

Why Our Separation of Powers Jurisprudence Is So Abysmal

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“The fault . . . is not in our stars,
But in ourselves”

—William Shakespeare¹

“[It has] always been the way of multitudes to interpret their own
symbols literally”

—Joseph Campbell²

Separation of powers jurisprudence in the United States is in an abysmal state. That conclusion emerges clearly from virtually every article in this symposium.

The kindest thing that anyone seems to be able to say about recent separation of powers decisions is that in certain cases the Supreme Court happened to reach the right result, albeit for the wrong reasons.³ Some commentators, while critical of the Court's reasoning (or lack thereof), appear to take great comfort from their ability to write “alternative opinions” in which they supply reasoned

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1. W. SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* 35 (S. Johnson ed. 1954).

2. J. CAMPBELL, *MYTHS TO LIVE BY* 9 (Bantam ed. 1973).

3. See, e.g., Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488, 488-89 (1987) (arguing that the Court reached “defensible results” in *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), but via “inconsistent reasoning”).

rationales for the Court's results. In my opinion, this draws just the wrong lesson. Far from being a hopeful sign, it is a damning commentary on the abysmal state of our current separation of powers jurisprudence that any reasonably competent law professor can supply better opinions than the justices of the Supreme Court in separation of powers cases.

Our separation of powers jurisprudence is abysmal because the Supreme Court has failed for over two hundred years of our history to develop a *law* of separation of powers. The Court has reached a collection of results in separation of powers cases—some sensible and pragmatic, others utterly asinine. But what the Court has undeniably failed to do through all of these cases is to develop a *law* of separation of powers, a body of principle and theory that is coherent and useful in enabling the system “to be wiser than the individuals who constitute it.”⁴ If anything, our separation of powers law is now dumber than the individuals who make it, as if there were some virtue in judges blinding themselves to the practical consequences of their decisions about governmental structure.⁵

I do not share the conclusion evidently reached by some other participants in the symposium that the primary cause for the sad state of our separation of powers jurisprudence is to be found in the limitations of the justices who currently, or in the recent past, populated the Supreme Court. I am no great fan of the Burger Court, but it seems to me that we should try whenever possible to avoid a “jurisprudence of personalities.” It diverts our attention from the deeper, more fundamental causes of our woes,⁶ which, ironically, are also more susceptible to our control as teachers of the next generation of lawyers. It is to these deeper, more abstract, and theoretical causes of the disease in our separation of powers jurisprudence that I want to turn.

4. Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 145 (1984).

5. The strongest defense of the formalist position that judges should ignore the practical consequences of their decisions has come from my colleague at Yale, Professor Stephen L. Carter, who argues that the predominant value in separation of powers law is that government ought not become a “lawbreaker” by contravening the strictures laid down in the Constitution. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 727 [hereinafter Carter, *From Sick Chicken to Synar*]; see also Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985) [hereinafter Carter, *Constitutional Adjudication*] (arguing that strict application of “structural” clauses of the Constitution “legitimizes” judicial review in protection of individual rights).

Carter's argument is circular in that it assumes that the practical effect on the operations of government plays no role in determining whether a measure is constitutional.

6. Cf. Elliott, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317, 350-51 (1987) (contrasting “normal politics,” during which most people believe problems can be solved “by replacing the people in authority,” with “constitutional moments” in which people realize that the sources of problems are structural).

My basic thesis is that separation of powers is different. It calls for different styles of judicial reasoning, and perhaps even for a different conception of the nature of the judicial enterprise and the role of the Supreme Court.⁷ The conception of constitutional interpretation that the Supreme Court has unthinkingly borrowed from other areas of constitutional law is fundamentally unsuited to the separation of powers field because it places undue emphasis on the words of the Constitution.

In interpreting most of the familiar texts in constitutional law, for example, the Free Press Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment, the Supreme Court is construing a discrete, "uni-directional" passage that creates a linguistic representation for a specific constitutional value. That is simply not true in separation of powers law. There is no discrete "Separation of Powers Clause" in the Constitution. Rather, the term "separation of powers" is used to encapsulate the general principles of constitutional structure and design that are immanent throughout the Framers' Constitution. The Framers found it either redundant or impossible to sum up their theory of the federal government in a single phrase. In a sense, the "text" in separation of powers law is everything that the Framers did and said in making the original Constitution plus the history of our government since the founding.

The techniques and habits of mind that judges and lawyers have developed for construing the Due Process Clause or the First Amendment are fundamentally ill-suited to the separation of powers area. Because of the nature of the issues, the clauses of the Constitution establishing the organs of government and defining the relationships among them *appear* to have greater precision and specificity than "open textured" provisions of the Constitution such as the First Amendment or the Due Process Clause. In actuality, however, literalism is an even greater danger in separation of powers than in other areas of constitutional law.

The essential flaw in prevailing separation of powers jurisprudence is that it (mis)understands the task of constitutional interpretation in too literal a way. In a sense, separation of powers cases are being decided as if there were a "Separation of Powers Clause" in the Constitution that the Court could read and apply like the wording of a statute or a contract.

Literalism as a theory of constitutional interpretation is responsible for generating both the "formalistic" and the "functional" strands that have been observed in our current separation of powers jurisprudence.⁸ By enforcing the words of the Constitution too

7. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

8. For the idea that there are two seemingly inconsistent strands in recent separation of powers cases, which may be called the "formal" and the "functional," see Strauss, *supra* note 3; Elliott, *supra* note 4; Carter, *From Sick Chicken to Synar*, *supra* note 5; and Carter, *Constitutional Adjudication*, *supra* note 5.

mechanically and uncreatively in its "formalistic" decisions, the Court loses sight of, and frequently violates, the true meaning of the Constitution. On the other hand, when the Court eschews a formalist result, its "functionalist" decisions seem to lose their moorings in the Constitution. They come across as *ipse dixit* because literalism was the only mode of constitutional interpretation that seemed available to the Court for grounding a result in the Constitution.

In the first section of what follows, illustrations of the dangers of literalism in separation of powers jurisprudence are catalogued. My contention is that literalism is stifling separation of powers jurisprudence and preventing it from becoming a positive, creative force in our constitutional law. The source of the prevailing literalism, I argue in the second section, is a fundamental misconception of the judicial role in separation of powers cases. This misconception can be traced to the undue emphasis that lawyers, judges, and law professors have placed on *Marbury v. Madison* and the problems of legitimating judicial review as the central issue in constitutional law. In the third section, I sketch briefly the difference between *interpretation* and *literalism* in the constitutional law, and suggest that judges should change their understanding of the proper role of the courts in separation of powers cases. Unlike Dean Choper, who would largely abandon the judicial role in issues of governmental structure,⁹ I believe that there is hope that judges can still play a positive and creative role in promoting the evolution of our governmental structure in ways that are attuned to the values in our Constitution and constitutional traditions.

I. *Separation of Powers Jurisprudence Evaluated*

The work of the U.S. courts in separation of powers law leaves much to be desired. Unlike some other areas of constitutional law, such as civil liberties, where the work of the federal courts has been dynamic and creative and has arguably even made contributions to improving the well-being of citizens in our society, in separation of powers cases the work of our courts has been characterized by *literalism* and *negativity*.

As a result, after two hundred years under our Constitution, our courts have yet to develop a sophisticated theory of the underlying philosophy of our structure of government. (Ask yourself: Does anyone assign judicial opinions in courses in American government for their perspicacity in describing the inner workings of our government?) The sterile, impoverished nature of the judicial literature in separation of powers cases should be evident when we compare decisions in this area with, for example, the splendid conceptual and

9. See J. CHOPER, *supra* note 7.

rhetoical edifices that judges have constructed under the First Amendment.¹⁰

Ironically, during the founding period the courts arguably had a much less rich tradition and literature with which to work regarding freedom of speech and the press¹¹ than they did in the separation of powers field. Yet a robust, dynamic judicial literature has flourished under the First Amendment but has failed to develop in separation of powers law. (Later I will suggest that the ossification of this field of constitutional theory has occurred in part precisely *because* the separation of powers tradition was so intellectually rich during our early formative period, in much the same way that Shakespeare made another major English dramatist impossible until Shaw.)

An additional consequence of the literalistic, negative tone of our separation of powers jurisprudence is that the role of the courts in this area must be measured primarily by how much net harm they have done. Hardly anyone thinks that the federal courts have played an *affirmative* role in moving the evolution of the structure of our government forward; discussion of their contribution (if "contribution" it be on balance) is almost entirely in terms of how much harm they have (allegedly) prevented, and at what cost in terms of efficiency or other values.

Again a comparison to other areas of constitutional law may be instructive. American lawyers are justly proud of the affirmative role that the federal courts have played during the past generation in goading our society to deal with issues of racial justice. Contrast the

10. The concept of conduct protected by the first Amendment has evolved from narrow beginnings. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (setting forth the clear-and-present-danger test for restricting freedom of expression); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) (defining the limits on criminalization of allegedly subversive speech); Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) (concerning a state's right to criminalize association with a seditious organization); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (applying the Establishment Clause to a state compulsory flag-salute statute); NAACP v. Alabama, 357 U.S. 449 (1958) (protecting against compelled disclosure of affiliation with an organization under freedom of association rubric); Engel v. Vitale, 370 U.S. 421 (1962) (applying the Establishment Clause to prayer in public schools); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (delevoping First Amendment defamation principles); Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishing a three-pronged test for analysis of Establishment Clause conflicts with freedom of expression); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (concerning advertisements for prescription drugs); Elrod v. Burns, 427 U.S. 347 (1976) (setting standards for administration of a spoils system for public employees); Board of Educ. v. Pico, 457 U.S. 853 (1982) (establishing guidelines for allowable censorship in public secondary school libraries).

My point is only that law has developed creatively under the First Amendment. I do not say that the Supreme Court's record in applying the First Amendment is unblemished. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (allowing CIA censorship of former employees); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (protecting corporation's right to "speak" on public-election issues); United States v. O'Brien, 391 U.S. 367 (1968) (prohibiting draft card burning due to significant government interest); Dennis v. United States, 341 U.S. 494 (1951) (upholding the criminal conviction of a Communist Party members); Debs v. United States, 249 U.S. 211 (1919) (upholding the criminal conviction of a former Socialist candidate for President).

11. *See generally* L. LEVY, EMERGENCE OF A FREE PRESS (1985) (noting that the Framers' theoretical understanding of freedom of the press and the purpose of the Free Press Clause was quite narrow).

courts' affirmative contributions in civil rights with their consistent refusal to become involved in the decades-long struggle between Congress and the executive branch over control of the power to make war,¹² and it should be clear that the courts cannot claim much credit for what they have brought to fruition in separation of powers law, but rather only for what they have prevented.

The negative, literalistic tone of this area of our constitutional law is even evident from the term that we conventionally apply to it, *separation of powers*. The term itself conjures up simplistic notions about our tripartite structure of government and how the roles of the three branches of government should be kept "separate." Such glorified crudities dominate most court decisions in the field. In fact, however, "separation of powers" jurisprudence is nothing less than our constitutional law about questions of governmental structure.

It is worth remembering that the Framers of the Constitution thought that this was all the constitutional law we really needed. When the question of a Bill of Rights was raised at the Constitutional Convention, it was quickly voted down as unnecessary. Why draw up a paper listing of rights, reasoned the delegates led by Alexander Hamilton and James Madison, when the institutional checks built into our constitutional structure would already provide a more effective means of guaranteeing the rights of the people?¹³

We have come a long way from the Founders' day in which separation of powers theory was considered the foundation of constitutional law. Today, separation of powers is a theoretical backwater, which until recently was hardly even included in most law school courses and casebooks about constitutional law. The reasons are not hard to discern. The courts in separation of powers cases are like a primitive tribal priesthood that still follows the forms of an ancient religion long after the true meaning of its rituals has been forgotten. In paying literal, even slavish, obeisance to the Framers' intentions on the specifics of governmental organization and structure, the courts violate the deeper, more fundamental spirit of the Framers' vision that power should be divided and balanced creatively to prevent misuse.

Like the mythical beast that bends back to consume its own tail, our separation of powers jurisprudence has become an impediment to achieving its true goals. The great historical contribution of the Framers of the U.S. Constitution—the core of their constitutional

12. See *Mora v. McNamara*, 389 U.S. 934 (1967) (Stewart & Douglas, JJ., dissenting from order denying certiorari to review constitutionality of Vietnam war).

13. For a highly readable account of these and other events at the Constitutional Convention, see C. BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* ch. 21 (1966).

vision—was that to minimize the shortcomings of individuals and processes of government, institutions should be combined creatively into systems so that the design of the whole compensates for the weaknesses of the parts.¹⁴ Ironically, this structural “separation of powers” approach to the problems of governing—creatively designing and balancing complex institutional systems to deal with governmental problems—has become increasingly unavailable in the U.S. The primary reason is our courts, which claim to be “enforcing” the constitutional principles of “separation of powers.” However, because the courts’ understanding of this constitutional principle has been literal and unimaginative, in their zeal to enforce the letter of the Constitution, they deny its essence.

The shortcomings of current separation of powers jurisprudence can be illustrated by considering several recent cases in which the Supreme Court has adjudged the constitutionality of measures developed by other branches of government to deal with significant contemporary problems: the legislative veto, the Gramm-Rudman deficit-reduction program, and the independent-counsel statute created in the wake of Watergate.

In two of these three cases, the Supreme Court struck down as unconstitutional innovative attempts by the other branches of government to solve contemporary problems. Even more bothersome than the results, however, is the Court’s overall approach and its conception of the judicial role, which in each of these cases is narrow, literalistic, and lacking in any serious theory of government or vision of constitutional structure.

There is really very little more to the separation of powers doctrine that the Court has developed in these cases than to look at the wording of the Constitution to ascertain whether the Framers intended the U.S. government (or some part thereof) to exercise a particular power or legal device. (“Yes” in the case of independent counsels; there is a clause in the Constitution that permits courts to appoint “inferior officers”;¹⁵ “no” for legislative vetoes, and for Gramm-Rudman.) Were it not so sad, it would be laughable for the Supreme Court to make pronouncements about the constitutionality of innovations in governmental structure that are reminiscent of the old farmer’s edict that if God had intended us to fly, He would have given us wings.

The Constitution was intended to create a structure of government for the ages, not to provide an exhaustive laundry list of all the things that the government may do to deal with changing

14. This idea is elaborated in Elliott, Book Review, 23 J. ECON. LITERATURE 654 (1985) (reviewing R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983)), and *infra* note 33.

15. “[The President] shall nominate . . . [etc.]; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper . . . in the Courts of Law” U.S. CONST. art. II, § 2, cl. 2. For a discussion of *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (the independent-counsel case), see *infra* text accompanying notes 53-60.

problems.¹⁶ By looking at the language of the Constitution for hints as to "what the Framers thought about" the legislative veto, or Gramm-Rudman, when they never really thought at all about the problems that these devices were created to solve, the courts trivialize the process of turning to our history and traditions for wisdom and guidance.¹⁷ The proper question is whether a new measure or device is consistent with the Framers' vision of government as reflected and made manifest to us by the constitutional structure that they created, and elaborated by our subsequent history and traditions.¹⁸ This the courts almost never ask.

A. *The Legislative Veto*

The so-called "legislative veto" is (or more accurately, *was*) a legal device invented in the 1930s to allow Congress to maintain a certain degree of supervisory authority over broad delegations of legislative powers to administrative agencies or officials of the executive branch. To create a "legislative veto," Congress simply reserves power to overrule an official's subsequent actions as part of a statute that delegates broad, discretionary powers to an administrative agency or executive branch official. Most of the legislative veto statutes prescribe that this power can be exercised by passing a resolution of disapproval in one house of Congress. By the early 1980s, Congress had passed over two hundred legislative-veto statutes delegating various powers on the condition that Congress could overrule the exercise of those powers in individual cases. Although Congress rarely exercised its reserved powers, the mere existence of statutory authority to overrule their actions was thought to make officials to whom power had been delegated more willing to exercise it in accordance with the will of Congress.¹⁹

In 1983 the Supreme Court declared the legislative veto unconstitutional in an eight-to-one decision, *INS v. Chadha*.²⁰ *Chadha* was a

16. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. . . . It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

17. See Carter, *From Sick Chicken to Synar*, *supra* note 5, at 795-97 (stating that arguments that something is either constitutionally prohibited or permitted because the Framers did not mention it are two sides of the same logical fallacy, and that the judge's task is to study text and history and use her "imagination" to decide whether a measure would "fit snugly into the system the Framers designed").

18. Cf. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (Structure and relationships established by the Constitution, not literal wording, are a crucial factor for constitutional interpretation.)

19. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977) (chronicling case studies under five statutes providing for legislative vetoes).

20. 462 U.S. 919 (1983). My views on the *Chadha* decision are elaborated in Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983

British citizen of Indian extraction who came to the United States from Kenya in 1966 on a student visa. When the visa expired and Chadha did not leave the country, the Immigration and Naturalization Service (INS) began proceedings to deport him as an illegal alien. Chadha did not deny that he was in the country illegally, but contended that the INS should exercise its statutory discretion to suspend deportation on grounds of "extreme hardship" because if he were deported to either Britain or Kenya, he would be subject to racial discrimination on account of his Indian heritage.

In 1974 an INS immigration judge agreed with Chadha's argument, but his decision was subsequently overruled by the House of Representatives. Acting on the recommendation of the staff of the Immigration Subcommittee, the House passed a resolution by voice vote disapproving 6 out of 340 recent INS decisions, including the decision in Chadha's case. Chadha then enlisted the aid of Public Citizen, a Nader-affiliated organization, to challenge the legislative veto on constitutional grounds.

By the time Chadha's case finally got to the Supreme Court in 1983, Chadha had married an American citizen, and accordingly was entitled to special preference in becoming a U.S. citizen. Rather than deciding the case on these narrow grounds, however, the Supreme Court announced a very broad decision declaring that all legislative vetoes were unconstitutional.

Two different textual grounds were advanced for this result. First, the Constitution requires that before a "Bill" (or any other "Order, Resolution, or Vote to which the Concurrence of [both houses] may be necessary") can become a law, it must be "presented" to the President to give him an opportunity to either sign it or exercise his veto.²¹ Second, the Constitution vests the legislative power of the United States in a bicameral legislature composed of a Senate and a House of Representatives.²²

The question presented in *Chadha* was whether these two procedural requirements, presentment and bicameral passage, that admittedly apply whenever Congress passes a law, should also apply in each instance in which a legislative veto is invoked. (After all, the presentment and bicameralism requirements already had been complied with when Congress passed each of the two hundred statutes setting up the legislative veto mechanisms.)

The Supreme Court attempted to answer this question via an exceedingly literal and legalistic mode of analysis. The Court began by invoking a "presumption" that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."²³ But to say that Congress is exercising a "legislative" (rather

SUP. CT. REV. 125, from which portions of the following discussions are drawn. Other articles discussing the decision are Strauss, *Was There A Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, and Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984).

21. U.S. CONST. art. I, § 7, cls. 2, 3.

22. *Id.* § 1.

23. *Chadha*, 462 U.S. at 951.

than a judicial or executive) power is not necessarily to determine whether Congress must follow the procedures for passing a statute. That was the question that the legislative veto case posed: when Congress acts by invoking a legislative veto rather than by passing another statute, must it follow the procedures for passing statutes?

The Court went on to assert that the legislative veto is "essentially legislative in purpose and effect" because it has "the effect of altering . . . legal rights."²⁴ Once again, however, the Court's reasoning is circular. The invocation of a legislative veto only "alter[s]" Chadha's "legal rights" if one assumes that he had an unqualified right to remain in the country once the immigration judge ruled in his favor. However, the statute granting the immigration judge the power to rule in Chadha's favor had built into it the possibility that one house of Congress might overrule that determination through a legislative veto. Why not construe Chadha's only "legal right" as the limited right to remain in the country *unless* either house of Congress overrules the immigration judge? If one adopts this view that Chadha's only legal rights were conditional, then the House's action in invoking the legislative veto did not alter Chadha's "legal rights" at all because the possibility of a legislative veto was built into his rights from the beginning.

Finally, in what turns out in hindsight to have been the analytical core of the opinion, the Court asserted that "the prescription for legislative action in Art. I, §§ 1, 7 [of the Constitution containing the presentment and bicameral requirements], represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."²⁵ This amounts to saying that any legal device or procedure not specifically authorized by the Constitution is implicitly forbidden by it. There is an old legal maxim to that effect, *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of the other"), which is sometimes used in construing contracts and other legal documents. Elsewhere I have argued that even on its own terms the *expressio unius* principle is inapplicable to a document such as the Constitution, which expressly indicates, in the Necessary and Proper Clause,²⁶ that the listing of enumerated powers is not intended to be exclusive.²⁷

The main point for the moment, however, is not that the Court in *Chadha* made a series of *bad* narrow, legalistic arguments that would

24. *Id.* at 952.

25. *Id.* at 951.

26. U.S. CONST. art. I, § 8, cls. 1, 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States . . .").

27. Elliott, *supra* note 20, at 140-43.

not be acceptable even if the Court were construing the fine print of an insurance contract or a municipal bond. It is rather the more basic point that the Court inappropriately adopted a narrow, legalistic approach to an important question of separation of powers law. Long ago Chief Justice Marshall reminded his colleagues that “it is a *constitution* we are expounding.”²⁸ It is the import of this famous statement that the *Chadha* Court seems to have forgotten.

As a leading constitutional law casebook puts it, “*Chadha* might be understood as an effort to reassert an understanding of the text of the Constitution as more or less self-contained, with clear answers to at least some problems.”²⁹ To say it more bluntly, the Court in *Chadha* insisted on blinding itself to any of the larger considerations that might have informed its decision. There was, for example, no real discussion of the *purposes* of the provisions of the Constitution which the Court purported to be construing, or how they might fit into any larger vision of separation of powers doctrine. This is particularly troubling because, as Justice White pointed out in dissent, a “modern administrative state” has arisen since 1789 in which unelected bureaucrats now have enormous discretion to make law essentially outside the eighteenth-century system of checks and balances created by the Framers.³⁰ Arguably, the legislative veto served to advance the true purposes of the principle of separation of powers that the Framers built into the Constitution by giving elected legislative officials an effective check over lawmaking by administrative bureaucrats.³¹

It would be possible to refute these structural arguments, of course, by positing a counter-theory of the true meaning of the constitutional principle of separation of powers. For example, one leading constitutional law casebook attempts to answer my position that the Court’s *expressio unius* argument in *Chadha* is nonsense by suggesting that it might be “plausible to respond that the *expressio unius* argument is supported by structural arguments having to do with the framers’ fear of factional tyranny.”³²

No one has yet suggested what the content of these hypothetical “structural arguments” connecting the legislative veto with the Framers’ concerns about “factional tyranny” might be. Remember: the proper question is not whether “factions”—today we call them “special interest groups”—may sometimes have too much influence over the congressional staffs that play a major role in deciding whether to exercise the legislative veto (I would concede that point); rather, the proper question is comparative: are we better or worse

28. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

29. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 385 (1986) [hereinafter STONE & SEIDMAN].

30. *Ins v. Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting).

31. See Karl, *Rule-Making Powers: An American Dilemma*, N.Y. Times, July 8, 1983, at A18, col. 4 (letter to the editor); see also Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 371 (1977) (stating that “[t]he most important aspect of the [legislative] veto is that it prevents, or at least postpones, executive actions from taking effect”).

32. STONE & SEIDMAN, *supra* note 29, at 384 (emphasis added).

off in terms of the risk of "factional tyranny" if a faction must dominate *both* the administrative decisionmaker *and* the congressional staff, or only one of them, in order to get its program adopted? For the Framers' answer, see *The Federalist No. 51*.³³

33. A fundamental principle of institutional design reflected in numerous ways throughout the Constitution, Madison explains in *Federalist No. 51*, was to disperse governmental power among multiple institutions, and often to require the concurrence of several of them, before the state was permitted to act. This is an application of what modern design engineers call the principle of "redundant design." The premise is simple. Just as there are no perfect, failure-proof mechanical components, there are no perfect governmental institutions; every institution invented by humans is subject to characteristic flaws and abuses. By combining these admittedly flawed components into a composite structure, however, the whole can be made much less vulnerable than its parts.

The central idea of redundant design is to arrange the parts so that their shortcomings compensate, or at least cancel out, one another. To take a familiar example, an interest group that is concentrated in the larger states might be able to dominate the House of Representatives, but it could be blocked in the Senate, in which power is organized along different lines. Neither population nor geography is the perfect principle of representation; the two in combination are, however, less prone to failure than either alone.

In *Federalist No. 51*, Madison reminds us that this guiding principle of redundant, mutually checking power centers runs throughout the design of our government: "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public." THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961). Another obvious example is the division of authority between state and federal governments:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 323.

The theory that dividing authority into a multiplicity of parts provides a bulwark against abuse was also a mainstay of the Framers' defense against possible abuses of power by electoral majorities:

Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. . . . [The method adopted in the Constitution for] providing against this evil [is] by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.

Id. at 323-24.

The same philosophy that multiple competing power centers would balance one another was also part of the rationale undergirding the Framers' commitment to political and religious freedom:

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects"

Id. at 324. In instance after instance in *Federalist No. 51*, Madison counsels that power should be shared and divided among multiple centers, organized in different ways, to counter-balance one another. We should learn from the Framers' example and extend their wisdom to the choices we make in our own time about the design of governmental institutions.

The legislative veto would in fact tend to reduce the risks of “factional tyranny” (undue influence by special interest groups) by making it necessary for the special interest group to dominate two different institutions, the agency and the congressional staff, in order to work its will. This is the essence of the Framers’ solution to the problem of “factional tyranny”: creating multiple power centers with different features as checks on one another so that a faction would have to take control of all of them in order to prevail.³⁴

What an irony that the Framers’ “fear of factional tyranny” is cited as an excuse for precluding us from implementing the Framers’ solution to the problem of factional tyranny.

Leaving the merits of these arguments about structural principles aside, however, the point for our present inquiry is that in the *Chadha* decision, the Supreme Court did not even get to this level of analysis. The Court gave no indication that it believed that the provisions of the Constitution relating to separation of powers even *have* purposes, much less discussed what they might be. Rather, the Court treated what it took to be the structural portions of the Constitution as mysterious edicts from on-high that we dare not even attempt to fathom.

When Justice White in dissent raised the problem of administrative lawmaking, the Court responded with the piety of a Pharisee: “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”³⁵ This is the rigid, sanctimonious attitude typical of priesthods the world over when they have lost touch with the substance of their religion, and therefore must convince themselves that it still exists by extreme efforts to preserve its outer forms. Doesn’t the fact that a given procedure is “useful in facilitating functions of government” have anything to do with whether it violates the constitutional principle of separation of powers? The Framers certainly thought so. Their purpose in creating separation of powers doctrine was to “facilitate the functions of government.”

B. *Gramm-Rudman*

The Supreme Court’s next major separation of powers decision, *Bowsher v. Synar*,³⁶ striking down as unconstitutional the Gramm-Rudman deficit-reduction statute, was not much better than *Chadha*.

The Balanced Budget and Emergency Deficit Control Act of 1985³⁷ (usually referred to by its popular name, “Gramm-Rudman,” after two of its principal sponsors) was passed to deal with what the Supreme Court characterized as “fiscal and economic problems of unprecedented magnitude,”³⁸ namely, a federal budget deficit that

34. See *supra* note 33.

35. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

36. 478 U.S. 714 (1986).

37. 2 U.S.C.A. §§ 901-922 (West Supp. 1988).

38. *Bowsher*, 478 U.S. at 736.

appears to many people to be out of control.³⁹ It is clearly beyond the scope of this paper to venture into the ongoing argument among economists about how much of a threat the deficit really constitutes. Interesting and difficult *legal* issues are nonetheless raised by attempts to control the deficit. The crucial legal problem posed by efforts to regulate the deficit is how—and indeed, whether—the U.S. government can pass a law that will effectively control its future spending and taxing decisions without violating the Constitution.⁴⁰

Gramm-Rudman attempted to deal with this problem by declaring a series of statutory ceilings on the size of the deficit, which would decline over a period of years until the deficit was eliminated. That aspect of Gramm-Rudman was hardly unique. Prior to Gramm-Rudman, Congress had previously passed statutory “ceilings” on the size of the national debt and the deficit, only to ignore them later when it became convenient to do so.⁴¹ Gramm-Rudman went beyond this familiar approach by creating an extremely clever “sanction” to deter Congress from passing spending bills that would increase the deficit above the limits: under Gramm-Rudman, if the targets were exceeded, an across-the-board “sequestration” procedure would go into effect automatically to cut all non-exempt federal spending programs by the amount necessary to get total spending back below the deficit targets.⁴² The sequestration procedure was intended to be an effective sanction to deter Congress from exceeding the targets precisely because it was politically unthinkable that Congress would permit across-the-board spending cuts in its favorite programs to go into effect. In other words, because the ultimate remedy of across-the-board spending cuts was so unpalatable, a new system of political incentives was created that used the political support for existing spending programs as a counterweight against new ones. There were no guarantees that this “separation of powers” approach to controlling the deficit would work, but there was hope that under the threat of automatic, across-the-board cuts, Congress and the President might act to prevent the deficit targets from being exceeded.

In *Bowsher v. Synar*, the Supreme Court struck down this carefully

39. My views on the deficit and possible legal mechanisms to control it are set out in Elliott, *supra* note 6, and Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077.

40. See Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986) (concluding that control of future spending can be accomplished constitutionally only through a constitutional amendment).

41. See, e.g., Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1(a), 98 Stat. 494, 1057 (1984), 26 U.S.C. § 1 (Supp. IV 1986) (establishing deficit ceilings).

42. 2 U.S.C.A. §§ 901, 902 (West Supp. 1988). For a more detailed explanation of Gramm-Rudman and its relationship to the structure of the spending and appropriations processes generally, see Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 595 (1988).

crafted attempt to alter the structure of institutional incentives for Congress and the President to deal with the deficit on what must be regarded as a purely hypothetical legal technicality. The crux of the Supreme Court's objection to the sequestration procedure was that there was a sixty-five year old statute, which had *never* actually been used, giving Congress the power to fire the Comptroller General of the United States—the official to whom the task had been given of projecting the deficit and calculating the size of the cuts necessary to bring spending back within the deficit targets. According to the Court, making this calculation was an exclusively “executive” function, and therefore, it could not be performed by an “agent” of the legislative branch without violating the constitutional principles of separation of powers: “By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.”⁴³

The Court's “reasoning” (if that term does not overly dignify it) is wrong on at least three levels. First, is the Comptroller General necessarily an “agent” of the legislative branch just because a statute gives Congress the hypothetical, never-exercised authority to remove him for cause? Second, and more important, are the Comptroller General's functions under Gramm-Rudman inherently “executive” just because they involve “executing” the law in the sense of carrying out its commands? And third, even if the Comptroller General's role is assumed to be at least partially “executive” in this sense, does the Constitution necessarily prohibit giving officials subject to removal by the legislature the task of carrying out the commands of the law? Elsewhere I have explained in detail why I believe that the Court's answers to each of these three questions in *Bowsher* were plainly wrong.⁴⁴ The main point here is not to rehearse these arguments, but to illustrate that in *Bowsher*, as in *Chadha*, the Court's whole approach to the separation of powers issues before it consisted of arid, simplistic conceptualism rather than an attempt to achieve a real understanding of the goals that separation of powers principles were intended to serve.

Consider, for example, the Court's stated reasons for considering the Comptroller General's functions to be “executive”:

[W]e view these functions as plainly entailing execution of the law in constitutional terms. *Interpreting a law* enacted by Congress to implement the legislative mandate is the very essence of “execution” of the law. Under § 251, the Comptroller General must *exercise judgment concerning facts that affect the application of the Act*. He must also *interpret the provisions of the Act* to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.⁴⁵

43. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986).

44. See Elliott, *supra* note 6, at 320-32.

45. *Bowsher*, 478 U.S. at 732-33 (emphasis added).

Isn't it both surprising and sad that two hundred years after the Constitution was adopted, the Supreme Court's stated theory of what constitutes an "executive" function turns on nothing more profound than the common etymological roots of the words *executive* and *execute*? It is true that one clause of the Constitution vests the "executive" power of the United States in the President,⁴⁶ and that another directs the President to "take Care that the Laws be faithfully executed."⁴⁷ But it simply does not follow, either logically or practically, that all government officials who faithfully carry out the commands of the law in performing their assigned duties must therefore be members of the executive branch.

In fact, the functions that Gramm-Rudman assigns to the Comptroller General—"interpreting" the law and "apply[ing]" it to facts⁴⁸—are actually more typically *judicial* in nature than they are executive. Under the terms of Gramm-Rudman, the Comptroller General's report is not immediately effective to sequester appropriated funds. Rather, the statute requires the President to take further action to carry out the Comptroller General's determinations as to what the law requires.⁴⁹ Thus, the Comptroller General performs the prototypical judicial roles of interpreting the law, applying it to specific facts, and issuing a judgment, which the President is then duty-bound to carry out.

That arrangement in itself raises a serious separation of powers issue: Can the President be bound to follow the determination by a subsidiary official as to what the law requires?⁵⁰ But, as in *Chadha*, the Court never even got to the serious questions posed by the statute. Its analysis stopped with a silly word game that equated "executing" the laws with the "executive" branch. Once again there was no attempt to ask *why* the Framers chose to separate the executive and legislative branches, or to figure out whether the institutional arrangements created by Gramm-Rudman would effectuate rather than contradict the separation of powers principles that the Framers built into the Constitution.

The fundamental fallacy in *Bowsher v. Synar* is not that the Court picked the wrong conceptual box in which to pigeonhole the Comptroller General's functions (executive, rather than judicial), but instead that the Court presumed that separation of powers law could be reduced to simplistic labels and definitions:

46. U.S. CONST. art. I, § 1, cl. 1.

47. *Id.* art. II, § 3.

48. *Bowsher*, 478 U.S. at 732-33.

49. 2 U.S.C.A. § 902(a)(3) (West Supp. 1988).

50. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838) (holding that the Circuit Court of the District of Columbia had jurisdiction to issue a writ of mandamus to compel the Postmaster General to perform a ministerial duty); Elliott, *supra* note 6, at 330-32 (discussing *Kendall*).

The constitutional theory of separation of powers is by its nature holistic; it draws its meaning from the totality of the structures created by the Constitution and the history of how our institutions have evolved. No simple definition, no matter how well-crafted, can encapsulate all the wisdom implicit in the structure of the Constitution and our political history. By resorting to a jurisprudence of definitions, the [*Bowsher*] Court inevitably oversimplifies the issues in separation of powers cases.⁵¹

To be sure, if one is sufficiently determined, a rationalization can always be invented to explain the result in a case like *Bowsher*. For example, it might be suggested that the Court acted responsibly by striking down Gramm-Rudman on a technicality that could easily be remedied by amending the statute (i.e., by repealing Congress's power to remove the Comptroller General from office, or by reassigning his tasks relating to sequestrations under Gramm-Rudman to an official of the executive branch, such as the Director of the Office of Management and Budget). On this reading, what the Supreme Court was "really saying" in *Bowsher* was that Congress may make fundamental changes in institutional relationships by statute without amending the Constitution, but only if the country is "really serious" as demonstrated by the fact that more than one Congress is willing to agree to the change.⁵² In my view, this charitable interpretation of *Bowsher* (which, so far as I know, no one else has ever even suggested) is too clever by half. There is not the slightest clue in the *Bowsher* opinion that the Court actually had anything beyond the most barren literalism in mind.

C. *Independent Counsels*

The Supreme Court's recent decision in *Morrison v. Olson*,⁵³ upholding the constitutionality of the "independent counsel" statute passed in the wake of Watergate,⁵⁴ may seem to contradict my pessimism about the role of the courts in separation of powers cases. There is no doubt that both the result and some of the language in *Morrison* represent substantial improvements over decisions like *Chadha* and *Bowsher*. For example, the majority opinion by Chief Justice Rehnquist in *Morrison* goes out of its way to criticize decisions such as *Bowsher* that are based on "rigid categories" of executive, judicial, and legislative, and to acknowledge the "difficulty of defining such categories."⁵⁵ And although I do not agree with his conclusions, Justice Scalia's dissenting opinion holds some promise for the future of separation of powers law, in that Justice Scalia at least attempts to go beyond literalism to begin a conversation about

51. Elliott, *supra* note 6, at 327-28.

52. Cf. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 8-15 (1982) (reviewing techniques courts use to require more than one legislature to reaffirm a policy).

53. 108 S. Ct. 2597 (1988).

54. Ethics in Government Act of 1978, 28 U.S.C. §§ 591-599 (1982 & Supp. IV 1986).

55. *Morrison*, 108 S. Ct. at 2618 & n.28.

the fundamental purposes that separation of powers law was intended to serve.

Nonetheless, despite these hopeful signs, on some of the crucial issues the Court's reasoning in *Morrison* is almost as narrowly gauged and literalistic as the Court's reasoning in *Chadha* and *Bowsher*. The statute at issue in *Morrison* provides that whenever reasonable grounds exist to believe that certain high-ranking government officials may have violated federal criminal laws, the Attorney General shall request a special court to appoint an "independent counsel" (formerly called a "special prosecutor") to investigate, and if appropriate, to prosecute, outside of regular Department of Justice channels.⁵⁶ This statutory scheme was challenged on three interrelated constitutional grounds: (1) that it infringes on the President's constitutional powers to appoint officers of the United States; (2) that the courts cannot be assigned an inherently "nonjudicial" task such as appointing and supervising independent counsels; and (3) that prosecuting crimes is an inherently "executive" function that cannot be removed from presidential supervision and control.⁵⁷ In rejecting these arguments, the Court placed heavy reliance on the specific language of the Appointments Clause:

[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.*⁵⁸

Although the Court in *Morrison* reached the right result, I read the opinion as resting less on the fundamental separation of powers principle that "no man should be judge of his own case" than on the specific language of the Appointments Clause. Suppose that the Constitution did not contain specific language permitting the courts to appoint inferior officials; would the independent-counsel statute be any less constitutional? I would say clearly not, but based on the opinion in *Morrison* and the Court's overall record in separation of powers cases, I doubt that it would agree. The predominant characteristic of the Supreme Court's separation of powers jurisprudence is *literalism* (which must be strongly distinguished from a true respect for the text). By making important questions of constitutional law turn on issues of phrasing, rather than on structure and history, the

56. 28 U.S.C. §§ 591, 592(c) (1982 & Supp. IV 1986).

57. Brief for Appellee at 9-13, *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (No. 87-1279).

58. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

Supreme Court has built its separation of powers jurisprudence on sand (or worse).

The mental image that most people have of the Framers of the Constitution painstakingly debating and rewriting the Constitution line-by-line at the Constitutional Convention is simply false.⁵⁹ The Constitutional Convention debated and voted on *principles* of constitutional structure, as reflected in a series of resolutions. The actual wording of the Constitution, however, was written by a committee of five men, headed by Gouverneur Morris, over what amounted to a long weekend.⁶⁰

There is no question that we can, and should, draw meaning from the structural choices made by the Framers, as well as the choices made by others throughout our subsequent constitutional history, but we might as well make our constitutional fate turn on the entrails of birds so as to entrust the constitutionality of innovations in governmental structure to whether Gouverneur Morris and other members of the “Committee on Style” thought to put a particular word or phrase into their draft of the Constitution.

D. “*The Best and Brightest*”

Lest it be suspected that I have selected the weakest of the Supreme Court’s recent separation of powers opinions to show it in a bad light (or alternatively, that the Burger Court was merely more benighted in this area than its predecessors), in this section an example of separation of powers’ “best and brightest” opinions is discussed. These are the opinions that are traditionally singled out in articles or teaching materials for study as particularly interesting due to the larger theoretical contributions that they allegedly make to the field of separation of powers law.

One such opinion is the famous *Steel Seizure Case, Youngstown Sheet & Tube Co. v. Sawyer*.⁶¹ In 1951, in the midst of the Korean War, the steelworkers union called a national strike, shutting down the flow of steel to the country’s factories including those manufacturing war materials, thereby allegedly jeopardizing U.S. troops in the field in Korea. After efforts at mediation failed, President Truman issued an executive order temporarily taking over the steel mills on behalf of the U.S. government and ordering them back into operation.

The Supreme Court subsequently declared President Truman’s actions unconstitutional. After noting that two statutes had been passed by Congress giving the President explicit authority to seize private property, but that President Truman’s actions did not come within either of them, the majority opinion by Justice Black declared that President Truman’s executive order was an impermissible attempt by the executive branch to exercise “lawmaking” powers and

59. Cf. Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. (forthcoming).

60. C. BOWEN, *supra* note 13, at 234-38.

61. 343 U.S. 579 (1952).

therefore violated the constitutional principle of separation of powers: "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."⁶²

The result may be correct, but as a matter of constitutional theory, Justice Black's explanation simply will not do. Both before and after the Court's opinion in *Youngstown*, the executive branch has issued over ten thousand executive orders, many of which plainly "make laws" in every sense at least as much as did the *Steel Seizure* order.⁶³ Are we to understand that all of these executive orders by the executive branch are also unconstitutional? If not, what distinguishes the impermissible kind of "lawmaking" at issue in *Youngstown* from that routinely engaged in by the executive branch?

Perhaps it was to address these troubling questions that Justice Jackson wrote his famous concurrence in *Youngstown*. Jackson began with an extraordinary confession of the "poverty" of existing theories of separation of powers:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.⁶⁴

Next, Jackson described the reasons why more refined understandings of separation of powers principles are necessary and why courts should not decide these cases based on literal interpretations of the Constitution:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.⁶⁵

62. *Id.* at 589.

63. See J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM CASES AND MATERIALS* 140-42 (2d ed. 1985). For example, a few years before the *Steel Seizure Case*, President Truman issued an order desegregating the armed forces. Exec. Order No. 9980, 3 C.F.R. 720 (1943-1948).

64. *Youngstown*, 343 U.S. at 634-35 (Jackson, J., concurring).

65. *Id.* at 635.

Having decried the lack of any useful theories of separation of powers, and having described the reasons why such theories are essential, Jackson moved on to sketch the outlines of his own contribution to the search for the meaning of the constitutional principle of separation of powers.

Woodrow Wilson once wrote that the Framers of the U.S. Constitution based their theory of “political dynamics” on an “unconscious copy of the Newtonian theory of the universe;”⁶⁶ if so, Justice Jackson’s updated model of the political universe is based on Einstein’s concept of relativity:

Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . .

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .⁶⁷

There is no question that Justice Jackson’s concurrence in *Youngstown* is a good deal deeper and more thoughtful than most of the Supreme Court’s efforts in the separation of powers field—say *Chadha*, for example. Indeed, Jackson’s concurrence might be among the most profound pieces of judicial literature written in the twentieth century about separation of powers issues. (A recent constitutional law text writes that Justice Jackson, one of the great justices of the twentieth century, is “perhaps best remembered for his graceful prose and his subtle and original efforts to articulate a coherent theory of separation of powers in his opinions in cases such as *Youngstown*.”⁶⁸) But judged by the standard of the “best and brightest,” how good *really* is Jackson’s *Youngstown* concurrence?

Stripped of its poetry, which dresses up the ideas and makes them harder to evaluate, Jackson’s separation of powers “theory” comes down to telling us that when the President acts with Congress behind him, he has more power than when he doesn’t. That is something worth knowing, and perhaps it was helpful in deciding the particular case before the Court in *Youngstown* (although to know that the President would have “more” power if he acted with congressional authorization doesn’t really answer the question

66. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54-55 (Columbia paperback ed. 1961).

67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1957) (Jackson, J., concurring) (footnote omitted).

68. STONE & SEIDMAN, *supra* note 29, at 1xiii.

whether he has "enough" when he acts without it). But more fundamentally, how useful is Justice Jackson's theory of expanding and contracting spheres of power as a source of guidance for deciding other separation of powers cases? The implicit underpinning of Jackson's view of separation of powers is the vision of three interacting realms of power: executive, legislative, and judicial. How are judges to decide what is in these orbits and what is outside of them? A related question is "From whence does all of this come?" Jackson merely announces his theory of these three spheres of governmental power contracting and expanding in dynamic relation to one another; he does not connect it to anything, except perhaps the idea that the constitutional system of government must be "workable." The problem of grounding Jackson's *Youngstown* concurrence in anything more substantial than assertion is also a fundamental problem for our separation of powers law more generally. Long ago Justice Holmes pointed out that legal concepts like "executive, judicial, and legislative" are not "things" that "have" immutable existences; rather, they are constructs that we create to serve purposes, and these purposes should define their reach and measure.⁶⁹

As long as the courts persist in analyzing separation of powers questions by asking whether a particular function "is" executive or legislative, their task will be hopeless. Only when they begin to attack these problems by abstracting and elaborating theories of what goals separation of powers law should serve, and then asking whether a particular function should be deemed to be executive in light of those goals, can they hope to make any progress.

II. *Beyond Marbury and the Jurisprudence of Inputs*

From the beginning, American judges and legal scholars have been obsessed with questions concerning the legitimacy of judicial review and corollary problems of what sources of law judges may properly consider in deciding constitutional cases. For convenience, let us call this "the jurisprudence of inputs," because it focuses almost exclusively on what judges may take into account in deciding constitutional cases.

The main lines of the debate in the jurisprudence of inputs were laid down in the early days of the Republic by Chief Justice John Marshall in his defense of judicial review in *Marbury v. Madison*.⁷⁰ Virtually every law school course in constitutional law begins with

69. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899) ("We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.").

70. 5 U.S. (1 Cranch) 137 (1803).

Marbury, and its antinomy, *McCulloch v. Maryland*,⁷¹ and the two together have largely defined the intellectual space for constitutional law (at least in the law schools). I want to suggest, however, that the prevailing definition of constitutional law in terms of *Marbury* and the jurisprudence of inputs has been a crucial factor in impoverishing constitutional thought in the field of separation of powers, and perhaps more broadly as well.

The essential justification for judicial review that Chief Justice Marshall posits in *Marbury* turns on an analogy between the Constitution and other legal documents, such as contracts or statutes. As my colleague, Professor Robert Burt, recently put the point, “the textuality of the Constitution is the key for the conventional justifications of American judicial review.”⁷² Textuality, however, is not the only plausible justification that might be given for judicial review, as is demonstrated by Professor Burt’s forthcoming comparative study of the development of judicial review in Israel, which has no written constitution. For example, Alexander Hamilton’s justification for judicial review in *The Federalist No. 78* is really quite different from Marshall’s in *Marbury*, and relies far less, if at all, on the written nature of the Constitution. In a similar vein, Professor Barbara Black has suggested that judicial review by courts on issues of constitutional law is “obvious enough to go without saying” from the nature of courts and their role in the structure of government created by the Constitution.⁷³

Nonetheless, Marshall’s justification for judicial review in terms of texts in *Marbury*, which has itself become constitutional law’s leading text, has had profound implications for all that has come thereafter. Under the justification for judicial review given in *Marbury*—but not under the others that might have been given—the strongest, most legitimate constitutional argument is one based on the text of the Constitution itself.⁷⁴ A close second is an argument based on other closely related texts from the founding period, such as the debates of the Constitutional Convention and *The Federalist Papers*.

Unlike most other areas of constitutional law, separation of powers law was “blessed” with a comparative wealth of these early texts. These early texts applying separation of powers concepts to various problems encountered during the founding period have made it easy to decide separation of powers cases literally. For example, in *Bowsher*, Chief Justice Burger can point to the Founders’ fears that the Congress might aggrandize its power at the expense of the other

71. 17 U.S. (4 Wheat.) 316 (1819).

72. R. Burt, *Inventing Judicial Review: Israel and America*, 1 (draft, Yale Law School Faculty Workshop, Oct. 3, 1988) (quoted by permission of the author) (copy on file at the *George Washington Law Review*).

73. Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 U. PITT. L. REV. 691, 695-96 (1988).

74. Elsewhere I have argued that undisputed legitimacy of textual arguments in American constitutional law causes them to predominate over “nontextual” arguments over the long run. E.D. Elliott, *What’s Wrong With Our Constitutional Law Process* (Georgetown University Law Center “After the Bicentennial” Conference, Nov. 14-15, 1987) (unpublished working paper on file with the *George Washington Law Review*).

branches.⁷⁵ Under *Marbury* and the conventional understanding of the jurisprudence of inputs, this would appear to be a highly authoritative insight. But does the fact that the Framers feared legislative (rather than presidential) aggrandizement in 1787 really imply that it should be our primary concern in 1987?

Just as wealth that comes too easily in other spheres of life may stifle and impoverish the spirit, so too a wealth of relevant textual material in separation of powers law has made it easy to decide, but may make it harder to learn to decide *well*. By this line of reasoning, separation of powers law has failed to develop a rich theoretical foundation precisely because these concepts were so prominent during the Founders' era.

This line of analysis may provide a partial explanation for the relative impoverishment of separation of powers law, but it alone is probably insufficient. In view of the absence of any specific "Separation of Powers Clause" in the Constitution, it may seem odd to suggest that the prevailing literalism in this area is due to the predominance of texts which have crowded out other modes of constitutional analysis. (However, a Freudian might argue that the very absence of an explicit textual foundation for the "separation of powers doctrine" has caused judges to fix unduly on secondary textual authority in applying these doctrines.)

There is also another reason to be suspicious of whether this line of analysis alone is powerful enough to explain the relative impoverishment of separation of powers law. Other areas of constitutional law were formerly dominated by a textual literalism reminiscent of that which currently afflicts separation of powers law. Many of them have broken these conceptual bonds, and have grown into something more in the twentieth century. Why, for example, have courts been able to expand the Fourth Amendment beyond the boundaries of the common law of trespass, but have not yet made similar conceptual advances in separation of powers law?

In part, the answer may lie in our conception of the nature of modernity as contrasted with our perception of the essential continuity of our governmental institutions. When judges confront the question of whether wiretapping a conversation in a telephone booth violates the Constitution,⁷⁶ it is obvious to them that the eighteenth century Framers of the Constitution had no opinions about the wiretapping of telephones, and therefore the judges are driven to try to abstract from specifics to deeper, more fundamental theories of what constitutional provisions are about. It is equally

75. *Bowsher v. Synar*, 478 U.S. 714, 722-24 (1986) (discussing the Founders' concerns with legislative interference in executive matters).

76. *Katz v. United States*, 389 U.S. 347 (1967).

true—but not nearly so obvious—that the “executive” of 1789 is not the “executive” of 1989.

Rather than applying separation of powers texts literally, the courts should be striving to reach a deeper, more fundamental, and therefore more relevant understanding of our separation of powers traditions, as they sometimes have in other areas of constitutional law. Professor Stephen Carter may be right that literal application of the structural provisions of the Constitution legitimates judicial review,⁷⁷ but it is the wrong kind of judicial review that gets legitimated.

III. Toward Interpretation in Separation of Powers Jurisprudence

The central fallacy that ails our separation of powers jurisprudence grows out of a failure to distinguish between *interpretation* and *literalism* in applying the Constitution.

No text applies itself. A text, like any other set of symbols, must be related to its environment through a process by which meaning is created. But the environment is always changing, and consequently, relating a text to its environment and thereby giving it meaning is problematic. Literalism does not escape this problem; it merely obscures the problem by abandoning the choice of meanings to the general cultural evolution of language. Thus, to the literalist, it seems self-evident that when the Framers referred to “the executive branch” in 1787, they meant to include everything that we call “the executive branch” today, even though the things that are actually encompassed by the term are now quite different. Why? Because our language has evolved so that the words “the executive branch” are now generally understood to encompass things that were not included (or did even not exist) when the Framers used those words in the Constitution.

For the interpreter, on the other hand, it does not follow so easily that the general evolution of the meanings of words in the language should control the interpretation of an ancient text, particularly not one like a constitution that was created to serve certain purposes. The interpreter would want to try to imagine herself moving between the Framers’ world and ours, and trying as best she could to translate the symbols of one to the other. From this perspective, it is not at all clear that “the executive” of 1789 means “the executive” of 1989; the issue would depend on the context and the constitutional and statutory purposes involved.

The problem I have just described is a general one for constitutional law, where we must always try to give meaning to symbols across two hundred years of historical distance. It is exacerbated for separation of powers by the absence of a single, general text that

77. See Carter, *Constitutional Adjudication*, *supra* note 5, at 855 (stating that strict application of structural clauses of the Constitution legitimates judicial review in protection of individual rights).

states a broad, constitutional principal. (One could imagine, for example, a proviso to the Necessary and Proper Clause that stated "However, in establishing such other offices and institutions, Congress shall take Care not to concentrate power unduly such that it might be abused.")

In lieu of such a "Separation of Powers Clause," we are given a number of specific clauses that constitute the three branches of government and define relationships among them. It is a mistake to imagine, however, that the constitutional doctrine of separation of powers is coterminous with the specific provisions of the Constitution creating the government. These words, in historical context, created the doctrine of separation of powers, but they do not exhaust it.

The point can be clarified, perhaps, by reference to Ronald Dworkin's distinction between general "concepts" and specific "conceptions."⁷⁸ Dworkin argues that the great, open-textured provisions of the Constitution, such as the Due Process Clause, do not embody the specific "conceptions" of fairness that the Framers may have had in mind, but rather refer to the general concept of fairness itself, which the Framers presumably recognized would develop and change over time.⁷⁹

The problem in separation of powers is just the reverse: we are given the specific conceptions of governmental structure by the constitutional text, but we must abstract the general concept(s) from the specifics for ourselves. Lack of an abstract statement of the principle(s) of separation of powers in the text of the Constitution itself has made it particularly difficult for judges to escape the bonds of literalism in order to engage in true interpretation.

Let me provide one specific illustration of how an interpretive approach to separation of powers law would differ from the prevailing regime of literalism. Under the prevailing literalism, "independent agencies" occupy a constitutionally questionable status.⁸⁰ Why? Because they are nowhere mentioned in the text of the Constitution, which creates only three branches of government. It has been conventionally thought by literalists that independent agencies must be

78. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 133-36 (1979) (distinguishing general "concept" of fairness from "specific conceptions" of fairness held by the Framers).

79. *Id.*; see also Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (arguing that the Framers did not intend future interpreters of the Constitution to be guided by the Framers' own "purposes, expectations, and intentions").

80. See, e.g., *A Symposium on Administrative Law: "The Uneasy Constitutional Status of Administrative Agencies,"* 36 AM. U.L. REV. 277 (1987) (including essays by several authors who examine, among other things, executive delegation of authority to administrative agencies); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 43 (stating that independent agencies have yet to overcome "constitutional questions").

“in” one of the three branches of government, most likely the executive branch. But if they are “in” the executive branch, why aren’t they subject to control by the President, in whom the Constitution “vests” the executive power?

This conundrum is a difficult one for the literalist who equates the doctrine of separation of powers with specific provisions of the Constitution; it becomes much more tractable for the interpreter. The interpreter asks not only *what* the Framers did, but also *why*, so that she can try to translate their wisdom to our own differing circumstances and conditions. The interpreter tries to divine a principle behind the Framers’ act of creating three branches of government, and seeks to apply the meaning of their words rather than the words themselves. She asks whether these purposes would be effectuated by permitting Congress to create agencies whose heads cannot be fired by the President. If it does not contravene the reasons why the Framers created three branches—what John Marshall called “the spirit of the Constitution”⁸¹—then a measure such as the independent agency is (or should be) constitutional.

The act of interpretation is not mechanical, and reasonable people may disagree about which principles, and what wise application of them for our times, should emerge from the Framers’ example. We should welcome, not despair of, such debates. They are the source from which a collective wisdom about issues of governmental structure grows.

The saddest casualty of the literalism that now pervades our separation of powers jurisprudence is that literalism cuts short discussion and thought. Lawyers and judges rarely think or talk today about how government works, or what history teaches are the characteristic flaws in particular governmental designs, and how these weaknesses may be overcome through creatively designing and combining institutions. It was just these types of questions that the Framers asked themselves when they met together in the summer of 1787 in Philadelphia. Perhaps the Framers’ answers on questions of governmental structure were so wise not because their generation was inherently smarter than ours, but because they asked the right questions, questions that we no longer dare to ask.

Perhaps we pay homage to the Framers in the wrong way when we apply their words literally rather than follow their example. Perhaps we need to think of our separation of powers jurisprudence as a continuation of the creative discussions about governmental structure that began at Philadelphia. This we cannot do, however, so long as we insist on applying the Framers’ words but neglecting their meaning.

81. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).