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CONGRESS, THE PRESIDENT, AND THE SEPARATION OF POWERS: RETHINKING THE VALUE OF LITIGATION

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. Designed to promote both liberty and efficiency, this structure affords ample opportunity for interbranch conflict. Consistent with Tocqueville's famous observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,"¹ the Supreme Court recently has addressed an unusually large number of disputes concerning the respective powers of Congress and the President.² 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.³

The renewed attention to the problem of government structure was largely stimulated by three cases that arose from the Watergate affair. The first,

¹A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (P. Bradley ed. 1945).
²The 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. CFTC v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Another line of cases addresses the problem of federalism and the role of the states in our constitutional system. E.g., National League of Cities v. Usery, 426 U.S. 833 (1976), overruled, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
United States v. Nixon,4 upheld the validity of a subpoena for tape recordings of presidential conversations relating to the illegal entry into the headquarters of the Democratic National Committee, a ruling that led ineluctably to Mr. Nixon's resignation from office two weeks later. The next case, Buckley v. Valeo,5 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,6 rejected a challenge to the constitutionality of a statute depriving Mr. Nixon of control over his presidential papers.

Increasingly frequent separation of powers litigation has not been simply an artifact of Watergate, however. Interbranch conflicts occupied a central place on the Court's docket during the 1980s. Among the more notable cases were INS v. Chadha,7 which invalidated the legislative veto; Bousher v. Synar,8 which struck down the central feature of the original Gramm-Rudman-Hollings Act; and Morrison v. Olson,9 which upheld the independent counsel provisions of the Ethics in Government Act.10

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

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5 424 U.S. 1 (1976) (per curiam).
10 The Court also decided some less publicized separation of powers cases during this period. See, e.g., Skinner v. Mid-America Pipeline, 490 U.S. 212 (1989) (upholding user fees imposed upon pipeline operators by Secretary of Transportation); Mistretta v. United States, 488 U.S. 351 (1989) (upholding validity of sentencing guidelines promulgated by United States Sentencing Commission).

in fact" scrutiny in equal protection cases. On other occasions the Court uses a more functional approach focusing upon checks and balances. During the 1980s, the selection of the analytical method determined the outcome of every legislative-executive controversy. The inconsistencies in outcomes and methodology are hardly unique to separation of powers problems, 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 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; 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, 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. 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.

Similarly, the judiciary has served as a bystander throughout the controversy over the War Powers Resolution. Congress passed that measure in 1973 to prevent a repetition of what was widely regarded as the unilateral

14The 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. Trevor, Andrew Johnson 330-31 (1989).
executive commitment of American military forces to the war in Southeast Asia. No President has accepted its validity, although several have submitted reports to Congress in apparent compliance with its terms. At the same time, the legislative branch has scrupulously avoided invocation of the Resolution in every situation in which it seemed to apply, including the Persian Gulf conflict. Court rulings have neither undermined this measure nor stimulated recent proposals to amend it.

Finally, Watergate itself suggests the limits of judicial review in separation of powers disputes between the political branches. Although the Supreme Court decision in the tapes case led directly to President Nixon's resignation, the judicial pronouncement was not the only factor in his departure from office. The House Judiciary Committee was conducting a simultaneous 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 by itself probably would have led to the same denouement.

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 opportunities 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

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

deciding constitutional conflicts between Congress and the President. This approach would require substantial revision of the political question doctrine 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 fashion workable solutions that would promote both free and responsible government.

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, where the party asserting a constitutional violation frequently lacks meaningful access to the political process as a means of self-defense.

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," but giving precise content to

22J. Choper, Judicial Review and the National Political Process 263 (1980); see id. at 260-379.
24Analogous reasoning applies to interbranch controversies involving the federal judiciary. Many such controversies implicate concerns of individual rights. Moreover, the judicial branch does not participate in the give-and-take of the political process as do the legislative and executive branches.

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, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 15-17 (1988). Even if these criticisms understate the protections that the states enjoy in national politics, see Hero, The U.S. Congress and American Federalism: Are 'Subnational' Governments Protected?, 42 W. POL. Q. 95 (1989), it remains true that the states do not participate directly in the federal government. By contrast, Congress and the President are the principal actors in a broad array of federal activities.

this principle has not proved easy. At times it has been said to prevent tyranny, at others to promote workable government.\(^26\)

The Constitutional Convention evaded the apparent conflict between liberty and efficiency by means of a novel attempt to accommodate both goals.\(^27\) The framers established a government of separated powers assigned respectively to legislative, executive, and judicial branches.\(^28\) In doing so, however, they 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,\(^29\) 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.\(^30\) 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.\(^31\) Similarly, the President was designated as Commander-in-Chief of the armed forces,\(^32\) but only Congress could declare war.\(^33\) The President gained the power to make

\(^26\)Compare Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("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.") with Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

\(^27\)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, 718-20, 721-22 (1984), and liberty, see Gwyn, supra, at 18-23, 40-43; M. Vile, Constitutionalism and the Separation of Powers 61-65 (1967), other rationales included the rule of law, see 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.

\(^28\)This new scheme directly addressed two of the major problems of the Articles of Confederation. First, the Constitution gave the federal government explicit authority to tax and to regulate interstate and foreign commerce. U.S. Const. art. I, § 8, cl. 1. Second, the new charter created a unitary executive. Id. art. II, § 1, cl. 1. 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. 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 . . . ." Id. art. I, § 1. Later, Congress is explicitly granted certain authority, id. § 8, and forbidden to undertake other actions, id. § 9. These restrictions upon central authority suggest an effort to reduce the prospect of tyranny.

\(^29\)Vile, supra note 27, at 13-18.

\(^30\)Id. at 18. Madison explained 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.

\(^31\)U.S. Const. art. I, § 7, cl. 2.

\(^32\)Id. art. II, § 2, cl. 1.

\(^33\)Id. art. I, § 8, cl. 11.
treaties, but only with the advice and consent of a supermajority of the Senate. The President also would appoint federal officers, but the Senate once again had to give its advice and consent.

Of course, the blending of powers in the Constitution greatly enhanced the possibilities of conflict 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." They therefore established a system designed to prevent overreaching by one branch at the expense of another and of liberty. Instead of relying upon rigid functional boundaries, the Constitution sought to provide officials of each branch with "the necessary constitutional means and personal motives to resist encroachments of the others." To prevent overreaching, therefore, "[a]mbition must be made to counteract ambition." These ground rules would structure interbranch conflict, and would do so in ways that increased the likelihood of beneficial outcomes.

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. Nevertheless, many supported some such right as a means of protecting the executive from legislative encroach-

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59 Id. art. II, § 2, cl. 2.
60 Id.
63 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 Epstein, supra note 37, at 127; White, supra note 37, at 103.
64 The Federalist No. 51, supra note 36, at 321-22.
65 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. White, supra note 37, at 98.
ment. Because the President might refrain from exercising an absolute veto for fear of being labeled a despot, 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.

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. That absence is not dispositive. After all, the Constitution does not expressly provide for judicial review, an institution dating to the earliest years of the Republic. Nevertheless, the structure of the Constitution and the traditional arguments supporting judicial review suggest a comparatively modest role for the courts in resolving separation of powers disputes between the political branches. Unlike the claimants in individual rights and perhaps also federalism disputes, 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.

II. THE DIFFICULTY OF RECONCILING THE CASES

The recent Supreme Court decisions addressing separation of powers disputes between the legislative and executive branches have employed dis-

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6 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. Spitzer, supra note 42, at 21; Storing, supra note 41, at 61.

7 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 36, at 323; Spitzer, supra note 42, at 12.

8 The Federalist No. 73, supra note 43, at 444-46; Spitzer, supra note 42, at 17-20.

9 Epstein, supra note 37, at 140.

10 This article focuses upon the utility rather than the legitimacy of judicial review of separation of powers disputes between the legislative and executive branches of the federal government. The legitimacy of judicial review as a general proposition is beyond the scope of the present discussion. The literature on that topic is so large that a disinterested observer "might well conclude that today this is not just the first but the only issue on the agenda of constitutional scholars." Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1931, 1931 (1988). 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).

11 See supra note 24 and accompanying text.
tinctive 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 determined the outcome of every case decided during the 1980s.\textsuperscript{49} Despite the existence of parallel lines of cases, the Court has failed almost completely even to acknowledge its contrasting methodologies in separation of powers disputes, much less explain how or why it chose which methodology in any particular case.\textsuperscript{50}

Several recent decisions have suggested that the key to understanding the differing outcomes is whether one branch has sought to aggrandize its power at the expense of another.\textsuperscript{51} Unfortunately, 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.\textsuperscript{52}

Consider, for example, \textit{Bowsher v. Synar}\textsuperscript{53} and \textit{CFTC v. Schor},\textsuperscript{54} which were decided on the same day. \textit{Bowsher} applied formalist reasoning to invalidate an arrangement under which an official supposedly subservient to Congress was given authority to impose spending reductions that otherwise would have been inapplicable.\textsuperscript{55} The sole exception to this pattern was \textit{Buckley v. Valeo}, 424 U.S. 1, 120-41 (1976) (per curiam), 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.\textsuperscript{56}


\textsuperscript{51}Mistretta, 488 U.S. at 381-83; \textit{Morrison}, 487 U.S. at 693; \textit{Schor}, 478 U.S. at 856-57.


\textsuperscript{53}478 U.S. 714 (1986).

\textsuperscript{54}478 U.S. 833 (1986).
have been directed by the President. Schor, by contrast, used a functionalist analysis to uphold an arrangement under which an administrative agency was given authority to decide certain common law claims that otherwise would have been resolved by the courts. The Court tried to distinguish the two cases on the ground that only Bowsher involved aggrandizement by one branch at the expense of another.\footnote{ld. at 856-57.}

This distinction is not persuasive. Even if Congress did not expressly usurp judicial power in Schor,\footnote{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." ld. at 836. Members of the legislative branch often regard independent agencies as creatures of Congress. Miller, Independent Agencies, 1986 SUP. CT. REV. 41, 63-64. From this perspective, Schor might indeed involve an attempt at congressional aggrandizement of authority at the expense of another branch.} it left the judiciary with a smaller proportion of federal power than that branch otherwise would have had. By the same token, the statute at issue in Bowsher allowed Congress, by passing a deficit-reduction measure over a presidential veto, to 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,\footnote{Bowsher, 478 U.S. at 730. For a critical analysis of the assumption that the procedure for removing the Comptroller General rendered that official subservient to Congress, see Entin, supra note 15, at 759-62.} 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 other recent decisions also involved reallocations of authority comparable to that rejected in Bowsher.\footnote{In Skinner v. Mid-America Pipeline, 490 U.S. 212 (1989), the executive branch gained the power to impose user fees that otherwise would have rested with Congress. In Mistretta v. United States, 488 U.S. 361 (1989), the judicial branch received the power to determine the permissible range of criminal sentences, authority that otherwise belonged to Congress. In Morrison v. Olson, 487 U.S. 654 (1988), the judicial branch obtained authority over law enforcement that otherwise would have been exercised by the executive. Even if characterized as congressional giveaways rather than executive or judicial usurpations, the arrangements in these two cases changed the interbranch balance of power. 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.}

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.\footnote{E.g., Krent, supra note 52, at 1256-58, 1273-98.} Those adhering to a 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 underlying structural principles of the Constitution.\footnote{E.g., Strauss, supra note 52, at 517-21; Sunstein, supra note 3, at 495-96.} Despite the impressive talents of their proponents, these theories...
are problematic. For example, some do not in fact account for the outcome of all of the recent separation of powers cases. 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." Thus, this approach may be "more effective as a means of organizing debate than as a rule for deciding cases."

The difficulty of reconciling the cases arises less from the idiosyncrasies or intellectual deficiencies of judges than from the intractable nature of the subject. No unitary approach to this subject can take account of its logical and empirical complexities. 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. 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. 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

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61 Professor Krent, a formalist, and Professor Pierce, a functionalist, both found the Sentencing Commission unconstitutional under their theories. Krent, supra note 52, at 1311-16; Pierce, Morrison v. Olson, Separation of Powers, and the Structure of Government, 1988 SUP. CT. REV. 1, 36. The Court, on the other hand, upheld the validity of the Sentencing Commission in Mistretta. 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, at 97.

62 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, The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar, 55 GEO. WASH. L. REV. 441, 479 (1987).

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, probably the leading academic functionalist, 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 52, at 520; see id. at 498-99, 519-21.

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


65 Choper, supra note 22, at 263; see id. at 260-379.

66 Id. at 131-40, 156-70.

67 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 24, at 17 n.101 (collecting criticisms of this aspect of Choper's reasoning).
principled decisions are difficult to construct and so basic a question as the proper method of analysis remains unpredictable. The suggestion of judicial deference or 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.68 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 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 v. Valeo69 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.70 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.71 Parts III and IV examine the reasons for this caution.

III. 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 constitu-

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68See, e.g., Gifford, supra note 62, at 447-48; Sunstein, supra note 3, at 494-95.
70This concern recently led a lower court to invalidate the method for appointing the first head of the agency charged with implementing reforms in the savings-and-loan industry. That court explained that "[t]he President and the Congress, whether alone or together, cannot decide to circumvent the Constitution's requirements." Olympic Fed. Savings & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1193 n.9 (D.D.C.), appeal dismissed, 903 F.2d 837 (D.C. Cir. 1990).
tionality 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 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. As to the second, 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.

The abhorrence of interbranch conflict also reflects a very different view of the process of government than the one embodied in 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.

A. Constitutional Interpretation by the Political Branches

The Supreme Court determined at an early date that the judicial branch has the duty "to say what the law is." This statement has served as the

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72 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 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).


74 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
predicate for the view that the Court has ultimate, if not exclusive, authority in constitutional interpretation. For this reason, many observers regard with trepidation any suggestion for restricting the role of the judiciary in separation of powers disputes between Congress and the President. 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* 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.77

Abraham Lincoln made his opposition to the *Dred Scott* decision an important part of his unsuccessful campaign for the Senate in 1858. He later broadened his attack on the "judicial monopoly" theory of constitutional interpretation. 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

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7617 U.S. (4 Wheat.) 316 (1819).
772 A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 576, 582 (J. Richardson ed. 1896) [hereinafter Messages and Papers of the Presidents].
79For 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 id. at 255.
80This term is used in Mulhern, In Defense of the Political Question Doctrine, 137 U. Pa. L. Rev. 97, 100 & n.5 (1988) (citing D. Morgan, Congress and the Constitution 89-96 (1966)).
extent practically resigned their Government into the hands of that eminent tribunal. 81

Similar views were expressed both before and after these statements. Thomas Jefferson pardoned those convicted under the Sedition Act of 1798 82 despite judicial rulings upholding the constitutionality of the statute. 83 More recently, President Franklin D. Roosevelt vigorously attacked Supreme Court rulings invalidating important aspects of his legislative agenda. 84 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." 85 Finally, former Attorney General Edwin Meese kindled fierce debate with a speech asserting that "constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government." 86

Perhaps these examples can be discounted as the sour grapes of those whose positions the Supreme Court rejected. Nevertheless, other powerful considerations support an independent role for the political branches in constitutional interpretation in separation of powers disputes between Congress and the President. At the most basic level, elected officials must take an oath to uphold the Constitution. 87 Faithfulness to their oath necessarily requires members of Congress and the President to consider the constitu-

81 6 Messages and Papers of the Presidents, supra note 77, at 5, 9.
82 Ch. 74, 1 Stat. 596 (expired 1801).
83 As Jefferson explained in 1804 in a letter to Abigail Adams:
[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 magistrates are equally independent in the sphere of action assigned to them. . . . [The Constitution] meant that its coordinate 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 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. 1854).
85 E. Drew, Washington Journal 5, 45, 283, 304-05, 328 (1975). 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.
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. United States 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, 488 U.S. 918 (1988).
87 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.
tionality of proposed policies as an important aspect of performing their duties.88

Beyond the implications of the oath requirement, the Constitution imposes affirmative obligations upon elected officials. Several provisions specifically proscribe certain kinds of legislation,99 and a number expressly authorize the passage of implementing statutes.90 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.91 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. Article III restricts the jurisdiction of the federal courts to cases and controversies.92 Hence, the judicial branch cannot provide advisory opinions to Congress and the President on the constitutionality of a proposed bill or program.93 Correlatively, 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.94 Even if that obstacle is surmounted, other barriers to standing


90E.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 without due process of life, liberty, or property, and uncompensated takings of private property).

92E.g., id. amend. XI, § 2; id. amend. XIV, § 5; id. amend. XV, § 2; id. amend. XIX, § 2; id. amend. XXI, § 2; id. amend. XXIV, § 2; id. amend. XXVI, § 2.


94U.S. Const. art. III, § 2, cl. 1.


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
might well prevent the litigation of an appreciable number of separation of powers disputes. Moreover, the Court has various devices to avoid deciding the merits of cases over which it does have jurisdiction. 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 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-


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, 486 U.S. 1042 (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). This doctrine also has proved controversial. See, e.g., Humphrey v. Baker, 848 F.2d 211, 214 (D.C. Cir. 1988); Melcher v. Federal Open Mkt. Comm., 836 F.2d at 555 n.4; id. at 565 (Edwards, J., concurring); Barnes, 759 F.2d at 59-61 (Bork, J., dissenting); Moore, 733 F.2d at 961-64 (Scalia, J., concurring).

For a comprehensive discussion, see Note, Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment, 40 CASE W. RES. L. REV. 1075 (1990).


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.


connected, could not hold the position. Similarly, despite the struggle 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. 97 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. 98 Thus, the question is not whether the political branches will interpret the Constitution but under what circumstances they will do so.

B. The Benefits of Interbranch Constitutional Debate

The preceding section 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, 99 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. The latter 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 framers of 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. 100 To minimize this possibility, each branch was given sufficient power and incentives to resist attempted usurpations. Because the framers feared legislative aggrandizement, 101 they made Congress bicameral and gave the President a qualified veto. At the same time, the unfortunate experience

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97 See Bessette & Tulis, supra note 88, at 9-10; Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 414 (1985).
98 See Drew, supra note 85, at 41, 43, 51, 283, 292; Bessette & Tulis, supra note 88, at 9.
99 N. Polsby, Congress and the Presidency 202 (4th ed. 1986). Professor Polsby is not one of those commentators. See id.
100 See supra notes 36-45 and accompanying text.
101 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 36, at 322. 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).
under the British made all concerned acutely aware of the dangers of unchecked executive power, which was "carefully limited" in article II.\textsuperscript{102} 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.\textsuperscript{103} Despite the availability of judicial review, Congress and the President were expected to rely primarily upon their own political self-defense mechanisms when interbranch 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. A faithful adherent to the founding design might argue that the courts should rigorously enforce the separation of powers to protect the core constitutional value of liberty. This argument takes on added strength 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 of this article seeks 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.\textsuperscript{104} 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.

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,\textsuperscript{105} several commentators have recognized the political implications of these conflicts. Rigid demarcation between the executive and legislative branches, accord-

\textsuperscript{102} *The Federalist* No. 48, *supra* note 101, at 309. See also Epstein, *supra* note 37, at 132.

\textsuperscript{103} *The Federalist* No. 48, *supra* note 101, at 308-09.


\textsuperscript{105} 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"); INS v. Chadha, 462 U.S. 919, 959 (1983) (separation of powers operates to "define and limit the exercise of... federal powers").
ing 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. 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.

Whether or not rigorous adherence to separation of powers principles would reduce the federal role, powerful legal arguments exist for a more permissive constitutional analysis in this field. Among them are the flexibility inherent in a Constitution that 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 what-


108 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 "unless 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 of Am. 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 of Am., 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 56, at 89-90 n.175; Strauss, Legislative Theory and the Rule of Law: Some Comments on Rubin, 89 COLUM. L. REV. 427, 447 (1989).
ever earlier consensus had existed in favor of strictly limited government. 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.

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 suggests that the concept of separation of powers provides less a rule of decision than a heuristic concept for structuring analysis. 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. This pattern has not always existed, however. For example, in the 1970’s the principal proponents 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 gov-

109Perhaps 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.


111Political 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 which invalidated many environmental, health, and safety programs would stimulate widespread controversy. Even Professor Epstein, a leading academic proponent of limited government, recognizes the difficulty of wholesale judicial reversal of objectionable legal doctrine. Epstein, supra note 106, at 306-07, 329; Epstein, The Proper Scope of the Commerce Power, 75 VA. L. REV. 1387, 1387, 1454-55 (1987).


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 v. United States* were brought by advocates of more vigorous government regulation. These proponents of a more activist state believe that strict adherence to separation of powers principles will reduce the influence of industry, trade, and other special interests and thereby facilitate the development and implementation of effective programs to protect public health and safety. 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.

Third, and most significant, 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, our system rests upon unexpressed understandings and an uncodified but shared sense of limits. 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.

Judicial opinions, on the other hand, raise the stakes of any particular conflict by clearly identifying winners and losers through formal explana-
tions that presumably will control other analytically related disputes. The prospect of litigation creates incentives to assert maximum positions for short-term advantage in court and to characterize opposing views as illegitimate. 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.

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." 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. To be sure, the relative powers of Congress and the President would change over time if interbranch disputes were generally negotiated rather than litigated, but the relative powers of the political branches have changed dramatically anyway.

Consider the legislative veto and the role of the Comptroller General in implementing Gramm-Rudman-Hollings under the approach advocated here. As to the former, the legislative veto often was the price that Presi-

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121 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").


123 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 122, at 516-40.


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 eighty percent of the more than two hundred bills containing legislative vetoes enacted between 1950 and 1976 were approved from 1970 onward. POLSBY, supra note 99, at 237 n.122 (citing Cooper & Hurley, The Legislative Veto: A Policy Analysis, 10 CONG. & PRESIDENCY 1 (1983)).

126 See NAGEL, supra note 121, at 22.
dents paid for obtaining broad delegations to undertake important initiatives for which a statutory basis did not already exist. Congress, protective of its institutional prerogatives even when it sympathized with presidential goals, often inserted legislative veto provisions into bills that gave the executive branch the requested substantive authority.\textsuperscript{127} Because the text of the Constitution does not specify that a legislative veto is subject to the bicameralism and presentation requirements,\textsuperscript{128} courts generally would uphold such accommodations.\textsuperscript{129} In the event of disagreement between Congress and the President, the political branches would have to determine the stakes for themselves. Congress could refuse to give the executive authority to act without a legislative veto, the President could disapprove a bill containing such a veto, or the chief executive might accept some (but not all) legislative veto provisions. Resolution of these differences might vary depending upon the centrality of the substantive initiative to the political program of the President and members of Congress or upon the form of the particular legislative veto at issue (two-house, one-house, or committee).

As to the latter, the procedure for removing the Comptroller General received almost no attention during the debate over Gramm-Rudman-Hollings.\textsuperscript{130} That procedure was, however, the subject of intense interbranch contention when the position was created shortly after World War I. President Wilson vetoed an important bill that was designed to reform the federal budget because he regarded a provision authorizing the removal


\textsuperscript{128}'Chadha, 462 U.S. at 981-82 (White, J., dissenting).

\textsuperscript{129}Courts would still invalidate particular legislative veto provisions that allowed Congress to make typically judicial decisions when legislative procedures did not afford due process to the targets of such decisions. Some have suggested that the statute at issue in \textit{Chadha} had this infirmity. See, e.g., id. at 964-65 (Powell, J., concurring in the judgment). This approach to \textit{Chadha} is not free from difficulty, however. Before the procedure at issue in that case was adopted, the legislative branch resolved deportation disputes through private bills. Id. at 954. Moreover, Congress has express power to regulate immigration. U.S. CONST. art. I, § 8, cl. 4. Finally, one of Madison's statements in the Constitutional Convention strongly implies his belief that the legislature had power over individual naturalization cases. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 236 (M. Farrand rev. ed. 1937) (opposing a proposal to require Senators to have been citizens for at least 14 years "because it will put it out of the power of the National Legislature even by special acts of naturalization to confer the full rank of Citizens on meritorious strangers").

of the Comptroller by concurrent resolution as an incursion upon executive prerogatives; Congress and his successor, President Harding, negotiated a compromise providing for removal by joint resolution.\textsuperscript{131} In light of the silence of the Constitution on the removal issue and the limited empirical significance of the power to remove federal officers,\textsuperscript{132} the judiciary should respect this not necessarily ideal interbranch accommodation.\textsuperscript{133} 

A more fundamental objection to the role of the Comptroller arises from the process for appointing that official, a subject about which the Constitution is quite explicit but which has been almost completely ignored in litigation.\textsuperscript{134} The President is required to select the Comptroller from a list of three nominees provided by the congressional leadership.\textsuperscript{135} Because the appointments clause does not give Congress authority to nominate officers or inferior officers, the procedure for choosing the Comptroller might well contravene the express terms of the Constitution.\textsuperscript{136} Under the approach

\textsuperscript{131}See Entin, supra note 15, at 754-55. 

\textsuperscript{132} See id. at 712-14, 777-81. 

\textsuperscript{133} Cf. United States v. Nixon, 418 U.S. 683, 694-95 n.8 (1974) (finding no constitutional infirmity in requirement that congressional leaders consent to removal of Watergate special prosecutor even though that official exercised executive power). Congress and the President recently reached a negotiated resolution of another controversy involving the role of the Comptroller General. Under the Competition in Contracting Act, 31 U.S.C. §§ 3551-3556 (1988), the Comptroller was authorized temporarily to stay the award or implementation of government contracts that were subject to protests by disappointed bidders. The Comptroller could investigate such protests but his disposition could not bind the executive branch. Litigation over the constitutionality of the Act was ended when Congress amended the statute to eliminate the provision that the executive branch found most objectionable. Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875 (3d Cir.), on reh'g, 809 F.2d 979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988); see Miller, supra note 10, at 418-21. 

The history of Ameron could be taken to suggest that Congress and the President would not have reached their accommodation without the uncertainty engendered by the pendency of the lawsuit about the constitutionality of the Competition in Contracting Act. That is not the only plausible interpretation of this episode, however. Ameron arose after the executive branch refused to enforce the Act, thereby precipitating a test case. The political branches at all times regarded the dispute as a purely legal question. If a greater degree of interbranch comity existed, the dispute never might have arisen or could have been treated as a subject for genuine negotiation. Id. at 420; see supra notes 119-20 and accompanying text.

\textsuperscript{134} The procedure for appointing the Comptroller was mentioned in passing but given no substantive weight in Bowsher, 478 U.S. at 727-28 & n.6. 


\textsuperscript{136} See Buckley v. Valeo, 424 U.S. 1, 126-35 (1976) (per curiam). The only legislative role in the appointment process is the provision for Senate confirmation of officers of the United States. U.S. CONST. art. II, § 2, cl. 2. Congress may, of course, create positions and define their terms and conditions, including the qualifications of federal officials. See, e.g., 15 U.S.C. § 41 (1988) (limiting partisan composition of Federal Trade Commission); 29 U.S.C. § 661(a) (1988) (requiring members of Occupational Safety and Health Review Commission to be selected "from among persons who by reason of training, education, or experience are qualified"); 47 U.S.C. § 154(b)(2)(A) (1988) (disqualifying from membership on Federal Communications Commission persons holding financial interests in entities subject to FCC regulation). Such generic requirements do not significantly restrict the universe from which the President may nominate. The procedure for selecting the Comptroller General, on the other hand, allows the congressional leadership to limit the universe of potential comptrollers to three persons.
advocated in this article, the judiciary would focus upon how the Comptroller is hired rather than how he might be fired when assessing the validity of legislation conferring authority upon that official.

To be sure, this approach would leave a residue of ambiguity about the precise limits of legislative and executive power. That residue exists anyway, because the Supreme Court has failed to articulate a consistent methodology in this field. Under the alternative proposed here, Congress and the President would fulfill their obligation independently to interpret the Constitution. Sometimes this process would result in deadlock, but the prospects for reasonable accommodation might be enhanced if the political branches knew that the judiciary would not ordinarily rescue them from the consequences of their disagreements and that the outcome of one dispute would not bind either side in subsequent conflicts.

IV. BRINGING POLITICAL JUDGMENT BACK IN: THE NEED FOR WISDOM

Forbearing to litigate separation of powers disputes between Congress and the President 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 soundness, of a statute or practice. 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 ... ." 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, Bowscher, Morrison, and other Supreme Court cases.

Consider the legislative veto. That device quite properly has been crit-
cized for skewing the administrative process in subtle but potentially important ways. In particular, the legislative veto tends to bias the process against regulation by giving members of Congress the opportunity to reject a specific proposal without having to weigh alternatives, to confer advantages upon economically powerful trade and industry groups which have the resources to oppose regulations both at the agency and on Capitol Hill, to encourage broad delegations, and to increase the risk of political impasse between regulators and legislators.140 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 mechanisms for preventing agency overreaching; they address the wisdom of the legislative veto on its own terms.141 Moreover, if the legislative veto were applied as broadly as many of its enthusiasts proposed, Congress could quickly find itself overwhelmed by the task of reviewing agency regulations.142 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 assump-

140See, 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, supra note 139, at 267-85.

141The principal empirical study of the operation and effect of the legislative veto suggested that the deleterious effects of the veto were greater than were those associated with other forms of congressional oversight of the administrative process. Bruff & Gellhorn, supra note 140, at 1420-23. That study unfortunately failed to examine programs in which regulations were not subject to legislative vetoes. It examined only the five programs which had provided "[m]ost of the current federal experience with legislative veto of rulemaking." Id. 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). The inability to compare the consequences of the veto with those of other forms of congressional oversight does not preclude an assessment of the impact of the veto on its own terms, however.

142This 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. Craig, supra note 116, 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 one hundred 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. L. Fisher, The Politics of Shared Power 102-03 (2d ed. 1987); Strauss, supra note 108, at 447 n.63.
tions concerning the adverse effects of deficits. 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 exceeded the annual deficit limit; the statutory targets applied only to the projected deficit at the beginning of the fiscal year, not to the actual deficit at the end of the fiscal year. More significant, 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 keep from triggering the sequestration process. Consequently, the measures taken to reduce the projected deficit frequently have strained credulity. These were the real problems presented by Gramm-Rudman-Hollings. The role of the Controller 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 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 resting the independent counsel provision upon a presumption of governmental incompetence. Perhaps this unintended consequence does not outweigh the benefits of avoiding perceived conflicts of interest, but

143 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., EISNER, supra note 110, at 161-64; Stith, Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings, 76 CALIF. L. REV. 595, 638-39 (1988).

144 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 automatic spending reductions for the fiscal year during which those measures were enacted. Consequently, the deficit target for those years was not attained. Stith, supra note 143, at 629-30.

145 Among the devices which 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) "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 Civic Courage, N.Y. REV. BOOKS, June 1, 1989, at 23, 26; Kuttner, supra note 144, at 22-23.

146 But see S. KUTLER, THE WARS OF WATERGATE 335-36 (1990) (contending that Justice Department lawyers performed creditably and had uncovered the essential facts before the appointment of Archibald Cox as special prosecutor).
that question apparently was 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. Surely we should expect public officials to aspire to higher standards of conduct than "Never Been Indicted."

V. CONCLUSION

The Constitution is more than "what the judges say it is." 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. 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, sophisticated legal staffs seek vigi-

147 The independent counsel statute might be seen as the only way to prevent a recurrence of the so-called Saturday Night Massacre, in which Special Prosecutor Archibald Cox was dismissed for too vigorously pressing his investigation into the Watergate affair. Id. at 581-82. The real lesson of that episode, however, is not what happened to Mr. Cox, but rather what happened to President Nixon. The national uproar that followed the Saturday Night Massacre not only forced Mr. Nixon to acquiesce in the appointment of a new special prosecutor but also fueled widespread suspicion that he had something to hide, a suspicion that fatally undermined his efforts to remain in office. DREW, supra note 85, at 112-13, 115-16, 148-49; KUTLER, supra note 146, at 406, 410-14, 619.

148 Carter, supra note 50, 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 to be totally innocent").


lantly to safeguard each branch's constitutional prerogatives. For these and other reasons, powerful incentives exist for conflict rather than cooperation.

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.