Marquette Law Review

Volume 75
Issue 4 *Summer 1992*

Article 5

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Richard A. Champagne Jr., *The Separation of Powers, Institutional Responsibility, and the Problem of Representation*, 75 Marq. L. Rev. 839 (1992).
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THE SEPARATION OF POWERS, INSTITUTIONAL RESPONSIBILITY, AND THE PROBLEM OF REPRESENTATION

RICHARD A. CHAMPAGNE, JR.*

In the last two decades, the United States Supreme Court has used the separation of powers doctrine to decide more cases than during any other period in American history.[1] These decisions have dealt with the most divisive issues of our day; President Nixon's refusal to release the Watergate tapes is a prime example.[2] They have involved the constitutionality of some of the most novel political innovations of our time, including the legislative veto.[3] They have also centered on the most trivial of matters, such as the composition of the Board of Review overseeing the Metropolitan Washington Airports Authority (MWAA).[4] While the Court has found it useful in recent years to invoke the separation of powers doctrine, it has yet to develop and articulate a coherent separation of powers jurisprudence. Indeed, indeterminacy and unpredictability seem to be the order of the day.

The Supreme Court's rediscovery and new reliance on the separation of powers doctrine comes at a crucial juncture in American history. The current period is a time of divided government, characterized by different political party dominance of different branches of national government.[5] The present period is also a time when American political institutions are undergoing significant change. Congressional power is decentralized and dispersed, manifesting itself in "subcommittee government" and individual member entrepreneurship.[6] The Office of the President is becoming more

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1. For several excellent discussions of the Supreme Court's separation of powers decisions see Stephen L. Carter, *From Sick Chicken to* Synar: *The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719; E. Donald Elliott, *Why Our Separation of Powers Jurisprudence is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

2. *See* United States v. Nixon, 418 U.S. 683 (1974).

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

4. *See* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. ___, 111 S. Ct. 2298 (1991).

5. MORRIS FIORINA, DIVIDED GOVERNMENT 1-23 (1992).

6. *See* LEROY RIESELBACH, CONGRESSIONAL REFORM 82-84 (1986).

and more institutionalized and politicized—marked by an increase in unelected executive branch officials.[7] Political party organizations grow weaker by the day as political election campaigns are now candidate-centered affairs, financed by political action committees of various stripes.[8]

Together, these changes raise fundamental questions about the capacity of American political institutions to perform their representative functions. The federal government's ability to create and implement major public policies designed to deal with the economic and social problems of the day is threatened by divided government. Congressional "subcommittee government" is the antithesis of majority rule because discrete and insular subunits in Congress are able to exercise veto power over the formulation of public policy. Moreover, the institutionalization of the Presidency contributes to the growing power of unelected executive branch officials who are not accountable to the electorate. The decline in party organizations, which should present the electorate with competing public policy choices, threatens the vital role that elections serve as referenda on the dominant public policy alternatives of the day.

This problem of representation is implicated in the Supreme Court's separation of powers jurisprudence. The separation of powers doctrine is not literally found in the text of the Constitution, but it informs the founding and development of the American constitutional system. To a large extent, the doctrine is concerned with the manner in which institutions act. Because the separation of powers decisions concern procedural issues, they involve the legitimacy of the ways in which institutions organize and structure themselves both internally and externally. To the extent that the Court's decisions allow Congress and the President to create governing mechanisms that may resolve the problem of representation, the separation of powers jurisprudence is no impediment to this resolution. However, to the extent that the Court prevents them from remedying this problem, the Court's separation of powers jurisprudence may deepen the problem of representation.

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7. *See generally* PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATIONAL PLANNING 1905-80 (1986); LOOKING BACK ON THE REAGAN PRESIDENCY (Larry Berman ed., 1990); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (1985).

8. *See generally* WALTER D. BURNHAM, THE CURRENT CRISIS IN AMERICAN POLITICS (1982); LARRY J. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES (1984); Benjamin Ginsberg & John C. Green, *The Best Congress Money Can Buy: Campaign Contribution and Congressional Behavior, in* DO ELECTIONS MATTER? (Benjamin Ginsberg & Alan Stone eds., 1986).

The aim of this essay is to examine the Supreme Court's separation of powers jurisprudence as it relates to the problem of representation. Part I focuses on the original understanding of the separation of powers doctrine in American politics. This section argues that the separation of powers doctrine is founded on an "ethic of institutional responsibility," whereby each branch of government is provided with a will to power, to maintain, and to expand its institutional boundaries. Part II analyzes how the Court's separation of powers jurisprudence diverges from this original understanding. Rather than try to bolster an ethic of institutional responsibility among the branches of government, the Court seeks to resolve separation of powers disputes by imposing parchment barriers to divide the political institutions. Part III examines the ways in which the Court's separation of powers jurisprudence makes the promise of representative democracy possible. This section argues that the Court deepens the problem of representation by reducing the prospects of political accommodation between the legislative and executive branches, by rendering political actors less accountable in the performance of their governing functions, and by limiting public policy innovation.

I. THE FEDERALIST PAPERS AND THE SEPARATION OF POWERS

The Federalist papers were a defense of the Constitution, written for the purpose of advocating its ratification.[9] Supreme Court decisions involving the separation of powers inevitably contain a discussion of *The Federalist* papers. This is understandable given that the problem of separating and dividing political power was of paramount concern to those who drafted the Constitution. But the Court's discussion of *The Federalist* on the separation of powers rarely amounts to a serious examination. For example, in *Bowsher v. Synar*,[10] a separation of powers case that involved the budgetary authority of the Comptroller General under the Gramm-Rudman-Hollings Act of 1985, the Court asserted:

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.[11]

The problem with this claim, aside from the fact that the Framers of the Constitution were less worried about "open debate on the great issues" than

9. THE FEDERALIST (Jacob E. Cooke ed., 1961).
10. 478 U.S. 714 (1986).
11. *Id.* at 722.

about legislative tyranny,[12] is that it is incomplete. It assumes that separation of powers operates without acknowledging that the actualization of the separation of powers doctrine is highly contingent. In other words, the Court fails to note that there are preconditions for the effective functioning of the separation of powers doctrine. The most important, as will be argued, is an institutional will to power that arises from the ability of each political institution to dominate. Conflict results from the separation of powers doctrine only if the different branches of government contest one another. However, if they do not contest one another, the separation of powers doctrine need not result in freedom. The doctrine could easily result in legislative, executive, or judicial tyranny. In sum, the Court is silent about the underside of the separation of powers doctrine.

The Federalist Nos. 47 through 51 are a series of essays written in response to those who claimed that the Constitution violated the separation of powers doctrine. Such opposition to the Constitution revealed not only the centrality of the separation of powers doctrine in public discourse of that time, but also that the structure of the federal government was vulnerable to this charge. *The Federalist* rejoinder consists of several key arguments.

First, in *The Federalist* No. 47, James Madison answered those who said that the Constitution violated Montesquieu's teaching about the separation of powers.[13] Madison claimed that Montesquieu's "real meaning" had escaped the Framers. The fact that Madison had to resort to Montesquieu's "real meaning" instead of the received meaning reveals the unusual nature of his interpretation. Nonetheless, Madison claimed that Montesquieu believed that the separation of powers did not entail the absolute division of powers among the branches of government.[14] Instead, different branches were allowed to have a "partial agency" or "control" over each other, so long as the "*whole* power of one department" was not in "the same hands which possess the *whole* power of another department."[15] In short, Madison read Montesquieu as standing for the proposition that the separation of powers doctrine did not require the complete separation of powers. This is a bold reading, the accuracy of which need not concern us.[16] However, what Madison's interpretation indicates is that while the separation of

12. THE FEDERALIST No. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

13. *See* THE FEDERALIST No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

14. *Id.*

15. *See id.* at 325-26.

16. A judicious assessment of Madison's interpretation of Montequieu's separation of powers doctrine can be found in DAVID EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 126-30 (1984).

powers informed the distribution of political power under the Constitution, it certainly did not describe it.

Second, in *The Federalist* No. 48, Madison argued that the separation of powers doctrine does not require the absolute separation of powers, but it demands that each branch of government have some control over the others.[17] The only caveat is that no one branch should "directly and compleatly administer" or have "an overruling influence over the others."[18] Madison's great fear was that the Legislature would seek to dominate the other branches. After all, the Legislature "is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."[19] The problem is that we must tame the Legislature without disabling it. Therefore, a line must be drawn to allow each branch to have a limited amount of control over the others. The teaching of *The Federalist* is that the line cannot be drawn in the Constitution. Said Madison: "[A] mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[20] How this line is to be drawn is the question that must be answered.

Third, in *The Federalist* Nos. 49 and 50, Madison considered the adequacy of appeals to the people for resolving separation of powers conflicts, but rejected this solution because of the resulting instability.[21] Madison stated that "frequent appeals would in great measure deprive the government of that veneration, which time bestows on every thing [sic], and without which perhaps the wisest and freest governments would not possess the requisite stability."[22] One must wonder whether this problem would arise not simply from appeals to the people, but rather from the appeals process itself. The veneration needed by republican governments can just as easily be undermined by frequent appeals to any authoritative body that has the power to determine the legitimacy of governmental action.

Finally, Madison proposed a remedy in *The Federalist* No. 51.[23] Each of the branches must be empowered to protect itself and draw its own line separating its powers from those of the others. Not only must each have "a will of its own," but each must also be given "the necessary constitutional

17. THE FEDERALIST No. 48, at 331 (James Madison) (Jacob E. Cooke ed., 1961).
18. *Id.* at 332.
19. *Id.* at 333.
20. *Id.* at 338.
21. THE FEDERALIST Nos. 49, 50 (James Madison).
22. THE FEDERALIST No. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1961).
23. THE FEDERALIST No. 51 (James Madison).

means, and personal motives, to resist encroachments of the others."[24] The motivation for this is self-actuating; it will arise from an institutional will to power. As Madison argued, "Ambition must be made to counteract ambition."[25] Hence, *The Federalist* No. 51 proclaimed an ethic of institutional responsibility.[26] Each branch of government would have to preserve and protect its own powers, and not rely on the other branches. If this arrangement failed to achieve its purpose, the only recourse was the federalism remedy discussed in *The Federalist* No. 10.[27] If one branch of government failed to protect itself from another, resulting in domination by one branch, the only safeguard preventing this usurpation from turning into tyranny was the principle of federalism.

Thus, *The Federalist* contains a sophisticated separation of powers doctrine. This doctrine does not entail the absolute separation of powers, but it does require that each political institution have some control over the others. The extent of this control is unclear and cannot be defined in the Constitution. Such a formal demarcation of the separation of powers would not be observed in practice, due to a will to power that arises in each branch of government—especially in the Legislature. *The Federalist* remedy is to impose on the constitutional system an ethic of institutional responsibility whereby the actors in each branch of government will act on their political ambition to fend off the designs of the other branches.[28] Their will to dominate is the key to their preservation. *The Federalist* teaching about the separation of powers doctrine is that the retreat from domination results in domination. It is on this fragile basis, at least in part, that the American constitutional system rests.

II. THE SUPREME COURT AND THE SEPARATION OF POWERS

The separation of powers doctrine is premised on the notion of an ethic of institutional responsibility. Each branch of government must vigilantly defend itself against the others, protecting and expanding its powers and authority. Under the Constitution, the ethic of institutional responsibility demands that Congress protect its legislative power, that the presidency protect its executive power, and that the courts protect their judicial power. However, problems arise with these simple demands. One of the most important "questions" or "issues" is how to distinguish the legislative power

24. *Id.* at 348-49.
25. *Id.* at 349.
26. *Id.*
27. *See* THE FEDERALIST No. 10, at 56-65 (James Madison) (Jacob E. Cooke ed., 1961).
28. *See generally* THE FEDERALIST (Jacob E. Cooke ed., 1961).

from the executive power, the legislative power from the judicial power, or the executive power from the judicial power. For instance, in *INS v. Chadha*, Chief Justice Burger's majority opinion found that the legislative veto was an unconstitutional use of legislative power.[29] However, Justice Powell's concurring opinion found the legislative veto to be unconstitutional in this instance because it was an improper legislative usurpation of judicial power.[30] Similarly, in *Bowsher v. Synar*, Chief Justice Burger's majority opinion found the Gramm-Rudman-Hollings Act unconstitutional because it allowed the Comptroller General, a legislative officer, to exercise executive power.[31] But Justice Stevens's concurring opinion found the same Act unconstitutional because the Comptroller General could exercise legislative power in violation of the presentment and bicameralism clauses.[32]

A different problem arises from the existence of judicial review and the power of the Court "to say what the law is."[33] The separation of powers is premised not only on an ethic of institutional responsibility, but also on the idea of institutional equality.[34] To the extent that the Court's law-declaring function involves identifying and demarcating each of the other political institutions' powers, the premises of institutional equality and the ethic of institutional responsibility are threatened. The former is called into question because by assuming the power to resolve conflicts among the branches of government, the Court becomes more equal, so to speak. The latter is in jeopardy because the other branches of government may come to rely too much on the Court, in exercising its law-declaring authority, to act as their political proxy in protecting their powers. As these premises are put into doubt, so too is the proper functioning of the separation of powers.

In this section, several separation of powers decisions from the last decade are examined to show how the Supreme Court's new separation of powers doctrine differs from that in *The Federalist*; the decisions also show how this new doctrine teaches us about the capacity of American political institutions to govern. In particular, the limits on legislative power imposed by the Court in *INS v. Chadha*[35] and *Bowsher v. Synar*,[36] the curtailment of

29. 462 U.S. 919 (1983).
30. *Id.* at 959-67 (Powell, J., concurring).
31. Bowsher v. Synar, 478 U.S. 714, 717 (1986).
32. *Id.* at 736-59 (Stevens, J., concurring).
33. Marbury v. Madison, 2-7 U.S. (1 Cranch) 368, 389 (1803).
34. *See* THE FEDERALIST No. 49, *supra* note 22, at 339.
35. 462 U.S. 919 (1983).
36. 478 U.S. 714 (1986).

executive power in *Morrison v. Olson*,[37] and the Court's restriction of federal power in general in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*[38] will be discussed. I argue that the Court's separation of powers decisions are threatening the separation of powers doctrine as it was understood in *The Federalist*. Instead of trying to promote an ethic of institutional responsibility among the different branches of government, the Court is imposing what can only be called a "code of right institutional conduct." For the Court, legitimate political action by any branch of government is that which strictly conforms to judicially constructed procedures. An important consequence of this is that political institutions increasingly come to rely on the Court, and not on themselves, to effectuate the demands of the separation of powers doctrine. American political institutions are unable to defend themselves and unable to live up to the demands of the separation of powers doctrine. The Court is adopting a separation of powers jurisprudence that consists largely of parchment barriers—precisely what the *Federalist* tried to avoid.[39]

A. Limiting the Legislature: Chadha *and* Bowsher

In the 1980s, the Supreme Court struck down two federal statutes on separation of powers grounds. In *INS v. Chadha,* the Court held that the legislative veto was an unconstitutional exercise of congressional power,[40] while in *Bowsher v. Synar*, the Court held unconstitutional those sections of the Gramm-Rudman-Hollings Act of 1985 that gave the Comptroller General the executive authority to report to the President mandatory reductions in program spending.[41] These were not ordinary constitutional decisions. The Court struck down congressional efforts to address some of the most critical problems of our day: the political accountability of the modern administrative state and the rapidly growing federal government deficit.

In *Chadha* and *Bowsher*, the Court adopted a highly formalistic notion of the separation of powers doctrine. The Court found that the legislative veto was unconstitutional because it violated the Presentment Clause and the bicameralism requirement of Article I of the Constitution.[42] The House of Representatives was able to overturn a discretionary executive decision of the Attorney General without the consent of the Senate and without the

37. 487 U.S. 654 (1988).
38. 501 U.S. __, 111 S. Ct. 2298 (1991).
39. *See supra* notes 9-28 and accompanying text.
40. INS v. Chadha, 462 U.S. 919 (1983).
41. Bowsher v. Synar, 478 U.S. 714 (1986).
42. *Chadha*, 462 U.S. at 956-59.

President having the opportunity to veto the House's action.[43] The Gramm-Rudman-Hollings Act was unconstitutional because the Comptroller General, an officer who exercised executive power under the Act, was subject to removal by Congress, and not the President.[44] In both *Chadha* and *Bowsher*, the Court held that Congress had extended the sphere of its legislative power beyond that allowed in the Constitution. The problem in these cases was Congress's will to dominate.

The Supreme Court's response in *Chadha* and *Bowsher* to congressional domination underscores the extent to which the Court's separation of powers doctrine differs from that in *The Federalist* papers. In *Chadha* and *Bowsher*, the Court went to the aid of the executive branch.[45] It struck down the legislative veto and freed the President from the supervisory authority of the Comptroller General. However, by coming to the assistance of the executive branch, the Court permitted executive branch actors to avoid their constitutional responsibilities. The Court allowed the executive branch to shirk its constitutional duty to counteract the legislative will to power.

In both *Chadha* and *Bowsher*, the President had signed the offending legislation into law. In fact, in the case of the Gramm-Rudman-Hollings Act, President Reagan had questioned the constitutionality of the powers of the Comptroller General, but nevertheless signed the measure into law.[46] By not exercising his veto power, President Reagan failed to use the specific constitutional means provided to the President to defend the executive branch against Congress.[47] Similarly, in the case of the specific legislative veto involved in *Chadha*—a one-house veto of an Attorney General decision to suspend the deportation of an alien deportable according to deferral law—the executive branch failed to use its considerable institutional powers to counter Congress.[48] The Attorney General could have simply refused to suspend the deportation proceedings of any deportable alien. Nothing in the statute required that the deportation proceedings of a deportable alien

43. *Id.*

44. *Bowsher*, 478 U.S. at 732-34.

45. I refer here only to the majority opinion in *Chadha* and *Bowsher*. In *Chadha*, Justice Powell's concurring opinion argues that Congress has usurped judicial power. This is a more defensible position for court intervention in this case, because the Court can claim it is protecting its institutional powers. *Chadha*, 462 U.S. at 960 (Powell, J., concurring).

46. Statement on Signing the Bill Increasing the Public Debt Limit and Enacting the Balanced Budget and Emergency Deficit Control Act of 1985, 2 PUB. PAPERS 1471-72 (Dec. 12, 1985).

47. *See* THE FEDERALIST No. 73, at 494-96 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

48. *Chadha*, 462 U.S. at 959.

be suspended.[49] If Congress wanted a certain class of otherwise deportable aliens to remain in the United States, it would have had to create a law specific to the features of that class of aliens. In short, the Attorney General could have refused to exercise the discretionary power that was subject to a legislative veto.

However, the Court in *Chadha* and *Bowsher* made it possible for the executive branch to avoid its responsibility to defend itself. Therefore, the executive did not have to meet the demands of the ethic of institutional responsibility. Instead, the Court conjured up a vision of an ideal legislative process, supposedly that of the Founders, and claimed that Congress had abused this process. There were two key features of this legislative process. First, "the legislative power of the Federal Government [should] be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[50] Second, "once Congress makes its choice in enacting legislation, its participation ends. . . . Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[51]

This rendition of the legislative process is a myth. It bears no relationship to the Founders' understanding of the legislature and the inherent dangers of majority rule. The problem with majority rule, as argued in *The Federalist*, is that it is activated and sustained by the most basic and fundamental of passions.[52] This passion carries over into the legislature, and is the foundation for the legislative tyranny that was so feared in *The Federalist*.[53] The Founders certainly did not think that the remedy for this was "a single, finely wrought and exhaustively considered, procedure."[54] Instead, strong and energetic institutions were needed, other than the Congress, endowed with an institutional will to power. Parchment remedies and barriers were rejected. Legislation was certainly expected to be erratic, self-interested, and perhaps at times tyrannical.

In addition, the Court mistakenly concluded that congressional participation in national government ends once Congress passes a law. In actuality, many would argue that congressional participation in national government continues in full force after the passage of laws. After all, congressional subcommittees oversee the enforcement and implementation of federal statutes, and congressional members maintain extensive and ongoing contact with agency and executive branch administrators. Congress can

49. *Id.* at 923.
50. *Id.* at 951.
51. Bowsher v. Synar, 478 U.S. 714, 733 (1986) (citation omitted).
52. THE FEDERALIST No. 10, at 56-65 (James Madison) (Jacob E. Cooke ed., 1961).
53. *See supra* notes 9-28 and accompanying text.
54. *Chadha*, 462 U.S. at 951.

often achieve through vigorous oversight what it would ordinarily have to achieve through new legislation.[55]

The Supreme Court held Congress accountable to a vision of the legislative process that was not justified by the political theory of the Founders and was not empirically correct in regard to contemporary legislative practice. The Court allowed the executive branch to avoid its constitutional responsibility to resist legislative domination.[56] *Chadha* and *Bowsher* indicate that the proper functioning of the separation of powers doctrine is not based on institutional self-reliance, but on institutional dependence. In sum, the new separation of powers doctrine is not based on an ethic of institutional responsibility. Rather, it is based on an effort of the vigorous, confident Court to establish parchment barriers dividing the different branches of the national government. The consequences of this new separation of powers doctrine remain to be seen.

B. Morrison *and the Curtailment of Executive Power*

The problem of executive power is the problem of the modern age.[57] A fundamental question is how a political regime can be founded on democratic or republican principles and, at the same time, maintain a strong executive leader who does not pose a threat to the political order. The separation of powers doctrine, at least in *The Federalist*, poses a solution to this problem by endowing the different political institutions of government with a constitutional capacity and will to counteract each other. But, as *Chadha* and *Bowsher* demonstrate, there are limits to what political institutions can do to combat each other. Just as the legislature must be limited, the executive must be curtailed.

In *Morrison v. Olson*,[58] the Supreme Court considered the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978.[59] This law allowed for the appointment of an independent counsel by a special court, comprised of federal judges, to investigate violations of federal criminal law.[60] The Attorney General, after a preliminary investigation, had the discretion to request that the special court appoint an

55. LAWRENCE DODD & RICHARD SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 155-211 (1979).

56. *See* Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

57. HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 247-78 (1989).

58. 487 U.S. 654 (1988).

59. *See* 28 U.S.C. § 49 (1982).

60. *Morrison*, 487 U.S. at 660-61.

independent counsel to further investigate the alleged violation.[61] If the Attorney General chose not to request an independent counsel, that decision was not reviewable by the courts. The Attorney General could not remove the independent counsel at will—only for good cause.[62] The special court could terminate an independent counsel when it believed the investigation was complete. Interestingly enough, the independent counsel was required to report to the House of Representatives any information that might constitute grounds for impeachment of an executive branch officer.[63]

The *Morrison* Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act.[64] What is important for this essay is not so much the outcome of the case, but rather the constrained vision of the Court's separation of powers jurisprudence. The Court essentially refused to discuss the issue of power. The Court found: (1) that the independent counsel was an "inferior Officer" under the Constitution, so that person did not have to be appointed by the President with the advice and consent of the Senate; (2) that the Congress could lodge the appointment of the independent counsel, an inferior officer, in a special court comprised of federal judges; (3) that the powers of the special court to select the independent counsel and define the jurisdiction did not undermine the authority of the executive branch; and (4) that the independent counsel provisions did not violate the separation of powers doctrine because the Attorney General could remove the independent counsel for good cause, and that the law did not interfere with the role and operation of the executive branch.[65]

The Supreme Court's separation of powers jurisprudence in *Morrison* is constrained. Much of the Court's examination of the independent counsel provisions is reduced to a didactic and relatively technical presentation of what is an "inferior Officer" under the Constitution. The Court does not consider the problem that this "inferior Officer" has the power, resources, and capacity to bring down a presidential administration. This power calls for a more searching judicial inquiry into whether the separation of powers doctrine allows one branch of government to place an agent of destruction within another branch of government.

Moreover, in reaching its decision that the independent counsel provisions do not violate the separation of powers doctrine, the Court makes two

61. *Id.* at 661.
62. *Id.* at 663.
63. *Id.* at 664-65.
64. *Id.* at 696-97.
65. *Id.* at 691-96.

highly significant assumptions. The first is that the independent counsel provisions do not infringe upon a core executive function; the second is that "this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."[66] With respect to the first assumption, one has to question the wisdom of the Court. The prosecutorial function is clearly a central component of executive authority. After all, under a separation of powers regime, the executive is largely responsible for the enforcement and implementation of laws.[67] The Court engages in bad faith by suggesting that other political institutions, such as the courts, have historically had the authority to appoint prosecutors, with the result that the prosecutorial function is not central to executive power. The strength of *Morrison* is that the Court upholds a congressional usurpation of executive power. By making this legislative usurpation something less than it actually is, the Court hampers the development of a coherent separation of powers jurisprudence.

The most disingenuous assumption in *Morrison* is that the independent counsel provisions are not efforts by Congress to increase its power. The separation of powers doctrine resembles a zero-sum game. It is an arrangement characterized by the fact that when one institution loses power, another gains power, and, similarly, when one institution gains power, another loses power. The independent counsel provisions weaken the executive branch because they place within that branch a prosecutor who has the investigative resources and capacity to undermine a presidential administration. This can be done without direct congressional involvement, and without Congress having to openly investigate what might be a popular administration. To the extent that a presidential administration is subject to an ongoing criminal investigation by one of its own officers, the administration is potentially paralyzed and weakened. In this condition, the Congress is relatively stronger and possibly more assertive.

The interpretation of the separation of powers doctrine in *Morrison* differs very little from that in *Chadha* and *Bowsher*. The Court continued to treat separation of powers as essentially a code of right institutional conduct. Matters of highest constitutional order and consequence are reduced to what is an "inferior Officer" under the Constitution.[68] At one point, the Court underscored that the Attorney General was not required to request the appointment of an independent counsel, and that this decision was not

66. *Id.* at 694.

67. *See generally* U.S. CONST. art. II.

68. *See generally* Morrison v. Olson, 487 U.S. 654 (1988).

reviewable by the courts.[69] This factor should have been the focus of the Court's decision—it was here that the Attorney General was provided with the means to counter Congress. A willful executive branch, via the Attorney General, could have simply refused to request an independent counsel. Congress would have then been forced to conduct its own investigations into executive branch illegalities.

However, the Court gave little indication that this provision in the statute was necessary to its constitutionality or central to effectuating the purpose of the separation of powers doctrine.[70] In the end, the Court celebrated a vision of institutional dependence in separation of powers disputes. The independent counsel provisions were upheld as constitutional because they did not take away too much power from the executive branch. Whereas the executive branch had found that institutional dependence on the judiciary paid off in *Chadha* and *Bowsher*, it found the outcome very different in *Morrison*. But such are the risks of not acting on an ethic of institutional responsibility in separation of powers disputes.

Justice Scalia's dissenting opinion in *Morrison*[71] is the most powerful separation of powers opinion written in the last two decades. Scalia's claim that the executive branch has absolute control over the executive power is clearly debatable. However, his notion of what is at stake in separation of powers disputes is remarkably close to that understood in *The Federalist*.[72] Scalia is correct in asserting that separation of powers disputes are entirely about power and that the prosecutorial function is central to executive authority.[73] Furthermore, his characterization of the majority opinion in *Morrison* is correct: "The Court essentially says to the President: 'Trust us. We will make sure that you are able to accomplish your constitutional role.' I think the Constitution gives the President—and the people—more protection than that."[74]

However, Justice Scalia's dissenting opinion is not convincing in his discussion of the provisions in the statute that grant the Attorney General discretion in requesting an independent counsel. According to Scalia, the Attorney General had no choice but to request an independent counsel because "the political consequences . . . of seeming to break the law by refusing to do so would have been substantial."[75] This vision of the execu-

69. *Id.* at 695.
70. *See id.*
71. *Id.* at 697-734 (Scalia, J., dissenting).
72. *See supra* notes 9-28 and accompanying text.
73. *Morrison,* 487 U.S. at 727 (Scalia, J., dissenting).
74. *Id.*
75. *Id.* at 702 (Scalia, J., dissenting).

tive branch is not one that inspires confidence. An ethic of institutional responsibility insists that political institutions accept the political consequences of what is required to maintain the separation of powers. The Court should not overturn laws simply because one institution lacks the will to accept the political consequences of an action that may be required to maintain its independence and constitutional power. Scalia recognizes the problem in separation of powers disputes, but he is unwilling to force the other political institutions to live up to what is constitutionally required of them. In this instance, his prescription is no different from that of the majority—institutional dependence.

C. Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc. *and the Limits of National and State Power*

Before 1991, the Supreme Court's separation of powers jurisprudence dealt with political conflicts among the national branches of government.[76] However, in *Metropolitan Washington Airports Authority*,[77] the Court blazed a new trail in separation of powers jurisprudence. For the first time, the Court held unconstitutional a provision in state law that gave members of Congress authority in violation of the separation of powers doctrine.[78]

At issue in *Metropolitan Washington Airports Authority* were laws enacted by the District of Columbia and the State of Virginia.[79] These laws called for the creation of a regional airport authority—the MWAA—to govern the operation of Dulles and National Airports.[80] These airports were owned by the federal government and were to be turned over to the MWAA pursuant to the Metropolitan Washington Airports Act of 1986.[81] One condition of this transfer of ownership of the airports from the federal government to the MWAA, however, was that the District of Columbia and the State of Virginia create a Board of Review comprised of nine members of Congress who would have veto power over certain decisions by the Board of Directors of the MWAA.[82] These members of Congress were to be chosen by the Board of Directors from a list submitted by Congress. The representatives were to serve in their individual capacity and were limited to

76. *But see* Springer v. Government of the Phil. Islands, 277 U.S. 189 (1928).

77. Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. __, 111 S. Ct. 2298 (1991).

78. *Id.* at __, 111 S. Ct. at 2312.

79. *Id.* at __, 111 S. Ct. at 2302.

80. *Id.* at __, 111 S. Ct. at 2301.

81. *Id.*

82. *Id.* at __, 111 S. Ct. at 2302.

those members of Congress who served on specific congressional committees that had jurisdiction over air transportation policy.[83]

The Supreme Court found that this arrangement violated the separation of powers doctrine.[84] It did not matter that the MWAA was a creation of state law; what was really at stake was the protection of a federal interest. Congress had conditioned the transfer of federal ownership of Dulles and National Airports on the creation of the MWAA, with a Board of Review comprised of members of Congress. The Court considered these members to be agents of Congress.[85] Interestingly, the Court was uncertain whether this Board of Review exercised legislative or executive power.[86] However, this was ultimately unimportant for the Court because the powers of the Board of Review were unconstitutional regardless of whether they were legislative or executive.[87] If the Board of Review exercised legislative power, it was unconstitutional because it violated the presentment and bicameralism requirements of Article I.[88] Likewise, it was unconstitutional for Congress to delegate the exercise of executive power to its own agents.[89] In the end, this "statutory scheme" was unconstitutional because it "provide[d] a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role."[90]

The Supreme Court's separation of powers vision in *Metropolitan Washington Airports Authority* is a significant departure from that in *The Federalist* and may very well portend an even more novel direction in the Court's recent separation of powers jurisprudence. In *Chadha*, *Bowsher*, and *Morrison*, the Court rejected an ethic of institutional responsibility in separation of powers disputes, advocating instead what seemed to be a notion of institutional dependence.[91] If one branch of the national government was unwilling to meet constitutional demands in separation of powers conflicts, that branch could appeal to the Court to save it from another branch of the national government. This arrangement did little to strengthen the institution under siege because it made that institution increasingly dependent on the Court for protection. At the very least, it provided a mechanism

83. *Id.*
84. *Id.* at __, 111 S. Ct. at 2301.
85. *Id.* at __, 111 S. Ct. at 2307.
86. *Id.* at __, 111 S. Ct. at 2312.
87. *See id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *See supra* note 57 and accompanying text.

whereby one branch could attempt to ward off the hegemonic advances of another branch of government.

In contrast, the Court in *Metropolitan Washington Airports Authority* used the separation of powers doctrine to strike down a law that neither Congress nor the President opposed.[92] Both branches of government supported the creation of the MWAA with a Board of Review comprised of members of Congress that had veto power over MWAA decisions.[93] The Court heralded a change in its separation of powers jurisprudence from a body of law that aimed directly at resolving political conflicts among the branches of the national government into one that strictly limited political cooperation among these branches. For that reason, the Court in *Metropolitan Washington Airports Authority* signaled that the separation of powers doctrine could no longer be viewed simply as a body of law regulating conflict among the different branches of national government; it is now an independent bar to the exercise of national political power.

Metropolitan Washington Airports Authority creates another novel innovation in the Supreme Court's separation of powers jurisprudence. At issue in this case was the member composition of the Board of Review overseeing the MWAA.[94] The transfer of Dulles and National Airports from federal to local ownership was conditioned on the creation of the MWAA and the Board of Review with its congressional member composition.[95] Nonetheless, what was at issue was the content of state law. By applying the separation of powers principle to limit a creature of state law, however, the Court proclaimed what may be called the "dormant separation of powers doctrine." According to the Court, the separation of powers doctrine is not only an independent bar to federal power, it is now a bar to the exercise of nonfederal political power.[96] Even though there is no specific constitutional prohibition against states appointing congressional members to serve in state offices, the Court announced that there may be a separation of powers limitation to the exercise of state statutory authority.[97]

The dormant separation of powers doctrine may be the most radical innovation in the Supreme Court's separation of powers jurisprudence to date. Whether this doctrine applies only to the unique features of this case remains to be seen. However, the vision articulated in *Metropolitan Wash-*

92. *See* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. __, 111 S. Ct. 2298 (1991).
93. *Id.* at __, 111 S. Ct. at 2304.
94. *Id.* at __, 111 S. Ct. at 2302.
95. *Id.*
96. *Id.* at __, 111 S. Ct. at 2298.
97. *Id.* at __, 111 S. Ct. at 2312.

ington Airports Authority is that the separation of powers doctrine is not simply a mechanism to prevent the concentration of political power in one branch of national government. It is also a mechanism to restrict the arena of political power reserved to the states, to the extent that state action may increase the concentration of political power in one branch of the federal government. The result is that the Court transforms the separation of powers doctrine from one that was instituted to make the exercise of federal political power more difficult and cumbersome to one that may place similar limits on state power. This is a seemingly boundless separation of powers doctrine.

III. THE SEPARATION OF POWERS AND THE PROBLEM OF REPRESENTATION

The Supreme Court's separation of powers jurisprudence can be seen as an effort to revive the notion of parchment barriers in demarcating the boundaries of the different branches of the national government. Rather than view separation of powers disputes as contests over power, the Court reduces these conflicts to technical issues of constitutional compliance. The problem of tyranny is reduced to the problem of which political institution should have removal power over certain political appointees. While parchment barriers may prevent the concentration of political power in one political institution, there is no guarantee that this will result. After all, this was why *The Federalist* rejected parchment barriers in favor of a constitutional polity founded on political ambition. In the end, the Court's separation of powers jurisprudence makes the exercise of political ambition more difficult.

The Supreme Court's separation of powers decisions are not merely theoretical. These decisions have profound practical implications; they are promulgated to resolve problems in a specific historical and political context. As mentioned at the beginning of this essay, the present period in American politics is a time of divided government and significant political and institutional change. While it may be going a bit far to call the present era a time of profound crisis, it is nonetheless a time in which "politics as usual"[98] is no longer considered an adequate response to dealing with the social and economic problems confronting the nation. The prevailing representational forms do not seem to be working; this manifests itself in a problem of representation. To the extent that the resolution of these problems demands a departure from "politics as usual," it also requires in-

98. *See generally* WALTER D. BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970).

stitutions be fully prepared to lead this departure.[99] One immediate concern is whether the Court's separation of powers jurisprudence prepares the different political institutions for this heady task.

In this section, I argue that the Court's separation of powers jurisprudence makes the resolution of the representation problem difficult. This jurisprudence does so for the following reasons: It reduces the prospect of political accommodation between the legislative and executive branches; it renders political actors less accountable in the performance of their governing responsibilities; and it limits public policy innovation.

Political accommodation between the legislative and executive branches is a necessity in the American political system. The separation of powers and the system of checks and balances make cooperation among the political institutions a desideratum in the performance of the governing function. While institutional conflict may allow for the articulation of different voices or electoral constituencies in carrying out this governing responsibility, at some point in the process an accord must be reached between Congress and the President. This accord can either be imposed or attained through mutual assent. Repeated mutual assent is a condition for the evolution of cooperation among the political institutions while imposed accords are a prescription for future conflict and, potentially, stalemate.[100]

The Supreme Court's separation of powers jurisprudence stands for the proposition that political accommodation need not be reached between the Congress and the President through a process of mutual assent. Instead of requiring Congress and the President to defend the boundaries of their respective institutions, the Court in *Chadha*, *Bowsher*, and *Morrison* imposed an accord to resolve the separation of powers conflict at issue.[101] It was not important that the President had failed to veto the legislation whose constitutionality was at issue; nor had other executive branch actors tried to fend off legislative efforts to curtail their authority. Instead, the executive branch sought refuge and relief in the judicial branch.

The Supreme Court's intervention on behalf of the executive branch in *Chadha* and *Bowsher* encouraged a type of "avoidance behavior" on the part of the President. Rather than forcing the President to rely on the means that the Constitution provides to constrain the legislative branch, such as the veto, the Court prevented the President and Congress from

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99. *Id.*

100. A theoretical presentation and demonstration of this proposition can be found in ROBERT AXELROD, THE EVOLUTION OF COOPERATION 55-69 (1984).

101. *See generally* Morrison v. Olson, 487 U.S. 654 (1988); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

resolving their differences through a process of political accommodation. For example, had President Reagan vetoed the Gramm-Rudman-Hollings Act in 1985 on the grounds that the powers given the Comptroller General were unconstitutional, Congress might have redrafted the statute to meet the President's objections. Similarly, had the Attorney General failed to exercise his discretion in changing the deportation status of an otherwise deportable alien, Congress would have had nothing on which to exercise a legislative veto. To the extent that Congress wanted the deportation status of certain categories of aliens changed, it would have had to amend the laws in question. In these instances, political accommodation might very well have produced institutional comity and cooperation. The President and Congress could have joined together to produce public policies that addressed the social and economic needs of the day—in a way that satisfied the institutional demands of both branches of national government. However, by relying on the Court to resolve the conflict between the legislative and executive branches, rather than exercising the executive's considerable constitutional powers, the President fostered institutional resentment and discord. As might be expected, the Court did not hesitate to impose an accord to resolve congressional-executive conflict. Unfortunately, such a situation is unlikely to make the resolution of the problem of representation possible.

The Supreme Court's separation of powers jurisprudence also makes the resolution of the problem of representation more difficult by reducing the accountability of political actors in carrying out their governing responsibilities. This can be seen by looking at the substance of the Court's separation of powers decisions. For example, *Chadha* overturned the legislative veto on constitutional grounds. In so doing, the Court prohibited Congress from employing one of its few institutional means to oversee the exercise of law-making authority that it has given the executive branch during the twentieth century. Clearly, this reduces the accountability of those executive branch actors who are given the discretion to enforce federal law.

The decision is not limited to such an application. All too often, there is a presumption that when the Supreme Court acts, its decisions are effectively implemented. However, this is not necessarily the case, especially when it involves the actions of other national political institutions. Simply because the Court ruled the legislative veto unconstitutional does not mean that Congress has acceded to the Court's demand. In the years since *Chadha*, for instance, Congress has continued to enact different variants of the legislative veto. The most common are provisions in federal law that require the executive branch to obtain the approval of specific congressional committees and subcommittees. Before *Chadha*, one house of Congress

had to publicly veto an executive action; now this decision can be made by more insulated and less visible actors in the legislative branch. Clearly, this makes Congress as a whole less accountable. One implication of *Chadha*, as Louis Fisher put it, has been "to drive legislative vetoes underground, operating at the committee and subcommittee level."[102]

Another way in which Congress has become less accountable can be seen in *Morrison*. By upholding the independent counsel provisions of the Ethics in Government Act of 1978, the Supreme Court allowed for the appointment of a prosecutor within the executive branch to investigate violations of the law by executive branch officials.[103] Although this clearly increases the accountability of the executive branch, it diminishes that of Congress. Under such a statutory scheme, Congress need not carry out its own independent investigation of executive branch conduct; it can simply allow for the appointment of an independent counsel to undertake an investigation of the executive branch. In this way, Congress can reap the benefits of a weakened executive branch, as well as receive any incriminating information that may be grounds for the impeachment of an executive branch official. This can be achieved without having to pay the political cost that could result from a prolonged and seemingly partisan investigation of the executive branch.

Therefore, *Chadha* and *Morrison* make governmental actors less accountable. Political power is distributed from one house of Congress to committees and subcommittees in Congress, while unelected independent counsels wield authority that has the potential of bringing down a presidency. Obviously, this has a significant impact on the possibilities for resolving the problem of representation. Most importantly, it makes it difficult for the electorate to hold Congress and the President responsible for their political actions. To the extent that congressional and executive branch actions are hidden from the fullest possible public view, the ability of the electorate to judge the adequacy of political institutional conduct is diminished. This deepens the problem of representation because it makes it more difficult for elections to assume their classic democratic function of serving as referenda on the vital public policy choices of the day. The electorate votes but it is uncertain what these votes mean.

Finally, the Supreme Court's separation of powers jurisprudence makes it more difficult for political institutions to resolve the problem of represen-

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102. Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57, 84 (1990); *see also* Louis Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705 (1985).

103. *Morrison*, 487 U.S. at 661.

tation because it places limits on public policy innovation. *Chadha* overturned the legislative veto which was invented to make the modern administrative state more accountable in the exercise of delegated powers.[104] *Bowsher* overturned those sections of the Gramm-Rudman-Hollings Act of 1985 that gave the Comptroller General the authority to resolve conflicts between Congress and the President over the federal budget.[105] In both cases, the Court elevated the value of relatively technical compliance with especially indeterminate constitutional texts over democratic rule.

Similarly, in *Metropolitan Washington Airports Authority*, the Court struck down an institutional arrangement whereby the federal government relinquished ownership of Dulles and National Airports.[106] While this arrangement to transfer ownership of the airports was clearly not established to resolve one of the great crises of our day, it was nevertheless a novel institutional mechanism that may have become a blueprint for returning control over federal assets and programs back to the states. Yet, the Court struck down this federal-state cooperative arrangement before it was allowed to develop.

By using the separation of powers doctrine as an independent bar to public policy innovation in *Chadha*, *Bowsher*, and *Metropolitan Washington Airports Authority*, the Supreme Court renders the resolution of the problem of representation considerably more difficult. In the absence of the legislative veto, for example, the administrative state goes relatively unchecked or is subjected to a check through a congressional committee process whose insulation is high and whose visibility is low. In either situation, electoral accountability is virtually impossible to achieve. When the Court overturned the Comptroller General enforcement provisions of the Gramm-Rudman-Hollings Act, there remained no statutory mechanism for ensuring the balancing of the federal budget. In this instance, the Court makes clear its preference for congressional compliance with nontextual sections of the Constitution—the President's removal power—over the value of democratic efforts to resolve the fiscal crisis of the state. And when the Court impedes congressional efforts to relinquish control of federal institutions to the states, it establishes a value system in which the maintenance of parchment barriers among the different branches of national government supersedes the devolution of political power from the federal government to the states. While such a devolution of power to the states does not constitute a

104. *See supra* notes 41-50 and accompanying text.
105. *See supra* notes 41-50 and accompanying text.
106. *See supra* notes 76-90 and accompanying text.

certain remedy for the problem of representation, it is at the very least an effort to restore power to that government closest to much of the electorate.

IV. CONCLUSION

Some years ago, Justice Robert Jackson observed that "it is hard to conceive a task more fundamentally political than to maintain amidst changing conditions the balance between the executive and legislative branches of our federal system."[107] And so it is. Ideally, the Supreme Court's separation of powers jurisprudence should be an attempt to mold a body of law that adequately maintains the balance between the Congress and the President in a way that preserves and strengthens democratic rule. This jurisprudence should make the institutions better and stronger. In this way, at least, the Court can justify its incursions into this highly political branch of constitutional law.

This essay has suggested that the Supreme Court has not succeeded in this task. Its separation of powers jurisprudence does not make our political institutions stronger. Instead, it makes them weaker. Rather than trying to strengthen Congress and the President by teaching them the value of an ethic institutional responsibility, the Court encourages institutional dependence and reliance. It heralds a separation of powers jurisprudence that is essentially a code of right institutional conduct. The irony is that this separation of powers jurisprudence is no different than the parchment barriers *The Federalist* rejected. For the Court to assume its proper role in separation of powers conflicts, it must teach the other branches of the federal government a simple lesson—"Ambition must be made to counteract ambition."[108]

107. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 62 (1955).

108. THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).