Winter 2015

The Separation-of-Powers and the Least Dangerous Branch

Edward Cantu
University of Missouri - Kansas City, School of Law

ARTICLES

The Separation-of-Powers and the Least Dangerous Branch

EDWARD CANTU*

A snapshot of controversies currently surrounding the President highlights a sobering, even if acceptable, reality: we live in an age of extremely amplified presidential power. From the executive use of military force with little or no congressional approval, to the use of executive orders to effectively make federal policy without congressional involvement, virtually all of these controversies have a common source: the Court's relegation of enforcement of the separation-of-powers to the political process.

This Article provides an account of this relegation. It argues that all of the Court's separation-of-powers decisions—even those seeming to strictly enforce the boundaries of branch power—make the most collective sense when framed as a narrative of ineffective, and thus merely symbolic judicial stand-taking. Much like "major" federalism decisions, "traditional separation-of-powers decisions" have proven doctrinally inconsequential, but have had the systemic effect of allowing the Court to bow out of the most consequential structural disputes in order to accommodate pragmatic governmental creativity. Thus, the trajectory of federalism jurisprudence over the past century helps inform the inevitable fate of its less developed structural cousin, the separation-of-powers.

INTRODUCTION 2

I. AN OPEN SECRET: FEDERALISM'S RELEGATION TO THE POLITICAL PROCESS 4

A. Traditional Federalism's Erratic Glide Path 6

B. Federalism Is Dead: Long Live "Federalism" 8

1. Relatively Established Strains of Dignity Federalism Jurisprudence 10

2. State Dignity in Recent Federalism Jurisprudence 11

* Associate Professor, University of Missouri-Kansas City School of Law. The author would like to thank professors Rebecca Brown (UCLA), Martin Redish (Northwestern), Jack Beermann (Boston U.), June Carbone (Minnesota), Michael P. Allen (Stetson), and my UMKC colleagues Nancy Levit, Allen Rostron, Doug Linder, and Barbara Glesner-Fines for reviewing drafts and providing helpful feedback.

II. "SEPARATION OF POWERS CASES": A FAINT PRETENSE OF DOCTRINALIZATION 15

A. *Traditional Separation-of-Powers Cases: The Best Sampling* 15

1. Non-Delegation Cases 16

2. Removal Power Cases 19

3. National Security/Foreign Affairs Cases 24

a. "Plenary Power" in the Foreign Affairs Context: United States v. Curtiss-Wright Corp 25

b. Youngstown Sheet & Tube Co. v. Sawyer 27

c. Post-9/11 Habeas Corpus Decisions 29

4. *INS v. Chadha* 34

5. *Noel Canning*: Doctrinalizing Relegation 35

B. *Seeing a Forest Where There Are Only Trees: Academic Efforts at Doctrinalization* 37

C. *Chairs on the Titanic* 42

III. THE UPSHOT: UNPRECEDENTED EXECUTIVE POWER 44

CONCLUSION 47

INTRODUCTION

In the battle between pragmatism and principle, at least where the enforcement of structural constitutional mandates are concerned, pragmatism has clearly won. Those who would make strange bedfellows in most other contexts agree that modern exigencies call for relatively amplified executive power.[1] In the foreign affairs context, the country is fighting the qualitatively unique "asymmetrical" war against terrorism, and its leaders see the corresponding need to preempt threats using controversial methods of surveillance and elimination. Similarly, in the domestic context, we live in what Justice Kagan has termed "an era of presidential administration,"[2] wherein various pressures inspire well-meaning presidents to circumvent Congress in advancing their policies. Naturally, then, we are witnessing a reinvigoration of what has been described as a

1. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 37 (2010) (describing how both liberal and conservative scholars have recently sought to legitimize expanding presidential power).

2. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

"backwater"[3] area of legal research: the study of the separation-of-powers.

The "backwater" charge largely reflects the reality that the Court's separation-of-powers jurisprudence has been more inconsistent, erratic, and episodic than its jurisprudence in any other doctrinal area. And it reflects the fact that those who have attempted to make principled sense of these decisions—that is, to "doctrinalize" the decisions[4]—have proven themselves to be gluttons for intellectual punishment. For their theories prove unpersuasive, not for being analytically weak, but, perhaps, for holding out excessive hope for doctrinal coherence.

It is thus time to stop and take sober inventory of exactly what "law" genuinely governs the political branches' various experiments in power allocation. The answer is effectively "none," hence our current situation, for better or for worse. This article offers a descriptive theory intended to synchronize the academic separation-of-powers zeitgeist with this reality. It proposes that, just as the Court has for the most part relegated enforcement of federalism to the political process (a few symbolic Rehnquist-Court decisions notwithstanding[5]), it has done the same with the other major structural value, the separation-of-powers. Such relegation in the federalism context is obvious, largely because the Court expressly informed us of it in *Garcia v. San Antonio Metropolitan Transit Authority*.[6] However, scholars have largely ignored how the Court's reluctance in enforcing one structural value can help color its posture with regard to the other.

This article provides an introductory and non-exhaustive sketch of how the Court's separation-of-powers decisions, when considered collectively, reveal a narrative of occasional symbolic assertions by the Court that the separation-of-powers as a structural mandate exists, but at once also a narrative of effective judicial abandonment of meaningful enforcement of that structural mandate.

The article proceeds as follows. Part I sets up the comparison between federalism and the separation-of-powers by discussing the historical trajectory of the former and by bringing into relief its conceptual influence in modern case law. Part I also highlights the largely recognized reality that the Court has relegated enforcement of federalism to the political process, and it argues that

---

3. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence is So Abysmal*, 57 GEO. WASH. L. REV. 506, 511 (1989) ("Today, separation of powers is a theoretical backwater, which until recently was hardly even included in most law school courses and casebooks about constitutional law.").

4. *See, e.g.*, Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467 (2011); Harold H. Bruff, *On the Constitutional Status of Administrative Agencies*, 36 AM. U. L. REV. 491 (1987). Both of these works are discussed further below.

5. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

6. 469 U.S. 528 (1985). The Court's decision, which the Rehnquist Court never overruled, announced that "the State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. This decision is often thought to represent "[t]he high water mark in [the] process of judicial sanctioning of federal expansion" until the Rehnquist Court began its "federalism revolution." Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 824, 851 (2005).

the primary role of federalism in the Court's modern jurisprudence is as a symbolic exaltation of federalism as a constitutional *value*, rather than enforcement of it as a constitutional *mandate*.

Part II demonstrates how the long-term trajectory of separation-of-powers jurisprudence closely parallels the historical and current life of federalism in the Court's case law. Specifically, this part is mostly devoted to demonstrating how the Court's separation-of-powers decisions—even those that appear to strictly enforce branch limitations, and are thus assigned reading in first-year constitutional law classes—have proven doctrinally inconsequential and thus are practically useless in distilling "doctrine" for purposes of resolving contemporary separation-of-powers issues. These decisions are largely specimens of symbolic stand-taking, which allows the Court to bow out of more consequential confrontations while still preserving for itself a theoretical role in "enforcing" an important aspect of the American politico-legal ethos.

Part III reflects on the corollaries of Parts I and II: first, the current unprecedented breadth of executive power, and the reality that political accountability is the only check on the use of that power; and second, the reality that expecting meaningful enforcement of structural mandates is simply unrealistic.

I. AN OPEN SECRET: FEDERALISM'S RELEGATION TO THE POLITICAL PROCESS

A fairly reliable axiom is that the higher the stakes, the less likely the Court will meaningfully involve itself in a given legal issue. From prudential creations such as the political question doctrine[7] to strategic use of standing doctrine,[8] the Court understands that the power of prestige on which it thrives is a far less formidable power compared to command of the purse and sword by Congress and the executive, respectively.[9] This reality not only theoretically relegates it to

---

7. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (listing reasons for dismissing cases under the political question doctrine, including prudential reasons such as the risk of "embarrassment," demonstration by the Court of a "lack of respect" toward coequal branches, or because there might exist an "unusual need for unquestioning adherence to a political decision already made"); Zivotofsky v. Clinton, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring) (citing *Baker*, and emphasizing that the Court reserves for itself the right to decline adjudication when "prudence may counsel against a court's resolution of an issue presented").

8. *See* Sandy Levinson, *Why isn't declining a grant of certiorari sufficient as a "passive virtue": Reflections on "standing,"* BALKINIZATION (July 3, 2013, 9:29 PM), http://balkin.blogspot.com/2013/07/why-isnt-declining-grant-of-certiorari.html (referring to various recent standing decisions and noting that "[t]he classic defense of what lawyers know as the doctrines of standing, ripeness, and mootness were developed by Alexander Bickel, the acolyte, at least in this respect, of Felix Frankfurter . . . as 'passive virtues' that would enable the Supreme Court to avoid taking certain hot potatoes that would generate potentially serious institutional costs for the Court. . . . [W]hy bother to maintain what appears to many of us, independent of our disagreements on a host of issues, to be an incoherent, basically intellectually corrupt set of cases? Why continue going through this charade whose consequence is simply to feed the already fairly widespread contempt of the Court?").

9. Justice Frankfurter described this reality best in his dissent in *Baker*. Believing the majority's willingness to adjudicate a state malapportionment dispute to be imprudent, Justice Frankfurter protested "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's

"least dangerous branch"[10] status but also compels judges to internalize that status in the form of their fear of over-enforcing law.

There are exceptions to the above axiom of course, but most seeming exceptions are not. The Warren Court, for example, might be thought brave for its relative willingness to recognize individual rights in contexts where doing so further inflamed already boiling social controversies. And it was. But, everything is relative: compare the Court's willingness to declare segregation in public schools unconstitutional to the same Court's general unwillingness to meaningfully enforce structural mandates because it feared consequences far greater than the outrage over desegregation.

The continuum of prudential courage that this pattern reflects can perhaps be best explained in terms of Abraham Maslow's "hierarchy of needs."[11] Tedious conceptualisms aside, nations are nothing but collections of people, and people have needs. First and foremost are physiological: nourishment for example. By contrast, the tip of Maslow's pyramid is where more ethereal aspects of human fulfillment reside—those evocative of the "dignity" common in individual rights decisions.[12] Ruling that, say, states cannot ban homosexual intercourse per substantive due process,[13] while riling one side of a culture war, does not threaten national security or the economic health of the country.

Enter the prudential albatross of federalism. The Court has historically been caught between the institutional need to maintain some semblance of federalism and the need to prevent that semblance from impeding efforts at satisfying national needs—mostly economic in nature. That pragmatism has trumped principle here is, in retrospect, unsurprising. It is therefore quite apparent that the Court's willingness to advance federalism principles is at most marginal. It is not clear, then, why there is not a general consensus that the separation-of-powers, as an abstract structural rule, is also doomed to the same status of empty formality. In light of the fate of federalism, it should be clear. To bring the inevitable similarities into relief, it helps to examine the trajectory of

---

complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." *Baker*, 369 U.S. at 267.

10. THE FEDERALIST NO. 78 (Alexander Hamilton) (predicting that the judiciary would be the "least dangerous branch" because of its inherent institutional limitations).

11. *See* Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 4, 370–96 (1943). Maslow graphically ranked his hierarchy of human needs using a pyramid, at the base of which were the basic physiological needs such as food and breathing, and at the tip, goals of "self-actualization," such as creativity and morality. *Id.*

12. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (discussing the substantive due process right to have an abortion via the right to privacy, the Court noted "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . .").

13. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003) (striking down Texas' "anti-sodomy" law that proscribed sexual intercourse between men, and noting "[t]he instant case involves liberty of the person both in its spatial and more transcendent dimensions.").

federalism in the Court's case law and briefly discuss where that trajectory has landed federalism in modern jurisprudence.

A. Traditional Federalism's Erratic Glide Path

Classically, federalism has been framed in terms of regulatory "enclaves" of mutually exclusive regulatory power of the states and the federal government. Often termed "dual federalism"[14] or "enclave federalism,"[15] this traditional framing holds that there exist "spheres" or "enclaves" of affairs that, by their nature, are of "traditional state concern" and therefore fall within the exclusive province of the states to regulate.[16] Early explications of federalism tracked this notion, but there was little need to employ this conception of federalism prior to the Industrial Revolution.

The advent of mass transportation and communication made commerce and its regulation more national.[17] The Court saw the writing on the wall but resisted on grounds of principle, which it could afford to do because the need for national command of economic matters was not as pressing in the late nineteenth century as it would become during the Great Depression. The resistance took the form of stand-taking jurisprudence via decisions such as *United States v. E.C. Knight Co.*,[18] *Carter v. Carter Coal Co.*,[19] and *Hammer v. Dagenhart*,[20] wherein the Court struck down federal regulations based on conceptualistic determinations that the given regulated economic activities were not sufficiently "commercial" or "national" so as to be fair game for federal regulation under the Commerce Clause.

By 1937, however, it became clear that the gig was up on dual-federalism; faced with either sticking to its principled guns or bending the rules to give

---

14. *See generally* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, *in* FEDERALISM AND SUBSIDIARITY, 34–82 (James E. Fleming and Jacob T. Levy eds., 2014); Robert A. Schapiro, *Federalism: Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2133 (2006). ("Dual federalism [is] the idea that the national government and the states enjoy exclusive and non-overlapping spheres of authority.").

15. *See* Aviam Soifer, *Truisms that Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 794 (1986) (referring to this approach as embodying a belief that the "Tenth Amendment creates an enclave for state authority"); Schapiro, *supra* note 14, at 2134 (noting that "[d]ualist federalism defines these protected enclaves in terms of subject matter. Some activities are local; others are national. Constitutional principles of federalism protect the local sphere from federal intrusion").

16. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990, which criminalized the possession of firearms in school zones, as infringing on "areas of traditional state concern," in this case local public safety, and blurring the "boundaries between the spheres of federal and state authority").

17. Robert S. Peck, *Extending the Constitutional Right to Privacy in the New Technological Age*, 12 HOFSTRA L. REV. 893, 893 (1984) ("Major shifts in constitutional doctrine occurred after the industrial revolution transformed the United States from an agrarian society to a manufacturing giant. As a result of that transition, the scope of the Commerce Clause was expanded to permit regulation of a host of activities never before subject to governmental oversight.").

18. 156 U.S. 1 (1895).

19. 298 U.S. 238 (1936).

20. 247 U.S. 251 (1918).

Congress the regulatory breathing room it needed to jump-start the economy, the Court chose the latter option[21] (especially in light of President Roosevelt's "court packing" threat). And, of course, the poster child for this deference is the Court's decision in *Wickard v. Filburn*,[22] in which the Court reasoned that when a farmer grows wheat on his private land for personal consumption, his conduct is sufficiently related to interstate commerce such that Congress may prohibit it in an attempt to stabilize the wheat market.

This deference lasted, so the story is often told in first-year constitutional law courses, until the Rehnquist Court ostensibly sought to reinvigorate federalism through decisions such as *United States v. Lopez*[23] and *United States v. Morrison*,[24] wherein the Court struck down legislation enacted under the Commerce Clause. In *Lopez*, the Court ruled that Congress could not outlaw the carrying of handguns in school zones without showing that the proscribed conduct had a meaningful impact on interstate commerce.[25] In *Morrison*, the Court similarly ruled that Congress could not create a civil remedy for gender-based violence through the Violence Against Women Act without evidence that such violence had a meaningful effect on interstate commerce.[26] In these cases, the Court uncharacteristically concluded that the regulated conduct was of a distinctly local character and thus implicated the exclusive regulatory provinces of the states.

At the time, these decisions appeared earthshaking, and the Rehnquist Court faced charges of conservative judicial activism. Larry Kramer, for example, declared that "conservative judicial activism is the order of the day" because, among other things, the Court had "cast aside nearly 70 years of precedent in the area of federalism."[27] Hindsight, however, reveals that the "dual-federalism" into which the Rehnquist court allegedly sought to breathe life has gone, and is going, nowhere. Scholars such as Ernie Young have declared that "[d]ual federalism remains hardly less dead than it was the day after the Court decided *Wickard v. Filburn*."[28] Indeed, nine years into John Roberts' term as Chief Justice, his Court has arguably not handed down one decision meaningfully curtailing Congress' regulatory reach under its most oft-invoked source of

21. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (reversing course in its Commerce Clause jurisprudence, and thus ushering in the modern era of extreme deference toward Congressional power generally).

22. 317 U.S. 111 (1942).

23. 514 U.S. 549 (1995).

24. 529 U.S. 598 (2000).

25. *Lopez*, 514 U.S. at 567–68.

26. *Morrison*, 529 U.S. at 617.

27. Larry D. Kramer, *No Surprise. It's an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33; *see also* Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173, 185 (2001) (labeling as "conservative judicial activism" the Rehnquist Court's "recent line of federalism decisions," and describing them as "lawless and indefensible from the standpoint of pre-1987 jurisprudence").

28. Young, *supra* note 14, at 34.

power, the Commerce Clause.[29] Therefore, most agree that *Lopez* and *Morrison* have proven to have little doctrinal momentum.[30]

Nevertheless, many hold fast—quaintly or wisely—to James Madison's premise that diffused power serves long-term liberty interests; that even though restraining federal power works short-term inconveniences, it nurtures the long-term subsidiarity that is the hallmark of tame and humble government.[31] Federalism decisions from the Rehnquist Court are a quote-miner's treasure-trove regarding this utilitarian sentiment.[32]

Of course, it is easy to hold fast to such sentiments in the abstract. But when enforcing them means invalidating many federal laws and undermining expectations that are deeply entrenched in the American political landscape, can a judge be faulted for seeking some alternate route for paying federalism principles their due at least symbolically? Fault aside, the reality is that the Court has rather clearly bowed out of deciding the most pressing and consequential states' rights issues. Nevertheless, the Court is not willing to give up on the *notion* that federalism is a meaningful constraint on federal power, and that the Court has an institutional responsibility (and right) to occasionally announce as much. What, then, is the primary manifestation of federalism in the Court's modern jurisprudence, and how might the answer help frame the Court's long-term posture toward the separation-of-powers as a constitutional mandate?

B. Federalism Is Dead: Long Live "Federalism"

The current life of federalism in the Court's jurisprudence is not as a manifestation of classic dual-federalism, or anything else that resembles systemic cabining of creeping federal power. Rather, federalism currently takes the form of stubborn extant abstraction, one the Court has an institutional responsibility to formally nod to in occasional, but largely symbolic pronouncements

---

29. The contrarian might pounce with National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), wherein the Court declared that Congress did not have the power under the Commerce Clause to require citizens to purchase health insurance. This holding, however, is of extremely limited consequence given the unique context of compelled commerce, a mechanism unusual in federal law. Indeed, this holding was even inconsequential in the case itself, as the Court ultimately concluded that the so-called "individual mandate" was nevertheless a valid exercise of Congress' power to tax. *Id.* at 2596.

30. *See, e.g.*, Young, *supra* note 14, at 34 ("I would think that by now the Court has made clear that it does not mean to impose particularly significant limits on the Commerce Clause, much less to bring back the entire dual federalist regime.").

31. THE FEDERALIST NO. 51 (James Madison) (asserting that federalism and the separation-of-powers serve as "a double security," in that "[t]he different governments will control each other; at the same time that each will be controuled [sic] by itself.").

32. *See, e.g.*, New York v. United States, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government. . . .").

that limits of federal power do indeed exist. For this reason, even aside from the reality that the Rehnquist Court decisions have had little *doctrinal* staying power, scholars have noted that the decisions themselves were not very impactful either bureaucratically or politically.

For example, Lynn Baker and Ernest Young have written that the Rehnquist Court's "most prominent federalism cases . . . all have involved fairly minor federal regulatory efforts with mostly symbolic impact."[33] Neil Siegel has similarly described some Rehnquist Court decisions as manifestations of "symbolic federalism,"[34] a sentiment Orin Kerr shares: "the theme of the Rehnquist Court's federalism jurisprudence is [s]ymbolic [f]ederalism. If there is a federalism issue that does not have a lot of practical importance, there's a decent chance five votes exist for the pro-federalism side."[35]

This symbolic vindication of federalism is important for purposes of comparing the fate of federalism in the Court's case law with that of the separation-of-powers. As such, it is worthwhile to further tease out the contours of this symbolic jurisprudence, especially as it relates to relatively recent decisions by the Court.

The symbolic federalism-vigilance in modern case law is largely the product of the Court working at the edges of the Tenth Amendment. One might term the product "penumbral federalism" because the approach finds answers in the Amendment's "penumbras and emanations."[36] This exercise expresses concerns that speak to the *spirit* of federalism rather than the classic conception of federalism as cordoning off state regulatory turf. Scholars' recognition of the increasingly symbolic incarnation of federalism-vigilance has yielded scholarship preliminarily investigating the vague and ethereal conceptualizing of feder-

---

33. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 159 (2001).

34. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1665 (2006); *see also* Anthony Johnstone, *Commandeering Information (and Informing the Commandeered)*, 161 U. PA. L. REV. ONLINE 205, 217 (2013) ("[J]udicial safeguards of federalism typically have more bite in narrow, symbolic cases . . . than in larger cases that threaten to undermine long-settled national policies.").

35. Orin Kerr, *The Rehnquist Court and Symbolic Federalism*, SCOTUSBLOG, (June 6, 2005), http://www.scotusblog.com/2005/06/the-rehnquist-court-and-symbolic-federalism/. Kerr goes on to note that the Court's decision in *Lopez:*

> resulted in very little change in substantive law. Yes, the decision struck down a federal statute, but it indicated that Congress could quickly reenact the statute with a very slight change. Congress did exactly that: It re-passed the statute with the added interstate commerce element shortly after the Lopez decision. Lower courts have upheld the amended statute, and the Supreme Court has shown no interest in reviewing their rulings. Because nearly every gun has traveled in or affected interstate commerce, the federal law of possessing guns in school zones is essentially the same today as it was pre-Lopez.

Id.

36. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The Court found that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and thus yield a right to privacy in certain contexts. *Id.*

alism principles—namely, the notion of "state dignity"—that increasingly animates Court decisions.

1. Relatively Established Strains of Dignity Federalism Jurisprudence

The doctrinal context in which state dignity has the most established doctrinal presence is the Eleventh Amendment state sovereign immunity context. The Rehnquist Court initiated the modern trend of relying on state dignity to animate the state sovereign immunity doctrine,[37] and by 2002, it was clear that protection of state dignity was, according to the Court, the primary purpose of the Eleventh Amendment: "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[38] Consistent with the trend, state dignity sentiment in the Eleventh Amendment context has only grown more pronounced and unequivocal in the Roberts Court.[39]

Ann Althouse in 2000 observantly viewed this increasing invocation of state dignity as part of a greater narrative: beginning with the era of Chief Justice Burger, the Court "began what has become a continuing search for ways to enforce federalism" following the Warren Court's disinclination to do so,[40] a trend that has culminated in the modern emphasis on abstract attributes of state sovereignty and prestige. Further, Adam B. Cox was one of the few scholars who fairly early on framed anti-commandeering decisions as also turning on "expressive" concerns. He proposed that "the anti-commandeering rule might serve the important function of representing and reinforcing social understandings of state 'autonomy' that are crucial to the production of some of the public goods secured by federalism."[41]

While a further exploration of this topic is best left for other efforts, state dignity as the driving sentiment of federalism jurisprudence appears to have peaked in the Court's 2012 term, influencing for the first time other doctrinal areas such as equal protection analysis and Congress' remedial power under the Reconstruction Amendments. A close, but nevertheless brief, examination of two 2012 decisions illustrates this reality well.

---

37. *See generally* Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003). For examples of decisions, see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) ("[C]urrent Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system[.]"); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997) (noting "the dignity and respect afforded a State, which the immunity is designed to protect.").

38. Federal Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).

39. *See* Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632 (2011) (majority and dissent clearly relying on offensiveness to state dignity as dispositive, with Justices Roberts and Alito doing so in dissent with unprecedented vociferousness).

40. Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 246 (2000).

41. Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule*, 33 LOY. L.A. L. REV. 1309, 1316 (2000).

2. State Dignity in Recent Federalism Jurisprudence

In *United States v. Windsor*,[42] the Court dealt with the constitutionality of Section 3 of the Defense of Marriage Act,[43] which effectively established that same-sex married couples—that is, legally married couples under the laws of their respective states—could not qualify for, among other things, various federal tax benefits available to opposite-sex married couples.[44] Many suspected the Court would declare the DOMA provision invalid on traditional federalism grounds because the provision "usurped" the states' traditional role of regulating marriage within their borders.

The Court rejected this approach, declaring instead that the DOMA provision violated equal protection principles under the Fifth Amendment. Nevertheless, the Court was blatantly clear that coloring its equal protection analysis was a concern about the *offensiveness* of the federal law to state sovereignty as a highly abstract matter; however, just as blatant was the Court's unwillingness to indicate the degree to which this offensiveness influenced the ultimate ruling.

Fundamentally, federalism amounts to the same type of "negative liberty"[45] for states that individuals enjoy under individual-rights provisions: it protects states' ability to do things—namely regulate within their borders—without the federal government stopping them.[46] The analytical elephant in the room in *Windsor* was that DOMA did not prevent New York from recognizing same-sex marriage and making such marriages legally valid generally. Those who advanced freestanding federalism arguments thus faced the task of demonstrating that state sovereignty included the ability not only to legalize same-sex marriage and define marriage for purposes of state law, but also to dictate how federal tax law would be applied within their borders. This argument is too ambitious, but the stench of federal arrogance remained. That stench is what inspired good-faith federalism arguments in the first place. So how should a judge sensitive to this arrogance and its implications frame and tackle the problem?

---

42. 133 S. Ct. 2675 (2013).

43. Defense of Marriage Act, Pub. L. No. 104-199, 1996 U.S.C.C.A.N. (110 Stat.) 2419, *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013) (though not a tax provision, it established that for purposes of federal law, "marriage" means "only a legal union between one man and one woman") (originally codified as 1 U.S.C. § 7).

44. *Windsor*, 133 S. Ct. at 2692.

45. Used here to mean its usual meaning: freedom from government action. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY 5, 31 (2005) (defining it as the freedom "to pursue [one's] own interests and desires free of improper government interference").

46. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 431 (1979) ("The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold."); Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013), *available at* http://yalelawjournal.org/2013/06/08/fishkin.html ("[S]tates are sovereign in that they possess the power to make law."). Of course, the flip side of this definitional coin is that federalism protects individuals from federal laws that dabble in the state regulatory province, even absent some state law with which the federal law "interferes." But this still presupposes that the federal law does indeed regulate in a manner in which only state law is constitutionally permitted.

While the analytical dust has not yet settled, scholars have generally taken the position that federalism had a nudging effect in *Windsor*, in some fashion causing the Court to ratchet up the level of scrutiny under its equal protection analysis.[47] Thus, federalism in *Windsor* appears to have taken the form of indignation that the federal government would disregard the moral determinations of state legislatures regarding the propriety of certain marital arrangements. The *symbolic* flouting of state policy determinations about matters of traditionally local concern represented nothing more than federal disrespect (rather than a material usurpation) of the states' traditional relationship with its own citizens. Such can hardly be deemed a "federalism" problem unless the operative conception of federalism is that it serves not only as a check on substantive federal regulatory overreach but also as a mechanism of maintaining a healthy dynamic of federal humility and state prestige. This more abstract conception is one the Court can "enforce" without many costs.

Also noteworthy is the Court's 2012 term decision in *Shelby County v. Holder*.[48] There, the Court addressed the continuing validity of the Voting Rights Act (VRA). The VRA, passed pursuant to Congress' authority to enforce the Fifteenth Amendment,[49] regulates the states' management of their elections to ensure state laws do not impede voting on the basis of race or systemically disable racial minorities from electing their preferred candidates. Important for present purposes are two provisions of the VRA.

First, Section 5 of the VRA[50] required that states "pre-clear" changes to their election laws with the U.S. Attorney General before these laws could go into effect. Second, Section 4 of the VRA[51] established the geographical "coverage" of the VRA's pre-clearance provision. Because the problem of race-based disenfranchisement was heavily concentrated in the southern states when the VRA was originally enacted in 1965, the most aggressive provisions of the law, including the preclearance requirement, only covered those states.

The problem in *Shelby County* was that since 1965 Congress had not reevaluated whether changed circumstances brought the original coverage formula out of sync with the otherwise legitimate purpose of the statute. The Court held that continued reliance on forty-year-old data made the coverage formula in Section 4

47. *See, e.g.*, Ernest A. Young, United States v. Windsor *and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 45 (2013) (noting that federalism concerns "seems to have ratcheted up the level of scrutiny somewhat"); Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG, (June 26, 2013, 3:37 PM), http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/ ("[U]nder Justice Kennedy's reasoning, it is the fact that states have recognized same-sex marriage that gives rise to heightened [equal protection] scrutiny.").

48. 133 S. Ct. 2612 (2013).

49. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST., amend. XV, § 1.

50. 52 U.S.C. § 10304(a) (2014) (originally codified as 42 U.S.C. § 1973c(a)).

51. Voting Rights Act of 1965, Pub. L. No. 89-10, 1965 U.S.C.C.A.N. (79 Stat.) 437, *invalidated by* Shelby County v. Holder, 133 S. Ct. 2612 (2013) (originally codified as 42 U.S.C. § 1973b).

"irrational,"[52] and unequal treatment of the states based on such data was a violation of the "principle of equal sovereignty."[53] This means, according to the Court, that pre-clearance was not a valid exercise of Congress' power to "enforce" the Fifteenth Amendment with "appropriate" legislation, a power Section 2 of the Amendment expressly grants Congress.[54]

Several things are clear. First, invocation of the "fundamental principle of equal sovereignty" was not necessary to the Court's decision because the finding of irrationality itself permitted the Court to reach the conclusion it ultimately reached.[55] Second, the "fundamental principle of equal sovereignty" is clearly not. As such, scholars, and Justice Ginsburg in her dissent, predictably and rightly emphasized the disingenuousness of the majority's suggestion that equal sovereignty between the states has long been recognized as a "fundamental principle" in the Court's case law.[56]

Regardless, the phrase "fundamental principle" is there, and very deliberately so; but why? The most plausible answer is that the reasoning in *Shelby County* embodies a belief that federalism and the Tenth Amendment are quintessentially about not only the division of regulatory power, but also about maintaining the states as viable competitors for citizens' respect and loyalty. If this is a sound premise, it must make unequal burdening of the states by Congress at least preliminarily problematic, even if reasonable people can disagree about the ultimate propriety of such unequal treatment in specific contexts.

The point of discussing *Windsor* and *Shelby County* is to illustrate that the unfolding of federalism jurisprudence as a narrative of judicial symbolic standtaking is currently decades farther along than the overall story of separation-of-powers jurisprudence. In the federalism context, this makes it a relatively easy task to plot recent decisions as data points on an emerging trend line (one which, as will be argued below, the separation-of-powers seems to have paralleled). An evaluation of the federalism approaches available to the federalism-vigilant judge makes apparent why the Court increasingly resorts to symbolic—

---

52. *Shelby County*, 133 S. Ct. at 2629 (emphasizing that "Congress . . . reenacted a [coverage] formula based on 40-year-old facts having no logical relation to the present day," and noting the "irrationality of continued reliance on the § 4 coverage formula" in imposing preclearance).

53. *Id.* at 2622.

54. Section 2 reads: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST., amend. XV, sec. 2.

55. *See* South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("As against the reserved powers of the States, Congress may use any *rational* means to effectuate the constitutional prohibition of racial discrimination in voting." (emphasis added)).

56. *See, e.g.*, *Shelby County*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting) ("Today's unprecedented extension of the equal sovereignty principle . . . is capable of much mischief. Federal statutes that treat States disparately are hardly novelties."); Richard A. Posner, *Supreme Court 2013: The Year in Review*, SLATE (June 26, 2013), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html (asserting that the *Shelby County* ruling was "about the conservative imagination," and that the equal sovereignty principle was a "principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle).

almost romantic—protection of state prestige, while failing to grant certiorari for cases implicating the most extreme forms of congressional ambition.[57]

One option available to federalism-vigilant judges is to enforce dual-federalism. As suggested before, this is not going to happen. Scholars regularly refer to the Rehnquist Court years as representing a "federalism revolution."[58] But the lasting doctrinal legacy of this revolution, is generally thought to be a revolution in the Court's manifest *attitude* toward federalism, rather than a meaningful and consistent doctrinal re-invigoration of dual federalism in the Court's decisions. For example, in 1998, Michael C. Dorf wrote that, far from the Rehnquist Court's federalism being substantively earth-shaking, the Court appeared to be relatively unconcerned with "pursuing decentralization and the other policy goals that federalism serves."[59]

The point is that, in light of contextual realities and the various pressures judges face, a focus on symbolic and sporadic protection of state prestige has proven to be the only realistic option for a judge to take if she is to, quite legitimately, see it as judicial abdication to give up on structural mandates altogether. Thus, the invocation of state dignity and similar concepts represents not an ideological fetishizing of federalism, but rather a pragmatically watered-down version of it.

In short, in the federal courts, pragmatism has won its battle with federalism as principle, even in the minds of relatively federalism-vigilant justices. This cannot be for want of exaltation, but rather for a greater want for palatable results. Most scholars—whether for or against greater federalism vigilance—recognize this reality.[60] Yet, strangely, scholars generally fail to ask what federalism's fate has to teach us about how to best frame separation-of-powers decisions and where separation-of-powers jurisprudence is headed. The next section is devoted to proposing an answer. Despite the fact that the Court occasionally pronounces separation-of-powers principles with Olympian profundity, its decisions have never meaningfully restrained the branches in their efforts at solving national problems. Thus, the story of the separation-of-powers as a legal mandate is a familiar one: it is here only in spirit.

---

57. For example, the Court does not address issues such as whether application of the Hobbs Act, which essentially federalizes a large swath of crimes traditionally pursued under state police power, such as robbery. *See* Patrick E. Higginbotham, *The Continuing Dialogue of Federalism*, 45 KAN. L. REV. 985, 991 (1996–1997) (Fifth Circuit judge asking rhetorically "[w]hat is left of a state's traditional role in prosecuting local crime when the federal government prosecutes a robbery of a corner grocery store under the Hobbs Act on the theory that the 100 bucks from the register would have been deposited in the bank and wired across the state line with the day's receipts?").

58. *See, e.g.*, Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 165 (2006).

59. Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998); *see also* Althouse, *supra* note 40, at 268 (noting that while she "respect[s] the attempt by the Court's conservative majority to try to design safeguards" for states' rights, she thought it "preferable to take the more drastic step of overruling *Garcia*," and thus holding that certain traditional state functions are off limits to otherwise legitimate exercises of Congress' Commerce Clause authority).

60. *See* Young, *supra* note 14, at 34.

II. "SEPARATION OF POWERS CASES": A FAINT PRETENSE OF DOCTRINALIZATION

Few other areas of constitutional law jurisprudence are as rudderless as separation-of-powers jurisprudence, yet few areas are as indisputably fundamental (at least theoretically) to our constitutional system. This is quite the paradox. The result is a body of allegedly "seminal" decisions that could not be avoided, yet have utterly failed to prove "seminal" by assigning an entrenched and effective meaning to the exalted abstraction.[61] What results from such a confrontation between fundamental political values and the pressing need for governmental effectiveness is a troubling spectacle for those who hold fast to the notion that separation-of-powers is actually a determinate constitutional mandate. This section is devoted to highlighting that spectacle to a degree scholars hereto have failed to do in a broad sense. The spectacle being the reality that the Court's traditional—indeed, often heralded as courageous—separation-of-powers decisions have proven to have little to no doctrinal legacy, as well as little to no constraining effect on the political branches' behavior.

The discussion thus requires an examination of quasi-canonical separation-of-powers cases and their long-term impact. These are familiar cases in which the Court has expressly or implicitly sketched the theoretical limits of branch power in deciding the disputes before them. Exhaustive discussion of every decision implicating the separation-of-powers is of course not feasible and, in any event, not necessary to sketch the theoretical approach introduced by this article. Because the goal of the argument is to initiate a discussion about the systemic effect of traditional separation-of-powers decisions, the following discussion will focus on those decisions most important in legal history and most often emphasized by constitutional law scholars and teachers.

A. Traditional Separation-of-Powers Cases: The Best Sampling

Overt separation-of-powers cases—especially those that are thought to be of historical import—are rare. Thus, while the discussion here need not be lengthy, a brief survey of the cases that form the heart of the separation-of-powers segments of casebooks is warranted.

Separation-of-powers cases thought most significant in American history generally fall into three categories: (1) "non-delegation cases," or cases centering on the propriety of Congress delegating to agencies (which fall generally under the executive branch[62]) the power to promulgate regulations, and there-

61. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) (referring to the case law as "an incoherent muddle"); Redish & Cisar, *infra* note 89, at 450 ("In the separation of powers area . . . the modern 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. The Court has gone from one extreme to the other, with the assertion of what are at best tenuous distinctions.").

62. So-called "independent agencies," while not operating within one of the executive *departments* like "executive agencies," still generally fall under the "executive branch."

fore to arguably exercise "legislative power"; (2) "removal power cases," or cases involving congressional restrictions on the President's ability to remove from office officials who exercise duties most accurately characterized as "executive"; and (3) those cases implicating the President's powers in the national security context. Important outlier decisions that must also be discussed are *INS v. Chadha*, in which the Court struck down the legislative veto, and *National Labor Relations Board v. Noel Canning*, wherein the Court invalidated several of President Obama's appointments to the NLRB as violative of the Recess Appointments Clause.[63]

1. Non-Delegation Cases

The non-delegation doctrine prohibits one branch from delegating its constitutionally vested power to another branch. In theory, because Congress is granted "legislative" power in Article I of the Constitution, it, and only it, may exercise that power.[64] As will be explained shortly, the "in theory" caveat is important, as the Court has not enforced the non-delegation doctrine to any meaningful extent. As for the argument here that separation-of-powers decisions have had little meaningful doctrinal impact, the non-delegation cases are low-hanging fruit, as scholars generally recognize that the non-delegation rule exists in name only.[65] Nevertheless, for the sake of thoroughness, a brief discussion of this line of jurisprudence is warranted.

Delegation issues have most commonly arisen due to the necessarily expansive breadth of the administrative state, and thus due to Congress's need to delegate law-making power to administrative agencies rather than govern completely through statutes. While the Framers assumed that separation-of-powers problems would normally take the form of one branch attempting to aggrandize itself at the expense of the other branch, the non-delegation doctrine combats what is the flip side of the separation-of-powers coin: one branch aggrandizing *another* branch by ceding to it powers that the Constitution vests in the first branch only.

As a practical matter, much of contemporary American law is promulgated in the form of rules and regulations by administrative agencies, not by Congress. Such agencies are bestowed law-making power by Congress, which, for a variety of reasons, has delegated that power to them increasingly since the early twentieth century. One primary reason is the increasing technological sophistication of modern industry. Because the sophistication of law makers' understanding should correspond to the increasing complexity of that being regulated, Congress has seen it necessary to cede regulatory power to agencies staffed by

63. See *INS v. Chadha*, 462 U.S. 919 (1983); *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014).

64. *See* Loving v. United States, 517 U.S. 748, 771 (1996) (noting that the Court's doctrine "seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes").

65. *See* Posner & Vermeule, *infra* note 77, at 1762.

those with more specialized knowledge required to promulgate workable rules sensitive to the esoteric realities of the subject matter at issue.[66] Another commonly accepted reason for Congress's delegation of power is that it simply does not want to make the tough political choices necessary to craft laws with a feasible level of specificity.[67] Regardless of reasons, the apparent need for delegation has been a fact of life for at least a century, and no legal soothsayer foresees a change.

Early on, the practice of delegating power raised questions of whether the practice was even constitutional; after all, Article I vests legislative power in Congress, not the executive branch.[68] Although the Court continues to claim that the non-delegation doctrine still has teeth,[69] only in two decisions, both handed down in 1935, has the Court actually struck down delegations by Congress on non-delegation grounds.

In *Panama Refining Company v. Ryan*,[70] the Court addressed the constitutionality of the National Industrial Recovery Act which, among many other things, authorized the President, when and to the degree he adjudged it to be economically beneficial, to regulate the amount of oil in the interstate market. The Court ruled that Congress delegated to the executive excessive law-making power: "[t]he Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."[71] Five months later, in *A.L.A. Schechter Poultry Corp. v. United States*,[72] the Court ruled that a law that granted "unfettered discretion" to the President to regulate the poultry industry was an impermissible delegation of legislative power:

> [The law] does not undertake to prescribe rules of conduct to be applied to particular states of fact. . . . Instead, it authorizes the making of codes to prescribe them. For that legislative undertaking it sets up no standards, aside

66. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 192 (2004) ("Broad delegations . . . are necessary . . . because of the sheer complexity of environmental standard setting, . . . [which] requires deliberations based upon a vast array of informational inputs. . . . The relevant information . . . is constantly changing in light of new information and technology. . . ."); WILLIAM LYONS & JOHN M. SCHEB II, AMERICAN GOVERNMENT: POLITICS AND POLITICAL CULTURE 516–17 (Atomic Dog Publ'g 2003) (1995) ("[T]hrough a series of broad delegations of legislative power, Congress has transferred to the federal bureaucracy much of its responsibility for making and enforcing the rules and regulations deemed necessary for a technological society. . . .").

67. *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (2003).

68. U.S. CONST. art. I, § 1. ("All legislative Powers herein granted shall be vested in a Congress of the United States. . . .").

69. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010) (describing as a "basic principle" that "the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch") (internal quotation marks omitted) (citing Clinton v. Jones, 520 U.S. 681, 712–13 (1997)).

70. 293 U.S. 388 (1935).

71. *Id.* at 421.

72. 295 U.S. 495 (1935).

> from the statement of the general aims of rehabilitation [of the poultry industry].[73]

Theoretically, a delegation of power becomes impermissible for being legislative if Congress fails to cabin the President's discretion with an "intelligible principle" to which the executive is to conform.[74] The intelligible principle standard theoretically continues to govern today.[75] But since *Panama Refining* and *Schechter Poultry*, the Court has allowed delegations of legislative powers to agencies sometimes so sweeping as to appear almost as if Congress is daring the Court to resuscitate what is generally considered to be, at best, a doctrine on life support. A glaring example of this reality is the Court's conclusion that, in enabling the Environmental Protection Agency to promulgate regulations "requisite to protect the public health," Congress had provided the EPA with a constitutionally sufficient "intelligible principle" to avoid non-delegation problems.[76] Thus, the consensus today appears to be that even the most vacuous phrases in enabling statutes will be deemed sufficiently "intelligible" for non-delegation purposes.[77]

The non-delegation vigilance of 1935 initially came with little cost; thus its (albeit transient) existence. The reason for the doctrine's eventual de facto demise should be obvious: the Court has simply recognized that maintaining the doctrine's vigor would come at the price of bureaucratic efficiency and effectiveness.[78] Thus, the non-delegation cases collectively provide a prototypical example of separation-of-powers decisions that seemingly discipline political branch experiments, but which have proven to be without consequence.

---

73. *Id.* at 541–42.

74. *See* J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

75. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Mistretta v. United States, 488 U.S. 361, 372 (1989).

76. *American Trucking*, 531 U.S. at 474–75.

77. In other words, the non-delegation doctrine is effectively dead. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1762 (2002) ("[T]he non delegation doctrine, and its corollaries for statutory interpretation, are dead."); Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 288 (2000) ("The passage of time . . . has rendered the non-delegation doctrine a dead letter at the federal level."); *cf.* Verkuil, *infra* note 169, at 319 ("[T]he nondelegation doctrine has an academic life far more robust than its judicial life.").

78. *See, e.g.*, Charmian Barton, *Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision-Making*, 13 GEO. INT'L ENVTL. L. REV. 837, 864 (2001) ("Implementing the non-delegation doctrine, by requiring greater specificity in legislative directives, [has] prove[n] unworkable, and the U.S. Supreme Court has not invalidated legislation on this basis since the 1930's."); Garrick B. Pursley, *Supreme Court Review: Avoiding Deference Questions*, 44 TULSA L. REV. 557, 579 (2009) (noting that enforcement of the traditional non-delegation doctrine has been rendered "pragmatically unacceptable").

2. Removal Power Cases

Removal power cases also wonderfully illustrate the reality that the Court in the separation-of-powers context almost never means what it says in declaring what the Constitution abstractly requires. This is less obvious than in the non-delegation context, so more explication is required.

Among the earliest—and, tellingly, the most recent—cases giving rise to separation-of-powers issues are administrative law cases involving Congress's attempts to limit the President's ability to remove at-will officers operating within the executive branch but not within the President's cabinet. Such confrontations for decades have been, and always will be, inevitable. Congress, in creating the administrative state, established mechanisms designed to limit the degree to which an administrative actor—say, a commissioner for the Federal Trade Commission—would be beholden to the ideological or partisan whims of a given President rather than technocratically focused on advancing public policy. In turn, presidents have advanced the "unitary executive" theory of the presidency, arguing that, because such actors are under the executive branch, Article II of the Constitution provides presidents the authority to directly manage and terminate such personnel at will.[79]

One of the earliest cases dealing with this issue was *Myers v. United States*.[80] Myers was appointed by President Wilson to be a postmaster.[81] In 1920, President Wilson changed his mind and demanded Myers' resignation. Myers refused, invoking an 1876 federal law requiring the advice and consent of the Senate for postmaster removals. In striking the removal restriction, the Court pronounced that the President enjoyed "the general administrative control of those executing the laws,"[82] and thus the power to remove them at will. The Court soon began backing away from this unequivocal proclamation.

The case of *Humphrey's Executor v. United States* followed, and it is often seen as the Court's first recognition of the constitutional legitimacy of independent agencies. William Humphrey was appointed by President Hoover as a Commissioner of the Federal Trade Commission. When Franklin Roosevelt took office, he informed Humphrey that he no longer had a job. Humphrey invoked the Federal Trade Commission Act,[83] which established that the President could remove commissioners only for "inefficiency, neglect of duty, or malfeasance in office."[84] Was this removal restriction a violation of the separation-of-powers? The government argued so, citing, understandably enough, *Myers*, which established quite clearly that the President had constitutional control over

79. *See generally* David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L. REV. AM. U. 309 (1993) (arguing that the executive has the inherent constitutional power to control agency regulation).

80. 272 U.S. 52 (1926).

81. *Id.* at 106.

82. *Id.* at 164.

83. 15 U.S.C. §§ 41, 42 (1922).

84. Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935).

all "those executing the laws." The Court disagreed. It dismissed a vast majority of the *Myers* opinion as dicta, concluding that the opinion was only relevant to the President's authority to "remove a postmaster of the first class;" the Court then cursorily stated that to the extent the *Myers* opinion was in tension with the instant opinion, such statements were "disapproved."[85]

In disclaiming the more categorical approach in *Myers*, the Court described a new rubric: "[p]utting aside dicta," the holding of *Myers* was relevant only with regard to "executive officers."[86] Because, unlike a postmaster, Humphrey was a member of "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed,"[87] he was not an "executive officer." Rather, the FTC acted only "quasi-legislatively."[88] One might naturally still wonder whether the act of "carrying into effect legislative policies"[89] is the essence of executive work. The answer, if it is not obvious, is yes.

As sophistic as the distinction created in *Humphrey's* was, the Court's reasoning worsened. While *Humphrey's* is generally understood as the Court backtracking from the anti-pragmatism of *Myers*, the Court would actually read *Humphrey's* out of relevance when the nature of modern government pressured it to become even more pragmatic. Before doing so, however, the Court took an inexplicable detour toward consistency with its decision in *Bowsher v. Synar*,[90] where it applied the distinction established in *Humphrey's*.

The mid to late 1980s produced a spurt of opinions from the Burger Court in which the Court appeared to perform an about-face in enforcing the conceptual boundaries of branch power in a manner faithful (wisely or not) to the literal text of the Vesting Clauses. In *Bowsher*, the Court dealt with the powers Congress assigned to the Comptroller General through the Gramm-Rudman Hollings Act. The Act gave the Comptroller General the power to mandate that the President make specific spending reductions to realize desired deficit decreases in the federal budget. Under the Budget and Accounting Act of 1921, the Comptroller General was made removable by Congress for "inefficiency," "neglect of duty," or "malfeasance."[91] Following the *Humphrey's* rubric, the Court concluded that under the Act the Comptroller General exercised "executive" powers. Thus, "[b]y placing the responsibility for execution of the . . . Act in the hands of an officer who is subject to removal only by itself, Congress in

85. *Id.* at 626.
86. *Id.* at 628.
87. *Id.*
88. *Id.*
89. 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, 479 (1991). As opposed to legislative power, generally thought to include "only the authority to promulgate generalized standards and requirements of citizen behavior or to dispense benefits—to achieve, maintain, or avoid particular social policy results." *Id.*
90. 478 U.S. 714 (1986).
91. *See* 31 U.S.C. § 703(e)(1) (2014).

effect has retained control over the execution of the Act and has intruded into the executive function."[92]

Those who hoped that decisions like *Bowsher* represented an actual entrenchment of the distinction established in *Humphrey's* (as problematic as it may have been) would soon be disappointed. For it was clear by the 1980s that the executive/quasi-legislative distinction discussed in *Humphrey's* (which, recall, was itself a pragmatic watering-down of *Myers*) might not always be sufficient to justify novel and useful arrangements between the executive and Congress. Thus, the Court's subsequent decision in *Morrison v. Olson*[93] made clear that *Bowsher* was a glitch in an overall pattern of rank pragmatism.

In *Morrison*, the Court dealt with the Ethics in Government Act,[94] which established a system for the appointment of an independent counsel to investigate executive-branch actors for possible criminal activity. The Act granted the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[95] The Act provided for removal of an independent counsel by non-executive officers, and for removal by the Attorney General, but only "for cause."[96] In other words, the independent counsel, as Congress established the position, performed quintessentially executive duties (investigation and prosecution) but Congress severely restricted the President's ability to remove a person from the position.

In assessing the constitutionality of the "for cause" removal provision, the Court re-characterized the rather formalistic reasoning of precedent into rank functionalism. The Court noted that although *Myers* and *Humphrey's* seemed to treat conceptual categories such as "executive" and "quasi-legislative" as dispositive, what the Court was really doing in those cases was simply using such concepts as proxies for whether, as a practical matter, the given removal provisions excessively "impede[d] the President's ability to perform his constitutional duty."[97] Thus, while the Court conceded that the power exercised by the independent counsel was squarely "executive," the independent counsel's exercise of this authority did not excessively interfere with the ability of the President to do his job. Thus, *Morrison*, with its more forthcoming functionalism, represents the implicit overruling of the pragmatic (though still conceptualistic) reasoning in *Humphrey's* for no longer being pragmatic enough. This implicit dismissal of *Humphrey's* by the *Morrison* Court is obvious to most observers, regardless of the Court's pretense of merely teasing out the latent

92. *Bowsher*, 478 U.S. at 733–34.
93. 487 U.S. 654 (1988).
94. 28 U.S.C. §§ 591–99 (2014).
95. Morrison v. Olson, 478 U.S. 654, 662 (1988).
96. *Id.* at 686.
97. *Id.* at 691.

meaning of *Humphrey's*.[98]

Lastly, and most recently, the Court decided *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[99] Here, the Court took a stand against increasing congressional limitations on the President's removal power. But, as the details of the decision illustrate, such stand-taking is merely symbolic in effect. Cases such as *Free Enterprise Fund* are ideal venues for the Court to reaffirm that it does, in principle, take the separation-of-powers seriously.

The issue was whether Congress could impose "two layers" of for-cause removal restriction in the administrative law context. Under the Sarbanes-Oxley Act of 2002,[100] Congress created the Public Company Accounting Oversight Board (the Board). The Commissioners of the Securities and Exchange Commission (SEC) were to appoint the five members of the Board. Importantly, the President was already limited to removing SEC Commissioners "for cause," and the SEC Commissioners, in turn, under the Act, were limited to removing Board members only "for cause" as well. This second layer of for-cause restriction, according to the law's challengers, made even more tenuous the President's ability to control those who were responsible for executing the law (the Board members) and was therefore unconstitutional.

Humphrey's and *Morrison* involved only one layer of removal restriction; can they be read to approve of more than one layer as well? The Court answered "no." Justice Roberts, writing for the Court and joined by the other conservative justices, concluded that a second layer of removal restriction was too much. The majority attempted to show formalistically how the second layer crossed the line, even though one layer did not:

> The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation . . . of two layers of for-cause tenure. And though it may be criticized as elementary arithmetical logic, two layers are not the same as one.[101]

The majority thoroughly peppered its opinion with declarations that sound faithful to textualism and originalism—quoting the Federalist Papers, declaring that the "arrangement [at issue] is contrary to Article II's vesting of the executive power in the President," and even invoking the non-delegation doctrine to support its reasoning: "[t]his violates the basic principle that the President cannot delegate ultimate responsibility . . . because Article II makes a

98. *See* Theodore B. Olson, *The Advocate as Friend: The Solicitor General's Stewardship Through the Example of Rex E. Lee*, 2003 B.Y.U. L. REV. 1, 64 (2003) (describing the Court in *Morrison* as "overruling in a very ipse dixit fashion *Humphrey's Executor*"); Redish & Cisar, *supra* note 89, at 476 ("The intellectual bankruptcy of a doctrinal approach that measures the validity of branch usurpations in terms of the particular threat of undue concentration of power posed in each case is well illustrated by the Court's most recent use of such a standard in *Morrison v. Olson*.").

99. 130 S. Ct. 3138 (2010).

100. 14 U.S.C. § 7211 (2014).

101. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3157 (2010).

single President responsible for the actions of the Executive Branch."[102]

To paraphrase Wallace Sayre, some feuds are so vicious because the stakes are so low. While *Free Enterprise Fund* is not characterized by the pragmatism of decisions like *Morrison*, the low stakes make the formalistic stridence in the decision more symbolic than practical.

Most doubtful about the opinion is its likelihood of playing a meaningful role in truly protecting executive power. In his dissent, Justice Breyer incisively explored the *practical* consequences of the dual for-cause restriction and the Court's holding invalidating it. In discussing "[t]o what extent is the Act's for-cause provision likely, as a practical matter, to limit the President's exercise of executive authority," he noted first that "no President has ever actually sought to exercise that power by testing the scope of a for-cause provision."[103] He then went on to attack the basic logic of the majority's opinion:

> [T]he Court fails to show why two layers of "for cause" protection . . . impose any more serious limitation upon the President's powers than one layer. Consider the four scenarios that might arise:
>
> 1. The President and the Commission both want to keep a Board member in office. Neither layer is relevant.
>
> 2. The President and the Commission both want to dismiss a Board member. Layer Two stops them both from doing so without cause. The President's ability to remove the Commissioner (Layer One) is irrelevant, for he and the Commission are in agreement.
>
> 3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One allows the Commission to make that determination notwithstanding the President's contrary view. Layer Two is irrelevant because the Commission does not seek to remove the Board member.
>
> 4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, Layer Two helps the President, for it hinders the Commission's ability to dismiss a Board member whom the President wants to keep in place.[104]

Thus, "the majority's decision to eliminate only Layer Two accomplishes virtually nothing"[105] in protecting executive power.

The logic of Justice Breyer's attack on the majority's reasoning was certainly not lost on the majority. However, the majority opinion should not be read as representing a concern about "layers," for it is not plausible that the Justices in the majority actually believed that *two* layers, but not one layer, of for-cause

102. *Id.* at 3154.
103. *Id.* at 3170 (Breyer, J., dissenting).
104. *Id.* at 3171.
105. *Id.*

removal restriction violate the original meaning of the Vesting Clauses or that, from a functionalist perspective, the additional layer of removal restriction meaningfully interfered with the President's ability to perform his duties. Rather, the majority opinion is best read as representing an intellectual conflict between institutional ethos, which requires exaltation of structural abstractions such as the separation-of-powers, and a self-conscious reluctance to interfere with effective government.

Justice Breyer did a good job of highlighting this by challenging the majority—a challenge that largely went unanswered—to commit to, with at least tentative clarity, discernible boundaries of the rule it applied. Are two layers of removal restriction *always* a violation of the separation-of-powers? No, according to the Court; rather, the constitutionality of such a scheme depends on context-specific nuances regarding the nature of the subordinate position in question. Justice Breyer chastised the majority for its case-by-case approach:

> [S]uch a mechanical [two-layer] rule cannot be cabined simply by saying that, perhaps, the rule does not apply to instances that, at least at first blush, seem highly similar. A judicial holding by its very nature is not "a restricted railroad ticket, good for" one "day and train only. . . ." I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court's opinion) threatens serious harm.[106]

Because its implications are deliberately narrow, *Free Enterprise Fund* appears to be a classic example of a facially assertive line-drawing decision that symbolically serves primarily—perhaps exclusively—to remind the other branches that the Court still takes separation-of-powers seriously while at once doing little to meaningfully discipline bureaucratic arrangements.[107] It thus capstones a century of judicial acquiescence in the form of the occasional ceremonial pretense of cabining Congress' removal power with doctrinal principles.

3. National Security/Foreign Affairs Cases

In recent years, separation-of-powers issues have taken the form of questions about the extent of the President's power in relation to national security. The new "asymmetrical" nature of the war against terrorism has given rise to

---

106. *Id.* at 3177–78.

107. Peter Strauss notes that "[i]n the end, the [*Free Enterprise*] majority's solution . . . appears to have avoided large disruptions of the institutions whose responsibilities were immediately before them, rescuing every element of the PCAOB's authority save the formal tenure protection of its members." Peter L. Strauss, *The Role of the Chief Executive in Domestic Administration* (Columbia Public Law Research Paper No. 10-252, 2010), *available at* http://ssrn.com/abstract=1693163; *see also* Rick Pildes, *The Free Enterprise Decision: A Symbolic Victory for the "Unitary Executive Branch" Vision of the Presidency, but of Limited Practical Consequence*, BALKINIZATION (June 28, 2010), http://balkin.blogspot.com/2010/06/free-enterprise-decision-symbolic.html.

the need for executive action without tedious congressional approval, and the increasing need for covert actions designed to head off the clandestine and treacherous strategies of a diffused enemy.

Of course, as a general matter, alleged abuses of presidential power in the name of national security are nothing new. Thus, regardless of era, when the executive asserts that it must be able to exercise a particular power to protect the country, the Court is extremely hesitant to tie its hands with doctrine.[108] It should come as no surprise, then, that in this context more than any other, the Court often declines to even pretend that there are formal principles that govern the constitutionality of a President's conduct. There are nevertheless several cases that highlight the Court's occasional pronouncements of allegedly doctrinal principles, and they are excellent vehicles for illustrating how legally impotent such unusual pronouncements are.

a. "Plenary Power" in the Foreign Affairs Context: United States v. Curtiss-Wright Corp. The Court's decision in *United States v. Curtiss-Wright Corp.*[109] is often considered to represent the zenith of the Court's deference to the executive in matters of foreign affairs. At issue was a law whereby Congress delegated to the President the power to prohibit the sale of arms to countries engaged in war in South America. The law gave the President unfettered authority to determine when such a prohibition would be in the nation's interests and thus delegated to him the power not only to create a mandate but also to exercise the traditional legislative power of deciding how, when, and why the nation's best interests warranted the mandate.[110]

President Roosevelt outlawed arms sales, and Curtiss-Wright was convicted for selling machine guns to Bolivia.[111] On appeal, Curtiss-Wright naturally argued that, in light of the Court's recent non-delegation decision in *Panama Refining*, such delegation was unconstitutional, and thus the President's prohibition was invalid. The Court disagreed, concluding that the normal delegation rules did not apply due to the additional dynamic of the President having "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations."[112] The opinion was heavily laden with the language of pragmatism, and it warned of "the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the president is governed."[113] Tellingly—as if to admit that doctrine simply could not apply to this sensitive context "with all of its delicate and

108. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (allowing the involuntary internment, without due process, of all Japanese-American citizens on the west coast of the United States during the Second World War).

109. 299 U.S. 304 (1936).

110. *Id.* at 313–14.

111. *Id.* at 311–12.

112. *Id.* at 319–20.

113. *Id.* at 321–22.

manifold problems"—the Court concluded: "it is evidence that this court should not be in haste to apply a general rule which will have the effect of condemning legislation . . . as constituting an unlawful delegation. . . ."[114]

According to Anthony Simones, "for every scholar who hates *Curtiss-Wright*, there seems to exist a judge who loves it."[115] The case is a toolbox full of rhetorical instruments ready for exploitation by those who are predisposed to defend concentrated executive power in the foreign affairs context.[116] Simones notes, "[i]t is a decision that is incredibly flexible, constantly evolving to fit the factual context of the specific case, the particular principle which the Court seeks to emphasize, and the circumstances in which the Court hands down its ruling."[117] "Finally," Simones adds, "it is a decision which . . . can be used to resolve almost any constitutional controversy . . . in favor of the president."[118] Similarly, H. Jefferson Powell, discussing the long-term impact of the case, writes: "when the president's independent power is at stake, comments about the meaning of *Curtiss-Wright* tend to be ideological weapons rather than stages in a real effort to discern the best answer to a question of constitutional law."[119]

In short, *Curtiss-Wright* has had very little, if any, impact in shaping the evolution of doctrine implicating foreign affairs. This is primarily because the non-delegation doctrine itself was undermined almost completely starting in 1937, shortly after *Curtiss-Wright* was handed down, thus mooting whether foreign affairs triggered an exception to the doctrine. The reason it nevertheless garners continued attention is that it best represents a certain *attitude* with which many judges approach issues that implicate foreign affairs: an attitude

---

114. *Id.* at 319–22.

115. Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 415 (1995).

116. To be sure, Simones does conclude that "*Curtiss-Wright* survives as a *precedent* for presidential power," and that "[f]or over half a century the Supreme Court has looked to *Curtiss-Wright* for *guidance* on questions of presidential power," suggesting that the decision has indeed been treated consistently as separation-of-powers doctrine. *Id.* at 420. However, Simones clarifies, stating that subsequent precedent invoking *Curtiss-Wright*:

> suggests that in the formulation of national security policy, the Constitution . . . can be ignored. According to this line of precedent, maintaining fidelity to the text of an eighteenth century document is of secondary importance to effectively managing the problems associated with being a superpower in the twentieth century. . . . *Curtiss-Wright* and its progeny represent the Court's conclusion that in the realm of national security affairs, policy product is more important than the policy process, as defined in the Constitution and by the separation of powers.

Id. This is consistent with interpreting the decision as embodying not binding and formal separation-of-powers "doctrine," but merely expressing an already extant predisposition to defer to the executive out of concerns of institutional competence. Contextualizing Simones' assertions thusly, the Court's subsequent invocation of *Curtiss-Wright* is best viewed as being for the purpose of justifying forgoing the enforcement of the separation-of-powers, not as the Court applying separation-of-powers "doctrine" as "established" in *Curtiss-Wright*.

117. *Id.* at 431.

118. *Id.*

119. H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, *in* PRESIDENTIAL POWER STORIES 195, 231 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

consumed by concerns for institutional competence and a refusal to "be in haste" in "applying general rules" to limit presidential power in the national security context.

b. Youngstown Sheet & Tube Co. v. Sawyer. Not long after *Curtiss-Wright*, the Court decided *Youngstown Sheet & Tube Co. v. Sawyer*[120] in a manner inconsistent with the former decision's sweeping view of presidential authority. For this reason, *Youngstown* is often characterized as embodying the "functionalist" approach to separation-of-powers problems.

In 1951, disputes between steel workers and industry employers led to a drastic decrease in steel production. This threatened the nation's war-fighting ability in Korea—*e.g.*, the ability to manufacture necessary munitions. Invoking his "aggregate" and inherent powers as Commander-in-Chief, the nation's "executive," as well as his power under the Take Care Clause," President Truman issued an executive order that required the Secretary of Commerce to seize most of the nation's steel mills to ensure their continued productivity.[121]

The Court rejected President Truman's arguments that his inherent or aggregate executive powers legitimized the seizure, but the Court was quite fractured as to why. The majority opinion written by Justice Black applied a rather conceptual delineation of branch power, concluding that the executive order amounted to law-making and was thus invalid, as the order did "not direct that a congressional policy be executed in a manner prescribed by Congress."[122] Notably absent from the majority's language was any express tweaking of this principle to accommodate foreign policy concerns. This is inconsistent with the Court's then-recent assertion in *Curtiss-Wright* that the executive enjoyed a "plenary" power in the field of foreign affairs, a field obviously implicated here given that the seizure of the mills was for purposes of sustaining the nation's war-fighting ability. As H. Jefferson Powell writes, "[t]he Steel Seizure Case on its face left *Curtiss-Wright* without any real significance."[123] Further, as was the case with *Curtiss-Wright*, Patricia Bellia warns against confusing *Youngstown*'s "symbolic or rhetorical significance from its doctrinal significance."[124]

That the importance of *Youngstown* is not in its formal entrenchment of doctrinal principles is highlighted by the fact that it is Justice Jackson's concurrence in the case, not the majority opinion, that has been the most influential in future analyses. Justice Jackson provided a now famous three-part framework for analyzing separation-of-powers issues.[125] However, as Patricia Bellia ex-

120. 343 U.S. 579 (1952).

121. *Id.* at 587.

122. *Id.* at 588.

123. Powell, *supra* note 119, at 228.

124. Patricia L. Bellia, *The Story of the Steel Seizure Case*, *in* PRESIDENTIAL POWERS STORIES 266, 266 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

125. To summarize, Jackson asserted that (1) "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum;" (2) "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own

plains, "the strength of the Jackson opinion lies less in its doctrinal categories than in its critique . . . of the decision-making in the political branches that gave rise" to the case.[126]

To be sure, scholars have treated Jackson's framework as a separation-of-powers "test."[127] What makes this so strange is the fact that Jackson in the same opinion essentially disclaimed his ability to provide such a test. His three-part test is best characterized as merely a cluster of truisms meant to preliminarily frame discussion: an on-ramp onto the analytical highway rather than signposts in the fast line guiding us toward "correct" or even wise answers.[128] After all, the three-part test essentially culminates in the conclusion that "when it comes to the tough cases, well, kid, you're on your own":

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law.[129]

Youngstown is cited often, including by courts, but the reason buttresses a central premise here: decisions like *Youngtown* serve the primary purpose of reserving for the Court's the power to play a role in the separation-of-powers without actually enforcing it through doctrine. In a number of cases, the Court has invoked *Youngstown* not as "doctrine" but simply to remind the political branches that the executive is not above the law and that the Court has a role in policing its actions notwithstanding executive assertions of context-specific plenary power.[130] And law professors are drawn to the case primarily as a tool for illustrating the difference between "formalist" and "functionalist" ap-

---

independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . [i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law"; and (3) "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

126. *See* Bellia, *supra* note 124, at 266.

127. *See, e.g.*, Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 341 (2005) ("For claims of executive branch overreaching, the most influential and widely cited test comes from Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*."); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1162, 1244 (1987) ("In an often-cited concurring opinion, Justice Jackson provided a three-pronged test to assess the President's authority to act.").

128. This is not to disparage Justice Jackson's opinion. Indeed, this author believes it to be one of the most, if not the most, brilliant opinion ever written by a Supreme Court justice. But its brilliance lies not in its establishment of a separation-of-powers "test," but rather as an incisively honest reflection on judicial limitations when it comes to adjudicating separation-of-powers problems, the first paragraph alone of which contains enough contemplative fodder to fill a one-hour constitutional law lecture.

129. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

130. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974); Clinton v. Jones, 418 U.S. 683 (1974).

proaches to resolving separation-of-powers issues.[131]

In short, it is generally understood that *Youngstown* is most useful as a lesson in different approaches to problems of executive power and how the exigencies implicated in particular contexts can affect application of those approaches. It is not best understood as establishing "doctrine" for resolving exercises of executive power in the war-fighting context.

c. Post-9/11 Habeas Corpus Decisions. The September 11, 2001 attacks and the ensuing War Against Terrorism presented the question of where to detain "enemy combatants" captured during U.S. operations in places such as Afghanistan. Advised that the detention camp at the U.S. naval base at Guantanamo Bay, Cuba would fall outside U.S. legal jurisdiction, President Bush began imprisoning detainees there. This became controversial, as many of the detainees remained there—and remain there still as of the time of this writing—without prosecution, and allegedly often based on very thin evidence of their dangerousness or guilt.[132]

Eventually, the detainees attempted to secure their release by filing petitions for writ of habeas corpus in U.S. federal district courts. These efforts eventually forced the Supreme Court to clarify the legal parameters regarding the jurisdiction of the federal courts, inherent executive power over military affairs, and the applicability of U.S. law to Guantanamo Bay. The Court's controversial 2010 decision in *Boumediene v. Bush*[133] is a perfect example of the Court's mere symbolic stand-taking in the national security context.

In *Boumediene*, the issue before the Court was whether Congress could statutorily strip the federal courts of jurisdiction to adjudicate habeas corpus petitions brought by non-citizens detained overseas absent formal suspension of the writ pursuant to the Suspension Clause.[134] Several years after the September 11th attacks, Congress passed the Detainee Treatment Act[135] (DTA) and the Military Commissions Act[136] (MCA), which together worked to deny detainees imprisoned at Guantanamo Bay the right to invoke formal habeas corpus process in federal courts. Specifically, these laws amended the pre-conviction habeas corpus statute, 28 U.S.C. § 2241, to deny federal courts jurisdiction over habeas petitions brought by Guantanamo detainees. Under the new law, a detainee who sought to challenge his detention as unlawful—that is, sought to require the Government to justify its conclusion that the detainee was indeed an

131. *See* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 108–09 (2002).

132. *See, e.g.*, Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 150 (2012) (noting that many detainees who "have remained at Guantanamo are often held on the basis of very little evidence indeed, virtually all of it hearsay").

133. 553 U.S. 723 (2008).

134. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

135. Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2739 (2005).

136. 28 U.S.C. § 2241(e) (2006).

"enemy combatant" or terrorist—enjoyed only a process that allowed the Government to circumvent the evidentiary and procedural rigors of traditional habeas review.

Boumediene, a detainee at Guantanamo Bay, filed a petition for habeas corpus in the U.S. district court, claiming that this denial of traditional habeas review was unconstitutional. The Government argued that the detainees had no right to habeas review because they were not detained on formal or "de jure" sovereign territory of the United States, and therefore a ruling for Boumediene would allow for an impermissible extraterritorial application of the Constitution. The Court rejected this argument, concluding that the United States' "de facto" sovereignty over the military base was sufficient to trigger the right to habeas review.[137] Because Boumediene was entitled to either the traditional writ process or an adequate substitute, the Court held that the review process established under § 7 of the MCA was excessively watered-down so as to be an insufficient substitute. Thus, the MCA was an unconstitutional suspension of the writ of habeas corpus.[138] The Court remanded the case for lower courts to determine what specific process was necessary so as to ensure access to "the fundamental procedural protections of habeas corpus."[139]

The majority saturated its opinion with angst. Angst that the relative novelty of post-9/11 asymmetrical, and virtually unending, warfare might inspire executive overreach unprecedented in both degree and kind, and thus a belief that the Court must carve out for itself a more assertive role in checking the executive use of power in this context. Several aspects of the opinion make this angst rather stark.

First, for the first time ever, in concluding that Guantanamo detainees are entitled to habeas procedures, the Court relied primarily not on individual rights doctrine, but rather on the role habeas plays in ensuring the separation-of-powers. That is, while the Court recognized that the traditional purpose of habeas is to protect individuals from unlawful detainment, the Court focused on framing habeas as a mechanism by which the judiciary could maintain its institutional vitality. Thus, "the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."[140]

Was the Court's invocation of the separation-of-powers in *Boumediene* consistent with the thesis so far? After all, the Court appeared to go out of its way to inject the separation-of-powers into an analysis that does not call for it. If the Court generally seeks to avoid genuine enforcement of the separation-of-powers, why not take the route of least resistance and rely on the obvious

137. *Boumediene*, 553 U.S. at 755, 769.

138. *Id.* at 792; U.S. CONST. art. I, § 9, cl. 2. The Suspension Clause reads: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Because Congress did not formally suspend the writ for one of these reasons, anything amounting to such a suspension, according to the Court, was impermissible.

139. *Boumediene*, 553 U.S. at 798.

140. *Id.* at 743.

concern for individual rights that lies at the core of habeas corpus procedures?

The Court's separation-of-powers argument in *Boumediene* was exceedingly weak.[141] Nevertheless, the Court ended its preliminary remarks by asserting "the separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause."[142]

This line more than any other in the lengthy opinion best represents what drove the decision, for it reveals that the Court used the Suspension Clause to voice its newfound willingness to play a more prominent role in checking the exercise of executive power in the national security context. In emphasizing that "our nation's past military conflicts have been of limited duration,"[143] the Court confirmed that the changing nature of warfare was a primary impetus for its invocation of the separation-of-powers in the habeas context. The possibly unending nature of post-9/11 hostilities, combined with the relative prominence of the "hearts and minds" aspect of the war against terrorism[144] and the specter of abusive practices such as "extraordinary rendition," likely inspired what

---

141. According to the Court, "A resolution passed by the New York ratifying convention made clear its understanding that the [Suspension] Clause not only protects against arbitrary suspensions of the writ but also guarantees an affirmative right to judicial inquiry into the causes of detention." *Id.* at 744. But if a given right is asserted to exist, does it not necessarily follow that individuals are entitled access to the courts for its vindication? The majority's attempt to tease out a separate structural function of the writ is not supported by the sources it invoked. The resolution of the New York Ratifying Convention stated:

> [E]very person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of habeas corpus.

Resolution of the New York Ratifying Convention (July 26, 1788), *in* 1 ELLIOT'S DEBATES 328, 328. To be sure, this resolution language implies a right to judicial determination of whether detainment is lawful, but nothing about it suggests that the Convention had in mind a separation-of-powers concern per se.

The other source the Court relied on—Alexander Hamilton via The Federalist No. 84—poses the same problem: it reflects nothing more than a belief that habeas protects individuals from arbitrary imprisonment, THE FEDERALIST NO. 84 (Alexander Hamilton), despite the Court's suggestion that Madison's words demonstrate that "the writ preserves limited government." *Boumediene*, 553 U.S at 744. Of course, it is uncontroversial that the ultimate goal of structural power distribution is to prevent tyranny. *See* THE FEDERALIST NO. 47 (James Madison) ("The 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."). It does not follow, however, that any constitutional provision that prevents tyranny is a mechanism of structural power distribution. And the Court provided no evidence that the Suspension Clause was intended as one by the Framers. Nevertheless, the Court ended its preliminary remarks by asserting "The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause." *Boumediene*, 553 U.S. at 746.

142. *Boumediene*, 553 U.S. at 746.

143. *Id.* at 797–98.

144. Certainly, judges cannot fail to notice this. As Ninth Circuit Judge Wallace Tashima has noted:

> The American legal messenger, so to speak, has been regarded throughout the world as a trusted figure of goodwill, mainly by virtue of close identification with the message borne: that the rule of law is fundamental to a free, open, and pluralistic society; that ours is a government of laws and not of persons; that no one–not even the President–is above the law;

amounts to little more than a gratuitous statement about what the Court deems to be its proper role in a new geopolitical situation.[145] Hence the Court's subtle reminder to the executive that the Court, and not the executive, has the authority to determine the outer boundaries of that power: "Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch."[146]

That *Boumediene* is a part of a greater effort at symbolic stand-taking is made clear by the path that led to the decision. After 9/11, the Court handed down a steady stream of decisions that declared certain *processes* to be available to detainees;[147] *Boumediene* cap-stoned this line of cases and at once represented the (inevitable, in the eyes of cynics) sputtering-out of judicial assertiveness. After all, substantive *results* are what most concretely implicate the executive's ability to protect the nation; requiring certain processes by comparison hardly presents such a threat. How much further could the Court go without actually announcing that the process in a particular case requires the actual release of a detainee?[148]

Consistent with this characterization, the Court already appears to have decided it will simply sit out of conflicts that ask for enforcement of the purported limits of executive power. The Court has failed to enforce *Boumediene*, even in the face of the D.C. Circuit repeatedly calling its bluff.[149] As

---

> and that the government is bound by the Constitution and laws enacted in conformance therewith.
>
> The credibility of this message, however, has been steadily undermined over the last six years since we began the so-called "War on Terror." Since then, the American rule of law message . . . has been greeted with increasing skepticism and even hostility. The actions we have taken in the War on Terror, especially our detention policies, have belied our commitment to the rule of law and caused this dramatic shift in world opinion.

Hon. Wallace Tashima, *The War on Terror and The Rule of Law*, 15 ASIAN AM. L.J. 245, 245 (2008).

145. A particularly vociferous Judge Silberman on the D.C. Circuit shares this interpretation, criticizing the Court for creating a "mess" in *Boumediene*, an opinion he characterizes as embodying the "charade" of what is only "theoretical . . . judicial supremacy." Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring).

146. *Boumediene*, 553 U.S. at 797.

147. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

148. Even in *Boumediene*, the Court noted that, even when a trial court finds a detention to be *unlawful*, the appropriate remedy is a matter "to be resolved in the first instance" by the trial court." *Boumediene*, 553 U.S at 733. Further, the Court has hereto failed to enforce any of the putative limits of executive power in this context when doing so would require a detainee to be released. For example, in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Court seemed to go out of its way to reverse a lower court's holding, aided by the Court's precedent, that Jose Padilla was entitled to habeas corpus release. The Court granted certiorari after the Second Circuit held that the President's inherent war powers did not extend to the detention of an "enemy combatant" who was an American citizen seized within the United States. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003). The Supreme Court reversed on jurisdictional grounds, avoiding the merits as well as Padilla's release, at least for the time being.

149. *See* Steve Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1456 (2011) ("[D.C. Circuit Judges Kavanaugh, Randolph and Silberman, along with Judge Janice Rogers

Linda Greenhouse has rhetorically asked, "How can it be that nearly seven years after the first detainees arrived at the prison . . . not a single detainee has ever been released by order of any court . . . against the wishes of the Administration?"[150] The Court has ignored what Cass Sunstein has called the D.C. Circuit's "national security fundamentalism," summarized by the belief that the President must simply be permitted to do what he believes is necessary to protect the nation.[151] Richard Fallon has, in detailing the Court's post-9-11 decisions, described it as operating "almost wholly at the margins of the United States' War on Terror policy,"[152] and has described as a "noteworthy disparity" the "juxtaposition of the Court's assertiveness in upholding judicial jurisdiction with its reticence regarding substantive rights."[153]

That reticence is largely explained by the Court's apparent goal in *Boumediene*: to remind all the key players that this thing we call the "separation-of-powers" is still there, floating around, patrolling, poised to unpredictably pounce from the brush should the Court need some nebulous umph to nudge a given doctrine toward yielding a prudent result while at once making the desired institutional statement.

In sum, in the national security context, separation-of-powers overwhelmingly manifests in the law in a manner that gives the political branches breathing room (perhaps more than they need) to protect the country.[154] Nevertheless, the Court cannot simply throw up its hands and bow out—declaring that it is simply unwilling to enforce the separation-of-powers in certain contexts for

---

Brown] are effectively fighting a rear-guard action [against *Boumediene* and they] have the general endorsement of virtually all of the district judges and the executive branch. That is by no means to commend these decisions, but rather to suggest that, if nothing else, fealty to precedent is not one of their shortcomings."); *see also* Katherine L. Vaughns, *Of Civil Wrongs and Rights:* Kiyemba v. Obama *and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11*, 20 ASIAN AM. L.J. 7, 46 (2013) (asserting that, since *Boumediene*, the Court has "bow[ed] out gracefully" by "refusing to 'go to bat' when the going got tough"); Linda Greenhouse, *Goodbye to Gitmo*, OPINIONATOR BLOG, N.Y. TIMES, May 16, 2012 (Oct. 31 2014, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/?_php=true&_type=blogs&_r=0, (arguing that D.C. Circuit detainee habeas review "has been anything but meaningful" after *Boumediene*, as the Court of Appeals "has been something very close to a rubber stamp" for executive policies in this context).

150. Linda Greenhouse, *The Mystery of Guantanamo Bay*, 27 BERKELEY J. INT'L L. 1, 2–3 (2009).

151. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 693–94 (2005).

152. Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 367 (2010).

153. *Id.* at 391.

154. This pattern seems inspired not only by a reluctance to dangerously tie the executive's hands but also by a fear of placing the judiciary's institutional prestige on the line and playing a game of "chicken" with the President, who not only controls the gun but also commands popular support during wartime. A rare exception that comes to mind would be *Youngstown*. In any event, the judiciary learned not to play chicken with the executive in *Ex Parte Merryman*, in which Justice Taney granted a habeas corpus petition notwithstanding President Lincoln's wartime suspension of the writ, because, as Taney correctly asserted, only Congress may suspend the writ. Ex Parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861). Lincoln ignored the court order mandating Merryman's release, claiming that doing so was a "matter of national survival." Timothy S. Huebner, *Lincoln Versus Taney: Liberty, Power, and the Clash of the Constitutional Titans*, 3 ALB. GOV'T L. REV. 615, 639 (2010).

fear of the consequences of judicial vigilance. A counterweight that slows what would otherwise be an utter free-fall of judicial abdication is the Court's tendency to symbolically remind the political branches that, although it will not aggressively enforce the separation-of-powers in the national security context, the Court still takes it seriously as a matter of principle. Such decisions are, in a sense, stern lectures on political morality meant to remind the political branches: "don't forget, we're watching."[155]

4. *INS v. Chadha*

While not neatly fitting into one of the categories above, the discussion cannot ignore *INS v. Chadha*, which is considered a major separation-of-powers decision. It is probably most often cited as an example of the formalism that characterized a spurt of Burger Court separation-of-powers decisions in the 1980s and early 1990s (which includes *Bowsher*, discussed above). A brief discussion of the decision and its consequences is important to the overall thesis.

At issue in *Chadha* was the constitutionality of the "legislative veto" of decisions made by administrative agencies.[156] Specifically, in enacting § 244(c)(2) of the Immigration and Nationality Act,[157] Congress reserved for itself the right to invalidate any decision by the Attorney General to allow particular deportable aliens to remain in the United States. The Court held the legislative veto unconstitutional. After a textual analysis of Article I of the Constitution, a discussion of the Framers' intent, and a conclusion that the legislative veto was "legislative in its character and effect,"[158] the Court concluded that the legislative veto amounted to legislating without bicameralism and without adherence to the Presentment Clause, which, among other things, provides the President the power of executive veto.

Chadha is a good example of the Court tacitly relegating enforcement of the separation-of-powers to the political safeguards of the democratic process while seeming to do the opposite. After the Court struck down the legislative veto in *Chadha*, Congress continued to enact statutes containing legislative veto provisions.[159] And while Congress has not yet provoked a confrontation with the judiciary by invoking them, it does not need to. Scholars have repeatedly noted how *Chadha* has merely driven the legislative veto underground into an informal process whereby Congress makes clear its intent to tinker with future

155. *See* Fallon, *supra* note 152, at 392 ("[T]he Court's [war-on-terror] jurisdictional rulings have . . . had the effect—which was almost surely intended—of unsettling the status quo ante by giving notice to the Executive Branch that its detention policies are not immune from judicial scrutiny.").

156. *See* 462 U.S. 919, 919–20 (1983).

157. 8 U.S.C. § 1254(c)(2) (repealed Sept. 30, 1996).

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

159. See Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95, 104 n.46 (2007) (noting that President George W. Bush "pointed to legislative vetoes in 47 of the first 110 signing statements in which he raised constitutional objections").

appropriations if the executive fails to honor informal agreements to obtain the permission of certain legislative committees before enacting regulations.[160] Thus, the effect of *Chadha* in disciplining the behavior of the political branches, even in the specific context at issue in the case, has been virtually nil. And its methodological legacy has not served as a guide in settling separation-of-powers disputes but rather as a formalist glitch in a consistent pattern of refusing to genuinely limit the problem-solving efforts of the political branches.

5. *Noel Canning*: Doctrinalizing Relegation

The Court recently decided, for the first time, to interpret the breadth of the President's power under the Recess Appointments Clause. While at first blush the Court's decision to hear the case, and subsequent decision to invalidate the recess appointments at issue, may appear to represent a resurgence of the Court's separation-of-powers vigilance, the decision is in perfect harmony with the pattern of relegation discussed above.

National Labor Relations Board v. Noel Canning[161] involved a labor dispute: the NLRB determined that Pepsi-Cola was financially liable for its unlawful treatment of the labor union representing its employees. Pepsi challenged the NLRB's conclusion by arguing that several of the NLRB board members who rendered the unfavorable decision were not properly appointed to the Board under the Constitution because the Senate never confirmed them pursuant to the Advice and Consent Clause.[162] The President responded that the appointments were valid because he made them pursuant to his power under the Recess Appointments Clause, which provides that: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by

160. Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 248–49 (2007) ("After *Chadha*, Congress has continued to include legislative veto provisions in new legislation, especially appropriations statutes. Although the executive claims that these have no legal effect, Congress clearly expects informal compliance with them and often obtains it. . . . Most appropriations require yearly renewal if they are to continue. This primal fact brings the executive to Congress to seek funds just as the presence of the President's veto brings Congress to the White House when it wishes to legislate. . . . [The executive] consults the appropriations committees within Congress, lest retaliatory budget-slashing occur the next year. Adding a legislative veto provision to this tradition provides emphasis but little more. In other words, for yearly appropriations, the presence or absence of a legislative veto has little legal or practical consequence."); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS., 273, 288 (1993) ("Notwithstanding the mandate in *Chadha*, Congress continued to add legislative vetoes to bills and Presidents Reagan and Bush continued to sign them into law. From the date of the Court's decision in *Chadha* to the end of the 102nd Congress on October 8, 1992, Congress enacted more than two hundred new legislative vetoes."). Thus, the "impact" of *Chadha* in the form of the Court's subsequent decision in *Metro. Wash. Airports Auth. v. CAAN* pales in comparison to the degree to which congressional power in this context lives on. Metro. Wash. Airports Auth.v. CAAN, 501 U.S. 252 (1991) (striking down the Metropolitan Washington Airports Authority as unconstitutional per *Chadha* for being a congressional reservation of legislative veto power).

161. 134 S. Ct. 2550 (2014).

162. U.S. CONST. art. II, § 2, cl. 2 ("The President] shall have Power [to] . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States. . . .").

granting Commissions which shall expire at the End of their next Session."[163]

When President Obama appointed the relevant board members in January 2012, the Senate was operating under a resolution providing that, beginning on December 18, 2011, the Senate would take a series of brief three-day recesses, separated by minutes-long "pro-forma" sessions. The President thus advanced several arguments that his appointments during these brief recesses were appropriate. First, he argued that the three-day recesses were long enough to trigger the recess appointment power. Second, he argued that, even if the three-day recesses were too short to amount to "recesses" for purposes of recess appointments (and thus were better characterized as short "adjournments" comparable at an extreme to lunch breaks), the pro-forma sessions should be treated as periods of recess, because the Senate conducted no business during such sessions. As the Court paraphrased the Solicitor General's argument, these sessions "were sessions in name only because the Senate was in recess as a functional matter."[164] Thus, according to the President, as a practical matter he made the appointments during a recess lasting much longer than three days. The Court, in granting certiorari, charged itself with interpreting a clause it had never interpreted in American history.

The Court tellingly opened its discussion with an unusually deliberate emphasis on the importance of "*put[ting] significant weight upon historical practice*" when it comes to rulings implicating the "relationship between Congress and the President."[165] It also emphasized that it was hesitant to "upset the compromises and working arrangements that the elected branches of Government themselves have reached."[166] Unsurprisingly, and without fail, the Court proceeded to decide each issue consistent with the historical practices between the two branches, practices that represent either deliberate or organic political compromises.

Most important for present purposes are the Court's conclusions that: (1) a three-day intra-session recess (that is, a recess that occurs within a formal session, as opposed to the recess that occurs between sessions) is too short to count as a "recess" for purposes of the Recess Appointments Clause; and (2) the various three-day recesses could not be combined based on the theory that the pro-forma sessions that segmented them were, as a functional matter, not "really" sessions. Thus, the Court ruled that the relevant board members were not validly appointed under the Constitution.[167]

The case could be characterized as the Court enforcing the separation-of-powers, and such a characterization would be accurate if what is meant by

---

163. U.S. CONST. art. II, § 2, cl. 3.

164. 134 S. Ct. at 2574.

165. *Id.* at 2559.

166. *Id.* at 2560.

167. *Id.* at 2567, 2575 (finding that the pro forma sessions counted as sessions for purposes of the Recess Appointments Clause, and thus that those sessions interrupted the immediately preceding recesses).

"enforcement" includes discrete and rather token enforcement that does not disturb the greater systematic pattern of non-enforcement. Indeed, what places *Noel Canning* in the same group as decisions such as *Chadha* and other stand-taking decisions is that it not only fails to disturb the greater pattern of non-enforcement, it *enables* that pattern.

It is of course too early to tell with certainty whether *Noel Canning* will be merely symbolic or rather disruptive in the name of formalism or rule-utilitarianism. But indications weigh heavily toward the former fate. Likely, the most impactful aspect of the decision will be the fact that it was made at all. By granting certiorari and deciding the case, the Court, much like it has with previous decisions, underscored its presence as a participant in the separation-of-powers debate, even if as a participant generally demonstrating the humility and timidity of a quiet and forgettable invitee cowering away from the microphone for fear of saying something memorable.

Jack Balkin has asserted that the Court's opinion was "centrally concerned with preserving the status quo."[168] By emphasizing primarily historical practice, the Court essentially doctrinalized it. It would be an overreach to assert that the decision has had, and will have, only a symbolic importance. But the same could be said of the Court's invalidation of the legislative veto. As such, in the greater context of the Court's failure to address the most pressing separation-of-powers problems of our times, the Court's institutional relevance following *Noel Canning* is similar to Congress' institutional relevance during a pro-forma session.

B. Seeing a Forest Where There are Only Trees: Academic Efforts at Doctrinalization

Most scholarship over the past several decades dealing with the separation-of-powers has been normative: overwhelmingly, publications over the past twenty-five years have been dedicated to advocating for some approach—usually termed "functionalism"—that is much more sensitive to what the authors assume are the non-negotiable realities of modern life.[169] Accompanying these

168. Jack Balkin, *Is* Noel Canning *a Victory for the Living Constitution? Constitutional Interpretation in an Age of Political Polarization*, BALKINIZATION (Sept. 29, 2014), http://balkin.blogspot.com/2014/09/is-noel-canning-victory-for-living.html.

169. *See, e.g.*, Redish & Cisar, *supra* note 89, at 474 (proposing "pragmatic formalism" as a normative doctrinal approach"); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 302–04 (1989) (asserting that "[w]e need a way of thinking about separation of powers that reduces its abstractness and provides a doctrinal foothold," and proposing a "rule of law" and "conflicts of interest" approach to separation of powers); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006); Brown, *supra* note 61, at 1525–26 (asserting that the formalistic enforcement of the separation-of-powers "tends to produce excessively mechanical results . . . [and often will] . . . straitjacket the government's ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basic purposes of the constitutional structure"); Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990) ("During the final years of the

arguments are the almost obligatory shots[170] at formalism as connoting a naïve and ham-fisted obsession with conceptualism at the expense of "realism."[171]

Some scholars, however, have gone a step further and tackled the much more difficult task of herding seemingly unruly separation-of-powers decisions into a single descriptive or normative theory. Descriptive theories that attempt to doctrinalize the above decisions by distilling clusters of principles resembling doctrine are to be applauded, but they nevertheless prove unconvincing. One holding out hope that the Court's separation-of-powers decisions collectively form some doctrine, even one rather loosely defined, is left with the nagging impression that these descriptive theories strain to see a forest where there are only trees.

An example of this is Professor Jack Beermann's recent theory, and I briefly focus on it to highlight why such theories are likely too ambitious. Beermann notes that the purpose of his recent article "is to provide a description of current separation-of-powers doctrine."[172] Beermann argues that the Court's decisions follow a discernible pattern: when government action violates a procedural mandate that is specifically described in the constitutional text, the Court is much more likely to rule that action unconstitutional. When, on the other hand, a separation-of-powers dispute centers on the vague Vesting Clauses—such as the question of whether the executive is impermissibly exercising power that is conceptually "legislative"—the Court is "lenient" because "only the general notion of separation-of-powers is implicated."[173] Because the Vesting Clauses "are not among the procedural or structural provisions of the Constitution . . . [t]hey have little or no substantive bite."[174]

First, note Beermann's implicit premise that the Court does not seriously enforce the provisions that are collectively the most meaningful textual source

---

Burger Court . . . the Justices gave a number of disconcerting indications that they were prepared to sacrifice the goal of a workable government in favor of a strict and formalistic interpretation of separation of powers. . . ."); *see also* Lloyd N. Cutler, *To Form a Government,* in SEPARATION OF POWERS: DOES IT STILL WORK? 1 (Robert A. Goldwin & Art Kaufman eds., 1986) (lamenting the unlikelihood of a constitutional amendment that would allow for great mixing of power between the branches and proposing ways around the amendment process to minimize the constraining effects of the separation-of-powers); James Q. Wilson, *Political Parties and the Separation of Powers in* SEPARATION OF POWERS: DOES IT STILL WORK? 18 (calling for political parties to use informal arrangements to overcome the separation-of-powers that "inhibits the capacity of the government, especially the president, to enact policies that are bold, timely, and comprehensive").

170. *See* Redish & Cisar, *supra* note 89, at 453–54 ("Any call for a return to 'formalism' in constitutional interpretation naturally will expose one to the barrage of ridicule and disdain traditionally reserved by modern scholars for what is almost universally deemed to be an epistemologically naive methodology.").

171. *See, e.g.*, Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 439 (1987) (suggesting formalism in the separation-of-powers context to be "simplistic," "inflexible" and "unrealistic").

172. Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 470 (2011).

173. *Id.* at 484, 514.

174. *Id.* at 472.

of the separation-of-powers as a constitutional rule: the Vesting Clauses. This, of course, supports the general argument that the Court is not willing to seriously enforce the boundaries of branch power. Beyond this, Beermann may be correct that the Court's willingness to forgive inter-branch overlap in traditional separation-of-powers cases correlates fairly well with the extent to which the given scheme implicates a "specific procedural or structural provision." But the evidence of a *causal* relationship here is thin. That is, when the cases he invokes are examined in greater detail, one is hardly convinced that the Vesting Clauses have "little or no substantive bite," and thus one is left with exceptions that undermine the alleged rule.

Beermann's thesis proceeds on a somewhat precarious parsing of the decisions he relies on. For example, regarding *Chadha*, Beermann argues that the Court's seemingly formalistic rigidity was based on the fact that two specific procedural mandates—the Presentment Clause and bicameralism requirements—were implicated by the legislative veto. According to Beermann, the Court's unforgiving conclusion is evidence of his causation theory, hence his conclusion that the Vesting Clauses have little or no bite.

But as Beermann acknowledges, "[t]he most difficult issue in *Chadha* was determining that bicameralism and presentment actually applied to the legislative veto," (as these two requirements apply only to "legislation"), and "[t]o do this, the Court had to construct a definition of 'legislation.'"[175] That is, the Court's decision turned on whether the legislative veto was "legislative" in the first place. The fact that the Court struck down the veto seemed to indicate that a formalistic conceptualization of "legislative" action (derived from where else but the Vesting Clause?) drove the Court's decision. Anticipating this argument, Beermann argues that *Chadha* did not rest on "a highly abstract conceptual concoction concerning the nature" of legislative power per the Article I Vesting Clause.[176] Rather, the Court "fashioned an effects test under which the determination of whether a congressional action is legislative is made based on the purported impact of the action, not on its nature or form."[177] Thus, according to Beermann, what had "bite" in *Chada* was not the conceptualistic offering of the Vesting Clauses but a more pragmatic notion of "legislation" rooted elsewhere.

To be sure, Beermann recognizes that *Chadha* cannot be characterized as all-out functionalism once the Vesting Clauses are implicated, but his argument does minimize the degree of importance that conceptualism played in the Court's opinion, a fact that casts doubt on his notion that the Vesting Clauses reliably have "little or no bite." This, in turn, brings into relief problems with his attempt to superimpose a sense of descriptive order over the Court's decisions.

Beermann partly concedes that the Court's opinion was "somewhat formalis-

175. *Id.* at 477.
176. *Id.* at 478.
177. *Id.*

tic because the Court did not support its analysis with arguments drawn on the policies underlying separation-of-powers or on the practical effect of outlawing the legislative veto."[178] But if the Court fashioned an effects test under which the determination of whether a congressional action is legislative is made based on whether that action is legislative in "character and effect," the Court necessarily focused on the "nature or form" of the power exercised.[179] It is no response to emphasize that the Court did not write solely in lofty question-begging abstract language; the Court simply chose to describe how precisely the conduct of the legislature *satisfied the abstract concept of legislation*. In other words, the *effect* merely illustrated the mechanism's "nature or form": "The nature of the decision implemented by the one-House veto further manifests its legislative character."[180]

Other allegedly representative illustrations of Beermann's theory more powerfully raise similar problems, such as his discussion of *Myers v. United States* and the recent decision of *Free Enterprise Fund*, two decisions (both discussed above) that strongly suggest instead that the Court relied on a conceptual interpretation of the Vesting Clauses in striking down laws on separation-of-powers grounds. According to Beermann, because *Free Enterprise Fund* did not implicate an express structural provision or procedural provision, it is a good example of the Court's relative pragmatism in enforcing the separation-of-powers, for "[a]lthough the Court did not recite the general separation-of-powers question of whether the removal restriction unduly interferes with the President's ability to fulfill the constitutional functions of the presidency, that was clearly the motivation for concern over whether the President had sufficient control over the [PCAOB]'s activities."[181] Beermann concedes that there is language in the decision that cuts against his position but asks the reader to read into that language a bit too much. For example:

> Because in [*Free Enterprise Fund*] the Court began its analysis by quoting Article II's Vesting Clause, and because the Court's opinion asserted that "the executive power included a power to oversee executive officers through removal," the decision may appear on the surface to contradict the proposition that the Vesting Clauses are not important to separation-of-powers doctrine. On closer analysis, however, the decision is not substantially different from prior law. Had the analysis stopped here and concluded that *any* (as opposed to a 2-level) limitation on the President's power to remove members of the PCAOB violated separation-of-powers, we would be characterizing the decision as the opening gambit in the "Roberts Court's separation-of-powers revolution." What we got instead, however, was a relatively moderate swing

178. *Id.*
179. INS v. Chadha, 462 U.S. 919, 953 (1983).
180. *Id.* at 954.
181. Beermann, *supra* note 172, at 489.

> toward greater presidential power and an ambiguous tip of the hat to the Vesting Clause of Article II.[182]

Thus, according to Beermann, the Vesting Clauses enjoyed a token cameo appearance in *Free Enterprise Fund*, while functionalism played the lead role. The argument that the decision was driven by a concern over whether the President had "*sufficient* control" of relevant executive responsibilities glides too smoothly past several important aspects of the opinion. Namely, the problem with the argument is the notion that two levels of removal restriction would manifestly impair the President's ability to execute the laws more than only one level would. As discussed in greater detail above, Justice Breyer's dissent laid to rest this argument, and it is highly unlikely that such a concern is what truly animated the majority's opinion.

Further, language in the opinion to the effect that sustaining the two-level removal scheme would undermine democratic accountability and other consequentialist concerns does not undermine the idea that the Court was primarily concerned with the conceptual boundaries of executive power: such language was used to *justify* conceptual boundaries, not *define* them.[183]

In sum, it is unlikely that Beermann's theory can *reliably* herd the Court's loner prudential alley cats into a cohesive and forceful doctrinal pack. A focus on the degree to which a decision implicates the Vesting Clauses as opposed to more specific procedural mandates is ultimately of little help in making collective sense of the Court's separation-of-powers decisions.

Another example of a problematic attempt to provide a descriptive theory is Professor Harold H. Bruff's position that the Court's occasional and sudden assertiveness in enforcing the separation-of-powers results when it believes that one branch is aggrandizing itself relative to another (as opposed to, say, when it aggrandizes another branch at the expense of itself, such as in the case of broad delegation of legislative power to administrative agencies).[184] According to Bruff, "[w]hen the Court perceives aggrandizement, it issues a formalist opinion insisting on the separation-of-powers. Examples would be *Myers, Buckley, Chadha,* and *Synar.* When the blending of power presents no such threat, a functional opinion allows it."[185]

---

182. *Id.* at 493.

183. *See, e.g.*, Free Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010) ("[The] arrangement is contrary to Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee, the President is no longer the judge of the Board's conduct. . . . He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch.").

184. Harold H. Bruff, On the Constitutional Status of Administrative Agencies, 36 AM. U. L. REV. 491 (1987).

185. *Id.* at 505.

But examples of the Court allowing aggrandizement of the executive to the detriment of congressional power abound. In fact, *Chadha*, a case Bruff invokes to make his point, actually undermines it. The legislative veto at issue in *Chadha* was arguably an excellent mechanism by which to accommodate the administrative state by allowing for wide delegation to agencies while still allowing Congress to effectively check agencies' use of delegated power, thus preventing aggrandizement of the executive.[186] But the Court would have none of it. As Justice White made so poignantly clear, by striking down the legislative veto, the Court refused the chance to mitigate the effects of delegation and thus prevent what many still fear is the eventual over-aggrandizement of the executive due to ever-increasing delegation. This, combined with the Court's traditional permissiveness in allowing for the aggrandizement of the Executive at the expense of Congress when it comes to foreign affairs and war powers, significantly weakens Bruff's theory.[187]

No doubt Beermann and Bruff's theories offer valuable insight into some of the Court's traditional separation-of-powers cases, but as comprehensive descriptive separation-of-powers theories, they seem incomplete. In short, descriptive theories attempting to distill from the relevant decisions a method to the madness, at least if the method is purported to represent the Court's entrenchment of principles systemically disciplining its jurisprudence, are too clever by half.

C. Chairs on the Titanic

Conspicuous about the decisions discussed in sub-section II. A above is not only that their legacies are non-doctrinal, but that in each, the Court "enforced" the separation-of-powers in times when much greater separation-of-powers issues begged for resolution. Paul Gewirtz' comments in this regard, made in

---

186. *See* INS v. Chadha, 462 U.S. 919, 974 (1983) (White, J., dissenting) ("The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches. . . . Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker. [T]he Executive has more often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.").

187. United States v. Midwest Oil Co, 236 U.S. 459 (1915) (allowing the President to effectively suspend a statute regulating public lands based on his policy calculus, not because the President had an inherent right under Article II to do so, but simply because Presidents had done this before and Congress is best deemed to have "acquiesced" to the "tradition"). Of course, key to Bruff's argument could be his use of the term "perceive": that is, an *express recognition* of aggrandizement reliably correlates with the likelihood of invalidation on separation-of-powers grounds. Assuming this is true it is unclear what it proves beyond the fact that the Court is reluctant to expressly use the term "aggrandizement" to describe governmental conduct that it allows to proceed. *See, e.g.,* Morrison v. Olson, 478 U.S. 654 (1988) (allowing Congress to strip from the executive the quintessentially executive power of investigation and prosecution because such, in the grand scheme of things, did not *excessively* interfere with the executive's ability to carry out its responsibilities).

the context of analyzing the Court's decision in *Bowsher*, are worth quoting at length:

> As the debate *outside* the courtrooms clearly acknowledged, Gramm-Rudman-Hollings raised a deeper and more basic issue. . . . Automatic across-the-board spending cuts spread out over a period of years apparently reflected Congress' own distrust, and consequent abdication, of its own lawmaking and appropriation powers. Whether Congress may legislate in that way . . . was for me the fundamental and important structure-of-national-powers issue that the case raised but that the Court chose not to address. Compared to that structural problem, the Court's altogether hypothetical worry about who might remove the Comptroller General seems like a makeweight.[188]

Gewirtz further notes:

> [I]n the spirit of realism, we should acknowledge that the separation-of-powers cases that come to the Supreme Court rarely if ever address the truly major separation-of-powers concerns of our time. For example, these cases barely touch the major issues concerning the proper roles of the President and Congress in foreign affairs decision making.
>
> . . . .
>
> Nor are the courts addressing, except at the edges, the basic concerns of those who are disturbed by a quite contradictory perception, that we live in an era of dangerously excessive presidential power. . . . To put the point slightly differently: politics and power relationships, not judicial decisions, most significantly determine the vitality and shape of our system of checks and balances.[189]

The de-facto survival, as described above, of the legislative veto at issue in *Chadha* well illustrates Professor Gewitz's last assertion.

The point is not to paint traditional separation-of-powers decisions as wholly inconsequential, but to underscore that these decisions have had the effect not of meaningfully enforcing the separation-of-powers, as much as keeping the actual limits of branch power in the given contexts vague but extant. Put differently, these decisions serve the purpose not of meaningfully defining branch power, but of leaving the everyday limits of such power to be negotiated by the political process,[190] while at once reminding the political branches that theoreti-

188. Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 349 (1989).

189. *Id.* at 345–46.

190. Louis Fisher, *The Legislative Veto: Invalidated, it Survives*, 56 LAW & CONTEMP. PROBS. 273, 273 (1993) ("The meaning of constitutional law in this area is evidently determined more by pragmatic agreements hammered out between the elected branches than by doctrines announced by the Supreme Court.").

cal (even if indeterminate) limits nonetheless exist.[191]

These cases illustrate the general trend with overt separation-of-powers decisions: to either recalibrate the "rules" to accommodate pragmatic arrangements between the political branches or, alternatively, to provide the pretense that the Court systemically tests those arrangements against meaningful constitutional limitations. The Court has consistently found the need to leave the separation-of-powers to the political branches to work out, while simultaneously seeing the need to not appear as if it is doing so.

III. THE UPSHOT: UNPRECEDENTED EXECUTIVE POWER

Some appear to hold out in their hope of helping to corral the Court's pragmatism into some construct resembling doctrine.[192] But separation-of-powers decisions are interminably pragmatic, and the systemic effect of that pragmatism becomes apparent upon a cursory examination of the state of modern government.

The most conspicuous and controversial manifestation of the pragmatism in power allocation that the Court has acquiesced to is the dramatic growth of executive power, and corresponding decrease in congressional power, over the past century. A good example of this dramatic growth, and the reality that the political process is the only check on it, is the recent use by Presidents of executive orders and other mechanisms of presidential control over administration to manage national affairs.

In 2001, then-Professor Elena Kagan reflected on the increasing control asserted by Presidents since Ronald Reagan over administrative agencies and declared quite correctly that "[w]e live today in an era of presidential administration."[193] She emphasized that "presidential control of administration, in critical respects, expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the

191. *See* Beermann, *supra* note 172, at 468 ("Every so often, a decision or series of decisions by the Supreme Court raises the specter of movement toward a strict view of separation of powers, but ultimately any such movement sputters to a halt, and in retrospect it usually turns out that the appearance of movement was more in the nature of wishful thinking than actual change.").

192. For example, in proposing a model they term "pragmatic formalism," Redish and Cisar speculate that the "Court's good-faith adoption" of their model "would go far toward confining the unlimited flexibility inherent in a purely functional or balancing model. Although there will no doubt be close cases, both historical tradition and linguistic common sense will impose restrictions on the Court's use of purely pragmatic factors in its separation of powers analysis." Redish & Cisar, *supra* note 89, at 474 ("Once one accepts (as we do) that separation of powers is an essential means of preserving both individual liberty and representative government, the next task is to find the most effective doctrinal model to preserve those protections. Our answer to that inquiry is 'pragmatic formalism'—an approach that requires a 'formal' separation of branch power, to be determined by means of a pragmatically-based definitional analysis of the concepts of 'executive,' 'legislative,' and 'judicial" power.'). As a more recent example, see Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006).

193. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

President's own policy and political agenda."[194] Lest one conclude that this is the result of rank grabs at power by ambitious Presidents, Kagan convincingly explained how this increasing assertiveness of Presidents is likely the result of "structural aspects of the modern presidency,"[195] created by several dynamics beyond Presidents' control.

For example, the American public's expectations of what Presidents can do have increased in recent decades, but the President's ability to convince Congress to go along has only decreased due to increasing partisanship.[196] Given Congress' decreasing ability to effectively legislate because of partisan gridlock, the President is left to meet national expectations using tools the use of which requires no congressional pre-approval. Naturally, then, Presidents get to work, tackling national problems as they see fit, even if that means taking an increasingly assertive stance regarding administrative agencies that Congress originally envisioned would be beyond the President's direct control.

As others have explained,[197] in the criminal law context especially, this is a vicious cycle. Congress understands it can escape political accountability and appear "tough on crime" by enacting broad criminal laws. Presidents, in turn, exercise increasing prosecutorial discretion in choosing what conduct the statute criminalizes, and which offenders to prosecute. This further increases the public's expectations of the President, which increases the President's willingness to push the boundaries of his prosecutorial discretion. Which encourages Congress to enact more laws empowering the executive . . . and so on.

The "structural aspects" of the modern presidency that Justice Kagan discusses manifest in controversies over, for example, President Bush's Executive Order 13,435,[198] which banned federal funding for certain types of embryonic stem cell research, based on Bush's belief that the restriction was necessary for "maintaining the highest ethical standards and respecting human life and human dignity."[199] President Obama reversed this Executive Order with one of his own.[200] These erratic shifts in federal law were due to simply a fundamental policy disagreement, one of a moral nature quintessentially the province of legislatures to resolve, yet one the legislature has left Presidents to resolve through massive delegation, a disinclination to be responsible for controversial federal policy, and a resignation to a reality that modern life requires a powerful executive branch.

---

194. *Id.*

195. *Id.* at 2309.

196. *See id.* at 2311 ("[T]he possibility of significant legislative accomplishment—which gives the President his most obvious means of demonstrating leadership . . . has grown dim in an era of divided government with high polarization between congressional parties.").

197. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 682 (2014).

198. 3 C.F.R. § 222 (2008).

199. *Id.*

200. Exec. Order No. 13,505, 3 C.F.R. § 229 (2010).

As of this writing, President Obama is well into his eight-year presidency, and the former constitutional law professor now well-appreciates the practical limitations of attempting to govern with the assistance of Congress. Rightly or wrongly—but no doubt controversially—President Obama has recently declared that, in light of Congress' inability or unwillingness to legislate with respect to important issues, "I have got a pen and I have got a phone," and that he would use his pen and phone to advance his policies without the help of Congress.[201] Obama has thus, for example, announced, without consultation with Congress, that the executive branch would stop deporting children present in the country illegally,[202] which some argue is tantamount to refusing to enforce federal immigration laws, at least in a significant categorical respect.[203] Also controversial is his (as of this time) forthcoming executive order that would raise the minimum wage for federal contractors' employees without any legislation,[204] a move justified, as defenders argue,[205] only by vaguely delegated authority in the Federal Property and Administrative Services Act of 1949, that charges the executive to promote "economy and efficiency" in procurement.[206]

Perhaps more relevant—though less controversial for being so familiar—is the increasing use of military power by Presidents since the end of the Second World War without congressional approval. The argument, for example, that wars are illegal without Congress first declaring them is generally deemed so illegitimate—to the point of being almost adorably quaint—such that even those generally against U.S. involvement abroad generally bypass the argument altogether, notwithstanding historical evidence that the Declare War Clause was, absent the need to repel a sudden attack, intended to ensure Congress and not the executive commit the nation to war.[207] Even half-way measures meant to

---

201. Tamara Keith, *Wielding a Pen and a Phone, Obama Goes it Alone*, NPR (Jan. 20, 2014, 3:36 AM), http://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone.

202. Julia Preston, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html.

203. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) ("The Obama Administration has claimed 'prosecutorial discretion' most aggressively in the area of immigration. The most notable example of this trend was its June 15, 2012 decision not to enforce the removal provisions of the Immigration and Nationality Act (INA). . . . The President's claim of prosecutorial discretion in immigration matters threatens to vest the Executive Branch with broad domestic policy authority that the Constitution does not grant it.").

204. Zeke J. Miller, *Barack Obama Minimum Wage Order Affects Only About 200,000 Workers*, TIME (Jan. 30, 2014), http://swampland.time.com/2014/01/30/barack-obama-minimum-wage-order-affects-only-about-200000-workers/.

205. Jenn Borchetta, *Yes, He Can Lift Contractor Pay*, DEMOS POLICYSHOP (Jan. 29, 2014), http://www.demos.org/blog/1/29/14/yes-he-can-lift-contractor-pay.

206. 41 U.S.C. §§ 251, *et seq.*

207. *See* LOUIS FISHER, PRESIDENTIAL WAR POWER 11 (1995) ("[T]he constitutional framework adopted by the Framers is clear in its basic principles. The authority to initiate war lay with Congress. The President could act unilaterally only in one area: to repel sudden attacks."); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548 (2002) ("Most academic voices in the war powers debate agree that, in the original understanding of the Constitution, most or all power to authorize military hostilities against another nation lies with Congress.").

preserve meaningful congressional constraints on executive war-making powers, such as the War Powers Resolution, have been largely ignored.[208] Thus, the Obama administration has asserted that it may conduct airstrikes against Syria without congressional approval.[209]

The current state of things—for better or for worse—is largely the result of the judiciary's pragmatism (or abdication, depending on one's view) manifest in a failure to establish and adhere to meaningful doctrine that enforces structural rules. It bears emphasis that this descriptive account may reflect the normative lesser-evil. That is, it is not a given that the judiciary's refusal to enforce the separation-of-powers has proven materially dangerous, at least in comparison to the alternative. But this does not foreclose serious questions that judicial non-enforcement invariably raises, especially in the eyes of those who think, perhaps naively, that structural rules should be enforced because they are, after all, *rules* rather than suggestions. Current critical examinations of the current state of executive power ultimately serve to help answer this empirical question, even if such examinations come by way of provocative conclusions of dangerous executive aggrandizement.[210]

CONCLUSION

The article has sought to highlight that the Court, through its jurisprudence, and much as the Court has done with federalism, relegated enforcement of the separation-of-powers to the political process, with the result being the current state of unprecedented executive power.

No doubt, the Court does at times announce violations of the separation-of-powers, but mistakes arise in taking these decisions too seriously on their face. History teaches that these decisions are of little consequence except to serve as reminders that, while the Court is generally willing to relegate resolution of more consequential separation-of-powers issues to the political branches, it is

---

208. *See* James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451, 472 n.12 (1993) ("In practice, the War Powers Resolution has been consistently ignored by both Democratic and Republican Presidents."); Peter Raven-Hansen, *Book Review: The Terror Presidency: Law and Judgment Inside the Bush Administration*, 102 AM. J. INT'L L. 672, 675 (2008) (noting that the Resolution has been "roundly ignored by all three branches of government" during its existence); *see also* Gewirtz, *supra* note 188, at 346 ("[A]s we have seen from the unsteady life of the War Powers Resolution, the relationship and interaction between President and Congress in the foreign policy area is shaped more by the respective political power of the two branches at a particular time than by any charter of legal rights.").

209. Justin Sink, *White House Insists it May Strike Syria Without Congressional Approval*, The Hill, (Sept. 9, 2013, 7:27PM), http://thehill.com/blogs/defcon-hill/operations/321103-white-house-insists-it-may-strike-syria-without-congressional-approval ("The White House insisted Monday that it was legally able to launch a strike on Syria without congressional approval. . . . White House counsel Kathryn Ruemmler told The New York Times that . . . the president could strike because of the 'important national interests' surrounding the use of chemical weapons, even without Congress or U.N. approval.").

210. *See, e.g.*, ACKERMAN, *supra* note 1, at 37 (describing, disapprovingly, how both liberal and conservative scholars have recently sought to legitimize expanding presidential power).

unseemly for those branches to be too comfortable with this fact. For the most part, however, separation-of-powers has always, and will likely always continue to, serve primarily as a nagging voice in the minds of judges reminding them of their own institutional limitations and of the imprudence of disciplining problem-solving efforts of the political branches with principled doctrine.

In light of the Court's historical relegation of separation-of-powers enforcement to the political process, one could be forgiven for doubting the ultimate value of descriptive theories that seek to superimpose principled order over traditional separation-of-powers cases, or normative theories that implicitly rest on the assumption that separation-of-powers doctrine is merely incipient and begging for guidance from those with the utmost analytical faculties. A healthy reaction to this fact would be for scholars to focus on the empirical effects of various power allocations—especially those the Court has approved in the face of strong arguments of unconstitutionality—so that legal thinkers, as well as Courts, can pragmatically identify those situations wherein seeming pragmatism turns out to yield the most unpragmatic results.