THE UNANNOUNCED REVOLUTION: HOW THE COURT HAS INDIRECTLY EFFECTED A SHIFT IN THE SEPARATION OF POWERS

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I. INTRODUCTION

What numerous commentators find surprising about the Rehnquist Court is that its federalism revolution was not accompanied by a corresponding revolution in the separation of powers area. Despite their similarity, in that both pertain to the constitutional scheme of intergovernmental organization and relationships, federalism has undergone a dramatic revival while separation of powers has seemed to languish in dormancy. This impression, however, is true only on the surface.

Over the past several decades, a steady but subtle shift has been occurring with respect to the separation of powers. It has been perhaps more evolution than revolution, and it has worked to shift power from Congress to the federal judiciary. The shift has not occurred through any announced doctrinal changes or applications but through the indirect effects of the transfers of power from Congress to administrative agencies. By delegating more and more power to the administrative state, over which the judiciary exercises a greater supervisory role, Congress has allowed the courts to effectively acquire a larger and larger role in the policymaking function that should be reserved to the legislative arena.

As one prominent legal scholar has observed, "[W]hen constitutional historians look back at the Rehnquist Court, they will say that the greatest changes in constitutional law were with regard to federalism."[1] Federalism has been called one of the defining themes of the Rehnquist Court.[2] Credited with re-aligning the balance of power between the federal government

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1. Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001).

2. William H. Pryor Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1167 (2002). For the first time since the post-New Deal era, the Court has struck down congressional acts on the grounds that they infringed on state powers and rights. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995).

and the states, the Rehnquist Court has been linked with a "new federalism,"[3] or a "federalist revival."[4]

Despite the revolution in the Court's federalism decisions, however, commentators argue that there has been no similar revolution in connection with separation of powers.[5] As Professor Magill argues, although "the Court seems willing to upset some old assumptions about the allocation of authority between the federal and state governments, the Court shrinks from any interpretation that would work a serious change in either the [separation of powers] doctrine or in the structure of the federal government."[6] This lack of "revolution" in separation of powers jurisprudence seems initially puzzling because logic "would expect doctrinal developments in federalism and separation of powers to track one another."[7]

The similarity between federalism and separation of powers results from the fact that both pertain to structural provisions of the Constitution; both focus on allocating power to various government entities, rather than placing substantive limits on the scope of any particular government action; and both act as a check on the power of the national government. Although there is no specific "separation of powers" provision in the Constitution, there is also no "federalism" clause.[8] Instead, both are features inherent

3. Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 693 (2005). Ever since the New Deal era, "federalism concerns had been largely dormant in the Court's decisions." *Id.*

4. Vicki C. Jackson, *Federalism and the Uses and Limits of Law*, 111 HARV. L. REV. 2180, 2181-82 (1998) (noting that scholars credit the Rehnquist Court with resurrecting the concept of federalism in constitutional law). This new federalism has revived such constraints on national power as the Tenth Amendment and state sovereign immunity. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); New York v. United States, 505 U.S. 144 (1992).

5. M. Elizabeth Magill, *The Revolution that Wasn't*, 99 NW. U. L. REV. 47, 52 (2004). Even those scholars who disagree with Professor Magill admit that the Rehnquist Court's handling of separation of powers cases has noticeably declined from the late Burger Court. *See, e.g.*, Steven G. Calabresi, *Separation of Powers and the Rehnquist Court, the Centrality of* Clinton v. City of New York, 99 NW. U. L. REV. 77, 79, 83 (2004) (arguing that during the Rehnquist era federalism cases outnumbered separation of powers cases by a ratio of nearly three-to-one, although this disparity must be considered in light of the fact that federalism cases were almost nonexistent at the high court between 1937 and 1986). Many of the major separation of powers cases in the recent era occurred during the early 1980s. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating the Gramm-Rudman-Hollings Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038); INS v. Chadha, 462 U.S. 919 (1983) (striking down the legislative veto); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (overturning Congress's broad grant of jurisdiction to federal bankruptcy judges); Dames & Moore v. Regan, 453 U.S. 654 (1981). However, despite this brief resurgence of separation of powers decisions during the Burger years, the post-1937 period has seen interpretation of structural constitutional law (including both federalism and separation of powers) greatly decline, almost to the point of disappearance.

6. Magill, *supra* note 5, at 54.

7. *Id.* at 47.

8. The Constitution contains no specific language mandating the separation of the three branches of government. Instead, it affirmatively states the powers of each branch and creates a system of direct checks and balances, such as the President's veto power. *See, e.g.*, John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 512 (2001). Thus, separation of powers is more of an informal descriptor of how the Constitution works, in terms of checks and balances, rather than a reflection of precise constitutional provisions.

within the scheme of the Constitution, reflecting constitutional structures and relationships.[9]

Just as the Constitution creates a system of checks and balances at the national level, it also creates a dual sovereignty structure between state and federal governments.[10] As James Madison wrote, both separation of powers and federalism enable the people "to conquer government power by dividing it."[11] Both establish structures and institutions "whose very purpose is to assure government compliance with the specific legal rights embodied in the Constitution."[12] Whereas separation of powers addresses the horizontal structure or division of power among the legislative, executive, and judicial branches of the federal government, federalism focuses on the vertical division between the national and state governments.[13] According to Madison, "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."[14]

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9. The Framers viewed the Constitution's structural provisions, especially the separation of powers, as a way to ensure and preserve individual liberty by checking the power of government. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 268 (2000).

These two structural features are mutually reinforcing. For instance, two separation of powers provisions in Article I, Section 7—bicameralism and presentment—restrain the number of laws that the federal government can pass, effectively limiting federal intrusion into state lawmaking. As evidence of this, each year only a small fraction of the bills introduced in the House and Senate actually survive the legislative gauntlet to become law. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1341 (2001). "[T]he imposition of cumbersome federal lawmaking procedures suggests that the Constitution 'reserves substantive lawmaking power to the states and the people *both* by limiting the powers assigned to the federal government *and* by rendering that government frequently incapable of exercising them.'" *Id.* at 1340 (quoting Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1261 (1996)). The Constitution sets out "'finely wrought and exhaustively considered' procedures" that must be followed so as to establish "the supreme Law of the Land" to which all states must adhere. *Id.* at 1392. These procedures, often categorized as part of the separation of powers between the executive and legislative branches, also help protect federalism by restricting the instances in which federal law will supercede state law.

10. As pertaining to the relationship between federal and state government, federalism "is a broad principle that can be derived from the Constitution read as a whole." Westover, *supra* note 3, at 697. According to Professor Charles L. Black, the Constitution creates governing structures and then addresses the relationships between and within those structures, with federalism and separation of powers being the most prominent of those structures. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 10-11 (1969). The relationship between the states and the federal government is governed by federalism, and the relationship between the legislative, executive, and judicial branches is governed by separations of powers. As the Court stated in *Bowsher v. Synar*, 478 U.S. 714 (1986), a general principle of separation of powers can be constructed from various provisions in the Constitution: "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty." *Id.* at 722.

11. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1450 (1987).

12. *Id.* at 1493. Alexander Hamilton made similar arguments. Like separation of powers, federalism served to check the abuse of power and the infringements on individual liberty. *See* THE FEDERALIST NO. 9 (Alexander Hamilton).

13. According to Lawrence Sager, "[O]ur constitutional text and jurisprudence respond in part to concerns of political justice by architecting and protecting structural features of government—the horizontal separation of powers and the vertical distribution of authority within a federal structure." LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 154-55 (2004).

14. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). Hence, a double

Some scholars see federalism as one aspect of constitutional separation of powers.[15] Indeed, without taking federalism into account, the complete workings of the constitutional system of separated powers cannot be fully understood.[16] Furthermore, federal action that violates separation of powers may also infringe on the various rights reserved to the states.[17] As the Supreme Court has stated, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[18]

The failure of the Court to embark on an overhaul of its separation of powers doctrine has prompted criticism from legal scholars. There is almost universal agreement among constitutional scholars that "the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle."[19] According to scholars, the Court "has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called 'functional' approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another."[20] But much of this criticism focuses only on the Court's overt separation of powers de-

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security arises to protect the rights of the people. The different governments will control one another—and at the same time, each will control itself. *Id.*

15. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 19 (2003).

16. *Id.* at 21. Peabody and Nugent argue that "federalism is a core element of separated powers, analogous in important ways to traditional aspects of this system." *Id.* at 56. They see "federalism and the separation of powers amongst the national branches of government as a single, interconnected system." *Id.* at 61 (articulating the "many theoretical, structural, and functional similarities between the vertical and horizontal separations of powers").

17. *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 80 (1938). Professor Clark argues that the Supremacy Clause likewise incorporates federalism concerns by assigning lawmaking power to actors subject to the political safeguards of federalism. Clark, *Separation of Powers as a Safeguard to Federalism*, note 9, at 1324. According to Clark, the states are the direct beneficiaries of federal lawmaking procedures that establish clear constraints on the federal government's ability to exercise power. *Id.* at 1325 (quoting Kramer, *supra* note 9, at 222) (emphasis omitted). "In other words, enforcement of federal lawmaking procedures not only implements the Constitution's formal separation of powers, but also functions to preserve 'the governance prerogatives of state and local institutions.'" *Id.* at 1324-25. "In short, the imposition of cumbersome federal lawmaking procedures suggests that the Constitution 'reserves substantive lawmaking power to the states and the people *both* by limiting the powers assigned to the federal government *and* by rendering that government frequently incapable of exercising them.'" *Id.* at 1340 (quoting Clark, *Federal Common Law: A Structural Reinterpretation*, *supra* note 9).

18. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985). The connection between federalism and separation of powers has also been reflected in the way scholars view Supremacy Clause decisions. Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1372. Clark argues that "[b]y upholding the exclusivity of constitutionally prescribed lawmaking procedures, the Court has prevented attempts to evade obstacles meant both to impede federal lawmaking and to give states a voice in the process." *Id.*

19. Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

20. Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) (footnote omitted). Adding to the puzzling, contradictory directions of separation of powers and federalism law, there is also a disconnect between federalism and preemption law. Scholars have generally concluded that the Court is predisposed to finding state laws preempted by federal statutes. Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 355 (2004). But there is an "'incongruity' between these statutory outcomes and the Court's preoccupation with federalism at the constitutional level." *Id.* (footnote omitted).

cisions. Examining the holdings and reasoning of these decisions, observers conclude that separation of powers is in a directionless drift. However, if one steps behind these decisions and examines both the practical and legal effects of a wider array of cases, one sees that, in fact, there is a definite trend in this area.

According to conventional thinking, the Court has not effected the changes in separation of powers that it has in federalism. But even though the Court has not announced any dramatic departures in its separation of powers doctrine, it has nonetheless altered the comparative status of the branches through its decisions regarding an intermediary—the administrative agency. Whereas many scholars argue that the added authority given to administrative agencies has resulted in greater power for the executive branch, the argument presented here is that the increased power of agencies has brought about increased powers for the courts—an increase which has come largely at the expense of Congress. Thus, the drift of power has traveled from Congress to the agencies and then to the courts, whose authority has increased because of the ways it can review the actions of administrative agencies.

In tracing the evolution of this separation of powers shift, this Article will present in Part II the underlying theory of separation of powers, as well as a brief constitutional history of the doctrine. In particular, it will trace the modern evolution of separation of powers law, including the Non-Delegation Doctrine. The goal of this discussion is to illustrate the need for continued, active judicial enforcement of a constitutionally mandated separation of powers. Part III will examine the nature of the administrative state and the legal accommodations made to the growth of that state. Although the needs and demands of modern society make an administrative state inevitable, the legal environment in which that state operates need not be inevitable. Part IV will analyze the courts' relationship to the administrative state and how that relationship has served to strengthen the power of the judiciary in comparison to the other branches. The expansion of the administrative state has brought about, albeit somewhat indirectly, a greater judicial role in the policymaking process that was originally intended to be the province of Congress. This trend, however, has gone unannounced and largely unnoticed. Perhaps only a more overt and determined judicial enforcement of a stronger separation of powers doctrine can slow or even reverse this trend. Finally, in the conclusion, this Article will illustrate how the seemingly inconsistent strains of two different lines of separation of powers case law nonetheless reinforce each other in strengthening the comparative position of the judiciary.

II. SEPARATION OF POWERS IN THE UNITED STATES

A. The Constitutional Theory

The United States Constitution creates a government with three separate branches, each vested with different powers and responsible for different functions. This particular structure reflects the doctrine of separated powers. The Framers adopted this doctrine so as to diffuse government power and thereby protect individual liberty from government encroachment.[21] Each branch is apportioned certain powers that enable it to act as a check on the other branches: "To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts."[22]

By parceling out governmental power among the three branches, the Framers sought to make ambition "counteract ambition," thereby restricting the overall power of the state.[23] In this way, the system of separated powers is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[24]

The Supreme Court has recognized the importance of the separation of powers doctrine to the American constitutional system.[25] Separation of powers "is at the core of American ideology."[26] It is "part of the essence of American government, as fundamental as the vote or representative government."[27] It provides a system of checks and balances, as well as a guard against improvident and impetuous government decisions.[28] The separation of powers doctrine seeks to control government power by splitting it among three different institutions. Not only are the three different functions of government separated—executive, legislative, and judicial—but they also are allocated to three different branches.[29] The doctrine of separation of powers,

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21. *See* Bowsher v. Synar, 478 U.S. 714, 721 (1986) (stating that the separation of powers was meant to "diffus[e] power the better to secure liberty" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring)) (alteration in original)); United States v. Brown, 381 U.S. 437, 443 (1965) (opining that the separation of powers is "a bulwark against tyranny").

22. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). Article I of the Constitution places all legislative powers in Congress. Article II vests executive power in the presidency. And Article III places the judicial power in the federal courts.

23. THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961).

24. Buckley v. Valeo, 424 U.S. 1, 122 (1976). Without such a self-executing system, the Framers feared the onset of the same kind of tyranny against which they had revolted.

25. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590 (1949) (noting that the Constitution's separation of powers "is fundamental in our system").

26. Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 78 (2004).

27. *Id.*

28. *Id.* at 80.

29. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001). As Madison wrote, "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." THE FEDERALIST NO. 47, at 271 (James Madison) (Clinton Rossiter ed., 1961) (emphasis

in its purest form, states that the preservation of political liberty requires that government be divided into three branches and that each branch be given a corresponding identifiable function—e.g., legislative, executive, or judicial.[30] Furthermore, each branch must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches.[31]

A claim that a particular government action violates the separation of powers usually takes one of two forms.[32] Either one branch has "interfere[d] impermissibly with the other's performance of its constitutionally assigned function,"[33] or one branch has assumed or usurped "a function that more properly is entrusted to another."[34] The Framers feared not only glaring encroachments of one branch on another, but also the more subtle and indirect encroachments.[35] Since such encroachments are less likely to be challenged, they were seen to pose an even greater danger to separation of powers.[36]

Separation of powers does more than just accomplish the negative function of preventing abuses of power; it also achieves a number of positive functions.[37] These functions include the following: allowing a wide-ranging political representation of diverse interests, leading to a broad-based consensus across a diverse republic; promoting the distinctive qualities associated with each branch; and providing the means by which to overcome temporary legislative or political impasses.[38] Under a system of separated powers,

> the intermingling of the Congress, President, and the Judiciary in policymaking, for example, provides for not only the energy and secrecy usually attributed to executive leadership but also the deliberation that is the frequent byproduct of legislative activity, and the judiciary's authoritative legal judgment and institutional inclination to articulate . . . rights.[39]

Thus, separation of powers helps the government to be "deliberative, representative, and accountable."[40] It helps to slow down the lawmaking process

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omitted).

30. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (2d ed. 1998).

31. *See supra* text accompanying note 24.

32. The doctrine of separation of powers has two basic modes. *See* INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring); Myers v. United States, 272 U.S. 52, 117, 163-64 (1926).

33. *Chadha*, 462 U.S. at 951, 963 (Powell, J., concurring).

34. *Id.*

35. THE FEDERALIST NO. 48, at 312-13 (James Madison) (Clinton Rossiter ed., 1961).

36. *Id.*

37. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the Constitution uses separation of powers to integrate the dispersed powers into a workable government).

38. Peabody & Nugent, *supra* note 15, at 22.

39. *Id.* at 24.

40. *Id.*

so that it can be responsive to all the various constituencies in a large democracy.

Another benefit of separation of powers is that it serves to multiply the veto points that in turn make impulsive and even demagogic state action more difficult. A checks-and-balances system makes it more difficult for the government to act unless there is widespread agreement that it should do so.[41] Such a system, by providing each branch with the means and the will to resist the others, promotes stability by insulating the status quo from tumultuous and unpredictable change.[42]

Although the various branches and functions of government seem clear enough in theory, reality has shown that it can be difficult to neatly distinguish between them and to know when one branch might be unduly encroaching on another. For this reason, the Court has recognized that "the Constitution by no means contemplates total separation of each of these three essential branches of Government."[43] Consequently, the Court will often accommodate "statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."[44] The difficulty, of course, lies in determining the actual or tolerable degree of encroachment.

B. Historical Underpinnings

The separation of powers doctrine reflects the Framers' fear of centralized power. As James Madison wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[45] One of the most pervasive concerns surrounding the adoption of the Constitution was that the federal judiciary would expand its own powers beyond the confines of limited government, thus subverting the separation of powers.[46] Opponents feared that the federal courts, exercising unbridled equitable powers, would decide cases as "their opinions, their caprice, or their politics might dictate."[47]

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41. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434 (1987). Sunstein echoes Montesquieu's observation that a system with three branches should naturally form a state of repose or inaction.

42. *Id.* at 436.

43. Buckley v. Valeo, 424 U.S. 1, 121 (1976).

44. Mistretta v. United States, 488 U.S. 361, 382 (1989).

45. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Madison believed that human nature required constraints on power: "It may be a reflection on human nature that such devices should be necessary to control the abuses of government." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

46. Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J., concurring) (discussing concerns that were raised during the drafting and ratification of the Constitution regarding the federal judiciary's power).

47. *Id.* at 128 (quoting FEDERAL FARMER NO. 15, Jan. 18, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 316, 322 (Herbert J. Storing ed., 1981)).

The Framers feared judicial encroachment into the legislative sphere more than any other breach of separation of powers. Alexander Hamilton argued that "there is no liberty if the power of judging be not separated from the legislative and executive powers."[48] Believing judges to be essentially aristocratic and too far removed from the people, James Madison saw the best protection against tyranny as keeping the elite governmental powers—the judiciary—from exercising any legislative power.[49]

This notion of separation of powers arose from the perceived weaknesses and disorders of previous republics, including the federal government under the Articles of Confederation.[50] As John Adams wrote in 1775, "[B]y balancing each of these powers against the other two . . . the efforts in human nature towards tyranny can alone be checked and restrained."[51] The Framers were also influenced by the Protestant Reformation.[52] Given the state of human failings, John Calvin had advocated a government in which "neither a King nor judges had excessive power."[53] This fear of excessive power has been prevalent throughout American history. As Justice Black later explained, America's colonial history "provided ample reasons for people to be afraid to vest too much power in the national government."[54]

One of the earliest advocates of the classical concept of separation of powers was Montesquieu, who wrote that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[55] And on this subject, the Framers were much influenced by Montesquieu.[56] Throughout its deliberations, the Constitutional Convention remained steadfast in its belief that governmental power should be separated and balanced among the three branches of government, as recommended by Montesquieu.[57]

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48. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 181 (Thomas Nugent trans., Hatner Publ'g Co. 1949) (1748).

49. THE FEDERALIST NO. 49 (James Madison).

50. Harvey Mansfield, *Separation of Powers in the American Constitution*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT 3, 4 (Bradford P. Wilson & Peter W. Schramm eds., 1994). Not only would checks and balances be the primary means of securing the separation of powers and thereby preserving liberty, but the separation would also make the different branches function better by defining their functions. *Id.* at 10.

51. VILE, *supra* note 30, at 133. By 1776, the separation of powers had emerged "as the only viable basis for a constitutional system of limited government." *Id.* at 147.

52. Benjamin V. Madison, *RICO, Judicial Activism, and the Roots of Separation of Powers*, 43 BRANDEIS L.J. 29, 74 (2004).

53. *Id.* at 76.

54. Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 869 (1960).

55. MONTESQUIEU, *supra* note 48, bk. XI, ch. 6, at 151.

56. FORREST MCDONALD, NOVOS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 81 (1985) ("American republican ideologues could recite the central points of Montesquieu's doctrine as if it had been a catechism.").

57. *See, e.g.*, THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 51-52 (1993). The Framers view of human nature required the separation of powers in the American republic, as Madison wrote: "If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). The Framers "turned to the separation of powers as a fundamental principle of free government." VILE, *supra* note 30, at 126.

The Framers foresaw that the separation of powers structure, by placing impediments in the path of the political process, would help to restrain the excesses of lawmaking. Although this structural bias in favor of the status quo would naturally defeat "a few good laws," it would also prevent "a number of bad ones."[58] Furthermore, the Framers grafted a uniquely American theory of checks and balances onto the classical notion of separation of powers.[59] A "rigid separation of functions in different hands was not itself seen as a sufficient safeguard."[60] A system of checks and balances was also needed, with each branch sufficiently independent so as to be able to keep the others in check.[61] According to Thomas Jefferson, "powers should be so divided and balanced 'as that no one could transcend their legal limits, without being checked and restrained by the others.'"[62] Thus, the two doctrines—separation of powers and checks and balances—were combined into a single, uniquely American doctrine.[63]

C. Separation of Powers in the Twentieth Century

Because the federal government has taken on increasingly broad and complex issues, the executive branch and its administrative agencies now exercise powers that are both legislative and judicial in nature.[64] This blurring of the lines between governmental functions has caused problems for the separation of powers doctrine. In addition, throughout the twentieth century, a series of political movements has questioned the validity and usefulness of the doctrine.

Prior to World War I, the Progressive movement tried to undermine the separation of powers doctrine by "stress[ing] the need to achieve an effective, harmonious relationship between the branches of government."[65] But such harmony was inconsistent with the notion of the sharp divisions between governmental functions and branches.[66] Progressives like Herbert Croly and Woodrow Wilson criticized the system of checks and balances and separated powers outlined by James Madison in *The Federalist*. They saw these structural provisions as robbing the government of the power of positive action.[67]

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58. THE FEDERALIST NO. 73, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
59. VILE, *supra* note 30, at 151.
60. *Id.*
61. *Id.*
62. *Id.* at 152 (citation omitted).
63. *Id.* at 154.
64. Cindy G. Buys & William Isasi, *An "Authoritative Statement" of Administrative Action: A Useful Political Invention or a Violation of the Separation of Powers Doctrine?*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 73, 89 (2003).
65. VILE, *supra* note 30, at 272.
66. *See id.* at 279.
67. *Id.* at 274.

Historians have credited the Progressive era with initiating a "fifty year transformation in the separation of powers and the rule of law."[68] Yet even though the strong presidency of Woodrow Wilson shifted the institutional balance of power in favor of the executive, it was the experience of the regulatory commissions established under the New Deal that had the greatest impact on the separation of powers.[69] The commissions incorporated within their province all three of the constitutional powers—legislative, executive, and judicial.[70] To achieve efficiency in government, it was considered vital to give these commissions and agencies the ability to combine and perform all the powers and functions of government.[71]

The rise of the administrative state, along with the centralization of federal government, began with the Progressive reform movement, continued into the World War I, and then intensified during the Great Depression and the New Deal.[72] The vast increase in executive power during the New Deal occurred in response to the national crisis posed by the Great Depression. The urgent and complex needs of a society in trauma demanded decisive, unified, and powerful governmental action. Contrary to the beliefs of the founding era, strong government was seen not as a threat to liberty but as a savior of society, and the agents of that saving power were the administrative agencies. But to enable those agencies to perform that role, the Court had to sanction the granting of wide, virtually undefined powers.[73] The Court also had to approve the combination of all three functions within each individual agency and regulatory commission.[74] This approval was couched in a semantic maze of "quasi-legislative" and "quasi-judicial" powers, but in truth, any real attempt to apply separation of powers criteria might have prevented the government from effectively meeting the demands being put upon it.[75] Not surprisingly, in the half century following the start of the New Deal, the separation of powers doctrine effectively died out.[76]

According to Keith Whittington, one of the forces contributing to a centralized federal state during the first half of the twentieth century, and peaking in the 1960s, was the rise of an expertise model of governing.[77] The New Deal reformers believed that administrative agencies would provide

68. Jamison E. Colburn, *"Democratic Experimentalism": A Separation of Powers for Our Time?*, 37 SUFFOLK U. L. REV. 287, 347 (2004).

69. VILE, *supra* note 30, at 283.

70. *Id.* at 283-84.

71. *Id.* at 284.

72. This history is outlined in Hugh Heclo, *What Has Happened to the Separation of Powers?*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT, *supra* note 50, at 131, 131-65.

73. VILE, *supra* note 30, at 287.

74. *Id.*

75. *Id.* at 287. Because the bureaucratization of the New Deal spawned different kinds of government authority and different structures of power, the administrative state quickly outgrew traditional separation of powers thinking.

76. Calabresi, *supra* note 5, at 78-79.

77. Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 490-503 (1998).

independent, expert avenues for social change.[78] Like the Progressives before them, New Dealers saw administrative agencies as insulating public officials from partisan pressures.[79] But to achieve this, the New Deal reformers had to reject the traditional notion of separation of powers. This was easy to do, since to them "the system of separated functions prevented the government from reacting flexibly and rapidly to stabilize the economy and to protect the disadvantaged from fluctuations in the unmanaged market."[80] Consequently, with respect to the administrative state, the New Deal "was a self-conscious revision of the original constitutional arrangement of checks and balances."[81] Checks and balances became associated with governmental inaction—an association which inspired New Dealers to undertake a transformation of the original distribution of national powers.[82] This transformation favored a system of more unified powers, which in turn, according to expectations, would facilitate more flexible government action utilizing the technical expertise and specialization of the agencies.[83] Dissatisfied with the perceived failings of the political process, reformers believed that knowledgeable, enlightened experts, insulated from political corruption, would serve the public interest better than elected representatives.[84] As Franklin Roosevelt proclaimed, "The day of enlightened administration has come."[85] Through a newly created administrative state, the New Deal reformers attempted to bypass the judicial and legislative processes, both of which appeared to have succumbed to factional control.[86]

As a result of all the forces put into play during the New Deal, the American administrative state has grown to a point where it now "often looks like Hobbes' Leviathan itself."[87] Administrative agencies have been called the "fourth branch" of government.[88] Contrary to the idealistic hopes of the New Dealers, agencies are often rigidly bureaucratic and cravenly political. But even though they defy the political expectations and theories of the Framers, the growth of administrative agencies has been tolerated by constitutional doctrines. As one commentator observes, even though Ameri-

78. *Id.* at 492-93.

79. Sunstein, *supra* note 41, at 422-23.

80. *Id.* at 424. In addition, the reformers believed that separation of powers created unnecessary political struggles that prevented the executive branch from making regulatory policies free of partisan pressure.

81. *Id.* at 430.

82. *Id.* at 433.

83. *Id.* at 440. Preferring a unified, activist government, the New Deal rejected the system of checks and balances as obstacles to rapid social change. *Id.* at 443. This rejection, according to Professor Sunstein, "was a central feature of the New Deal reformation." *Id.* at 447.

84. *Id.* at 440-41.

85. Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club, San Francisco, Cal. (Sept. 23, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE GENESIS OF THE NEW DEAL, 1928-32, at 752 (1938).

86. Sunstein, *supra* note 41, at 421-22.

87. Colburn, *supra* note 68, at 287.

88. Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1139 (2004).

cans still believe in limited government, they can no longer see how the limits are to be applied in modern circumstances.[89]

Unquestionably, the modern administrative agency is in considerable tension with constitutional principles.[90] Having attenuated the links between citizens and governmental processes, federal agencies can hardly serve as an outlet for democratic aspirations.[91] According to some observers, the agency role in the lawmaking process has become almost unchecked, largely because current separation of powers jurisprudence is unsuited to the realities of modern administrative governance.[92] Out of perceived necessity, the Court has accepted, as a constitutional matter, the administrative state.[93] Congress has actively participated in its explosive growth, eagerly passing off the tasks of legislating complex public policies and making politically tough decisions that members of Congress would just as soon avoid to agencies.

III. THE CONSTITUTIONAL ACCOMMODATION OF THE ADMINISTRATIVE STATE

A. The Non-Delegation Doctrine

The Constitution vests all legislative power in Congress. Article I, Section 7 provides that legislation must pass both houses of Congress and then be presented for the President's approval or veto. Though it may be somewhat cumbersome, this process makes it more difficult for factions to capture the legislative process.[94] "[I]t [also] restrains passion and promotes deliberation,"[95] and it helps filter out bad laws by raising the barriers to the passage of any law.[96]

Maintaining a constitutionally-mandated separation of powers requires that the judiciary ensure that this legislative function remains the sole prerogative of Congress. To do this, the Court has adopted the Non-Delegation Doctrine, which holds that Congress may not delegate its lawmaking powers to the executive branch.[97] This doctrine, however, is almost completely

89. VILE, *supra* note 30, at 12. Consequently, if there is a danger posed by this expansion of the administrative state, it is more from a process of erosion than from a direct assault upon liberty.

90. Sunstein, *supra* note 41, at 497-98.

91. *Id.* at 505.

92. Colburn, *supra* note 68, at 293.

93. Magill, *supra* note 5, at 68. Modern developments have caused separation of powers norms to be "increasingly fragile and . . . violated as they never have been before." Saikrishna B. Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J.L. & PUB. POL'Y 543, 543 (2003) (arguing that the "wobbly state [of separations of powers] is bad for the nation" (citing Peter M. Shane, *When Interbranch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 CORNELL J.L. & PUB. POL'Y 503, 510 (2003))).

94. *See* INS v. Chadha, 462 U.S. 919, 951 (1983).

95. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 899 (2004) (citing *Chadha*, 462 U.S. at 951).

96. Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1340.

97. Magill, *supra* note 5, at 48.

incompatible with the administrative state.[98] Not since 1935 has the Court invalidated any statute under this doctrine.[99]

Theoretically, the Non-Delegation Doctrine seeks to prevent lawmaking from occurring within agencies, outside the process of bicameralism and presentment.[100] The doctrine allows Congress to delegate legislative authority to an administrative agency only if in its authorizing statute Congress articulates an "intelligible principle" that will guide the agency in "fill[ing] up the details."[101] However, under the current Non-Delegation Doctrine, "virtually anything counts as an 'intelligible principle.'"[102] The Court's hesitancy to overrule congressional delegations, no matter how broad, results from the conclusion that a robust Non-Delegation Doctrine would make effective governance impossible in a vast, complex, and ever-changing society.[103]

By allowing Congress to broadly delegate decision-making powers and duties to administrative agencies, the Court has facilitated the growth of the federal government.[104] The Supreme Court continues to turn down opportunities to reinvigorate the Non-Delegation Doctrine. In 2001, it overruled the D.C. Circuit's holding that the Clean Air Act contained an unconstitutional delegation of legislative power.[105] The D.C. Circuit found that the air quality standards promulgated by the EPA, pursuant to the Clean Air Act, were invalid because Congress had not articulated an "intelligible principle" to guide the EPA in the formation of those standards.[106] However, the Supreme Court rejected this effort to resurrect the doctrine.[107] The D.C. Circuit, incidentally, was the first federal court in nearly seven decades to apply the "intelligible principle" test and conclude that legislation contained an unconstitutional delegation.[108] The Court ruled that a broad grant of dis-

98. *Id.* at 53.

99. *Id.* at 55 (stating that despite being given numerous opportunities, the modern Court has declined to "re-think its stance" on the Non-Delegation Doctrine).

100. Manning, *supra* note 95, 899-900.

101. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825); *see also* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (explaining the intelligible principle test).

102. Manning, *supra* note 95, at 900 (citing Mistretta v. United States, 488 U.S. 361, 373 (1989)).

103. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

104. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 947-50 (2000).

105. *See* Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *rev'd*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472-76 (2001); 42 U.S.C. §§ 7408-7409 (2000).

106. *See Am. Trucking Ass'ns*, 175 F.3d at 1034.

107. The Supreme Court unanimously reversed the lower court's holding and reaffirmed its previous approach to delegation issues. *Whitman*, 531 U.S. at 472-76.

108. *See Am. Trucking Ass'ns*, 175 F.3d at 1033-34. But it's not just congressional delegations to which the courts defer. Courts seldom rule against executive orders; indeed, the Supreme Court has "seldom addressed cases involving executive orders." Leanna M. Anderson, *Executive Orders, "The Very Definition of Tyranny," and the Congressional Solution, the Separation of Powers Restoration Act*, 29 HASTINGS CONST. L.Q. 589, 590 (2002). Only once has the Court ruled against the expansive use of executive orders. *Id.* These orders have the force and effect of law. *Id.* at 592. But since they are legislative in nature, they "can upset the balance of the separation of powers by concentrating legislative power in the executive branch." *Id.* at 611. Yet, "[e]xecutive orders are protected from judicial review by common law requirements for challenging an executive order." *Id.*

cretion to the EPA to promulgate air quality standards under a "public interest" standard did not rise to the level of an unconstitutional delegation of legislative authority.[109]

Congress has numerous reasons for making vast delegations of power to administrative agencies. Members of Congress often want to escape responsibility for making hard choices.[110] Furthermore, as a way of claiming credit and escaping blame, they "have a strong incentive to enact vague laws that leave the operative details . . . to someone else."[111] But on a more laudable level, it also may seem desirable for government agencies to have broad and discretionary authority to address complex issues like cleaning up the environment.

The willingness to uphold any and all delegations also reflects a judicial recognition that it is nearly impossible to define lawmaking, execution, and adjudication as mutually exclusive functions.[112] As experience has shown, "the modern administrative state does not fit comfortably within the constitutional structure."[113] With their broad policymaking discretion, agencies can promulgate rules and regulations which, unlike statutes, do not have to follow the constitutionally prescribed lawmaking procedures of bicameralism and presentment.[114]

Various scholars have declared the Non-Delegation Doctrine,[115] which was first announced by the Supreme Court in *Field v. Clark*, to be dead.[116] In *Field*, the Court sustained a delegation contained in the Tariff Act of 1890, distinguishing between "the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution."[117] Later, in *J.W. Hampton, Jr. & Co. v. United States*, the Court outlined the test for determining the scope of the Non-Delegation Doctrine: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation . . . ."[118] The Court used this test in 1935 to strike down several attempted delegations. In *Panama Refining Company v. Ryan*, the Court

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109. *Whitman*, 531 U.S. at 472-76.

110. Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 243 (2005).

111. *Id.*

112. Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1431.

113. *Id.* at 1430.

114. Executive agencies now administer intricate programs that require the promulgation of regulations to implement the broad legislative programs enacted by Congress. Thus, the executive branch exercises powers that are both legislative and judicial in nature. Buys & Isasi, *supra* note 64, at 88.

115. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). *But see* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 277 (2000) (claiming that the doctrine serves important values and should be kept). For the most part, however, and as evidenced in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), the Court has not shown much interest in enforcing the doctrine in a meaningful way.

116. 143 U.S. 649, 692 (1892).

117. *Id.* at 693-94.

118. 276 U.S. 394, 409 (1928).

found that the National Industrial Recovery Act of 1933 (NIRA) did not set any limitations on the President's power to establish policies under the Act.[119] The problem with the NIRA was that "Congress left the matter to the President without standard or rule, to be dealt with as he pleased."[120] Five months after *Panama*, the Court took another swing at the NIRA. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down an even more sweeping delegation in the act which authorized the President to approve "codes of fair competition" for "a trade or industry."[121] Since *Schechter*, however, the Court has not invalidated any federal legislation on the grounds that it violates the Non-Delegation Doctrine. In every case in which the issue has been raised, the Court has concluded that the delegation contains a sufficiently intelligible standard.[122]

B. The Debate on Separation of Powers

There are basically two different schools of thought on separation of powers. The formalists advocate strict adherence to the Framers' original intent regarding separation between the branches of government.[123] They see the text of the Constitution and the intent of the Framers as controlling, and they deny that broader policy concerns should play any role in legal decisions.[124] Formalism does not recognize any extra-constitutional governmental entity existing "outside" the three enumerated branches.

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119. 293 U.S. 388, 417 (1935).

120. *Id.* at 418.

121. 295 U.S. 495, 521-22 (1935). In *Carter v. Carter Coal Co.*, the Court invalidated another piece of New Deal legislation, the Bituminous Coal Act of 1935, for excessive delegation to parties outside government. 298 U.S. 238 (1936).

122. Krotoszynski, *supra* note 110, at 264-65. The Rehnquist Court rejected every opportunity to develop a Non-Delegation Doctrine that actually prohibits delegation of legislative authority to the executive branch. *See* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 357 (2004) The "intelligible principle" test does nothing to specify how vague a principle can be without becoming unconstitutional. *See* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1121 (2003). In fact, the Court has been willing to find "intelligible principles" wherever it looks. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) (noting that the Court has not found a non-delegation violation since *Schechter* and *Panama* in 1935). Small signs of trying to control this trend, however, appeared in *United States v. Lopez*, 514 U.S. 549, 561 (1995) (involving a five-to-four decision that marked the beginning of an effort to undermine some of the more expansive New Deal interpretations of the commerce power by striking down a provision of the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844, which made it a federal crime to knowingly possess a firearm in a school zone). The *Lopez* precedent was followed by *United States v. Morrison*, 529 U.S. 598, 613 (2000) (striking down the civil remedy provision of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, for exceeding congressional power to regulate activities that substantially affect interstate commerce). Since the New Deal, the Supreme Court has been much more deferential, repeatedly upholding broad delegations of policymaking discretion to administrative agencies under vague and sweeping congressional language. Roberts, *supra* note 8, at 507.

123. This strict separation yields benefits by preventing tyranny and producing a more effective government. Prominent examples of formalist theories include: MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); and, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

124. Sunstein, *supra* note 41, at 493. Changed circumstances are irrelevant to constitutional outcomes

Functionalists, on the other hand, do not take a textual approach and do not rely on distinct labels of legislative, executive, or judicial. Instead, they focus on whether a proposed action upsets the balance of power between the branches.[125] To functionalists, the inter-branch balance of power is the key to avoiding tyranny.[126] This constitutes a more flexible approach to separation of powers, recognizing that strict separation is unnecessary and that the functioning of the modern administrative state cannot fit into a neat, three-branch separation.[127] Indeed, to functionalists, a strict separation of powers would destroy the modern state, the effectiveness of which depends on a combination of powers.[128]

Whereas the formal approach advocates drawing clear lines between the distinct and definable powers of the three branches,[129] the functional approach stresses the maintenance of a working government over an adherence to strict divisions between the branches. Functionalists look to preserving the essential function of each branch within a flexible system of checks and balances.[130] They emphasize the ambiguities surrounding the definition of governmental functions and the degree of authority that each branch can properly exercise.[131]

Outside of the formalist/functionalist debate, critics of a separation of powers approach in general claim that such disputes often call for judgments beyond the judiciary's expertise and that the courts are not always able to foresee the implications of their decisions on the branches.[132] One critic argues that the traditional aim of balancing three branches exercising three different powers is "tired," "unhelpful," and "incoherent."[133] Not only can government authority not be parceled neatly into three categories or functions, but government actors cannot be understood solely as members of a single branch of government.[134] But according to critics, distinguishing between the three functions of government is a central tenet of both the functional and formalistic approach to separation of powers law.[135] While the formalist approach sees the Constitution as textually dividing governmental power into three categories and assigning these powers to three dif-

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according to formalists.

125. Functionalists include Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) and Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

126. *See* Farina, *supra* note 125, at 455-56.

127. *Id.*

128. *Id.* at 456.

129. Peabody & Nugent, *supra* note 15, at 13.

130. *Id.*

131. Whereas formalists argue that the functional approach allows courts to construe the separation of powers on an ad hoc and unpredictable basis, functionalists contend that formalism fails to recognize the flexibility required by the complexities of the modern administrative state. *Id.* at 14.

132. *Id.* at 37.

133. Magill, *supra* note 29, at 605.

134. *Id.* at 606.

135. *Id.* at 608.

ferent branches, the functionalist approach focuses on whether an institutional arrangement upsets the overall balance among the branches by permitting one of them to compromise the core function of another.[136]

Further complicating the matter of separation of powers, according to the critics, is the fact that the branches are complex entities with many different subparts. Consequently, it would be an impossible endeavor to identify a branch's institutional competency.[137] Moreover, government authority is said to be highly fragmented, which poses still more challenges to traditional separation of powers analysis.[138] But because of this wide fragmentation of state power, even if it is not distributed on a three-branch basis, critics say that a separation of powers concern is less acute.[139] According to the argument, the fact that state authority is already diffused among a large and diverse set of government decision-makers should "put to rest any concerns about dangerous concentrations" of centralized power.[140]

However, just because governmental structures and operations are becoming more complex is not reason enough to simply abandon one of the most important constitutional doctrines—separation of powers. Moreover, the empirical studies in this area "lend little support to any claim that the separation of powers is an arrangement that does not work, or works significantly less well than democratic governments with unified executive and legislative powers."[141]

IV. How the Growth of the Administrative State is Shifting Power to the Courts

A. The Varieties of Judicial Response

The common conclusion is that, owing to the inevitability of the administrative state, the Court has steadily retreated from any involvement in separation of powers. This retreat, in turn, has allowed a shift of power to occur in favor of the executive branch, of which agencies are a part. Under this view, the Court has more or less permitted the state of separation of powers to drift at the sole whim of the executive.[142]

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136. *Id.* at 609 (recognizing that functionalists see the branches of government as having shared or overlapping powers). To base a legal doctrine on the separate exercise of governmental functions, one must identify the differences among those functions; but, as Professor Magill claims, the sporadic judicial efforts to identify the differences among the governmental powers are almost universally viewed as unhelpful. *Id.* at 612.

137. *Id.* at 625. Thus, we are unlikely to ever agree on an ideal distribution of authority among the branches. This discordance will make it difficult to tell whether some governmental action increases the power of one branch at the expense of another. *Id.* at 635.

138. *Id.* at 651.

139. Magill, *supra* note 29, at 605.

140. *Id.*

141. Heclo, *supra* note 72, at 152.

142. Federalism has also been a victim of this shift to the administrative state. For instance, administrative rulemaking can displace state law "without adhering to the constitutionally prescribed lawmaking procedures designed to safeguard federalism"—procedures such as bicameralism and presentment. *See*

One school of thought holds that this judicial withdrawal is precisely the correct approach. The courts should avoid separation of powers disputes and let the political branches work out the proper balance of power between them. According to the argument, the judiciary has no competency to dictate the allocation of governmental power between the executive and legislative branches, both of which are made up of democratically elected representatives.[143] On the other hand, separation of powers is inextricably connected to judicial review.[144] The validity of judicial review depends on the very notion of checks and balances as essential barriers to the improper exercise of power.[145] Judicial review not only preserves the separation of powers but is justified by it. As one scholar has noted, separation of powers makes judicial review possible.[146]

Those who favor a more active judicial enforcement of separated powers point to the Non-Delegation Doctrine as evidence of the Court's retreat from this area of constitutional law. However, the status of the Non-Delegation Doctrine is but one part of the picture. The complete view of the separation of powers landscape is much more complex, and it reveals that the judiciary is anything but a passive observer. The Court has basically faced two types of separation of powers disputes. One type involves the branches directly, where the President or Congress attempts to acquire power by short-circuiting some constitutional mandate or process.[147] With these types of disputes, the Court has been very strict in its separation of powers supervision.[148] The second type involves the administrative agencies. Here, there are two stages of judicial involvement. The initial stage—and the one most often focused on by legal scholars—is the point at which the agency first acquires power and where the Non-Delegation Doctrine comes into play.[149] But there is also a second stage—a stage that is not often considered in terms of separation of powers analysis. This stage involves the way the courts interact with or supervise the agencies once they have acquired and exercised their delegated power. It is during this stage that the courts have most affected the balance of power among the branches, by

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Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1433. In addition, there is a tension between the presumption against federal preemption of state law and the *Chevron* deference given to agencies. *Id.* at 1434. Under the Supremacy Clause, the issue is whether Congress intended to preempt state law; but in *New York v. FCC*, 486 U.S. 57, 65 (1988), the Court upheld FCC regulations that preempted state law by inquiring into whether the FCC intended such preemption to occur. *See* Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1435.

143. *See* Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1433.

144. *See* VILE, *supra* note 30, at 157-62.

145. *Id.* at 158.

146. Bradford P. Wilson, *Separation of Powers and Judicial Review*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT, *supra* note 50, at 63, 81.

147. Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1379-80.

148. *Id.*

149. For discussion and criticism of the nondelegation doctrine, see Krotoszynski, *supra* note 110; Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Posner & Vermeule, *supra* note 115; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

using the agencies as intermediaries in the transferring of power from the legislative to the judicial branches. By increasing the power of the agencies, the courts, in turn, have increased their own power.

Many scholars argue that the administrative state has shifted power from a congressional government to an executive-dominated government, and that if there has been any beneficiary of Congress's massive relinquishment of legislative authority, it has been the President.[150] But this argument ignores how the courts have become the ultimate beneficiaries of Congress's initial delegation to the agencies.[151] Even though the "organizational power and impenetrability of agencies have become corrosive influences in many ways," and even though the separation of powers doctrine is "subject to massive interpretive ambiguities" and produces "puzzlingly inconsistent results," the courts have been able to increase their power throughout the growth of the administrative state.[152]

B. Using the Agencies to Expand Judicial Power

"Challenges to the validity of agency decisions have mushroomed in the past 25 years, especially since much of the domestic legislation passed in this time literally invites disgruntled groups to litigate agency actions."[153] Consequently, federal courts have become intimately involved in formulating agency rules and dictating how they should apply to various kinds of agency actions spanning the areas of education, health, the environment, and consumer safety.[154] To facilitate a meaningful judicial review, courts have gone beyond statutory mandates to require that agencies develop and maintain thorough records of all the information that has gone into the creation of a new rule.[155] This record is then used by judges to scrutinize agency decisions and determine if they are consistent with statutory mandates that are inevitably ambiguous.[156] Through this process of review—"deciding whether an agency action accords with congressional legislation and fair procedures—judges are frequently the final word on what action is 'reasonable,' and therefore what public policy is to be."[157]

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150. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1817-21 (1996).

151. As one scholar has noted, the "actual distribution of powers in our system looks little like the one the Framers must have contemplated." James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN'S L. REV. 293, 306 (2005) ("The rise of the administrative state . . . gave the President immense and previously unknown power."). Yet, as Professor Gardner points out, "this power was not seized, but handed over [voluntarily by Congress]." *Id.* at 307. But, whereas Congress has given up its power voluntarily and overtly *to* the administrative state, the courts have acquired their power subtly and perhaps unintentionally *from* the administrative state.

152. Colburn, *supra* note 68, at 290.

153. Heclo, *supra* note 72, at 147.

154. *Id.*

155. *Id.* Essentially, the need for an effective judicial review mandates that agencies keep a more thorough record than is called for in the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

156. *Id.*

157. *Id.* The promulgation of agency regulations is governed by procedures set out by the APA.

Generally speaking, it is this statutory review of agency decisions, rather than the constitutional review of statutes under any separation of powers doctrine, that has interjected the courts into the allocation of authority over policymaking among the branches. "[I]n the contemporary political environment, deference to administrative expertise has become a means for courts to make policy by determining whether agencies have used reasonable means to achieve reasonable results."[158] Moreover, when an administrative agency engages in rulemaking, similar to that done by Congress, the courts have much more control over the process than they ever could have over congressional legislation.[159] For instance, the courts have restricted the type of off-the-record, "ex parte" contacts that agency officials can have with interested parties prior to promulgating a rule, even though the hallways of Congress are filled with ex parte contacts.[160] In addition, courts can require agencies to give very specific kinds of public notice regarding an upcoming rulemaking process—a requirement that is completely inapplicable to the congressional legislative process.[161]

In reviewing many types of agency actions, the courts have placed higher standards of review than those imposed by Congress in the Administrative Procedure Act (APA).[162] Rather than just requiring that agency decisions not be "arbitrary and capricious," for instance, the courts have held agencies to a higher standard of reasoned decisionmaking.[163] As one commentator has noted, there has been a kind of informal compromise worked out regarding the administrative state.[164] Broad delegations of power have been tolerated as long as they were accompanied by extensive procedural safeguards.[165] But this compromise effectively transfers power from Congress to the courts because it is the judiciary that interprets and enforces those safeguards.

Colburn, *supra* note 68, at 380. But these processes are often up to the agency's choosing, and hence, are subject to judicial interpretation and enforcement. *See* 5 U.S.C. §§ 551, 553(a), 553(b), 706 (2000). For instance, while the definition of "rule" is very broad, the APA provides no signal as to what sort of rule must be made only by a "rulemaking" involving notice and comment, or what sort of rule requires a hearing. Thus, agencies are free to write or interpret at will a class of rules—interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice—as well as any rule where the particular agency believes (with good cause) that public notice and participation is impractical or unnecessary. Consequently, agencies can make lots of law with little or no mandatory public process, subject only to judicial scrutiny.

158. Heclo, *supra* note 72, at 147.

159. *Id.*

160. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (1977).

161. *See* PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 220-22 (2002).

162. APA, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended 5 U.S.C. §§ 551, 706 (2000)).

163. Under the APA, a reviewing court can set aside an agency action that is arbitrary and capricious. 5 U.S.C. § 706(2)(A). This is the residual standard of review, to be used when no other standard applies. It is not supposed to "empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties." OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947).

164. Sunstein, *supra* note 41, at 448.

165. *Id.*

The checking role of the courts over administrative agencies is reflected in the development of the "Hard-Look Doctrine."[166] This doctrine constitutes one way in which courts are in a stronger position with respect to agencies than with respect to Congress. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court ruled that, beyond what the arbitrary and capricious standard had previously required, a reviewing court must make a thorough examination of the entire record.[167] According to *Overton Park*, the standard of review was to be "searching and careful."[168] A reviewing court could not simply look at those parts of the record that supported the agency's decisions; it had to examine all sides of the record.[169] However, these demands went beyond what the APA required.[170]

Later, in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Court took the arbitrary and capricious test one step further and adopted the "hard look" standard of review regarding agency action.[171] This standard calls for a more "aggressive mode of judicial review."[172] Using it, the Court found that the Department of Transportation's explanation of why it rescinded certain passive restraint standards was deficient and incomplete, and that the agency failed to provide the sort of reasoned analysis the Court needed so as to conduct a hard-look review.[173] Thus, the *State Farm* decision holds agencies to a high standard of "reasoned decisionmaking" and requires judges to immerse themselves in the technical details and underlying studies of the agency's action.[174] Some commentators have even claimed that the hard look review under the arbitrary and capricious test provides an occasion for judges to impose their own policy preferences.[175] It clearly gives courts greater discretionary power to intrude into the agency process. As one scholar noted, "[w]hen the Court wishes to invoke [the Hard-Look Doctrine], it will; when it wishes to

166. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

167. 401 U.S. 402, 416 (1971).

168. *Id.* Aside from requiring that judicial review be "probing" and "careful" in analyzing the agency's stated reasons for action, *Overton Park* also indicated that the review was to be done on the basis of "the record" compiled by the agency, even though the APA did not require a formal record to be made. STRAUSS, *supra* note 161, at 236. Thus, the lesson of *Overton Park* is that agencies must provide a sufficient record of their decisionmaking process so that a court has enough information to undertake a hard-look review. *Id.* at 380.

169. In *Ass'n of Data Processing Service Organizations v. Board of Governors of the Federal Reserve Board*, the court seemed to make the arbitrary and capricious standard even more demanding by equating it with the higher standard of substantial evidence. 745 F.2d 677, 683-84 (D.C. Cir. 1984).

170. STRAUSS, *supra* note 161, at 379.

171. 463 U.S. at 57.

172. STRAUSS, *supra* note 161, at 385.

173. According to Professor Strauss, the Court found two failures in the reasoning of the Department of Transportation. First, it had failed to consider whether an air bag alternative should be implemented, considering that detachable seat-belts could be easily ignored. STRAUSS, *supra* note 161, at 378. And second, it had not considered the effect of driver inertia on the usage rate of seat belts. *Id.* On this second factor, it could well be concluded that the Court "substitute[d] its judgment for the Secretary's." *Id.*

174. Herz, *supra* note 20, at 310.

175. Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 ADMIN. L. REV. 1237, 1264-65 (2002).

be much more lenient with regard to an agency's action, the doctrine will be disregarded."[176]

The Hard-Look Doctrine authorizes courts to scrutinize agency action more closely than previously mandated by statute. For instance, it can be used to require agencies to show that the advantages of a regulation outweigh the disadvantages.[177] It can also be used to invalidate regulations that did not sufficiently fulfill the goals of the original, underlying statute.[178] Although the APA requires the judiciary to apply no more than an arbitrary and capricious test to many agency actions, the Hard-Look Doctrine modifies this standard by requiring agencies to consider all relevant factors, justify departures from past practices, furnish detailed explanations of their decisions, and explain the rejection of alternatives.[179] Thus, the hard-look approach seeks to "flush out" illegitimate or unarticulated factors that might have influenced the agency's decision.[180] Critics, however, claim that this approach allows judges to basically re-shape agency actions.[181] But whatever its ultimate effect, the Hard-Look Doctrine permits the courts to intrude into agency action much more than they could ever intrude into the workings of Congress.[182] One commentator characterizes the demise of the Non-Delegation Doctrine and rise of the Hard-Look Doctrine "as together forming part of a *modus vivendi* between the courts and the modern administrative state."[183] Even though the judiciary allows Congress to delegate increasing amounts of power to agencies, it responds by increasing judicial efforts to police the actions of those agencies and to demand more evidence of agency rationality.[184]

The judicial treatment of non-legislative rules promulgated by agencies also shows the kind of power that courts can exert over the actions of agencies. The distinction between legislative and non-legislative rules is that the former have binding effects and are products of the policymaking (not interpretive) function.[185] But in reality, the difference between the two "is far

176. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 325 (4th ed. 2000).

177. Sunstein, *supra* note 41, at 463-64; *see also* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 659 (1980) (ruling that the Secretary of Labor, in promulgating new benzene standards, went beyond the power granted under the Occupational Safety and Health Act of 1970).

178. Sunstein, *supra* note 41, at 464.

179. *Id.* at 469-70.

180. *Id.* at 471. For an early application of the Hard-Look Doctrine, see *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

181. *See* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 478-79 (1986).

182. Courts have no authority to substitute their own policy decision for that of Congress. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 321-23 (1999).

183. Richard W. Murphy, *The Limits of Legislative Control over the "Hard-Look,"* 56 ADMIN. L. REV. 1125, 1134 (2004).

184. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 413-27 (1987) (depicting the stiffening of rationality review as a judicial response to the failure of structural (e.g., Non-Delegation Doctrine) and procedural controls to check agency discretion).

185. Manning, *supra* note 95, at 893-94. Consequently, legislative rules require the notice and comment procedures outlined in the APA.

from clear-cut."[186] Moreover, trying to distinguish between interpretation and policymaking requires courts to differentiate between the degrees of policymaking discretion and intrude into the agency process, even though the traditional model holds that courts have limited competence in the policymaking process.[187]

Significantly expanded standing rights give the courts yet another way to review and influence agency decisions. During the early years of the APA, individual standing to challenge agency actions was quite restrictive.[188] But during the 1970s, standing was greatly expanded, in part because of a desire to allow for more judicial oversight of administrative agencies.[189]

In *Bennett v. Spear*, a unanimous Court held that recreational users of water were within the zone of interests of the Endangered Species Act and could sue to contest measures taken to protect certain species.[190] In *Friends of the Earth, Inc. v Laidlaw Environmental Services, Inc.*, the Court granted standing to an environmental group suing under the Clean Water Act.[191] This standing was granted even though the plaintiff had not demonstrated that the pollution had caused any identifiable harm to the natural resource utilized by the plaintiff.[192] Despite requiring in *Lujan v. Defenders of Wildlife* that plaintiffs in environmental citizen suits satisfy the standing requirement by showing an "injury in fact," the Court recognized that such injury could be merely aesthetic or recreational.[193]

These environmental citizen suits, brought against a defendant who is allegedly violating a federal environmental statute, could well violate the separation of powers doctrine insofar as they interfere with the executive branch's constitutional duty to execute the law.[194] After all, the Court has emphasized that enforcement is an important part of the President's constitutional duty to execute the law.[195] Consequently, the allowance of citizen suits may erode the executive branch's most important duty—executing the laws.[196]

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186. *Id.* at 894.
187. *Id.* at 894-95.
188. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1075-76 (1997).
189. *See* United States v. Students Challenging Regulatory Agency Procedure, 412 U.S. 669 (1973); Ass'n of Sierra Club v. Morton, 405 U.S. 727 (1972); Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150 (1970). Liberal judges are "generally more inclined to find that standing exists." Herz, *supra* note 122, at 350.
190. 520 U.S. 154 (1997); 16 U.S.C. § 1540 (2000).
191. 528 U.S. 167 (2000); 33 U.S.C. § 1342 (2000).
192. *Id.* at 187-88.
193. 504 U.S. 555, 560, 582 (1992); *see also Sierra Club*, 405 U.S. at 734 (holding that aesthetic injuries can support standing); STRAUSS, *supra* note 161, at 318.
194. *See, e.g.*, *Bennett*, 520 U.S. at 165 (noting that the "obvious purpose" of citizen suits was "to encourage enforcement by so-called 'private attorneys general'").
195. *See id.* at 163.
196. Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 159-163 (2001); *see also* Buckley v. Valeo, 424 U.S. 1, 138, 140 (1976) (holding

Those who argue that the growth of the administrative state has diminished judicial power often cite *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, a decision which requires courts to accept any reasonable agency interpretation of an ambiguous statute.[197] The *Chevron* doctrine is put forth as prime evidence of judicial deference or subservience to agency decisions.[198] Yet even though this case is often cited as one in which the courts have delegated policymaking to an agency, the judiciary still controls the matter of when to give such deference (for example, by deciding when a statute is ambiguous).

Chevron established a two-step process for determining the standard of review a reviewing court should apply to an agency's interpretation of a statute.[199] First, the court must ask whether the statute is ambiguous: whether the "traditional tools of statutory construction" yield a clear answer to the interpretive question.[200] If so, that is "the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[201] If, however, the reviewing court determines that the statute is "silent or ambiguous" in relevant respects, then, in step two, the court must accept the agency's "reasonable interpretation."[202]

Although at first glance the *Chevron* doctrine seems to give agencies a big advantage over the courts, a more careful examination shows that the courts still retain the upper hand. First, it is up to the courts to determine when a statute is ambiguous and then whether the agency decision is reasonable.[203] Several years after *Chevron*, in *INS v. Cardoza-Fonseca*, the Court overturned an INS interpretation of an immigration statute, stating that the judiciary was the final authority on statutory construction when congressional intent was clear.[204] Thus, if the court finds an absence of doubt concerning congressional intent, it will independently judge whether the agency's interpretation of the statute supports or contradicts that intent. In another case showing that *Chevron* was not as judicially deferential as first thought, the Court struck down a policy of the Federal Energy Regulatory Commission after deciding that the policy contradicted the underlying statute, in which there was no ambiguity.[205]

Under the second step required by *Chevron*, the courts must decide if the agency has interpreted legislative or non-legislative rules. In *United*

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that the executive's discretionary ability to seek judicial relief is central to its constitutional authority).

197. 467 U.S. 837, 844-45 (1984).

198. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996).

199. *Chevron*, 467 U.S. at 842-44.

200. *Id.* at 843 n.9.

201. *Id.* at 842-43.

202. *Id.* at 843-44.

203. Where the *Chevron* framework governs the review of agency interpretations of statutes, judges must determine "whether Congress has directly spoken to the precise question at issue"—that is, whether the statute is unambiguous with respect to the litigated issue. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

204. 480 U.S. 421 (1987).

205. Mobil Oil Exploration v. United Distrib. Co., 498 U.S. 211 (1991).

States v. Mead Corp., however, the Court modified the *Chevron* framework by making it presumptively inapplicable to non-legislative rules.[206] In *Mead*, the Court held that informal interpretations do not receive *Chevron* deference.[207] Thus, *Chevron* deference is not given to non-legislative rules.[208] The *Mead* Court explained that *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[209] But because there is great uncertainty involved in distinguishing legislative from non-legislative rules, *Mead* gives the courts great power in determining when to accord *Chevron* deference to agency interpretations.[210] As one scholar has noted, the distinction between interpretive rules and legislative rules has "an air of arbitrariness to it."[211] Furthermore, interpretive rules can exert a real policymaking effect since they can be used to clarify statutory or regulatory ambiguity.[212] In summary, with *Mead* essentially denying *Chevron* deference to a large swath of agency interpretations, scholars have recognized that the ruling has resulted in a shift of power from agencies to the courts.[213]

The *Chevron* effect is further diluted by the fact that the Court has indicated that interpretations of jurisdiction statutes are not subject to *Chevron* deference and "must always be decided *de novo* by the courts."[214] Thus, the issue of whether agency action preempts state law will be decided by courts, not by the agency.

Just as the *Chevron* doctrine initially seemed to leave courts in a weakened position with respect to agencies, the *Chenery* rule likewise appeared at first to give agencies the upper hand. In *SEC v. Chenery Corp.*, the Court

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206. 533 U.S. 218 (2001).

207. *Id.* at 226-27 (refusing to accord *Chevron* deference to a customs service tariff classification ruling because it was not issued pursuant to a congressional delegation to make decisions with the force and effect of law).

208. Christensen v. Harris County, 529 U.S. 576, 587 (2000).

209. *Mead*, 533 U.S. at 226-27.

210. *Mead* is also somewhat vague on whether an agency receives *Chevron* deference for all adjudications or merely the formal variety. Manning, *supra* note 95, at 940.

211. *Id.* at 926. The courts have articulated a number of tests for determining whether a nominal interpretive rule merely interprets a statute or makes new law. *Id.* at 920.

212. *Id.* at 926. As Professors Elliott and Funk have argued, courts can enforce the distinction between legislative and nonlegislative rules simply by assigning different legal effects to an agency's application of rules that are adopted without notice and comment. *See* William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 660-67 (2002) (arguing that courts should take an ex post approach to putative non-legislative rules); E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491(1992). In addition, aside from how the rules are categorized, there are different ways in which the agency can promulgate rules—e.g., "publication" or "notice and comment." STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES, *supra* note 161, at 256. Courts may not only review the agency's choice regarding which method of rulemaking it used, but also may enforce different procedural requirements for the different methods. *Id.*

213. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and The Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 751 (2002) (criticizing *Mead* as a "naked power grab by the federal courts"); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 537 (2003).

214. Smiley v. Citibank (S.D.), 517 U.S. 735, 744 (1996).

stated that the choice of proceeding by rulemaking or adjudication belonged to the agency alone.[215] However, like *Chevron*, this rule has subsequently been modified and scaled back. For instance, the courts have outlined various fair notice requirements that constrain an agency's choice to announce new policies retroactively through adjudication, at least when doing so would interfere too much with settled expectations.[216] In these cases, the retroactivity of applying new standards through adjudication has been rejected because of "unfairness."[217] In another case, the Federal Trade Commission was forced to use rulemaking rather than adjudication where the underlying statute imposed an unusually forceful effect.[218] Still other cases indicate that only rulemaking may be used by agencies operating under government grant programs.[219] And finally, an agency might not be free to choose rulemaking if the reviewing court finds that certain facts to be determined by the agency are unique to a party appearing before that agency.[220]

C. The Court's Strict Scrutiny of Separation of Powers Disputes with the President

When put into a direct confrontation with the higher echelons of the executive branch, unlike the indirect dealing through the administrative state, the courts yield no ground. This is just the opposite of how the courts operate with the Non-Delegation Doctrine. In *Rasul v. Bush*, the Supreme Court addressed the availability of habeas corpus to foreign nationals detained abroad in connection with the U.S. campaign against terror.[221] The Court ruled that the detention of alleged enemy combatants was not a matter entrusted to the sole and absolute discretion of the President and Congress,

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215. 332 U.S. 194, 203 (1947).

216. Manning, *supra* note 95, at 928.

217. *See, e.g.*, Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n, 826 F.2d 1074 (D.C. Cir. 1987).

218. Ford Motor Co. v. FTC, 673 F.2d 1008, 1009-10 (9th Cir. 1981).

219. *See, e.g.*, Curry v. Block, 738 F.2d 1556, 1564 (11th Cir. 1984) (demonstrating that this discretion could be used in an arbitrary manner).

220. *See generally* Heckler v. Campbell, 461 U.S. 458, 467 (1983) (stating that hearings held pursuant to an agency-created rule must include a case-by-case determination of whether a specific individual qualifies for social security benefits).

221. 542 U.S. 466 (2004); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004). In *Hamdi*, the Court held that an alleged enemy combatant was entitled not only to challenge the circumstances of his detention before a court, but also to present arguments against his detention. *See Hamdi*, 542 U.S. at 538-39. In his dissent, Justice Thomas argued that the constitutional authority of the President to wage war and protect the security interests of the American people should take precedence over the perceived authority of the courts. *Id.* at 579. According to Justice Thomas, matters involving military or war-related affairs belong solely to the executive and legislative branches. *Id.* at 580-81. Moreover, such matters are of a type for which the judiciary has neither the aptitude, facilities, nor responsibility. *Id.* Justice Thomas noted that the Court's holding might "require the Government to divulge highly classified information to the purported enemy combatant, who [could] upon release" turn over such secrets to America's enemies. *Id.* at 595. But in *Rasul*, the Court went even further, because there it determined that federal courts could hear cases in which foreign enemy combatants could challenge their detention. *See Rasul*, 542 U.S. at 477-78.

and hence not outside the ambit of judicial review. It held that the U.S. federal courts do have jurisdiction to hear the habeas corpus petitions of such detainees. This case was essentially a separation of powers dispute between the President's authority in the military arena and the courts' role in preserving individual rights. Yet despite the unquestioned role of the President to conduct military and foreign affairs, especially during periods of armed conflict, the Court refused to give any deference.

A similarly harsh and unyielding stance toward the President was displayed in the Court's decision approving the independent counsel statute.[222] In 1988, the Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act, authorizing the creation of independent counsels to prosecute high-level executive branch officials.[223] The Court so held even though the counsels investigating executive personnel were to be appointed by a panel of judges, rather than the President, and not removable except for good cause.[224] This decision not only chipped away at the independence of the presidency, but also gave the judiciary added powers and status.

In *Clinton v. City of New York*, the Court invalidated the Line Item Veto Act, which authorized the President to cancel various budgetary provisions that had been signed into law.[225] In *Clinton*, the President had exercised his power under the act to cancel an item of new direct spending.[226] Subsequently, this cancellation was challenged on the ground that the act allowed the President to engage in lawmaking outside the procedures established by Article I, Section 7.[227] In its decision, the Court agreed, noting that through the act the President had effectively amended an act of Congress by repealing a portion of it.[228]

The Line Item Veto Act required the President to make a one-time decision, within five days of enactment, regarding the desirability of tax and spending provisions.[229] Moreover, the President had to "make an all-or-nothing choice; he could not devise a compromise of his own."[230] These features allowed Congress to delegate certain powers to the President, while at the same time making that delegation less costly to Congress.[231] With the line item veto, Congress effectively controlled who would exercise the power it had conferred and when such power would be exercised.[232] In addition, "because the power can be exercised only once, Congress [did not have to] enact additional legislation to regain control of future policymak-

222. Morrison v. Olson, 487 U.S. 654 (1988).
223. *Id.* at 660, 697.
224. *Id.* at 661, 663-64.
225. 524 U.S. 417, 436 (1998).
226. *Id.* at 421.
227. *Id.*
228. *Id.* at 438, 448.
229. *Id.* at 436.
230. Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1389.
231. *Id.*
232. *Id.*

ing."[233] Altogether, "these features ma[d]e the power conferred by the Line Item Veto Act less significant than traditional delegations" made by Congress and upheld by the courts.[234] Even so, the Court in a very rigid and strict approach ruled that the President's authority under the act more closely resembled lawmaking than law execution, and it held that the act violated the separation of powers.[235]

D. The Strict Approach to Separation of Powers Disputes With Congress

All the separation of powers cases seem to go against Congress, not against agencies or the courts. As one commentator theorizes, "the Rehnquist Court likes agencies more than it likes Congress."[236] Although the Court may tolerate broad grants of power from the legislative to the executive branch, it "is much . . . strict[er] with [perceived] congressional attempts to aggrandize its own power."[237] Contrary to the flexibility given to administrative agencies, the Court has required Congress to hold strictly to the lawmaking requirements in Article I, Section 7.[238] But some scholars have argued that the Court's devotion to such strict and formal procedures is overly simplistic.[239] They note that the rise of the administrative state has led to many delegations of legislative authority to executive agencies, which promulgate regulations without meeting the requirements of bicameralism and presentment.[240]

Among the decisions that have favored agencies over Congress, *Buckley v. Valeo* rejected Congress's effort to create a Federal Election Commission, in which some of the members were directly appointed by Congress.[241] In *INS v. Chadha*,[242] the Court struck down the device of the one-house legislative veto of executive branch action. In *Bowsher v. Synar*, the Court invalidated still another hybrid congressional scheme which gave important decision-making powers under the Gramm-Rudman-Hollings Act to the

233. *Id.*
234. *Id.*
235. Clinton v. City of New York, 524 U.S. 417, 449 (1998).
236. Herz, *supra* note 20, at 363.
237. Buys & Isasi, *supra* note 64, at 89.
238. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 736 (1986). Because the Constitution does not grant Congress the power to execute the law, the Court has employed the anti-aggrandizement principle to strike down a number of statutes that purported to endow Congress with such executive power. The Court has reviewed very strictly any legislative actions that result in an aggrandizement of Congress's power. This anti-aggrandizement principle is reflected in *Bowsher*, *Chadha*, and *Metropolitan Washington Airports Authority*, and it is summed up in the Court's insistence that "once Congress makes its choice in enacting legislation, its participation ends." *Bowsher*, 478 U.S. at 733.
239. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575, 579 (1984).
240. Laurence H. Tribe, *The Legislative Veto Decision: A Law by any Other Name?*, 21 HARV. J. ON LEGIS. 1, 11 (1984). These scholars conclude that the Court must have some concern other than ensuring that all legislative acts meet the single, finely wrought and exhaustively considered procedure found in the Constitution. *Id.* at 17. Perhaps the concern is that the courts can control agency discretion better than they can congressional discretion.
241. 424 U.S. 1, 138-39 (1976).
242. 462 U.S. 919 (1983).

Comptroller General.[243] On the other hand, the Court approved of Congress's decision to give jurisdiction over common law counterclaims to the Commodity Futures Trading Commission in *Commodity Futures Trading Commission v. Schor*.[244] Additionally, it upheld the independent counsel statute against separation of powers attacks in *Morrison v. Olson*.[245] Scholars have struggled to reconcile these decisions, all of which arguably deal with the structural separation between the branches of government and the degree to which the traditional functions of one can be exercised by another. If all these decisions rest on separation of powers theory, how can their divergent outcomes be explained?[246] Perhaps the answer lies in the fact that the Court is more lenient towards separation of powers transgressions by agencies, which are much more under the control of the judiciary than is the President or Congress.

At issue in *INS v. Chadha* was the one-house legislative veto provision in the Immigration and Nationality Act, under which either the House or the Senate could veto the suspension of an alien's deportation after it had been ordered by the Attorney General.[247] When the Attorney General suspended Chadha's deportation, the House of Representatives exercised its veto authority by passing a resolution overturning the suspension.[248] Because the House did not see the resolution as a legislative act, but rather as an exercise of its authority under the INA, the resolution was not submitted to the Senate or sent to the President.[249] But the Court disagreed, holding that the House's veto was in fact an exercise of Congress's legislative power, and that for such an action to have any binding legal effect, it must be "exercised in accord with a single, finely wrought and exhaustively considered, [bicameralism and presentment] procedure" outlined in Article I.[250]

In *Chadha*, the Court declared that all one-house legislative veto provisions were unconstitutional, arguing that since the exercise of such vetoes was equivalent to lawmaking they should have to follow the normal constitutional requirements of passing both houses of Congress and being presented to the President for his signature or veto.[251] Thus, *Chadha* makes clear that Congress may not participate in the execution of a law, as the Court said it did by giving itself a role in the administration of the INA's statutory scheme.[252] However, such an executive role could be exercised by

243. 478 U.S. 714, 736 (1986); Gramm-Rudman-Hollings Act 1985, Pub. L. No. 99-177, 99 Stat. 1038.
244. 478 U.S. 833, 857 (1986).
245. 487 U.S. 654, 696-97 (1988).
246. Roberts, *supra* note 8, at 514.
247. 462 U.S. at 919 (1983). The act gave the Attorney General discretionary authority to suspend an alien's deportation from the United States, subject to a legislative veto by either house of Congress acting alone. *Id.* at 924-25.
248. *Id.* at 926-27.
249. *Id.* at 927-28.
250. *Id.* at 951.
251. *Id.* (stating that all actions by the Congress having the effect of legislation must meet these explicit constitutional requirements).
252. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53

administrative agencies, even those that also exercised lawmaking powers. Still, perhaps agencies are given more leeway because they, in turn, are controlled more by the judiciary.

Subsequent to *Chadha*, the Court put even more rigid controls on Congress when it declared unconstitutional a provision in the Gramm-Rudman-Hollings Budget Act that allowed the Comptroller General to order executive spending cuts if a schedule of deficit reduction targets was not met.[253] To compensate for its own inability to control spending, Congress created an automatic deficit-reduction mechanism in the act. At issue in *Bowsher* was § 251, which provided that the Office of Management and Budget and the Congressional Budget Office would make periodic reports to the Comptroller General on whether spending exceeded the agreed-upon budget ceilings. If the Comptroller General found that spending had in fact exceeded the caps, he would report that fact to the President, who was required to institute across-the-board spending cuts in the executive branch.[254] But the Court found that the Comptroller General exercised executive powers under this provision. Since the Comptroller General is removable at the initiative of Congress, the executive duties given to that officer by the act were said to interfere with the powers and independence of the executive branch.[255]

Another case in which the Court strictly enforced federal lawmaking procedures, especially the bicameralism and presentment requirements of Article I, Section 7, was *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise* (*MWAA*).[256] In *MWAA*, the Court considered the constitutionality of a statute that authorized the transfer of operating control of two major airports from the federal government to the Metropolitan Washington Airports Authority on the condition that the MWAA create a Board of Review composed of nine members of Congress and vested with veto power over decisions made by MWAA's Board of Directors.[257] After concluding that the Board of Review was an agent of Congress,[258] the Court applied the anti-aggrandizement principle to find the action unconstitutional.[259] But the Court avoided having to decide whether Congress's powers under the statute were executive or legislative, reasoning that either classification would force it to invalidate the statute: "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in confor-

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VAND. L. REV. 1457, 1467 (2000).

253. Bowsher v. Synar, 478 U.S. 714, 736 (1986).

254. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 252, 99 Stat. 1037, 1072.

255. *Bowsher*, 478 U.S. at 725. The Court ruled that Congress could not tamper with the specific appointment and confirmation provisions for the appointment of executive officers in the Constitution. *Id.* at 722, 733.

256. 501 U.S. 252 (1991).

257. *Id.* at 255.

258. *Bowsher*, 478 U.S. at 733.

259. *Metro. Wash. Airports Auth.*, 501 U.S. at 274.

mity with the bicameralism and presentment requirements of Art. I, § 7."[260] Thus, the Court held to a strict, formalistic review as embodied in the anti-aggrandizement principle.[261]

Commentators have criticized decisions like *Chadha* and *MWAA* as unduly formal applications of the separation of powers doctrine that "produce excessively mechanical results."[262] The counter argument, however, is "that the Founders regarded such procedures as a principal means of maintaining the . . . separation of powers."[263] And yet, no such formalism is applied to agencies. Although agencies have wide latitude to exercise a combination of legislative, judicial, and executive functions, *Chadha* held that an arm of Congress—e.g., one house—cannot exercise the kind of lawmaking power that an administrative agency could make once it had been delegated such power by Congress.[264]

V. CONCLUSION

The general view sees the modern Court as having withdrawn from the separation of powers arena, at least in comparison to its activism in the federalism area. This view is largely a product of the Court's acquiescence in the continued growth of the administrative state. Because it has permitted Congress to delegate broad powers to agencies, the Court is seen as a non-player in the separation of powers arena. However, this conclusion is based on only one-half of the equation—the half that involves the initial grant of authority to the agency. It ignores the other half—the half that pertains to the actual exercise of that authority and to the judicial review of that exercise.

Through the workings of the agency process, the Court has come to occupy a stronger position, especially regarding the policymaking role traditionally assigned to Congress. Policymaking power has traveled from Congress to the agencies and then to the courts. Consequently, vis-à-vis Congress, the Court has gained in both influence and stature. Meanwhile, this gain, occurring indirectly through the agency process, has occurred at the same time that the Court has placed stricter separation of powers limits on the two elected branches.

This two-track approach (treating grants of authority to the agencies more leniently than delegations made by Congress to itself or the President) provides a strong reason to revisit and reinvigorate the constitutional separation of powers doctrine in the same way that federalism doctrines have been revitalized. Indeed, as outlined in Part II above, the concerns and values of a separation of powers doctrine continue to prevail. Moreover, through its

260. *Id.* at 276.
261. *Id.* at 276-77.
262. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1525 (1991).
263. Clark, *Separation of Powers as a Safeguard to Federalism*, *supra* note 9, at 1328.
264. 462 U.S. 919, 951 (1983).

two-track approach on separation of powers, the Court is strengthening itself in two different ways. First, it is gaining power through its review of agency actions. Second, it is gaining a relative advantage in connection with the elected branches because of its formalistic decisions that limit the scope of freedom available to those other branches. However, this gain in judicial power is just what the Framers opposed.

An examination of constitutional history shows that a system of separation of powers exists not just as an organizational model for democratic government. It is also the primary means by which to ensure the protection of individual liberty. But this aspect of separation of powers has been largely ignored in modern constitutional law. Instead of protecting the separation of powers as a means of protecting individual rights, the Court has turned its sights almost completely on the articulation of a vast array of substantive rights. It has created new privacy rights and new substantive due process rights, rather than relying on the structural or procedural safeguards built into the Constitution by the Framers. Granted, in the modern age the enforcement of clear separation of powers standards poses difficult challenges, but so too does the "discovery" of new and enumerated substantive rights.

The Court's two-track approach to separation of powers is just the opposite of what it should be. Its deferential stance toward congressional delegations of power to agencies effectively strengthens the two unelected branches of government—the judiciary and the "fourth branch" of the administrative agency. However, with respect to the two elected branches—the President and Congress—the Court has chipped away at their power and freedom. Yet with these two branches, the Court should be more accommodating, not less; the Court should be more flexible, not so rigidly formalistic. Since both these branches are politically accountable, any leeway in the separation of powers area can be made up by the additional controls imposed through the political process.

This approach was advocated by Justice White in his *Chadha* dissent, where he argued in favor of letting Congress make its own judgments about separation of powers issues.[265] According to Justice White, the courts should defer to congressional decisions on the best structure and functioning of government.[266] In *Chadha*, for instance, the growth of the administrative state was balanced by Congress's retention of oversight ability through the legislative veto. So, if agencies are going to receive more and more powers, the ability of Congress to oversee them should be greater. If agencies can be

265. *Chadha*, 462 U.S. at 967-1003 (White, J., dissenting).

266. Justice White favored a functional approach, unlike the formal approach of *Chadha*. *See* Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting) ("I will, however, address the wisdom of the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives . . . .").

delegated certain lawmaking and executive powers, Congress should certainly be able to delegate to one of its own houses a legislative veto.[267]

Other critics likewise argue that, with respect to the political branches, the Court should be more accommodating on separation of powers disputes.[268] It is often claimed that "the resolution of separation of powers questions may demand distinctively political information that is easy for the judiciary to misread or misapply, such as understanding executive and legislative perceptions of whether their core powers are being encroached upon or not."[269] In *Bowsher*, for example, the Court may have been better off to defer to the experiences of executive and legislative officials who had worked with the Comptroller General under the law.[270] Furthermore, perhaps the Court should give separation of powers issues extra time to play themselves out to see how they actually affect the branches. Perhaps the question should be asked as to whether the matter is still subject to political checks. Is there still meaningful conflict between the President and Congress on the particular issue? For instance, with the line item veto, Congress could still reenact the provision struck down by the President.

In the modern era, there seems to exist a rather permanent opposition to what is perceived as an activist Court. Critics claim that the Court has become hopelessly "activist" and has made a "grab for power."[271] In 2004, the House of Representatives passed bills that would limit the jurisdiction of the federal courts over the Pledge of Allegiance[272] and the Defense of Marriage Act.[273] Members of Congress talked about reigning in the judiciary, and possibly impeaching wayward federal judges. Judicial defenders protested, saying the independence of the judiciary was at stake; in reply, the argument was made that separation of powers was all about conflict between the branches and that judicial independence does not mean unquestioned judicial sanctity. Furthermore, if judicial independence is viewed "as the relative absence of external constraints on judges," this could lead to judicial independence from the rule of law.[274] If criticism of court decisions is seen

267. In Justice White's view, the administrative process should proceed, but one house of Congress should also be able to block the instance of delegated authority if it disagrees with the agency. *See* TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 188 (2004).

268. *See* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 813 (2002) (arguing that separation of powers disputes seem to call for judgments beyond the judiciary's expertise).

269. Peabody & Nugent, *supra* note 15, at 38 (footnotes omitted).

270. *Id.* at 39.

271. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 227, 249 (2004) (arguing that it is time now for the people to assert the supremacy of their judgment over the meaning of the constitution).

272. Pledge Protection Act of 2004, H.R. 2028, 108th Cong. (2004).

273. The Marriage Protection Act, passed by the House in July 2004, would limit the judiciary's jurisdiction in determining the constitutionality of the Defense of Marriage Act. *See* The Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004).

274. Ramesh Ponnuru & Robert P. George, *Independence Day: Thinking Seriously About Judicial Independence, and the State of Our Courts*, NAT'L REV., May 23, 2005, at 39.

as undermining the separation of powers, then the doctrine is already in deep trouble.[275]

The various contemporary movements to control the Court, however, inevitably focus on the Court's decisions regarding substantive individual rights. All the debate regarding judicial power and activism seems to take place along the terrain of individual rights. Almost never is the focus on the more indirect and structural ways in which the Court has increased its power, one of which is the way the Court has shifted the balance of separated powers through the intermediary of the administrative state.

275. In 2001, the Separation of Powers Restoration Act was introduced in Congress. H.R. 864, 107th Cong. (2001). The goal of the act is to "restore the separation of powers between the Congress and the President." *Id.*