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Gerard V. Bradley

Notre Dame Law School, gerard.v.bradley.16@nd.edu

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LAW ENFORCEMENT AND THE SEPARATION OF POWERS

Gerard V. Bradley*

Among the many parallels between the Watergate and Contragate scandals is the central role played in each by special prosecutors. Archibald Cox and then Leon Jaworski investigated the Watergate burglary and resulting cover-up by Nixon Administration officials, and precipitated a presidential resignation in the process. Ronald Reagan has escaped Nixonian obloquy so far, but the Contragate hearings' star witness, Oliver North, is the subject of special prosecutor scrutiny, and eventual prosecution of North might lead to subpoena of presidential communications. A "smoking gun" memo or tape may yet emerge.

These surface affinities bear a casual relation. The Watergate experience—in which executive officials in charge of criminal prosecution are themselves the criminals—showed the need for a prosecution capability outside the Executive Branch. Congress responded with the independent counsel provisions of the Ethics-in-Government Act,¹ and the criminal investigation of North is pursuant to these provisions. Given Attorney General Meese's uncertain efforts to ferret out Contragate wrongdoing, North otherwise might have escaped the demands of criminal justice. His predicament, then, is truly a fruit of Watergate. But is criminal prosecution an "executive" task that can be divested from the Executive, especially against presidential wishes? Constitutional law giant Paul Freund addressed the question at a Senate Judiciary Committee Hearing soon after the October, 1973 "Saturday Night Massacre":²

* Associate Professor of Law, University of Illinois College of Law. Henry Monaghan of Columbia Law School and faculty colleagues Steve Ross, Don Dripps, Rick Marcus and Tom Mengler all read the Article in draft and each provided much appreciated, insightful criticisms. I also benefited from these and other comments by colleagues at a College of Law faculty discussion of this paper. Lynn Dombrowski, College of Law Class of 1986, provided invaluable research assistance, especially on the current law of prosecutorial discretion discussed in Part IV. Anthony Hopp, Class of 1988, did a great job on final preparation of the manuscript for publication. A comment on *Morrison v. Olson*, the independent counsel case decided by the United States Supreme Court in June, 1988, concludes the Article. While the practical result in that case represents some "relaxation" of separated powers, any careful reading of it reveals the Court's continuing reliance upon the principles critiqued here.

1. 28 U.S.C. §§ 591-598 (1982).

2. The "Saturday Night Massacre" occurred on October 20, 1973, and resulted in the firing of Special Prosecutor Archibald Cox and the resignations of Attorney General Elliott Richardson and his chief deputy, William Ruckelshaus. President Nixon instigated the crisis by directing Richardson to fire Cox, who then was investigating the Watergate burglary which, we now know, Nixon helped cover up. Richardson and Ruckelshaus resigned rather than implement the presidential di-

SENATOR KENNEDY. Some members of this committee [primarily Nebraska Senator Roman Hruska] and others have asserted that prosecution is exclusively an executive function. May I have your view?

MR. FREUND. Senator, with all respect to those that have raised this, it seems to me a red herring. One can readily admit that prosecution is an executive function in a general sense, in the same sense that marshals of the court perform executive functions or that supervisors of elections perform executive functions. Surely they are not legislative or judicial. But as an old teacher of mine used to say, granted that little ray of sunshine, what hay do you make? What conclusion follows?³

History attests that even Freund could not right the analytical derailment Hruska engineered. The independent counsel bill became law, but its constitutional validity remains in doubt. The challenges of both North⁴ and Michael Deaver⁵ to their impending prosecutions are rooted in precisely that characterization of prosecution as an "exclusively executive function" which must be performed by those serving at presidential pleasure. The Reagan Administration likewise doubts the law's constitutionality, even as it has been obliged to defend it against North and Deaver. Before the recent rash of special prosecutor appointments the Administration promised a judicial test at the first convenient opportunity.⁶ The President now says he will veto congressional renewal of the law.⁷

That much is known to anyone informed by the popular media. Fewer know that the Administration also claims constitutional authority to decline enforcement, *in toto*, of a law whose constitutionality it questions, even after a judicial declaration of constitutional validity.⁸ In one case, the President ordered executive agencies to ignore the mandatory stay provisions in the Competition in Contracting Act (CICA), and intimated that the Executive would ignore court decisions sustaining the law.⁹ The Administration has expanded a Carter-era practice of declining to defend statutes under constitutional attack, and has increasingly challenged statutes signed by the President as violative of separation of powers.¹⁰ The Gramm-Rudman Balanced

rective. Then Solicitor General Robert Bork finally agreed to carry out Nixon's order. See N.Y. Times, Oct. 21, 1973, at 1, col. 8.

3. *Hearings Before the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. 370 (1973)* [hereinafter *Hearings*].

4. *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987). See LEGAL TIMES, Mar. 2, 1987, at 10-11, for a full copy of North's complaint.

5. *Deaver v. Seymour*, 656 F. Supp. 900 (D.D.C. 1987); see also N.Y. Times, Feb. 26, 1987, at 1, col. 2.

6. Letter from William French Smith to Michael Davidson (Apr. 17, 1987), cited in Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970 n.1 (1983).

7. N.Y. Times, June 17, 1987, at 1, col. 4.

8. *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875, 889 (3d Cir. 1986) (The Justice Department attempted to justify the President's order to all executive agencies to ignore the stay provisions in CICA by claiming that, in the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the law requires him not to observe a law which is in conflict with the Constitution.). See also Waas & Toobin, *Meese's Power Grab*, NEW REPUBLIC, May 19, 1986, at 15-16.

9. *Ameron*, 787 F.2d at 889.

10. See Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970 (1983).

Budget Act is just the most celebrated instance of this practice.¹¹

It is obvious that Hruska's point has mushroomed, and not without design. North's attorneys pointedly added "investigation" to the list of exclusive executive functions.¹² The Reagan Administration goes further, all the way to a constitutional theory of "law enforcement," which Attorney General Meese regards as an indivisibly "executive function."¹³ With specific reference to independent agencies, Meese proclaims that "[i]n the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government."¹⁴ The Attorney General makes plenty of hay with that shaft of sunlight. The President heads the executive branch and is the sole designee of article II "executive power." Therefore, *he* enjoys a broad, constitutionally-grounded discretion over how the law is enforced.

In December, 1982, the Administration made clear that neither Congress nor the courts may intrude on this presidential prerogative. After the House cited EPA administrator Anne Gorsuch for contempt of Congress when she ignored a congressional subpoena pursuant to presidential directions, the Justice Department declined to take the case to the grand jury, as the United States Code explicitly required.¹⁵ The Department's actions confirm the otherwise easily deducible conclusion to the Administration's argument: Article II invests the President with an irreducible discretion over not only how, but whether, the law shall be enforced.

The Supreme Court has followed suit. A widely-noted passage in *United States v. Nixon*¹⁶ said that the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." More recently, and reflective of the blossoming of prosecutorial discretion into a broader "enforcement" prerogative, the Court in *Allen v. Wright*¹⁷ denied standing to plaintiffs challenging IRS "enforcement guidelines": "The Constitution, after all, assigns to the Executive Branch and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'"¹⁸ That "structural principle,"¹⁹ the Court reasoned, precluded judicial entry into a dispute over "enforcement" so lax that it effectively repealed the statutory ban on tax breaks for racially discriminatory private schools. The Supreme Court's invalidation of Gramm-Rudman, in *Bowsher v. Synar*,²⁰

11. See *Bowsher v. Synar*, 478 U.S. 714 (1986). One result of this executive tendency has been retention of counsel by the Houses of Congress to defend statutes against Department of Justice attack.

12. LEGAL TIMES, *supra* note 4, at 10.

13. See *A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B8, col. 3, quoted in *Ameron*, 787 F.2d at 887 n.6 [hereinafter *A Question of Power*].

14. *Id.*

15. Instead the Department sued the House for a declaratory judgment in favor of executive privilege to withhold "sensitive law enforcement information" from a congressional oversight committee. See *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983). See generally Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333 (1983).

16. 418 U.S. 683, 693 (1974).

17. 468 U.S. 737 (1984).

18. *Allen*, 468 U.S. at 761 (quoting U.S. CONST. art. II, § 3).

19. *Id.*

20. 478 U.S. 714 (1986).

climaxed these developments, and it did so blithely astride separation of powers thinking almost indistinguishable from Meese's.

The juncture of these trends alone portends a dramatic shift in responsibility for the effective, practical shape of the federal legal order. No matter that the Justices allow that separation of powers is more an "intuition" than "a rigorous and explicit theory."²¹ Even if only a set of blurred guidelines, the *Allen, Synar*, and *North/Deaver*²² litigation show its practical import. And the FTC and SEC have already been hauled before courts by well-heeled enforcement targets armed with these intuitions.²³ The remaining alphabet agencies cannot be far behind.

The future looks even more bleak when one realizes that the rise of our administrative state has created a palpable constitutional tension between the notion of separate powers and the structure of modern federal law enforcement. As then Judge Scalia remarked in the *Gramm-Rudman* case: "It has . . . always been difficult to reconcile [a] 'headless fourth branch' with a constitutional text and tradition establishing three branches of government"²⁴ Meese warns that we cannot keep the constitutional tigers on their chairs with weasel-words any longer. "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that."²⁵

Synar is the dawn of that long-postponed day of reckoning. It attempts to reconnect constitutional theory and governmental practice at their widest chasm: law "execution" defined to include the characteristic activities of the administrative state. *Synar* uses, or rather distorts, separation of powers analysis to accomplish this reconnection. This Article critically examines the effort to legitimate the vast bulk of contemporary government's coercive activities, treating *Synar's* encompassing vision of separated powers as the focal point. It concludes that separation of powers thinking cannot reunite theory and practice. Law enforcement just is not a peculiarly article II activity requiring presidential direction. Rather, Freund set us on the right track. Call an activity "executive" (or "enforcement") if you like; it does not matter because, *pace* Edwin Meese, the label implies no theoretical commitments. Law enforcement is a governmental activity dispersed across the branches with effective congressional direction.

Justifications for the claimed article II enforcement discretion fall along two distinguishable but overlapping avenues and are an engaging mix of structural and textual reasoning. They overlap in that the operative phrase in each is "execution" of law; they are separable in that the phrase is used in different fields of reasoning, thus implicating different conceptions of truth or verification. The structural or theoretical argument critiqued in the first three parts stems basically from the denotation of a branch as "executive" in

21. See *Allen*, 468 U.S. at 750 (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (1983)(Bork, J., concurring)).

22. See *supra* notes 4, 5.

23. See *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747 (D.D.C. 1986); see also *SEC v. Blinder, Robinson & Co.*, 681 F. Supp. 1 (D.D.C. 1987).

24. *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

25. *A Question of Power*, *supra* note 13.

a tripartite scheme of separated powers. It aspires to the truth of "coherence" in three senses corresponding to the three parts. Is the separation of powers theory which contains and justifies the claimed enforcement prerogative an internally coherent one? Does the claimed discretion make sense, once it is extracted from the arguments and viewed as a free standing system of thought? That is Part I. Part II asks, does it resonate or cohere with our Constitution? Even if coherent, the theoretical fuel of *Synar* and the Administration's thinking may be unconstitutional—simply not what the Constitution actually embodies. Does the same thinking nevertheless harmonize with the way we presently enforce the law? That is Part III, which further wonders whether the questioned separation of powers thinking possesses the virtue of making sense of governmental practice—a substantial achievement since the administrative state has confounded most attempts at schematization.

Dramatically contrasting is the clause-based reasoning examined in Part IV. The referent there is the text of article II, specifically, the presidential duty to "take Care that the Laws be faithfully executed."²⁶ The value of this reasoning in justifying the Administration's position depends upon satisfaction of an "ontological" or "correspondence" notion of truth. Does the noted executive prerogative "correspond" to some sense of the "take care" clause, as distilled from recognized aids to textual interpretation, especially the tools of historical recovery? In Part IV, and throughout the Article, the domestic activity of the President and his subordinates is discussed. Neither Meese nor *Synar* defend what irreducible discretion the President may have over foreign policy, and I do not examine the issue.

I. THE UNDERLYING THEORY AND ITS INTERNAL COHERENCE

"[I]n the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the law requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land."²⁷ That common sense Justice Department stance in the CICA litigation is, with one critical distinction, a good overture to Part I. By untangling its various connotations one can identify what precisely is discussed in this part. There is certainly a history, and some plausibility to the idea of "autonomous" constitutional interpretation by each of the "coordinate" branches of government. *Marbury v. Madison*²⁸ established it for the judiciary, and President Jefferson was prepared to claim it for the Executive, had the now legendary mandamus actually issued in that case. That is, Jefferson intended to ignore the writ.²⁹ Of course the President is obliged to uphold the Constitution; his oath prescribes no less.³⁰ It also may be true that *Marbury* would sustain presidential allegiance to the Constitution over a conflicting statutory command, assuming the conflict was clear. (*Marbury's* facts

26. U.S. CONST. art. II, § 3.

27. *Ameron*, 787 F.2d at 889 (citations omitted).

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

29. See Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804) (quoted in G. GUNTHER, CONSTITUTIONAL LAW 22 (11th ed. 1985)).

30. See U.S. CONST. art II, § 1, cl. 7.

faced off the Executive and Judiciary only). More troubling the court in *Ameron Inc. v. United States Army Corps of Engineers* was "[t]his claim of right for the President to *declare* statutes unconstitutional" and "to declare his refusal to execute them,"³¹ notwithstanding a contrary judicial declaration. But even this claim is distinguishable from this Article's focus, so long as the following caveat is kept in mind.³² Note first that the classic rationale for separated powers is to prevent "tyranny" by placing execution of the laws—the community's sword—in hands distinct and independent from those of the legislature's lawmaking power.³³ Otherwise, oppressive laws will be executed in an oppressive manner. Put differently, the expectation, or at least the hope, is to protect the community from bad governance with two bites at the apple of liberation—by just legislation in the first place or by executive refusal to aid and abet a tyrannical legislature.

The scenario such rationale contemplates, and the context in which it achieves maximum appeal, is where the Executive "doubts" the constitutionality of some provision and refuses to enforce it in order to protect individual liberty. *Marbury* gave a good example. Suppose Congress passed a law providing for the conviction of traitors on one witness's testimony.³⁴ Surely, Marshall reasoned, the judiciary was not bound to convict, and presumably the Executive acts responsibly in declining to prosecute. The example, indeed, possesses an artificial clarity, now, as in 1803. The harder question is what the Executive and the Judiciary should do where they "doubt" a statute which Congress reasonably supposed to be constitutionally valid. Also, reliance upon this artificially clear view of separated powers implies a rejection of the "supremacy" and "exclusivity" embellishments of *Marbury* in *Cooper v. Aaron*³⁵ and *United States v. Nixon*,³⁶ respectively.

The Justice Department is talking about something entirely different from these plausible renderings of an executive duty to follow the Constitution in derogation of statutory demands. In *Ameron*, the administration relied upon no particular constitutional provision at all, but sat firmly upon a separation of powers theory which it attributed to our Constitution in general.³⁷ Executive solicitude for Anne Gorsuch had nothing to do with her individual liberty but turned analytically upon the nature of the enforcement act itself, or "law execution." That is, her contumacious conduct was rooted in separation of powers thinking. Since the Executive enforced the law, "sensitive" enforcement information was concealable even from the Con-

31. 787 F.2d 875, 889 (3d Cir. 1986).

32. This is in addition to the presumed absence of contempt liability.

33. As John Locke explained:

And because it may be too great a temptation to human frailty apt to grasp at Power, for the same Persons, who have the Power of making Laws, to have also in their hands the Power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law; both in its making, and execution, to their own private advantage, contrary to the end of Society and Government.

Quoted in Sharp, *The Classical American Doctrine of the 'Separation of Powers'*, 2 U. CHI. L. REV. 385, 388 (1935).

34. *Marbury*, 5 U.S. (1 Cranch) at 179.

35. 358 U.S. 1, 18 (1958).

36. 418 U.S. 683, 703 (1974).

37. See generally *Ameron*, 787 F.2d at 887-90.

gress whose law it supposedly was enforcing. That same thinking justified Executive refusal to prosecute her. The proper comparison to *Marbury* treason example would be executive disdain for congressional direction to prosecute a traitor—where Congress supplied a battalion of witnesses to the treasonous act. Moreover, the refusal would be phrased “To Congress: It’s none of your business.” The double-dip here produces a twisted course of reasoning circulating about an undefended premise: The Executive’s view of its autonomy in the constitutional order gives rise to “doubts,” which the Executive’s view of its constitutional autonomy authorizes it to act upon. Whatever validity such a dizzying rationale possesses, it needs a distinctive theory of law enforcement and separated powers to get it going, one that produces the claimed article II shield against attempts to prescribe law enforcement. If the claim is more than rhetorical wrapping around a naked power grab, then that theory must be one justified by persuasive analysis drawing upon recognized constitutional source materials. That theory, and its “reasonableness,” are the questions this section addresses.

One readily observable glitch in expansive notions of executive autonomy is that they are marginally self-contradictory. At the edges, the claimed executive prerogative violates the separation of powers in a manner additional to that suggested by the *Marbury* passages in *Nixon*. Two textual reminders of the structural brakes on law enforcement, the Arrest³⁸ and Speech and Debate³⁹ Clauses, exemplify immunities otherwise inferable from the constitutional scheme.⁴⁰ The “Abscam” prosecutions⁴¹ of incumbent Congressmen best illustrate the inference. Courts reviewing Abscam convictions declined to especially safeguard Congressmen against criminal prosecution,⁴² but the seminal Second Circuit opinion recognized that special considerations *do* arise in such cases. The congressional defendants argued that without extraordinary judicially-enforced constraints, the Executive might compromise congressional independence by “political targeting” of disfavored legislators. The court thought the fears constitutionally cognizable, sufficient to justify, for instance, legislative exclusion of Congressmen from bribery proscriptions.⁴³ But the court refused to articulate that immunity or to impose a factual predicate for investigations of legislators higher than the fourth amendment normally required. Other courts have rejected pleas by indicted federal judges for absolute immunity from criminal prosecution⁴⁴ but at least one recognized that judicial independence from external pressures—that is, from executive enforcement action—would justify a limited immunity for judicial acts done in good faith.⁴⁵

These were hardly resounding victories for the individuals prosecuted, but they suggest a defect in the pristine separation of powers thinking behind

38. U.S. CONST. art. I, § 6, cl. 1.

39. *Id.*

40. *See* United States v. Myers, 635 F.2d 932, 937-38 (2d Cir. 1980).

41. *See* United States v. Myers, 692 F.2d 823 (2d Cir. 1982).

42. *Id.* at 835.

43. *Myers*, 635 F.2d at 939 (citing United States v. Brewster, 408 U.S. 501, 524 (1972)).

44. United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982).

45. *Hastings*, 681 F.2d at 711 n.17.

the Meese/*Synar* view of executive discretion. The requisite tripartite independence this thinking requires is, in fact, a limiting, as well as a liberating, principle. They think it is just the latter. Viewed from within one branch, say from inside the Executive, the Meese/*Synar* theory leads to constraint as well as to freedom. Note that the Abscam courts rejected the legislators' pleas only after satisfying themselves that the constitutionally-required independence was already secured, chiefly through the various articles I⁴⁶ and III⁴⁷ guarantees of independence, but also by the ordinary citizen's civil rights, the availability of entrapment as a defense, and extant immunity from civil damage actions. The Court in *United States v. Myers*⁴⁸ also relied on the additional protection against political targeting afforded by the first amendment. The opinions reasoned that the public interest in stamping out political corruption outweighed even these plausible claims of immunity. The courts were extremely reluctant to speculate in the absence of reliable textual guidance, to effectively place officials "above the law" due to fuzzy notions of structurally-required independence. Their extra-textual commitments placed great stock in the structural "balance" supplied by executive action, which embodied the "law" properly hovering "above" and, when necessary, "checking" the other branches.⁴⁹

Synar indicates a complete reordering of those priorities, and so the cases must now be rethought. In *Synar*, Solicitor General Fried told the Court that giving the Comptroller General—an officer at least theoretically removable by Congress—an "executive function" to perform violated the Constitution. "Executive functions may only be performed by officials serving at the pleasure of the President," he concluded.⁵⁰ The Court agreed that the "structure of the Constitution does not permit Congress to execute the laws;"⁵¹ indirect congressional "control"⁵² or "supervision"⁵³ over "execution of the laws" is similarly unconstitutional. Reserving power to dismiss the Comptroller General was inconsistent with the separation of powers. Indeed, "the power to remove" was akin to congressional participation in law "execution," and Congress "cannot grant to an officer under its control what it does not possess."⁵⁴ This uncrossable chasm between the legislative and executive provinces is clearly the opinion's central pronouncement. Save for the impeachment bridge specifically constructed by the Constitution, Congress cannot legitimately cross over to the Executive province. *Synar*'s controlling principle inevitably leads to that chasm. "The Framers provided a vigorous legislative branch and a separate and wholly independent executive branch, with each branch responsible ultimately to the people."⁵⁵ And not, most emphatically, to each other.

46. See *supra* notes 38-39 and accompanying text.

47. See U.S. CONST. art. III, § 1 (tenure and salary provisions).

48. 635 F.2d at 939.

49. See especially *Hastings*, 681 F.2d at 711.

50. See *Synar*, 54 U.S.L.W. 3709 (Apr. 29, 1986) (report of oral argument).

51. *Synar*, 478 U.S. at 726.

52. *Id.* at 727.

53. *Id.* at 722.

54. *Id.* at 726.

55. *Id.* at 722.

Synar stressed that the legislature and the Executive, at least, were directly accountable to the people if they neglected these interbranch checks. The "law" enforced by the Executive is no longer that brooding omnipresence in the sky. The populace is. The "checking" function of each branch over the others is equally diminished by the surprisingly crisp definition of constitutionally-assigned functions. Once Congress makes its legislative choices, its function ends. Congress may thereafter affect the legal order only by making new choices, by passing new laws.⁵⁶ Conversely, the Supreme Court already said in *INS v. Chadha*⁵⁷ that the presidential duty to "take care" refutes the idea that he is to be a "lawmaker." Having anchored separation-of-powers themes in not only mutual unaccountability but virtual isolation—that is, in insulation from interbranch static where core functions such as "lawmaking," "execution," or "adjudication" are carried on—the *Synar* court vastly inflated the values championed by the Abscam defendants and by the likes of Judges Claiborne and Hastings. In short, *Synar* takes that minimal increment of independence from executive interference recognized by those cases, but subordinates the controlling principle of American popular government.

The historical perspective provided by M.J.C. Vile's excellent, though neglected, treatise⁵⁸ permits us to see how closely *Synar's* principles resemble a theory of "pure" separation of powers. The "pure" form aspires to political liberty. To that end, it allocates all governmental power to one of three identified branches, and corresponding to each branch is an identifiable generic governmental function. Each must be confined to the exercise of its own function and not be allowed to encroach upon the functions of the other branches. Further, plural office holding is prohibited so that no single group of people can dominate the government. In that way, each branch operates independent of the others.⁵⁹

Additionally, the common resemblance of the *Synar* opinion and the Administration's constitutionalism to Jefferson's undefiled thinking⁶⁰ on separated powers is worth noting. His answer to the interbranch encroachment thought necessary to "check" the abuses latent in the pure system—especially the tendency towards legislative supremacy—was to seek restraints upon each branch from entirely outside the governmental apparatus. That is, in the people. "If all branches of government were equally responsible directly to the people, they [the branches] would at once be equally independent of each other and equally subordinate to the true sovereign power."⁶¹ The touchstone of constitutionality, Jefferson believed, was always the people, speaking through frequent elections. The ballot box is the vital check upon the therefore clearly distinguished, autonomous, tightly compartmentalized branches of government. The genius of separated pow-

56. *Id.*

57. 462 U.S. 919, 953 n.16 (1983) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) [hereinafter *Youngstown Steel*]).

58. M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

59. *See id.* at 13-18.

60. *Id.* at 163-67.

61. *Id.* at 165.

ers is thus preserved while its potential abuses are checked. In Jefferson's scheme, and particularly in *Synar's* vision, each branch is assigned a minimal "negative" checking authority over the others.

Jefferson was the most celebrated devotee of pure separation of powers, but its real American theoretician was John Taylor of Caroline County, Virginia, an unjustly forgotten, exceedingly impressive thinker.⁶² The "pure" scheme's swollen democratic tendencies clue us to the second "purity" of *Synar*, and to what makes that opinion fizz. Consider that the justificatory portion of the opinion opens with the declaration that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."⁶³ Less than four short paragraphs later, it concludes that the "Constitution does not contemplate" active congressional "supervision" of law execution, and, since the practical effect of legislative removal would be just this sort of supervision, it is unconstitutional.⁶⁴ What happens in between reveals how thoroughly *Synar's* premises add up to a "pure" theory of "pure" separation of powers.

Is *Synar* so ethereal? Yes, if you look carefully at its justificatory passages. The opinion recites the standard "preservation of liberty" rationale for separated powers, quoting specifically from *Youngstown Sheet and Tube Co. v. Sawyer*, that its purpose is to "diffus[e] power the better to secure liberty."⁶⁵ Then on to Montesquieu, via Justice Jackson through Madison's *The Federalist No. 47*: "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."⁶⁶ In the next paragraph the Justices evince what initially seems an uncertain grasp on theory. They appear to equate "checks and balances" with that vigorous separation. "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."⁶⁷ The two concepts seem to have become confused. As a term of constitutional art, "checks and balances" refers to interbranch interference and the *shared* exercise of legislative (the presidential veto) or executive (Senate participation in appointments) powers, in stark contrast to the Jeffersonian "wall of separation" between the branches. This shared exercise is how Madison, for instance, used the phrase in *The Federalist Papers*.⁶⁸

In reality, the confusion is nominal, for the opinion as a whole has firmly and lucidly gripped its theory. *Synar* knows what it is about. The reference to "checks and balances" actually confirms the Court's commitment to an unadulterated separation of powers. First, the location and non-chalance of this passage suggest continuity with its surroundings, which are unambiguously "pure." The immediately succeeding observation on ac-

62. *Id.* at 167.

63. *Synar*, 478 U.S. at 721 (citing *Chadha*, 462 U.S. at 951).

64. *Synar*, 478 U.S. at 722.

65. *Id.* at 721 (citing *Youngstown Steel*, 343 U.S. at 635 (Jackson, J., concurring)).

66. *Synar*, 478 U.S. at 722 (citing THE FEDERALIST NO. 47, at 325 (J. Lodge ed. 1961)).

67. *Synar*, 478 U.S. at 722.

68. See *infra* notes 153-69 and accompanying text.

countability of each branch directly to the people suggests that,⁶⁹ and is confirmed a paragraph later:

[T]hat 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.⁷⁰

Here the clouds part and one can see clearly that the “checkers” in *Synar* are those enshrined in pure theory—the people. Weaving the strands together, it can be concluded that *Synar* unequivocally aspires to guide all governmental power, including that which Justice Scalia grouped within the “headless” fourth branch, into avenues conducive to popular review and judgment.

With these clarifications in mind we return to the margins, where we observe some further self-refuting qualities in the proffered scheme of three independent branches. One problem is that each branch commonly exercises powers which theoretically should be—and ordinarily are—monopolized by another, where the “borrowing” is necessary to insure the functioning of the “borrowers.” The Supreme Court recently used this reasoning to sustain courts’ inherent authority to punish contumacious disregard of judicial orders. The majority in *Young v. U.S. ex rel. Vuitto*⁷¹ anchored its holding deeply in structurally required judicial independence, and thereby justified judicial use of prosecuting authority generally located within the Executive Branch. “If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that branch declined prosecution.”⁷² The House of Representatives, and presumably the Senate enjoy similar “prosecutorial” jurisdiction, at least since the 1821 decision of *Anderson v. Dunn*.⁷³ While Congress relies upon its own Sergeants-at-Arms for enforcement, judges evidently must use federal marshals to execute their prosecutorial jurisdiction, even though the Marshal Service is located within the Executive Branch.⁷⁴

Justice Scalia’s concurring opinion in the recent *Young*⁷⁵ case was steeped in separation of powers theory, and carried the discussion to a helpfully illustrative point. He recognized a “narrow” principle of necessary compromise of separated powers to presume the requisite independence. He insisted, though, that only actual disruption of judicial proceedings fell within the exception. Elsewhere, only the Executive Branch could prosecute.⁷⁶ Evidently, Scalia’s solution to the separation of power’s problem is to locate every prosecution in the Executive Branch, including all contempt proceedings. But that is not a “separation of powers” solution at all. What

69. See *supra* note 55.

70. *Synar*, 478 U.S. at 722.

71. 107 S. Ct. 2124 (1987).

72. *Young*, 107 S. Ct. at 2134.

73. 19 U.S. (6 Wheat.) 204 (1821).

74. See *Pennsylvania Bur. of Correction v. United States Marshals Serv.*, 474 U.S. 34 (1985).

75. *Young*, 107 S. Ct. at 2141-47.

76. *Id.* at 2145-46.

follows in Scalia's scenario is the addition of "obligatory" prosecutions to the list of independence-required prosecutorial abstention—to prevent executive harassment—and sharing—to protect basic functions. Why? The President is oath bound to uphold the entire Constitution, not just article II. If presented with evidence for a prosecution "necessary" for the separation of powers to function properly, in principle, he would have to do it. Anything less would subvert the constitutional order. So, theory may give the prosecution back to the Executive, but only in exchange for the traditionally-prized discretionary authority over its initiation.

The reasoning is equally applicable to Congress in ways which can be appreciated by looking at Ann Gorsuch's case.⁷⁷ Remember that Congress subpoenaed EPA documents in order to inform itself prior to drafting new legislation. EPA Director, Ann Gorsuch, refused to comply with the subpoena, and evidence of her contempt was forwarded to the Attorney General. The applicable statute required prosecution, but it is plausible to say now that the statute was declarative of what the Executive's constitutional obligation otherwise would be. That is, the separation of powers defense raised by the Executive against the congressional command can be turned against the President. So that Congress may function effectively as the sole lawmaking body in our constitutional order, the President has no choice but to prosecute.

These are more than just minor contradictions in a pure theory of separated powers, or at least the version of it articulated by Meese and *Synar*. The "pure" theory translates tripartite independence into executive autonomy, signalling thereby an absolute presidential discretion. But this translation simplifies so much that it seriously distorts. It flattens analysis where it should be supple and subtle. Most importantly, it forgets that with freedom comes responsibility.

Worse, there are major ways in which the scheme is incomplete. One has to do with the disproportion of premises to conclusions. *Synar* is typical, and wears its premises proudly. "Separate"⁷⁸ and "independent"⁷⁹ branches, each "ultimately accountable to the people,"⁸⁰ exercise all governmental power delegated by the sovereign populace. From this foundation, the opinion briskly proceeds to foreclose not only congressional execution of the law, but indirect "control" and "supervision." These moves result in an "autonomous" executive, one equal in an important sense to the other branches. The problem is that the premises insure neither autonomy nor equality, nor do they preclude outright congressional subordination of the executive. "Independence" need be no more than a ban on plural office-holding, along with selection by means other than by the legislature. "Separate" may mean no more than that, too. It may also mean that no branch may exercise its powers and *all* of another branch's as well. "Ultimate" accountability to the people is even more difficult to derive from these premises. It may be, as the *Synar* Court concedes it is, in relation to impeachment, "ultimately" to the

77. *Supra* note 15 and accompanying text.

78. *Synar*, 478 U.S. at 722.

79. *Id.*

80. *Id.*

people but immediately through the Legislature.⁸¹

The point is that the conclusions *Synar* pursues—"separate" and "independent," for instance—do not necessarily follow from the premises. At the very least, they are not obviously deducible. And the burden of showing that they are rests squarely on *Synar* and Meese because the executive *is* subordinate to the legislature in separation of powers theory. As it was initially articulated during the Middle Ages, separation of powers theory regarded the executive as the weakest branch.⁸² Without authority to either "make" law as the legislature did or to "find" it in judicial fashion, the Executive was doomed to get its marching orders from others. It was a kind of headless third branch. The role originally identified, then, is that which the branch's title intuitively suggests: a loyal agent of Congress, enforcing its laws. *Marbury* confirmed this intuition early in our constitutional history. There, the Supreme Court reckoned it radically inconsistent with constitutional basics to suppose that where Congress specifically defined an executive duty—upon no less a figure than the Secretary of State—article II conveyed other than an unbending duty to perform it.

Experience with the pure form confirms these observations. Our Constitution's Framers witnessed experiments with such schemes in Pennsylvania and Vermont. The results were scandalous precisely because dangerous tendencies toward legislative supremacy surfaced.⁸³ Indeed, one commonplace estimate of colonial and early national state executives was that they were mere "cyphers,"⁸⁴ pawns swallowed up in a vortex of legislative dominance. The Framers understandably sought a "strong" executive, but in order to create one they modified the separation of powers. They did not consummate it. "Faithful execution" of the laws is its basic constitutional responsibility. Congress makes the laws, and "controls" execution of the laws by telling executive officials precisely what to do. There are practical limits to congressional capacity to do so exhaustively, but not theoretical ones. Certainly, none follow from stating that the executive is "separate" and "independent" and "accountable to the people." None of that changes the object of which "execute" is the predicate—"the laws." *That* is where executive accountability begins and pretty much ends.

A more compelling gap in the theory is not quite the standard problem with the recipe for chicken soup, which is that first you must catch the chicken. There are plenty of birds here. The problem is that some are chickens and some are not, and you have to identify each with your eyes closed and your hands tied behind your back. This kind of separation of powers thinking requires that the initial stage of characterization has immense consequences, but fails to supply the definitions or say where you should go for them. It is more than venturing outside the "four-corners" of the plan for important information. That is true of almost any speculation. The flaw is,

81. *Id.*

82. B. TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT* 45 (1982).

83. M. VILE, *supra* note 58, at 159.

84. R. BERGER, *EXECUTIVE PRIVILEGE* 51 (1974) (quoting James Madison at the Philadelphia Convention).

rather, that the missing birds are the crucial starting point for the analysis. Any speculative endeavor is undermined by this uncertainty; you can never be completely sure that you have caught a chicken.

Still, the *Synar* Court was up to the task. The opinion knew government was comprised of three types of activities, and it generated a free-standing definition of "executive" power.

Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.⁸⁵

But it is just not that simple. A careful look at this definition of "executive power" reveals equal parts of different base elements. About half—"implement[ing] the legislative mandate"—looks like legislative power as it is commonly delegated to agencies. This suspicion is shared, at least, by the *Synar* plaintiffs who said apparently with straight faces that Congress either improperly delegated legislative power or wrongly claimed executive power.⁸⁶ Justice Stevens saw *Synar* as a delegation case, as he noted the "chameleon[ic]" quality of attempts to conclusively label particular functions.⁸⁷ The other half looks much like the "mere ministerial acts"—simple discretionless behavior, here calculations—which even the *Synar* opinion conceded was "executive" power.⁸⁸ Of course, courts commonly "interpret" laws in order to "implement" them, and this description on the whole fairly characterizes what independent agencies do. This is one reason why the opinion's professed defense of those agencies⁸⁹ is hollow. Another is its reservation of judgment upon the fall-back provisions of the Act. The law provided for congressional determination of deficit levels in case delegation to the Comptroller General was invalidated. But given the "executive" character of that decision, there is no way Congress itself may do what its putative agent may not.

There is more to this than observing that orange is actually a mixture of red and yellow. The tidy symmetry of pure separation is purchased only by high-stakes artificiality and arbitrariness. *Chadha*⁹⁰ is another recent example. There, the Court invalidated a legislative veto which reinstated the petitioner's deportation status, reasoning that such action constituted an article I legislative act, or "lawmaking" in the constitutional sense. The bicameralism and presentment requirements therefore applied. But Justice Powell characterized precisely the same action as "clearly adjudicatory."⁹¹ After *Synar*, it is most usefully viewed as law "execution" in "constitutional terms." This is the enduring flaw in such trilogistic approaches to separation

85. *Synar*, 478 U.S. at 733.

86. *Id.* at 720-21, 736 n.10.

87. *Id.* at 749.

88. *Id.* at 732-33.

89. *Id.* at 725 n.4.

90. *Chadha*, 462 U.S. at 944-59.

91. *Chadha*, 462 U.S. at 964 (Powell, J., concurring).

of powers, and the modern administrative state is not entirely to blame. The regulatory apparatus grown up around us in the twentieth century does present formidable challenges. *Chadha* and *Synar* testify to that. But it has never been easy to figure out what specific powers and functions belong in which branch. The bifurcated appointment process, qualified veto, and shared military authority are not only compromises of separation of powers—that is, intended as “checks”—but also evolved, as Professor Vile observes, due to the Framers’ uncertainty about whether they were legislative or executive functions.⁹² In other words, not even the Framers were sure which function belonged to which branch, and their work reflects that uncertainty.

Nor is the uncertainty abating. We have lost the Framers’ innocence (or abandoned their practice) of judges “finding” and not “making” law. Courts “make” law, and calling them “super-legislatures” for doing so no longer scandalizes anyone. Is the difference between Congress and the Court, then, one of procedure and not of substance? Further, if there is any supposedly established “core function” monopoly, it is the judiciary’s *Marbury* duty “to declare what the law is.” On what basis, then, does the Reagan Administration set up constitutional doubts as grounds for non-enforcement of CICA? On the other hand, every prosecution involves at least an initial application of law to facts as well as a decision that a criminal law may constitutionally be enforced against a particular individual for specific acts. Put differently, the President cannot faithfully execute the law without ascertaining what the law is. Constitutional adjudication, in turn, breaks down into various components which give rise, as Archibald Cox demonstrated, to varying constitutional competences.⁹³ These observations alone suggest that the “core function” vocabulary is again just not supple enough to carry the meanings and ideas requisite to a helpful discussion of separation of powers.⁹⁴

One salutary result of this categorical description of “executive” is to tighten up the vocabulary of separation of powers. In a famous passage from the *Youngstown Steel* case, Justice Jackson bemoaned the “[i]oose and irre-

92. M. VILE, *supra* note 58, at 156.

93. Cox, *The Role of Congress in Constitutional Determinations*, 4 U. CIN. L. REV. 199 (1971).

94. The *Synar* methodology is representative of that necessary to the “pure” structural argument and it should not be confused with an even more institutionally descriptive one which would validate expanded executive power due to organizational and behavioral virtues possessed by it and not by Congress. Dispatch, secrecy, and efficiency are examples of such virtues, and they may help explain the ascendancy of the President in foreign affairs and military conduct. Whatever normative relevance those analyses possess, even if they are assumed to be descriptively accurate, is largely irrelevant to this discussion. The law enforcement discretion claimed here is justified by more traditional arguments from structural relationships established and implied by the Constitution itself. In any event, those executive qualities may well serve individual decisions to prosecute, as well as the conduct of most criminal investigations. But they clearly are not required for the wider executive function encompassing the enforcement strategies of the Justice Department, which frequently are functionally indistinguishable, both in genesis and in practical effect, from statutes. For instance, Congress has articulated an enforcement policy which relegates ordinary auto theft to state courts, even though federal jurisdiction is clear. Act of July 24, 1933, Pub. L. No. 72-169, 47 Stat. 301 (1933). It is evidently Justice Department policy to leave small-scale drug traffickers to local jurisdictions even though federal crimes have been committed. Anyone who has prosecuted drug offenses in state courts—as I have in New York City—knows the highly selective character of federal efforts.

sponsible use of adjectives . . . [in] all nonlegal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers . . . are used, often interchangeably and without fixed or ascertainable meanings."⁹⁵ He might have added "ancillary" and "exclusive" to the list. What this bloated lexicon shares with *Synar* is the supplementing of article II specifics with enveloping notions of "executive" power. Nevertheless, *Synar* does not add to the list because it renders most of it superfluous. *Synar* does not purport to modify executive power but to define it. "Law enforcement" is neither an "inherent" nor an "implied" executive power, it *is* executive power, "in a constitutional sense."

Just two adjectives need be retained after *Synar* in discussions of presidential powers not textually expressed, and they permit more careful definition. An "indispensable" executive power, is one thematically or "definitionally" unrelated to executive power but necessary to the exercise of it. This is Justice Scalia's "necessity" principle,⁹⁶ also known as the Kantian hypothetical imperative: "[w]ho wills the end wills also the means in his power which are indispensably necessary thereto."⁹⁷ Executive privilege⁹⁸ and removal of subordinates⁹⁹ are two illustrations. Neither comes within the categorical description of executive functions, but one provides the assurance of confidentiality and the other the accountability necessary to their performance:

"Indispensable" thus covers much of the area otherwise superintended by the notion of "implied" powers: certain means are essential to the performance of enumerated duties and denying their existence practically frustrates the duty and, therefore, frustrates the constitutional design. Whether it covers for all previous uses of the term "inherent" is much less clear, largely because "inherent" has so many possible meanings. It may be a synonym for "implied" or "indispensable," which highlights the self-executing quality of the power. That is, it does not need authorization by Congress for legal existence.

A cognate use of "inherent" was at issue in *Myers v. United States*.¹⁰⁰ Specifically, the Court addressed whether "removal" of an executive officer was an "executive" function notwithstanding congressional declarations to the contrary. Barely visible in this use of "inherent" is a meaning quite different from "implied" or "indispensable" and akin to the view Corwin refuted. Certain actions are "executive" in nature either because executive officers like governors and kings, and presidents, customarily perform them, or because some "free-standing" generic definition of the term "executive" says they are. Law enforcement discretion is certainly not "inherent" in any of these senses.

The second retained adjective is suggested by Jackson's term "plenary,"

95. *Youngstown Steel*, 343 U.S. at 646-47.

96. *Young*, 107 S. Ct. at 2144-45.

97. I. KANT, *METAPHYSICS OF MORAL* § 42, *quoted in* D. EMMET, *RULES, ROLES AND RELATIONS* 38-39 (1966).

98. *See* *United States v. Nixon*, 418 U.S. at 705-06.

99. *See infra* notes 515-27 and accompanying text.

100. 272 U.S. 52 (1926).

and is very often rendered in discussions of prosecutorial discretion as "exclusive."¹⁰¹ This term comports with the pure separation-of-powers analysis favored by the Court and the Administration; the constitutional structure dictates that each branch has a core function which it, and it alone, may perform. "Lawmaking" and "adjudication" constitute the borders of this constitutional triptych. Between them (assertedly) is law "enforcement" or "execution." The important requirement here is that each department monopolizes its own core function and is free from interference, control, and supervision from the other branches.

Another consequence of the "pure" form is that it commits one to the Hamiltonian view that by vesting "executive power" in the President, article II granted powers nowhere mentioned in the Constitution, particularly in light of the contrasting conveyance of "legislative Powers herein" to Congress. An educated but non-specialist reader might opine that such an inconspicuous difference was not intended to bear such momentous implications. He might, therefore, concur with Professor Corwin that the purpose of the clause was only "to settle the question whether the Executive branch should be plural or single and to give the executive a title."¹⁰² That is, I think, the correct view. But since there is no specific article II grant besides "take care" which plausibly grants broad law enforcement discretion, a precarious Hamiltonian reliance is inescapable if the minimalist account of "take care" in Part IV is accurate. With a surprising lack of reticence, then, the *Synar* Court ignored the specifics of article II and created an encompassing notion of "execute" in the "constitutional sense." In the process it refuted Corwin's thesis and climbed out onto a very long and treacherous limb.

This fixation with three separate and independent departments leads to still further difficulties. One may be illustrated by calling the Comptroller General what *he* is—a "mixed officer." He exercises both legislative and one or more executive powers. That, of course, is the problem in the case, at least when "removal" is equated with "control" and "supervision," as the Court did. How can we intelligibly govern this bifurcated fellow, drawing upon premises like *Synar's*?

We cannot. Equipped with three kinds of governmental activity and branding removal a surrogate for either prohibited or required control, mixed officers are unconstitutional and must be eliminated. In all events the Comptroller General exercises delegated legislative power and is a congressional agent. Obviously, then, he cannot serve at presidential pleasure, and the opinion knows it. But the opinion also decided that assignment of even one "executive" task precludes congressional removal. And, having rejected the proffered resolution of eliminating congressional removal, the case commanded that the office be "unmixed" to avoid constitutional infirmity. The moral of the story is if there are to be "mixed officers" in our system they

101. Justice Sutherland gluttonously joined the two in describing, the President's "plenary" and "exclusive" foreign affairs power. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

102. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

must be independent of all three departments. Since you can at least arguably get no more from the conclusion than was contained in the premises, one has here discovered a deep limitation in pure separation of powers theory. It cannot, in principle, constructively address the characteristic activities of the modern administrative state.

The *Synar* Court ridiculed suggestions that its holding endangered the status of independent agencies like the FTC,¹⁰³ forswearing any such intent or effect.¹⁰⁴ It denied the core of its own position. The President is the only constitutionally-designed holder of "executive power."¹⁰⁵ Having characterized the duty as "executive" in a "constitutional" sense, the Court does not address how it would avoid ultimate control of the duty by the President. The opinion simply holds that while Congress may not participate in the removal of such an officer, it is not because removal of the Comptroller General by the President is constitutionally required.¹⁰⁶ At the same time, the vice of congressional participation is assertedly illicit "supervision" or "control" over "law execution" forbidden by separation of powers strictures. The opinion ventures closer to self-refutation when one fleshes out the consequence of the denial. Congress may not supervise executive functions in a constitutional sense but the President need not. So "law execution" may be performed with accountability to no one at all! This implausible result is further evidenced by its asserted faithfulness to the holding in *Humphrey's Executor v. United States*.¹⁰⁷ As that case refashioned *Myers*, only "purely executive officers" need serve at presidential pleasure.¹⁰⁸ There is an illusory quality of the caveat, for Congress may render it a null set by assigning some—or one—non-executive functions to every office it creates. The Comptroller General is clearly not that kind of officer, and therefore need not be removable by the President. *Synar* added to *Humphrey's Executor* the proposition that "mixed-officers"—those neither purely executive nor wholly legislative or judicial—cannot be "controlled" by Congress either, and therefore must be independent of all three branches. So, "executive" in a constitutional sense is "sensible" enough to push Congress out of the picture, but too senseless to push the President into it. Neither the claim that all law enforcement should be ultimately supervised by the President, nor the claim that none of it may be supervised by Congress, harmonizes with the tripartite constitutional foundation laid down in that case. The majority's limp denial highlights these flaws.

It is therefore unclear how seriously one should take the opinion's opening catechetical recitation that "all sovereignty" is divided into three parts. Indeed, all that, as well as observations about legislative and executive responsibility to the people, and not to each other, may now be dictum. In *Synar*, an allegedly executive task of making the calculations and judgments necessary to deficit reduction, is linked neither to one of the three govern-

103. Note that this is precisely the object of similar thinking by Edwin Meese.

104. *Synar*, 478 U.S. at 725 n.4.

105. See U.S. CONST. art. II, § 1, cl. 1.

106. *Synar*, 478 U.S. at 725 n.4.

107. 295 U.S. 602 (1935).

108. *Humphrey's Executor*, 295 U.S. at 632.

mental departments, nor to the people. Exactly why the Court declined to follow through with its analysis is a separate question from the observation that, by doing so, it aggravated the problem according to the normative criteria of the opinion.

There is another way of looking at the case, the way urged by the Reagan Administration through Solicitor General Fried. That is, anyone exercising executive power "in constitutional terms" is a presidential subordinate. And here we must fish or cut bait even if the Court did not, or would not admit that it did. Is the opinion more devoted to its version of separated powers, or to its footnote in favor of the independent agencies? Certainly one could escape accusations of paranoia while siding with the decision's inflated theoretical passages. One then could see *Synar* as a premise in the next case, just as an equally dubious *Myers* opinion served as the premise in *Synar*. Only we will not have to wait nearly so long. It was approximately sixty years from *Myers* to *Synar*. Frontal assaults on the FTC and SEC, utilizing *Synar*-type thinking, are already under way.¹⁰⁹ There is only one way this case can turn out after *Synar*: It can either harmonize with *Synar* reasoning or with its footnote dictum. The reasoning surely leads to chopping up the agencies, their delegated policymaking returned to Congress, executive function to presidential subordinates, and their adjudicative activities perhaps swept under article III. This suggests that there is no such thing as administrative agencies in the *Synar* world.

Assuming that one has firmly grasped a sound, that is, internally coherent theory of separated powers *and* that it is somehow "in" the Constitution or relevant to proper interpretation of it, the question remains: When should one bring theory to bear upon conflicting, more specific, textual directives? When should a pure theory which is textually unexpressed invalidate long-standing and politically beneficial governmental and statutory practices? *Synar* and the Abscam cases are apt illustrations of this fork in the road. The latter were unwilling to pay for speculative satisfaction with present practical evil.¹¹⁰ That is, they would not bring admittedly plausible theoretical concerns with little practical utility to bear upon present necessity. The *Synar* Court felt differently, and extremely so. As the *Synar* dissent suggested, the dangers even to the pure form of separated powers cherished by the majority were minimal.¹¹¹ Actual congressional supervision had never occurred, and was unlikely ever to occur. Even if it did in this context, the entire structure was hardly guaranteed to crumble, and at this point in our history it is not clear that the governmental inefficiency wrought by separated powers is still a guarantor of liberty. *Synar*'s insouciant negation of the balanced budget law, which the majority agreed was a

109. *Supra* notes 22, 23.

110. The best example is from the *Hastings* opinions:

[T]he minuscule increment in judicial independence that might be derived from the proposed rule [immunizing] judges from prosecution would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law.

Hastings, 681 F.2d at 711.

111. *Synar*, 478 U.S. at 759 (White, J., dissenting).

political breakthrough,¹¹² is an unsurpassably prophylactic effort, guarding against remote threats to theoretical rectitude even where the "threat" has great present, and future, practical benefits. The Court's recent invalidation of another politically useful device, the legislative veto, makes it clear that immediate practical benefits do not count. A critical prudential component of constitutional lawmaking—the "when" of theory—begged for critical analysis, but the *Synar* Court said nothing about it. And the *Synar* dissent demonstrates how the case could have gone the other way without any significant diminution of either the theory of separated powers or the Court's commitment to it. There was, the dissent effectively argued, a "de minimis" incursion, if there was one at all, and, like *Myers*, an insufficient basis upon which to predicate a blow to such an important device for solving the problem of budgetary deficits.¹¹³

These reflections suggest that a "pure" theory of "pure" separation of powers exercises a powerful influence over the Court, an influence sufficient to threaten the "independent" regulatory agencies, even if the opinion flinched at the prospect. A theory of pure separation of powers is analytically suspect; applying pure theory as *Synar* did is methodological madness. It could be worse. The suspect madness might also be gratuitous. A pure theory of pure separated powers may have nothing to do with our Constitution. That is the subject of Part II.

II. SEPARATION OF POWERS VS. "OUR CONSTITUTION"

The essence of separation of powers is just as the *Synar* Court described it—independent and separate branches monopolizing performance of a generic governmental activity under the watchful, controlling eye of the people. That was Jefferson's vision, too, and Vile calls it "pure" separated powers. Two momentous deductions logically follow and Jefferson did not hesitate to draw them. One is familiar to those acquainted with the first chapter of virtually any constitutional law casebook. Jefferson denounced judicial review as a "very dangerous doctrine indeed" because it compromised the independence and equality of the three branches.¹¹⁴ Each branch instead properly interpreted the Constitution as it applied to its sphere of action. According to Jefferson, a potentially fragmented constitutional law was melded by "the people," who ultimately determined the soundness of a branch's interpretation.¹¹⁵ Voters would kick out rascally, unsound interpretations in a kind of hermeneutical survival of the fittest. Second, if the people are the judges of constitutionality and guardians against the ambitions of the powerful, *all* the departments—legislative, executive, *and* judicial—need be subject to frequent popular review. Jefferson bemoaned the Virginia Constitution as un-republican for its failure to popularly select judges.¹¹⁶ Since our Constitution also does not so provide, the next best thing is to diminish the scope within which "an unelected federal judiciary"

112. *Synar*, 478 U.S. at 734-35.

113. *Synar*, 478 U.S. at 759 (White, J., dissenting).

114. M. VILE, *supra* note 58, at 165.

115. *Id.* at 165-66.

116. *Id.* at 166.

operates. This fall-back position resonates with at least the rhetoric of an administration and some jurists, embracing pure separation of powers.

The difference is that Jefferson never purported to describe the actual workings of our system, but instead described what a better system would look like. He depended upon the "pure" form to critique the Constitution and hopefully to reform it. He never said his was a restoration project, one designed to return the system to the way it was designed to operate, or to the way it once operated. "Since our Constitution does not so provide" illustrates the distance between Jefferson's views and the Constitution itself: the Constitution does not even purport to follow the pure doctrine of separated powers. One glance at it shows that by 1787, experiences in Pennsylvania persuaded the Framers to adulterate the pure form by introducing checks and balances, not by the people but by and among the three branches.

There is more than a fine point here, much more even than the enduring presence of an unelected, life-tenured federal judiciary. That alone might be enough to mark the fundamental departure from theory, since an "unaccountable" judiciary predictably became a major point of opposition to the Constitution, especially among those fearing federal enforcement of debts.¹¹⁷ The departure lamented by Jefferson, however, was more momentous than that, more imposing than we now imagine. It is helpful here to glance at our Constitution. A martian visitor fluent in English would never guess that frequent recurrence to the people through elections was a, much less the, guarantor of faithful performance by our government officials. Given their desire to build a national government upon a federation of states, it is hard to see how the Framers could have done otherwise. Put differently, even a moderately adulterated form of separation of powers was not adaptable to their purpose, which was to build a national government upon a federation of states. The projected "pure" scheme is stuck in its reliance upon not only popular, but virtually populist, national politics. Most simply, there was in 1787 no "national politics" upon which to graft the contemplated institutional forms.

A few examples explain this point. The revolutionary consciousness of national identity was, by 1787, supplanted by a more deeply rooted, more familiar state parochialism, the manifestations of which were the *raison d'être* of the Philadelphia Convention.¹¹⁸ At no time had anything like a "national" electorate existed.¹¹⁹ "National" political issues were hard to frame,¹²⁰ and a pool of qualified, honest candidates for national political office was lacking.¹²¹ Indeed, experience under the Articles revealed a dismaying lack of interest in national politics among the best men, who greatly preferred more lucrative private affairs or more edifying, prestigious state

117. See G. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 73, 81 n.18 (1987).

118. The "balkanization" of the national economy owing to state trade barriers was the single most significant practical incentive to reworking the constitutional order. See, e.g., G. GUNTHER, *supra* note 29, at 231-32.

119. President George Washington's was the first *national* election in our history.

120. Once the victory at Yorktown vanquished a common enemy, localist sympathizers resurfaced and eventually became the *raison d'être* of the Philadelphia Convention.

121. See Rakove, *The Structure of Politics at the Accession of George Washington*, in *BEYOND CONFEDERATION* 261-66 (R. Beeman, S. Botwin & E. Carter ed. 1987).

honors.¹²² Moreover, the still largely autonomous states, whose continued existence as sovereign buffer entities was never doubted, squashed the populist impulses animating Jefferson's pure theory. While scholarly discussion about the Philadelphia Convention debates may go on forever,¹²³ one can confidently say that state representation in the national government was *the* critical issue there.¹²⁴ How offices to that government should be "filled"—through popular election or otherwise—was a subsidiary concern. And state "checks" upon the national government obscured the view of even the most eagle-eyed visionaries seeking that popular check integral to pure theories like those of Jefferson.

When the Framers got to the selection problem, they slighted popular elections. Aggravating the empirical obstacles to Jeffersonian populism was their generally low opinion of "démocracy," which they generally blamed for the instability of the state governments during the 1780s.¹²⁵ While not universal, skepticism towards democracy was the predominant opinion of both supporters and foes of the Constitution. Foes regularly derided the scheme as the work of "better" men who had learned from popular uprisings like Shays Rebellion, ruinous state emissions of paper currency and democratic excesses under Pennsylvania's populist Constitution that government responsive to popular wishes was liable to be bad government.¹²⁶ But the foes themselves were not populists so much as they were fearful that the federal behemoth would devour the state governments. One can now appreciate the near incoherence of reading the pure form into our Constitution. By 1787, the politically astute Americans feared purity's affinity with legislative supremacy exactly because that body was subservient to the people.

A "vigorous" and "independent" executive was necessary to combat precisely that tendency,¹²⁷ and it may be granted that our Constitution establishes one. But the chain of deductions most assuredly does not lead all the way to *Synar*. The "independence" sought and found was basically one of selection and unmediated commission. The Chief Executive was *not* dependent upon the legislature for selection and unmediated commission. He took *some* power directly from the Constitution, instead of entirely from the laws, as, for instance, the Virginia governor did.¹²⁸

Any attempt to further indulge purist sympathies must come to grips at the outset with two incontestable constitutional realities. The first is the designation of the President as the sole addressee of executive power.¹²⁹ The second is the electoral college mode of selecting that officer.¹³⁰ Quadrennial election is probably not that "frequent" recurrence to the ballot envisioned

122. *Id.*

123. See, e.g., articles collected in the excellent Bicentennial Issue of the *William & Mary Quarterly*. (44 WM. & MARY Q. 1987).

124. See, e.g., Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424-25 (1987).

125. See Wood, *Interests And Disinterestedness In The Making Of The Constitution*, in BEYOND CONFEDERATION 75 (R. Beeman, S. Botwin & E. Carter ed. 1987).

126. See *id.*, *passim*.

127. See Sharp, *supra* note 33, at 399.

128. See *infra* note 351 and accompanying text.

129. U.S. CONST. art. II, § 1.

130. *Id.*

by pure theory. Certainly theory envisioned a more direct expression of *vox populi*, however frequent, than our Constitution provides. Moreover, there was and is no requirement that the College actually select a President.¹³¹ Early in our history the House of Representatives selected Presidents after electoral deadlocks,¹³² constitutionally defined as the failure of any candidate to secure a majority of the College's vote. Also, since Congress judges the Electors' returns it literally certifies the President-elect.¹³³ As the disputed election of 1876 demonstrated, this power, too, is reducible to House selection of the President.¹³⁴ That contest also showed that there is no necessary correlation between a popular majority and electoral success. In a situation that is quite repeatable, Tilden secured more popular votes than Hayes, but Hayes became President.¹³⁵ Even now there is only a very rough practical equation between popular and electoral college voting.

In theory there is none, and so another refraction of popular will is the absence of a constitutionally-required nexus between popular votes cast for an elector and that person's vote in the Electoral College. A renegade electoral vote for Ronald Reagan in 1976¹³⁶ reminds us that the Electors are just that—the Electors. *They* vote for the President; "We, the People" do not. Through various state laws and, more importantly, through party discipline the average voter thinks he is voting for President on the first Tuesday in November every fourth year, and effectively he is, but the Constitution does not so require. It leaves state legislators entirely in charge of setting up their state's mechanism for commissioning electors,¹³⁷ and there is no requirement whatsoever that "the people" participate at all. They did not in many states for quite a while. It is very difficult then to see how a theory of our Constitution may take as a premise the "popular accountability" of the Executive.

As a matter of practice now commonly codified in state law, the people have a voice in presidential selection, but it is important to see from whence that comes. Our elections have been "democratized," but the democratization of American politics dates from sometime after 1830. It clearly was neither the aspiration nor the achievement of our Constitution's drafters. But for the institutionalization of two major parties together monopolizing

131. *Id.*, providing for selection by the House of Representatives in case of tie and where no candidate receives a majority of electoral votes cast.

132. The House elected Jefferson in 1800 by a vote of 10-1 after a tie between Aaron Burr and him. In 1824, under revisions accomplished by the twelfth amendment, the House elected John Quincy Adams. *ENCYCLOPEDIA OF AMERICAN HISTORY* 157, 196 (R. Morris ed. 1976).

133. *See* U.S. CONST. amend. XII. The 1876 election highlighted an inadequacy in the constitutional plan. It states that the Senate President shall open the ballots in the presence of both houses "and the votes shall then be counted." *Id.* It does not say who counts them. Since the political parties then each controlled a house, this lacuna was critical. Party leaders eventually agreed to set up a commission to judge the returns which, in a straight party vote, certified the Republican Hayes. R. Morris, *supra* note 132, at 301.

134. For a thorough account of this disputed election, see C. WOODWARD, *REUNION AND REACTION* (1951).

135. Tilden received about a quarter million vote popular majority. *See* R. Morris, *supra* note 132, at 301.

136. The elector, Seattle lawyer Mike Padden, was pledged to Gerald Ford but voted for Reagan because of Reagan's pro-life stance on abortion. *See* *ABORTION: FREEDOM OF CHOICE & THE RIGHT TO LIFE* 14 (L. Sass ed. 1977).

137. U.S. CONST. art. II, § 1, cl. 2.

political allegiances in this country, a reality dating from the early nineteenth century, the people might have precious little to say about their President, except through the House of Representatives. I frankly do not know whether the Framers anticipated frequent recurrence to the House for presidential selection. Given the welcome inevitability of a Washington Administration for as long as the Father of our Country chose to serve, they may have thought rather little about it. Still, in an era where a "partisan imperative"¹³⁸ did not exist, nor could have been reasonably anticipated, there was no institutional reassurance available to the Framers that, after Washington, the Electoral College would function effectively. Indeed, it soon malfunctioned, and was retooled in the twelfth amendment when it yielded President Jefferson and Vice-President Burr, who actually hated each other. The unlikely Electoral College procedure is the answer to one, and only one, question: how to make the Chief Magistrate independent of the legislature *without* making him dependent upon the people. It should hardly surprise one, then, that the President is "checked" at various points—which means that he shares executive power—by other branches of the national government, notably the Senate.

The Constitution as a whole shows little more dedication to securing for its institutions anything like the electoral vigilance essential to popular accountability. Members of the House are the *only* officials chosen by "the People"—"of the several states" as article I phrases it.¹³⁹ State legislators chose United States Senators.¹⁴⁰ Each House of Congress remains free to judge the qualifications of its members,¹⁴¹ and neither is constitutionally obligated to open its deliberations to the public.¹⁴² More important, even the single "popular" body was, as a constitutional matter, only apparently that. Nowhere in the Constitution are "the People," or any one of them, guaranteed a right to vote for Representatives. The "electors in each state have the qualifications requisite for electors of the most numerous Branch of the State Legislature."¹⁴³ Not only was voter eligibility constitutionally dependent on state choice, but, at least initially, the manner of voting as well. The most significant instance here is the distribution of Congressmen within the state and whether the state be divided into a like number of roughly equal districts, disproportionate districts, or no districts at all. Statewide "at-large" elections, for instance, could deprive a significant minority of any representation. Indeed in the days before parties effectively reduced contests to two candidate run-offs, there was no bar to nonrepresentation of a majority of voters where more than two candidates contested.

By now one's curiosity should be sufficiently quickened to wonder how *Synar* substantiated its key "accountability" premise. The Court noted the obvious judicial anomaly, but in a fashion designed to ensure that the reader

138. The term is the title of political historian Joel Silbey's *The Partisan Imperative* (1985).

139. U.S. CONST. art. I, § 2.

140. U.S. CONST. art. I, § 3. The seventeenth amendment now compels popular election of senators but it too relies upon eligibility to vote for the state legislature for its electoral base.

141. U.S. CONST. art. I, § 5, cl. 1.

142. See *id.* at cl. 3. In fact the Senate met in seclusion for the first several years of its existence.

143. U.S. CONST. art. I, § 2.

would not. The precise location and curt manner of delivery clearly suggest that the opinion thought the best defense was a good offense, and so it brazenly suggested continuity among all three branches, and between them and theory.

The Framers provided a vigorous legislative branch and a separate and wholly independent executive branch, with each branch responsible ultimately to the people. The Framers also provided for a judicial branch equally independent with "[t]he judicial Power . . . extend[ing] to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States."¹⁴⁴

The critical justificatory passages are similarly awash in *ipse dixit*, but one paragraph was apparently drafted to serve as "proof" that ours is indeed a constitution of separated powers.

Other, more subtle, examples of separated powers are evident as well. Unlike parliamentary systems such as that of Great Britain, no person who is an officer of the United States may serve as a Member of the Congress. Art. I, § 6. Moreover, unlike parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people, subject only to impeachment proceedings which are exercised by the two Houses as representatives of the people. Art. II, § 4. And even in the impeachment of a President the presiding officer of the ultimate tribunal is not a member of the legislative branch, but the Chief Justice of the United States. Art. I, § 3.¹⁴⁵

Take the last of these "reasons" first. It is obviously a makeweight. It neither adds to nor detracts from the immediately preceding reference to presidential accountability via impeachment. And the Court failed to note that notwithstanding the presiding presence of the Chief Justice, impeachment proceedings are evidently "political questions." That is, they are unreviewable by Courts.¹⁴⁶ Congressional judgment is conclusive and exclusive. Granted, impeachment is an unusual occurrence. But, the House has impeached more Presidents—one, not counting Nixon's near escape from that fate¹⁴⁷—than it has dismissed Comptrollers General. Would *Synar* agree that the President is "controlled" by Congress? Doubtful, even though the Framers included it as a means of legislative control *after* Rufus King warned that the effect of impeachment would be presidential service at congressional pleasure.¹⁴⁸

The article I, section 6 ban on plural office holding certainly evidences separation of powers but the question the Court ignores is whether the Constitution goes any further? *Synar's* unjustified but prized rule of construction would say so. *Synar* branded the explicit authority to impeach "Officers of the United States" the *only* permissible manner of congressional removal

144. *Synar*, 478 U.S. at 722 (quoting U.S. CONST. art. III, § 2).

145. *Id.*

146. The Senate is constitutionally vested with "sole Power to try" impeachments. U.S. CONST. art. I, § 3.

147. That one was President Andrew Johnson. .

148. II M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 100-02 (J. Hutson Supp. 1911).

and characteristically so.¹⁴⁹ The *Synar* opinion would like to fill in all "silences" with pure separation of powers theory, so that banning plural office-holding was the start of separationist influences, while impeachment was the end of their diminution. But the propriety of that rule of construction is what is being examined. The Court is also unaware that the Framers rejected a more crippling ban on plural office holding, one suggested by thoroughgoing separated powers, in favor of the present prohibition on taking offices "created" or whose "emoluments" were "increased" during the Congressman's term.¹⁵⁰

Finally, the middle passage is, well, startling. To the extent that it suggests the President is answerable to the "people," but through the Congress, it runs counter not only to the tenor of the opinion but to the rest of the sentence. Anyway, what happened to the presidential responsibility to laws made by Congress which is, after all, even according to *Synar*, the sole "lawmaker" in the federal government? The assertion is, once again, the issue. Asserting it several times in the same paragraph does not make it any more true.

Nevertheless, the Court insists that popular accountability is there and that it sustains the independence and separation of the departments. We have seen that the accountability is an illusion. Such a link was hardly considered essential to good government and more often thought conducive to bad government. Nevertheless, the very real desire to limit government and to make it accountable—that is, not oppressive and operating at least roughly in the "public" as opposed to "private" interest—found expression in ways not contemplated by the pure theory of separated powers. True, a "strong," "independent" Executive checks legislative tyranny,¹⁵¹ but a written constitution itself is a more powerful expression of the theme. Adding a Bill of Rights is another. The constitutionalism of the era was uncertain about judicial enforcement of these mechanisms, but each nevertheless was an attempt by the governed to control the governors. Moreover, the conscientious legislator found profoundly expressed limits on his authority. For some, the problem was solvable by practices productive of accession of able, public-spirited individuals. This upward filtration of talent¹⁵² would obviate the need for more subtle complexes of institutions and habits incumbent upon the constitutional designer harboring more sober views of human propensities. Madison ably articulated that pessimistic alternative: "Ambition must be made to counteract ambition."¹⁵³ To prevent overconcentration of power in one department, a prescription for tyranny, "those who administer each . . . [must have] the necessary constitutional means and personal motives to resist encroachment of the others."¹⁵⁴ "This policy of supplying, by opposite and vital interests, the defect of better motives"¹⁵⁵ is the

149. *Synar*, 478 U.S. at 722.

150. See Rakove, *supra* note 121, at 270-71.

151. See, e.g., Sharp, *supra* note 33, at 399.

152. See Rakove, *supra* note 121, at 271.

153. THE FEDERALIST NO. 49 (C. Rossiter ed. 1961).

154. *Id.*

155. *Id.* at 301-13.

core insight of a system of checks and balances. That is, instead of "external" checks by the people and the dreamy confidence that men are so angelic that such artifices are unnecessary, internal relations among the branches must be structured to preserve liberty by maintaining a *degree* of separated powers by mixing them. Then "ambition" may confront "ambition," face to face. This is "checks and balances" reasoning, and its prevalence in our Constitution cuts deeply into the next major premise—separation.

Here, the *Synar* opinion is guilty of criminal misrepresentation. It relied upon *The Federalist No. 47*, written by Madison, and the discussion of separated powers, in particular Montesquieu's caution that "liberty" is destroyed where legislative and executive powers are united in one body. Consistent with previous use, the remark may mean no more than a ban on plural office holding. The Court also fails to add a few other caveats *The Federalist Papers* supplied: Madison responded to critiques of the Constitution rooted in pure separation of powers; he defended the Framers' rejection of that doctrine in favor of a system of checks and balances;¹⁵⁶ he argued prodigiously against the Jeffersonian check through frequent recurrence to the people;¹⁵⁷ and, finally, he believed that the only way to keep the *departments* separate enough to insure liberty was by blending their *powers* enough to allow each to exercise "control" over the others.¹⁵⁸ Ironically, Madison pointedly criticized just that ahistorical, non-contextual, politically motivated misuse of Montesquieu¹⁵⁹ that the *Synar* Court either ignorantly or disingenuously deployed.

It is worth savoring how Madison arrived at this position. He forthrightly addressed Jefferson's view and approved the Constitution's rejection of it.¹⁶⁰ "[F]requent appeals" to the people, the linchpin of Jefferson's scheme, would largely deprive the government of "requisite stability."¹⁶¹ How? Popular questioning of the government's virtues would erode public confidence by constantly exposing alleged vices in the system.¹⁶² Worse, electoral appeals evoked the "passions" and not the "reason" of the governed, so that the results of such contests were unreliable.¹⁶³ Most importantly, Madison reckoned that the "purpose of maintaining the constitutional equilibrium of government" was endangered.¹⁶⁴ Put differently, frequent recurrence to the people is not conducive to separated powers because the legislature, more directly drawn from and more responsive to them, would invariably win.¹⁶⁵ Since the primary danger to separation was the temptation toward legislative supremacy, popular judgment did not solve the problem, it worsened it.

156. *Id.*

157. *Id.* at 313-17.

158. *Id.* at 308.

159. See generally THE FEDERALIST NO. 47 (C. Rossiter ed. 1961).

160. *The Federalist No. 49* is devoted entirely to discussion of Jefferson's views. THE FEDERALIST NO. 49, at 313-17 (C. Rossiter ed. 1961).

161. *Id.* at 314.

162. *Id.* at 314-15.

163. *Id.* at 317.

164. *Id.* at 315.

165. *Id.* at 316.

Madison self-consciously and without apology investigated the "sense" in which "liberty requires that the three great departments of power should be separate and distinct."¹⁶⁶ The "sense" of Montesquieu on this was *not* "that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."¹⁶⁷ It is not hard to see why *Synar* left out *that* part of *The Federalist No. 47*. It is even easier to understand the omission of Madison's positive statement of Montesquieu's "sense."

His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.¹⁶⁸

Madison's estimation of our Constitution accords with his understanding of Montesquieu. "[U]nless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxium requires, as essential to a free government, can never in practice be duly maintained."¹⁶⁹ The dispositive rule of *Synar*, that one branch may not "control" or "supervise" the powers of another, is now not only weakened by the corrosion of its key premises but is clearly refuted by the sources which it said stood for those premises.

That Madison is describing our Constitution, and that the *Synar* Court is not, is demonstrable. The Philadelphia Convention swam in a stream of identifiable constitutional experience with eyes wide open. Vile observed that "the need for executive independence loomed so large" in delegates' minds that they were prepared to restore some of the discredited Crown prerogatives.¹⁷⁰ Yet, the Framers "were hesitant about this, and adopted a half-way position on almost all issues."¹⁷¹ That is, executive powers like appointments, treaties and military affairs were shared, and the veto qualified. Shorn of merely ceremonial functions associated with any head of state and excluding the pardon power, the President has *no* substantive authority which he does not share with some or all of the Congress. In other words, "autonomy" does not readily come to mind when reading article II. The Senate's powers illustrate the Executive's role as it should be understood, in Madisonian terms. That body is unmistakably constituted by article I, but the Framers regarded it much as an article II phenomenon.¹⁷² The Senate was envisioned as a council of well-bred presidential familiars formally and informally sharing what otherwise might be described as "executive" powers like foreign affairs. Recall that the Senate in its initial days was not much larger than the Cabinet is now, and the Vice President actually presided over much of its deliberations, as the Constitution explicitly authorizes.¹⁷³

166. *Id.* at 301.

167. *Id.* at 302 (emphasis in original).

168. *Id.* at 302-03.

169. *Id.* at 308.

170. M. VILE, *supra* note 58, at 156.

171. *Id.*

172. R. SWANSTROM, *THE UNITED STATES SENATE 1787-1801*, at 93-94 (1985).

173. U.S. CONST. art. I, § 3, cl. 5.

The point is that our Constitution "checks" exercises of what theory denotes as core "executive" powers, those over military appointments and foreign affairs, not by recourse to elections, but by breaking up the "powers" into discrete components or subfunctions and then dispersing the subfunctions among the branches. These are very large pieces of the "executive power" vested by article II. But they do not add up to all of it, and division of control over them does not necessarily imply fragmentation of remaining parts or "executive power" itself, assuming it as such, is vested by article II.

In contrast, *Synar* provides a definition of "executive power" independent of article II specifics.¹⁷⁴ This "law execution" in "constitutional terms" is apparently that "law enforcement" staked out by the Attorney General, and for present discussion purposes the terms are fungible. *Synar* keeps this generic activity from Congress. "The structure of the Constitution does not permit Congress to execute the laws."¹⁷⁵ True, in the limited sense that by virtue of the textual injunction against plural office holding members of Congress may not actually inhabit *any* other office, including executive positions. It is entirely a different matter, and one on which no concession is made, to state as *Synar* did that congressional "control" or "supervision" over law execution is similarly precluded.

In fact, that view is false. One flaw in it, or at least an exception to it, was identified in the case. *Synar* apparently intended its limitation of congressional action to "lawmaking" as the flip-side of its observation that the Constitution forecloses a "supervisory" role over law enforcement for Congress. From this the Court concluded that Congress was limited to lawmaking. But the dichotomy *Synar* posits is uninformative. Congress could stick to lawmaking *and* effectively control law execution as it pleases. That is, there is no constitutional, as opposed to practical, brake upon congressional authority to *reduce* executive functions to "merely ministerial" tasks whose performance, assuming implied or explicit private-citizen standing, courts stand ready to compel.

The distinction between ministerial executive tasks and those conveying discretion goes all the way back to *Marbury*. As Henry Monaghan points out, but for *Marbury's* subjection of ordinary executive tasks to the discipline of judicial superintendence, the constitutional system might have gone away at the outset.¹⁷⁶ *Kendall v. United States*¹⁷⁷ decisively squashed the contrary view. In *Kendall*, the Van Buren Administration ambitiously contended for complete judicial abstention wherever any executive task was concerned; Postmaster General Kendall was statutorily directed to settle a claim for money due a contractor in a manner which the Court had no trouble depicting as "ministerial." The act required little more than calculations based upon fairly obvious criteria and conveyed no "discretion" to the executive officer. In other words, a fairly routine administrative chore, like at least *part* of what the Comptroller General was assigned to do by Gramm-Rudman. The Administration set up a pure separation of powers defense,

174. *Synar*, 478 U.S. at 732-33.

175. *Id.* at 726.

176. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

177. 37 U.S. (12 Pet.) 524 (1838).

even citing Jefferson in its argument.¹⁷⁸ It is worth detailing precisely what the Supreme Court refuted in *Kendall*. The Administration's argument was rendered by Judge Cranch in the Circuit Court.

It is premised that, by the theory of our government, the three great departments, the legislative, executive, and judicial, are to be kept so distinct that one cannot exercise any portion of the power which properly belongs to the other. That whatever power is in its nature executive, can be constitutionally exercised only by an executive officer; and whatever power is in its nature judicial, can only be exercised by courts and judges constitutionally established and appointed. It is, then, contended that the constitution, by declaring that "the executive power shall be vested in a president of the United States," and that "he shall take care that the laws be faithfully executed;" and by giving him the power of appointment and removal of all executive officers, has vested "in him and in him alone," with a few exceptions, "the whole executive power of the government." "That the obvious design of these provisions was, to make the president responsible for the faithful execution of the laws, and for the official acts of all the officers of the executive department." That the executive officers are his agents, for whom he is held "responsible to the people, whose agent he is." That "the acts of the executive officers are the acts of the president; that constitutionally he is as responsible for them as if they were done by himself; though not morally. That, so far as regards the execution of the laws, therefore, no distinction can be maintained between the acts of the president and those of his subordinate officers. That in law they are all the acts of the president." That when a mandamus issues from the judiciary to an executive ministerial officer, commanding him to do a merely ministerial act which he is absolutely required by an act of congress to do, which he cannot lawfully refuse to do, and which the president cannot lawfully forbid him to do, it is said "they attempt to control the executive power, to assume the functions of the president, and to make themselves the executive in the last resort; superior to the executive created by the constitution, and elected by the people." This argument rests, almost entirely, upon the force of the word "control;" which, as before suggested, implies an interference with some right or power of the person to be controlled.¹⁷⁹

In such a regime of undivided executive power the President, and only the President, constituted the appellate authority for aggrieved parties. Unless impeachment was expected to become a frequent practice, the President's felt obligation to the laws along with his whip of removal would have to do justice in the administrative state. The Supreme Court sharply divided over whether Congress had vested jurisdiction to issue the writ,¹⁸⁰ but all rejected the Administration view. That the Postmaster General was subject only to presidential direction was "a doctrine that cannot receive the sanc-

178. This detail of the argument is preserved in the circuit court account of the case. *United States v. Kendall*, 26 F. Cas. 702, 719-20 (C.C.D.C. 1837)(No. 15,517).

179. *Id.* at 747-48.

180. Justices Barbour and Catron, along with Chief Justice Taney, dissented, concluding that Congress had not vested jurisdiction in the Circuit Court. *Kendall*, 37 U.S. (12 Pet.) at 626-53.

tion of this court."¹⁸¹ Implying a power to decline execution of laws "is a novel construction of the constitution and entirely inadmissible," for it would "cloth[e] the President with a power entirely to control the legislation of Congress, and to paralyze the administration of justice."¹⁸²

The "merely ministerial act" account of the Comptroller General's task was pressed in *Synar* by the statute's defenders, probably because they correctly surmised that the Court would abide *Marbury* and *Kendall* on the legitimacy of extra-executive supervision of ministerial tasks. After affirming full congressional authority to prescribe the content of executive responsibility, *Synar* contrasted merely "ministerial" tasks with execution of the laws in "constitutional terms."¹⁸³ Such "executive" functions give rise to no important structural implications. Most important, they are conclusively severed from article II "executive power" in constitutional terms. Even if *Synar* relegated to that category only ministerial functions, it suggested no theoretical bar to congressional authority to require, for instance, criminal prosecution of a particular individual like Anne Gorsuch, or of a class, such as *all* government officials against whom probable cause is adduced. Yet these are precisely the issues upon which the Reagan Administration makes its stand. And it will not do to seek solace higher up in the ladder of power. A cabinet member was brought to heel in *Kendall*, and would have been in *Marbury*. In the latter, Secretary of State Madison was cut off from article II and squeezed without separation of powers escape between Congress and the federal judiciary.

That the judiciary should "enforce" the law made by Congress in aid of those seeking their due from the Executive is no surprise to us. Our courts do it all the time. It is also theoretically predictable. Christopher Wolfe writes that "[h]istorically, the Anglo-American judicial system originated with ministers of the British monarch who rode from place to place dispensing justice . . ."¹⁸⁴ This historical indistinguishability of the executive and judicial functions influenced theory, which held that judging was one aspect of an encompassing notion of law execution. Locke, for instance, assumed that the judiciary was part of the executive,¹⁸⁵ and Montesquieu based his separation of powers upon British constitutionalism as presented to him by Bolingbroke,¹⁸⁶ a presentation accurately rendered by Wolfe. Madison described judges as "shoots from the executive stock."¹⁸⁷ A tripartite division of powers, then, is arrived at only, as Wolfe suggests, by separating what Locke calls the "federative" or military/foreign affairs authority from the "ordinary domestic power of enforcing the laws."¹⁸⁸ In other words, to get three branches out of two theoretical ancestors, the judiciary is broken off from a subsuming "executive," which is then understood primarily as a "fed-

181. *Id.*

182. *Id.*

183. That is, its strenuous refutation of the premise suggests its assent in the logical necessity of the suggested conclusion.

184. C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 357 n.1 (1986).

185. *Id.*

186. See F. McDONALD, *NOVUS ORDO SECLORUM* 80 (1985).

187. *THE FEDERALIST* No. 49, at 303 (C. Rossiter ed. 1961).

188. *Supra* note 184.

erative" creature. The unmistakable result is to bisect "law enforcement," and to give it, at least, a "judicial" aspect and an "executive" aspect, which is why the Meesian identity of the two may be accepted for discussion purposes only. Most simply, "law enforcement" in theory may be an "executive" function but only until the judiciary is clearly distinguished from the then diminished "executive," as it is in our Constitution.

Here we need recall Professor Engdahl's historically-grounded caveat that the "due process of Law" guaranteed in Anglo-American constitutions after the Magna Carta was a limit upon executive discretion in law enforcement.¹⁸⁹ Joined with an independent judiciary specially entrusted with making that guarantee effective, our Constitution unmistakably stamps law enforcement as a transbranch governmental function. In a tripartite scheme, one can call law enforcement an "executive" function if one likes, but it is certainly *not* thereby solely an article II function. Put more eloquently by Judge Cranch in *Kendall*: "The executive and judicial departments are not rivals. They must unite in their functions, or the laws cannot be executed. The president is as dependent on the judiciary to enable him to see that the laws be faithfully executed, as the judiciary is on him to enforce its judgments."¹⁹⁰ Cranch then concluded that mandamus actually aided the President in faithfully executing the laws by bringing errant subordinates to heel on his behalf.¹⁹¹ Note that, otherwise, administrative law, where Congress requires courts to police the process by which the executive reaches results committed to executive discretion by Congress, is out the window.

It is hardly necessary to trot out historical derivations or to distill from "executive power" mere "ministry" to illustrate that the President does not hold all executive power. Even the *Synar* Court admitted that there were exceptions. The constitutional text further demonstrates that sometimes Congress exercises the whole executive authority. In the territories¹⁹² and in the District of Columbia,¹⁹³ for instance, Congress enjoys "unseparated" governmental power. "The plenary municipal authority" there vested¹⁹⁴ leads to such otherwise oxymoronic creatures as "article I courts," meaning that judicial, and executive, power is exercised, but via the granting clauses of article I.

Any statement identifying "law execution" with article II, much more with the President, is qualified by "article I executive power" in the territories and federal district. Any meaningful statement, then, is about federal executive power in the states, and there its meaning is further qualified by the structure of the Constitution. This is more than the observation that, because of the "interstitial" nature of federal power, the President might have few laws to enforce in the states. The more potent insight was previewed earlier, and is now available for fuller explication. The states al-

189. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 7 (1971).

190. *Kendall*, 26 F. Cas. at 748.

191. *Id.* at 749.

192. U.S. CONST. art. I, § 8, cl. 17.

193. U.S. CONST. art IV, § 3, cl. 2.

194. *See, e.g.,* *McAllister v. United States*, 141 U.S. 174, 184 (1891).

ready had ongoing enforcement mechanisms (such as sheriffs, prosecutors, and courts) and the Constitution permits Congress to prefer enforcement through those mechanisms. As an original matter, Congress could have relied almost entirely upon state functionaries and courts to enforce its will, and largely did. There need not have been any federal trial courts. Article III provides "such inferior Courts as the Congress may from time to time ordain and establish."¹⁹⁵ As there may have been state court trials of federal crimes, it probably follows that there would not have been federal prosecutors. What authority the President would have possessed over state prosecutors enforcing federal statutes in a state court is obscure, but it undoubtedly would have been much less than the "expansive" authority he now claims over the United States attorneys. Put differently, it is hard to see why Congress cannot assign prosecutorial duties to Lawrence Walsh, the North special prosecutor, if it can, based upon original possibilities, assign such duties to, say, Robert Morgenthau, the New York County District Attorney. Then, as now, state functionaries do not change into federal apparatchiks. Critically, they do not exercise either article III judicial power or article II executive power even as they execute federal law. They remain state officers subject to federal duties imposed by Congress, enforceable through judicial process ultimately in the United States Supreme Court. As it was, Congress established federal courts, provided them with marshals, and gave federal prosecutors exclusive criminal jurisdiction in the Judiciary Act of 1789.¹⁹⁶ But, as it was, federal executive power was still effectively subject to state control, for Congress adopted local law in delineating the marshals' powers.¹⁹⁷ The upshot was that the President could not "control" marshals even in their discretionary duties in cases where state law said differently. And while marshals practically served at presidential pleasure, deputies did not. They served at judicial will.¹⁹⁸

The second consequence of federalism is that federal law is ordinarily "interstitial." There is no general federal police power. From this it followed that federal crimes have largely been derived from enumerated powers. Once *United States v. Hudson*¹⁹⁹ eliminated judicially-defined offenses, Congress gained exclusive authority to decide whether some interference with federal functions was serious enough to be criminal. That the President may not define crimes is unexceptionable enough, but it does reiterate that his "executive power" is called into play only after Congress has opened the show. Here, Congress opens the show by grounding judgment in two-part constitutional authority, an enumerated power, usually but not always in article I, plus the "necessary and proper" clause: "Congress shall have power . . . to make all laws necessary and proper" for carrying into effect the foregoing powers.²⁰⁰

Two observations can be made about the "horizontal" effect of this

195. U.S. CONST. art. III, § 1.

196. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

197. Act of May 5, 1792, ch. 29, 1 Stat. 265 (1792).

198. The Judiciary Act of 1789, ch. 20, 1 Stat. 89 (1789).

199. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

200. U.S. CONST. art I, § 8, cl. 18.

“sweeping” clause.²⁰¹ One is that Congress and not the President is authorized to figure how, for example, the post office power should be executed. *Kendall* reveals this principle in action, and how it really means that Congress controls execution of the laws it enacts. The second, more important but more hypothetical, observation is that it is clear that the “necessary and proper” clause intrudes congressional judgment into each of the other branches in a way that is not reciprocal. For that matter, the Appointments Clause allows Congress to intrude another branch into the affairs of the third without mutuality, as *Ex parte Siebold* illustrates.²⁰² “Separation” is thus a term of art with a ratchet effect, and Congress holds the ratchet. The speculative point is this: Why cannot Congress tell the Executive how to “faithfully execute the laws”? *Kendall* is nearly on point. Congress authorized mandamus jurisdiction, and Judge Cranch described it as an aid to the President. But if Congress can decide, notwithstanding presidential resolve to the contrary, how to “faithfully execute” the laws, what is left of *Synar*’s ordering principles?

Some federal crimes are rooted in no particular constitutional provision but in common sense, in principles of governmental sanity available to all mankind. Criminal prohibitions, like the infamous Alien and Sedition Acts in the Framers’ era and against Seditious Conspiracy²⁰³ in our own, evidently stem from a power of self-preservation impliedly residing in all governments, including ours. And this implied power, which is not itself ascribable to any particular branch of government, arguably leads in separation of powers theory to a complete reversal of the legislative and executive roles. That is, while the lawmaking power ordinarily is logically superior to its execution, in extraordinary situations where the basic civil order which makes legislation possible is endangered, the executive is ascendant. In theory, the President possesses the power of the sword and can summon the community’s force to restore the preconditions of law enforcement. As Jeffrey Poolevorde relates Locke’s thought on the point, “this responsibility is logically prior to the standing law of the community—the end of which so to speak, is to provide a more ‘procedural’ statement of ordered liberty.”²⁰⁴ Locke considered the preservation of the people to be the “supreme law”, suggestive of an executive prerogative to act contrary to individual laws in times of emergency. Justice Holmes captured the notion succinctly. “[P]ublic danger warrants substitution of executive for judicial processes.”²⁰⁵ We have had lots of experience with such situations. Two full-scale wars have been waged on our soil, in 1812 and 1861. Moreover, after the Civil War, what were formerly member states in the Union were

201. See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the ‘Sweeping Clause’*, 36 OHIO ST. L.J. 788 (1975).

202. 100 U.S. 371 (1879). “Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2.

203. 18 U.S.C. § 371 (1982).

204. J. Poolevorde, *The Ground and Scope of Executive Power in Natural Rights Doctrine* (unpublished paper in author’s possession).

205. *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).

constitutionally regarded as conquered provinces under military occupation. The Framers of our Constitution had recently concluded another bitter armed conflict waged in their own yards. Just prior to the Philadelphia Convention²⁰⁶ and soon after national administration commenced²⁰⁷ ordinary law enforcement was completely nullified by armed rebels, at a time when the government's writ always ran erratically to the frontier. The "Steel Seizure"²⁰⁸ and Japanese interment litigation²⁰⁹ are recent judicial examinations of the constitutional issues raised by cognate "extraordinary" occasions.

There is certainly a plausible strand of reasoning here which might justify something fairly called "inherent" executive authority to act contrary to statutes and common law in order to discharge his constitutional responsibility. What can we say about our Constitution and this rationale? A compelling caveat here is the extreme difficulty, verging on impossibility, of estimating the "constitutionality" of what, in theory, are desperate acts of survival by a government *in extremis*. Also, the historical materials show that the "Take Care" clause of article II has at least something to do with this problem.²¹⁰ Consequently, that analysis will be continued in Part IV. A preliminary and humble analysis of the argument must begin, then, with two deflections of the theoretical reasoning due, not to any particular constitutional text, but to the distinguishing features of the American polity. One is popular sovereignty. "We, the People" delegate governmental authority to the governors but do not transfer sovereignty. Where the people are thus sovereign, any claim to governmental survival at all costs is diminished. Indeed, "when in the course of human events" the people deem it necessary to do so, they may exercise their residual sovereign authority to dissolve a government and establish another in its stead. In theory, only the political community need survive because it, and not the government, is the starting point of theoretical reflection.

The second qualifier is the federal structure of the union and how it exerts a multifaceted practical diminution in the available scope of Lockean speculation. Now practically so because the major theoretical inroad was conclusively refuted by the Civil War. Before that conflict some constitutional theorists reasoned that a state could "nullify" federal law within its jurisdiction under certain circumstances.²¹¹ Even now, a basic definition of federalism is two sovereignties upon the same soil, neither possessing the authority to destroy the other, and it contains some indeterminate limit on pure theory.²¹² Practical limitations have ebbed as theoretical concern for state prerogative has diminished. While the concern still exists, it was much greater in the Framers' time, and bore fruit in constitutional provisions unaffected by the years. State governments had every incentive to preserve them-

206. See Brown, *Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in *BEYOND CONFEDERATION* 113-27 (R. Beeman, S. Bostein & E. Carter ed. 1987).

207. See T. SLAUGHTER, *THE WHISKEY REBELLION* (1986).

208. *Youngstown Steel*, 343 U.S. 579.

209. See *Korematsu v. United States*, 323 U.S. 214 (1944).

210. See *infra* Part IV.

211. See, e.g., G. GUNTHER, *supra* note 29, at 38-39.

212. B. TIERNEY, *supra* note 82, at 55.

selves and so naturally were expected to be the first line of defense against executive actions in "extraordinary" conditions. Second, the tensions of state autonomy were conducive to a healthy coincidence between "extraordinary" conditions and organized state subversion of federal law. Such a condition is more like genuine warfare between sovereigns than the situation Locke contemplated. Finally, and most importantly, the state allegiances of the Framers translated what theory denoted the rescuing hand of executively summoned national force into a red flag. "Fear of centralized political authority" is probably the best one sentence description of the whole case against the Constitution. The vision of a President galloping into a state at the head of a uniformed column concentrated those concerns. It is no surprise then that the Framers did not leave such an apocalyptic vision to mere implication, but addressed the problem forthrightly, and resolved it in the text.

The starting point is the fifth amendment guarantee of due process, which made explicit what the Habeas Clause²¹³ implied: so long as courts were open and functioning, ordinary procedures of law enforcement *must* be observed. "Executive" processes were "substituted" only when no alternative existed. Therefore, on the rare occasions of executive substitution, the President acquired authority he otherwise did not possess, but he acquired it not by virtue of being the Executive. Since "extraordinary law enforcement" is almost indistinguishable, conceptually and practically, from martial law—that is, suspension of civilian procedures in favor of those instituted by military commanders and executed by soldiers—the "Commander-in-Chief" comes to the rescue, not the Chief Magistrate as such. That the textually-expressed power of military command applies here is confirmed by the Militia Clause,²¹⁴ which places the President at militia's head "when called into actual Service of the United States."²¹⁵ *This* is the power to command the sword indicated by theory, and once unsheathed, however rarely, the President wields it. But here that fear of national power profoundly refracts theory. The President may have some self-executing power but it is not self-activating. He does not decide when to unsheathe the sword; Congress does.²¹⁶ The President cannot constitutionally judge when extraordinary conditions prevail and, in fact, unilateral executive action has been consistently condemned throughout our history.²¹⁷

Congress, in the Militia Act of 1792,²¹⁸ further fragmented this authority by bringing the judiciary into the picture. The "first general" commanded only when a Supreme Court Justice certified that regular modes of law enforcement were futile, where, for instance, rebels forcibly closed the courts as they did under Daniel Shays. Only then may the President forcibly reestablish the minimum respect for governmental processes which is a pre-

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

214. U.S. CONST. art. I, § 8, cl. 15.

215. U.S. CONST. art. II, § 2, cl. 1.

216. That is, when "call[ed] forth" by Congress "to execute the laws of the Union." U.S. CONST. art. I, § 8, cl. 15.

217. See generally Engdahl, *supra* note 189.

218. Militia Act of 1792, ch. 28, 1 Stat. 264 (1792).

condition to regular law enforcement. The Militia Act of 1795²¹⁹ deleted judicial certification, and the legislative history provides no explanation. That law authorized action upon presidential judgment alone but there is no evidence that it was thought declarative of constitutional requirements. Also, the Supreme Court in *Martin v. Mott* routinely described this as a "power . . . confided by Congress to the President."²²⁰

Interestingly, the latter act continued an earlier provision bounding presidential judgment. Before the President can call for the state militia, the federal marshal at the scene of disturbance need be unable to execute the laws, even with militia serving in his posse.²²¹ At no point in the course of an emergency does the President become a "lawmaker." So he cannot define bases for detention. Congress retains discretion over continuance of habeas corpus relief, and can stymie executive action by subjecting all detentions to judicial review. At any time Congress, by new legislation, can reclaim the power confided to the President and so end the militia's national service. Reassuringly, the President cannot free himself of these constraints by calling out the palace guard instead. British history effectively taught the Framers that a standing army was the instrument of executive oppression, and they lodged decision-making over all but actual command in Congress. Whether there be a uniformed service and, if so, how it should be governed, are legislative decisions. Congress has prohibited deployment of the military for domestic law enforcement purposes.²²² The Commander-in-Chief clause may actually reduce executive power, theretofore theoretically understood,²²³ as James Iredell remarked in the North Carolina ratifying convention.²²⁴ In sum, our Constitution limits presidential messiahs to rare, brief appearances, and only when called forth by Congress. His performance ends when Congress has seen enough. All the while his essential props—the militia, the military, the marshals—are governed by legislative regulation. The President is effectively powerless to act on his own initiative. Our Constitution renders his service completely subordinate to congressional desires, and thus restores the legislature to that logical superiority it usually enjoys but which Locke would have occasionally reversed.

The precise issue in many cases discussing separation of powers is "removal," as in "who has authority to dismiss an employee exercising executive (or judicial or legislative) powers"? *Myers*, *Humphrey's Executor*, and *Synar* are examples. Whether Congress can reserve removal authority over someone with executive powers—the issue in *Synar*—depends *entirely* upon the validity of the major premise drawn from separation of powers methodology we have discussed. The analytically dispositive question is whether Congress may retain "control" or "supervision" over law execution. Removal has always been discussed in this way. *Synar* and *Myers* did it; so did

219. Militia Act of 1795, ch. 36, 1 Stat. 424 (1795).

220. 25 U.S. 19, 29 (1827).

221. Act of May 5, 1792, ch. 29, 1 Stat. 264 (1792); see Engdahl, *supra* note 189 at 47-48.

222. See U.S. CONST. art. 1, § 8, cls. 12, 13, 14; 10 U.S.C. § 333 (1982).

223. Cf. Engdahl, *supra* note 189, at 30.

224. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (J. Elliot ed. 1937) [hereinafter ELLIOT'S DEBATES].

Madison. On the House floor in 1789, he argued for exclusive presidential power to dismiss the Secretary of State.²²⁵

It is understandable that "removal" should be analyzed contingently because, as Madison suggested, its significance is purely incidental to other constitutional purposes and principles. "Removal" is not an independently analyzable question. It is not a talisman, though it threatens to become one if it persists as an issue after its "parent" organizing principle is undercut. But it is understandably contingent for another reason, too. It is commonly said and literally true that, save for impeachment, the Constitution is "silent" on removal. Therefore, one necessarily must reason *to* a treatment of removal *from* some other, more accessible basis like inference from structure. But the statement, while true, suppresses two alternative approaches. First, the Constitution says a good deal about appointments and, as Madison also remarked in 1789, "[t]he laws cannot be executed but by officers appointed for that purpose . . ." ²²⁶ Madison also related what the Supreme Court has since confirmed as the traditional rule on removal: the power to dismiss is incident to the power to appoint.²²⁷ This is still the governing principle; departures from the rule, and not the rule itself, require justification. Madison, in citing a constitutionally recommended "unity," offered a reason for such a departure. The "sense" of the Constitution, then, is not mute, and speaks indirectly to removal where it speaks of appointment.

Second, as Judge Scalia observed in *Synar*, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."²²⁸ This may be true as far as it goes, but it does not go very far. For one thing it is overstated. By appointing an officer with pre-existing loyalty and perhaps professional debts to it, Congress can insinuate itself into executive processes without removing anyone. And if you push the time frame ahead a bit, you wonder what happens to a government officer dismissed by the Executive. The answer is that he probably seeks another appointment. The "revolving door" of professional life in federal service engenders an ongoing subservience to the body which appoints. Also, the vast bulk of executive employees enjoy civil service protection or other tenure protection, and so are practically unremovable.

These are all preliminary remarks. The deeper inadequacy with the statement is that it just is not that simple. The Constitution itself specifies a class of offices to be filled by presidential nomination with Senate concurrence, including "officers of the United States."²²⁹ Then the critical qualifier: "[B]ut Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."²³⁰ As a constitutional matter, then, the

225. "Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department which was intended for the security of liberty and the public good." 1 ANNALS OF CONG. 518 (J. Gales ed. 1835).

226. *Id.* at 519.

227. *Id.* at 516.

228. *Synar*, 626 F. Supp. 1374, 1401 (D.D.C. 1986).

229. U.S. CONST. art. II, § 2, cl. 2.

230. *Id.*

President as sole holder of executive power has absolutely no unilateral appointment power. In addition, the settled interpretation is that Congress effectively decides whether a particular person is an "Officer" or an "inferior."²³¹ The Constitution, therefore, either requires Senate participation or permits Congress to vest the appointment elsewhere.

*Ex parte Siebold*²³² made clear that Congress need not vest appointment in the body (the President or the courts, for example) supervising the employee. In that case, Congress authorized courts to appoint election inspectors, whose work was conceded executive. Thus "removal" is, in the dispensation heralded by *Synar*, completely severed from appointment. That we should have come *that* far from the traditional rule is sobering. It also suggests that *Synar*, and Madison, too, obscured the analysis of removal precisely by its grand theorizing at the expense of the constitutional text.

The text is even less supportive of Scalia's observation. It follows from the *Synar* chain of reasoning that Congress has only two genuine appointment options, the President or the courts. Given the executive "unity" championed by Madison, cited by the Administration in *Kendall*, and implicit in *Synar*'s account of separated powers, "heads of departments" is redundant. They, like the inferior officers they appoint, are "one" with the President. The subtle refutation in the Appointments Clause is but another example of how theory leads in one direction and the constitutional text in another.

The Supreme Court has affirmed the latter as the guiding principle. Early on, it decided that where Congress vested appointment in a department head, the traditional rule applied in the absence of more specific congressional direction.²³³ Where department heads appointed, they removed. "[T]he president certainly has no power to remove," the Court concluded.²³⁴ Just as Congress designates appointment it may choose to except removal from the traditional rule. *Marbury* is an example. The plaintiff was appointed Justice of the Peace via Senate confirmation of a presidential nomination. Yet *Marbury*'s was a term of years, and it is a necessary premise of that opinion that presidential removal was implicitly eliminated. Otherwise, whether the appointment had "vested" absent delivery was an academic issue. Such an "appointment" could be immediately terminated, and any right to the office thereby extinguished.²³⁵ The Supreme Court reaffirmed this congressional excepting power in *In re Shurtleff*,²³⁶ there requiring "very clear and explicit language" to invoke it. *United States v. Perkins*²³⁷ is a case in which presidential removal of an almost pure executive officer, a naval lieutenant, was congressionally forbidden.

Even where the President removes an executive officer the President has

231. See, e.g., the concession even in the celebrated contrary-leaning case of *Myers*, discussed *infra* at notes 280-85 and accompanying text.

232. 100 U.S. 371 (1879).

233. *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

234. *Id.* at 260.

235. See *Myers*, 272 U.S. at 141. Among its many faults, *Myers* questioned whether *Marbury* really held this.

236. 189 U.S. 311, 315 (1903).

237. 116 U.S. 483 (1886).

not necessarily acquired "control" over law execution. Sure, he can fire the subordinate who fails to heed presidential commands, but removal leaves a vacancy. Laws are not executed by vacant offices and execution cannot recommence until a new appointment is made—that is, until the Senate confirms another nominee. There are some subtle twists here. For instance, Congress, in 1789, alleviated the abruptness of removal by authorizing a "dismissed" federal marshal to execute all process in his hands.²³⁸ And Congress decreed that courts, not the President, fill interim vacancies in U.S. Attorney positions. In fact, as *McAllister v. United States*²³⁹ suggests, notions of presidential responsibility do not inevitably lead to removal anyway. A power to suspend from active duty would do just as well. In all, there is neither case nor constitutional language holding that anyone *must* be removable by the President. None.

III. PRAXIS, OR DOES THE THEORY COHERE WITH HOW WE ENFORCE OUR LAWS?

If advocates of law enforcement autonomy and prerogative justify their position by resort to constitutional theory, as they must to rebuff congressional intervention, the necessary theoretical defense generates serious internal contradictions and parts company with our Constitution at significant points. One powerful possibility for confirmation or justification remains: whether it makes sense of the way we actually do things. The *Synar* and *Meese* analyses are theoretically flawed and a bit foreign to the written Constitution, but they may yet provide the most useful vocabulary and set of analytic tools for investigating, understanding, and explaining the regime we presently inhabit. They may represent ways of reconceptualizing certain practical anomalies theoretically suppressed by weasel words like quasi-judicial, -legislative, and -executive. One example of this virtue is Henry Monaghan's seminal article on constitutional common law.²⁴⁰ The concept of constitutional common law eliminated the "contradiction" there, not by changing the reality, but by transforming our thinking about it, by generating a new concept commodious enough to house both propositions.

Here, notions like complete executive control over law "enforcement" do coincide with some familiar features of our legal order, features effectively parts of our "working" constitution. Since 1789, the United States Attorneys have enjoyed exclusive jurisdiction to prosecute federal offenses, to the exclusion of state participation and virtually to the exclusion of private parties. They are now ultimately accountable to the President through the Attorney General and the Justice Department.²⁴¹ Moreover, as Justice Brennan recently and more or less correctly observed: "The decision whether to prosecute, what offenses to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of the prosecutors."²⁴² There is virtually no judicial precedent for compelling the Execu-

238. The Judiciary Act of 1789, ch. 20, 1 Stat. 88 (1789).

239. 141 U.S. 174, 189 (1891).

240. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

241. See generally *infra* notes 340-406 and accompanying text.

242. *De Garmo v. Texas*, 474 U.S. 973 (1985)(Brennan, J., dissenting from denial of *cert.*).

tive to prosecute²⁴³ anyone it does not wish to prosecute, and there is some recent authority that the Executive enjoys a similar discretion over civil law enforcement.²⁴⁴ The vast administrative network comprises what are conventionally called "executive departments," and the President certainly has a lot to do with how they are run. But then, the ideas propounded by the Attorney General and by the *Synar* Court may be assumed to resonate with the way the three branches actually operate. Otherwise, such serious people would not take them seriously, or expect us to.

A more careful, broader look at how federal law is enforced reveals that the harmonies produced by the proffered conceptualization are slight compared to the jarring discordance the law creates. Just a few significant examples must suffice. One is the presumably unassailable network of law enforcement which entirely bypasses the Executive Branch, "private" law enforcement. It is not that there are so many "private" federal prosecutions to be foreclosed;²⁴⁵ "prosecution" of criminal contempt of court by private attorneys is perhaps the only lingering example, besides the independent counsel law, of criminal prosecution without connection to the Executive. Still, private prosecution at the state level was, and is, a familiar practice.²⁴⁶ It was the Judiciary Act of 1789 which established the monopoly on federal prosecutions by United States Attorneys that continues to the present,²⁴⁷ and there is no historical evidence that the First Congress felt constitutionally obliged to do it.²⁴⁸ Presidential supervision is also at least a creature of statute. The United States Code sets up a ladder of "at will" employment contracts, rising from Assistant United States Attorneys through their bosses to an attorney who serves at presidential pleasure, and gives the Attorney General supervisory authority over them.²⁴⁹

As previously noted, federal prosecutorial jurisdiction could have been shared with state prosecutors as well as with private parties. The constitutional barrier to congressional reordering along the latter lines is more the due process requirement that a relatively disinterested public official, and not the bias-laden representative of the victim, stand between a suspect and initiation of criminal proceedings.²⁵⁰ Put differently, private prosecution may be constitutionally suspect, but the finger-pointer is not article II. It is the due process clause. The broad theoretical nemesis to private prosecution has likewise not been tied to notions of executive responsibility. The ever clarifying, now crystallized, if not redefined, claim that "crimes" are indivisibly "public" wrongs, in contrast to private "wrongs" remedied in civil proceedings, has instead wrought the virtual state monopoly of prosecutions by the

243. See generally *infra* notes 418-36 and accompanying text.

244. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985).

245. See generally, Note, *The Outmoded Concept of Private Prosecution*, 25 AM. U.L. REV. 754 (1976). "Private prosecution" occurs in one of two ways. A private attorney may assist a public official in a particular case or then he may prosecute the case entirely himself. The former is much more common and the latter is confined to minor offenses.

246. *Id.* at 765-68.

247. Act of Sept. 16, 1789, ch. 15, 1 Stat. 69 (1789).

248. See generally *infra* notes 393-409 and accompanying text.

249. 28 U.S.C. § 519 (1982).

250. See Note, *supra* note 245, at 787-89.

state.²⁵¹ But this notion neither requires nor suggests any particular division of labor in the state's monopoly. Such fairness concerns weigh in favor of, for example, special prosecutor provisions insofar as those laws are triggered by interest or bias by the regular prosecutor. Finally, the due process requirement does not lead to an executive monopoly; if anything, it is more conducive to a professionalized independent prosecutorial agency than one ultimately accountable to the electorate through the President.

Private prosecution may be practically rare but private law enforcement is not. Consider the private civil enforcement mechanisms in, for example, antitrust,²⁵² civil rights,²⁵³ securities,²⁵⁴ and racketeering laws.²⁵⁵ Plaintiffs in this context undeniably function as private attorneys general. Their motives may be individual and ego-centered, but their legal remedies are fashioned in the same public interest that the plaintiff, via an "invisible hand," vindicates. Where congressional authorization is explicit, as in the antitrust arena, that is the unmistakable intention. Where the courts imply a private cause of action, the principal objective is to further a congressional regulatory goal, not to provide private compensation. Perhaps the best example of how well private parties may impersonate the Justice Department is civil RICO. It is almost pure private prosecution, since civil plaintiffs are effectively called upon to prosecute violations of ordinary criminal laws. Moreover, the statute makes unlawful virtually no primary conduct which previously was lawful. It serves law enforcement purposes almost entirely by enhancing penalties and increasing the available deterrent effect. Private actions can and do lead to "overenforcement" of the law in the Executive's opinion. That is why the "public" Attorney General increasingly appears as amicus on the defendant's side in antitrust cases, arguing against the private attorney general view of proper enforcement.²⁵⁶

A second, doubtlessly permanent aspect of law enforcement in our times does not bypass the Executive Branch but instead subjugates it. Congress may, even according to the *Synar* court, prescribe executive duties and authorize lawsuits to enforce the law upon the Executive. These are the merely "ministerial" tasks discussed earlier.²⁵⁷ In between these two poles—where the law is enforced without any executive participation and where executive enforcement occurs without any discretion—is that area where enforcement discretion is fragmented or shared among the three branches. This is more than the true, but non-trivial, observation that without congressional action there is neither substantive law to enforce nor the law enforcement departments necessary to enforce it. It is more than that the due process clause requires judicial participation in any enforcement action involving a deprivation of life, liberty or property. This seems to apply to virtually all enforcement since, even though executive failure to take en-

251. J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 10-11 (1980).

252. 15 U.S.C. § 15 (1982).

253. 42 U.S.C. § 198(b) (1982).

254. See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

255. 18 U.S.C. § 1964(c) (1982).

256. See Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 *YALE L.J.* 677, 707-08 n.187 (1984).

257. See *supra* notes 175-83 and accompanying text.

forcement action may arise outside the adjudicatory context,²⁵⁸ the converse is rarely true. The more subtle and more important reality is that each branch actually enjoys an autonomous and effective role in ascertaining *how* to enforce the law; even while the Congress is confined to lawmaking only, the courts solely to adjudication, with the Executive still the nominal repository of law "execution."

The *Kendall* opinion is suggestive of a helpful modern example of independent judicial enforcement of the law: consent decrees and the ongoing effort of this Attorney General to revive the notion that, in enforcement actions, courts can be reduced to adjuncts of the Executive.²⁵⁹ Here the big battle has already been fought and won by the judiciary in *Marbury*. That case drew directly upon the nature of rule by law, and staked out an unmediated judicial duty to fashion an appropriate remedy for every legal wrong,²⁶⁰ at least where the conditions of adjudication exist and where Congress has not forbidden the remedy the court considers appropriate. In all events, the Executive is powerless to stem the remedial course chosen by the courts once their jurisdiction is invoked, as it must be by the Executive if it is to enforce the law. The exclusionary rule is a perfect illustration. I have demonstrated elsewhere that it originated precisely in that *Marbury* remedial duty,²⁶¹ and Edwin Meese is sorely aware that whenever he institutes criminal proceedings, the judiciary stands ready to enforce search and seizure law against his agents.

The Reagan Justice Department has now run into the same judicial autonomy obstacle in relying upon consent decrees rather than final adjudications to enforce the law. Antitrust is the arena and the Tunney Act²⁶² the protagonist. That law provides for judicial review of decrees proposed by the parties to government civil antitrust actions. The reason for the law is simple. Congress feared that the Executive Branch—here, the Antitrust Division of the Justice Department—might make, in fact, had made some bad antitrust settlements.²⁶³ "Bad settlements" are those acceptable to the parties, but against the public interest. In other words, Congress has authorized the courts to police executive enforcement decisions, to substitute the courts' judgment of "the public interest" for that of the Executive Branch.

In *Maryland v. United States*,²⁶⁴ then Justice Rehnquist made the separation-of-powers argument against the Act's validity, and in terms entirely consonant with the theoretical warrants for executive discretion already explored here. Troubled "that a district court, by entering what is in essence a private agreement between parties to a lawsuit"²⁶⁵ might exercise such

258. See *infra* notes 498-500 and accompanying text.

259. See, e.g., Memorandum to All Assistant Attorneys General (Mar. 13, 1986)(copy in author's possession).

260. *Marbury*, 5 U.S. (1 Cranch) at 162-66.

261. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 St. Louis U.L.J. 1031 (1986).

262. 15 U.S.C. § 16(b)-(h) (1976).

263. See Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C.L. REV. 291, 322 nn.217-19 (1988).

264. 460 U.S. 1001 (1983).

265. *Maryland*, 460 U.S. at 1002.

sweeping authority, Rehnquist thought the inquiry assigned "a classic example of a question committed to the Executive" to the judiciary.²⁶⁶ The question whether to prosecute a lawsuit is a question committed to the Executive by article II and it was inconsistent with the express language of *Marbury* for courts to interfere where the Executive enjoys a discretion. "Even though Congress may by statute impose such a duty in the federal courts, they may not perform it."²⁶⁷

Rehnquist may be quite right when he additionally observes that the discretion-limiting standard promulgated by Congress is exceedingly fuzzy.²⁶⁸ As a matter of policy as well as institutional capacity, the Tunney Act was better left unpassed. But when Rehnquist builds a constitutional argument from this foundation, the effort falters badly. Rehnquist relies upon a series of simple mischaracterizations. First, a consent decree is not only a contract between private parties. The Court previously declared it a judicial act, too, thus implicative of judicial responsibility in ways that the "private contract" model is intended to foreclose.²⁶⁹ At a minimum, Rehnquist opted to rely exclusively upon one of two competing analyses and, as my colleague Tom Mengler writes, consent decrees are best evaluated from a third "functional" perspective. In all events, "simple private contract" is an unlikely account of what the parties (the United States of America and AT&T) wrought in the case. Second, the question is hardly whether to prosecute a lawsuit. The Tunney Act does not apply even to stipulated dismissals, much less to initial decisions to file. The Rules of Criminal Procedure analogously require "leave of the Court" to dismiss a criminal antitrust action, as the rules do all indictments,²⁷⁰ and that theoretically significant cap on executive discretion is not widely regarded as unconstitutional. Third, *Marbury* really cuts the other way, and deeply into Rehnquist's view. Whether, or to what extent, the Executive enjoys a discretion is a function of the laws, primarily statutes; that executive discretion exists up to a point to be discerned by the judiciary in a given case is a staple of our constitutional order. Surely, *Marbury* requires the limited judicial review of agency action mandated by the Administration Procedure Act²⁷¹ more than it forbids such review. Fourth, Rehnquist's assertion that the Executive Branch enjoys an irreducible article II discretion over how the antitrust law should be enforced, besides being question-begging *ipse dixit*, is demonstrably wrong. Besides the judicial intrusion heralded by the Tunney Act, we know that private parties enforce those laws in ways displeasing to the Executive, and that Congress effectively "enforces" them, too.²⁷² Fifth, and following from previous points, his characterization of Tunney Act review as "nonjudicial" business,²⁷³ like the advisory opinions condemned in *United States v. Musk-*

266. *Id.* at 1004.

267. *Id.* (quoting *United States v. Muskrat*, 219 U.S. 346 (1911)).

268. *Maryland*, 460 U.S. at 1002.

269. *See, e.g.*, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975). *See generally* Mengler, *supra* note 263.

270. FED. R. CRIM. P. 42(a).

271. 5 U.S.C. §§ 701-706 (1982).

272. *See supra* note 256; *infra* notes 282-85, 287-93.

273. *Maryland*, 460 U.S. at 1004.

rat,²⁷⁴ is simply implausible. Indeed, the near opposite is more likely true. That is, as more and more courts have recently opined, the Tunney Act may be declarative of what the law otherwise would be, that courts possess "inherent" authority to review consent decrees for their consistency with the interests of third persons who are not parties to the lawsuit.²⁷⁵ In this view, courts abdicate their *Marbury* responsibilities if they fail to perform the reviewing function expressly committed to them by the Act. Indeed, the main attraction for the parties of consent decrees over voluntary dismissals is the relative ease of enforcement made possible by the court's inherent powers to punish contempt.²⁷⁶ It is at least plausible to conclude that courts possess authority to reject conditions which might later result in contempt citations. Here again broad executive discretion rooted in separation of powers theory comes close to self-refutation. The same "inherency" and "independence" themes that buttress that claim rebut it when applied to the judiciary. That is, the Executive is attracted to consent decrees primarily because of the enforcement efficiency which the courts' inherent powers to punish contemptuous deviations by the other party portends and its preferred "private contract" model is thought to preserve maximum independence for it, the Executive, to modify the decree. Now the arguments boomerang. The contempt power attaches to a court, as such, once its jurisdiction is invoked. Then the judiciary's constitutionally-grounded "independence" prevents it from reflexively acceding to executive demands.

Congress might be well advised to either repeal the Tunney Act *in toto* or to at least further clarify its guidelines for judicial review.²⁷⁷ Moreover, the Act has already been judicially declared constitutional, and even the Reagan Administration despairs of securing a judgment of constitutional invalidity. The evidence here includes recently-issued guidelines dramatically curtailing the Justice Department's reliance upon consent decrees generally.²⁷⁸ Either increased litigation to judgment, or, more likely, increased resort to voluntary dismissals, must follow.

Rehnquist's weak separation-of-powers critique of Tunney shows that when you hold up the theories which justify article II discretion against the light of reality, they shrink. They do not resonate with ways that we enforce the law, ways that are not seriously suggested to be unconstitutional. The necessary role of courts in law execution and their constitutionally-required autonomy will always refract the enforcement designs of the Executive Branch. The Tunney Act is powerfully indicative of how Congress can legitimately supplement, assuming the Act does not restate existing law, that judicial role.

Congress may also act directly to enforce the law. Bear in mind the Chief Justice's advice that "whether to prosecute a lawsuit" is a prime example of discretion committed to the Executive Branch by article II.²⁷⁹ From

274. 219 U.S. 346 (1911).

275. See Mengler, *supra* note 263, at 319 nn.204-05.

276. *Id.*

277. See generally *id.*

278. *Supra* note 259.

279. *Maryland*, 460 U.S. at 1004.

this one may conclude that Rehnquist would side with the Administration in the Ann Gorsuch and Ethics-in-Government Act controversies. He would no doubt agree with the earlier observation of Justice Brennan that the Executive similarly possesses the prerogative to dismiss prosecutions as well. A more helpful formulation to this analysis, for present purposes, would be that these decisions represent the strongest possible instances of the claimed discretion. Should these instances fail to exemplify that prerogative, then the overall constitutional theory is seriously weakened.

Congress' power to enact a criminal law, and thereafter suspend its enforcement for some specified duration (that is, its power to declare a general amnesty)²⁸⁰ prevents the Executive from initiating any prosecutions at all, even under a law whose validity is not impaired, just its present enforceability. At the other end of the spectrum of techniques is the private bill.²⁸¹ It resembles the amnesty in that it responds to executive overenforcement, but in microcosm, whereas the amnesty does so in macrocosm. The private bill represents a more finely-tuned congressional response to executive overenforcement. While not often used in the criminal context, it is a mainstay of immigration, citizenship, and civil claims against the government, and there is no apparent reason for constitutionally so confining it. Further, the private bill may pre-empt prospective enforcement action against an individual. Just as commonly, the private bill intervenes in ongoing executive activity or even reverses its outcome. Note also that "private" bills are constitutional "lawmaking" in the full sense. They conform to the bicameralism and presentment requirements of article I that tripped the legislative veto in *Chadha*. In *Synar's* terms, a private bill is article I lawmaking and also permits Congress to resolve individual cases as it chooses, conclusively trumping executive intentions to the contrary.

Both of these devices should be distinguished from an effectively similar, but formally distinct, hybrid technique used by Congress to apply the law to individual cases, particularly in the realm of taxation. This technique incorporates in the basic statute an exemption from its requirements for a particular person, an exemption artfully couched in general language. Former Louisiana Senator and Finance Committee Chair Russell Long was its master. The convoluted but neutral-sounding section 613 A(c) of the Internal Revenue Code had one beneficiary: his mother. A similarly neutral-looking provision, section 512(b)(15), benefitted his favorite Louisiana radio station, and no one else.

Closely related is the two-step lawmaking technique employed in anti-trust exemptions. There, Congress writes general regulatory rules and subsequently particularizes them after unanticipated enforcement liability, undesirable judicial opinions, or both. When insurance underwriters were indicted for price-fixing,²⁸² Congress responded by exempting them from the Sherman Act.²⁸³ The Sports Broadcasting Act of 1961,²⁸⁴ as another exam-

280. *Brown v. Walker*, 161 U.S. 591, 601 (1896).

281. The "private" bill is so called because of its limited applicability, frequently to one person. It is not, for example, "secret" in any way.

282. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

283. The congressional response is codified in 15 U.S.C. §§ 1011-1015 (1982).

ple, was intended to overturn the District Court injunction sought by the Justice Department against the National Football League.²⁸⁵ The effect here undermines the "legislative" and "executive" dichotomy proffered in cases like *Synar*. The intent of passages confining Congress to general legislative choices is to leave the Executive free to apply, or execute its generalities in particular instances. These techniques permit Congress to do both—to express general rules first, and to determine individual applications later.

Tax and antitrust provide further examples of "lawmaking" which is practically law enforcement. Archie Parnell wrote of Congress' tendency to prohibit the Internal Revenue Service from executing aspects of the Code, instead of changing the Code itself.²⁸⁶ The techniques include legislative prohibitions on IRS efforts to provide nationwide guidance on specific tax issues and appropriation limitations that restrict use of operating funds to administer various Code provisions. In one delicate example, among the many cited by Parnell, Congress forbade expenditure of funds to enforce Revenue Rulings denying deductions for "contributions" to a religious school. In the process, a Revenue Ruling designed to eliminate deductions for what effectively were tuition payments was overcome.²⁸⁷ Congress was thereby relieved of debating and voting on tax breaks to parochial schools.

Appropriation riders have been extensively used to control executive enforcement of the antitrust laws. In 1984, the Justice Department filed an amicus brief before the Supreme Court urging the Justices to reverse their 1911 holding that resale price maintenance was per se illegal.²⁸⁸ In response, Congress inserted into the Department's Appropriations Bill for 1984 a restriction on the use of funds to overturn the per se rule.²⁸⁹ In oral argument before the Court, the Assistant Attorney General was compelled to ignore the point previously made in his brief.²⁹⁰ Another appropriations bill disavowed congressional support for, and called upon the Attorney General to withdraw, Vertical Restraint Guidelines promulgated by the Department.²⁹¹ Soon thereafter the Antitrust Division announced that the guidelines were for "internal" enforcement purposes only.²⁹² Also in 1984, in response to an administrative complaint against New Orleans and Minneapolis ordinances regulating taxicabs, the Senate and the House both passed riders preventing the FTC from suing cities.²⁹³ The riders were repealed after passage of legislation exempting cities from private antitrust suits.²⁹⁴ Perhaps the most pertinent example of executive cowering in the face of

284. 15 U.S.C. § 1291 (1982).

285. See *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

286. Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 *YALE L.J.* 1360, 1361 (1980).

287. *Id.* at 1374.

288. See *Brief for the United States, Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

289. See H.R. 3222, 98th Cong., 1st Sess. (1983).

290. See H.R. REP. NO. 99-399, 99th Cong. 1st Sess. 4 (1985).

291. Act of July 7, 1985, Pub. L. No. 99-180, 99 Stat. 1136 (1985).

292. *Ginsberg Will Continue Direction of Division, Won't Revise Vertical Guidelines*, [Jan.-June] *Antitrust & Trade Reg. Rep.* (BNA) No. 1257, at 56 (Jan. 9, 1986).

293. Act of August 30, 1984, Pub. L. No. 98-411, 98 Stat. 1545 (1984).

294. Act of October 11, 1984, Pub. L. No. 98-544, 98 Stat. 2570 (1984).

tightened purse strings occurred in the CICA imbroglio. The Reagan Administration backed down from its threat to ignore mandatory stay provisions only after Congress threatened a *zero* appropriation for the Department of Justice. That was hard-ball, to be sure, but the Supreme Court surely has invited the contest. While disclaiming in *Laird v. Tatum* a federal judicial role "as virtually continuing monitors of the wisdom and soundness of Executive action," the Court made clear that "such a role is appropriate for the Congress acting through its committees and the 'power of the purse.'"²⁹⁵

Now the *Synar* case can be ushered back onstage, cast as a double-edged critical illustration. There, Congress retained the power to oust the Comptroller General from office, for "inefficiency," "neglect of duty," and "malfeasance." Although never exercised and urgently depicted by the dissenting Justices as a power no more likely to be used than the power of impeachment, the Court reckoned that this provision precluded assignment of an "executive power" to this "legislative officer." Otherwise, Congress would "reserve . . . control over the execution of the laws." From this and from the contours of the enforcement regime so far sketched, one of two conclusions follows: since the "control retained" in *Synar* is *de minimis* compared to the "control" described here, either *Synar* is wrong or the regime needs to be dismantled, brick by brick. Either *Synar* is wrong or it is, as a matter of practical fact, a revolutionary holding.

Choice between the alternatives may be postponed pending further description of the existing framework of law enforcement. It is helpful to begin with Professor Langbein's remark that criminal law enforcement is comprised of two elements, investigation and prosecution, and that there is simply no clear border between the two.²⁹⁶ Considering investigation for the moment as a separable governmental "function," the Executive obviously enjoys no monopoly, as Congress may investigate facts so long as loosely related to lawmaking or to their supervisory role over the various executive agencies.²⁹⁷ Courts undoubtedly rely upon the parties to produce most adjudicative facts, but even in our adversary system judges may question witnesses called by litigants, call witnesses of their own, and appoint special masters to help locate and sort through facts. Still, these qualifications go to the fringes. The investigation and collection of evidence for government enforcement actions is clearly the domain of the FBI and other "executive" agencies. Indeed, the due process rights of litigants, and not separation of powers, may preclude active congressional involvement in an ongoing executive enforcement action.²⁹⁸ But the undeniable judicial superintendence of *how* criminal investigation is conducted is, it sometimes seems, the Court's "core" function in our constitutional order. The fourth, fifth, and sixth amendments are exclusive judicial provinces and they largely govern police activity. Further, the Supreme Court may forswear a general supervisory

295. 408 U.S. 1, 15 (1972).

296. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 335 (1973).

297. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

298. See *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966).

power over state law enforcement, but it makes no similar pronouncement concerning the federal police regime, the one we are concerned with here. While this supervisory power is both inexactly locatable and a bit controversial,²⁹⁹ combined with the "bottomless pit" nature of fourth amendment theory emerging wherever there is a legitimate expectation of privacy, it indicates judicial supervision of investigation equal to that of the President.

Ordinarily, one of the traits distinguishing the federal system from state law enforcement is that an Assistant United States Attorney supervises police investigation, a working relationship produced by the generally proactive nature of federal law enforcement.³⁰⁰ This distinctive involvement is the best available example of an executive officer performing an executive function, that of federal criminal prosecutor, and makes noteworthy two observations. One is that the constitutional law of search and seizures and of confessions simply makes no note of it. In other words, article II has had no impact on judicial supervision of the investigative function.

That an "investigative" function is an independent analytical focus is also confirmed by the nature of prosecutorial immunity from section 1983 damages actions established by the Supreme Court in *Imbler v. Pachtman*.³⁰¹ While "investigative" activity by prosecutors may enjoy the qualified immunity of ordinary investigators, their advocacy or "quasi-judicial" actions enjoy full immunity.³⁰² These immunities derive from congressional intent, not from constitutional analysis, and admit judicial supervision of prosecution through the granting of injunctive relief. Indeed, the entire history of prosecutorial immunity reveals no separation-of-powers influences. It developed, instead, by analogizing prosecutorial functions to either what judges (or grand jurors)³⁰³ do or to what police³⁰⁴ do. The prosecutor is non-pedigreed; legal thinking historically has not known where to place him in the tripartite scheme. In fact the prevalent view considered him some kind of "quasi"-judicial officer. The Supreme Court in *Imbler* was rightly impressed by the potentially chilling effect of damage actions upon prosecutors,³⁰⁵ but failed to make the expected constitutional argument, the one Edwin Meese might make: Congress may not authorize and the courts may not enforce consistent with article II a remedial scheme which compromises that independence of executive judgment required by the separation of powers. Instead, *Imbler* is consistent with a congressional recalculation of "chilling effect" leading to elimination of the privilege.

299. See, e.g., Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

300. Basically, local prosecutions are commenced after a suspect has been taken into custody by police agencies for a completed, past criminal offense. Compare this "reactive" mode to the federal system's common practice of conducting extensive pre-arrest investigation of targeted individuals (who might even be given by the agents an opportunity to commit the crime which results in prosecution).

301. 424 U.S. 409 (1976).

302. *Imbler*, 424 U.S. at 430-31.

303. *Id.* at 421-23; *Smith v. Parman*, 101 Kan. 115, 165 P. 663 (1917); *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896).

304. See, e.g., *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965)(prosecutor who helps elicit illegal confession acts in investigative capacity and enjoys qualified immunity); and cases cited in *Imbler*, 424 U.S. 430 n.31.

305. *Imbler*, 424 U.S. at 424-25.

*United States v. United States District Court*³⁰⁶ held that constitutional constraints fully apply when the President investigates domestic threats to national security. While it is still unclear what the distribution of constitutional authority among the Court, Congress and the President may be regarding foreign threats, *United States v. United States District Court* conclusively merged domestic security investigations with the rules of "ordinary" law enforcement. The structure of the presidential claim in the case was both stark and familiar: the express constitutional command to "preserve, protect and defend" the Constitution, along with an amalgamated "foreign affairs" ascendancy, could not be performed without the essential information gathered by electronic surveillance.³⁰⁷ Therefore, the Constitution implicitly authorized these indispensable means of fulfilling those duties.³⁰⁸ The sunlight is that the argument's internal logic demonstrates how impossible it is to locate ordinary "law enforcement" or prosecution in either article II generally or in the "take care" clause specifically. If so, the "indispensable" means necessary to insure faithful presidential execution of that constitutional duty would destroy the legislative and judicial supervision of federal investigative activity ensconced in our constitutional law.

At the other end of the "enforcement" continuum, away from the pre-trial investigative stage, is another tightly-controlled executive performance, one whose ordering principles are produced outside the Executive Branch. The rules of evidence and procedure have evolved under congressional tutelage with the help of judges and evince *no* constitutionally-grounded concern for executive prerogative. The "discretion" of a prosecuting attorney over the actual conduct of litigation is no more than that of the ordinary attorney, and probably less. Due process responsibilities of fundamental fairness impose greater duties upon government attorneys; the *Brady v. Maryland*³⁰⁹ disclosure of exculpatory evidence is one example, and the duty to seek "justice" and not just a conviction is another.³¹⁰ The Constitution's relevance here is the same as in all lawsuits: the adversary system it sustains places important evidence—production burdens—on the litigants. The forensic role of the prosecutor is undoubtedly an executive function. The *Confiscation Case*³¹¹ made this clear one hundred and twenty years ago. Nevertheless, constitutional requirements were not there mentioned. The Supreme Court confirmed that it depended exclusively upon statutory authorization twenty years later in *United States v. San Jacinto Tin Co.*³¹² There, the Attorney General sued to annul a patent for land on the ground that the patent was secured by fraud. The defendants argued the Attorney General had no

306. 407 U.S. 297 (1972).

307. *United States v. United States District Court*, 407 U.S. at 310-13, 318-19.

308. Similarly, President Reagan promulgated Executive Order 12,333 delegating to the Attorney General authority to dispense with warrants in foreign agent situations. Reagan relied upon the proposition that "timely and accurate information about the activities . . . of foreign . . . agents" is necessary to the discharge of presidential duties specified in the Constitution. Exec. Order 12,333, 46 Fed. Reg. 59,941 (1981). See Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611 (1983).

309. 373 U.S. 83 (1963).

310. See *Berger v. United States*, 295 U.S. 78, 88 (1935). See Note, *supra* note 245, at 774-75.

311. 74 U.S. 454 (1868).

312. 125 U.S. 273 (1888).

authority to bring such a suit, since no statute expressly provided for it. The Supreme Court found the necessary sanction in the 1861 law establishing the Justice Department, with the Attorney General at its head. The Attorney General was thereby placed in "charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government." There was, the Court noted, no express statutory authority for him to begin criminal prosecutions either, but the Attorney General's "general superintendence" of all government suits also implied authority to cause such actions to be instituted. The lesson of *San Jacinto* is that by omitting all mention of the Constitution and specifically the "take care" clause in this portion of the opinion, it teaches that control over criminal prosecutions is where Congress puts it. And the opaque reference to the President in the very last sentence of this section of *San Jacinto* confirms the opinion's assault upon, for example, the alleged constitutional defects in the independent counsel law.³¹³

Notions of "exclusivity" are also overstated. To the private prosecution of contempt and independent prosecution under the Ethics-in-Government Act must be added the prosecution function in areas of congressional exclusivity (in the territories and in the District of Columbia). Also, only actual litigation is monopolized. State investigators commonly participate in federal operations, and no jurisdictional line is thought necessary. Also, federally punishable criminal behavior is not monopolized. Many acts and schemes which constitute federal violations and thus implicate federal regulatory interests are prosecuted in state courts by state officials. Were Congress now to make federal criminal jurisdiction concurrent judicially, as it could, "federal" prosecutors would, at a minimum, have to be admitted to the state bar to perform their executive functions.

"The decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of . . . prosecutors."³¹⁴ So observed Justice Brennan, who could not have been happy to observe it. Surprisingly, then, Brennan overstated it. Beyond previously-discussed protection afforded Congressmen and judges is the President's probable immunity from criminal prosecution prior to impeachment.³¹⁵ Remaining constitutionally-rooted qualifications included equal protection,³¹⁶ "vindictive" prosecution³¹⁷ (for example, punishment for exercise of a constitutional right); double jeopardy³¹⁸ (for example, enhanced charges at retrial); cruel and unusual punishment³¹⁹ (plausibly, an

313. *San Jacinto*, 125 U.S. at 278-80. The last sentence remarks that the Attorney General, as head of an executive department, "represent[s] the authority of the president in the class of subjects within the domain of that department and under his control." *Id.* at 280. This evidently refers to a portion of law enforcement activity inextricably bound up with presidential authority. Examples would probably include pardon and litigation relative to foreign affairs. Implicit, of course, is the negation of *Synar*-type claims that law enforcement as such, in toto, is a matter of presidential prerogative.

314. *DeGarmo v. Texas*, 474 U.S. 973 (1985) (Brennan, J., dissenting from denial of *cert.*).

315. See G. GUNTHER, *supra* note 29, at 384.

316. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

317. *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

318. *Blackledge v. Perry*, 417 U.S. 21 (1974).

319. *Cf. United States ex rel. Lewis v. Lane*, 656 F. Supp. 181, 195 (C.D. Ill. 1987).

impermissible "arbitrariness" where prosecutors may select from among eligible defendants those liable to capital punishment); due process generally³²⁰ (for instance, the prosecutor knowingly uses perjured testimony). A more exotic limitation was suggested in last term's sodomy case, where Justice Blackmun noted a possible eighth amendment bar to imprisonment for acting upon an "attraction" constituting the "very fiber of an individual's personality."³²¹ Most recently, the Supreme Court recognized limited judicial review of "release-dismissal" agreements between prosecutors and criminal defendants who might become civil plaintiffs.³²² The relevant premise of that opinion is judicial competence to trump such deals with an independently-derived view of the public interest in deterring prosecutorial misconduct.

All federal charging decisions must be supported by probable cause and in the case of serious crime the operative charging decision is not the prosecutor's, but the grand jury's.³²³ It may be that grand jurors no longer function as an independent buffer between the state and the accused, but they did in the Framers' time.³²⁴ Even now it is an "arm of the court," not of the prosecutor, and the formalities of modern grand jury practice present a grave theoretical obstacle to grand conceptions of prosecutorial discretion: the grand jury could constitutionally be reorganized and restored to its original function as buffer against executive prerogative. Put differently, an executive branch happy with its control of grand juries would be constitutionally powerless to restrain a reform agenda which included, for instance, telling grand jurors more about their nullification powers, widening the scope of inquiry to include presently "irrelevant" issues of unreasonable search and seizure, and injecting adversarial qualities or closer judicial management into the proceedings.

These direct constitutional constraints immediately distinguish the prerogative attending prosecutorial decisions from that of article II functions where the President enjoys immense, almost unlimited, freedom of action. Discretion in such a strong sense is characteristic of the pardon³²⁵ and veto powers. Aside from the juridical forms necessary to render a pardon or veto operative, it is difficult to conceive another constitutional attack on an exercise of those powers, and no successful attack is recorded. Even so, the President's pardoning authority does not preclude a congressional power to grant general amnesty.³²⁶ The veto, of course, is but a conditional check upon legislation.

As further examples of the contrasting limits on prosecutorial discretion, the Federal Rules of Criminal Procedure require "leave of the Court" to dismiss an indictment, and the defendant may veto attempts to dismiss

320. *Berger v. United States*, 295 U.S. 78, 84-89 (1935).

321. *Bowers v. Hardwick*, 478 U.S. 186, 202-03 n.2 (1986)(Blackmun, J., dissenting).

322. *Town of Newton v. Rumery*, 107 S. Ct. 1187, 1192 (1987).

323. U.S. CONST. amend. V.

324. See *infra* notes 442-47 and accompanying text.

325. See *Ex parte Garland*, 71 U.S. 333, 380-81 (1866); see also *Schick v. Reed* 419 U.S. 256, 266-67 (1974).

326. *Brown v. Walker*, 161 U.S. 591, 601 (1896).

once trial begins.³²⁷ Until federal crimes are codified we will not know whether the significant legislative constraints upon plea bargaining in New York, for instance, are constitutionally tolerable.³²⁸ Whether they are depends upon the issues addressed by this Article. Enough has been said to now wonder what "discretion" federal prosecutors possess that is not derived from statute or from their role as attorneys in our adversary process.

Notwithstanding such questions, the Supreme Court in *Heckler v. Cheney*³²⁹ subsumed such discretion within a broader law enforcement power, which it then slyly justified by its kinship with prosecution:

Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take care that the Laws be faithfully executed.'³³⁰

Shorn of tautological undertones and corrected for its misreading of the constitutional text—the President is charged to take care, not some abstract or amorphous "executive" branch—this claim admits of verification. That is the subject of Part IV.

By now what might be considered a criticism of my analysis suggests itself: am I saying that the Framers abandoned "separation of powers"? Well, almost, but we must be careful to specify what that means. There is a separation of persons. Vile reminds us that the ban on plural office holding is no small matter. He called it the "most significant aspect of the doctrine in forming the special character of the American government."³³¹ This prohibition on mixing personnel is possible only after the government has been divided into distinct branches. So there is also a separation of branches or departments.

But that is as far as the Framers went, in principle. Their genius was a candid recognition of the lessons of experience: hermetical separation of powers on parchment did not lead to separation in practice. In practice, the legislature dominated. Precisely to keep the benefits of separated powers did the Framers purposely mix them, and significantly so. Here, *The Federalist No. 47* is most instructive. Fully digested, Madison is saying no less than this: Liberty is the unexpressed but fairly obvious systemic objective. The Constitution would achieve that goal by keeping the three departments "separate and independent." This is accomplished by the ban on plural office holding touted by the *Synar* court, resulting in separate and independent governmental personnel. Put differently, the Constitution ordains a single "identity" for each of the institutional actors, members of Congress, the President and federal judges. "Ambition" comprised of self-interest, institutional loyalty, and perhaps a good faith but still parochial view of the public good, is distinctly channelled. Effective "checks," especially upon the legis-

327. FED. R. CRIM. P. 48(a).

328. See N.Y. CRIM. PROC. LAW § 220.10 (1968).

329. 470 U.S. 821 (1985).

330. *Heckler*, 470 U.S. at 832-33.

331. M. VILE, *supra* note 58, at 134.

lature, are attainable only if the spheres of operation overlap, if powers are mixed and shared. Each branch then possesses an active voice in the others' affairs, and "ambition" may then confront "ambition," instead of passing it by on separate tracks. Powers are, in principle, not separated but shared. That is the sense in which the doctrine is abandoned.

So much explains the diffusion of authority over substantive areas like the military, foreign affairs, appointments and (even) law enforcement. We have also seen how "separation of powers" is subordinate to the requirements of separate and independent branches. The "necessity" of congressional and judicial contempt prosecutions justifies borrowing executive powers. The same necessities may limit the President's pardon power: executive exoneration of, for instance, congressional contemnors might compromise legislative independence.

There are good reasons for concluding that separation of powers theory should not decide concrete cases. Perhaps surprisingly, but reassuringly, it rarely does. Almost all of what we call "separation of powers" cases are really resolved by the text and inferences from structure deducible without resort to theoretical speculation. Consider the main cases covered in a separation of powers chapter of a constitutional law casebook. Then count how many are actually examples of Kant's hypothetical imperative.³³² *United States v. Nixon* is treated as a separation of powers case, yet, the "executive privilege" deduced there is a "necessary" means to effective exercise of textually-assigned functions. The same is true for the various immunities.³³³ Without it governmental personnel are "chilled" in the performance of designated tasks. So, too, removal. Once one attributes a "unity" to the executive aspect of government it probably follows. At least the question in cases like *Myers* and *Synar* where Kant is applied is whether service at presidential pleasure is necessary to the administrative oversight assertedly required of the Chief Executive. One good nuanced discussion of the necessity principle, *Nixon v. Administrator of General Services*,³³⁴ was, unfortunately, neglected by the *Synar* Court. That opinion helpfully recognized the analytic dependence of "powers" upon "departments" sketched here, and added an appropriate legislative "spin" to it. That is, Congress could overcome executive "necessity" for compelling reasons—an appropriate inference from the overall predominance of Congress in the constitutional scheme.

Youngstown Steel had to do with "self-executing" presidential power, the authority to act unilaterally in the absence of congressional prohibitions. The President's action there was traceable to the text, the "take care" clause as well as the Commander-in-Chief power, and it seems the Court would have upheld a legislative veto, a position evidently shared by President Truman. The issue in *Chadha*, whether this was an act of article I lawmaking to which Bicameralism and Presentment applied, was, and is, difficult to resolve so stated. It gets no easier if one introduces separation of powers theory. Just try it and see. Actually, as in *Synar*, separation of powers thinking

332. I. KANT, *supra* note 97. He who wills the end wills the indispensable means to it. I use Gunther's casebook as an example. See G. GUNTHER, *supra* note 29.

333. See *id.* at 383-87.

334. 433 U.S. 425 (1977).

formed a question which it could not answer. Which means the question should be reformulated. Finally, theories are not necessary to see that in some important sense the President superintends foreign affairs, especially the use of military forces overseas. The text says as much. But herein resides a lesson. What makes issues like the War Powers Act so difficult is the imprecisely defined *shared* authority over military and foreign affairs of the President and Congress. And that is *not* due to "separation of powers," for as such there is no problem. There are strictly matters for the Executive, and not for the legislature. Precisely because our Constitution compromises separation of powers, and textually assigns aspects of war and foreign affairs to Congress, do we have interpretive problems—in other words, because the Framers abandoned separation of powers.

To be sure, these capsule observations are neither exhaustive nor completely unchallengeable. But they do suffice to raise an issue deserving serious consideration: do we really have a jurisprudence of separated powers? Or is it that standard compilations lump together an array of cases whose common characteristic is their unassimilability to the other "lumps," or chapters, in the compilation? Maybe Frankfurter and Landis hit it right, sixty years ago, when they said that separation of powers is a "'political doctrine' and not a technical rule of law."³³⁵

IV. "THE PRESIDENT SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED"

We have seen in Part I how structural arguments aspire to the truth of coherence or resonance. The Supreme Court has also proclaimed, as if it were a self-evident and non-trivial truth, that the presidential duty to "take care that the laws be faithfully executed" conveys the enforcement discretion identified by Edwin Meese. The important turn here is that the "take care" attribution need not be in harmony with the overall constitutional structure to be legitimated. Put differently, in terms of "truth" conceptions, the textual injunction aspires to "ontological" truth. If the interpretation is verified by extra-textual sources of definition, or if it possesses a "plain meaning" supporting the Meese view, it is "true" notwithstanding its dysfunctional effect. Two examples of the contrasting notions of truth spring to mind. The Electoral College no longer, if it ever did, resonates with constitutionally embedded notions of equality and fair representation. It is constitutionally secure only because the meaning of the relevant passages is undeniable. Closer to home, the President's pardoning authority could not be deduced from the constitutional structure, but comes to us via British tradition. But it is undeniably vested in the President because the text says so.

Perhaps the best example of this justificatory method is *Chadha's* preference for dysfunctional, but assertedly explicit, constitutional provisions. "The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is

335. Frankfurter & Landis, *Power of Congress over Procedure in Criminal Courts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1014 (1924).

contrary to the Constitution."³³⁶ Neither will "policy arguments" supportive of useful political invention' overcome constitutional demands clearly set out in the text.³³⁷ While the *Chadha* opinion is justly criticized for failing to demonstrate an inevitable collision, that the plain meaning of the text where ascertainable is conclusive is an observation with an impeccable pedigree, and correctly so.

The proffered "take care" rationale participates in that rule of priority. It is as if the words say that Congress may not supervise law execution because the President is here given the exclusive charge to do that. The phrase itself may not unambiguously say that to minds two centuries removed from its genesis, but recognized aids to textual interpretation—reconstruction of the prevailing historical lexicon, notable accompanying intentions, judicial precedent, governmental tradition—may evaporate the intervening mists of history. The question succinctly: do the Meese and *Synar* positions amount to the plain meaning of "take care," historically recovered?

Now that is like the problem with the recipe for chicken soup. First, we must establish a substantiated "plain meaning;" then, we will bow to it. But before moving on to the chicken hunt we should develop an appreciation for the recipe's theoretical insight. The title of Forrest McDonald's recent work provides an incontestable starting point for constitutional hermeneutics. *Novus Ordo Seclorum* ("A New Order for the Ages")³³⁸ was the boast of the Framers and an apt description of what they accomplished. There is no doubt that the Constitution was and is a unique project, even if one stops short of Gladstone's encomium that it was the "most wonderful work ever struck at a given time by the hand and purpose of man."³³⁹ Careful students of the summer of 1787, including Jack Rakove,³⁴⁰ J.M.C. Vile,³⁴¹ and McDonald, all agree that the Constitution was a decisive break with all that came before it, practically and theoretically. The Framers were shrewd brokers of ideas and experiences. They threw separation of powers, classical republican theory, British constitutional history, common law vocabulary, colonial and early national experience, and more, into one giant cauldron and cobbled together a system discontinuous with all the elements yet influenced by each. And it does not matter whether the welding was fueled by economic interest, sectional jealousy, state parochialism, idealism, practicalities, or mere obtuseness. Or all of them. For no answer to that question detracts from the "recipe" quality of our Constitution. Various identifiable ingredients with their own histories and properties went to Philadelphia in May, 1787, and emerged that September as elements in a new compound. One can reliably ascertain their place in the resulting creation only by reading the text to see what the Framers actually did with them.

Quite properly, then, the "take care" clause is critically relevant to any

336. *Chadha*, 462 U.S. at 944.

337. *Id.* at 945.

338. F. McDONALD, *NOVUS ORDO SECLORUM* (1985).

339. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION* 69 (R. Beeman, S. Bostein & E. Carter ed. 1987).

340. J. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS* 381 (1979).

341. See M. VILE, *supra* note 58, at 153-63.

justification, or refutation, of the claimed law enforcement prerogative. But a couple of caveats necessary to refining the discussion intrude. One is that, notwithstanding the confidence with which defenders of the claim, beginning—effectively—with Madison³⁴² in 1789 and running through Postmaster General Kendall up to the present, have simultaneously cited the article II heading of “executive power” and the clause, there is a mutual antagonism between the two. Analytically, they occupy a see-saw, with the potency of one rising or declining in reverse proportion to the other. Resort to theoretical speculation suggests the absence of a firm textual ground. And a firm grounding in the text makes theoretics superfluous. Ignorance or indifference to this tension leads to the lame compromise of Chief Justice Taft: “The executive power is given in general terms strengthened by specific terms where emphasis is appropriate.”³⁴³

Highlighting the “take care” clause implicitly diminishes not only Taft’s view, but, worse, the clause itself. That is because analytical fortunes are joined by the inescapable reliance upon the notion of “law execution” for operative content. One does appropriately rely on the text, but primarily because Taftian speculation rooted in “execute” is cut off by the notion of “constitution as recipe.” Put differently, if raw “executive power,” as *Synar* defined it in light of Montesquieu’s theory, was unkindly received by the Framers, it is unlikely that the emphasis of “take care” and “faithfully” restore the lost potency. That intuition, however, must be verified.

Neither the words themselves nor their location within article II is auspicious for executive aggrandizers. While “execute” undoubtedly refers to some activity subsequent to “lawmaking” itself, stripped of connotations presently associated with it, it allows no more precise intuitive definition than simply to “give effect” or force to the laws. As a whole, the clause is most plausibly rendered with a heavy emphasis upon agency notions, that the President is obliged to give effect to congressional will. This intuitive reading is confirmed by early opinions like *Kendall* and *Marbury* denying the “take care” clause a “dispensing” power, an authorization to frustrate Congress by declining to enforce the law.³⁴⁴ Significantly then we find the clause in article II section 3’s compilation of presidential duties, all of which, with the alleged exception, are undeniably mundane and merely ministerial.³⁴⁵

Thus, untutored plain meaning is little help. But there is still the possibility of establishing that the “take care” clause was a legal term of art with a “tutored” meaning that was widely understood. “Letters of Marque and

342. F. McDONALD, *supra* note 338, at 276.

343. *Myers v. United States*, 272 U.S. 52, 128 (1926).

344. See *Kendall*, 26 F. Cas. 702; *supra* notes 177-78 and accompanying text; *United States v. Smith*, 27 F. Cas. 1192 (D.N.Y. 1866) (No. 16,342); *infra* note 474 and accompanying text.

345. U.S. CONST. article II, § 3 reads:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Reprisal"³⁴⁶ no doubt smack of a French novel to educated moderns. The term refers to authorized privateering. That is the meaning in our constitutional scheme, too, because the term had a standard usage in 1787.

Is the "take care" clause a similar phenomenon? Since ratification of the Philadelphia Constitution by various state conventions during 1787 and 1788 is the operative juridical act, the meaning apprehended by those ratifiers is the constitutional meaning. And only the language of the Constitution was ratified, not the Convention debates which were made public decades later in heavily reacted,³⁴⁷ even misleading, forms. The privately expressed "intentions" of the Framers are less germane. Strictly speaking, the Philadelphia conventioners drafted a proposal for consideration by the real decisionmakers—"We, the People." Even this modest description of their role was arguably a usurpation. Antifederalist critics berated the Framers for going way beyond their original commission to fashion necessary amendments to the Articles of Confederation. Precisely because the Constitution was then a mere proposal does this criticism fail. Even if the Constitution had been found under a rock on the banks of the Delaware, ratification by the people legitimized it. The important point is to establish the methodological place of the Convention debates in this analysis, that of helpful aids, in ways shortly to be explored, to what the ratifiers understood the language they ratified to mean.

Julius Goebel provides bearings to find the "sense" of the "take care" clause. He points out that the noun "executive" was not a term of art in English law in 1787, and became one in America through its use in the various Revolutionary-era state constitutions.³⁴⁸ These initial uses of the term reflect the revolutionaries' familiarity with theorists like Locke and Montesquieu. The full-bodied executive midwifed in Philadelphia is in large measure explainable by unhappy state experiences, Pennsylvania and Vermont in particular, with pure separation of powers. Vile opined that the more revolutionary the atmosphere, the "purer" the separation of powers in the state constitution.³⁴⁹ And an executive cypher, one who merely enforced the rules laid down by the legislature, was characteristic of pure forms like Pennsylvania's. The emphasis, then, is upon the breadth and abruptness of the discontinuity between the colonial royal governors and state executives. Each may legitimately be styled an "executive," but only the latter usefully so in connection with our Constitution. The observation of Finley and Sanderson that the royal governor controlled prosecutions may be true,³⁵⁰ but it is irrelevant to our Constitution's "sense" of executive. As a rule, state governors did not control prosecutions and that is relevant to the search for a post-1776 constitutional idiom.

A search so bounded brings almost immediate rewards. The article II

346. U.S. CONST. art. I, § 8, cl. 11 states that Congress shall have power "to grant Letters of Marque and Reprisal . . ."

347. See the excellent discussion of convention records in Hudson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 411-23 (1987).

348. Goebel, *Ex parte Cleo*, 54 COLUM. L. REV. 450, 474 (1954).

349. M. VILE, *supra* note 58, at 135.

350. J. FINLEY & J. SANDERSON, *THE AMERICAN EXECUTIVE AND EXECUTIVE METHODS* 12-13 (1908).

injunction to "take care that the laws be faithfully executed" coincides verbatim with the formulations in two then extant state constitutions, those of Pennsylvania³⁵¹ and Vermont.³⁵² Pennsylvania was especially notorious among the Framers as an example of exactly what they were trying to remedy: legislative domination due to an impotent executive. This particular verbal dressing of the basic "law execution" function, could not, as intuition suggested, have signalled to the ratifying generation anything like the broad executive power the Supreme Court now associates with it.

But had not the pendulum swung away from Pennsylvania's pure form, so much so that by 1787 the Framers were determined to, and did, craft a "vigorous" "independent" executive able to keep the legislature at bay? Yes it had, and they did. How then can Pennsylvania be the model for the "take care" clause? It can, and without shoving the pendulum back in the direction from whence it came. How this is so tells us all we need to know about the "sense" of the "take care" clause understood by the ratifier.

There is a suppressed and grievously flawed premise to the "contradictory" view of these developments. That view would break down or build up the Executive Branch by adding or subtracting modifying words or connotations to the basic term "law execution." That is hardly a reliable means of communication and certainly not how the founding generation tinkered with their executive branches. They built a "strong" executive much in the manner we make a banana split. What distinguishes a banana split from a "mere" dish of vanilla ice cream is not new, improved or invigorated vanilla ice cream. The base element, vanilla ice cream, is the same in both instances. You add to it separable ingredients like cherries and bananas until you have the desired product. "Law execution" is like the vanilla ice cream. It is the basic, even irreducible, element of anything legitimately styled the "Executive Branch" of a tripartite government. What distinguished the Pennsylvania constitution was its halt at that point. Stripped of all royal prerogatives, that is what is left of the governor's office, and this unadorned figure was an executive in the proper, limited sense of that term, one who carried the legislative will into effect with the tools made available by the legislature and consistent with limitations there set. A "mere" executive, we shall call him. This fellow can be further weakened by dividing or pluralizing him, by charging the legislature with his selection and by rendering his tenure brief and unrepeatable. You can also make the executive entirely dependent upon the laws, instead of the constitution, for its duties. Taken to this extreme, the executive has no inherent power to act unilaterally and outside the law in extraordinary circumstance. Locke was fascinated by this problem of a latent discretionary power, but Montesquieu, whom the Framers seem to have read more frequently and more rabidly, obscured it; the Virginia Constitution of 1776, for instance, charged the governor to "exercise the executive powers of government, according to the laws of the Com-

351. II B. POORE, *FEDERAL AND STATE CONSTITUTIONS 1545* (CONST. of 1776) (1924).

352. II B. POORE, *supra* note 351, at 1863 (CONST. of 1777). Both Pennsylvania and Vermont had plural executives—a Governor and Council. New York's singular executive was charged "to take care that the laws are faithfully executed to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature." *Id.* at 1335.

monwealth; and shall not under any pretense, exercise any power or prerogative, by virtue of any laws, statute or custom of England."³⁵³ Jefferson believed this clause meant that a power not defined by law could never be exercised, that the constitution made no provision for extraordinary occasions when no law was applicable, and that the Virginia charter refused to admit that such circumstances could arise.³⁵⁴ Vile further diagnosed the issue, one treated here in contexts like the Militia Bill³⁵⁵ and later in the *Neagle* case.³⁵⁶

Thus . . . the problem of a discretionary power in government [was] . . . in the democratic mood of the American patriots . . . declared no problem at all. The implications of this view for the American system of government can hardly be exaggerated; the history of the Presidency of the United States is, in large part, the history of the attempts to change this conception of the functions of a 'chief executive'.³⁵⁷

The pendulum was swinging in May 1787, when the Framers arrived in Philadelphia, but it would have to have been a wrecking ball to sustain claims now made on behalf of the Chief Executive, most especially that in the course of ordinary law enforcement the President was free to disregard an explicit congressional command to, say, prosecute Ann Gorsuch. The Framers established a singular office of substantial and possibly indefinite tenure, independent of Congress for its selection, which took power directly from the Constitution. Most importantly, the Framers invigorated the office by restoring important portions of the infamous royal prerogative. The enlarged appointments, treaty, and veto powers were all counter to the tendency to strip the state executives of all crown resemblances,³⁵⁸ and were vested to enable this independent executive to check the legislature. Even the pardon power was withheld from some state governors,³⁵⁹ but it too was vested in the President. Critically, the Framers left purely executive power, the duty to enforce the laws, where they found it. The President was *also* a "mere" executive. Put differently, the Framers had great expectations of the President, but the bare notion of "law execution" and the "take care" clause were just not carriers of those expectations. The action was elsewhere in article II.

This general account is verified by the record of Convention proposal and state ratification. The Presidency was a most controverted issue at the Convention³⁶⁰ but there appears to have been no disagreement over vesting "executive" power in the, as yet, unconstituted Executive Branch. Madison expressed it most forcefully in urging that certain powers could be vested before the problems of executive selection and unity were resolved.

353. See M. VILE, *supra* note 58, at 135; II B. POORE, *supra* note 351, at 1910-11 (VA. CONST. of 1776).

354. *Id.*

355. *Supra* notes 218-24 and accompanying text.

356. *Infra* notes 484-89 and accompanying text.

357. M. VILE, *supra* note 58, at 135.

358. See R. BERGER, *supra* note 84, at 49-51.

359. See, e.g., II B. POORE, *supra* note 351, at 1615 (S.C. CONST. of 1776), 1279 (N.H. CONST. of 1776).

360. See, e.g., F. McDONALD, *supra* note 186, at 228.

“[C]ertain powers were in their nature Executive, and must be given to that departm[en]t.”³⁶¹ That a “mere” executive was here in mind is confirmed by the lack of objection to this statement. Madison explained that he meant a “power to carry into effect the national laws,” along with a residual power to appoint where the legislature did not.³⁶² James Wilson agreed that these were the only powers “strictly Executive,”³⁶³ and the Convention had little trouble concluding that a “power to carry into execution the national laws” had to be lodged in the Executive regardless of its other characteristics and powers.³⁶⁴

This was the substance of article II on the subject of law execution, and it represented what all agreed was irreducibly executive at a time when, as Madison said in the Convention, the state governors were “mere cyphers.” The Wilson-headed Committee on Detail suggested an “Executive Power” heading to article II along with a separate “take care” to “duly and faithfully” execute the laws clause,³⁶⁵ in what cannot be termed an attempt to alter substance. The Convention background shows conclusively that the bifurcation of “Executive Power” and “take care” were details stemming from a single root, and cannot legitimately be read, singly or in sum, as greater than an ancestor which was itself “merely” executive. It is not even necessary then to debate the Hamiltonian view of this with Chief Justice Taft, even if all conceivable “Executive power” *was* given by the heading it was still confined to that Wilson-Madison “carry into effect” definition.

These debates are significant only insofar as they shed light on the meaning apprehended by the ratifiers. And they do. They suggest by their tenor, and by the lack of rancor among the delegates, a widespread understanding of what the term “executive”, without more, meant to politically-interested Americans in 1787. Explanations in the ratifying conventions confirm that shared understanding. In the pivotal Virginia convention, Edmund Randolph, who subsequently became the nation’s first Attorney General, asked rhetorically, “What are [the President’s] powers? To see the laws executed. Every executive in America has that power.”³⁶⁶ To a Virginia audience that did not register as much. William Wilson told the Pennsylvanians that this was a power of “no small magnitude,”³⁶⁷ but otherwise did not elaborate on a formulation which his listeners knew, from their own constitutional experience, amounted to very little. James Bowdoin advised the Massachusetts Convention that “the executive powers of the President are very similar to those of the several states, except in those points which relate more particularly to the Union; and respect ambassadors, public ministers and consuls.”³⁶⁸ James Iredell said much the same in North Carolina.³⁶⁹ A “strong” executive, Charles Pinckney told South Carolina’s

361. I M. FARRAND, *supra* note 148, at 66-67.

362. *Id.* at 67.

363. *Id.* at 66.

364. *See id.* at 67 (unanimous vote of the states, save for a divided Connecticut delegation).

365. The sequence is described in R. BERGER, *supra* note 84, at 54.

366. 3 ELLIOT’S DEBATES, *supra* note 224, at 201.

367. 2 ELLIOT’S DEBATES, *supra* note 224, at 513.

368. DEBATES AND PROCEEDINGS IN THE CONVENTION HELD IN 1788, at 230 (1856).

369. 4 ELLIOT’S DEBATES, *supra* note 224, at 107.

convention, meant "that degree of vigor which will enable the President to execute the laws with energy and [dispatch]." ³⁷⁰ This "vigor" was infused by the independence and unity of the President, and by specifically enjoining him to faithfully execute the laws. It may be granted that the rhetorical strategy of these Constitution boosters was to give the President a low profile, in recognition of what North Carolinian William Davies called "that jealousy of executive power which has shown itself so strongly in all the American governments." ³⁷¹ But which way does this cut? It certainly does not legitimate a super-executive, which Hamilton and some others wished they had constituted, but did not because no state would have ratified it. Rather, they fix the ratifiers' sense of the Constitution in three related but distinguishable ways. As clarifying statements by Philadelphia Framers (Madison, Randolph, Pinckney, Wilson and Davies), they are important "bits" of the ratifiers' understanding of the words. Second, they are powerful witnesses to the standard usage of the time. Third, the rhetorical strategy attests the predisposition of the ratifiers and testifies to their probable rule of construction. Take the words in their standard usage and no more, and perhaps less, than that.

By examining the early national state and federal prosecutorial regimes we can both confirm and explicate the "mere" executive our Constitution establishes. The actions of the First Congress are commonly regarded as powerful evidence of constitutional meaning. ³⁷² It might suffice in this context to simply cite *Synar's* ³⁷³ and *Myers's* ³⁷⁴ extraordinary reliance on the "Decision of 1789," where Congress deleted from a bill Senate participation in removal of the Secretary of State, and apply estoppel principles. A large number of Framers *were* indeed among the first Congressmen, ³⁷⁵ and, with the ratification debates still fresh in their ears, they set about constructing an executive establishment as well as a prosecutorial network. It is plausible to seek the "sense" of the Constitution in their actions. Their actions may also verify constitutional interpretation by launching a governmental practice of sufficient duration to qualify it as constitutionally sound. Notwithstanding *Chadha's*, and to a lesser extent *Synar's* deprecation of it, governmental practice is and should be a critical facet of constitutional hermeneutics.

Comparison of federal prosecutorial practice with state precedents may also confirm the interpretation here by revealing a deep continuity. Description of state regimes, especially the relation between prosecution and the constitutionally designated holder of executive power, may then illuminate a sometimes mysterious federal apparatus. In the late eighteenth century, prosecution was not an executive but a judicial function, ³⁷⁶ and the prosecutor a relatively minor actor at that. He was a court adjunct dwarfed by the

370. *Id.* at 329.

371. *Id.* at 120.

372. *See, e.g., Synar*, 478 U.S. at 722-23; *Hampton Co. v. United States*, 276 U.S. 394, 412 (1928).

373. *Synar*, 478 U.S. at 722-23.

374. *Myers*, 272 U.S. at 111-27.

375. *See Synar*, 478 U.S. at 722.

376. J. JACOBY, *supra* note 251, at 23.

county judge and the sheriff.³⁷⁷ A figure denoted the "King's Attorney" or "Attorney General" had charge of prosecution in the colonial era³⁷⁸ but revolution conclusively cut off that tradition from what followed. After independence five state constitutions mention an "Attorney General" but each in the judicial article.³⁷⁹ One, Connecticut, mentioned local prosecutors as "attornies to the Governor."³⁸⁰ But this independence from the Executive effectively translated the Connecticut prosecutor into a local official, one appointed by county judges. In sum, until eve of the Civil War, the prosecuting attorney was *never* listed in state constitutions as a member of the executive branch.³⁸¹

Broader historical trends confirm this separation between constitutionally defined executive power and criminal prosecution. First, private prosecution never sank deep roots in the colonies and had been largely displaced by public actions in the newly independent states.³⁸² Constitution makers consequently *had* numerous occasions to consider the constitutional status of public prosecutors doing most of the criminal litigation. Second, the drift toward our present system of decentralized, county level prosecutors was underway but just barely so. Other states relied upon Deputy Attorneys General, thus suggesting centralized administration, but they were not identified with the Governor either.³⁸³ Third, even where local prosecutors were in place, as in Connecticut, they were still lumped with the personnel of the county court.³⁸⁴

Connecticut is a good place to pause on our way to the federal regime. For one thing, a careful student of the era heard an "echo" of Connecticut's 1704 prosecution act in the U.S. Attorney provisions of the Judiciary Act of 1789.³⁸⁵ For another, Connecticut was the first state to entirely eliminate private prosecution, and did so in favor of a modified form of centralized

377. *Id.* at 23-24.

378. *See id.* at 13-19.

379. *Id.* at 22.

380. *Id.*

381. *See id.* at 23-24.

382. Jacoby sums up things at the advent of the Revolution:

By the advent of the American revolution, private prosecution had been virtually eliminated in the American colonies and had been replaced by series of public officers who were charged with handling criminal matters. The nature of these officials varied. Some were county officials appointed by the courts; some were deputies of the Attorney General but were nominated by the county court and operating with little supervision; some were deputies of the Attorney General operating directly under his view. In spite of these differences, the prosecuting attorneys in all the colonies held one thing in common—they were a new breed, unlike any judicial officer in England or Europe, created by the demands of a new society.

Id. at 19.

383. *Id.*

384. For instance, the "Attorney General" in North Carolina, South Carolina, and New Jersey, was appointed by the Assembly. II. B. POORE, *supra* note 351 at 1412, 1619, 1312. In South Carolina the "Attorney General" clearly had prosecutorial authority, for the Constitution provided a salary of 2,100 pounds "in lieu of all charges against the public for fees upon criminal prosecutions." *Id.* at 1620. The Georgia Constitution of 1777 also provided him "a competent salary," and located him in the judicial article. *Id.* at 386. Delaware's 1776 Constitution provided for joint appointment by the executive and upper legislative house. *Id.* at 275. Maryland did likewise, but otherwise deals with him along with judges and clerks. *Id.* at 826-27.

385. J. JACOBY, *supra* note 251, at 20.

prosecution that continues to this day.³⁸⁶ Thus, it was and is one of the few state regimes institutionally similar to the federal system. Finally, a recently compiled set of Connecticut statutes, originally collected by Framers and First Congressman Roger Sherman along with Richard Law,³⁸⁷ provides a good look at the relationship among the legislature, law enforcement and that critical body in between, the grand jury. And, it is the grand jury which opens up the federal system for analysis.

"An Act for the More Effectual Putting in Execution the Laws against Vice, Immorality and Profaneness, and for Promoting Christian Knowledge"³⁸⁸ is representative of a much larger Connecticut cohort. It required "grand-jury men" to "make diligent search after, and presentment of all the breaches" of the act relevant to their office.³⁸⁹ This inelegantly captioned act illustrates legislative authority to "take care" of the execution of its own laws by placing statutory duties directly upon field personnel. More importantly, it reminds us of the "active" grand jury, the only kind the Framers knew. Grand jurors were obliged to inform themselves of illicit activities and make "presentment of them." "Presentment" was the formal means by which members of the grand jury identified offenders to the whole body for formal charge. Prosecutorial initiative, and for that matter, the prosecutor, was not involved and trial commenced on the now obsolete grand jury presentment. Connecticut not only saw fit to bypass the local state's attorney by enjoining a discretion-less charging function upon ordinary citizens, but fined any grand-jury man who "shall neglect to make seasonable presentment of any breach of law, where of he hath cognizance."³⁹⁰ The fine was sixty-seven cents.³⁹¹ Where the state's attorney remained in the picture he too was bullied by the legislators. "An Act to Prevent the Importation of Convicts" made it his duty, and grand jurors' as well, to make "information and presentment of all breaches."³⁹² "Information," then as now, was the means by which a prosecuting official unilaterally charged an offender.

Presumably to no one's surprise, the Senate Committee for Organizing the Judiciary initially authorized each District Court to appoint its own United States Attorney.³⁹³ Such a "person learned in the law" was empowered to prosecute "delinquents" for federal crimes and all civil actions in which the United States might be concerned.³⁹⁴ This reflection of the dominant view of prosecution as a minor judicial function had reputable witnesses. No less than half the First Senate, one from each state, served on the Committee,³⁹⁵ and half of them were veterans of the Philadelphia Convention. The three Senators mainly responsible for the bill, Oliver Ellsworth,

386. *Id.* at 16.

387. *FIRST LAWS OF THE STATE OF CONNECTICUT* (R. Cushing ed. 1982).

388. *Id.* at 671-72.

389. *Id.*

390. *Id.* at 371.

391. *Id.* at 372.

392. *Id.* at 193.

393. 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 490 (1971).

394. *Id.*

395. *See id.* at 458.

William Paterson and Caleb Strong, were Framers of the Constitution.³⁹⁶ Ellsworth later served as Chief Justice of the Supreme Court and Paterson as an Associate Justice. All three had long and distinguished legal careers, including service in the state judiciary (Ellsworth),³⁹⁷ as a state attorney general (Paterson),³⁹⁸ and as a county attorney (Strong).³⁹⁹ Ellsworth, in addition, was a first rank pro-Constitution activist during the ratification struggle of 1788. His "Landholder" letters⁴⁰⁰ were among the best and most widely-read federalist apologies, and were a kind of contemporaneous gloss on the Constitution much the same as we now treat the then only moderately influential *Federalist Papers*.

The point is that the Senate Committee comprised individuals of the highest stature and achievement, men as conversant with the Constitution's birth as anyone in America. When *they* placed the prosecutor where the tradition of their time placed him, outside the Executive Branch, we can be virtually certain that the "sense" of the Constitution previously described is the right one. A "merely" executive power to "enforce" the law did not entail control over prosecution of criminal "delinquents." Witness to this continuation thesis is amplified by Julius Goebel's broad estimate of early congressional prescriptions on criminal procedure: few and bare, on the assumption that traditional practices sufficed.⁴⁰¹ In other words, the experience of Constitution-making did not tip lawmakers off that the separation of powers settlement contained in it affected prevailing modes of thinking about prosecution.

More interesting and potentially consequential, then, is the Senate's deletion of the judicial appointments clause. The enacted law simply said that an attorney for the United States "shall be appointed in each district."⁴⁰² It said nothing of how that should or would be done. As a matter of fact, one day after enactment, President Washington submitted nominations for each of the thirteen prosecutorial posts created by the Act.⁴⁰³ A day after that the Senate confirmed.⁴⁰⁴ Nothing is known of the senatorial debate over the deletion,⁴⁰⁵ if there was one. Goebel reports a single mention of it in private correspondence on the Judiciary Act.⁴⁰⁶ Senate debates were unrecorded and private. However, William Maclay's diary⁴⁰⁷ ordinarily pierces this veil

396. Members of the Committee included Ellsworth (Conn.), Paterson (N.J.), Maclay (Pa.), Strong (Mass.), Lee (Va.), Bassett (Del.), Few (Ga.), Wingate (N.H.), Izard (S.C.), and Carroll (Md.). New York, Rhode Island, and North Carolina were unrepresented at the time—New York because of delay in selection, the others because they had yet to ratify the Constitution and thus were outside the union. Bassett, Ellsworth, Few, Paterson, and Strong were delegates at Philadelphia. See *Synar*, 478 U.S. at 724 n.3.

397. J. GOEBEL, *supra* note 393, at 459.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.* at 609.

402. The Judiciary Act of 1789, ch. 20, 1 Stat. 92 (1789).

403. THE JOURNAL OF THE SENATE 202-03 (Claussen ed.) (Senate Executive Journal entry for Sept. 24, 1789).

404. *Id.* at 204-07.

405. See J. GOEBEL, *supra* note 393, at 501.

406. *Id.* at 501 n.148.

407. E. MACLAY, THE JOURNAL OF WILLIAM MACLAY (1890).

of secrecy. Yet, even it did not address this one. The Senate Journal preserves most votes on amendments to the bills, but not this one. Together with the isolated reference unearthed by Goebel, this silence plausibly suggests that little importance was attached to the deletion, and that it was not an episode in original brainstorming on the constitutionally required provenance of the President.

If less ambitious thinking prompted the change, what was that thinking? The clue recovered by Goebel is cryptic, and seemingly useless, as an explanation. A letter from Vice President Adams to Massachusetts' Francis Dana referred to Senate discussion on eliminating the District Courts,⁴⁰⁸ and may have reflected concern for an appointments vacuum in that case. Adams went on to specify an amendment authorizing appointment, with Senate confirmation, of the Attorney General, where the draft bill empowered the Supreme Court to do that.⁴⁰⁹ Apparently under consideration at that moment was appointment of deputies by the Attorney General. Fortunately, we know that the Senate rejected that centralization of prosecutorial authority, since the Judiciary Act provides for United States Attorneys and an Attorney General, but for *no* institutional connection between them.

Adams' letter obliquely suggests the compelling explanation alternative to the "executivization" of prosecution. The change had nothing to do with separation of powers and the prosecutor's place in it. Rather, the appointments clause stood in critical judgment of the draft bill. Remember that the constitutional text provides two alternative modes for filling offices: "inferior" officers were appointed by either the President, the courts, or heads of departments as Congress saw fit. But Adams made a telling point—was the Attorney General fairly denoted an "inferior" officer? A distinguished Senate panel evidently thought so, itself suggesting that our conception of that office is far removed from the Framers'. For those who disagreed, the Constitution specified that "Officers of the United States" be appointed by the President with Senate concurrence. Note that this applies "across the board" and has nothing to do with whether the "officer" performs legislative, executive or judicial functions. The intuitive plausibility of viewing United States Attorneys and the Attorney General of the United States as "Officers of the United States" is apparent. It is probably more remarkable that the Congress still refused to go along, instead adopting the agnostic "shall be appointed" formulation.

The First Senate was obviously uncertain about how to appoint those officers now most identified with the President's "core" authority over law enforcement. The uncertainty was not rooted in separation of powers solicitude for presidential prerogative over law enforcement, but it did eventually contribute to that development. If the Judiciary Act had treated prosecutors as "inferior officers" and vested appointment in the logical place, in the courts they served, then traditional thinking authorized courts to fire them. As it turned out the President acquired removal power via the traditional rule since *his* was the active power of appointment. The Senate merely con-

408. J. GOEBEL, *supra* note 393, at 501 n.148.

409. *See id.* at 490.

sented. In fact, early Administrations exercised the customary removal authority⁴¹⁰ which also was statutorily "expressed" in agnostic terms. That is, the upshot of the Decision of 1789 so fascinating to the *Myers* and *Synar* Courts was not a congressional declaration of presidential removal power. Madison argued vigorously for just that, but fell short. The First Congress simply deleted a provision for Senate participation, and the enacted law said nothing at all about removal.⁴¹¹ The practical outcome, which surprised no one, was service at presidential pleasure, the practical fate of United States Attorneys.

Congratulations to the President are still premature. There is nothing in the historical materials or in traditional analyses that would have prevented Congress from insulating federal prosecutors by, for example, term appointments accompanied by a prohibition on premature removal. As it was, Congress did insulate them from presidential control, but more by what they did not do. Aside from the implied power to dismiss they set up no institutional relation between the United States Attorneys and anyone in the Executive Branch. The initial supporting observation here is of that forlorn figure, the Attorney General. The Senate Committee charged the Supreme Court with his appointment. He had two duties: Supreme Court litigation, essentially our Solicitor General, and legal advisor to the government.⁴¹² He had no administrative duties whatsoever and was undoubtedly *not* cast in a supervisory role over federal prosecutors in the field. He was not considered a cabinet officer, nor did he head a department. He was not even allowed a clerk.⁴¹³ He was not formally placed in charge of the United States Attorneys until Congress placed him there in 1861.⁴¹⁴ Not until 1870 did Congress officially establish a "Department of Justice," headed by the Attorney General.⁴¹⁵ Finally, the historical record shows that the Attorney General did not enjoy a customary control over federal law enforcement in the absence of formal charge. Attorney General Randolph, for instance, relayed his opinion of prosecutorial policy through others, notably the Secretary of State.⁴¹⁶ Not unexpectedly, early Attorneys General continued their private legal practices, even residing outside the nation's capital.⁴¹⁷

Who was in charge of federal prosecutors and of federal prosecution policy? Formally, no one. They were part of no institutional flow chart.

410. See D. HENDERSON, CONGRESS, COURTS, AND CRIMINALS 22 (1985).

411. Act of July 27, 1789, ch. 4, 1 Stat. 28 (1789). The *Myers* Court, nevertheless, had "not the slightest doubt, . . . that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone . . ." *Myers*, 272 U.S. at 114. The *Synar* Court stated simply that "Madison's position ultimately prevailed." *Synar*, 478 U.S. at 723. The statute is still not reflective of a Madisonian triumph, and the Court fails to inquire what developments owed to policy as opposed to constitutional concerns.

412. J. GOEBEL, *supra* note 393, at 490. The Judiciary Act made no change. The Judiciary Act of 1789, ch. 20, 1 Stat. 93 (1789).

413. J. GOEBEL, *supra* note 393, at 611-12.

414. Act of Aug. 2, 1861, ch. 37, 12 Stat. 285 (1861).

415. Act of June 22, 1870, ch. 150, 16 Stat. 162 (1870).

416. See, e.g., D. HENDERSON, *supra* note 410, at 10. This indirect influence stemmed from the Attorney General's duty under the Judiciary Act to "give his advice and opinion upon questions of law when required by the President or when requested by the heads of any of the departments." The Judiciary Act of 1789, ch. 20, 1 Stat. 93 (1789).

417. J. JACOBY, *supra* note 251, at 20.

Joan Jacoby in her study of our nation's prosecutorial experience concluded that "[t]here was nowhere any general, organized control of Federal prosecution."⁴¹⁸ They were "legally and *actually quite* independent in the conduct of their office" until 1861.⁴¹⁹ Legally so, and actually quite so. But not completely. There are intriguing but vague claims that the Secretary of State acquired a supervisory power. Professor Dwight Henderson states flatly and without citation in his monograph on early criminal practice that federal prosecutors "reported" to the Secretary of State.⁴²⁰ Julius Goebel affirms Jacoby's view at the same time he qualifies it along Hendersonian lines. He tells of a "successful coup . . . making the District Attorneys quasi-dependents of the Department of State."⁴²¹ Goebel is generally a reliable guide, and he does mention several instances where the Secretary of State gave instructions to the district attorneys,⁴²² a practice for which Henderson provides additional support.⁴²³ But two critical caveats are in order. Nowhere was this *de facto* arrangement, such as it was, statutorily or judicially validated and there is nothing in it to overcome congressional direction to the contrary. Second, the "proof" is episodic. There are instances where the Secretary of State instructed federal prosecutors, and presumably stood ready with the President to remove recalcitrant officials. It was not always that simple. The four-year vacancy in Kentucky reveals that sometimes no one was willing to carry out certain enforcement policies,⁴²⁴ in which case there is no enforcement. But they are still episodes, and not anointment of prosecution as an article II executive power.

It is more complicated than that. A careful look at both Henderson's "macro" account of all federal prosecutions between 1801-1828,⁴²⁵ and Mary Tachau's "micro" examination of Kentucky from 1789-1816,⁴²⁶ actually reveals an "issue specific" form of incomplete supervision by a host of masters executive, legislative, and judicial. For example, the Secretary of State both recommended prosecutions, and "ordered" their termination. But the instructions reflect a rough coincidence with matters substantively within that officer's ken, primarily foreign affairs,⁴²⁷ neutrality⁴²⁸ and slave trade violations.⁴²⁹ Occasionally the President ordered prosecutors to terminate proceedings. Henderson here reports almost exclusively libels of vessels, usually slave traders and mostly during the War of 1812,⁴³⁰ where presidential prerogative need not be rooted in a general power over law enforcement. A proportionately larger share of supervisory authority was

418. *Id.*

419. *Id.*

420. D. HENDERSON, *supra* note 410, at 212.

421. J. GOEBEL, *supra* note 393, at 632-33.

422. *See, e.g., id.* at 629 n.79, 633 n.89.

423. D. HENDERSON, *supra* note 410, at 56, 188.

424. *See* M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816*, at 66, 101 (1978).

425. *Supra* note 410.

426. *Supra* note 424.

427. J. GOEBEL, *supra* note 393, at 629 n.79 (concerning protection of consuls).

428. D. HENDERSON, *supra* note 410, at 56.

429. *Id.* at 188.

430. *Id.* at 173, 174, 186, 196, 198.

claimed by the Secretary of Treasury, reflecting the predominance among federal law enforcement business of revenue matters. On one occasion, Treasury Secretary Hamilton advised his Collector in Kentucky to hire a private attorney to handle government matters until a willing United States Attorney could be found and appointed.⁴³¹ Revenue collection also was the subject of a specific statutory intervention, one suggestive of where ultimate control over the enforcement of revenue laws resided—in Congress, which wrote the laws. An 1820 law expressly subordinated United States Attorneys and their discretion to instructions emanating from the Treasury.⁴³² And we know from *Marbury* and *Kendall* that Congress can tell even department heads the manner in which its laws are to be carried into execution, presidential wishes to the contrary notwithstanding. The latent chain of command is thus activated: from Congress to its immediate agent in the department to field operatives which Congress created in the first place, and now dragoons into its enforcement initiative.

A further supporting observation is that Henderson reports that federal prosecutors entered “nolles” in fully one-third of their criminal cases between 1801 and 1828.⁴³³ No matter how you interpret that figure, it shows the diffusion of power over prosecutions in the founding era. Looked at from one end, if prosecutors pursued charges they could have initially declined, the high frequency of dismissal suggests a supervening power at the far end of litigation. We have seen examples of termination commands from outside the prosecutor’s office. The President and department heads sometimes played this part, suggesting a lack of coordination among the same actors at the charging stage. But the numbers add up only with inclusion of judicial initiative. Nolle prosequi was technically the prosecutor’s stipulation that he was abandoning a case. In fact, it appears to have commonly been a directive from the presiding judge to give it up. That was the Kentucky experience reported by Tachau,⁴³⁴ and an ingredient necessary to explain Henderson’s numbers. While the dismissals were no doubt influenced in jurisdictional and evidentiary deficiencies, they were not therefore purely “objective” judicial decisions. Criminal jurisdiction was the cutting edge of national policy and thus implicative of the courts’ views of the federal-state balance. Even so, judicial disagreement with the merits must have animated these more technical categories. The era’s able and distinguished federal prosecutorial line-up lauded by Goebel⁴³⁵ just could not have made such technical errors in, as Henderson reports, fully one-third of their cases.

The figures also resonate with the essential nature and purpose of early federal law enforcement. The law enforced was interstitial, and was not comprised of those precepts of basic civility that any community wishing to live peaceably gladly accepts. Rather, federally-initiated litigation was the cutting edge of discrete national policies which were either ideologically charged (the Alien and Sedition Acts) or wildly unpopular (revenue meas-

431. M. TACHAU, *supra* note 424, at 72.

432. Act of July 14, 1798, ch. 74, 3 Stat. 596 (1798).

433. D. HENDERSON, *supra* note 410, at 213.

434. See, e.g., M. TACHAU, *supra* note 424, at 128, 134, 138.

435. J. GOEBEL, *supra* note 393, at 613.

ures, especially the tax on whiskey), or both. Often enough, prosecutions were initiated simply to harass political adversaries.⁴³⁶ Given the ever shifting but always politicized nature of prosecutions, and the life tenure of federal judges, judges' opinions of lawsuits inevitably differed from prosecutors' and, in the "undifferentiated" adversary system of the time, they were able to act on them.

Power to end prosecutions was thus separate from the power to initiate. Power to initiate is at the heart of modern arguments for executive exclusivity and autonomy, and *Heckler's* attempt to make prosecutorial charging discretion paradigmatic for the whole of law enforcement, including civil actions, bears repeating.

Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithful executed."⁴³⁷

As a descriptive matter this is historically backwards: the government-initiated civil enforcement suit was the typical law enforcement action. In Kentucky, there were 675 such civil enforcement actions and ninety-five percent of them were revenue cases.⁴³⁸ During the same time, there were just one hundred criminal prosecutions.⁴³⁹ These figures are even more revealing when joined to Henderson's demonstration that Congress empowered state courts to try and resolve claims arising under the federal revenue laws, thus divorcing the "core" of early federal law enforcement from federal executive control.⁴⁴⁰ Still, it is *Heckler's* dramatically incomplete and misleading description of the prosecutorial function that is most distressing. It is incomplete in that even now prosecutors have no power "not to indict." They decide to present evidence in support of a bill which they place in front of the grand jury. That citizen body does or does not indict. And it is misleading in the intimated equation of prosecutors' decisions to prosecute and decisions not to prosecute, for this overlooks precisely that alternate mode of formal accusation permitted by the fifth amendment: presentment. Presentment was formal accusation which bypassed entirely the prosecutor, save for Goebel's note of his residual power to refuse to put non-statutory offenses in form.⁴⁴¹ Where an indictment was sought, the prosecutor had virtually no control over the grand jury. First, as Tachau reports the Kentucky practice, an indisputably judicial officer—the federal marshal—decided if and when to summon grand jurors.⁴⁴² Once assembled, the district judge instructed jurors in what has become an almost legendary judicial form, the early national grand jury charge.⁴⁴³ These charges were an integral part of the overt

436. See generally D. HENDERSON, *supra* note 410; M. TACHAU *supra* note 410.

437. *Heckler*, 478 U.S. at 832-33.

438. M. TACHAU, *supra* note 424, at 95.

439. *Id.*

440. D. HENDERSON, *supra* note 410, at 37-38.

441. J. GOEBEL, *supra* note 393, at 622.

442. M. TACHAU, *supra* note 424, at 145.

443. See J. GOEBEL, *supra* note 393, at 620-23.

politicization of early federal criminal justice, and included impassioned partisan polemics on current events. The prosecutor then prepared an indictment, but that was it. He was not allowed in the grand jury room. The prepared document was returned as "not a true bill," or as an indictment.

Broader statements regarding specific grand jury practices are impossible precisely because Congress failed to provide any. We know from *Wayman v. Southard*⁴⁴⁴ that Congress possessed plenary authority to regulate proceedings in federal courts, which would include grand jury practice. But in the early period, as Goebel remarked in connection with the 1790 Crimes Act, there were only "random [statutory] references to presentment and indictment."⁴⁴⁵ In other words, Congress made no effort to produce a code of grand jury practice and thus left courts free to rein in that citizen body.⁴⁴⁶ Where Congress endeavored to fill out federal procedures it usually adopted the law of the state in which the federal court was located. What the prosecutor's powers were in the latter event is generally inferable: very little. We have seen that the prosecutor was a minor judicial figure in the state practice of the time.

The *Heckler* Court actually overlooked the one manner in which federal prosecutors could choose targets and proceed forthwith, by information. Only available for minor offenses due to the fifth amendment, its utility was further diminished by reliance upon civilian informants willing to risk costs of litigation in case of acquittal.⁴⁴⁷ A similar judicial authority to formalize an accusation was contained in the Judiciary Act draft,⁴⁴⁸ but rejected by the Senate.⁴⁴⁹ Interestingly, the rationale had nothing to do with separation of powers difficulties but with the fear that judges would use it to retaliate against political opponents.⁴⁵⁰

What I call the "undifferentiated" adversary system of late-eighteenth century America fills in blanks between the prosecutor's circumscribed, shared power to begin and end prosecutions in a center so large that all remaining as "fringe" was the petit jury. Forrest McDonald calls it a "miniature republic,"⁴⁵¹ an all-purpose institution of social and political control. Indeed, in some parts of revolutionary America, the county court was just about all there was to government. William Nelson points out that into the nineteenth century, the jury was "an adjunct of local communities which articulated into positive law the ethical standards of those communities and which in doing so completely dominated the legal system's decision-making processes."⁴⁵² As an instrument of social control and an expression of political unity it is easy to understand then why "trial by jury" was a frequently

444. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

445. J. GOEBEL, *supra* note 393, at 609.

446. See Beale, *supra* note 299, at 1436-37. Tachau reports how the empanelling of grand juries in Kentucky was left in the Marshal's discretion because that was prevailing state practice. M. TACHAU, *supra* note 424, at 145.

447. This is true even if the informer was the District Attorney himself. See M. TACHAU, *supra* note 424, at 145.

448. *Id.* at 501.

449. *Id.*

450. *Id.*

451. F. McDONALD, *supra* note 186, at 162.

452. W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 170 (1975).

demanded amendment to the 1787 Constitution.⁴⁵³ Nor is it difficult to explain why the bulk of the Bill of Rights, the various provisions of the fifth, sixth, seventh and eighth amendments, are guarantees related to accusation or trial. Quite simply, Americans were not going to loose the federal leviathan upon them without this jury between them and the coercive power of the state.

Events lived up to these fears. Juries convicted for federal crimes with startling infrequency. Dwight Henderson relates a 21.9 percent conviction rate for all federal indictments between 1801 and 1828.⁴⁵⁴ In Pennsylvania, where more than forty-one percent of the indictments were filed, juries convicted just over seven percent of the time, and this only after a usually reluctant grand jury had returned a true bill. The notorious refusal of juries to convict owed to popular disapproval of federal policies like the whiskey tax, the slave trade, and neutrality.⁴⁵⁵ Charles Warren counted five states "at war" with the federal judiciary;⁴⁵⁶ and there were indeed times and places where particular federal laws, sometimes all of them, were completely unenforceable precisely because a hostile community held the trump card in the law enforcement game: a trial jury drawn from the vicinity.

The jury we moderns contemplate could never bear this pivotal burden. It inhabits a "fully differentiated" adversary system. Impartial lay judges, in the first resort, of historical fact, these strangers to the actions and parties are obligated to apply the law, and only the law, given to them by the judge. Trained professional advocates on each side supply the only information today's jurors get about the case, consistent with rules of evidence that at root reflect a distrust of juries. Never informed of their nullification power, the modern jury can effectively nullify in only one instance anyway. Other than the double jeopardy insulation of their acquittal of a criminal defendant, verdicts at odds with either the law or the evidence are thrown out by the judge. In criminal cases, substantive liability is exhaustively defined by another body: the legislature. This jury is not a "miniature republic," but one of many "functions" in a carefully orchestrated bureaucratic minuet, which is but the opening act in the drama of criminal litigation. Bring your common sense with you, we routinely tell jurors, but "prejudices"—that is, your beliefs and attitudes—disqualify you. We do not want the jury to bring the ethical sense of the community. We tell them to assume John Rawls' "original position."

How different is Senator William Maclay's view: "twelve honest jurors

453. See, e.g., MASSACHUSETTS CONVENTION 84; 3 ELLIOTT'S DEBATES, *supra* note 222, at 626 (Va); 2 DOCUMENTARY HISTORY OF CONSTITUTION 143 (1965)(N.H.).

454. D. HENDERSON, *supra* note 410, at 213.

455. One review of Henderson's findings concluded:

The refusal of juries to convict, a widespread phenomena noted repeatedly throughout the book, is explained more frequently in terms of generalized opposition to policies which involved ideological, political or moral issues—neutrality, the Embargo, trading with the enemy, the slave trade. Inadequacies of the mechanisms for enforcement are detailed; they show most conspicuously in the unsuccessful prosecution of many engaged in the slave trade.

15 K. PREYER, *Coping with Crime*, in 15 REVIEWS IN AMERICAN HISTORY 239, 243 (1987).

456. See M. TACHAU, *supra* note 424, at 7.

make good chancellors"?⁴⁵⁷ The community's conscience was the crucible of judgment and the Founders' legal system gave it full sway. Juries found law as well as fact. "Legal" instructions were frequently political discourse, a conversation federal jurors eagerly entered. Verdicts were legally dubious only when no evidence supported them, and no one but the trial judge applied that standard since there was no general right of appeal in criminal cases until 1889.⁴⁵⁸ Judges commented freely upon the evidence and at least one Supreme Court Justice announced that jurors *ought* to have personal knowledge of the accuser.⁴⁵⁹ Judicial "impartiality" was similarly underdeveloped by an ethical "code" which permitted Chief Justice Marshall to hear cases, like *Marbury*, in which he had personally participated.⁴⁶⁰

This was not solely a ratchet of leniency. Despite the appallingly low success rates of federal prosecutors, President Jefferson thought jurors voted their consciences to convict. He complained to a Philadelphia correspondent:

The marshal in your city, who being an officer of justice, intrusted with the function of choosing impartial judges [jurors] for the trial of his fellow-citizens . . . selected judges [jurors] who either avowed, or were known to him to be predetermined to condemn . . . The same practice of packing juries, and prosecuting their fellow-citizens with the bitterness of party hatred will probably involve several other marshals and attorneys.⁴⁶¹

Jefferson did his best to straighten out the enforcement process, which meant that he sought to replace men, not to redefine function. Of his 146 removals, thirteen were district attorneys and eighteen were marshals.⁴⁶²

When the criminal trial is a rump session of the town meeting, and the verdict a form of communal self-definition, jurors need little help in doing their duty. What little assistance they required, or at least were offered, came mainly from the court. The lawyers were proprietors of sideshows. In other words, the nature of the criminal process dictated that after accusation, and so long as the proceedings were not terminated by a *nolle*, the prosecutor had little of importance to do. As Professor Langbein suggests, it is *only* when a jury comprised of strangers to the action need to be informed of the relevant facts in the course of a complexly organized ritual are professionally-trained advocates, like prosecutors, necessary.⁴⁶³

Forces outside the legal process—changing social and economic conditions—eventually wrought the institutional redefinitions which make up the differentiated adversary system. Nelson says that an expanding commercial economy required a certainty and predictability in law that runaway juries subverted.⁴⁶⁴ Langbein's observations permit greater emphasis upon the

457. J. GOEBEL, *supra* note 393, at 499.

458. See Beale, *supra* note 299, at 1436.

459. *Id.*

460. Marshall's own actions as Adams' Secretary of State were part of the factual predicate in the case.

461. D. HENDERSON, *supra* note 410, at 22.

462. *Id.*

463. Langbein, *supra* note 296, at 314-15.

464. See W. NELSON, *supra* note 452, at 166.

breakdown of cultural homogeneity heralded by the non-British and especially Catholic immigration of the mid-nineteenth century.⁴⁶⁵ That is, once the ethical unity of the community was disturbed, the traditional jury might have deliberated for eternity. Whatever the proper emphasis, the changes did not occur until after the founding generation passed. The Constitution they wrote and ratified gained its "sense" of the prosecutor from institutions and accompanying ways of thinking which did not highly regard his "law enforcement" functions.

The appointments clause and traditional rule on removal conduced to presidential control of personnel even while other forces, notably Congress, controlled definition of function. This impossibility of immediate judicial control, evidently the Senate's first choice, joined with the constitutional unavailability of local election, made a formidable "executivizing" pressure out of personal fealty. But the countervailing pressures were for a long time more powerful. For decades after ratification, inherited institutional practices made sense. Just as important was the federal structure of the union. Attempts to centralize law enforcement policies in the President or in his cabinet were stymied by local resistance and by a Congress responsive to states' rights. The sundry adoption and conformity acts of the early national period,⁴⁶⁶ as well as the occasional use of state processes themselves, tell us that federal law was enforceable in states but largely on state terms. This centrifugal force is reflected in the distribution of indictments among the states.⁴⁶⁷ More than half the indictments were filed in two states, Pennsylvania and Louisiana, with Pennsylvania responsible for forty-one percent of the national total. Between 1801 and 1828, the United States Attorney in Delaware filed one indictment. In New Jersey he filed five; in Kentucky six. The six indictments in Illinois, Ohio's eleven, and Indiana's twelve are meager even when adjusted for territorial status during part of the period studied. Connecticut had twenty-four, Georgia had 196, South Carolina ninety-eight, and North Carolina thirty-nine. Conviction rates also fluctuated in an unpredictable pattern. The figures plausibly suggest that, at least until 1828, federal law enforcement was out of control, if by "out of control" we mean the absence of nationally coordinated prosecutorial policies. In sum, despite a reported "coup" by the Secretary of State and frequent presidential and cabinet instructions, federal prosecutors did, as Jacoby concluded, operate independently. Except that in some places, they operated practically not at all. Since they received no salary and were compensated by fees collected by the court, no wonder they, like the Attorney General, continued their private practices of law.⁴⁶⁸

The Civil War closed the era inaugurated by the Framers. The social changes noted soon may have prompted Congress to pursue uniformity in federal law by centralizing its administration in an executive official, but we will never know. The War's outbreak preceded the 1861 reorganization of the district attorneys under Attorney General supervision, and the formal

465. Langbein, *supra* note 296, at 315.

466. See Beale, *supra* note 299, at 1438-39.

467. D. HENDERSON, *supra* note 410, at 213.

468. J. GOEBEL, *supra* note 393, at 612-13.

establishment of the Justice Department occurred during Reconstruction. Notably, the brief Senate discussion of the latter reveals it to have been an economy measure with no felt constitutional compulsion behind it.⁴⁶⁹ Both the War itself and Reconstruction were, as a constitutional matter, just prodigious efforts to enforce federal law upon objecting communities. The Civil War Amendments crowned the effort's success by committing the national government to an enforcement task unlike any preceding it. By the time short term enforcement pressures stemming from armed rebellion subsided in the mid-1870s, there was no question of turning back to the days of the annual federal indictment. A culturally heterogeneous population struggling to make an urban industrial, and increasingly international, economy work under the influence of an unprecedented felt "nationhood" forged in war *had* to have a coherent federal legal order.

What has this narrative got to do with the question? The question is the meaning of the "take care" clause, with special reference to presidential control of federal prosecution. Well, none of it affects the "sense" of the Constitution apprehended by the ratifiers. One can say, probably glibly, that constitutional meaning changes. So it might. But surely the burden is reasonably placed on those ascribing the changed meaning. The narrative will not do. It culminated in a series of statutory reforms, implicitly confirming congressional competence to oversee law execution. It helps to note that the earmark of the Reconstruction era, including both Andrew Johnson's impeachment and the post-war constitutional amendments, is aggrandized congressional enforcement power. And the era up to 1896 is not remembered for strong presidential leadership.

A few specifics must suffice to demonstrate nineteenth century faithfulness to the original sense of the take care clause. Louis Henkin reviews some strained uses of the term to cover foreign military adventures,⁴⁷⁰ but more relevant to our discussion of the clause's effect upon domestic law enforcement is the 1871 Ku Klux Klan Act. It addressed situations in which "execution of the laws" was obstructed by "unlawful combinations," and where state authorities were either unable or unwilling to prevent the conspiratory from curtailing the privileges and communities of citizens.

[S]uch facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; . . . and it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.⁴⁷¹

Even the Civil War did not free the President from waiting upon Congress in

469. See CONG. GLOBE, 41st Cong., 2nd Sess. 4490 (1870).

470. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 54-57 (1972).

471. Act of Apr. 20, 1871, ch. 22, 17 Stat. 14 (1871).

situations demanding the same "extraordinary" law enforcement addressed by the 1792 Militia Act.

Nor was the President's own Attorney General uniformly more forgiving of presidential prerogative. Moreover, an 1890 opinion regarding inherent authority to implement an eight-hour workday proposal lowered presidential expectations.

In short, the statutes do not contain any such provisions as would authorize or justify the President in making such an order as is asked. Nor does any such authority inhere in the executive office. The President has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the Government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from this duties.⁴⁷²

The relief asked in this matter can, in my judgment, come only through additional legislation.

On the other hand, Attorney General Butler rabidly defended *Kendall's* unitary executive position, and Andrew Jackson's legal advisor, Roger Taney, argued against judicial review of prosecutor's nolle prosequi decision, at least partly because of the President's "take care" power. But Butler lost, and Taney relied more heavily upon the nature of the adversary system and the United States Attorney's right to discontinue a suit, just as any litigant might.⁴⁷³

The "take care" clause was most faithfully preserved throughout the nineteenth century in the place which matters most: the Supreme Court. Examples are *Marbury*, *Kendall*, and the various appointments clause cases previously discussed. Previously ignored is *United States v. Smith*,⁴⁷⁴ a decision by Supreme Court Justice William Paterson sitting as Circuit Judge, emphatically affirming the President's "merely" executive character in circumstances similar to those of the Nicaragua controversy. Smith was indicted for setting on foot a military expedition against Spanish territory when that nation was at peace with the United States, a violation of the 1794 Neutrality Act. He defended by way of justification, specifically that the foray took place with "the knowledge and approbation of the President and the secretary of state."⁴⁷⁵

Paterson denied Smith's motion to subpoena Secretary of State Madison, who was allegedly able to relate the claimed presidential sanction. "Supposing then that every syllable of the affidavit is true," Paterson reasoned, "of what . . . use or benefit can it be to the defendant in a court of law?"⁴⁷⁶ The President cannot "dispense" with the law. Nor can the Presi-

472. Op. Att'y Gen. 685-86 (1890).

473. 2 Op. Att'y Gen. 482 (1831).

474. 27 F. Cas. 1192 (D.N.Y. 1866) (No. 16,342).

475. *Id.* at 1203.

476. *Id.* at 1230.

dent "control the statute;" much less can he "authorize a person to do what the law forbids."⁴⁷⁷ Once the Neutrality Act was enacted it was the President's "duty to take care that it be faithfully executed."⁴⁷⁸ He cannot "prevent its effect" other "than by the exercise of [the] constitutional power of pardoning, after conviction."⁴⁷⁹ Why such a crabbed view of executive discretion? Otherwise, the President "could . . . render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government."⁴⁸⁰ Our constitutional separation of powers joined the popular condemnation. The defendant's argument was one effectively for presidential "repeal" of the law, "and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government."⁴⁸¹ The claimed power was one to nullify the Neutrality Act by failing, to "take care" of it, and was "an exercise of the same legislative power as to make a law."⁴⁸²

Not that Paterson's impassioned rebuke needs it, but two further emphases helpful to this Article's analysis need be drawn. First, the Neutrality Act was not an exercise of "ordinary" law enforcement but constrained the President in an area, armed conflict abroad, in which his specific constitutional powers are at a zenith. In other words, if Congress can label presidential adventurism in this area mere outlawry, it can probably do so anywhere. Second, this legislatively-designed straightjacket was not executive specific. That is, unlike congressional directives which literally tell the Executive how to execute the law, the Neutrality Act stated a general prohibition on primary conduct. Put differently again, how much more irritated would Paterson have been if a congressional command to carry an "ordinary" law into effect in a particular way was "dispensed"? Then you pretty much have the evident impatience of the *Kendall* court, whose opinion in that case audibly echoes Smith. Paterson not only denied the motion but forbade questioning any witness about presidential authorization. Nevertheless, the jury promptly acquitted Smith.⁴⁸³

Paterson's 1806 *Smith* opinion represents the exegesis of one present at the creation (of the Constitution as well as the Judiciary Act) and is the front cover to the "take care" story. *In re Neagle*,⁴⁸⁴ decided in 1890, is the back cover. This bracketing is justified by the socio-economic developments, discrete practical events and intellectual developments roughly coincident with the dawn of the twentieth century which produced a new constitutional milieu and eventually constitutional *renvoi*. Some examples of those developments include dominant administrative function in the national government,

477. *Id.*

478. *Id.* at 1229.

479. *Id.* Later in the opinion Paterson stated that a "nolle prosequi" also may be entered. *Id.* at 1230. Given the foreign affairs tinge to the case, either the President or the Secretary of State could have ordered termination.

480. *Id.* at 1230.

481. *Id.* at 1203.

482. *Id.*

483. D. HENDERSON, *supra* note 410, at 65.

484. 135 U.S. 1 (1890).

in which all agree the President has some important provenance; strong Presidents directing an increasingly imperial and martial foreign policy, thereby placing a premium on the "dispatch, energy and secrecy" characteristic of the President; the new politics of an electronic era, with its diminution of party discipline and hence of Congressional decisiveness; and, most importantly, the inevitable transformation of the President from caretaker head of a "night-watchman" state to the nation's leader, writ large. Again, these changes tell us a lot about *why* the President has become what he is and largely by accentuating long-standing but previously dormant aspects of his office like foreign officers, and through "extra constitutional" political influence. They do not change the "sense" of the Constitution, and one is prone to agree with Justice Jackson that the presidency is doing quite well, thank you, without judicial apology, and reinventing the Constitution to confer greater authority upon it is not self-evidently desirable.

Neagle is a fascinating case. The events at issue have elevated its protagonist, Deputy Federal Marshal William Neagle, into the Marshals' Hall of Fame with Wyatt Earp and Bat Masterson.⁴⁸⁵ While acting as bodyguard for Justice Stephan Field on the California circuit, Neagle killed an assailant, Terry. That's the mundane part of the report. The deed's history included a year-long public debate in California over the justice of Terry's plan to assassinate Field when next he toured the state. With all that, the Terrys (the deceased's wife was part of the plan) remained at liberty. One suspects they were even something of popular heroes, so much so that they managed to get on Field's train, close enough to him for Neagle to kill in self-defense. That much more than this was going on is confirmed by the state's prompt arrest and imprisonment of Neagle for murder. He applied for habeas relief, claiming his detention was for "an act done or committed in pursuance of a law of the United States." There was one problem: no "law of the United States" volunteered for service as necessary predicate. Neagle's service as a judicial protector was pursuant to a request by the federal attorney in California, relayed through the Attorney General.

The Supreme Court struggled mightily to fill the lacuna. Along one line of analysis the majority opinion turned longingly to the "take care" duty, and suggested some inherent executive discretion to act unilaterally in the absence of statutory authorization:

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?⁴⁸⁶

The implicit suggestion that the President enjoyed unmediated article II

485. Although their most dramatic exploits may be called to mind by references to names like Bat Masterson, Wyatt Earp, and David Neagle, or to events like the enforcement of civil rights legislation in the 1960's, the primary assistance to the federal judiciary provided by the marshals has been in the area of protection of the trial process, including the courtroom itself, and the service of writs issued by the judges.
 Pennsylvania Bur. of Corrections v. United States Marshals Serv., 474 U.S. 34, 48-49 (1985)(Stevens, J., dissenting).

486. *Neagle*, 135 U.S. at 64 (emphasis in original).

authority to identify threats to the government and commit resources sufficient to meet the threat, was both potent and portentous. Still, Neagle's action transgressed no federal statutory provision (thus distinguishing *Smith*, *Marbury* and *Kendall*) and occurred in a virtually unrepeatable context. Neagle could have been freed without setting dangerous precedent.

In the end, the "take care" dissertation was dictum. The italicization of "express terms" was the clue. There *was* a "positive law" investing the marshal with power not only justifying what Neagle did, "but which imposed it upon him as a duty."⁴⁸⁷ An Adoption Act gave federal marshals the same powers in executing federal law as did sheriffs of the relevant state in executing state laws. And the majority concluded that a California sheriff could have slain Terry with impunity.⁴⁸⁸

That scaled-down rationale was still too much for Justice Lamar and Chief Justice Fuller. In a dissent redolent of most extreme notions of limited executive power, they read to the "take care" clause as a command to faithful observance of whatever directives Congress laid down. But Lamar and Fuller did more than continue the tradition, undisturbed by the majority's dictum, that no "dispensing" power or article II shield against congressional authority existed. Contrary to their brethren's dictum, the clause vested *no* power independent of statute. Unilateral action of this sort was lawmaking, and not law execution.⁴⁸⁹

Times, or at least courts, have changed. Judicial opinions now routinely say that the "take care" clause, and not "positive laws," makes prosecution an inherently or exclusively executive function, and frequently both, without clearly defining either. It conveys as "absolute" discretion. Congress "implements" this constitutionally-required arrangement but cannot alter it, which explains the Administration position in the *Burford* and *Independent Counsel* situations. The clause, therefore, indissolubly weds the President to criminal prosecution in a way that, at most, can be voluntarily alienated (as in *United States v. Nixon*),⁴⁹⁰ but not involuntarily divorced by Congress. From these propositions, *Heckler* advances to like treatment of an encompassing "enforcement" prerogative, a move whose deeper theoretical warrants are found in *Synar*.

If the argument I have developed in this Article is plausible, one must wonder, "How did these ideas become a matter of routine constitutional interpretation?" Justice Marshall appropriately questioned *Heckler's* glib identification of prosecution with civil law enforcement,⁴⁹¹ and then went after the critical premise—the "fading talisman" of prosecutorial discretion.⁴⁹² It is certainly a "talisman" but I doubt that it is fading. In truth, it seems to have burst brightly on the scene sometime shortly after 1960, and shines now pretty much as it did then. Reading the cases backwards in time from the present, the search for persuasive reasoning leads one to Oakland

487. *Id.* at 63.

488. *Id.* at 68.

489. *Id.* at 76-99.

490. *Nixon*, 418 U.S. at 692-97.

491. *Heckler*, 478 U.S. at 847-48 (Marshall, J. concurring).

492. *Id.* at 847-50.

—there is really none there. What one currently finds are citations to early seminal cases like *Pugach v. Klein*⁴⁹³ and *United States v. Cox*,⁴⁹⁴ and there one finds a sequence of troubling naked assertions. The overarching constitutional conceptualization of *Pugach* is frequently quoted:

Article II, Section 3 of the Constitution, provides that “[the President] shall take Care that the Laws [shall] be faithfully executed.” The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government. Congress has implemented the powers of the President by conferring the power and the duty to institute prosecution for federal offenses upon the United States Attorney for each district.⁴⁹⁵

The prerogative quality of this executive function is frequently traced to the common law rule of “absolute discretion”, for which the 1868 *Confiscation Case* opinion is cited.⁴⁹⁶ There is some reference to “policy” reasons in the cases, but at this point they are superfluous, unless one believes that contrary policy reasons can overcome crisply articulated constitutional commands. These practical points have their place in a proper account of the tradition, an account that I now undertake.

Taken in their entirety, the precedents fail both math and philosophy. The “whole” stated, such as *Pugach*’s constitutional prerogative, far exceeds the sum of the parts actually adduced. This quantitative deficiency is aggravated by categorical mistakes, especially at the theoretical level. Correct statements about relative judicial incompetence are blithely rendered as strong claims of exclusive executive competence. Worse, the arguments are commonly cast in a peremptory separation of powers language, when the rationale’s moving forces have virtually nothing to do with that then hopelessly obscured constitutional feature. That some of the “parts” are irredeemable historical inaccuracies, such as the asserted foundation of a justice or “enforcement” department in 1789,⁴⁹⁷ is comparatively a minor shortcoming.

Start with the prosecutor’s charging discretion. There is virtually no judicial authority for compelling him to prosecute someone he would rather leave alone. A recent celebrated instance of discretion, Raymond Donovan’s unavailing effort to compel prosecution for perjury of an informer whose assertions were apparently fabricated, touched off an investigation of Donovan’s business activities, eventuating in indictment based on other evi-

493. *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961).

494. *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965).

495. *Pugach*, 193 F. Supp. at 634.

496. See, e.g., *Committee Note to Rule 48*, in 1985 RULES PAMPHLET Pt. 3, at 563 (J. Moore ed.).

497. As Roger Cramton stated:

While the nature and extent of the executive power cannot be stated with precision there is no doubt that the functions placed in the four original executive departments—conduct of foreign affairs, collection of taxes, enforcement of the law, and command of the military—are at the core of the Executive’s authority.

Hearings, supra note 3, at 349.

dence.⁴⁹⁸ The insuperable obstacle in Donovan's path was the embedded notion that "[i]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."⁴⁹⁹ This suggests that Donovan lacked standing. But that means the issue arises outside the adjudicatory process, and the animating impulse is not separation of powers but, instead, our traditional distinction between "public" and "private" wrongs. The former implicate the whole community's interests, not those of one person. The criminal process vindicates solely the community's. Nevertheless, courts continue to attribute this "traditional judicial aversion" to separation of powers doctrine,⁵⁰⁰ indifferent to the still unjustified fall-out constraints upon the legislature so generated.

A complementary rationale for the "aversion" sounds a lot like a determination that prosecution is a "political question," which it is once an overarching commitment, to the executive via the "take care" clause, is made. But we know that is too strong a view, for there are many constraints upon the prosecutor's charging decision. We are then told that "the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary."⁵⁰¹ True enough, and few observers want courts to become "super prosecutors," regularly second-guessing charging decisions. Even so, a "rational basis," or "good faith" test, might still be compatible with an absence of judicially ascertainable standards for prosecutions. But therein lies an insight lost upon the courts which persist in treating this too as a separation of powers notion. It means only that there is no available law. The obvious rejoinder is what if Congress provides some. The Anne Gorsuch case is one real example. A hypothetical example: a statute which says "no plea to less than the top count shall be accepted in any murder prosecution from a defendant who either (a) performed the acts which actually caused death, (b) acted as "ringleader" of the enterprise, or (c) who had previously been convicted of a violent felony. This statute shall be construed to create a collateral cause of action on behalf of any defendant on trial for murder, so standing problems are eliminated. Another real life example: The Ethics in Government Act, which compels presentation of evidence to the Grand Jury if certain triggering events occur. Since courts split⁵⁰² over whether a private right of action was created by the statute, assume hypothetically that Congress explicitly creates one. The critical qualifier, which some courts have remembered to include in their "we-can-find-no-law-to-apply" judicial forbearance opinions, is simply "Absent statutorily defined standards"⁵⁰³ Roger Taney did not

498. In the Matter of an Application for Appointment of Independent Counsel, 766 F.2d 70 (2d Cir. 1985).

499. *Id.* at 75 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

500. *See id.*; *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-80 (2d Cir. 1973).

501. *Attica*, 477 F.2d at 380. *See Wayte v. United States*, 470 U.S. 598, 608-09 (1985).

502. *Compare Dellums v. Smith*, 573 F. Supp. 1489 (1983)(private citizen standing) with *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984)(no standing).

503. *See, e.g., Attica*, 477 F.2d at 380. *Accord Adams v. Richardson*, 480 F.2d 1159, 1162, 359 Fed. 235, 236 (1973).

forget the distinction. He labored to get prosecutors out from under judicial control, and enlisted the "take care" clause in his brief for presidential supervision of nolle. Still he carefully qualified executive discretions with "except insofar as [its] powers may be restrained by particular act of Congress," the prosecutor has the same control over lawsuits as any other attorney.⁵⁰⁴

As then Circuit Judge Warren Burger noted in *Newman v. United States*,⁵⁰⁵ the United States Attorney's discretionary control of prosecutions has "most frequently" arisen "in connection with the filing of a nolle prosequi, and the courts have regularly refused to interfere with these voluntary dismissals of prosecution."⁵⁰⁶ This "common law rule" supposedly prevailed in federal courts until Rule 48(a) cut into it. But whence does this rule originate? Burger evidently believed in the separation of powers, but that is true only insofar as one identifies a fully differentiated adversary system with "separation of powers." In more primitive arrangements, like those known to the founders, judges *did* control prosecutors through the "nol pro" order. It helps to recall that nolle prosequi refers to the options of anyone "prosecuting" a lawsuit, and historically applied in both civil and criminal litigation. Where the moving party to a lawsuit wished to stop moving, he could do so. The "detached and neutral magistrate," particularly before commencement of trial, interfered in that decision only at the expense of his customary role. Ironically, once government monopolizes prosecution, this rationale weakens. The prospect of pouring the "public intent" exclusively into the prosecutor's glass is not intuitively appealing, and the federal rules now subject this "nolle" authority to limited judicial review and, once trial begins, to a defense veto. Again, the strong article II rendition of this aspect of prosecutorial discretion is negated by this congressionally authorized judicial oversight.

So, claims about executive prerogative are commonly the exaggerated flip-side of judicial reticence. Prosecutorial freedom has been effectively free from judicial control, and as part of courts' more general reluctance to interfere with governmental administration. The most compelling demonstration here is the single mandamus issued by federal courts to executive officials up to 1880.⁵⁰⁷ That one was *Kendall*. This tradition was technically, but no less significantly, founded upon the perceived absence of statutory jurisdiction to issue the writ. Professor Davis helpfully notes, too, that the tradition was "settled before the successes of the modern system of *limited* judicial review became fully recognized."⁵⁰⁸ It is certainly now a mainstay of our tradition that courts police the edges of enforcement activity to protect against the most flagrant abuses of public authority.

Finally there is the usual ration of judicial willfulness in the strong executive cases. *Smith v. United States*⁵⁰⁹ is the most comprehensive example. After quoting the "take care" clause, the opinion designates the Attorney

504. See *supra* note 470.

505. 382 F.2d 479 (D.C. Cir. 1967).

506. *Newman*, 382 F.2d at 480.

507. See *Monaghan, supra* note 176, at 54 nn.96-97.

508. K. DAVIS, DISCRETIONARY JUSTICE 211 (1969)(emphasis in original).

509. 375 F.2d 243 (5th Cir. 1967).

General as the President's "surrogate" in all prosecutions.⁵¹⁰ Even the immediately succeeding citation to statutes so designating the Attorney General failed to sober the opinion's treatment of prosecution as an article II function.⁵¹¹ Further, this discretion "in choosing whether to prosecute or not to prosecute or to abandon a prosecution already started, is absolute."⁵¹² That is not true, nor does the primary citation in support thereof, the *Confiscation Cases*, stand for it. And the difference between what *Smith* attributes to the *Confiscation Cases*⁵¹³ and what they actually say is the difference between the constitutional law of the matter and what opinions like *Smith* think it is. The 1868 opinion actually said:

Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some act of Congress.⁵¹⁴

The *Confiscation Cases* say nothing of the "take care" clause. The founding generation would also agree that given the statutory monopoly granted federal prosecutors by the Judiciary Act of 1789, in the absence of further direction by Congress, courts should not resist a formally proper pretrial "nol pros" motion. At the level of general constitutional principle though, that statement bears no resemblance to assertedly faithful rendition in cases like *Smith*.

"In light of these precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."⁵¹⁵ With that bow to stare decisis the *Synar* Court reinforced an opinion otherwise battered by its identification of those precedents with a dubious organizing principle: Congress may not practically control law execution. *Synar* discussed two precedents. *Humphrey's Executor* was one, and since its principles are contrary to *Synar's*, the other, *Myers*, must bear a heavy justificatory burden. There is truly a unique bond between *Synar* and *Myers*. There are lots of removal cases, but they alone examine congressional participation in removal of officers performing executive functions. We know the facts of *Synar*. Simply put, Frank Myers was a Postmaster first class appointed pursuant to an 1876 law by the President with Senate concurrence. The statute, which covered Myers as well as postmasters of the second and third classes, combined four-year terms with presidential dismissal, but only "with Senate advice." Myers sued for unpaid salary due after the Postmaster General fired him with the President's sanction. The Senate was not consulted. The lower court found against the now deceased Myers' estate.⁵¹⁶ The Supreme Court affirmed.

510. *Smith*, 375 F.2d at 246-47.

511. *Id.*

512. *Id.*

513. *Id.*

514. *Confiscation Cases*, 74 U.S. at 457.

515. *Synar*, 478 U.S. at 726.

516. *Myers*, 272 U.S. at 106-07.

Synar and *Myers* are analytical twins too. Each distinguished limited legislative removal authority from seemingly contrary precedents, which sustained congressional insulation of executive officers from presidential removal. *Perkins* is one example cited. Put differently, the kind of executive unity decisively refuted by *Kendall* was concededly unavailable but assertedly not controlling. Nevertheless, *Myers* went even further than *Synar* in its exclusive reliance upon that rejected *Kendallian* unity. The proof here is *Myers'* willingness to admit that its controlling principles endangered independent agencies like the Interstate Commerce Commission.⁵¹⁷ *Synar's* denial of similar effect distinguishes its candor, not its thinking, for it happily joins *Myers* on a common justificatory path. *Myers* and *Synar* share a common conceptual infrastructure, and, for reasons this Article has identified, it was as rotten when *Myers* built upon as when *Synar* did.

Still, *Synar's* is more the unpardonable sin. That court had almost sixty years to ponder the withering *Myers* dissents of Holmes,⁵¹⁸ McReynolds,⁵¹⁹ and Brandeis.⁵²⁰ Holmes branded the majority's "executive power" and "take care" lectures "spider's webs inadequate to control the dominant facts."⁵²¹ The *Myers* opinion reads more like a turgid executive manifesto, with a thick veneer of undigested historical information. And Freund long ago pointed out how *Myers* is self-refuting. The opinion freely admits that Congress can after all destroy the cherished executive unity and responsibility.⁵²² All the legislature need do is vest appointment in a department head or expressly provide for a term appointment without prior removal by anyone, save perhaps for good cause shown. That was *Perkins*, and *Myers* said it was still good law.⁵²³ The entire *Myers* opinion is really reducible to the traditional appointments, removal tandem, with a demented twist. The presidential appointment route traditionally did not imply Senate assent in removal. That is *Shurtleff*.⁵²⁴ *Myers'* modification was unjustifiably assuming that once Congress effectively designated an "officer of the United States," it was powerless to deflect the traditionally implied presidential removal.⁵²⁵

The *Synar* Court also had the benefit of *Humphrey's Executor*, which all but overruled *Myers*. It most certainly so gutted the infrastructure that the superstructure, its precise holding on legislative participation, lingered only as an analytically bankrupted talisman. That fetish was crushed just as *Myers* predicted, by legislative extension of civil service protection to postmen like Frank Myers. Why should any of this surprise? After all, the Constitution grants Congress the power to make all necessary and helpful rules for governance of the postal system.⁵²⁶ If Congress wanted to make mail deliv-

517. *Id.* at 171.

518. *Id.* at 177.

519. *Id.* at 178-239.

520. *Id.* at 240-95.

521. *Id.* at 177.

522. *Hearings, supra* note 3, at 366-67; *Myers*, 272 U.S. at 173.

523. *Myers*, 272 U.S. at 160-62.

524. *See supra* note 236 and accompanying text.

525. *Myers*, 272 U.S. at 162. The *Myers* Court evidently understood this as a limit upon *Perkins* if *Perkins* did not stand for this proposition already.

526. *See* U.S. CONST. art. 1, § 8.

ery entirely independent of the President, and it has moved in that direction, why should we doubt its authority to do so?

Holmes did not. His brief dissent tells us how properly to approach the problem in *Myers*:

We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal.⁵²⁷

Justice Brandeis too remained loyal to the founders "sense" of the "take care" clause. He said that "[t]he President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. Compare *Kendall v. United States*."⁵²⁸

V. CONCLUSION

Legislative removal of persons performing executive functions is not a difficult constitutional question. The Constitution may well negative congressional appointment of such fellows, but it contains no similar removal disability. *Humphrey's Executor*, and not *Myers* or *Synar*, identified the relevant structural constraint: "purely" executive officers need serve at presidential pleasure. Otherwise, presidential removal existed, as the 1957 *Wiener* opinion insisted, "only if Congress may fairly be said to have conferred it."⁵²⁹ Moreover, only some "purely" executive officers are covered by the *Humphrey's* rule. Military officers like Perkins, and postmasters like Frank Myers, perform "executive" functions full-time. But no one says *they* must, as a constitutional matter, be exclusively removable by the President. The proper sense of *Humphrey's Executor* is that purely executive officers are those few individuals at the highest levels whose job is exclusively implementing presidential control over *specific* article II executive powers (for examples, the President's closest foreign affairs and military advisors, and probably cabinet members⁵³⁰). If there is someone whose sole function is to review pardon applications, him too.

Freund got it right. The vast bulk of modern government is "executive" in common usage of that term, a usage which implicates no theoretical

527. *Myers*, 272 U.S. at 177.

528. *Id.* at 292 (citation omitted).

529. *Wiener v. United States*, 357 U.S. 349, 353 (1957).

530. Whether cabinet ministers are "purely" executive is hard to say, since some may have "merely ministerial" duties outside presidential control (like Secretary of State Madison and Postmaster General Kendall). It may be that a prudential spin on "purely executive" is necessary to presidential removal—a spin that, while advisable, does not disturb this Article's speculation.

commitments. To reformulate his point, the thinking critically examined in this Article would make "executive" a talisman, just as prosecution has largely become. The obvious intention of the thinking is to add a legislative disability to the traditional judicial aversion to supervising prosecution, and to then extend the whole to "law execution," broadly defined. The unmistakable result of that is presidential control of the effective shape of our legal order.

The thinking is intellectually vapid but one fears that this has little to do with its appeal. Decades of events have fostered an imperial presidency. In their wake have come rationalizations, apologies stressing the President's superior organization, ability to command, integrate information, formulate policy, mobilize the masses, and appeal to voters.⁵³¹ Congress has repeatedly been urged to transfer authority and simply wait upon presidential leadership.⁵³² The political scientists and editorial writers can say that if they wish, but the apologies pervert constitutional law, and judges (as well as legal academics) should say so. Dismayingly, we have quoted several judges willing to anoint these same developments with constitutional chrism. And, if applications for Bicentennial Constitutional Fellowships are a rough barometer, Locke and Montesquieu are about to be enshrined by legal scholars as the intellectual architects of our Constitution.⁵³³

These considerable fears are rooted in an even deeper and broader crisis of legitimacy in and of our constitutional order. A heuristically disposed imaginary editorial might describe the problem to which the separation of powers revival is the solution as "too much law made by impersonal, faceless bureaucrats." The same writer might bemoan an "imperious unelected federal judiciary," sporting constitutional platitudes about privacy and freedom of expression, but actually saddling us with their personal preferences for dirty books, abortion, and criminals. Then he celebrates federalism. Decisionmaking by state and local officials is too often displaced by remote Washingtonians, not our Congressmen, but bloodless functionaries.

These populist sentiments, and that is what they are, largely explain the Reagan Administration's views on the Supreme Court, Congress, the President, and the states. For that matter they probably account for the Reagan Administration. No doubt the felt necessity of our age is to somehow make government more responsive and accountable to the governed, to keep the contemporary state-as provider-of-services on one hand and, on the other, to restore control over it to the people. One need not be unsympathetic to this vision to suspect that, like most populist platforms, this one contains contradictory impulses. The central tensions are revealed by the close association of pure separated powers with the negative government of a "night watchman" state.⁵³⁴ The modern administrative state and primitive separationist thinking may well be mutually exclusive, and weasel-wording may be the only way to presently reconcile the two.

It helps to recall how we got here. It was the felt necessity of the age

531. Van Alstyne, *supra* note 201, at 791.

532. *Id.*

533. Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. 420 (1987).

534. See M. VILE, *supra* note 58, at 14.

beginning about a century ago that popular politics was ruining government. Americans pretty much got the government they wanted in those days but probably not the government they needed. At least, the "best men" of the time thought so.⁵³⁵ They reformed the civil service in 1883⁵³⁶ and established the first of many alphabet agencies in 1887⁵³⁷ to help get politics, and the people, out of government, which they envisioned as professional, scientific, and bureaucratic (not then a dirty word). They also persuaded judges that their job was to substitute good laws for the laws people wanted. See, for example, *Lochner v. New York*.⁵³⁸

You may be wondering, so I shall tell you that my sympathies are with the populists. That is why I think further contributions to an imperial presidency are a bad idea. The Executive Branch never was and is not now more popularly attuned than the Congress. And the testimony of Oliver North about secret foreign policy, unaccountable not only to Congress but, assertedly, to the President makes the contrary proposition a bit less plausible. One thing is for sure. It is lousy constitutional law.

POSTSCRIPT: *MORRISON V. OLSON*⁵³⁹

The June 30, 1988 edition of your favorite newspaper probably carried a headline like the *New York Times*, which heralded the Supreme Court's "Upholding" of "Independent Counsel Law."⁵⁴⁰ The problem with such reports of *Morrison* is that they are false. Oh, the Court did sustain Alexia Morrison's authority to prosecute Theodore Olson, and Morrison was indeed so authorized by the Ethics-in-Government Act, Congress' answer to the Watergate riddle of how to ensure prosecution of the prosecutors. But notwithstanding even informed contrary opinions, we can no longer consider her an "independent counsel," at least in constitutional law. According to the Court, she is not. Even though "counsel is to some degree 'independent' and free from executive supervision to a greater extent than other federal prosecutors,"⁵⁴¹ the President retains "substantial ability,"⁵⁴² "ample authority"⁵⁴³ and "sufficient control"⁵⁴⁴ over her to satisfy constitutional requirements. What are those requirements? Essentially those of *Synar*, which *Morrison* explicitly reaffirmed.⁵⁴⁵ After *Morrison*, prosecution remains a uniquely executive function which may *not* (repeat: *not*) be severed from effective presidential control. That is the central teaching of *Morrison*, and it candidly responds to the Watergate query. Is prosecution outside the Executive Branch constitutional? *Morrison* says "No!"

That is implicit in the opinion's guarded employment of the term "in-

535. See generally J. SPROAT, *THE BEST MEN* (1968).

536. Pendleton Civil Service Act, ch. 27, 22 Stat. 403-07 (1883).

537. Interstate Commerce Commission. See *Myers*, 272 U.S. at 171.

538. 198 U.S. 45 (1905).

539. 108 S. Ct. 2597 (1988).

540. *New York Times*, June 30, 1988, at A18, col. 1.

541. *Morrison*, 108 S. Ct. at 2622.

542. *Id.* at 2621.

543. *Id.* at 2619.

544. *Id.* at 2622.

545. *Id.* at 2620.

dependent." Morrison is "independent" in a fashion, and that fashion is simply that she enjoys greater latitude than other federal prosecutors, who are not independent at all. *They* do serve at pleasure of the Attorney General, who serves at the President's will. It matters little whether the reader agrees with the Court's estimate of the mechanisms securing presidential control.⁵⁴⁶ I, for one, think *Morrison* overstates the matter, by far. The holding remains: "substantial" control is constitutionally necessary and the next case will likely emphasize *that*. Here, I submit, the undeniable pragmatic edge to the opinion actually signals adherence to *Synar*. Separation of powers principles remain about where *Synar* left them. As far as I call tell, *Morrison's* "black letter" principle is the President need retain "substantial," but not exclusive or total, control over other-than-"purely" executive functions.⁵⁴⁷ For what it is worth and insofar as that is intelligible, that principle seems quite consistent with *Synar*. Its rigor can, as the occasion demands, be relaxed. The relaxation, as Justice Scalia so clearly saw in his dissent,⁵⁴⁸ remains entirely at the Court's pleasure. "Substantial," "ample," "sufficient" are obviously terms of degree—judgment calls—and no further structure to that inquiry is evident in *Morrison*. The important question is thus unanswered by that opinion: what are the unexpressed commitments coloring the judgment calls? For my money, *Morrison* is a pragmatic opinion precisely because the Court wished to leave untouched the infrastructure crafted in *Synar* and to save the pragmatically attractive "independent counsel" law.

546. See *id.* at 2616-22.

547. See *id.* at 2617-18.

548. While I maintain that Justice Scalia is profoundly mistaken in his separation of powers jurisprudence, his *Morrison* opinion is an impressive one, refreshing for its clarity, honesty and integrity. With his concluding paragraphs, other than the particular statements on separation of powers, I could not more heartily agree. Justice Scalia has done us all a great service by arrainging the obvious deterioration of constitutional "law" into a giant, ad hoc balancing act, whose only unwavering attribute is its ability to permit the Justices' ideologies to substitute for analysis. Those paragraphs state, in full:

A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of. Taking all things into account, we conclude that the power taken away from the President here is not really too much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it is too much. That opinion, like this one, will not be confined by any rule. We will describe, as we have today (though I hope more accurately), the effects of the provision in question, and will authoritatively announce: "The President's need to control the exercise of the [subject officer's] discretion is so central to the functioning of the Executive Branch as to require complete control." This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that—as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President. The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that "[t]he executive Power shall be vested in a President of the United States."

Id. at 2640-41.