary power to make rules in connection with the exercise of executive or legislative power. *Mistretta*, 109 S. Ct. at 678-79 (Scalia, J., dissenting).

238. E.g., *United States v. Grimaud*, 220 U.S. 506 (1911); see also *Synar v. United States*, 626 F. Supp. 1374, 1385-86 (D.D.C.) (3-judge court) (discussing Supreme Court decisions upholding delegation of allegedly nondelegable functions), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986).

239. See *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).

240. 109 S. Ct. 1726 (1989).

241. Consolidated Budget Reconciliation Act of 1985, § 7005, 49 U.S.C. app. § 1682a (Supp. V 1987). This provision directed the Secretary to fix the fees at a level sufficient to cover the costs of administering these programs but limited their aggregate amount to 5% above the maximum expenditures for that purpose provided in the statute. The goal was to make these programs self-financing without providing a windfall for the treasury. See *Mid-America Pipeline*, 109 S. Ct. at 1728-29.

242. *Mid-America Pipeline*, 109 S. Ct. at 1732-33. The Court found *National Cable Television*, see *supra* note 239 and accompanying text, entirely compatible with this analysis. The fees at issue in that case inured in

tional delegation principles to constrain the Secretary's discretion, it survived the constitutional attack.

In short, these cases continue the Court's consistent rejection of delegation challenges. Despite the urging of various commentators,<sup>243</sup> the Supreme Court has essentially abandoned the delegation doctrine as a meaningful approach to separation of powers problems. Judicial reluctance to apply the doctrine does not necessarily render the concern over delegation any less genuine. Rather, it may reflect the difficulty of fashioning meaningful judicial criteria for applying the doctrine to situations involving less "a point of principle [than] a question of degree."<sup>244</sup> This lesson may have more general application in separation of powers disputes.

### III. CONGRESS, THE PRESIDENT, AND THE LIMITS OF JUDICIAL REVIEW

Perhaps "[i]t is emphatically the province and duty of the judicial department to say what the law is,"<sup>245</sup> but the discussion in Part II suggests that the Supreme Court's efforts to define the allocation of power between the legislative and executive branches have left the law in an unsatisfactory state. This condition arises less from the idiosyncrasies or intellectual deficiencies of judges than from the intractable nature of the subject.<sup>246</sup> No unitary judicial approach to this subject can take account of its logical and empirical complexities. Unlike individual rights and perhaps also federalism disputes,<sup>247</sup> Congress and the President possess ample political resources with which to protect their interests. For this reason, and because the legislature and the chief executive also have the practical wisdom to determine for themselves the stakes of any particular controversy, courts should hesitate to insist upon comprehensive resolution of constitutional turf battles between the political branches. More important, the political branches themselves and the citizenry at large should hesitate to seek judicial resolution of these issues.

The following sections first explore various unsuccessful efforts to reconcile the recent separation of powers jurisprudence, next suggest that less enthusiasm for judicial resolution of these disputes might have encouraged more meaningful dialogue between Congress and the President, and finally urge that the focus upon the constitutional issues at stake in these cases tended to obscure more mundane, but also more significant, objections to the wisdom of the governmen-

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part to the benefit of the public, but the statute under which they were imposed did not clearly enough indicate congressional intent to authorize recovery from regulated parties of the cost of benefits conferred upon society at large. In *Mid-America Pipeline*, by contrast, the statute reflected an intention to make the pipeline safety programs self-financing. *Mid-America Pipeline*, 109 S. Ct. at 1733-34.

243. E.g., J. ELY, *DEMOCRACY AND DISTRUST* 131-34 (1980); T. LOWI, *THE END OF LIBERALISM* 92-126, 300-01 (2d ed. 1979); Aranson, Gellhorn & Robinson, *supra* note 146; Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

244. *Mistretta v. United States*, 109 S. Ct. 647, 677 (1989) (Scalia, J., dissenting); see also Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1693-97 (1975).

245. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), *quoted in* *United States v. Nixon*, 418 U.S. 683, 703, 705 (1974).

246. See Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 27-28; Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805-07 (1982).

247. See *supra* note 24.

tal policies in question. Accepting the premises of this discussion would not assure more intelligent public policies, but it would increase the likelihood that such policies would emerge.

#### A. *The Difficulty of Reconciling the Cases*

The recent Supreme Court decisions addressing separation of powers disputes between the legislative and executive branches have employed distinctive analytical techniques. At times, the Court has applied a strictly formal approach emphasizing the essential separateness of the branches and underscoring the importance of allowing each to function as master in its own sphere. At others, the Court has followed a more pragmatic course focusing upon the existence of checks and balances to prevent the accumulation of unopposed authority that could lead to arbitrary action by a single branch. The analytical scheme selected has determined the outcome of virtually every case discussed in Part II, including all of those during the 1980s. The *Chadha* and *Bowsher* rulings fall into the former group, while *Morrison*, *Mistretta*, and *Mid-America Pipeline* fall into the latter.<sup>248</sup>

The difficulty arises less from the existence of parallel lines of cases than from the Court's almost complete failure even to acknowledge its contrasting methodologies in separation of powers disputes.<sup>249</sup> This phenomenon was most pronounced in *Bowsher*, which reached its conclusion through rigidly formal reasoning without so much as citing *Commodity Futures Trading Commission v. Schor*,<sup>250</sup> a decision announced the same day which used a much more flexible approach in rejecting a separation of powers challenge to the assignment of adjudicatory powers to an agency whose members lacked the salary and tenure protections of article III judges.<sup>251</sup> The opinion in *Schor* attempted to distinguish *Bowsher* on the basis that Gramm-Rudman-Hollings, but not the CFTC's organic statute, involved a congressional attempt to aggrandize power at the expense of another branch.<sup>252</sup> That theme was reiterated in *Morrison* and *Mis-*

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248. The sole exception to this pattern was *Buckley*, in which the Court endorsed a relatively pragmatic approach to separation of powers problems but found that the method for selecting members of the Federal Election Commission violated the express terms of the appointments clause. See *supra* notes 97-106 and accompanying text.

249. Judicial acknowledgments of analytical inconsistencies in recent separation of powers jurisprudence appear primarily in dissenting opinions. *Morrison v. Olson*, 108 S. Ct. 2597, 2637 (1988) (Scalia, J., dissenting); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 865 (1986) (Brennan, J., dissenting). Commentators who take different positions on the proper method for resolving separation of powers disputes express equal dissatisfaction with the Court's failure to address the analytical inconsistencies in its jurisprudence in this field. See, e.g., Carter, *supra* note 199, at 110, 113, 116-17 (advocating a relatively formal approach to separation of powers problems); Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1084-85, 1097-101 (1987) (advocating a relatively pragmatic approach to separation of powers problems).

250. 478 U.S. 833 (1986).

251. See *supra* note 2. An only somewhat less egregious example occurred in *Mistretta*, where the Court claimed consistently to have followed a "flexible understanding of separation of powers." *Mistretta v. United States*, 109 S. Ct. 647, 659 (1989). That understanding was said to emphasize the danger of interbranch aggrandizement. See *id.* at 658-61.

252. *Schor*, 478 U.S. at 856-57.

*tretta*.<sup>253</sup> Yet none of these opinions attempted to explain how or why the Court chose which methodology in any particular case.

Beyond this substantial problem, the aggrandizement-nonaggrandizement distinction is difficult to apply coherently. Any measure that reallocates authority from one branch to another can be said both to increase the power of the branch which gains new authority and to diminish the power of the branch which loses authority that it previously possessed.<sup>254</sup> All of the cases considered here involved statutes of this type. For example, in *Schor*, an administrative agency was given authority to decide certain common law claims that otherwise would have been resolved by the courts, thus diminishing the power of the judiciary. In *Bowsher*, an official supposedly subservient to Congress was given authority to perform executive functions that otherwise would have been undertaken or directed by the President. Thus, even if Congress did not expressly usurp judicial power in *Schor*,<sup>255</sup> it left the judiciary with a smaller proportion of federal power than that branch otherwise would have had. By the same token, Gramm-Rudman-Hollings contained a procedure for avoiding sequestration under which Congress, by passing a deficit-reduction measure over a presidential veto, could act unilaterally. Hence, even if one accepts the dubious assumption that the procedure for removing the Comptroller General rendered that official subservient to the legislative branch, the extent of congressional aggrandizement might well have been substantially less in *Bowsher* than in *Schor*. Nevertheless, the arrangement in *Bowsher* was invalidated while that in *Schor* was upheld. The arrangements approved in *Mid-America Pipeline*, *Mistretta*, and *Morrison* also involved reallocations of authority comparable to that rejected in *Bowsher*.<sup>256</sup>

The infirmities of the Court's approach have prompted several commentators to propose alternative reconciliations of these cases. Academic formalists have suggested that the cases turn on considerations of the constitutional limitations upon how each branch may act.<sup>257</sup> Those adhering to a more functionalist perspective have tried to harmonize the cases with reference to a more holistic focus upon the quality and extent of interbranch relationships that vindicate

253. See *Mistretta*, 109 S. Ct. at 660; *Morrison*, 108 S. Ct. at 2620.

254. See Blumoff, *supra* note 173, at 1150-51; Krent, *supra* note 124, at 1288-89; Strauss, *supra* note 10, at 517. Professor Krent attempts to demonstrate the point algebraically. Krent, *supra* note 124, at 1288 n.141.

255. In one sense, Congress did arrogate power to itself by conferring the adjudicatory authority in question upon the Commodity Futures Trading Commission. The CFTC is an "independent agency." *Schor*, 478 U.S. at 836. Members of the legislative branch often regard independent agencies as creatures of Congress. See Miller, *supra* note 165, at 63-64. From this perspective, *Schor* might indeed involve an attempt at congressional aggrandizement of authority at the expense of another branch.

256. The analogous reasoning concerning the cases discussed in the text proceeds as follows. In *Mid-America Pipeline*, the executive branch gained the power to impose user fees that otherwise would have rested with Congress. In *Mistretta*, the judicial branch received the power to determine the permissible range of criminal sentences, authority that otherwise belonged to Congress. In *Morrison*, the judicial branch obtained authority over law enforcement that otherwise would have been exercised by the executive. Even if one characterized the arrangements in the first two cases as congressional giveaways rather than executive or judicial usurpations, the interbranch balance of power changed as a result of these arrangements. The provision in Gramm-Rudman-Hollings authorizing Congress alone to prevent sequestration from occurring makes it difficult to maintain that the magnitude of the reallocation of power in *Bowsher* exceeded that in any of the cases discussed in this footnote.

257. E.g., Krent, *supra* note 124, at 1256-58, 1273-98.

underlying structural principles of the Constitution.<sup>258</sup> These theories are based upon considerable intellectual acumen and reflect impressive powers of synthesis. Unfortunately, they are also problematic. For example, some of these theories do not in fact account for the outcome of all of the recent separation of powers decisions.<sup>259</sup> Moreover, formalism, as *Bowsher* demonstrates, can attach enormous legal weight to factors that have little actual significance. By contrast, functionalism can yield such divergent conclusions that even its adherents caution against the possibility of "conscious or unconscious manipulation."<sup>260</sup> Thus, this approach may be "more effective as a means of organizing debate than as a rule for deciding cases."<sup>261</sup> These difficulties underscore the intractable complexity of the subject.

The unsatisfactory judicial performance and the inadequacies of existing theories also suggest that Dean Choper might have had a more valuable insight than he has received credit for when he urged the Supreme Court to refrain from deciding separation of powers disputes between Congress and the President; such disputes would be resolved through bargaining and accommodation between the political branches.<sup>262</sup> To the extent that his proposal rests upon the notion that judicial decisions in this field squander limited institutional capital that should be saved for more urgent individual rights cases, it has received justifiable criticism.<sup>263</sup> On the other hand, this proposal has the virtue of forcing us to confront the limitations as well as the benefits of judicial review in a field where principled decisions are difficult to construct and so basic a question as the proper method of analysis remains unpredictable.

The suggestion of judicial abstention in separation of powers disputes has elicited concerns that one branch might use its short-term bargaining advantage to effect permanent and deleterious changes in the relative allocation of powers.<sup>264</sup> These concerns are legitimate but they should not be exaggerated. As noted in the introduction to this Article, the judiciary has played no role or only

258. *E.g.*, Strauss, *supra* note 10, at 517-21; Sunstein, *supra* note 3, at 495-96.

259. Professor Krent, a formalist, and Professor Pierce, a functionalist, both found the Sentencing Commission unconstitutional under their theories. Krent, *supra* note 124, at 1311-16; Pierce, *supra* note 223, at 36. The Court, on the other hand, upheld the validity of the Sentencing Commission in *Mistretta*. See *supra* notes 222-37 and accompanying text. Professor Pierce sought to avoid the implications of his theory by treating the placement of the Commission in the judicial branch as a slip of the legislative pen. Pierce, *supra* note 223, at 37.

260. Strauss, *supra* note 23, at 617. A critic of this approach charges that functionalism serves as "a shield behind which courts could rationalize their decisions to restructure governmental arrangements, but it does not provide them with useful criteria as to when and in what circumstances that restructuring is needed." Gifford, *supra* note 165, at 479.

The indeterminacy of functionalism is illustrated by the *Bowsher* case. Justice White demonstrated in detail that the procedure for removing the Comptroller General, which served as the centerpiece of the Court's opinion, posed no real threat of congressional usurpation of executive authority. *Bowsher v. Synar*, 478 U.S. 714, 770-75 (1986) (White, J., dissenting). Professor Strauss, in turn, criticized Justice White's analysis for failing to look beyond the removal procedure to "the general framework of relationships among the GAO, Congress, President, and courts." Strauss, *supra* note 10, at 520; see *id.* at 498-99, 519-21.

261. Strauss, *supra* note 23, at 625 (footnote omitted).

262. J. CHOPER, *supra* note 22, at 263; see *id.* at 260-379.

263. *Id.* at 131-40, 156-70. Dean Choper offered no persuasive evidence that public reaction to rulings upholding individual liberties has been affected in any way by the results in separation of powers cases. See Merritt, *supra* note 2, at 17 n.101 (collecting criticisms of this aspect of Choper's reasoning).

264. See, e.g., Gifford, *supra* note 165, at 447-48; Sunstein, *supra* note 3, at 494-95.

a marginal one in many important conflicts between Congress and the President, including those involving the Tenure of Office Act, the War Powers Resolution, and Watergate.

These considerations do not necessarily establish the cogency of Dean Choper's proposal. The original structure of the Federal Election Commission, which was invalidated in *Buckley* for violating the appointments clause, shows that Congress and the President, left to their own devices, might agree to arrangements that contradict the allocation of authority expressly provided in the text of the Constitution.<sup>265</sup> That prospect suggests the need for some judicial role in separation of powers disputes. The experiences with the Tenure of Office Act, the War Powers Resolution, and Watergate should remind us, however, that the political branches have their own resources and responsibilities in this field. That in turn counsels against excessive reliance upon the judiciary as the ultimate arbiter of legislative-executive controversies. The Supreme Court itself recently cautioned against gratuitous judicial resolution of such a constitutional turf battle.<sup>266</sup> The next two sections examine the reasons for this caution.

### B. *The Political Branches and Separation of Powers Disputes*

Enthusiasts of judicial resolution of separation of powers disputes between the political branches reason from two essential premises. One is that the political branches are unqualified to interpret the Constitution. The other is that interbranch differences pose unacceptable risks to the quality of public policy. Both of these premises are misleading at best.

The assumption that only the judiciary can resolve constitutional disputes between Congress and the President has at least two unfortunate consequences. First, elected officials might refrain from evaluating the constitutionality of practices or proposals that come before them for consideration. Second, legislators and chief executives might seek to disguise their opposition to the wisdom of such practices or proposals by structuring them so as to leave them vulnerable to lawsuits challenging their constitutionality. These avoidance and camouflage techniques might insulate politicians from the discomfort associated with making hard choices, but they also debase the quality of deliberation about public policy.

These are not purely hypothetical concerns, as situations discussed in Part II of this Article attest. As to the first, several members of the House Judiciary Committee voted against the article charging President Nixon with committing impeachable offenses by defying congressional subpoenas on the ground that only the courts could determine the validity of the subpoenas.<sup>267</sup> As to the sec-

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265. See also *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, No. 90-0482(RCL), slip op. at 30 n.9 (D.D.C. Mar. 21, 1990) ("The President and the Congress, whether alone or together, cannot decide to circumvent the [appointments clause's] requirements.").

266. *American Foreign Serv. Ass'n v. Garfinkel*, 109 S. Ct. 1693, 1698 (1989). For discussion of the substantive questions at issue in that case, see Quint, *Reflections on the Separation of Powers and Judicial Review at the End of the Reagan Era*, 57 GEO. WASH. L. REV. 427, 451-55 (1989).

267. H.R. REP. NO. 1305, 93d Cong., 2d Sess. 360-61, 485-87 (1974) (minority views); *id.* at 504-05 (additional views of Mr. Railsback); *id.* at 507-08 (additional views of Mr. Dennis); *id.* at 520-23 (additional views of Mr. Froehlich in opposition to article III); DEBATE ON ARTICLES OF IMPEACHMENT: HEARINGS BEFORE THE

ond, the Democratic leadership of the House of Representatives, which opposed the Gramm-Rudman-Hollings Act, supported specific provisions that they believed would make a constitutional challenge to the statute more likely to succeed.<sup>268</sup>

The abhorrence of interbranch conflict also reflects a very different view of the process of government than the one embodied in the structure of the Constitution. The framers constructed an elaborate set of checks and balances to structure the relationship between the political branches. Adherence to these ground rules was expected to prevent overreaching by one branch and to discourage the enactment of unsound proposals. Excessive reliance upon the judiciary to resolve legislative-executive turf battles threatens to undermine the benefits of this scheme. This prospect should be troublesome to all citizens, regardless of their general views about originalism in constitutional interpretation.

### 1. *Constitutional Interpretation by the Political Branches*

As noted at the outset of this Part, the Supreme Court determined at an early date that the judicial branch has the duty "to say what the law is."<sup>269</sup> This statement has served as the predicate for the view that the Court has ultimate, if not exclusive, authority in constitutional interpretation.<sup>270</sup> For this reason, many observers regard with trepidation any suggestion to treat separation of powers disputes between Congress and the President as nonjusticiable. Yet the status of the Supreme Court as sole expositor of the Constitution has not been universally accepted.

For example, Andrew Jackson refused to regard the ruling in *McCulloch v. Maryland*<sup>271</sup> as having settled the constitutionality of the Bank of the United States. In vetoing a bill to recharter the Bank, Jackson wrote:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.<sup>272</sup>

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HOUSE COMM. ON THE JUDICIARY, 93d Cong., 2d Sess. 455-56 (1974) (remarks of Rep. Froehlich); *id.* at 469-70 (remarks of Rep. Smith); *id.* at 473, 474 (remarks of Rep. Railsback). For criticism of excessive reliance upon the judiciary for resolution of this matter, see J. CHOPER, *supra* note 22, at 307-08; Gunther, *supra* note 21, at 35-39.

268. See Ellwood, *supra* note 150, at 564.

269. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see *supra* text accompanying note 245.

270. *E.g.*, *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). This is not the only possible interpretation of the language from *Marbury*, however. See, *e.g.*, Gunther, *supra* note 21, at 34; Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 20.

271. 17 U.S. (4 Wheat.) 316 (1819).

272. 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 582 (J. Richardson ed. 1896).



Abraham Lincoln made his opposition to the *Dred Scott* decision<sup>273</sup> an important part of his unsuccessful campaign for the Senate in 1858.<sup>274</sup> He later broadened his attack on the "judicial monopoly" theory of constitutional interpretation.<sup>275</sup> In his first inaugural address, Lincoln explained:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. . . . At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.<sup>276</sup>

Similar views were expressed both before and after these statements. Thus, Thomas Jefferson pardoned those convicted under the Sedition Act of 1798<sup>277</sup> despite judicial rulings upholding the constitutionality of the statute.<sup>278</sup> More recently, President Franklin D. Roosevelt vigorously attacked Supreme Court rulings invalidating important aspects of his legislative agenda.<sup>279</sup> During the Watergate investigation, President Nixon implied that he might disregard a Supreme Court directive to comply with the special prosecutor's subpoena unless that ruling was "definitive."<sup>280</sup> Finally, former Attorney General Edwin Meese kindled fierce debate with a speech asserting that "constitutional interpretation

273. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

274. For example, during the Lincoln-Douglas Debates, Lincoln accepted the *Dred Scott* decision as conclusive of the rights of the parties to that case but explained that he would "refus[e] to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should." 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 495 (R. Basler ed. 1953). In a subsequent debate, Lincoln added that he opposed *Dred Scott* "as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision." 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 255.

275. This term is used in Mulhern, *supra* note 23, at 100 & n.5 (citing D. MORGAN, CONGRESS AND THE CONSTITUTION 89-96 (1966)).

276. 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra* note 272, at 5, 9.

277. Ch. 74, 1 Stat. 596 (expired 1801).

278. As Jefferson explained in 1804 in a letter to Abigail Adams, whose husband he had defeated in the presidential election of 1800 in large measure due to popular revulsion against the Sedition Act:

[N]othing in the Constitution has given [the judges] a right to decide for the executive, more than to the executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. . . . [The Constitution] meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what are not, not only for themselves in their own sphere of action, but for the Legislature and executive also, in their spheres, would make the judiciary a despotic branch.

4 THE WRITINGS OF THOMAS JEFFERSON 560, 561 (H. Washington ed. 1857).

279. See G. GUNTHER, CONSTITUTIONAL LAW 24 (11th ed. 1985). The judicial hostility to Roosevelt's program led to the ill-fated Court-packing plan. See L. FISHER, CONSTITUTIONAL DIALOGUES 209-15 (1988); Leuchtenburg, *The Case of the Contentious Commissioner: Humphreys' [sic] Executor v. U.S.*, in FREEDOM AND REFORM 276, 310-11 (H. Hyman & L. Levy eds. 1967).

280. E. DREW, *supra* note 80, at 5, 45, 283, 304-05, 328. One of President Nixon's advisors was widely quoted as saying: "We're leading ourselves into believing the Supreme Court is the ultimate arbiter of all disputes, and I don't believe it. I think there are times when the President of the United States would be right in not obeying a decision of the Supreme Court." *Id.* at 21.

is not the business of the Court only, but also properly the business of all branches of government."<sup>281</sup>

Even if one rejects the nonjusticiability approach and supports highly deferential judicial review in separation of powers disputes between Congress and the President, other powerful considerations support an independent role for the political branches in constitutional interpretation. At the most basic level, elected officials must take an oath to uphold the Constitution.<sup>282</sup> Faithfulness to their oath necessarily requires members of Congress and the President to consider the constitutionality of proposed policies as an important aspect of performing their duties.<sup>283</sup>

Beyond the implications of the oath requirement, the Constitution imposes affirmative obligations upon elected officials. Several provisions specifically proscribe certain kinds of legislation,<sup>284</sup> and a number expressly authorize the passage of implementing statutes.<sup>285</sup> Moreover, the Supreme Court itself has held that Congress is not strictly bound by judicial interpretations of equal protection in enforcing the fourteenth amendment through legislation.<sup>286</sup> Accordingly, the political branches cannot escape the necessity of assessing the constitutionality of at least some policy proposals.

In addition, the judiciary cannot resolve every constitutional issue. First, article III restricts the jurisdiction of the federal courts to cases and controversies.<sup>287</sup> Hence, the judicial branch cannot provide advisory opinions to Congress or the President on the constitutionality of a proposed bill or program.<sup>288</sup> Sec-

281. Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987). For a compilation of popular and academic responses to this speech, see *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977-1095 (1987).

In an earlier and less publicized episode, Mr. Meese suggested that the executive branch might not deem itself bound by an adverse judicial ruling in a separation of powers dispute. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 889-90 (3d Cir.), *on reh'g*, 809 F.2d 979, 991-92 n.8 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988); see Waas & Toobin, *Meese's Power Grab*, NEW REPUBLIC, May 19, 1986, at 15.

282. The presidential oath is prescribed in U.S. CONST. art. II, § 1, cl. 7. The requirement that members of Congress (as well as federal judges and all state officials) pledge to "support this Constitution" appears in *id.* art. VI, cl. 3.

283. L. FISHER, *supra* note 279, at 233-34; Bessette & Tulis, *supra* note 65, at 11; Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975); Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 313-14 (1987).

284. *E.g.*, U.S. CONST. art. I, § 9 (prohibiting, *inter alia*, bills of attainder, ex post facto laws, expenditures not authorized by a duly enacted appropriations statute, and titles of nobility; and limiting the grounds for suspending habeas corpus); *id.* amend. I (prohibiting laws that establish religion or abridge freedom of religion, speech, press, and assembly); *id.* amend. V (prohibiting, *inter alia*, double jeopardy; self-incrimination; deprivation of life, liberty, or property without due process; and uncompensated takings of private property).

285. *E.g.*, *id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, § 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

286. The leading case is *Katzenbach v. Morgan*, 384 U.S. 641 (1966). For discussion of the role of the legislative branch in interpreting the fourteenth amendment, see L. TRIBE, *supra* note 206, § 5-14, at 334-50; Burt, *Miranda and Title II: A Morgantic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Ross, *supra* note 283.

287. U.S. CONST. art. III, § 2, cl. 1.

288. Some state courts do have the authority to issue advisory opinions. A prominent example is Massachusetts, where Governor Michael Dukakis's decision to veto a mandatory flag-salute law in response to the advice of his state's highest court, *Opinions of the Justices to the Governor*, 372 Mass. 874, 363 N.E.2d 251 (1977), became an unusually salient issue in the 1988 presidential campaign. See generally J. GERMOND & J. WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS?* 7-8, 160, 359, 460 (1989); Drew, *Letter from Washington*, NEW YORKER, Oct. 10, 1988, at 96, 96-97.

ond, only those with standing to sue may challenge the constitutionality of government policies. If too many persons are affected by a particular policy, no private party will have standing to litigate a generalized grievance.<sup>289</sup> Even if that obstacle is surmounted, other barriers to standing might well prevent the litigation of an appreciable number of separation of powers disputes.<sup>290</sup> Third, the Court has various devices to avoid deciding the merits of cases over which it does have jurisdiction.<sup>291</sup> In each of these situations, the absence of judicial resolution of the merits effectively requires members of Congress and the President to determine the constitutionality of governmental activities for themselves.

Finally, as a practical matter, Congress and the President already interpret the Constitution. That document fixes important political understandings that

289. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

The standing of members of Congress to litigate the validity of governmental activities remains unsettled. The Supreme Court expressly declined to address that issue in *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), and avoided the merits in a subsequent case in which the question was squarely presented, *Burke v. Barnes*, 479 U.S. 361 (1987). Most of the jurisprudence on this question has arisen in the United States Court of Appeals for the District of Columbia Circuit, which has recognized congressional standing in some cases. See, e.g., *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). The concept of congressional standing has been controversial even in that court. See, e.g., *Barnes*, 759 F.2d at 43-56 (Bork, J., dissenting); *Moore v. United States House of Representatives*, 733 F.2d 946, 957-61 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 469 U.S. 1106 (1985).

At the same time, the D.C. Circuit has limited congressional access to judicial relief under a doctrine known as "equitable discretion," which results in the dismissal of some cases in which the congressional plaintiff is found to have standing and where no other devices for avoiding the merits are available. See, e.g., *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983); *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); see generally McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981) (proposing equitable discretion doctrine as an avoidance device). This doctrine also has drawn withering criticism, see *Barnes*, 759 F.2d at 59-61 (Bork, J., dissenting); *Moore*, 733 F.2d at 961-64 (Scalia, J., concurring), and some members of the court who previously had applied the doctrine have expressed serious misgivings about it, see *Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir.), *cert. denied sub nom. Humphrey v. Brady*, 109 S. Ct. 491 (1988); *Melcher*, 836 F.2d at 565 n.4; *id.* at 565 (Edwards, J., concurring). For a comprehensive discussion, see Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. \_\_\_\_ (1990).

290. In order to establish standing, a plaintiff must satisfy a three-prong test of injury in fact, causation, and redressability. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge*, 454 U.S. at 472. The jurisprudence of standing has been notably erratic, but recent decisions have adopted a markedly restrictive approach. See, e.g., *Allen*, 468 U.S. 737; *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975). The commentary on this subject is voluminous. See, e.g., Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1986); Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980).

291. Among these avoidance techniques are the political question and ripeness doctrines. The former holds that the issue in dispute is inappropriate for judicial resolution at any time, whereas the latter views the controversy as prematurely presented to the courts.

The political question doctrine has been distinctly out of favor with the Supreme Court in recent decades. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 121-27 (1986); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 940-43 (1983); *United States v. Nixon*, 418 U.S. 683, 692-97 (1974); *Powell v. McCormack*, 395 U.S. 486, 518-49 (1969); *Baker v. Carr*, 369 U.S. 186, 217 (1962). But see *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring in the judgment); *Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973). Lower courts have made greater use of the doctrine during this period. See Mulhern, *supra* note 23, at 106-08 nn.25-31 (collecting cases).

The leading case on ripeness is *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). See generally Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987).

typically go unremarked because of their broad acceptance. For example, no controversy exists over the eligibility standards or the duration of terms for federal elected officials. Presidents Dwight Eisenhower and Ronald Reagan did not seek third terms because all concerned understood that the twenty-second amendment precluded them from doing so; Edward Kennedy did not seek his brother John's Senate seat in 1961 because article I made clear that a twenty-nine-year-old, no matter how prominent or well connected, could not hold the position. Similarly, despite the controversy over the legislative veto, no one questions that bills must satisfy the bicameralism and presentation requirements to become laws, or that the Senate must confirm ambassadors, federal judges, and other officers of the United States.<sup>292</sup> Indeed, during Watergate members of Congress from both parties believed that President Nixon's defiance of a Supreme Court ruling in the litigation over the White House tape recordings would both justify and assure his impeachment and removal from office, a conclusion for which no judicial precedent existed.<sup>293</sup> Thus, the question is not whether the political branches will interpret the Constitution but under what circumstances they will do so.

## 2. *The Benefits of Interbranch Constitutional Debate*

The preceding discussion demonstrated that legislative and executive evaluation of the constitutional issues raised in separation of powers disputes between Congress and the President is appropriate. This section further suggests that such consideration is desirable. To be sure, independent constitutional interpretation by nonjudicial officials holds out the prospect of disagreement between the political branches on fundamental issues. Although many modern commentators view interbranch conflict with distaste,<sup>294</sup> the Constitution was designed to facilitate debate among elected officials on important public questions. This debate might lead to stalemate, but it also could stimulate more thoughtful public policy. This prospect suggests that Congress and the President should be discouraged from relying too much upon the judiciary as arbiter of separation of powers disputes and encouraged to reach workable accommodations that do not contravene the constitutional text.

As noted earlier, the Constitution recognized the possibility that one branch would seek to encroach upon the power of another, thereby jeopardizing the core value of freedom upon which the new government rested.<sup>295</sup> To minimize this possibility, each branch was given sufficient power and incentives to resist attempted usurpations. Because the framers feared legislative aggrandizement,<sup>296</sup> they made Congress bicameral and gave the President a qualified veto.

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292. See Bessette & Tulis, *supra* note 65, at 9-10; Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414 (1985). The only exception to the statement in text concerns the President's power to make recess appointments when the Senate is not in session. See U.S. CONST. art. II, § 2, cl. 3.

293. See E. DREW, *supra* note 80, at 41, 43, 51, 283, 292; Bessette & Tulis, *supra* note 65, at 9.

294. N. POLSBY, CONGRESS AND THE PRESIDENCY 202 (4th ed. 1986). Professor Polsby is not one of those commentators. See *id.*

295. See *supra* notes 64-77 and accompanying text.

296. Perhaps the most famous expression of this concern is Madison's observation that "[i]n republican government, the legislative authority necessarily predominates." THE FEDERALIST No. 51, *supra* note 68, at 322.

At the same time, the unfortunate experience under the British made all concerned acutely aware of the dangers of unchecked executive power, which was "carefully limited" in article II.<sup>297</sup> Significantly, however, the Constitution did not explicitly define the respective powers of each branch, and its supporters discounted the value of "parchment barriers" against overreaching.<sup>298</sup> Despite the availability of judicial review,<sup>299</sup> Congress and the President were expected to rely primarily upon their own political self-defense mechanisms when inter-branch disputes arose.

In short, the framers did not contemplate an active judicial role in separation of powers disputes. This crude originalism cannot end the discussion, however. After all, the framers also created a system of limited government. Because the Constitution embodied liberty as one of its core values, a faithful adherent to the founding design might argue that the courts should police the vision of the framers by rigorously enforcing the separation of powers. This argument takes on added force in light of the vastly increased scale of federal activities compared with the role of the central government envisioned in the last decades of the eighteenth century.

Two responses to this claim are available. First, the Supreme Court in recent years has tried to give effect to the founding design. As Part II sought to demonstrate, the results of this enterprise have been unsatisfactory. An originalist might rejoin that these difficulties have arisen from the Court's failure to apply a strict separation principle with sufficient consistency. That point leads directly into the second response to the originalist position: The framers lacked a detailed vision of the institutional implications of the separation of powers doctrine and did not contemplate a regime of rigid formality in this field.<sup>300</sup> The absence of such a vision might help to explain the difficulties of the recent judicial opinions on this subject. Because the Constitution does not yield conclusive answers to these questions and because Congress and the President have both the resources and the incentive to defend their positions, disputes of this kind are appropriately addressed primarily in the political arena, with judicial recourse serving only as a last resort.

At bottom, these disputes involve questions about the role of government in American life. In general, those who advocate strict maintenance of interbranch boundaries believe in a comparatively limited federal role. Although the Supreme Court has dealt with the subject only obliquely,<sup>301</sup> several commentators

Madison also complained that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." THE FEDERALIST No. 48, at 309 (J. Madison) (C. Rossiter ed. 1961).

297. THE FEDERALIST No. 48, *supra* note 296, at 309. See also D. EPSTEIN, *supra* note 69, at 132.

298. THE FEDERALIST No. 48, *supra* note 296, at 308-09.

299. The question of the legitimacy and proper scope of judicial review is beyond the scope of this Article. See *supra* note 24. Suffice it to say that supporters of the Constitution argued that the courts would have the power to invalidate legislation. *E.g.*, THE FEDERALIST No. 78, at 466-69 (A. Hamilton) (C. Rossiter ed. 1961).

300. W. GWYN, *supra* note 46, at 128; Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212, 224, 239-42, 260-61 (1989); Shane, *supra* note 209, at 616-17.

301. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (separation of powers "provide[s] avenues for the operation of checks on the exercise of governmental power"); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (separation of powers operates to "define and limit the exercise of . . . federal powers").

have recognized the political implications of these conflicts. Rigid demarcation between the executive and legislative branches, according to this view, would make it more difficult for the federal government to act. A strong delegation doctrine would force Congress to make hard policy choices about contentious subjects; the more specific the statute must be, the greater the possibility that opponents could defeat it. The absence of the legislative veto would discourage Congress from authorizing agencies to promulgate regulations that could be overturned only through the regular legislative process with all its complexities and pitfalls. And giving the President unfettered removal authority and absolute control over all officials exercising executive power would make Congress less willing to permit agencies from which the legislature would be effectively insulated.<sup>302</sup> The political compromises leading to the creation of the Interstate Commerce Commission and the Federal Trade Commission suggest that this view is not entirely implausible.<sup>303</sup>

Whether or not rigorous adherence to separation of powers principles would reduce the federal role,<sup>304</sup> powerful legal arguments exist for a more flexible constitutional analysis in this field. Among them are the flexibility inherent in a Constitution which does not rigidly define the authority of the legislative and executive branches, the apparent pragmatism of the framers in addressing problems of administration, the wide (though not unlimited) latitude afforded to Congress under the "necessary and proper" clause to structure the government, and the twentieth-century breakdown of whatever earlier consensus had existed in favor of strictly limited government.<sup>305</sup> Moreover, wide public support remains for an enlarged federal role, as the difficulty of reducing the budget defi-

302. See, e.g., R. EPSTEIN, TAKINGS 16-17 (1985); Aranson, Gellhorn & Robinson, *supra* note 146, at 63-64; Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153, 156 (1987); Gellhorn, *Returning to First Principles*, 36 AM. U.L. REV. 345, 349 (1987).

303. See R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 177-87 (1941) (ICC); S. SKOWRONEK, BUILDING A NEW AMERICAN STATE 138-50 (1982) (FTC).

304. It is difficult to assess the accuracy of this hypothesis. In *Chadha*, the Supreme Court held that statutes containing unconstitutional legislative vetoes could remain in force if the objectionable veto provisions were severable. *Chadha*, 462 U.S. at 931-32. The Court endorsed a severability criterion that would uphold a partially unconstitutional statute "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932).

Applying that standard reveals the difficulty of predicting what Congress would do under a stricter separation of powers regime. The *Chadha* majority found the legislative veto provision severable from the remainder of the Immigration and Nationality Act. *Chadha*, 462 U.S. at 932-35. Justice Rehnquist, after examining the identical historical record, found that it was not. *Id.* at 1013-16 (Rehnquist, J., dissenting). Similarly, the Court summarily affirmed a finding of severability in one of *Chadha*'s companion cases despite strong indications that the measure in question would not have been enacted without the veto. See *Consumer Energy Council v. FERC*, 673 F.2d 425, 440-45 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983). The evidence to the contrary included protracted congressional consideration of the statute, which passed the House by only one vote after its proponents emphasized the availability of legislative vetoes of objectionable agency rules. See Miller, *supra* note 165, at 89 n.175; Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 447 (1989).

305. Perhaps the leading academic advocates of this perspective have been Professors Strauss and Sunstein. See, e.g., Strauss, *supra* note 23; Sunstein, *supra* note 3. On the "necessary and proper" clause, see Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102.

cit during the 1980s attests.<sup>306</sup> In these circumstances, a sustained effort to invalidate government programs on separation of powers grounds could threaten a political crisis comparable to the one that arose from the Supreme Court's overturning many of the early New Deal reforms.<sup>307</sup>

The optimum solution to this conflict is for partisans of the competing approaches to argue over their political disagreements in political settings. This solution has several advantages over reliance upon the courts. First, the difficulties of producing consistent, principled answers to these problems suggest that the concept of separation of powers provides less a rule of decision than a heuristic concept for structuring analysis.<sup>308</sup>

Second, interbranch negotiation rather than judicial determination acknowledges the political contingencies involved in many separation of powers disputes. As noted above, supporters of a strong doctrine in this field traditionally have also endorsed limited government. For that reason, advocates of a more activist state generally have denigrated the separation principle as an anachronism at best and an obstacle to essential reforms at worst.<sup>309</sup> This pattern has not always existed, however. For example, in the 1970s the principal exponents of legislative authority as a means of recapturing the proper interbranch allocation of power supported a greater federal role; the defenders of expansive presidential prerogatives favored a smaller central government.<sup>310</sup> Moreover, the leading separation of powers cases in recent years have been advanced not by advocates of smaller government but by champions of a more aggressive federal role. The challenges to the constitutionality of the legislative veto in *Chadha*, the deficit-reduction mechanism of Gramm-Rudman-Hollings in *Bowsher*, and the Sentencing Commission in *Mistretta* were brought by advocates of more vigorous government regulation. These exponents of a more activist state believe that strict adherence to separation of powers principles will reduce the influence of industry, trade, and other economic special interests and thereby facilitate the development and implementation of effective programs to

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306. See R. EISNER, HOW REAL IS THE FEDERAL DEFICIT? 160-61 (1986); D. STOCKMAN, THE TRIUMPH OF POLITICS 8-9, 376-77, 390-92 (1986).

307. Political prediction is a notoriously risky affair. Nevertheless, the intense opposition to the failed Supreme Court nomination of Robert Bork, which reflected concern over the threat of significant changes in constitutional law, suggests that a separation of powers jurisprudence that invalidated many environmental, health, and safety programs would stimulate widespread controversy. Even Professor Epstein, a leading academic exponent of limited government, recognizes the difficulty of wholesale judicial reversal of objectionable legal doctrine. R. EPSTEIN, *supra* note 302, at 306-07, 329; Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387, 1454-55 (1987).

308. See Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 602 (1986).

309. For modern expositions of this view, see, e.g., J. BURNS, THE DEADLOCK OF DEMOCRACY (1963); Cutler, *To Form a Government*, 59 FOREIGN AFF. 126 (1980). Similar conceptions undergirded the Progressive critique of American politics developed most conspicuously by Woodrow Wilson. See J. TULIS, *supra* note 66, at 119-24; see also Mahoney, *A Newer Science of Politics: The Federalist and American Political Science in the Progressive Era*, in *SAVING THE REVOLUTION*, *supra* note 64, at 250, 251-61.

310. Several statutes passed during this period exemplify Congress' efforts to reassert its powers. See, e.g., Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C. (1988)); War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1982)). For a skeptical view of these efforts, see E. DREW, *supra* note 80, at 9-10.

protect public health and safety.<sup>311</sup> Thus, committed advocates of contrasting substantive political visions might find it advantageous not to have separation of powers disputes resolved by the courts because short-term judicial victories for one side might have sobering longer-term implications when the other side controls the government.<sup>312</sup>

Third, and most significantly, reliance upon the political process to resolve most separation of powers disputes recognizes that an effective government requires a degree of interbranch comity that is inconsistent with frequent resort to the judicial process. Despite the importance of "uninhibited, robust, and wide-open" debate on public issues,<sup>313</sup> our system rests upon unexpressed understandings and an uncodified but shared sense of limits.<sup>314</sup> Understandings are unexpressed and the sense of limits is shared but uncodified because participants in the political process recognize the need to avoid open warfare and because both structural and institutional factors dampen the inevitable conflicts that do arise.<sup>315</sup>

Judicial opinions, on the other hand, raise the stakes of any particular conflict by clearly identifying winners and losers through formal explanations that presumably will control other analytically related disputes.<sup>316</sup> The prospect of litigation creates incentives to assert maximum positions for short-term advantage in court and to characterize opposing views as illegitimate.<sup>317</sup> In situations where the Constitution provides no determinative answer, Congress and the President would do better to seek to resolve their separation of powers disputes by negotiating them in good faith than to depend upon the judiciary as other than a last resort. Negotiated resolutions of specific disagreements can decide smaller questions in ways that create a foundation for similarly informal arrangements of future interbranch differences while recognizing the contrasting interests of the governmental institutions involved.<sup>318</sup>

311. All three of these cases were argued in the Supreme Court by Alan Morrison, director of litigation at Public Citizen, Inc., a public-interest organization founded by Ralph Nader that favors more vigorous government regulation. Morrison agreed to take these cases for the reasons described in the text. B. CRAIG, *supra* note 112, at 61-65; Elliott, *supra* note 159, at 319 n.12.

312. For example, a conservative journalist recently warned that admirers of Ronald Reagan who advocate a strong presidency as a bulwark against intrusive actions by an unsympathetic Congress should consider the implications of giving similar powers to a liberal chief executive when political fashions change. Francis, *Imperial Conservatives?*, NAT'L REV., Aug. 4, 1989, at 37.

313. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

314. See, e.g., E. DREW, *supra* note 80, at 9; Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976). This is a lesson that some notably unsuccessful recent Presidents, especially Richard Nixon and Jimmy Carter, failed to learn. N. POLSBY, *supra* note 294, at 45, 49-50, 66.

315. See N. POLSBY, *supra* note 294, at 206-09.

316. R. NAGEL, *CONSTITUTIONAL CULTURES* 18-22 (1989). Professor Nagel probably would not agree with the suggestion that separation of powers disputes are generally better handled outside the judicial system. See Nagel, *A Comment on the Rule of Law Model of Separation of Powers*, 30 WM. & MARY L. REV. 355, 360-62 (1989) (criticizing functionalist arguments supporting the result in *Morrison*); but see *id.* at 363-64 (warning against the dangers of "[d]octrinaire enforcement of the theory of separation of powers").

317. R. NAGEL, *supra* note 316, at 20-21; Shane, *Legal Disagreement in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 464-65, 492, 501-14 (1987).

318. The procedural details for accomplishing interbranch negotiations are beyond the scope of this article. For a suggested framework for handling executive privilege disputes, see Shane, *supra* note 317, at 516-40.



Some might object to this approach on the ground that it will undermine the rule of law by facilitating interbranch power grabs. Yet our political history teaches that "an excessive force in one direction is apt to produce a corresponding counterforce."<sup>319</sup> This is the lesson not only of the controversies over the Tenure of Office Act and of Watergate, but also of most of our political history. Overreaching by one of the political branches typically begets reassertion by the other.<sup>320</sup> To be sure, the relative powers of Congress and the President would change over time if interbranch disputes were generally negotiated rather than litigated,<sup>321</sup> but the relative powers of the political branches have changed dramatically anyway.<sup>322</sup> In any event, the argument here does not preclude judicial resolution of separation of powers issues. Instead, it simply urges Congress and the President to avoid excessive reliance upon that practice. Courts would still be available to address properly presented legal claims. The point is only that most such claims are more appropriately addressed in nonjudicial forums.<sup>323</sup>

319. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 20 (1974).

320. Diver, *Presidential Powers*, 36 AM. U.L. REV. 519, 532 (1987); Karl, *supra* note 110, at 34; Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U.L. REV. 391, 405-06 (1987).

Indeed, the reassertion itself may represent an alternative form of overreaching in the absence of the necessary interbranch comity. For example, Congress became enamored of the legislative veto as a means for controlling substantive administrative rules during the Nixon administration, when the relationship between the legislative and executive branches was especially bitter. Approximately 80% of the more than 200 bills containing legislative vetoes enacted between 1950 and 1976 were approved from 1970 onward. N. POLSBY, *supra* note 294, at 237 n.122 (citing Cooper & Hurley, *The Legislative Veto: A Policy Analysis*, 10 CONG. & PRESIDENCY 1 (1983)).

321. See R. NAGEL, *supra* note 316, at 22.

322. In both relative and absolute terms, the presidency has become considerably stronger than Congress. Except for foreign affairs, early Presidents played a comparatively minor role. Andrew Jackson seized the initiative from Congress on a number of fronts, generating intense controversy in the process. Jackson was followed by a series of weaker chief executives until Abraham Lincoln, who held office during a period of unprecedented national crisis. See generally E. HARGROVE & M. NELSON, *PRESIDENTS, POLITICS, AND POLICY* 45-50 (1984).

Since the Civil War, the federal government has undertaken vastly increased responsibilities. In the latter part of the nineteenth century, Congress predominated, often with presidential acquiescence. The twentieth century has seen cycles of more active executive leadership interspersed with periods of congressional ascendancy. *Id.* at 49-50; B. KARL, *EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL* 30-31, 34-35, 166-68, 186-87 (1963); H. LASKI, *THE AMERICAN PRESIDENCY* 127-37 (1940). The balance began moving toward the White House under Theodore Roosevelt and Woodrow Wilson, with a less activist interlude between them under William Howard Taft. Wilson was succeeded by weaker Presidents until Franklin D. Roosevelt seemingly altered the congressional-executive balance permanently. The perceived excesses of subsequent Presidents, particularly Lyndon Johnson and Richard Nixon, in turn gave rise to fears of executive domination. Indeed, some of the most vocal critics of executive power had been celebrants of the rise of the presidency at the expense of Congress in earlier years. See, e.g., A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). The difficulties of Gerald Ford and Jimmy Carter, by contrast, prompted many observers to wonder whether the institution of the presidency had become too weak, a concern that has been much subordinated by the apparent success of Ronald Reagan. See, e.g., Greenstein, *The Need for an Early Appraisal of the Reagan Presidency*, in *THE REAGAN PRESIDENCY* 1, 6-7 (F. Greenstein ed. 1983); Reeves, *The Ideological Election*, N.Y. Times, Feb. 19, 1984, § 6 (Magazine), at 26, 29. But see Lowi, *Ronald Reagan—Revolutionary?*, in *THE REAGAN PRESIDENCY AND THE GOVERNING OF AMERICA* 29, 47-48 (L. Salamon & M. Lund eds. 1985).

323. An episode of a different sort illustrates the point. The apparent success of negative campaigning by independent organizations such as the National Conservative Political Action Committee in 1980 enabled some targets of NCPAC attacks in 1982 to generate sympathy and made it easier for them to raise campaign funds. A striking example occurred in Maryland, where the Republican challenger to Senator Paul Sarbanes pleaded unsuccessfully with the organization to tone down its advertisements or withdraw from the state altogether. See

### C. *Bringing Political Judgment Back In: The Need for Wisdom*

Forbearing to litigate interbranch separation of powers disputes offers one final benefit. Because participants in such disputes would have less incentive to jockey for advantage in judicial proceedings, they might devote more attention to the wisdom of controversial proposals. Courts determine only the constitutionality, not the wisdom, of a statute or practice.<sup>324</sup> Professor Nathanson reminded us that "the debate over . . . desirability . . . need not be conducted entirely on the constitutional level, and that a Supreme Court decision rejecting a constitutional challenge should not be interpreted as a vindication of . . . practical value . . . ."<sup>325</sup> This reminder has particular relevance to the policy innovations that gave rise to the recent separation of powers jurisprudence. Some of those innovations, whatever their constitutionality, were of dubious wisdom. That mundane point was frequently overlooked in the loftier legal and academic debate over *Chadha*, *Bowsher*, *Morrison*, and other Supreme Court cases.

Consider the legislative veto. That device quite properly has been criticized for skewing the administrative process in subtle but potentially important ways. In particular, the legislative veto tended to bias the process against regulation by giving members of Congress the opportunity to reject a specific proposal without having to weigh alternatives, confer advantages upon economically powerful trade and industry groups which have the resources to oppose regulations both at the agency and on Capitol Hill, encourage broad delegations, and increase the risk of political impasse between regulators and legislators.<sup>326</sup> Whatever the constitutionality of the veto, these characteristics provide potentially powerful arguments against the desirability of the device as a means of controlling administrative discretion. Those arguments do not depend upon hypothetical comparisons with other congressional devices for preventing agency overreaching; they address the wisdom of the legislative veto on its own terms.<sup>327</sup> Moreover, if the legislative veto were applied as broadly as many of its

Leatherberry, *Rethinking Regulation of Independent Expenditures by PACs*, 35 CASE W. RES. L. REV. 13, 27 & nn.81-82 (1984).

This episode suggests that the adverse impact of a Supreme Court ruling upholding the constitutionality of the so-called regulatory legislative veto might well have been less than veto opponents feared. The principal beneficiaries of such a ruling would have been politically well-connected interests such as used-car dealers and funeral directors, whose generous campaign contributions were widely noted. Such groups probably would have overplayed their hand before long, thereby generating a political backlash that would have made it more difficult for those groups to prevail in Congress because many legislators would fear criticism for having been "bought" by special interest groups.

324. See, e.g., *Bowen v. Roy*, 476 U.S. 693, 712 (1986); *Clements v. Fashing*, 457 U.S. 957, 973 (1982); *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 550-51 (1949); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447-48 (1934).

325. Nathanson, *supra* note 110, at 1091. Professor Nathanson made this point in a discussion of the legislative veto, but his suggestion apparently was too subtle for some readers who characterized his reluctance to invalidate the veto as showing his "generally favorable" disposition toward its desirability. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 976 n.12 (1983) (White, J., dissenting); Martin, *supra* note 134, at 255 n.5.

326. See *supra* text accompanying notes 110 & 134.

327. See *supra* note 142 and accompanying text.

enthusiasts proposed, Congress could quickly find itself overwhelmed by the task of reviewing agency regulations.<sup>328</sup> Even if it is constitutional, then, the legislative veto is a bad idea that would create more problems than it would solve.

Similarly, the abstract debate over the Comptroller General's alleged subservience to Congress diverted attention from the fundamental flaws of Gramm-Rudman-Hollings as a means for reducing the budget deficit. At the most basic level, the statute rests upon controversial economic assumptions concerning the adverse effects of deficits.<sup>329</sup> Even accepting the underlying premise that current budgetary shortfalls have reached unacceptable levels, however, Gramm-Rudman-Hollings had numerous defects. First, it contained no sanction if the federal government actually exceeded the annual deficit limit; the statutory targets applied only to the projected deficit at the beginning of the fiscal year.<sup>330</sup> More significantly, nothing in the law required that the projected deficit be based upon realistic economic assumptions or that the political branches avoid the most blatant accounting gimmicks to avoid triggering the sequestration process. Consequently, the measures taken to reduce the projected deficit frequently have strained credulity.<sup>331</sup> These defects do not necessarily mean that Gramm-Rudman-Hollings should have been defeated. Nevertheless, these were the real problems presented by the statute. The role of the Comptroller General was peripheral.

Finally, the litigation over the constitutionality of the independent counsel obscured other troublesome questions about the Ethics in Government Act. First, by requiring an outside investigation of credible allegations of criminal wrongdoing against high-level executive officials, the statute presumes that the

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328. This daunting prospect played an important role in the defeat of bills that would have created so-called generic legislative vetoes in the years before the *Chadha* decision. See B. CRAIG, *supra* note 112, at 49-50, 56-57.

At the same time, neither the Supreme Court's invalidation of the legislative veto in *Chadha* nor the general undesirability of the device has prevented its reappearance in a large number of statutes since 1983. Congress has enacted more than 100 such provisions despite the seemingly unambiguous judicial condemnation of the practice. Almost all of these new vetoes appear in appropriations bills and give the power to disapprove proposed expenditures to committees or even to subcommittees. Despite presidential objections, the executive branch has acquiesced in these arrangements because they afford useful flexibility. See L. FISHER, *THE POLITICS OF SHARED POWER* 102-03 (2d ed. 1987); Strauss, *supra* note 304, at 446 n.63.

329. Gramm-Rudman-Hollings rests upon the notion that deficits are unmitigated evils. Many economists, however, reject this concept and believe that a single-minded campaign to reduce the deficit can do more harm than good. See, e.g., R. EISNER, *supra* note 306, at 161-64; Stith, *supra* note 150, at 638-39.

330. Kuttner, *The Fudge Factor*, *NEW REPUBLIC*, June 19, 1989, at 22, 23. Moreover, both the original version of the statute and the 1987 revisions passed in response to the ruling in *Bowsher* specifically limited the size of any sequestration order for the fiscal year during which these measures were enacted, even though these provisions prevented attainment of the deficit target for those years. See Stith, *supra* note 150, at 629-30.

331. Among the devices that have been used to bring projected deficits into compliance with Gramm-Rudman-Hollings are postponing payments from the last day of one fiscal year to the first day of the following one, assuming higher rates of economic growth and lower rates of inflation than predicted by reputable private forecasters, selling off government assets, and removing items likely to contribute substantially to the deficit (such as the savings-and-loan relief program and, in the current year, the Postal Service) "off budget" in whole or part. B. FRIEDMAN, *DAY OF RECKONING* 278-79 (1988); Domenici, *The Gramm-Rudman-Hollings Budget Process: An Act in Legislative Futility?*, 25 *HARV. J. ON LEGIS.* 537, 540 (1988); Downey, *The Futility of Gramm-Rudman-Hollings*, 25 *HARV. J. ON LEGIS.* 545, 548-49 (1988); Drew, *Letter from Washington*, *NEW YORKER*, May 15, 1989, at 87, 91; Friedman, *A Deficit of Courage*, *N.Y. REV. BOOKS*, June 1, 1989, at 23, 26; Kuttner, *supra* note 330, at 22-23.

professional staff of the Department of Justice is incapable of dispassionately handling sensitive cases. To be sure, the Department performed inadequately during Watergate. Ironically, the Ethics Act, which was passed to restore public confidence in government, subtly undermines that goal by the presumption of governmental incompetence upon which the independent counsel provision rests. Perhaps this unintended consequence does not outweigh the benefits of avoiding perceived conflicts of interest, but that question apparently got lost in the constitutional rhetoric. Second, despite its name, the Ethics Act emphasizes criminality rather than ethical impropriety. Accordingly, targets of investigations by independent counsel routinely proclaim themselves vindicated if the counsel does not seek an indictment.<sup>332</sup> Surely we should expect public officials to aspire to higher standards of conduct than "Never Been Indicted."<sup>333</sup>

#### IV. CONCLUSION

The Constitution is more than "what the judges say it is."<sup>334</sup> That document provides the framework for our government and our politics. It is, in short, an important part of our culture as well as of our law.<sup>335</sup> Accordingly, the Constitution derives its meaning not only from judicial interpretation but also from shared understandings that emerge from governance and politics. This fact suggests that not every dispute over the appropriate division of authority between Congress and the President requires judicial resolution. Instead, the political branches themselves have resources and obligations to develop their own views and to fashion accommodations of their sometimes conflicting interests. Moreover, just as the Constitution might not apply in a determinative way to particular interbranch disputes, sometimes the wisdom of a proposed statute or policy is more important than its constitutionality. Both politicians and citizens too often forget this mundane point.

This view of the separation of powers assumes a minimum level of interbranch comity. The present political situation affords few grounds for optimism. For most of the past generation, we have had a divided federal government, with one party controlling the legislative branch and the other controlling the executive. In addition, each branch has developed sophisticated legal staffs which seek vigilantly to safeguard their constitutional prerogatives.<sup>336</sup> For these and other reasons, powerful incentives exist for conflict rather than coopera-

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332. Carter, *supra* note 199, at 139. Not only the targets of such investigations adopt this rhetorical posture; Presidents do, too. See The President's News Conference, 24 WEEKLY COMP. PRES. DOCS. 255, 258 (1988) ("no attention is paid to the fact of how many [targets of independent counsel investigations], when it actually came to trial, [were] found totally to be innocent").

333. C. TRILLIN, *The Motto-Maker's Art*, in IF YOU CAN'T SAY SOMETHING NICE 11, 11-12, 14 (1987). See also Carter, *supra* note 199, at 139.

334. L. FISHER, *supra* note 279, at 245 (quoting ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 139 (1908)).

335. See S. LEVINSON, *CONSTITUTIONAL FAITH* (1988).

336. See Miller, *supra* note 79, at 412-26.

tion.<sup>337</sup> Even when those obstacles are overcome, the quality of interbranch constitutional debate might disappoint aficionados of judicial interpretation.<sup>338</sup>

Regardless of the current outlook, however, the approach suggested here comports with the constitutional design for a government characterized by both liberty and efficiency. The unlikelihood that this approach will be adopted simply proves that the Constitution affords the necessary, but not sufficient, conditions for such a government.<sup>339</sup>

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337. The unwillingness or inability of the political branches to accommodate their conflicting budgetary priorities led to passage of Gramm-Rudman-Hollings with all of its inadequacies. See R. EISNER, *supra* note 306, at 158-60; C. WEBBER & A. WILDAVSKY, *A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD* 610-12 (1986); Schneider, *The Political Legacy of the Reagan Years*, in *THE REAGAN LEGACY* 51, 85 (S. Blumenthal & T. Edsall eds. 1988).

338. See, e.g., Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 *GA. L. REV.* 57, 98-101 (1986); Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 *N.C.L. REV.* 587 (1983).

339. See D. MOYNIHAN, *The "New Science of Politics" and the Old Art of Governing*, in *CAME THE REVOLUTION* 301, 307 (1988); J. TULIS, *supra* note 66, at 42.

