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THE RISE AND FALL OF THE SEPARATION OF POWERS

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ABSTRACT—The U.S. Constitution’s separation of powers has its origins in the British idea of the desirability of a Mixed Regime where the King, the Lords, and the Commons all checked and balanced one another as the three great estates of the realm. Aristotle, Polybius, Cicero, St. Thomas Aquinas, and Machiavelli all argued that Mixed Regimes of the One, the Few, and the Many were the best forms of regimes in practice because they led to a system of checks and balances. The Enlightenment killed off the Mixed Regime idea forever because hereditary office-holding by Kings and Lords became anathema. The result was the birth of a functional separation of legislative, executive, and judicial power as an alternative system of checks and balances to the Mixed Regime. For better or worse, however, in the United States, Congress laid claim to powers that the House of Lords and the House of Commons historically had in Britain, the President laid claim to powers the King historically had in Britain, and the Supreme Court has functioned in much the same way as did the Privy Council, the Court of Star Chamber, and the House of Lords. We think these deviations from a pure functional separation of powers are constitutionally problematic in light of the Vesting Clauses of Articles I, II, and III, which confer on Congress, the President, and the courts only the legislative, executive, and judicial power. The United States badly needs a rebirth of the functional separation of powers idea.

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INTRODUCTION

It is a privilege and an honor for us to write about the legacy of Justice John Paul Stevens with respect to the executive power specifically and the separation of powers more generally. Justice Stevens has had a huge impact on this subject, which all of us care about deeply. Justice Stevens was the author of two of the most momentous and consequential separation of powers opinions of the last thirty years: *Chevron U.S.A. Inc. v. NRDC*¹ and *Clinton v. City of New York*.² In the first case, Justice Stevens wrote a seminal opinion for the Court arguing for deference by courts to reasonable executive branch interpretations of law³—a view that he later wisely qualified in subsequent cases when some of his colleagues tried to take it too far.⁴ In the second case, Justice Stevens limited presidential power by holding unconstitutional a statute that purported to give the President a line item veto by delegating enormous impoundment powers to the President.⁵ The *Chevron* opinion and its progeny recognized that the President and his executive subordinates are often functionally lawmakers.⁶ The *Clinton* case sets outer limits on Congress’s power to delegate its appropriations power to the President.⁷

Taken together, these two cases suggest that the very idea of the separation of powers is in a state of crisis today. Congress often passes sweeping delegations of legislative power to the Executive Branch,⁸ thereby placing courts in a quandary when they are called upon to review the

¹ 467 U.S. 837 (1984).

² 524 U.S. 417 (1998).

³ *Chevron*, 467 U.S. at 844–45.

⁴ Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448, 453 (1987) (reading *Chevron* less expansively in the majority opinion than Justice Scalia did in his dissent), with *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (joining Justice Souter’s opinion for the Court limiting *Chevron* deference to occasions when Congress intended rulings of an administrative agency to have the force of law).

⁵ *Clinton*, 524 U.S. at 446–47.

⁶ *Chevron*, 467 U.S. at 865.

⁷ A brief history of separation of powers decisions and the *Clinton* decision are explained and discussed in Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of Clinton v. City of New York*, 99 NW. U. L. REV. 77, 77–87 (2004).

⁸ See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (containing over three hundred instances of delegations of power phrased “the Secretary may” take certain actions as well as over one thousand uses of the formulation “the Secretary shall”).

legality of agency regulations and orders. Justice Stevens's opinion calling for judicial deference to reasonable executive branch interpretations of law in *Chevron* recognizes that quandary while his later opinions and votes limiting the scope of *Chevron* reflect the Justice's desire to preserve as much of the separation of powers as possible by allowing for judicial review.⁹ Congress also tried with the Line Item Veto Act to surrender part of the traditional legislative prerogative of the power of the purse to the President.¹⁰ Justice Stevens, writing for the Court, struck that particular delegation down.¹¹

Chevron and *Clinton v. City of New York* raise fundamental questions about the separation of powers. How did we get to a world where executive branch agencies routinely make law and where Congress tries by statute to surrender the most ancient of legislative prerogatives? Was Justice Stevens right to create *Chevron* deference and then to try to confine that deference in subsequent case law? Was he right to strike down the Line Item Veto Act as, in essence, a violation of bicameralism and presentment and therefore as being an unconstitutional delegation of power? We believe the answer is that Justice Stevens ruled correctly in all of these cases, but to explain why requires a brief historical review: first, we must consider how the doctrine of the separation of powers initially arose; second, we must consider how two centuries of practice have shaped the separation of powers doctrine here in the United States into a workable whole; and finally, we must consider what concrete steps Justice Stevens took on the Court to try to reinvigorate the separation of powers and how we all might supplement his efforts today. We will discuss each of these three topics in turn.

I. THE HISTORICAL ORIGINS OF THE SEPARATION OF POWERS

We begin with the question of how the idea of the separation of powers arose in America in the first place. The answer is that the American concept of the constitutional separation of powers had its roots in seventeenth- and eighteenth-century English and colonial American constitutionalism.¹² Englishmen at this time—and from 1607 to 1776 the American colonists were Englishmen—believed that their constitution was among the world's best. Englishmen thought they had inherited what certain ancient Greek and Roman philosophers had called a "Mixed Regime."¹³ A Mixed Regime was

⁹ See, for example, Justice Stevens's majority opinion in *Cardoza-Fonseca*, 480 U.S. at 448, and his vote in *Mead*, 533 U.S. at 220, 226–27.

¹⁰ *Clinton*, 524 U.S. at 436–38, 446; see Calabresi, *supra* note 7, at 85.

¹¹ *Clinton*, 524 U.S. at 448–49.

¹² The classic treatments here are M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967) and W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* (1965).

¹³ See DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM* 220–21 (2008); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE,*

one that combined elements of monarchy, aristocracy, and democracy so as to obtain the best features of each of those pure regime types while avoiding the worst.¹⁴

According to the advocates of a Mixed Regime, government by one person had the advantage of providing for energy in foreign policy, in the waging of war, and in the combating of powerful domestic special interests. Government by one person had the disadvantage, however, that it usually degenerated into tyranny.¹⁵ Government by a few people had the advantage that the wise and the virtuous might rule. But it had the disadvantage that it could easily degenerate into a self-interested and corrupt oligarchy.¹⁶ Government by all of the people had the advantage that it promoted liberty and brought popular common sense into public policymaking. But it had the disadvantage that it too could degenerate into mob rule, which is a tyranny of the Many.¹⁷

The great advantage of a Mixed Regime that combined the powers of the One, the Few, and the Many was that the three social classes represented by the monarch, the aristocrats, and the commoners could check and balance one another, thereby increasing the chance that each social class would rule justly.¹⁸ Power was dispersed in a Mixed Regime rather than concentrated in the hands of one social class. For this reason, Aristotle,¹⁹ Polybius,²⁰ Cicero,²¹ St. Thomas Aquinas,²² and Machiavelli²³ all

ROME, AND THE AMERICAN ENLIGHTENMENT 123–57 (1994); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 11 (Univ. of N.C. Press 1998) (1969).

¹⁴ See, e.g., VILE, *supra* note 12, at 33–52.

¹⁵ See ARISTOTLE, POLITICS 1286a8–20, 1286a33–35, 1289a38–b5, 1279b4–8; POLYBIUS, THE HISTORIES bk. VI, 7.

¹⁶ See ARISTOTLE, *supra* note 15, 1286b3–19, 1289a38–b5; POLYBIUS, *supra* note 15, bk. VI, 8.

¹⁷ Aristotle was the first constitutional theorist to argue normatively for the idea of a Mixed Regime. Aristotle categorized constitutional arrangements according to which social class held power. See ARISTOTLE, *supra* note 15, 1286b3–7, 1295a25–1296b11. A government of one person was a monarchy or a tyranny, a government of a few people was an aristocracy or an oligarchy, and a government of all the people was a commonwealth democracy or a situation of mob rule. Each of the three forms of government had an ideal state and a corresponding degraded state. See *id.* 1289a26–b10. Aristotle identified a Mixed Regime where power was shared by the One, the Few, and the Many as being the best regime that would often be realistically obtainable. See *id.* 1293b21–1294b40.

¹⁸ See POLYBIUS, *supra* note 15, bk. VI, 10.

¹⁹ See ARISTOTLE, *supra* note 15, 1265b33–1266a5, 1293b21–1294b40, 1309b18–1310a1.

²⁰ Polybius argued that governments follow an inevitable cycle of constitutional decay (*anacyclosis*). See POLYBIUS, *supra* note 15, bk. VI, 4, 57.1. According to Polybius, anarchy would drive people to support a king out of necessity. Eventually the King would abuse his power, and a group of elites would usurp the throne in order to establish an aristocracy. *Id.* bk. VI, 7–8. This aristocracy would eventually give way to the power of the people, who would reject the concentration of wealth in the elite social class; however, the rule of the Many would eventually deteriorate, ushering in a new period of anarchy. *Id.* bk. VI, 8–9. Polybius supported the Mixed Regime because he believed it would slow this cycle by making it difficult for one class to abuse the power of the government on its own. *Id.* bk. VI, 10. He argued that the Roman Republic, whose constitution he felt was responsible for its longevity, was one that created a Mixed Regime. See *id.* bk. VI, 11.

praised the idea of a Mixed Regime. And, as we shall see, it was the idea of a Mixed Regime with a system of checks and balances that was to become the parent of the idea of the separation of powers. Both systems share the same premise that “[p]ower tends to corrupt and absolute power corrupts absolutely.”²⁴

Aristotle, Polybius, Cicero, and Machiavelli all praised ancient Sparta for being a Mixed Regime, and they attributed Sparta’s success as a polity in part to that fact.²⁵ Polybius and Cicero also praised the Roman Republic

²¹ Cicero’s support for the Mixed Regime grew out of his admiration for the Roman Republic. See CICERO, *De Re Publica*, in DE RE PUBLICA, DE LEGIBUS II, XXIII (Clinton Walker Keyes trans., 1928) (1st century b.c.) [hereinafter CICERO, *De Re Publica*] (“[Q]uod proprium sit in nostra re publica, quo nihil possit esse praeclarium,” i.e., “[T]he unique characteristic of our own commonwealth [is] the most splendid conceivable . . .”). At the time of Cicero’s writings, the Roman consuls, representing the rule of the One, had an executive prerogative power—especially during emergencies and military conflicts—but their power was checked by the holding of annual elections. See *id.* II, XXXII; CICERO, *De Legibus*, in DE RE PUBLICA, DE LEGIBUS, *supra*, III, VII [hereinafter CICERO, *De Legibus*]. The educated members of the Senate, representing the Few, developed and enacted the policies of the Republic, while popular assemblies, representing the Many, checked this power by voting on proposed legislation and electing consuls and other magistrates who might later serve in the Senate. See CICERO, *De Re Publica*, *supra*, II, XXXII–XXXIV; CICERO, *De Legibus*, *supra*, III, X. Rather than seeking to establish an ideal constitution, Cicero proposed changes to the Roman Republic, such as increasing the authority of senatorial decrees. See CICERO, *De Legibus*, *supra*, III, III; see also ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 225–32 (1999) (describing the changes that Cicero proposed in *De Legibus*).

²² St. Thomas Aquinas modified the earlier version of the Mixed Regime to account for the superior status of the One. St. Thomas argued that a Mixed Regime structure would provide more stability for monarchies by reducing the likelihood that the Few or the Many would revolt. See ST. THOMAS AQUINAS, *De Regimine Principum*, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 181, bk. I, ch. 6 (Dino Bigongiari ed., 1953) [hereinafter AQUINAS, *De Regimine Principum*]. St. Thomas also reconciled the Mixed Regime with his Christian faith, thus making the doctrine relevant for both politicians and theologians living in Europe. St. Thomas compared Mixed Regimes to the government instituted by Moses, which included the supreme power of Moses, a group of seventy-two elders, and the participation of all men in the selection of the elders. See ST. THOMAS AQUINAS, *Summa Theologica*, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 3, *supra*, I-II Q.105 [hereinafter AQUINAS, *Summa Theologica*].

²³ In contrast to St. Thomas, Machiavelli argued for a form of the Mixed Regime where the power of the Many was supreme rather than the power of the One. See MACHIAVELLI, *Discourses*, in II THE HISTORICAL, POLITICAL, AND DIPLOMATIC WRITINGS OF NICCOLO MACHIAVELLI 93, bk. I, ch. VI (Christian E. Detmold trans., Cambridge, Riverside Press 1882) [hereinafter MACHIAVELLI, *Discourses*]. Machiavelli argued that the people were the class best situated to governing because the wealthier classes could use their riches to quickly implement abusive policies. *Id.* bk. I, ch. V. Machiavelli brought back Polybius’s cycle of constitutional decline, repeating Polybius’s argument that the Mixed Regime had slowed the fall of the Roman Empire. *Id.* bk. I, ch. II. Machiavelli specifically praised the Republic of Venice as constituting an ideal Mixed Regime since it featured a senate, a greater council, and a civil and military leader who was elected for life. See *id.* bk. I, ch. VI.

²⁴ Letter from Lord Acton to Mandell Creighton (Apr. 5, 1887), in LORD ACTON, ESSAYS ON FREEDOM AND POWER 329, 335 (Gertrude Himmelfarb ed., 1972).

²⁵ See ARISTOTLE, *supra* note 15, 1265b33–1266a5; CICERO, *De Re Publica*, *supra* note 21, II, XXIII; MACHIAVELLI, *Discourses*, *supra* note 23, bk. I, ch. VI; POLYBIUS, THE HISTORIES, *supra* note 15, bk. VI, 10.

for being a Mixed Regime,²⁶ and it should be noted for the record that the Roman Republic lasted for more than four hundred years (509 B.C. to 44 B.C.). Machiavelli praised the Republic of Venice as being a Mixed Regime,²⁷ and it should be noted for the record that the Republic of Venice lasted for more than one thousand years (697 A.D. to 1797 A.D.). By the seventeenth century, the idea of the Mixed Regime appeared to be triumphant in political philosophy.

Beginning at least in 1640, and continuing on into the eighteenth century, many Englishmen believed that England was a kind of Aristotelian Mixed Regime. Many Englishmen thought that the King, the House of Lords, and the House of Commons each represented the three great estates of English society—the One, the Few, and the Many.²⁸ All three estates were subordinate to the law and to the ancient constitution of King Edward the Confessor, including even the King.²⁹ Sovereignty rested in the King-in-Parliament because when the three great estates of the realm spoke together, society as a whole had made a decision.³⁰ Thus, neither the King nor his judges could question or suspend or judicially review an Act of Parliament because the King-in-Parliament was sovereign when that act was adopted.³¹

Americans in the seventeenth and eighteenth centuries also believed that they lived in a colonial version of the Mixed Regime. Every colony eventually came to have a royal governor, appointed by the King of England, who represented the interests of the One; a Governor's Council, usually appointed by the Governor with the King's consent to advise him, who represented the interests of the Few; and a popularly elected lower House of the Colonial Legislature, which represented the interests of the Many and most especially the interests of those who paid taxes.³² The English Mixed Regime structure was thus replicated in the American

²⁶ See CICERO, *De Re Publica*, *supra* note 21, II, XXIII; POLYBIUS, *THE HISTORIES*, *supra* note 15, bk. VI, 10.

²⁷ See MACHIAVELLI, *Discourses*, *supra* note 23, bk. 1, ch. VI.

²⁸ See GWYN, *supra* note 12, at 24–27; VILE, *supra* note 12, at 38.

²⁹ GWYN, *supra* note 12, at 30.

³⁰ The term “King-in-Parliament” refers to the King approving a bill that has been passed by the House of Commons and the House of Lords. See JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 9 (1999). The idea is that the King acted together with the aristocracy and the common people. The King-in-Parliament was sovereign because it represented the three great estates of society. Today in England, the Monarch is a cipher, as is the House of Lords; the sovereignty of the Queen-in-Parliament means, in practice, the sovereignty of the House of Commons. See *id.* at 125 (“[T]he King’s power to make Acts of Parliament, with the assent of the Lords and Commons, is ‘the most sovereign and supreme power above all and controllable by none.’”); see also GWYN, *supra* note 12, at 30 (noting that the King was bound by laws made in Parliament).

³¹ William Blackstone says as much in his *COMMENTARIES ON THE LAWS OF ENGLAND*, *185–86, contradicting the contrary view of Sir Edward Coke in *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646 (K.B.) 652–53; 8 Co. Rep. 113 b, 117 b–118 b.

³² See JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689–1776*, at 12 (1963).

colonies from 1607 until 1776.³³

The death of feudalism and the coming of the American Revolution killed off the idea of the Mixed Regime for all time. The American Revolution was premised on the idea that all men are created equal,³⁴ and it did not permit a hereditary monarchy, aristocracy, or any other distinctions of social class.³⁵ All power was thus to be in the hands of the Many. So beginning in the 1650s, after the English Civil War, and continuing with the writings of John Locke³⁶ and Montesquieu,³⁷ an effort was made by political philosophers to come up with a replacement for the Mixed Regime whereby the Many ruled but whereby power would not be concentrated in any one institution that could be easily corrupted.³⁸ The idea that emerged from this

³³ Several American colonists praised the British Mixed Regime government during this period of time and supported efforts to replicate it in the colonies. According to M.J.C. Vile, “[B]y the middle of the eighteenth century the theory of the balanced constitution seemed as impregnably established in America as it was in England.” VILE, *supra* note 12, at 125.

³⁴ See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁵ Vile notes that when colonies began to move towards revolution, “the theory of mixed government as applied in England was first criticized on the grounds that corruption had so warped the Constitution that it no longer represented a truly balanced structure but was a disguised tyranny.” VILE, *supra* note 12, at 125–26. Authors such as Thomas Paine helped transform this criticism into a wholesale rejection of Mixed Regime government due to its emphasis on hereditary social class status. See *id.* at 136.

³⁶ See generally JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (J.W. Gough ed., 1948) (1690) (arguing both that government rests on the consent of the people and for a functional separation of powers).

³⁷ See generally 1 MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., J.V. Prichard ed., 1914) (1748) (arguing that a functional separation of powers is necessary to avoid tyranny).

³⁸ In 1648, Charles Dallison argued for a functional separation of powers with different personnel in each branch of the government. See CHARLES DALLISON, THE ROYALIST’S DEFENCE: VINDICATING THE KING’S PROCEEDINGS IN THE LATE WARRE MADE AGAINST HIM 126 (1648). However, “in one major respect it adhered to the theory of mixed government” by giving the King broad powers. VILE, *supra* note 12, at 47. John Sadler and other writers developed similar constitutional theories in subsequent years. See *id.* at 31–32.

The execution of Charles I at the end of the English Civil War catalyzed efforts to create a constitutional system rooted in the sovereignty of the Many. See VILE, *supra* note 12, at 47–52. In 1653, the *Instrument of Government* established England’s first written constitutional system, the first Protectorate Parliament. THE ORIGINAL INSTRUMENT AND REPUBLICAN SCHEME OF GOVERNMENT (London, A. Moore 1722) (1653). Though the Protectorate was short-lived, it entrusted supreme legislative power in the Parliament and included a modest effort at a separation of powers. See VILE, *supra* note 12, at 47–48. At this point in time, the separation of powers was well on its way to becoming an established theory, “but it was a relatively unsophisticated doctrine, . . . [and] suffered from the fact that no real attempt was made . . . to ensure that deadlock did not result from the separation of functions in separate hands.” *Id.* at 52.

In the late 1650s, George Lawson argued for a threefold separation of powers but only for a twofold separation of personnel, adhering to the earlier division of powers between legislative and executive personnel. See GEORGE LAWSON, AN EXAMINATION OF THE POLITICAL PART OF MR. HOBBS HIS LEVIATHAN (London, Francis Tyton 1657); GEORGE LAWSON, POLITICA SACRA & CIVILIS: OR, A MODELL OF CIVIL AND ECCLESIASTICAL GOVERNMENT (London, John Starkey 1660); VILE, *supra* note 12, at 55–58. According to M.J.C. Vile, “The Restoration introduced a long period in which the two

effort was the idea that it was desirable to separate functionally the legislative, the executive, and the judicial power.³⁹ This functional separation of powers would thus replace the Mixed Regime's division of powers among the three social classes. Tyranny, oligarchy, and mob rule would be avoided thanks to the functional separation of legislative, executive, and judicial powers.

In the 1770s and 1780s, John Adams, who had been a big fan of the British Constitution's Mixed Regime, led a successful campaign to induce Americans to adopt separation of powers and bicameralism because he thought it would lead to a new democratized version of the Mixed Regime.⁴⁰ Popularly selected presidents and governors would replace the

doctrines [mixed government and separation of powers] were combined in an amalgam which recognized the class element in the control of the legislative power." VILE, *supra* note 12, at 34. Soon afterwards, "[w]hen democratic movements gained the ascendancy the theory of mixed government dropped out, and the theory of the separation of powers became the major theory of constitutional government." *Id.* In 1701, the Act of Settlement established judicial independence in England by recognizing judicial tenure for life during good behavior. *See id.* at 54.

³⁹ Aristotle may have anticipated the separation of powers when he wrote that "[a]ll constitutions have three parts. . . . One of the three deliberates about public affairs; the second concerns the offices; . . . and the third is what decides lawsuits." ARISTOTLE, *supra* note 15, 1297b36–1298a5. He never really develops this insight nor does Aristotle talk about the importance of keeping these three functions separate and balanced with one another. John Locke envisioned a twofold division of government powers between the executive, which had the executive and foreign affairs powers, and the legislature, which had lawmaking power. LOCKE, *supra* note 36, at 72–73. John Locke's *Second Treatise on Government* represented a step forward for the functional separation of powers doctrine. Locke argued both for the rule of the Many and for the independence of judges. *See* VILE, *supra* note 12, at 60–63. Locke also helped bring about the supremacy of the legislature in constitutional theory, as opposed to the monarch or executive. Locke, along with other eighteenth-century writers, "[transformed] the demand that the King be the sole executive . . . into the very different demand that he be solely concerned with execution." *Id.* at 43.

Montesquieu's *De l'Esprit des Loix* offered the first widely recognized articulation of the separation of powers doctrine as it is understood today. Though Montesquieu still viewed the legislative and executive powers as the two major branches of the government, he argued for a politically independent judiciary whose personnel would not be drawn from the legislative or executive branches of the government. *See* MONTESQUIEU, *supra* note 37, at 163–65; VILE, *supra* note 12, at 88–89. Montesquieu famously declared that individual liberty depends upon a separation of both powers and persons, writing that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty Again, there is no liberty, if the judiciary power be not separated from the legislative and executive." MONTESQUIEU, *supra* note 37, at 163. Montesquieu also focused on ensuring the rule of the Many through the establishment of representative government. *See id.* at 165–67.

Blackstone modified Montesquieu's constitutional theory in the *Commentaries on the Laws of England*. Since "the Commentaries were regarded as authoritative in the American colonies as well as in England, it was often through Blackstone's eyes that the colonists saw the Montesquieu theory." VILE, *supra* note 12, at 102. Blackstone accorded much more authority to the judiciary than Montesquieu did, arguing that it was a "main preservative of the public liberty." BLACKSTONE, *supra* note 31, *269. According to M.J.C. Vile, "Blackstone was an essential link between Montesquieu and Chief Justice Marshall," VILE, *supra* note 12, at 104, and thus a bridge between the Framers and the earlier separation of powers theorists.

⁴⁰ In April of 1776, Adams wrote that a bicameral legislature was necessary because, "if the

King as the voice of the One; the Senate and the Supreme Court would replace the House of Lords, the Privy Council, and the Court of Star Chamber as the voice of the aristocratic or oligarchic Few; and the popularly elected House of Representatives would replace the House of Commons as the people's special branch with the Power of the Purse. In the U.S. Constitution of 1787, there was a functional separation of legislative, executive, and judicial powers, but it was supplemented by a Madisonian system of checks and balances whereby some powers with Mixed Regime antecedents were blended together so as to check and balance power.⁴¹ Thus, the President was given a role in the lawmaking function by virtue of his possessing the veto power.⁴² The Senate was given a role in the execution of the law through its power to confirm or reject presidential nominees for high office and through its power over treaty ratification—powers that the British Parliament had lacked.⁴³ And, the Supreme Court and the inferior federal courts were arguably given some executive power as a result of their power to issue writs of mandamus to federal executive officials—something that only the Court of King's Bench or the Court of Star Chamber could do in England because of the fiction that the King was a member of the Court of King's Bench and because of the reality of his membership on the Court of Star Chamber.⁴⁴ The power of the Many was

legislative power is wholly in one Assembly, and the executive in another, or in a single person, these two powers will oppose and enervate upon each other, until the contest shall end in war." JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (1776), reprinted in 4 PAPERS OF JOHN ADAMS 85, 88–89 (Robert J. Taylor ed., 1979). In support of the separation of powers, Adams reasoned that the legislature, "possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favour." *Id.* at 88.

⁴¹ Though the separation of powers doctrine and the Mixed Regime are related, the system of checks and balances is more closely related to the Mixed Regime. The separation of powers doctrine by itself is inconsistent with the Mixed Regime because it would entrust each of the legislative, executive, and judicial powers in three separate institutions. The theorists who developed the Mixed Regime were concerned not only with dividing the power of the government generally, but also with ensuring that no single group would possess sole control over an important government function. The tripartite structure of government prescribed by the Mixed Regime remained after the American Revolution made social classes irrelevant, but this connection to the Mixed Regime is more indirect than the system of checks and balances. The concern associated with the Mixed Regime that no one part of the government should acquire too much power was the driving force behind the system of checks and balances, which ensures that the Supreme Court, each house of Congress, and the President do not have exclusive control over certain important government functions. See Allison Bates, *The Republican Balance: The Guarantee Clause, the Framers' Republic, and the Popular Initiative* 64–66 (Dec. 23, 2010) (unpublished manuscript) (on file with the Northwestern University Law Review).

⁴² MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 197 (2010).

⁴³ *Id.*

⁴⁴ *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 614, 620–22 (1838) (discussing the Court of King's Bench); see also ALBERT VENN DICEY, *THE PRIVY COUNCIL: THE ARNOLD PRIZE ESSAY* 101 (London, MacMillan & Co. 1887) ("[There is] a peculiar feature of the [Court of] Star Chamber's constitution,—the frequent presidency of the King in person. The legal fiction that the King is present personally in all his courts, was here carried into act. . . . The part taken by the King was no

rendered supreme over time because of their role in a six-year cycle of three separate elections: (1) in electing all of the members of the House of Representatives; (2) in electing, since the ratification of the Seventeenth Amendment in 1913, all of the senators who also play a key role in choosing the Justices of the Supreme Court;⁴⁵ and (3) in electing all of the members of the Electoral College who then elect the President of the United States.⁴⁶ All the power of all the institutions of the U.S. government comes from officials who are picked, either directly or indirectly, by all of the people. In the United States, the Many rule because the Many get to pick the One and the Few in our democratized version of the English Mixed Regime.

The answer to our first question, then, is that the separation of powers arose to replace the Aristotelian and English Mixed Regime as a way of diffusing power once the fall of feudalism had made the English Mixed Regime unviable in the United States. Hereditary Kings and Lords would no longer be tolerated, so other institutions were needed to take their place.

II. TWO CENTURIES OF SEPARATION OF POWERS PRACTICE

The second question we want to address is how more than two centuries of practice have shaped the doctrine of the separation of powers as we understand it in the United States. The answer, in our view, is that all three branches of the federal government—the Legislative Branch, the Executive Branch, and the Judicial Branch—have taken on vitally important “functions” that are not assigned to them by the Constitution and that are inconsistent with a pure separation of powers functional theory.

Let us start, as the Constitution does, with the Congress. The Congress today is for better or for worse knee-deep in the business of overseeing the execution of the law. Congress maintains an elaborate set of oversight and appropriations committees and subcommittees that follow everything the Executive Branch tries to do and that limit and constrain the President in law execution at every turn.⁴⁷ The congressional committees are, in effect, a shadow parliamentary government that duplicates the presidential appointees in every policy area and that competes with the presidential appointees for the loyalty of the career bureaucracy.⁴⁸ The only reason members of Congress do not demand that they themselves be appointed to

empty formality. On one occasion James presided for five days, ‘seated on a chair high above the rest,’ and terminated the case by pronouncing a sentence, of which, if the annalist is to be believed, the wisdom surpassed that of any judgment before uttered from an English tribunal.”).

⁴⁵ PAULSEN ET AL., *supra* note 42, at 201.

⁴⁶ *Id.*

⁴⁷ See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 48–55 (1995).

⁴⁸ See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1048 n.11, 1090 (1994).

the Cabinet and the sub-Cabinet is because the Incompatibility Clause of Article I, Section 6 forbids members of Congress from holding executive or judicial offices.

As a matter of practice, Congress has carved out for itself a huge role in law execution through the oversight and appropriations processes.⁴⁹ This role is nowhere mentioned in the Constitution, which does not specifically provide for legislative committees, and it is in important ways extraconstitutional. Congress has also claimed for itself extensive quasi-executive and quasi-judicial powers to investigate almost anything under the sun, and it claims that it can, in theory, have an officer of either house imprison a contumacious witness with no prosecution being brought by the Executive Branch and with no adjudication by the Judicial Branch.⁵⁰ Such

⁴⁹ See Calabresi, *supra* note 47, at 51–54.

⁵⁰ The question of congressional power to punish first came before the Supreme Court in 1821 when John Anderson attempted to bribe a member of the House of Representatives. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 215 (1821). Justice Johnson’s opinion in *Anderson* begins with the premise that “such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers.” *Id.* at 225. Justice Johnson cautioned that the ability of the House to claim an implied power “on the plea of necessity . . . is unquestionably an evil to be guarded against,” but he felt that rejecting Congress’s claim to the power to punish for contempt would bring about “the total annihilation of the power of the House of Representatives to guard itself from contempts.” *Id.* at 228. Justice Johnson recognized that “there is no power given by the constitution to either House to punish for contempts, except when committed by their own members,” *id.* at 225, but he astonishingly decided to support Congress’s claim to such a power anyway because his own intuition caused him to think Congress ought to be able to punish contempt by nonmembers by itself imprisoning the contumacious witness absent any Executive Branch prosecution. *Id.* at 228–29.

Justice Miller reexamined this question in *Kilbourn v. Thompson*, a case in which Congress had instructed one of its committees to investigate a private real estate pool. 103 U.S. 168, 171 (1880). In *Kilbourn*, Congress argued that its inherent power to punish for contempt without the Executive Branch bringing a prosecution was incidental to its general legislative powers and also derived from Parliament’s power to unilaterally incarcerate contumacious witnesses. *Id.* at 182–83. Citing a similar case from Britain, *Kielley v. Carson*, (1841) 13 Eng. Rep. 225 (P.C.), Justice Miller revealed that not even colonial British legislative bodies outside of Parliament were thought to hold the power to punish for contempt. *Kilbourn*, 103 U.S. at 188–89. Thus, the Privy Council held that the House of Assembly lacked power on its own to imprison contumacious witnesses because Parliament only held such power “by virtue of ancient usage and prescription” unique to that institution. *Id.* at 188. However, because Justice Miller found that the subject of the subpoena in *Kilbourn* was not properly within the jurisdiction of the House of Representatives, he did not uphold inherent congressional power to punish for contempt. *Id.* at 196. Instead, Justice Miller limited his holding to establishing that each house of Congress may not punish for contempt when investigating issues outside its jurisdiction. *Id.* at 197. Miller explicitly denounced any general power held by Congress to punish for contempt, arguing that Congress could only exercise that power “in a limited class of cases.” *Id.*

Justice Miller’s narrow reasoning in *Kilbourn* was cast aside by Justice Van Devanter, whose opinion in *McGrain v. Daugherty*, 273 U.S. 135 (1927), offered a closer parallel to *Anderson* than to *Kilbourn*. Justice Van Devanter conceded that “there is no provision expressly investing either house with power to make investigations and exact testimony,” but he decided in favor of sweeping congressional power because “[i]n actual legislative practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate.” *Id.* at 161. Instead of heeding Justice Miller’s warning that Congress can only exercise the power to punish for contempt without the Executive Branch’s bringing a prosecution “in a limited class of cases,” *Kilbourn*, 103 U.S. at 197,

an imprisonment would seem to present all the evils of a bill of attainder, but Congress claims that it has this extraordinary power because such a power was exercised in England by the House of Commons and the House of Lords.⁵¹ The two Houses of the English Parliament, however, possessed more than merely legislative power because they were two of the three components of a constitutionally Mixed Regime.⁵² They thus had the power of the Few and the Many. Under the U.S. Constitution, Congress has only the “legislative” power and that would not seem to include a power to try and punish contempts. The analogy of Congress to Parliament is thus a false one that obscures rather than sheds light on the scope of Congress’s real power. As a factual matter, however, Congress has claimed and has exercised the power to unilaterally imprison witnesses for contempt.⁵³

If the Congress is knee-deep in the business of law execution, it must also be said that the President is knee-deep in the business of lawmaking. Presidents functionally make law when they issue executive orders, proclamations, or signing statements,⁵⁴ and when their subordinates

Justice Van Devanter wrote that Congress can exercise that power in the course of investigating any subject within its proper jurisdiction. *McGrain*, 273 U.S. at 173–74. Justice Van Devanter concluded that the power of Congress to punish for contempt is a practical necessity which should be checked by the Court through decisions such as *Kilbourn*. *Id.* at 175–76.

The trouble with the decisions in *Anderson* and *McGrain* is that they pit the utility of compelling testimony against the rights of the defendant without giving any attention to the separation of powers issues these cases present. Under the principle of the separation of powers, contempt of Congress ought only to result in deprivations of liberty or property where the Executive Branch has prosecuted the contumacious witness, a jury has convicted him, and the Article III federal courts have upheld the constitutionality of the conviction. Justice Black said rightly in *United States v. Lovett* that “legislative acts, no matter what their form, that apply . . . to named individuals . . . in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.” 328 U.S. 303, 315–16 (1946). The Constitution only allows for deprivations of liberty and property when all three branches of the national government have signed off on the deprivation.

⁵¹ Justice Powell expressed concern over legislative powers of punishment in *INS v. Chadha*, though there the issue was private bills for deportation as opposed to punishment for contempt. 462 U.S. 919, 960 (Powell, J., concurring). Justice Powell argued that “[w]hen Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.” *Id.* More generally, Justice Powell argued that any adjudication undertaken by Congress amounted to “the exercise of unchecked power . . . not subject to any internal restraints . . . [or] procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal.” *Id.* at 966.

⁵² PAULSEN ET AL., *supra* note 42, at 292–94.

⁵³ See *McGrain*, 273 U.S. 135.

⁵⁴ Signing statements often operate as a constitutional means by which the President can communicate both with the public and with subordinate members of the Executive Branch. See generally Steven G. Calabresi & Daniel Lev, *The Legal Significance of Presidential Signing Statements*, 4 FORUM 1 (2006). However, when signing statements are used as binding directives for members of the Executive Branch, they can become lawmaking in contravention of the separation of powers in two different ways.

Signing statements become legislation when they interpret unreasonably the original public meaning of federal statutes. Despite the deference given to agency directives in accordance with *Chevron*, the

promulgate the many rules and regulations that fill the pages of the Federal Register.⁵⁵ Presidential lawmaking is aided and abetted by Congress, which

federal courts can and do strike down unreasonable executive interpretations of statutes as in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 486 (2001). If the President issues a signing statement that creates a policy clearly at odds with the relevant statute, he has unconstitutionally encroached upon the legislative power of Congress.

Signing statements also change law and policy when they are used to decline to enforce provisions of statutes that are in fact constitutional. Critics of presidential signing statements say that when the provision in question is constitutional, the use of a signing statement to decline to enforce the disputed provision “is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York*.” Letter from Neal R. Sonnett, Chair, ABA Task Force on Presidential Signing Statements & the Separation of Powers Doctrine, to Cong. Leaders 22 (Jan. 17, 2007), available at http://www.abanet.org/poladv/letters/antiterror/2007jan17_signingstmts_1.pdf. The ABA Letter, however, totally overlooks the fact that all three branches of the national government must be guided by their own independent judgments as to what the Constitution requires. If the President thinks that Congress and the federal courts have upheld a statute like the Sedition Act of 1798 because they were “clearly mistaken” as to the constitutional issue, the President must decline to bring prosecutions under the law in question. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 67* (2008). The clear mistake rule in constitutional law was put forth and defended by James Bradley Thayer in *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). This is in fact exactly what President Thomas Jefferson ordered with respect to the one Sedition Act prosecution he inherited from the Adams Administration. CALABRESI & YOO, *supra*, at 67. Jefferson ordered the prosecution to be stopped, and it was stopped. *Id.*

Justice Stevens has argued that the original understanding of the Framers on the issue may well have been that signing statements could never be used in place of a veto to decline enforcement of unconstitutional legislation. As Justice Stevens explained in *Clinton v. City of New York*, “Our first President understood the text of the Presentment Clause as requiring that he either ‘approve all the parts of a Bill, or reject it in toto.’” 524 U.S. 417, 440 (1998) (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)). As a practical matter, two centuries of practice have established that the President may decline to enforce unconstitutional provisions of statutes that he or a former President has signed. See generally CALABRESI & YOO, *supra*, at 30–36 (arguing that 220 years of practice establishes such a power).

⁵⁵ In his concurring opinion in *Whitman*, Justice Stevens said that he agreed with Justice Scalia that the Clean Air Act (CAA) had constitutionally delegated the power to promulgate National Ambient Air Quality Standards (NAAQS). 531 U.S. at 487 (Stevens, J., concurring in part and concurring in the judgment). However, Justice Stevens noted that “[i]f the NAAQS that the EPA promulgated had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of ‘legislative power.’” *Id.* at 489. But, as Justice Thomas pointed out in his own concurrence in *Whitman*, Justice Scalia’s opinion in that case held that the CAA “[did] not delegate legislative power to the EPA.” *Id.* at 486 (majority opinion). Justice Scalia maintained that the CAA had delegated “decisionmaking authority” to the EPA but not legislative power. *Id.* at 472. Under Justice Stevens’s logic, Congress may delegate legislative power to executive agencies, just not too much. See, e.g., Calabresi, *supra* note 7, at 85–86 (arguing that the *Clinton v. City of New York* opinion, which Justice Stevens wrote, subtly endorses the nondelegation doctrine). Under Justice Scalia’s logic, Congress may delegate decisionmaking authority, but not legislative power, to executive agencies. Justice Scalia explains this in his dissent in *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting). Both Justices agreed that there are some powers which Congress may choose either to exercise for itself or to delegate to the Executive Branch. Whenever Congress delegates too much of this power—as it often does—executive officers become lawmakers. See Calabresi, *supra* note 7, at 85–86. While the precise extent of this practice in the present is impossible to quantify, there can be little doubt that there are at the very least some executive agencies that currently hold unconstitutional legislative power. The power

routinely delegates broad lawmaking power to presidential-Executive-Branch subordinates and sometimes to the President himself.⁵⁶ Congress especially likes to delegate lawmaking power to officials in so-called independent agencies which it can control through the congressional oversight process⁵⁷ or, alternatively, to legislative courts.⁵⁸ When Congress

of the Federal Communications Commission to regulate broadcasting in the public interest is a case in point. *See, e.g.*, 47 U.S.C. §§ 303(g), 307, 309, 310 (2006). The Act was upheld as constitutional by the Supreme Court in *National Broadcasting Co. v. United States*, 319 U.S. 190, 25–26 (1943).

⁵⁶ In the past, Congress has delegated broad authority to the President in both the foreign and domestic affairs areas, as the cases discussed below indicate. First, in *Field v. Clark*, the Court upheld a statute giving the President the power to levy predetermined duties or taxes based on his own determinations of whether trade policies between the United States and its trade partners were “reciprocally unequal and unreasonable.” 143 U.S. 649, 680 (1892) (quoting McKinley Tariff Act, 26 Stat. 567, 612 (1890)). Justice Harlan upheld the delegation, arguing that “it is often desirable, if not essential, for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments . . . [for Congress] to invest the President with large discretion in matters . . . relating to trade and commerce with other nations.” *Id.* at 691. Second, in *United States v. Curtiss-Wright Export Corp.*, the Court upheld the power of the President to issue a proclamation pursuant to a congressional statute that expressly authorized the President to prohibit the sale of weapons if he felt that such action would “contribute to the reestablishment of peace.” 299 U.S. 304, 312 (1936) (quoting Joint Resolution of May 28, 1934, 48 Stat. 811). Justice Sutherland wrote that “congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” *Id.* at 320.

While Congress has not been shy about delegating similar authority to the President in the domestic affairs area, the Supreme Court has not given Congress the same level of deference with respect to domestic affairs delegations as it has given with respect to foreign affairs delegations. In *A.L.A. Schechter Poultry Corp. v. United States*, Chief Justice Hughes, writing for the Court, struck down a statute that would have empowered the President to promulgate “codes of fair competition” for domestic industries. 295 U.S. 495, 516 (1935). Chief Justice Hughes reasoned that the President needed merely a “statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws . . . in order to put into operation a legislative code.” *Id.* at 538. That same year, Chief Justice Hughes also decided *Panama Refining Co. v. Ryan*, again ruling that Congress had not placed adequate limits upon a delegation of power to the President. 293 U.S. 388, 430 (1935). The statute in dispute authorized the President to issue executive orders prohibiting “the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation.” *Id.* at 406 (quoting National Industrial Recovery Act, § 9(c), 48 Stat. 195, 200 (1933) (internal quotation marks omitted)). Chief Justice Hughes reasoned that the statute gave “the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.” *Id.* at 415. Chief Justice Hughes acknowledged that “legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly,” but ultimately concluded that this “cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.” *Id.* at 421. As mentioned above, the Court struck down an attempt by Congress to delegate to the President sweeping impoundment powers in *Clinton v. City of New York*, 524 U.S. at 421.

⁵⁷ Congress has used unconstitutional restrictions on the removal power to bring administrative agencies under its control. Under the for-cause removal requirements upheld in *Humphrey's Executor v. United States*, the President is often unable to remove executive officers for reasons related to policy. 295 U.S. 602 (1935). When an executive officer meets the requirements of the for-cause removal requirements in *Humphrey's Executor*—“inefficiency, neglect of duty, or malfeasance in office”—

Congress and the President can both agree that the officer needs to be removed. *Id.* at 620 (quoting Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (internal quotation mark omitted)). This means that the President can never really remove an executive officer subject to these types of for-cause removal requirements *on his own*. See generally CALABRESI & YOO, *supra* note 54, at 417–31 (arguing that the President has never acquiesced in the constitutionality of such limits on the removal power). As a result, the President has no meaningful influence over—and more importantly, no meaningful accountability for—the policies implemented by his subordinates. See *Morrison v. Olson*, 487 U.S. 654, 729–31 (1988) (Scalia, J., dissenting).

The question of statutory restrictions on the removal power first came before the court in *Shurtleff v. United States*, 189 U.S. 311 (1903). Congress had created an “office of general appraiser of merchandise,” the holder of which “may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 313 (quoting Customs Administrative Act, ch. 407, § 12, 26 Stat. 131, 136 (1890)). The general appraiser contended that this statutory language precluded the President from removing him from office for reasons beyond those expressly stated. *Id.* at 315–16. Justice Peckham ruled that the President could remove the general appraiser for reasons not written into the statute, but noted that the general appraiser “is entitled to notice and a hearing” when the President seeks to remove him for the causes listed. *Id.* at 314. Justice Peckham reasoned that construing the statute to preclude the President from removing the general appraiser for causes beyond those in the statute would have the bizarre effect of giving the general appraiser life tenure. *Id.* at 316. The for-cause removal clause in *Shurtleff* gave an executive officer the opportunity to defend himself against allegations of “inefficiency, neglect of duty or malfeasance in office,” but it in no way restricted the power of the President to remove executive officers. *Id.* at 317.

In *Humphrey’s Executor*, the Court ruled that the inclusion of term limits in a statute that contained the exact same for-cause removal language as that analyzed in *Shurtleff* precluded the President from removing commissioners of the Federal Trade Commission (FTC) because “the fixing of a definite term subject to removal for cause . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause.” *Humphrey’s Executor*, 295 U.S. at 623. Justice Sutherland denied that the FTC was part of the Executive Branch, writing that the court instead faced “the serious question whether . . . members of these quasi-legislative and quasi-judicial bodies . . . continue in office only at the pleasure of the President.” *Id.* at 629. Justice Sutherland even supported the notion advanced by Congress that the FTC should be “independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.” *Id.* at 625–26. This similarity to Article III judges belies Congress’s intent to give broad judicial powers to administrative agencies.

The Court continued its narrowing of presidential removal power in *Morrison v. Olson*, where Chief Justice William Rehnquist ruled that Congress could create an office of an independent prosecutor—removable only by the Attorney General—to investigate certain members of the Executive Branch. 487 U.S. 654, 660–63 (1988). In his dissent, Justice Scalia pointed out the flaw in Chief Justice Rehnquist’s assertion that for-cause removal requirements ensured that the independent prosecutor would be under the control of the Executive Branch. *Id.* at 706 (Scalia, J., dissenting). Justice Scalia explained that “[w]hat we in *Humphrey’s Executor* found to be a means of eliminating Presidential control, the Court today considers the ‘most importan[t]’ means of assuring Presidential control.” *Id.* at 707 (alteration in original). Both *Morrison* and *Humphrey’s Executor* show that Congress implements strict for-cause removal requirements when it wishes to eliminate—not merely diminish—Presidential control over executive officers.

In the most recent Supreme Court opinion to address this issue, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, Chief Justice Roberts articulately explained why the establishment of independent agencies and offices poses a serious constitutional problem. 130 S. Ct. 3138, 3153–55 (2010). In *Humphrey’s Executor*, Justice Sutherland discussed the independence of the FTC from executive power but declined to discuss the enormous influence of Congress on so-called independent agencies. See 295 U.S. at 625–26. Justice Sutherland’s opinion gives the impression that the elimination of executive influence over those agencies somehow makes them politically independent,

does this, it effectively supersedes the separation of powers by concentrating legislative and executive power in a few officials who are under the control of a powerful committee or subcommittee.⁵⁹ It is telling that these committees and subcommittees are often captured by representatives or senators from districts or states which have a strong local interest in the federal policy in question. Thus, we find members of Congress from farm states on the Senate and House Agriculture Committees and members from Wall Street on the Finance or Ways and Means Committees.⁶⁰

Presidential power has also been augmented over the last 220 years by the claim first advanced by Alexander Hamilton during the Neutrality Controversy in 1793 that the President's "executive Power" under Article II of the Constitution has given him all of the foreign policy powers possessed by British Monarchs except for those expressly reserved to the Senate, the Congress, or both.⁶¹ This is a plausible claim given expectations about King George III's powers in 1787, but it suffers from the critical difficulty that the Constitution gives the President only the executive power and not the "royal" power as James Madison pointed out in response.⁶² As with unilateral congressional imprisonment for contempt, the British analogy is a

when the truth is that Congress simply gains exclusive control, usually without proper accountability. As Chief Justice Roberts explained in *Free Enterprise Fund*, "Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence." 130 S. Ct. at 3156. While Roberts drew the line at two levels of for-cause removal restrictions, this constitutional problem persists with only one level of restrictions.

⁵⁸ The Supreme Court first upheld the constitutionality of legislative courts in the territories in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 543 (1828), and it subsequently allowed them in cases involving public benefits. *See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855).

Legislative courts were further extended to apply when administrative agencies were acting as adjuncts to an Article III court in *Crowell v. Benson*, 285 U.S. 22, 56–57 (1932).

The appropriate extent of authority for administrative agencies and legislative courts is murky at best. As Gary Lawson observed, "the imposition of a civil penalty or fine is very hard to distinguish from the imposition of a criminal sentence (especially when the criminal sentence is itself a fine)." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247 (1994). Nevertheless, it is clear that many administrative agencies and legislative courts often exercise powers that, at the very least, approach those properly held by Article III judges.

⁵⁹ *See Calabresi, supra note 49, at 54–55.*

⁶⁰ Thus, for example, Senator Charles Schumer of New York sits on both the Senate Finance Committee and on the Senate Committee on Banking, Housing, and Urban Affairs. *Committee Assignments*, SENATOR CHARLES E. SCHUMER, <http://schumer.senate.gov/About%20Chuck/committeeassignments.htm> (last visited June 4, 2012). Both committees have a jurisdiction which is of real importance to New York State.

⁶¹ PAULSEN ET AL., *supra note 42, at 99–112* (2010) (quoting Alexander Hamilton, *Pacificus No. 1*, GAZETTE U.S. (Phila.), June 29, 1793).

⁶² *Id.* at 105–12 (quoting JAMES MADISON, *Letters of Helvidius No. 2* (Sept. 14, 1793); JAMES MADISON, *Letters of Helvidius No. 1* (Aug. 24, 1793)) (responding to Hamilton).

very imperfect one because Britain in 1787 had a Mixed Regime⁶³ while the first three Vesting Clauses of the U.S. Constitution spoke the language of a functional separation of powers. Hamilton's argument has mostly carried the day since 1793, but the fact remains that this is another respect in which the Enlightenment Project of creating a functional separation of powers has given way to a reversion to the Aristotelian Mixed Regime.

Finally, we find today that the federal judiciary is also performing functions that go well beyond the judicial function of deciding particular cases and controversies. The federal courts often do this when they exercise their power of judicial review in a way that is broader than is called for to decide the cases or controversies before them. This occurred most dramatically in recent years in *Roe v. Wade*, where the Court made up out of thin air an elaborate trimester system for determining the legality of abortion laws that had no roots in the Constitution.⁶⁴ As a result, the Supreme Court has come under sustained criticism for acting like an

⁶³ See *supra* note 25 and accompanying text.

⁶⁴ 410 U.S. 113 (1973). When the Supreme Court issues an opinion mandating measures beyond the minimum requirements of the Constitution, it usurps the policymaking powers of Congress and the President. If the Court crafts its own general remedy for a constitutional violation, rather than simply declaring that a specific law or policy is unconstitutional, it limits the range of options from which Congress and the President may choose their own solution. The authors would also like to note that the second and third authors of this Essay do not share the view that *Roe v. Wade* represents such a usurpation of congressional and executive powers.

An example of this misbehavior occurred in 1966 when the Supreme Court held in *Miranda v. Arizona* that prosecutors "may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444 (1966). Chief Justice Warren relied heavily upon the decision two years earlier in *Escobedo v. Illinois*, 378 U.S. 478 (1964), where the Supreme Court had ruled that statements made after a suspect had been denied requests to speak with an attorney were inadmissible. *Miranda*, 384 U.S. at 440. In *Escobedo*, however, the Court had declined to establish any further requirements for prosecutors. 378 U.S. at 492. In contrast, Chief Justice Warren's opinion in *Miranda* abandoned this approach in favor of establishing "concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 442. The result was a series of four warnings and a requirement of an affirmative waiver, without which statements made in custodial interrogation could not be used in court. *Id.* at 444. Though the Court's intention was to make matters clearer for law enforcement officials, Justice White correctly predicted that the holding left "open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation." *Id.* at 545 (White, J., dissenting).

Another similar example of the Supreme Court legislating from the bench came in *Roe v. Wade*, when the Court not only invalidated the abortion law in dispute, but also purported to establish elaborate legislative standards for the allowance of abortion laws in each of the three trimesters of pregnancy. 410 U.S. 113, 162–64 (1973). Much in the same way that Justice Warren prescribed a warning in *Miranda*, Justice Blackmun detailed what he felt were the legally "'compelling' point[s]" during each of the three trimesters of pregnancy and the legal scope of regulation permissible during each trimester. *Id.* at 162–63. Two decades later, the Court's holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey* modified *Roe* beyond recognition, saying that "[a] framework of this rigidity was unnecessary." 505 U.S. 833, 872 (1992).

oligarchy of the robe. Moreover the Supreme Court is not only a major policymaker in the United States today when it decides Fourteenth Amendment substantive due process and Bill of Rights cases, but it is also the author of many federal common law rules and of the Federal Rules of Evidence and of Civil and Criminal Procedure.⁶⁵ Some of the lower federal courts have even gotten knee-deep into the business of law execution when they were in effect administering prisons or school districts subject to bussing orders, although the Prison Reform Litigation Act has helped to limit that.⁶⁶

The Supreme Court has thus revealed itself over the last 220 years to be an institution that favors the rule of social elites. During the Founding era, the Supreme Court under Chief Justice John Marshall favored the Federalist elite.⁶⁷ During the pre-Civil War era, the Supreme Court under Chief Justice Roger Taney favored the slave-holding elite.⁶⁸ During the Lochner era, the Supreme Court favored business elites.⁶⁹ And, most recently, during the modern era the Supreme Court has favored Harvard and Yale Law School cultural elites, who are liberal on social issues.⁷⁰ It is striking in this respect that all nine of the current Supreme Court Justices went to Harvard or Yale for some portion of their legal training. As is the case with Congress and the President, our actual practice over the last 220 years is one of Mixed Regime triumph. The Supreme Court and the federal judiciary confirmed by the Senate have come to replace the Privy Council, the Court of Star Chamber, and the House of Lords as the oligarchic or aristocratic component of the U.S. Mixed Regime. The Senate's oligarchic tendencies, in turn, are augmented by a filibuster rule under which nothing of importance can be done unless one can get sixty out of one hundred votes. This filibuster rule is constitutionally problematic.⁷¹

⁶⁵ The Federal Rules of Civil Procedure and the Rules Enabling Act are cases in point. 28 U.S.C. § 2072 (2006).

⁶⁶ Pub L. No. 104-134, 110 Stat. 1321 (1996) (codified at 42 U.S.C. § 1997e (2006)). See also, for example, the litigation that culminated in the Supreme Court saying in *Missouri v. Jenkins*, 515 U.S. 70, 125–26 (1995), that under some circumstances judges can effectively order a tax increase.

⁶⁷ See, e.g., *Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (broadly construing the Contracts Clause to protect elites at the state level); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (same).

⁶⁸ See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding ludicrously that free slaves could not become citizens of the United States and striking down the Missouri Compromise as unconstitutional); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (broadly construing the federal power to recover alleged fugitive slaves).

⁶⁹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding a federal law outlawing child labor unconstitutional); *Lochner v. New York*, 198 U.S. 45 (1905) (holding a sixty-hour limit on a workweek unconstitutional).

⁷⁰ *Roe v. Wade*, 410 U.S. 113 (1973) (extending the right to privacy to include a right to an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a right to privacy in the penumbras and emanations of the Constitution).

⁷¹ PAULSEN ET AL., *supra* note 42, at 283–84 (citing *Judicial Nominations, Filibusters, and the*

In our view, the Constitution's grant of only the "judicial" power to the federal courts ought to preclude those courts from making law, as occurred in *Roe v. Wade*. The Supreme Court's oligarchic rule exemplified in *Roe v. Wade* is, in our opinion, an improper reversion to the Mixed Regime antecedent.⁷² The current Supreme Court wields the oligarchic powers of the Privy Council, the Court of Star Chamber, and the House of Lords. This is improper in a true separation of powers regime.

The answer to our second question, then, is that over the last two centuries all three branches of the federal government have strayed markedly from a pure model of the functional separation of powers. The President, the Senate, the Supreme Court, and the House of Representatives are separate institutions from one another but they all exercise a blend of what Montesquieu would have called legislative, executive, and judicial power.

III. SUGGESTED SEPARATION OF POWERS REFORMS

This leads to our third and final question, which is what should we do today, if anything, to rectify the erosion of the functional separation of powers principles described above in Part II? Does the last 220 years of American constitutional history imply that a pure "functional" separation of powers is impossible to maintain? What should we make of the fact that the United States has reverted away from a functional separation of powers and toward a democratized version of the English Mixed Regime? How have Justice Stevens's opinions in *Chevron* and *Clinton* affected the erosion in the functional separation of powers principles that we have discussed? We will comment here not only on Justice Stevens's ideas but also on a few reform ideas that are relevant to each of three branches of the federal government.

With respect to Congress, there is a huge problem, in our opinion, with Congress delegating too much legislative power to the President and to executive branch agencies. Justice Stevens's opinion in the *Chevron* case worked to discourage unconstitutional delegations of power by putting Congress on notice that, if it delegated power, its institutional rival, the President, would be empowered and not the congressional oversight committees and subcommittees.⁷³ Post-*Chevron* case law also made it clear that the federal courts would not abdicate their rightful power of judicial

Constitution: When a Majority Is Denied Its Right to Consent: Hearing Before the Subcomm. on the Const., Civil Rights and Property Rights of the S. Comm. on the Judiciary, 108th Cong. 32–46 (2003) (statement of Steven G. Calabresi, Professor of Law, Northwestern University School of Law)).

⁷² As mentioned *supra* note 64, the second and third authors of this Essay do not share this view.

⁷³ Justice Scalia has made this point many times in remarks at Federalist Society conferences, including most recently at a conference on the separation of powers which Professor Calabresi attended on September 1 and 2. Justice Antonin Scalia, Remarks at the Federalist Society's 2011 Separation of Powers CLE Course (Sept. 1–2, 2011).

review by deferring absolutely to agencies that were being micromanaged in the oversight process.⁷⁴ Finally, Justice Stevens's opinion for the Court in *Clinton v. City of New York* explicitly prevented Congress from delegating part of its Power of the Purse to the President.⁷⁵ This case also therefore addressed the danger of the President becoming too powerful relative to Congress.⁷⁶

We think Justice Stevens's opinions in *Chevron* and its progeny and in *Clinton v. City of New York* are all helpful, but we think that real reform of the pathologies caused by the congressional committee system and its involvement in oversight can only come from Congress itself. Congress needs to take action to prevent its members from gravitating to, and staying for decades on, committees that are uniquely important to their home states. Congress should assign its members to committees randomly, the way federal courts of appeals panels are assigned their cases, and Congress should then adopt strict term limits for the number of years a member of Congress can serve on any one committee. Like Justice Stevens, we are skeptical of term limits on members of Congress,⁷⁷ but we are in favor of term-limiting their service on congressional committees. We think it was unhealthy and corrupting to allow recent former Senators like Robert Byrd of West Virginia and Ted Stevens of Alaska to serve for decades on the Senate Appropriations Committee.

We also think Congress should consider adopting a general sunset law that sunsets all federal statutes after a period of years except for those of quasi-constitutional status like the Civil Rights Act of 1964 or the Voting Rights Act of 1965. Thomas Jefferson famously thought the Constitution should sunset every twenty years so the living would not be governed by the dead.⁷⁸ We disagree with Jefferson on that, as did our personal hero

⁷⁴ The Court's holdings in *Industrial Union Department v. American Petroleum Institute (Benzene Case)*, 448 U.S. 607 (1980), and in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), make it clear that *Chevron* deference is not absolute. In order to reconcile the principle behind *Chevron*—that the Court should “respect legitimate policy choices” made by agency experts, *Chevron* U.S.A. Inc. v. NRDC, 467 U.S. 837, 866 (1984)—with the holding in the *Benzene Case*, Justice Stevens emphasized that “we [the Court] have neither made any factual determinations of our own, nor have we rejected any factual findings made by the Secretary.” *Benzene Case*, 448 U.S. at 659. Rather, Justice Stevens felt that the Secretary of Labor had ignored a statutory requirement. *Id.* Similarly, Justice Scalia's opinion in *Whitman* rested upon a finding that the EPA had interpreted “the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” 531 U.S. at 485. These opinions allow Congress to delegate power to executive agencies without the risk that those agencies will be able to use that power in a manner inconsistent with relevant statutes.

⁷⁵ 524 U.S. 417, 448–49 (1998); *see also* Calabresi, *supra* note 7, at 85 (discussing the importance of the *Clinton* decision as a separation of powers decision).

⁷⁶ *See Clinton*, 524 U.S. at 446–47.

⁷⁷ *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Stevens, J.) (striking down state-imposed term limits on federal members of Congress).

⁷⁸ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES 3, 9–10 (Paul Leicester Ford ed., 1904); Letter from Thomas Jefferson

James Madison,⁷⁹ but we do think that most federal statutes ought to sunset every twenty years. If a law is good and is working well, Congress and the President will reenact it. That is the way our democracy ought to work.⁸⁰

With respect to the Executive Branch, twenty-first-century Americans need to make sure that federal agencies are not under the thumb of congressional oversight and appropriations committees that are trying to bend the execution of federal law in some way that improperly benefits their home state or district. There are two solutions to this problem: the unitary Executive and judicial review. The unitary Executive puts the President, who is elected nationwide, in charge of law execution instead of a Senator or Representative, who represents only a state or a district.⁸¹ This counteracts interest group capture of agencies by the congressional committees. Judicial review, without too much *Chevron* deference, also ameliorates the problem of interest group capture of congressional committees and of the agencies they regulate. Finally, twenty-first-century Americans should demand that the administrative law judges in the various independent and executive branch agencies be given life tenure so that they are employed under Article III and not under Article II. The notion of allowing agencies both to prosecute and to adjudicate the same case ought to be clearly and decisively rejected.

Finally, as to the federal courts, twenty-first-century Americans need narrow, more fact-specific decisions of the kind the Justices on the Roberts Court now seem to be rendering.⁸² The Court needs to reject the lawmaking judicial activism of cases like *Roe v. Wade*.⁸³ We also think Congress ought to remove the Supreme Court from its current role as the promulgator of the

to William Stephens Smith (Nov. 13, 1787), in 5 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, *supra*, at 360, 362.

⁷⁹ Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 5 THE WRITINGS OF JAMES MADISON, 1787–1790, at 437, 437 n.1 (Gaillard Hunt ed., 1904).

⁸⁰ There are at least two counterarguments to this proposal worth mentioning. First, it could be argued that Congress has so much to do already that requiring it to revisit every section in the U.S. Code every twenty years would be too time-consuming to be practical. Such a demand would risk turning an opportunity for retrospection into an annual pro forma vote to continue the laws as written. Second, it could also be argued that each vote in Congress is an opportunity for members of Congress to grandstand and raise funds from affected groups. The ability to hold hostage long-settled law for purposes of fundraising from affected groups may risk increasing, rather than decreasing, public perceptions of corruption. Any sunset proposal would, of course, have to be carefully drafted and may be ineffective if not accompanied by other anticorruption reforms.

⁸¹ Calabresi, *supra* note 47, at 59; Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1700 (2009).

⁸² There are signs that the Court has abandoned the activist approach employed in *Miranda v. Arizona* and *Roe v. Wade*. Justice Kennedy's opinions in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), like *Miranda* and *Roe*, dealt with controversial questions concerning individual rights; however, Justice Kennedy wrote judicially restrained opinions for the Court.

⁸³ As mentioned *supra* note 64, the second and third authors of this Essay do not share this view.

Federal Rules of Evidence and of Civil and Criminal Procedure.⁸⁴ “It is emphatically the province and duty of the judicial department to say what the law is,” not what it should be.⁸⁵ The Supreme Court needs to get out of the business of lawmaking. Twenty-first-century America does not want or deserve to have a life-tenured Privy Council or Court of Star Chamber or House of Lords.

CONCLUSION

Why is the separation of powers so important and so worth fighting for? Because:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.⁸⁶

Our Madisonian system of checks and balances has its origins in the Aristotelian idea of a Mixed Regime whereby the King, the Lords, and the Commons all checked and balanced one another. The Framers of the U.S. Constitution replaced the elitist and oligarchic Mixed Regime with a democracy and a move toward a pure functional separation of powers. We need to breathe new life into our functional system of a separation of powers. To do that, it helps to see how different in theory and in practice the British Constitution of 1787 was as compared to our own Constitution. The insight that links together the U.S. system of separation of powers and the seventeenth- and eighteenth-century British Mixed Regime is a healthy skepticism toward great concentrations of power. This insight is correct, which is part of the reason why James Madison’s *The Federalist No. 51* has become a canonical text.

What remains to be seen, however, is whether the U.S. system of a functional separation of powers can be salvaged from the wreck of the British Mixed Regime. For better or worse, our Constitution has actually operated in practice over the last 220 years as a democratized version of the

⁸⁴ Justice Hugo Black objected to the adoption by the Supreme Court of the Federal Rules of Civil Procedure on separation of powers grounds. *See* Order of Jan. 21, 1963, 374 U.S. 865, 866 (1963).

⁸⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁸⁶ THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

Mixed Regime rather than as a functional separation of powers. The idea of the Mixed Regime is a whole lot older than the idea of the separation of powers, and it may well be more enduring. The writings of Aristotle, Polybius, Cicero, St. Thomas Aquinas, and Machiavelli all illustrate this point. The way a regime works, in practice, may show the true nature of the regime. It may be the case that the U.S. Constitution inadvertently gave rise to a democratized version of the Mixed Regime. If so, then that is an error which our generation of Americans needs to correct.

We do not think that the constitutional status quo with respect to the death of the separation of powers is acceptable. We think the United States badly needs a rebirth of the Enlightenment idea of the separation of powers through the adoption of the reforms proposed in Part III above. Just as the Founding Fathers revolted against hereditary Kings and Lords, so too must present-day Americans revolt against rule by congressional committees, by independent agencies, and by judges. Americans did not fight and die in the Revolutionary War to be governed by an oligarchy. We need to revive the functional separation of powers.

Justice John Paul Stevens understood the central importance of the separation of powers during his thirty-five-year tenure on the U.S. Supreme Court. Thanks in part to Justice Stevens's herculean efforts in the *Chevron* case and its aftermath, and in *Clinton v. City of New York*, and in *U.S. Term Limits, Inc. v. Thornton*,⁸⁷ the functional separation of powers in our government is somewhat stronger today than it was when he arrived on the Supreme Court in 1975. The decisions in *Clinton v. City of New York* and in *U.S. Term Limits* were essential to maintaining congressional power as a coequal branch to the presidency. Justice Stevens has left us a truly heroic legacy.

⁸⁷ 514 U.S. 779 (1995). Congress would have lost substantial institutional power relative to the President and the states had the Supreme Court failed to strike down as unconstitutional state-imposed term limits on service in the Senate and the House of Representatives. Justice Stevens's 5–4 opinion for the Court in *U.S. Term Limits* was thus of foundational importance both to the separation of powers and to federalism.

