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Contemporary Debate About Legislative-Executive Separation of Powers

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THE CONTEMPORARY DEBATE ABOUT LEGISLATIVE-EXECUTIVE SEPARATION OF POWERS

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I
TOWARD A DEEPER UNDERSTANDING OF LEGISLATIVE-EXECUTIVE SEPARATION OF POWERS

Why does the separation of powers seem at once so passé yet so remarkably pertinent? On the one hand, many contemporary observers are fond of noting that it is an old-fashioned, indeed eighteenth-century, notion. Even when the principle cuts deeply into modern consciousness, many regard it as an anachronism that disserves the demands of efficient government.[1] On the other hand, events seem repeatedly to confound those who would relegate the separation of powers to the deep background of American constitutional law and practice. That is especially true with respect to the separation between the legislative and executive branches of government, the topic of this article.

The 1986 decision by the Supreme Court[2] invalidating the core of major legislation designed to reduce the national budget deficit—the so-called Gramm-Rudman-Hollings Act—offers a striking example of the enduring prominence of the separation of powers. Moreover, this was hardly the first instance of the Court so condemning major legislation. Another is the still-reverberating decision in 1983[3] to strike down the legislative veto device,[4] which conditioned

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1 *See, e.g.*, R. DENENBERG, UNDERSTANDING AMERICAN POLITICS 22 (2d ed. 1984) ("Foreign observers often portray America as thrashing about inside an eighteenth-century straitjacket . . . ."); K. LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 35 (2d ed. 1965) (separation of powers doctrine is "obsolete and devoid of reality"); D. MCKAY, AMERICAN POLITICS AND SOCIETY 54 (1983) ("[T]here are more than enough critics who claim that the basic division of power between legislature and executive is inappropriate for the sort of efficient policy making needed to run an economically powerful late 20th century world power.").

2 Bowsher v. Synar, 106 S. Ct. 3181 (1986).

3 Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

4 The legislative veto debate has generated considerable commentary. *See, e.g.*, Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785 (1984); Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125; Kaiser, *Congressional Control of Executive Actions in the Aftermath of the* Chadha *Decision*, 36 ADMIN. L. REV. 239 (1984); Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 633-40 (1984) [hereinafter Strauss, *Place of Agencies*]; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto*

executive action on the possibility of legislative reversal. In other recent cases the Supreme Court and lower federal courts have confirmed the vitality of legislative-executive separation.[5] A wide range of commentary also reflects this energy.[6]

What explains the competing tendencies to denigrate and to emphasize the separation of powers? It is tempting to consider the principle a generally peripheral structural notion that occasionally, if somewhat melodramatically, soars into public consciousness. From this perspective, a number of other features of our administrative and constitutional systems appear of greater importance. Yet when one embraces a more engaged approach, it becomes difficult to ignore the enigma of the separation of powers.

This article adopts the position that it is imperative to confront the basic tension between those who take the separation-of-powers principle lightly and those who take it seriously. The moment has passed when evasion of its imponderables may be an appropriate, or even reassuring, strategy. At the same time, we need to look beyond

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Decision, 1983 DUKE L.J. 789 [hereinafter Strauss, *Legislative Veto*]; Tribe, *The Legislative Veto Decision: A Law by Any Other Name?,* 21 HARV. J. ON LEGIS. 1 (1984). For pre-*Chadha* commentary, see, e.g., Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 HARV. L. REV. 1369 (1977); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?,* 56 N.C.L. REV. 423 (1978); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees,* 66 HARV. L. REV. 569 (1953); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis,* 52 N.Y.U. L. REV. 455 (1977); Miller & Knapp, *The Constitutional Veto: Preserving the Constitutional Framework,* 52 IND. L.J. 367 (1977); Schwartz, *The Legislative Veto and the Constitution: A Reexamination,* 46 GEO. WASH. L. REV. 351 (1978).

5 *See, e.g.,* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974); United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977); United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983); Borders v. Reagan, 518 F. Supp. 250 (D.D.C. 1981), *vacated as moot,* 732 F.2d 181 (D.C. Cir. 1984); Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979).

6 *See, e.g.,* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260-379 (1980); L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1985); W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967); Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19; Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea,* 52 OR. L. REV. 211 (1973); Glennon, *The Use of Custom in Resolving Separation of Powers Disputes,* 64 B.U.L. REV. 109 (1984); Levi, *Some Aspects of Separation of Powers,* 76 COLUM. L. REV. 371 (1976); Quint, *The Separation of Powers Under Carter,* 62 TEX. L. REV. 785 (1984); Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law,* 1981 DUKE L.J. 1; Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935); *see also* sources cited *supra* note 4. For discussions of legislative-executive separation, see L. FISHER, THE POLITICS OF SHARED POWER 14 (1981) ("The exercise of prerogatives by Congress and the president often puts the two branches on a collision course . . . ."). *See generally* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1789-1984 (5th rev. ed. 1984); FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT (G. Graham & S. Graham eds. 1977); A. SCHLESINGER & A. DE GRAZIA, CONGRESS AND THE PRESIDENCY: THEIR ROLE IN MODERN TIMES (1967).

the traditional conceptual map that has guided many forays into this field in order to grasp the depth of controversies informing current separation doctrine.

As this article develops, the traditional picture of the separation of powers holds fast to what may be called the formalist-functionalist dichotomy. This view considers that the axis for understanding separation questions ranges between two major poles: a formalist approach and a functionalist perspective.[7] The former view is allied with the very concept of a separation among the branches of government. The notion of what exactly separates them provides the formal underpinnings of the larger theory.[8] The functionalist view, by contrast, builds on various impulses in modern law that are critical of formalism. Functionalism is closely allied with the vision of checks and balances among the branches of government. This vision stresses the complex interaction and tension among the institutions of government. Such interaction presumably requires some blending of the tasks of governance among supposedly distinct branches.[9]

The formalist-functionalist axis can illuminate much in separation doctrine. Yet it is time to look beyond this axis and consider the deep normative visions that inform separation theory. After all, simply retaining the formalist-functionalist antinomy limits the scope of the debate to movement between the themes of separation and checks and balances. Such an approach can go only so far in explaining conceptual tensions in the law.

This article moves beyond the formalist-functionalist dichotomy's preoccupation with the method of legal analysis to a level of substantive normative debate in the doctrine. I maintain that separation doctrine, as it relates to legislative-executive separation, involves fundamental controversies not only about the relative emphasis of the separation and checks and balances themes, but also about the legitimacy of the modern administrative process. These controversies provide an intense energy that fuels ongoing legal disputes. I seek to illuminate these basic conflicts in relation to major aspects of the doctrine.[10]

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7 For a general discussion of formalism and its critics, see R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982). For a discussion of functionalism, see E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973).

8 *Cf.* M.J.C. VILE, *supra* note 6, at 9 ("[P]olitical institutions are the framework of rules within which the actors in political situations must normally operate . . . .").

9 For an emphasis on the blending of the tasks of government, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). For a vigorous application of the functionalist approach to a separation-of-powers problem, see Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979).

10 In so doing, I do not attempt to "solve" a particular separation-of-powers problem. Rather, I seek to place the contemporary doctrine in its larger theoretical frame-

I certainly do not claim that all separation debates can or should be understood solely in these terms. Yet by focusing on theoretical controversies in the law, one can illuminate critical doctrinal disputes that seemingly refuse to be resolved. One also can better understand why for some, the separation principle is central, while for others it is overrated. This basic difference is an example of larger conflicts informing the field, and therefore is not only explicable, but actually is basic to the modern debate.

In advancing this perspective, I proceed in two main steps. First, I sketch major doctrinal positions in the contemporary debate about the separation of powers: those that concentrate, respectively, on the two core themes of separation and of checks and balances. Second, I associate this debate with competing ideals of the administrative process which, in my view, permeate the doctrine.

II
THE BASIC POSITIONS IN THE CONTEMPORARY DEBATE ABOUT LEGISLATIVE-EXECUTIVE SEPARATION OF POWERS: THE THEMES OF SEPARATION AND CHECKS AND BALANCES

This section outlines major positions commonly taken in the modern debate about the separation of powers. I do not attempt to be exhaustive or fully to qualify arguments in particular contexts as their proponents would be compelled to do. Rather, I seek to summarize central viewpoints that tend to dominate our contemporary legal understanding of separation doctrine.

A. The Two Themes Introduced

It often is taken for granted that the American doctrine of the

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work. For a related discussion of major competing ideals of the administrative process in the contemporary debate about its reform, see Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate,* 1984 WIS. L. REV. 385. For the view that the Constitution itself leaves major ambiguities regarding the meaning of the separation of powers, see J. CHOPER, *supra* note 6, at 260 ("[B]ecause of the inherent deficiencies of the written word and because an unyielding separation of powers was neither contemplated nor enacted, a host of fundamental questions regarding this division of authority have arisen for which the basic charter has afforded only the most ambiguous guidance or, indeed, no helpful signal at all."); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 50 (1982) ("The framers' judgments regarding separation . . . are somewhat indeterminate."); Banks, *Efficiency in Government: Separation of Powers Reconsidered,* 35 SYRACUSE L. REV. 715, 715 (1984) ("[T]he lack of explicit textual reference to the separation rule in the Constitution itself, coupled with inconclusive evidence of the exact intentions of the Framers and some unfortunate judicial misstatements of our constitutional history, has produced considerable confusion concerning the meaning and relevance of the separation principle." (footnote omitted)); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy,* 12 RUTGERS L. REV. 449, 464-65 (1958) (viewing separation of powers doctrine as indefinite and uncertain).

separation of powers has two main tenets. First, it is thought that the three major "branches" of government should be kept in some fundamental sense separate. Second, this separateness should permit a working interdependence in which each branch, in guarding its own prerogatives, effectively checks and balances self-interested behavior by the other branches.[11]

The joinder of these themes is so familiar in the rhetoric of American constitutionalism that it may initially seem odd to view them as distinct. If so, it may be useful to note the associated contrast—advanced by M.J.C. Vile in his classic work on the subject—between a "pure" and a more eclectic conception of the separation of powers.[12]

A "pure" view posits the radical division of the legislative, executive, and judicial branches from one another. It takes for granted the definitional distinction of the functions of each branch. It also presupposes that no persons holding a position in one branch can simultaneously hold office in another branch.[13] Most important, the mere existence of such autonomous decision-making bodies is thought sufficient to prevent the concentration of powers in any single branch.[14]

This set of ideas, as Vile elaborates, exerted considerable influence during the revolutionary period.[15] It also carried a great deal of weight after the Constitution's ratification for critics of the system that subsequently evolved.[16] Yet this pure view did not dominate the Philadelphia convention itself. Rather, the vision that the Constitution ultimately reflected and its supporters defended in *The Federalist* and at the state conventions is a hybrid notion of separated powers designed specifically to check and balance one another.[17]

As famously defended by James Madison, the hybrid conception rests on the assumption that the separate branches will not long remain independent unless more than a definitional boundary exists between them.[18] Madison's familiar premise is that "ambition must

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11 *See, e.g.*, J. CHOPER, *supra* note 6, at 273-75; M.J.C. VILE, *supra* note 6, at 18; *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

12 M.J.C. VILE, *supra* note 6, at 13-18, 153-71.

13 *Id.* at 13-18.

14 *Id.* at 18.

15 *Id.* at 136-53.

16 *Id.* at 161-71.

17 *Id.* at 153-60; *see also* D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984); Levi, *supra* note 6, at 374-79; Sharp, *supra* note 6, at 394-411.

18 THE FEDERALIST No. 48, at 308-09 (J. Madison) (C. Rossiter ed. 1961) ("Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trnst to these parchment barriers against the encroaching spirit of power? . . . [E]xperience assures us that the efficacy of the provision has

be made to counteract ambition."[19] The notion is that self-aggrandizing ambition inevitably leads each governmental actor continually to press the limits of his authority.[20] Madison further assumed that the ambitions of actors in each branch of government will foster efforts to promote the overall power of their respective branch. Thus, a legislator will seek to expand legislative power in general as well as in his own case.[21] Accepting these assumptions as valid, a need then exists for effective structural checks on the tendencies toward self-serving expansion inherent in the governmental system.[22]

Such checks, to be sure, will take different forms. Some—such as the Senate's advice and consent to presidential nominations of officers of the United States[23]—will serve as an external, interbranch limit. Such a constraint directly advances the main theory of checks and balances among the different branches. In contrast, the bicameralism requirement—namely, that majorities of both Houses of Congress must adopt a bill or resolution constituting an exercise of legislative power[24]—amounts to an internal check on the legislature. The bicameralism requirement, Madison argued, helps counterbalance the legislative branch's special opportunities in a representative system to amass power to itself.[25] Moreover, requiring two differently constituted deliberative bodies to agree on governmental policy arguably alleviates, at least somewhat, the danger of factional dominance of the legislature.[26]

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been greatly overrated; and that some more adequate defense is indispensably necessary . . . .").

19 THE FEDERALIST No. 51, *supra* note 18, at 321-22 (J. Madison) (He argues that "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.").

20 *Id.*; *see also* D. EPSTEIN, *supra* note 17.

21 *See* THE FEDERALIST No. 51, *supra* note 18, at 322-23 (J. Madison).

22 *See id.* at 320-23.

23 U.S. CONST. art. II, § 2, cl. 2 (providing that President shall nominate, "and by and with the Advice and Consent of the Senate, shall appoint" public officers whose appointments are not otherwise provided for, except that Congress may by law vest appointment of inferior officers in the President alone, the courts, or heads of departments).

24 *Id.* art. I, § 7, cl. 2 (providing that "[e]very bill which shall have passed the House of Representatives and the Senate" shall be presented to President, who may approve it, or veto it; in latter case, for bill to become law, it must be approved by two-thirds of both Houses); *id.* cl. 3 (providing that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)" shall be presented to President for approval or veto).

25 THE FEDERALIST No. 51, *supra* note 18, at 322-23 (J. Madison).

26 *See* INS v. Chadha, 462 U.S. 919, 949-50 (1983).

B. The Growing Disenchantment with the Separation Theme

The general outlines of the foregoing story are well known. Less frequently stressed is the notion that Madisonian checks and balances depend critically on a substantive separation between the branches of government, and in particular, between the legislative and executive branches. After all, to talk of one branch "checking" another presupposes that different branches are indeed involved. Moreover, viewing the legislature as internally checked requires a distinct understanding of the role of the legislative, as opposed to the executive, branch.[27]

For Madison, these requirements did not loom as major difficulties. He simply borrowed the then-common axiom that legislative, executive, and judicial functions were in and of themselves easily distinguishable.[28] In this regard, it bears noting that when he assumed a critical posture, Madison directed his fire against a position closer to a pure view of separation of powers than his own.[29] Not surprisingly, in his writings Madison demonstrated less concern for establishing the basic separation themes than he might have if he had sought to criticize a view skeptical of separation as an initial matter.

In the contemporary debate, however, the underpinnings of the separation axiom have been called into serious question. Indeed, uncertainty has been mounting for decades. In the context of legislative-executive separation, the debate focuses on the fact that agency rulemaking obviously shares the core characteristics—prospectivity, generality, policy-making force—ascribed to legislated norms. As the Supreme Court acknowledged in a classic delegation decision, *United States v. Grimaud,* it has become "difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations."[30] In *Amalgamated Meat Cutters v. Connally,* a leading statement of modern delegation doctrine, the late Judge Leventhal noted that "no analytical difference, no difference in kind" exists between the legislative function "of prescrib-

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27 In this sense, the idea of checks and balances depends on the prior notion of separation. *See* M.J.C. VILE, *supra* note 6, at 16 ("The 'separation of agencies' . . . is an essential element in a theory which assumes that the government must be checked internally by the creation of autonomous centres of power that will develop an institutional interest."). *See generally* THE FEDERALIST Nos. 47, 48 & 51 (J. Madison).

28 *Cf.* THE FEDERALIST No. 47, *supra* note 18, at 302-03 (J. Madison) (discussing Montesquieu on separating powers among branches, which assumes that powers are distinguishable). This separation axiom has played a major role in American doctrine. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 124, 139-41 (1976); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law . . . .").

29 *See generally* THE FEDERALIST No. 47 (J. Madison).

30 220 U.S. 506, 517 (1911).

ing rules for the future" and what agencies do by rulemaking pursuant to statute.[31]

This collapse of faith in a clear substantive differentiation between the legislative and executive functions is reflected in the literature. As Professor Peter Strauss has noted, agencies perform tasks substantially identical to the legislative functions supposedly assigned to a discrete branch of government, making it difficult to retain the classical tripartite scheme as a framework for identifying the place of agencies in government.[32] From this vantage point, the rigid separation axiom has scant descriptive power at the day-to-day level of agency administration.[33]

Some might expect—or perhaps hope—that this clash between the classical categories and moderu administrative realities would undermine belief in the separation-of-powers doctrine in general. But that would seriously underestimate the principle's centrality to the constitutional structure of national government.[34] Instead, the emphasis in much contemporary discussion has merely shifted from the separation idea itself toward the allied notion of checks and balances. Indeed, much of the modern debate represents a search for ways to advance the values behind checks and balances while admitting some loss of confidence in the classical tripartism that traditionally has grounded separation theory.

C. The Emphasis on the Checks and Balances Theme

A strong current in recent discussions thus stresses, not the separation theme, but rather the checks and balances premise. A leading source of encouragement in this direction is Justice Jackson's famous concurring opinion in the 1952 steel seizure-decision, *Youngstown Sheet & Tube Co. v. Sawyer.*[35] In a few well-crafted sentences, Justice Jackson struck the note of practicality that informs much argnmentation for the checks and balances idea. Justice Jackson wrote that "[t]he actual art of governing . . . cannot conform to judicial definitions of the power of any . . . branch[] . . . toru from

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31 337 F. Supp. 737, 745 (D.D.C. 1971).

32 *See generally* Strauss, *Place of Agencies*, *supra* note 4.

33 *See id.* at 581-83.

34 *See* Buckley v. Valeo, 424 U.S. 1, 124 (1976) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted . . . ."). The very structure of the Constitution indicates the importance of the separation of powers by assigning powers to the legislative, executive, and judicial branches, respectively, in articles I, 11, and III. *See also* 1 ANNALS OF CONG. 581 (J. Gales ed. 1834) (statement of Rep. Madison in debate during the first Congress on June 22, 1789, that "if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers").

35 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

context."[36] The "context" referred to is plainly the practice of modern government. As Justice Jackson noted, this practice presupposes the need to "integrate the dispersed powers into a workable government."[37] There must be, in his much-quoted phrase, "separateness but interdependence, autonomy but reciprocity."[38] The not-so-hidden premise here is that single-minded devotion to the analytics of separation evinces an inflexible and unrealistic attitude.

Justice Jackson's practical bias and realist premises, combined with widening awareness of the implausible descriptive foundation of traditional separation theory, have significantly influenced contemporary debate. Many critics have pointedly disavowed what they see as the "simplistic" doctrinal framework of classical tripartism.[39] They have stressed institutional checks and balances rather than the definitional separation thesis itself.[40]

For the sake of analysis, two different models of the checks and balances emphasis may be contrasted. They may be called the "moderate" and the "extreme" positions.

1. *The Moderate Position*

The moderate checks and balances perspective is impelled by frustration with what it considers the simplistic separation axiom. The moderate position also rests on a desire to achieve some alternative doctrinal framework that courts can manage. In pursuing these twin commitments, the moderate approach often advances what its proponents regard as a "functional" understanding of separation-of-powers problems.[41]

Functionalism in law, of course, has a long history.[42] Its central commitments include suspicion of abstract verbal formulae. As a general matter, a functionalist approach holds that legal analysis should center on the actual operation and values of a given doctrine, rather than on its general meaning or definition.[43]

A functionalist effort to lend legal substance to the concept of checks and balances stands on hard-to-hold conceptual ground.

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36 *Id.* at 635.

37 *Id.*

38 *Id.*

39 *See generally* Bruff, *supra* note 9, at 470-88. *See also* Wiener v. United States, 357 U.S. 349, 352 (1958) ("The versatility of circumstances often mocks a natural desire for definitiveness.").

40 *See, e.g.*, Bruff, *supra* note 9, at 471-80.

41 *See generally* J. CHOPER, *supra* note 6, at 260-71.

42 *See* E. PURCELL, *supra* note 7, at 23-24 (discussing functionalism in social sciences with its emphasis on "the things men actually did in society"), 74-94 (discussing legal realism as emphasis on empiricism in law), 159-78 (elaborating limits of realism in law in terms of modern "crisis of jurisprudence").

43 *See id.* at 23.

Functionalism is chary about what it considers mere doctrinalism. Yet the moderate perspective seeks also to assign doctrinal content to the notion of checks and balances.[44] This builds a certain tension into the perspective.

The problem of delineating the limits on presidential oversight of the federal regulatory process illustrates this inherent tension. Presidential oversight is a much-discussed area in which the moderate approach has achieved considerable prominence.[45] Such a perspective typically emphasizes the need to balance an array of values that arise in a particular context. These often include competing goals, such as unified executive policy making and agency autonomy. Analysis takes into account such disparate factors as the discretion for executive oversight seemingly contemplated by the relevant authorizing statutes, the President's capacity in a given area to exercise supervision, the possible involvement of due process constraints against political oversight, and the predictable effectiveness of checks by the other branches on the President.[46]

Despite its undeniable appeal, the moderate approach raises major questions. As with other balancing frameworks, one can legitimately ask what normative perspectives guide its operation.[47] The outcome of a balance of competing values implicated in a particular instance of presidential oversight, for instance, will depend in significant measure on judgments made independently of the balancing process. These will include the way in which one frames the values in contest. Moreover, as many have noted, the very concept of a balance presupposes some common scale of values useful for making comparisons among competing claims. Such a scale must exist prior to any balance, and requires its own defense.[48]

It seems insufficient to respond that one simply must judge whether some result would involve "undue" or "excessive" infringement on certain of the values at stake in the system of checks and balances. It may be, for example, that as long as there is not

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44 *See, e.g.*, Bruff, *supra* note 9, at 470-71; Strauss, *Place of Agencies*, *supra* note 4, at 602-04.

45 *See* Bruff, *supra* note 9, at 486-98.

46 *Id.* at 488-89.

47 This question is commonly asked, for instance, about cost-benefit balancing in regulatory decision making. The idea is that underlying any such balance, anterior normative decisions are made that guide the balance itself. *See generally* Anderson, *The Place of Principles in Policy Analysis*, 73 AM. POL. SCI. REV. 711 (1979); Coddington, *"Cost-Benefit" as the New Utilitarianism*, 42 POL. Q. 320 (1971); Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REGULATION, Jan./Feb. 1981, at 33; Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972).

48 *See, e.g.*, Kennedy, *supra* note 47, at 388 (making value judgments precedes economic analysis).

"too much" intrusion on the role of agencies, the aims of legislative oversight, or other competing interests, centralized executive supervision is acceptable. But such a generalization begs the key questions: how much is too much, and by what measures are such things to be determined?[49]

It is difficult to know how proponents of the moderate position can resolve such primary questions without reference to at least tacit principles regarding the place of agencies in the broader governmental scheme and the relative weights of agency independence and political oversight. Yet such baseline principles appear suspiciously similar to the type of supposedly oversimplified precepts that inform the separation theme. It is hardly surprising that a moderate checks and balances approach often tends to obscure the underlying structural norms that guide the balancing it espouses.[50]

2. *The Extreme Position*

The moderate checks and balances perspective stands in contrast to an extreme position. Both approaches share a suspicion of formal definitions of the separation principle, and both seek support in the functionalist tradition. However, unlike the moderate view, the extreme position eschews the goal of formulating a doctrine for courts to use in adjudicating separation-of-powers controversies.

Dean Jesse Choper is a major proponent of the extreme position.[51] He argues that the system of checks and balances, viewed in its broader political context, is essentially self-correcting, such that courts need not intervene in the name of separation doctrine.[52] From this perspective, the governmental system should be left alone to work out its own pattern of institutional relations in a manner presumed faithful to the guiding aims of checks and balances.[53]

For instance, under this extreme view no court should adjudicate a dispute about a claim of executive privilege by the President against a committee of Congress. After all, the constitutional theory presupposes that the political branches can adequately check and

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49 *Cf.* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) ("[T]he proper inquiry focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." (citation omitted)).

50 That is not to say this inevitably occurs, as many of the most careful checks and balances theorists have kept in mind the need for some embodiment of the separation requirement. *See, e.g.*, Bruff, *supra* note 9, at 470-71, 486-508; Strauss, *Place of Agencies*, *supra* note 4, at 578-81.

51 *See* J. CHOPER, *supra* note 6, at 260-379.

52 *Id.* at 263.

53 *Id.* at 273-75.

balance one another.[54] Given this faith in a larger system of institutional balance, a particular assertion of power within the system necessarily will call forth an array of counterbalancing checks on that power. These may include not only formal institutional checks by one branch against the other, but also a host of informal influences on the part of government and, for that matter, private groups.[55]

This optimistic vision offers a rough political analogue to faith in the market as an impersonal system that filters values.[56] Governmental actors are seen to pursue their self-interest. Their interdependence is seen to force them toward an equilibrium that will reflect the preferences of all parties. To be sure, shocks to an equilibrium can occur. But the main political actors—Congress and the President—are presumed to have sufficient will and resources to continue to pursue their institutions' interests.[57] Accordingly, any predictable disequilibrilizing tendencies imply their eventual self-correction. This line of reasoning culminates in the prescription that courts should stay away from separation-of-powers disputes by deeming them nonjusticiable as a class, at least absent a plausible claim that a government actor's efforts at aggrandizing power infringe individual rights grounded on some other principle.[58]

Even by confining a critique of this position to the premises of a checks and balances perspective, serious questions spring to view. First, as an empirical matter, it is by no means clear that the legislative and executive branches tend toward an equilibrium in which neither branch has a systematic structural advantage over the other. As some political scientists have argued, periods of decline and resurgence in the relative roles of Congress and the President have apparently occurred.[59] Even if one takes a long-term approach to the matter, at different times significant imbalances in the powers of the branches may well exist.[60]

Second, because the defense of the extreme position rests centrally on the putative inappropriateness of judicial resolution of separation-of-powers controversies, what is one to do with the not extensive but nonetheless notable body of case law on the subject?[61] One could simply dismiss it as wrongly decided. Yet a blanket rejec-

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54 *See id.* at 334-49.

55 *See generally id.* at 260-379.

56 *See* A. SCHOTTER, FREE MARKET ECONOMICS: A CRITICAL APPRAISAL 39-44 (1985). *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).

57 *See generally* J. CHOPER, *supra* note 6, at 260-379.

58 *See id.* at 377-78.

59 *See, e.g.*, J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS (1981).

60 *See generally id.*

61 *See, e.g.*, Bowsher v. Synar, 106 S. Ct. 3181 (1986); INS v. Chadha, 462 U.S. 919 (1983); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet &

tion of the role that courts have evolved on their own in resolving such disputes should give one pause. Certainly, such an approach strains directly at the down-to-earth practicality seemingly underlying a checks and balances perspective. It appears odd to suppose that a realistic appraisal forces one to conclude that the reality of significant judicial intervention is itself invalid, and for largely abstract reasons at that.[62]

Third, although the extreme view holds that no overwhelming and disequilibrilizing shock to the system of checks and balances is likely to occur, it is fundamentally disabled from fully conceiving of such a possibility. After all, the extreme position depends on the premises that separation-of-powers doctrine is inherently vague and that courts should not enunciate its meaning in contested cases.[63] But if no doctrine exists to administer, how can one know whether the doctrine has or has not been put under severe stress? It appears that one cannot. The extreme argument thus apparently proceeds on faith that there will be no need for doctrine. To go much further—by actually developing the norms of balance presumably upheld by the institutional system—would ultimately defeat the project of maintaining silence about the norms' legal meaning.

Fourth, this extreme view, for one concerned directly with the separation theme itself, fails to address the key matter. From the separation perspective, the central need is to fashion some plausible, principled basis for resolving concrete interbranch disputes. This need is not met simply by assuming that the disputes require no legal resolution.[64]

Despite its difficulties, the extreme perspective does have the virtue of carrying through systematically on its belief in checks and balances. In particular, it brings to a logical terminus the notions that checks and balances are paramount and that the separation theme is embarrassing and beside the point. It considers that an adequate degree of separation will exist—by postulate—because the

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Tube Co. v. Sawyer, 343 U.S. 579 (1952); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926).

62 This is not to suggest, of course, that reevaluation of lines of doctrine is impossible or impractical in every context. *Cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976). The Court's decision in *Garcia*, 469 U.S. at 551-54 & nn.11-18, took note of and relied in part on Dean Choper's argument that judicial abstention would be advisable in the federalism context. *See* J. CHOPER, *supra* note 6, at 175-84.

63 *See id.* at 377-78.

64 *See* INS v. Chadha, 462 U.S. 919, 942-43 (1983) ("It is correct that this controversy may, in a sense, be termed 'political.' But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . .").

framers designed institutional checks and balances to make it so. As the contemporary debate underscores, however, actually making the analytical difficulties dogging the separation theme disappear has not proven so easy.

D. The Revival of the Separation Theme and the Contemporary Debate

Both the moderate and extreme checks and balances perspectives endeavor to avoid formalistic definitions of the separation principle. Yet both *assume* that separation exists. The question remains: how can we be sure it exists without making a primary effort to define it?

It is striking that so many of the instances of concern to checks and balances theorists involve conflicts between actors unmistakably "in" one or another branch. An example of such a controversy would be one involving a claim of executive privilege by the President against a committee of Congress. In that case, as a matter of first premises the President is an executive branch official and the committee acts as part of the legislative branch in aid of Congress's power to gain information needed to legislate.[65] "Separation" undeniably exists here. The real question involves balancing the asserted prerogatives of the two branches.

Such issues, although not rare, do not exhaust the repertoire of separation-of-powers controversies. Other problems include those concerning the constitutional status of an actor or action as legislative or executive. For easy reference, I will refer to these as boundary questions because a principal element of doubt attaches to the nature of the boundary between the legislative and executive branches in the particular circumstances.[66]

Several such questions have had considerable notoriety in recent years. For instance, the debate about the delegation doctrine—

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65 *See generally* United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983). For discussion of executive privilege, see R. BERGER, EXECUTIVE PRIVILEGE (1974); Cox, *Executive Privilege,* 122 U. PA. L. REV. 1383 (1974); Ratner, *Executive Privilege, Self-Incrimination, and the Separation of Powers Illustration,* 22 UCLA L. REV. 92 (1974); Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress,* 71 MINN. L. REV. 461 (1987); Comment, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy,* 1983 DUKE L.J. 1333; Note, *Executive Privilege and the Congressional Right of Inquiry,* 10 HARV. J. ON LEGIS. 621 (1973). *See also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974); United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

66 By "boundary question" I do not mean to presuppose that there is necessarily a clear line of demarcation in the doctrine that allows distinction between the legislative and executive spheres. Rather, the term underscores that the questions arise whether any such line exists and, if so, what it may entail.

which holds that Congress cannot delegate its legislative function to agencies[67]—raises a classic boundary question: what is the nature of the legislative function that cannot in any event be passed from the hands of Congress?[68] The continuing conflict about this issue confirms that this query lacks an easy answer.[69]

Another example involves the President's removal power, long a staple of separation-of-powers discussions.[70] We know from classic decisions in this area that the extent of the President's power to remove officers depends in significant measure on the location of the agency in the larger constitutional scheme.[71] The boundary question often becomes: is the agency part of the executive branch as to which there is plenary presidential removal power,[72] or does the agency perform hybrid functions (i.e., "quasi-legislative" or "quasi-judicial") that may permit it to lie beyond the scope of plenary removal?[73] If the latter, what is the status of so-called "independent" agencies: do they constitute a suspect fourth branch of government, as certain critics have argued, or can the tripartite scheme assimilate them in some fashion?[74] The ongoing conflicts

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67 *See generally* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971). *See also* Lichter v. United States, 334 U.S. 742 (1948); Yakus v. United States, 321 U.S. 414 (1944); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); United States v. Grimaud, 220 U.S. 506 (1911); Field v. Clark, 143 U.S. 649 (1892).

68 *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980); J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 78-94 (1978); T. LOWI, THE END OF LIBERALISM 92-126 (2d ed. 1979); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) (advancing economic interpretation of delegation doctrine); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968); Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review*, 1982 WIS. L. REV. 208 (discussing rebirth of interest in doctrine); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1693-97 (1975); Wright, Book Review, 81 YALE L.J. 575, 582-87 (1972).

69 *See A Symposium on Administrative Law, "The Uneasy Constitutional Status of the Administrative Agencies": Delegation of Powers to Administrative Agencies*, 36 AM. U.L. REV. 295-442 (1987) (articles by Professors Lowi, Stewart, Gellhorn, Schoenbrod, Pierce, and Sargentich); *see also* sources cited *supra* note 68.

70 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926); *cf.* Buckley v. Valeo, 424 U.S. 1 (1976) (dealing with appointment clause).

71 *Humphrey's Executor*, 295 U.S. 602 (1935).

72 *Myers*, 272 U.S. 52 (1926).

73 *Humphrey's Executor*, 295 U.S. 602 (1935).

74 *Cf.* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 41 (2d ed. 1985) (referring to "uneasy constitutional position of the administrative agency"). For the difficult political position of such agencies, see W. CARY, POLITICS AND THE REGULATORY AGENCIES 4 (1967) (describing regulatory agencies as "stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one"); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE

about these issues reveal that the boundary notions in this area are far from self-evident.[75]

Yet another example of a boundary problem is the recent dispute about the legislative veto.[76] To understand the reach of the procedural requirements attending legislative action—bicameral passage by majorities of both Houses of Congress and presentment to the President[77]—one has to grasp the character of legislative action itself. Plainly, Congress need not follow the full panoply of constitutionally mandated formalities for everything it does. Hence, the key boundary question here is: what exactly makes something legislative action for purposes of the bicameralism and presentment requirements?[78] The ongoing dispute about the Supreme Court's efforts to address this elusive issue underscores that doubts are unremitting.[79]

When confronted with such fundamental boundary questions, analysis cannot totally ignore the issue of the constitutional status of the relevant actor or action. Even if only implicitly, analysis must address the underlying definitional problem. As soon as one acknowledges that reality, the initially reassuring movement to a checks and balances emphasis often appears inadequate to the task.

Various critics—including lawyers in the United States Department of Justice[80] and others[81]—seek greater judicial fidelity to their

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L.J. 1395, 1410 (1975) (speaking of struggle over agencies "with each elected branch seeking to prevent the other from exercising active control, hut with neither consistently wanting to do so itself").

75 The concern about the role of agencies, and in particular "independent" agencies, has a long lineage. *See, e.g.*, PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) (Ash Council); STAFF OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE TO THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) (J. Landis, author); COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, THE INDEPENDENT REGULATORY COMMISSIONS: A REPORT TO THE CONGRESS (1949) (Hoover Commission); PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937) (Brownlow Committee). *See generally* Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978); Strauss, *Place of Agencies*, *supra* note 4.

76 INS v. Chadha, 462 U.S. 919 (1983); *see* sources cited *supra* note 4.

77 U.S. CONST. art. 1, § 7, cls. 2-3; *see Chadha*, 462 U.S. 919 (1983).

78 *See, e.g.*, Elliott, *supra* note 4, at 131-44.

79 *See id.* at 128 ("[T]he difference between Justice White and the majority [in *Chadha*] goes deeper than disagreement over the legislative veto. It goes to the very nature of the Constitution . . . ."); Strauss, *Legislative Veto*, *supra* note 4, at 790 (Congress's function and relationship with those who execute the laws not as limited as the *Chadha* majority and Justice White believe); Tribe, *supra* note 4, at 8-9 (noting problems inherent in *Chadha* majority's definition of legislative action).

80 *See* Memorandum from the Department of Justice to the Honorable David Stockman (Feb. 12, 1981) (concerning proposed executive order on federal regulation), *reprinted in Role of the Office of Management and Budget in Regulation: Hearings Before the*

vision of the necessary primacy of the separation theme in the separation of powers. This approach is reflected in several contexts. For instance, some maintain that the delegation doctrine should be given greater emphasis, largely to reestablish the integrity of the legislative role.[82] Others argue that the separation-of-powers doctrine, properly understood, should generate suspicion about the evolved position of independent agencies.[83] Such critics routinely call into service the specter of a "fourth branch" that violates classical tripartism.[84] In these and other situations, a revival of the separation theme is applauded by some as a more rigorous, less flaccid, and more faithful incarnation of first principles of American governmental structure.

What is one to make of the renewal of separation rhetoric in some quarters, not incidentally including major recent decisions by the Supreme Court?[85] One could see it as an anachronism, a throwback to a simpler era of public life when the demands on govern-

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Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158-64 (1981); Department of Justice Memorandum on Jurisdiction over Independent Agencies, *excerpted in* Legal Times of Wash., July 27, 1981, at 24, col. 1. A revival of a strict separation emphasis has been associated with a broader "executive branch" view of the separation of powers emphasizing *Myers*' notion of a unitary executive bureaucracy with the President at the top of the hierarchy. *See* Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59, 60-69 (1983) (discussing and criticizing executive branch view).

81 Recent litigation challenging the constitutionality of the Federal Trade Commission on a strict separation premise has generated considerable interest. *See* Statement of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 6-28 [hereinafter Statement of Points] (on file at *Cornell Law Review*), Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747 (D.D.C. 1986) (No. 85-3089), *aff'd*, 814 F.2d 731 (D.C. Cir. 1987). The district court granted the defendant's motion to dismiss on ripeness grounds. 625 F. Supp. at 750-52. The Court of Appeals affirmed, although each panel member relied on a different ground—exhaustion, ripeness, and lack of final agency action. *See also* Miller, *supra* note 75, at 49 n.40 (referring to other lawsuits raising similar arguments).

82 *See, e.g.*, T. LOWI, *supra* note 68; Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

83 *See* Statement of Points, *supra* note 81, at 23-25; *see also* Olson, *Separation of Powers Principle Is No "Triviality,"* Legal Times of Wash., July 21, 1986, at 4, col. 1 (questioning constitutionality of agencies beyond control or direction of President).

84 The concern about the constitutional status of independent agencies is longstanding. *See* sources cited *supra* note 75. For recent attacks, see sources cited *supra* notes 81 & 83. *See also* Fein, *Get Rid of Regulatory Agencies*, Washington Post, July 27, 1986, at D5, col. 4; Miller, *supra* note 75; Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1785 (1985) (characterizing as "anomalous" position of independent agencies in "post-functionalist legal landscape").

85 Renewal of the separation theme is not necessarily either a "conservative" or a "liberal" position in contemporary political parlance. First, many separation issues have indeterminate policy implications. Second, the separation of powers concerns people of notably diverse political persuasions. Third, the separation of powers ultimately invokes general theoretical justifications on a level beyond that occupied by narrowly partisan programs. The revivalist movement, therefore, can legitimately claim a broad parentage.

ment—and resulting needs for institutional innovation—were less intense.[86] It also could be conceived as a farsighted step in the right direction, as it forces greater attention to the often avoided definitional basis of a core principle of American constitutionalism.[87] Partisans continue to present both views. Each one rests on an anterior choice of positions emphasizing either the theme of checks and balances or that of separation.

In other words, in the present terms of discourse, a circle often keeps completing itself: from the traditional emphasis on separation, to a pragmatic attitude that resonates with the idea of checks and balances, and for some back to the separation theme under the banner of reinvigorated doctrinalism. With each step taken or avoided, patterned and predictable arguments appear. The overall movement leaves the observer wondering if there is not some deeper theoretical framework that puts in perspective the dynamics of legal doctrine in this area without simply spinning endlessly from one to another conventional position in the contemporary debate.

III
A Theoretical Perspective on Legislative-Executive Separation of Powers: The Competing Ideals of the Administrative Process

The separation of powers is a broad enough topic to accommodate a variety of theoretical frameworks. The one advanced here has the advantage of forcing us to look underneath the doctrine for larger visions of law in relation to administrative life. In this part, I argue that the separation of powers, by focusing on legislative-executive relations, implicates the most fundamental debates about the character and legitimacy of the administrative process.[88] I develop major aspects of what I regard as the central competing ideals of administration in relation to the separation of powers. Although this article does not exhaustively survey theoretical linkages to separation doctrine, it does highlight deep, unresolved controversies in

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86 *Cf.* INS v. Chadha, 462 U.S. 919, 978 (1983) (White, J., dissenting) ("From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective . . . means to insure its role as the Nation's lawmaker.").

87 *Cf. Chadha*, 462 U.S. at 944-46; *see also* R. Denenberg, *supra* note 1, at 22 ("[T]he [C]onstitution is no more an irrelevant relic of eighteenth-century America than the Bible is of ancient Palestine.").

88 For discussion of the legitimacy of the modern administrative process, see J. Freedman, *supra* note 68; J. Mashaw, Bureaucratic Justice (1983); Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984); Stewart, *supra* note 68.

our liberal democratic polity that continue to fuel disputes about the relevant law.

To characterize this effort as a political theory of the separation of powers is partly right. Such a label correctly implies an attempt to place in broader perspective the tangles of doctrine that so bedevil the separation of powers. Such a characterization is also partly wrong, however, to the extent that it might suggest that the goal is to move to some realm of conceptual abstraction for its own sake. In my view, the most effective way to explain this puzzling doctrine of separation, taken so lightly by some critics and so seriously by others, is to link it with its deeper ideals. This linkage in turn can help in both understanding and critiquing the law.

This picture of competing ideals centers on the rule of law vision of bureaucracy, which I discuss in part A. In part B, I consider the major limits of that ideal in relation to the rise of an emphasis on the theme of checks and balances in the doctrine. In part C, I demonstrate how what I call the public purposes and the democratic process ideals, which compete with the rule of law vision, relate to the tensions between the separation and checks and balances themes. I illustrate each of these three steps in terms of one of the main boundary questions noted above: respectively, the delegation doctrine, the removal power, and the legislative veto. In the fourth and final part, I discuss the value of such a theoretical perspective on the separation of powers, using as an illustration the recent decision about the Gramm-Rudman-Hollings deficit reduction legislation.

A. The Rule of Law Ideal's Linkages with the Separation Theme

1. *General Linkages*

Why does the familiar ideal of the rule of law, a core precept of liberal democratic theory, have any necessary connection with the American separation of powers? After all, Britain's jurisprudential tradition is deeply tied to the rule of law,[89] but it does not hold to an institutional system like our separation of powers.[90] The answer is that one can have rule of law without institutional separation, but

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89 *See, e.g.*, R. ROSE, POLITICS IN ENGLAND (1964); *see also* H.L.A. HART, THE CONCEPT OF LAW (1961). For discussion and comparison of the different attitudes toward delegated legislation in the United States and Britain, see Asimow, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD J. LEGAL STUD. 253 (1983).

90 Indeed, some commentators criticize the American separation of powers and use Britain's parliamentary system as a model for reform in the United States. *See, e.g.*, H. HAZLITT, A NEW CONSTITUTION NOW (1974); REFORMING AMERICAN GOVERNMENT (D. Robinson ed. 1985); Cutler, *To Form a Government*, 59 FOREIGN AFF. 126 (1980).

that separation theory is closely associated with the idea of a rule of law.[91]

The linkage between the American separation of powers and the rule of law vision may be traced to Madison himself.[92] This association has been noted by commentators,[93] and has appeared in the rhetoric of judicial decisions.[94] As an analytical matter, the connection exists both to defend the need for limited government and to prescribe the basic roles of the legislature and the executive. I will discuss each in turn.

A close relation between the rule of law and the separation of powers is evident in both the liberal and the democratic elements of liberal democratic theory. Professor Judith Shklar nicely captured the liberal preoccupation when she wrote of a "liberalism of fear."[95] Fear of governmental power is the primary underpinning of this vision, a key element of which is the suspicion of officials with power to intrude upon the posited sphere of personal interests in life, liberty, and property.[96] Both the rule of law ideal and the separation

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91 *See* D. EPSTEIN, *supra* note 17, at 127-30 ("While there could be no separation of . . . powers . . . without rule by law, there could be rule by law without such a separation.").

92 *See* THE FEDERALIST No. 47, *supra* note 18, at 303 (J. Madison) (discussing Montesquieu's conception of separation of powers in terms of protection of liberty under law, and in particular of preventing "*the same* monarch or senate" that enacts laws from being able "to *execute* them in a tyrannical manner").

93 *See* D. EPSTEIN, *supra* note 17, at 127-30; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784 (1983) (noting close association between separation of powers and rule of law, and seeing both as elements of liberal political theory).

94 This association is especially prominent in cases dealing with the constitutional validity of statutory authorizations to administrative agencies under the delegation doctrine. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424-25 (1944) (discussing need for intelligible statutory principle to guide agency discretion); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971) (citing *Yakus*); *see also* Jaffe, *An Essay on Delegation of Legislative Power* (pt. 2), 47 COLUM. L. REV. 561, 569 (1947) (discussing transformation of Chief Justice Taft's intelligible principle into Justice Cardozo's reasonably clear standard). *See generally infra* text accompanying notes 112-27.

95 *See* J. SHKLAR, ORDINARY VICES 236-49 (1984) (contrasting "liberalism of rights," associated in particular with John Locke's notion of natural rights, with "liberalism of fear," associated with Montesquieu, which emphasizes possibility of state cruelty as overriding evil to be averted). Professor Shklar writes: "Justice itself is only a web of legal arrangements required to keep cruelty in check, especially by those who have most of the instruments of intimidation closest at hand. That is why the liberalism of fear concentrates so single-mindedly on limited and predictable government." *Id.* at 237.

96 For classical liberal theory, see J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1960). *See also* 1 J. PLAMENATZ, MAN AND SOCIETY 209-52 (1963) (critical examination of Locke's *Second Treatise*); *cf.* L. TRIBE, CONSTITUTIONAL CHOICES 7 (1985) ("[I]n matters of power, the end of doubt and distrust is the beginning of tyranny." (emphasis removed)); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 514 (1984) ("If we learn nothing else from twentieth century life, we should learn that the human values of autonomy and solidarity require legal expression and protection.").

of powers reflect this suspicion.

The rule of law vision insists that laws announced in advance must guide and control the use of governmental power. As supporters and critics are fond of noting, this ideal presupposes that rule-governed legal reasoning to a siguificant degree is independent from open-ended moral and political argument.[97] That is the much-noted premise of legal formalism, a term I use here without any necessarily negative connotation. This approach considers law to have an integrity of its own. This does not deny the infusion into law of any broader moral and political values, but it posits a distinctness of law itself.[98] As a prescriptive matter, the formalist conception takes to heart the liberal fear of political power, and seeks to constrain such power by means of law. To be sure, it regards statutes as the products of political bargaining. Yet once political forces have settled on a particular regime, the theory posits that the statute has a constraining force of its own.[99]

Theorists working within this perspective generally assign to courts a primary role in upholding "the law."[100] Yet this general

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97 Many commentators express this notion. *E.g.*, F. HAYEK, THE ROAD TO SERFDOM 80 (1944) ("It may even he said that for the Rule of Law to be effective it is more important that there should be a rule applied always without exceptions than what this rule is. Often the content of the rule is indeed of minor importance, provided the same rule is universally enforced."); F. HAYEK, THE CONSTITUTION OF LIBERTY 158 (1960) ("Since the lawgiver cannot foresee what use the persons affected will make of his rules, he can only aim to make them beneficial on the whole or in the majority of cases. But, as they operate through the expectations that they create, it is essential that they be always applied, irrespective of whether or not the consequences in a particular instance seem desirable."); *see also* J. RAWLS, A THEORY OF JUSTICE § 38, at 236 (1971) ("[B]ecause these precepts [of the rule of law] guarantee only the impartial and regular administration of rules, whatever these are, they are compatible with injustice."). Many criticize the rule of law emphasis. *See, e.g.*, R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 192-216 (1976) (noting opposition between formality inherent in rule of law and equity and solidarity associated with substantive justice); Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 YALE L.J. 561, 566 (1977) (rule of law prevents "benevolent exercise" of power, allowing the powerful to manipulate procedures to their own advantage, thus promoting "an adversarial, competitive, and atomistic conception of human relations"); Tushnet, *supra* note 93, at 784-85 (doubting that two common theories of constitutional interpretation, interpretivism and neutral principles, are viable in liberal, individualistic society).

98 *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); H.L.A. HART, *supra* note 89; *see also* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

99 *See, e.g.*, F. HAYEK, sources cited *supra* note 97; J. RAWLS, *supra* note 97; *see also* P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 53-72 (1978) (discussing as "autonomous law" the rule of law conception that legal norms exist independently of frank political bargaining and intervention, and thus are designed to provide a check on that political world); Stewart, *supra* note 68, at 1671-76 (discussing "traditional model" of administrative law that depends, in siguificant measure, on the rule of law notion and its commitment to prospectively enunciated legal norms by which agency discretion is constrained).

100 This notion, of course, has long been central to the emphasis on judicial review

vision also serves as a traditional picture of administration.[101] However much political bargaining may impinge on administrative choices, an agency's action ultimately should be grounded in, and limited by, norms of public law.[102]

The separation-of-powers theorist also shares the liberal fear of governmental power. In particular, the separation principle rests on the idea that concentrated and unchecked official authority is likely to attract to itself ever greater power.[103] The need, therefore, is to create different branches of government that can act as rival power centers and thereby check one another.[104] To be sure, the branches may not in fact compete with each other. Indeed, the confidence that they would not always compete seems to underlie the hope for a workable government. Nevertheless, faith is placed in the notion that structural checks are likely to operate in many important contexts in which unrestrained governmental authority otherwise could become excessively concentrated.[105]

Although these negative strands of the rule of law ideal and the separation of powers are most often stressed, both notions also share a positive commitment to democratic principles. Plainly, the alliance of liberal and democratic ideals is problematic. Liberalism's stress on the restraint or control of government may conflict, to a certain degree, with democratic theory's emphasis on the affirmative aims of public life: to realize public values and to achieve greater coherence with the popular will.[106] Rather than explore the intricacies of this relationship, I only underscore that a democratic commitment is evident in both rule of law and separation of powers.

In the rule of law ideal of concern here, this commitment is most obvious with respect to its conception of statutory law. Statutes are conceived as the basic normative embodiments of popular will, as viewed by representatives, on a given subject. Agencies show commitment to this fundamental notion of representative democracy by accepting the guidance of public law.[107]

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of agency action in administrative law. *See, e.g.*, J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 32-36 (1927).

101 *See, e.g.*, Stewart, *supra* note 68, at 1671-76.

102 That is significantly different from saying that agencies are mainly political bodies seeking to survive and if possible to amass greater power in a political environment. For the rule of law vision, see Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971). *See generally* Sargentich, *supra* note 10, at 397-410 (discussing rule of law ideal, problem of "open-ended legal norms," and influence of procedural restraints).

103 *See* THE FEDERALIST No. 51, *supra* note 18, at 322 (J. Madison).

104 *See id.* ("Ambition must be made to counteract ambition.").

105 *See id.* at 321-22.

106 For a discussion of the purposes of democracy, see R. HANSON, THE DEMOCRATIC IMAGINATION IN AMERICA (1985); C.B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL (1973).

107 *See* Stewart, *supra* note 68, at 1672-73 ("The requirement that agencies conform

The American separation of powers also reveals an affirmative democratic side. The prescribed formalities for the legislative process provide an example. The requirements of bicameral passage and presentment to the President are designed to ensure that different institutions must agree on the products of lawmaking, thereby broadening the base of representation in the process.[108] Among other things, this gives some assurance that highly partisan, narrowly supported proposals are unlikely to become law.[109]

Aside from their overlap within liberal democratic theory, the rule of law ideal discussed here and the American separation of powers also share similar pictures of the legislative and executive roles. For both, the legislative branch is the representative lawmaker, and the executive branch acts pursuant to law. This does not deny that constitutional norms guide both branches or that the executive branch also "makes" law through its decisions. Yet the executive branch, except when acting pursuant to a specific constitutional grant, must act chiefly under statutes, which provide outer limits to its authority.

This picture of the division of primary roles between the legislature and the executive has both a theoretical and an institutional side. The theoretical side rests on the premise that law, once enacted, has independent constraining force on administration, such that it is meaningful to say that the executive's responsibility is to act pursuant to law.[110] The institutional aspect holds that, in practice, two different branches perform the essential tasks of lawmaking and of acting pursuant to law. This latter idea is the familiar separation axiom.[111] Both of these theoretical and institutional premises have come under attack, as the next part notes.

In sum, close associations exist between the rule of law ideal and the principle of legislative-executive separation of powers, although they are distinct in many respects. Put another way, the rule of law vision buttresses the theory behind legislative-executive separation, while the latter provides an institutional embodiment of the rule of law theory. This linkage, in my view, has become central

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to specific legislative directives . . . legitimates administrative action by reference to higher authority . . . ."). To be sure, it is possible to believe in rule of law without also caring about the democratic status of the rules themselves. *See, e.g.*, F. HAYEK, THE CONSTITUTION OF LIBERTY 211 (1960). The ideal with which I am concerned melds a commitment to law with a belief in democracy.

108 *See* INS v. Chadha, 462 U.S. 919, 948-51 (1983).

109 *See* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 & n.20, 1732 n.197 (1984); *see also* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 53-54 (1985) (doubting that, even with bicameralism and presentment, legislation adequately represents broad interests).

110 *See generally* J. RAWLS, *supra* note 97.

111 *See* THE FEDERALIST Nos. 47, 48 & 51 (J. Madison).

to the modern debate. Those arguing for definitional separation attempt to gain broader support by invoking the values of the rule of law, even as controversies about the separation principle become enmeshed in larger disputes about the rule of law and the legal formalism underlying it.

2. *The Illustration of the Delegation Doctrine*

This section uses the delegation doctrine to clarify the linkage between the rule of law and the separation of powers. This effort responds to the concern that the rule of law ideal may seem an unduly general context in which to understand the separation debate. In my view, because the ideal is so closely tied to the doctrine, it does help to illuminate major theoretical difficulties posed by boundary questions like those central to the delegation principle.

The delegation doctrine embodies the constitutional requirement that Congress perform its article I legislative function and not simply delegate that role to an administrative body.[112] For some fifty years the Supreme Court has not employed this doctrine to invalidate legislation.[113] Yet the principle behind it remains important. It animates, at least in part, certain narrow judicial constructions of statutes used to avoid purportedly serious delegation questions.[114] Moreover, the doctrine constitutes a reminder to

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112 *See* cases cited *supra* note 67; *see also* J. LOCKE, *supra* note 96, § 141, at 380 ("The legislature cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others." (emphasis removed)).

113 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down delegation under § 3 of National Industrial Recovery Act of 1933); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (striking down delegation under §§ 9-10 of National Industrial Recovery Act of 1933); *see also* B. SCHWARTZ, ADMINISTRATIVE LAW § 2.8, at 48 (2d ed. 1984) (Supreme Court's requirement of standards as legal guides for agencies has become "a vestigial euphemism" whose practical meaning is difficult to specify). For the argument that political pressures and sheer convenience encourage Congress to delegate broadly, see M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 48 (1977) ("Congressmen . . . earn electoral credits by establishing various federal programs . . . . The legislation is drafted in very general terms . . . . At the next stage, aggrieved and/or hopeful constituents petition their congressman to intervene in the . . . decision processes of the bureaucracy. . . . [T]he Congressman . . . piously denounces the evils of bureaucracy . . . . Congressmen take credit coming and going."); *cf.* T. Lowi, *supra* note 68, at 93 ("In a vitally important sense, value-free political science is logically committed to the norm of delegation of power because delegation of power is a self-fulfilling mechanism of prediction in modern political science." (emphasis removed)).

114 *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) (plurality opinion) (refusing to enforce OSHA regulations because OSHA had gone beyond its authority in determining workplace safety standards); National Cable Television Ass'n v. United States, 415 U.S. 336, 341-43 (1974) (act permitting assessment of fee by FCC must be read narrowly and limited to fee for "benefit" of "value to the recipient"; otherwise, invalid delegation of taxation power would result).

the legislative branch of its ultimate duty. In sum, the doctrine has an established if somewhat subdued place in administrative and constitutional law, as debate continues about its revival or extended quiescence.[115]

To a remarkable extent the delegation doctrine restates in a particular context the chief aspirations of the rule of law ideal. At its core, the delegation principle insists that Congress act as a lawmaker, laying down legal norms for agencies to follow. Executive behavior is to be pursuant to law.[116] The legitimacy of executive action traces ultimately to legislative grants,[117] except in circumstances where constitutional authority by itself authorizes action, as for example in the case of the President's pardon power. Moreover, the delegation doctrine is designed to force adherence to the rule of law vision. Congress should fulfill its paramount duty, the executive should have the law's gnidance, and the courts should have reasonably clear legal benchmarks against which to assess executive behavior.[118]

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115 Some have urged that courts should make more active use of the delegation doctrine to assure that legislators, not administrators, initially make major policy decisions. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring); *see also* J. ELY, *supra* note 68, at 131-34 ("[B]y refusing to legislate [and delegating decision making], our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."); T. LOWI, *supra* note 68, at 300 ("The [Supreme] Court's rule must once again become one of declaring invalid and unconstitutional any delegation of power to an administrative agency or to the president that is not accompanied by clear standards of implementation."); Wright, *supra* note 68, at 581 ("Congress should control [administrative] discretion by reassuming its rightful role as the architect of fundamental administrative policy."). Others have expressed skepticism about such suggestions. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 27-51 (1969) ("Legislative clarification of objectives may sometimes be undesirable . . . [w]hen the society is sharply divided, when the problems are new . . . ."); Stewart, *supra* note 68, at 1693-97 ("[L]arge-scale enforcement of the nondelegation doctrine would clearly be unwise. Detailed legislative specification of policies under contemporary conditions would be neither feasible nor desirable in many cases . . . .").

116 *See, e.g.*, Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745 (D.D.C. 1971) ("An agency assigned to a task has its freedom of action circumscribed not only by the constitutional limitations that bind Congress but by the perimeters described by the legislature as hedgerows defining areas open to the agency."). For further discussion of the relation between rule of law and the delegation principle, see Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U.L. REV. 419, 423-27 (1987).

117 *See* United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result) ("Formulation of policy is a legislature's primary responsibility . . . and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people."); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 286 (1978) ("[L]imits on congressional capacity to delegate responsibility derive from the implicit constitutional requirements of consensual government under law.").

118 *See Amalgamated Meat Cutters*, 337 F. Supp. at 746, 759-60.

One might object that the conjunction between the delegation doctrine and the rule of law is too idealized to fit an era in which the doctrine has become relatively diluted. Yet that would miss the point—the linkage exists apart from the vigor of the doctrine itself. Indeed, arguments on behalf of the doctrine's renewal confirm this association. Critics seeking a more rigorous appraisal of public laws in the name of the delegation principle routinely invoke the liberal democratic values informing the rule of law conception;[119] some rely on the rule of law itself.[120]

To be sure, drawing a line in particular cases between legitimate lawmaking and undue delegation remains difficult. That vagueness underscores the generality of the norms underlying the doctrine. Again, few intermediate steps exist between the large vision of the rule of law and the particular delegation precept; it is thus not surprising that so many judicial encapsulations of the doctrine are metaphorical and allusive. Examples include Justice Cardozo's much-quoted injunctions that Congress should make sure that agency discretion is "canalized within banks that keep it from overflowing" and should avoid "delegation running riot."[121] Such references highlight the doctrine's essential reliance on the generalities of the rule of law.

This deep connection is confirmed as well in the modern case law, which reveals how important the ideal is in understanding why a particular delegation is valid. For example, in the leading decision of *Amalgamated Meat Cutters v. Connally*,[122] a union challenged a core provision of the Economic Stabilization Act of 1970[123] as an excessively broad delegation. Under the provision, President Nixon had issued an executive order creating a Cost of Living Council charged, inter alia, with promulgating and enforcing wage and price guidelines to control the rate of inflation.[124] The union argued that, be-

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119 *See, e.g.*, Schoenbrod, *supra* note 82, at 1224 ("Unchecked delegation would undercut the legislature's accountability to the electorate and subject people to rule through ad hoc commands rather than democratically considered general laws."); Wright, *supra* note 68, at 582 (criticizing notion that delegation doctrine is not "a realistic means of subjecting agencies to the rule of law" and to Congressional supremacy).

120 *See, e.g.*, T. Lowi, *supra* note 68, at 300-01 ("Rule of law, especially statute law, is the essence of positive government.").

121 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551, 553 (1935) (Cardozo, J., concurring).

122 337 F. Supp. 737 (D.D.C. 1971).

123 Pub. L. No. 91-379, § 202, 84 Stat. 796, 799-800 (expired 1974). The key language provided that the "President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970." *See also* Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743 (expired 1974).

124 Exec. Order No. 11,615, 3 C.F.R. 602 (1971-1975) (superseded by Exec. Order No. 11,627, 3 C.F.R. 621 (1971-1975)).

cause the statute's delegation was invalid, the actions under it were unauthorized.[125]

In rejecting this challenge, the court reviewed the purposes of the delegation doctrine, reaffirming that it requires Congress to enunciate an intelligible legal principle to guide administrative activity.[126] The court evinced a fair amount of creativity in discerning the limiting principle in this case. To a degree, the court relied on the statutory language. Beyond that, the court surveyed the provision's legislative history, the practice under predecessor statutes, the goals advanced by the law, and certain other aspects of the Act as a whole[127]—such as time limits placed on core authorizations. Arguably, the court sought not to discover but to impute a principled limit on agency authority, albeit a limit of considerable generality. In any event, in concluding that the delegation doctrine was not violated, the court underscored the connection between that doctrine and the basic vision that law must constrain administration—the rule of law.

B. The Limits of the Rule of Law Ideal and the Emphasis on the Theme of Checks and Balances

1. *General Linkages*

It is a commonplace of much modern administrative theory that a strict rule of law ideal seems out of touch with reality.[128] Exploring this claim sheds light on related doubts about the separation theme. My basic point is that seemingly parochial problems with separation doctrine in fact implicate more basic conundrums of liberal democratic theory. These matters help illuminate more fully both the power and the weaknesses of an emphasis, not on separation itself, but on checks and balances.

This discussion proceeds in two steps. First, I note major criticisms of the rule of law ideal, and relate them to a connected critique of the separation theme. Second, I argue that an alternative emphasis on checks and balances seeks to, but ultimately does not, escape from this critique.

Of course, different endeavors yield distinct attacks on the rule of law ideal. Many call into question its underlying vision of a private life free from arbitrary governmental intervention. To some, this vision provides too negative a picture of government's role.[129]

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125 *Amalgamated Meat Cutters*, 337 F. Supp. at 742-43.

126 *Id.* at 746.

127 *Id.* at 747-59.

128 *See generally* Stewart, *supra* note 68.

129 *See, e.g.*, Sandel, *Justice and the Good*, in LIBERALISM AND ITS CRITICS 159 (M. Sandel ed. 1984); Walzer, *Welfare, Membership and Need*, in *id.* at 200. These are excerpts,

To others, it offers too crabbed a view of social life.[130] I do not attempt to explore these criticisms, but rather focus on the vision of law—formalism—that is associated with this ideal.[131]

Critiques of formalism vary, but often coalesce around the idea that law after all is not so different from morals and politics. Some use legal realism's debunking premises to argue that underneath the purported integrity of law lie judgments based on mere judicial preference, not exalted legal principle.[132] The critical legal studies movement prominently develops this idea by stressing the contingent character of legal judgment,[133] but its general critique is hardly unique.

The increasingly mainstream character of attacks on legal formalism is revealed by the ease with which we contrast formalist and instrumentalist thinking in law.[134] If formalism sees law as significantly distinct from morals and politics, then instrumentalism may be viewed as deeply suspicious of this formalist tenet. The instrumentalist view emphasizes, for example, that general values or ends underlie positive law, and that the terms of statutes are not self-de-

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respectively, from M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 165-83 (1982) and M. WALZER, SPHERES OF JUSTICE 64-67, 78-91 (1983).

130 *See* Horwitz, *supra* note 97, at 566.

131 "Formalism" as used here has both a conceptual and an institutional dimension. In conceptual terms, formalism refers to a range of possible legal theories stressing the centrality of rules or principles as guideposts of analysis. This much-used term thus refers not merely to a very narrow view of legal rationality holding that all results can be deductively or mechanically arrived at through the correct application of rules. The key idea is that legal norms are distinct from sheer moral and political discourse, and that the former have guiding normative force on their own. *See generally* R. DWORKIN, LAW'S EMPIRE (1986); H.L.A. HART, *supra* note 89. *See also* R. UNGER, *supra* note 97; Kennedy, *supra* note 98. The institutional face of formalism is seen vividly in the legislative-executive separation axiom itself: one institution, the legislature, makes law and another, the executive, executes or acts pursuant to law. *See supra* text accompanying notes 110-11.

132 For discussion of legal realism in American law, see E. PURCELL, *supra* note 7; W. RUMBLE, AMERICAN LEGAL REALISM (1968); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

133 *See* THE POLITICS OF LAW (D. Kairys ed. 1982), *reviewed by* Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229 (1983), *by* Forbath, Book Review, 92 YALE L.J. 1041 (1983), *by* Levinson, Book Review, 96 HARV. L. REV. 1466 (1983); *see also Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). *See generally* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). *Compare* Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 772 (1982) ("Much of our commitment to *the* rule of law really seems a commitment to the rule of *our* law." (emphasis in original)) *with* Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1220-21 (1985) (rejecting deconstruction and embracing rule of law).

134 *See generally* R. SUMMERS, *supra* note 7. *See also* Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950-52 (1981); Note, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119 (1985).

fining but must be understood in light of those values.[135] This approach has various proponents. But the larger point remains: the instrumentalist critique, which informs much of our legal culture, questions the effort to separate a realm of law from broader normative conceptions informing it.[136]

The critique of formalism naturally emerges in criticism of the separation theme in separation-of-powers doctrine because of the theme's dependence on the notion that lawmaking is distinct from the execution of law. This faith comes under both an empirical and a theoretical attack. According to the former, in reality executive agencies adopt rules that are functionally similar to laws passed by the legislature.[137] The latter, theoretical attack questions the basic premise that law has an integrity which separates it in conceptual terms from broader moral and political life.

This theoretical assault on formalism is especially important in the present context because it throws into doubt the core idea that execution of the law is distinct from legislative lawmaking.[138] If political and moral reasoning invade the legal sphere, rendering formalism untenable, then what is the basis for saying that formal legal rules—not sheer politics and morals—guide executive discretion?[139]

Accordingly, general doubts about legal formalism bolster an already notable skepticism about the separation principle. A problem centering on separation thus is closely related to a larger theoretical challenge. This is ultimately not surprising given that the rule of law ideal generally, and its formalist aspirations in particular, are so closely associated with the American doctrine of separation of powers.

Given such challenges to the formalist theme in separation doctrine, many respond by emphasizing the idea of checks and balances, often while downplaying the separation principle itself. Again, this proves most illuminating if the existence of a boundary between the branches is not in central dispute. But it does not answer all questions, for many involve doubts about the very nature of such a boundary.

Moreover, the checks and balances theme itself contains under-

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135 *See* R. SUMMERS, *supra* note 7, at 83-91, 138-42.

136 *Id.* at 143-58.

137 *See supra* text accompanying notes 30-31.

138 Again, the classic separation axiom assumes that this distinction is clear. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 139 (1976); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

139 To be sure, formalism as referred to here does not necessarily deny that moral and political ideas ever enter into law. Instead, formalism emphasizes that law has a conceptual integrity of its own and is not collapsible solely into broader normative discourse. *See generally* R. DWORKIN, *supra* note 131; R. SUMMERS, *supra* note 7.

lying, if suppressed, premises of institutional formalism. After all, it makes sense to say that X "checks" and "balances" Y only if X and Y are in some basic sense independent of one another. Even if X and Y form parts of a larger whole, the questions of their relation to one another, and their differences, remain. If they are essentially the same, it seems nonsensical to say that one checks the other. But if they are different, we still need some formal basis to make the claim that they do check one another.

In the end, to avoid challenges to the formalistic underpinnings of separation theory by emphasizing a checks and balances framework can go only a certain distance toward averting the pitfalls of abstract institutional definitions. To continue to ask on what ground the underlying separation ultimately rests remains not only legitimate, but also necessary.

2. *The Illustration of Presidential Removal Power*

By entering the well-trodden field of presidential removal power I hope to illustrate the discussion of limits of the formalist faith associated with the separation theme, as well as the attractions and constraints of an alternative emphasis on checks and balances. At the same time, this perspective helps illuminate widely recognized muddles in modern removal doctrine itself.[140] In my view, these derive in significant measure from the law's tendency both to reject and to embrace the formalism that informs separation theory.

The two still-leading removal decisions are *Myers v. United States*[141] and *Humphrey's Executor v. United States.*[142] Briefly, the first decision embodies the triumph of a formal view of the distinctions between lawmaking on the one hand and execution of the law on the other hand. The second decision represents a renewed sensitivity to checks and balances. At the same time, the latter decision illustrates the limits of the critique of formalism in this context.

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140 For discussion of the confusions of removal doctrine which raise basic questions about the place of agencies in government, see Strauss, *Place of Agencies*, *supra* note 4, at 609-16. Major decisions on removal include Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926); Shurtleff v. United States, 189 U.S. 311 (1903). *See also* Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983); National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981); Borders v. Reagan, 518 F. Supp. 250 (D.D.C. 1981), *vacated as moot*, 732 F.2d 181 (D.C. Cir. 1984). For discussion of removal, see Cinillo, *Abolition of Federal Offices as an Infringement of the President's Power to Remove Federal Executive Officers: A Reassessment of Constitutional Doctrines*, 42 FORDHAM L. REV. 562 (1974); Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353 (1927); Cross, *The Removal Power of the President and the Test of Responsibility*, 40 CORNELL L.Q. 81 (1954); Parker, *The Removal Power of the President and Independent Administrative Agencies*, 36 IND. L.J. 63 (1960).

141 272 U.S. 52 (1926).

142 295 U.S. 602 (1935).

To begin, no removal provision exists in the Constitution apart from the mechanism of impeachment.[143] From the earliest decisions, courts have implied removal authority from the power of appointment.[144] Because the most senior officers are appointed after nomination by the President and approval (advice and consent) by two-thirds of the Senate,[145] the question naturally arises whether removal also requires Senate approval. After a rich history, the argument that the Senate had to approve any removal was rejected in *Myers*.[146] The Court there concluded that the President had plenary power to remove the postmaster in question, even though he had been appointed with the Senate's advice and consent.

The *Myers* opinion rests on the postulate that because the President is supreme in the executive branch, he must have ultimate and singular removal power over officers in that branch.[147] The asserted necessity arises from the idea of a unitary executive.[148] This idea holds that an effective chief executive must have supervisory power over "his" subordinates.[149] The Court, speaking through Chief Justice Taft, considered the removal possibility a vital incident of supervisory responsibility.[150] Article II's grant to the President of the executive power was seen to bolster this view.[151]

All of this, however, presupposes that there exists an entity definitively identified as the executive branch or, at least, officers who are "in" that branch. How do we know that? *Myers* rests on the notions that lawmaking is the legislature's task and that execution of the law is a basically different function located in agencies such as the post office.[152] In retrospect, the Court paid surprisingly little

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143 *See* L. TRIBE, *supra* note 117, § 4-9, at 186 & n.2.

144 Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 896 (1961) ("[G]overnment employment, in the absence of legislation, can be revoked at the will of the appointing officer."); *In re* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839) ("[I]t would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."); Kalaris v. Donovan, 697 F.2d 376, 381 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983); National Treasury Employees Union v. Reagan, 663 F.2d 239, 246-48 (D.C. Cir. 1981).

145 U.S. CONST. art. II, § 2, cl. 2.

146 272 U.S. at 121-22. *Compare* THE FEDERALIST No. 77, *supra* note 18, at 459 (A. Hamilton) ("The consent of [the Senate] would be necessary to displace as well as to appoint.") *with Myers*, 272 U.S. at 136-39 (arguing that debates of First Congress indicate that Hamilton later reversed this position).

147 272 U.S. at 117.

148 *Id.* at 116-19.

149 *Cf. id.* at 117 ("As he is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication . . . was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.").

150 *Id.* at 134-35.

151 *Id.* at 117.

152 *Cf. id.* at 116 ("[T]he reasonable construction of the Constitution must be that

attention in its extended opinion to the precise nature of the boundary between the branches. That is not inexplicable, however, given the formalist faith in this context that the legislative and executive roles are definitionally separated.[153]

In the subsequent decision of *Humphrey's Executor*[154] the limits of this faith became clear, for *Myers*-type formalism could not account for the complex realities of modern administrative practice. In particular, the Court could not place the Federal Trade Commission—a so-called independent agency, the removal of one of whose members was contested in that case—as unproblematically "in" the executive branch. To the contrary, the Court recognized, first, that Congress had evinced an intent to shield the agency's members from plenary presidential removal.[155] In addition, the Court acknowledged that a definitional separation between the legislative, executive, and judicial branches bore only limited explanatory force in the face of the hybrid functions performed by the contemporary agency.[156]

In its most famous passage, *Humphrey's Executor* resorted to what Justice Jackson later aptly called "the qualifying 'quasi' "[157] in characterizing the FTC's functions. The Court described the agency's functions as in part "quasi-legislative," because they entail the promulgation of rules and policies of a general and prospective nature. Moreover, they were regarded as "quasi-judicial," for they involve deciding individual cases under law in a manner analogous to judicial adjudication.[158] What these well-known phrases recognize above all is the tendentious character of the institutional formalism informing *Myers'* concept of a hegemonic, unitary executive branch.

The move away from such formalism was accompanied by renewed sensitivity to the policies of checks and balances. The notion of an independent agency immediately raises the question, independent of what? Although much of the rhetoric attaching to

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the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.").

153 The major qualifications on *Myers'* reasoning in favor of plenary presidential removal power involve cases in which it might be said that a statute "peculiarly and specifically" commits discretion to an officer, or in which due process concerns in an adjudicative setting limit the presidential role. *Id.* at 135.

154 295 U.S. 602 (1935).

155 *Id.* at 621-26.

156 *Id.* at 628; *cf.* L. TRIBE, *supra* note 117, § 4-9, at 188 ("In *Myers,* the Court seemed moved by considerations of constitutional symmetry" whereas "[i]n *Humphrey's Executor,* the Court pursued a more functional approach.").

157 Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) ("The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down . . . .").

158 295 U.S. at 624.

such agencies speaks hopefully of independence from politics in general, doubtless the key independence, if it exists, is from the same degree of executive supervision that may attach to other agencies.[159] After all, Congress, in moments of candor, often sees independent agencies as in its camp.[160] Such qualified "independence" fosters the kind of supposedly creative tug-and-pull between Congress and the President that underlies the concept of checks and balances.[161]

Thus, the constitutional acceptance of independent agencies in *Humphrey's Executor* is tied to the emphasis of the checks and balances theme in separation-of-powers analysis. This theme has the attractions here that it offers more generally: an allegedly greater practicality flowing from its acceptance of institutional realities that strain a simple conception of separation.

But the story has no perfect ending. As many have noted, removal doctrine remains opaque. Apart from specific difficulties of applying the doctrine, the questions of exactly in what branch agencies truly reside, and whether they do so reside, remain problematical.[162] Some have argued that the matter is so muddled that we should abandon the task, and focus instead on an effort to realize the values of checks and balances in the relations between agencies, on the one hand, and Congress and the President, on the other hand.[163] Others have suggested that calm acceptance of the tangled status quo constitutes heresy in the face of the formalist injunction above all to separate the branches.[164]

Basic ambiguity in the doctrine of *Humphrey's Executor* complicates this debate. While moving away from *Myers'* institutional formalism, *Humphrey's Executor* does not abandon the theory completely. The very idea of "quasi-legislative" power, for instance, depends on the concept of a "legislative" role. The qualifier cannot obscure reliance on underlying categories that are themselves called into question by the qualification. *Humphrey's Executor*

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159 *Id.* at 628-32. *See generally* W. CARY, *supra* note 74.

160 *See* Strauss, *Place of Agencies*, *supra* note 4, at 592 ("Congressmen tend to talk about the independent commissions in a proprietary way—these are our agencies, not so much independent as independent-of-the-President.").

161 *See generally* Tiefer, *supra* note 80.

162 *See* Strauss, *Place of Agencies*, *supra* note 4, at 609-19.

163 *See, e.g.*, Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 494 (1987) ("Just as contemporary property analysis tends to speak of the property relationship as a 'bundle of rights,' no one of which is essential to the characterization of a particular bundle as having the attributes of 'property,' this analysis of separation-of-powers issues proposes examining the quality of relationships between an agency and each of the three named heads of government.").

164 *See* sources cited *supra* notes 81 & 83-84.

ultimately retained the supposition that governmental entities have substantive essences which depend on their role in the creation and implementation of law. To this extent, the formalist conception retains a lingering hold on the doctrine.

C. The Tension Between the Separation and Checks and Balances Themes and the Rule of Law's Conflicts with Competing Ideals

1. *General Linkages*

The oscillation between the themes of separation of powers and of checks and balances reflects efforts, respectively, to embrace or to suppress formalist tendencies in separation-of-powers doctrine. It also reflects competing ideals of the administrative process. These ideals build on different premises about the nature and legitimacy of administration in American government. For the sake of convenience, they may be called the public purposes and the democratic process ideals.[165]

My purpose is not to suggest that the rule of law ideal is heedless of public purposes in law or inconsistent with the democratic process. To the contrary, overlaps among the ideas inhabiting the liberal-democratic universe are common. Rather, my aim is to identify core distinctions within that universe which play a prominent role in shaping the dynamics of doctrine dealing with the separation between the legislative and executive branches.

In this section, I summarize key relations among these three ideals—rule of law, public purposes, and democratic process—and tie them to the separation doctrine. In the next section, I illustrate these ideals in terms of the recent controversy about the constitutionality of legislative vetoes.

The chief precept animating both alternatives to the rule of law ideal is by now familiar. In short, the rule of law ideal is thought not to work as a practical matter, or at least not to work to the extent sufficient to win credence as a guiding paradigm of much administrative behavior. Thus, the critique of formalism acts both to erode partially the faith in the separation theme and to prompt the search for an alternative to the larger rule of law vision.[166]

What I call the public purposes ideal views the administrative process as the agent for the rational pursuit of valued public ends. Under this view, administrators are often in a position of direct re-

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165 *See* Sargentich, *supra* note 10, at 395 n.25, 441-42 (contrasting the competing ideals approach in another context with other conceptual frameworks on administrative process).

166 *Cf.* R. SUMMERS, *supra* note 7 (advocating theory of pragmatic instrumentalism).

sponsibility for maximizing desired results.[167] One example is the cost-benefit balancing methodology applied by regulators.[168] Additionally, administration is seen as indirectly fostering—while not assuming primary responsibility for—rational policy outcomes. The latter mode includes economic critiques of regulation that assign to agencies a limited role in correcting perceived market failures, while assuming that in many, if not most, instances the market will generate efficient choices.[169]

To be sure, faith in administration differs in significant ways from a market-based skepticism about administrative intervention. One major difference is the basic contrast between confidence in and doubts about the public sector's potential efficacy. Nevertheless, I wish to underscore a larger level of consonance between these perspectives; both adopt a policy-based picture of administration which emphasizes a managerialist, efficiency-oriented vision of public decision making.[170]

Such a vision, however embodied in particular, provides a powerful critique of the separation of powers. After all, it is difficult to contest that separation is by design an inefficient basis of national government. It is often hard enough to get two hands clapping, but what are we to think when the hands are directed to move to a different beat?[171] It is thus not surprising that much political science literature, which implicitly adopts an instrnmentalist picture of pol-

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167 *See generally* J. LANDIS, THE ADMINISTRATIVE PROCESS (1938) (enunciating New Deal view of expert agency as vehicle for solving social problems). For general treatments of policy rationality in administrative decision making, see A. MELTSNER, POLICY ANALYSTS IN THE BUREAUCRACY (1976); E. QUADE, ANALYSIS FOR PUBLIC DECISIONS (1975); E. STOKEY & R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS (1978); A. WILDAVSKY, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (1979).

168 *See generally* RISK QUANTITATION AND REGULATORY POLICY (D. Hoel, R. Merrill & F. Perera eds. 1985); L. LAVE, THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY (1981); *see also* sources cited *supra* note 47.

169 *See, e.g.*, 1-2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1970 & 1971); R. POSNER, *supra* note 56. For critical discussion of economic theory, see Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Kennedy, *supra* note 47. *See generally* Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975).

170 This is not to deny the differences in analysis between an omnibus balancing approach and a market-oriented perspective. *See generally* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

171 For discussion of the inefficiencies of the separation of powers, see L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE (1979); K. LOEWENSTEIN, *supra* note 1; D. MCKAY, *supra* note 1. *See also* INS v. Chadha, 462 U.S. 919, 944 (1983) ("[T]he 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 contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").

icy making, questions the worth of the separation of powers.[172]

Equally important, some theorists seek to establish an alliance between the separation of powers and an efficiency vision of administration. Professor Harold Bruff has done so in an illuminating contrast between models of legislative formality and administrative rationality.[173] Bruff accepts the separation principle while using the thriving instrumentalist notion of administration to explain themes in administrative doctrine and to offer a springboard for critique.[174] The larger point is that the public purposes ideal of administration—although standing in contrast to the rule of law ideal—both criticizes and, in limited ways, complements the separation principle.

The third ideal—that of the democratic process—is distinguished by its suspicion of both formalism and managerialism as pictures of legitimate administration. This ideal is specifically process-oriented.[175] It seeks to offer administration the kind of justifying theory that Dean John Hart Ely tried to furnish for judicial review.[176] The ideal sees administration as part of a broader democratic system in line with the conventional notion of a pluralist legislative process representative of and responsive to the public.[177]

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172 *See* sources cited *supra* note 1. For the view that American politics is not dominated by a true institutional separation of powers, but rather by "subsystem" alliances between agency officials, legislative committees, and private interest groups, see L. DODD & R. SCHOTT, *supra* note 171; J. FREEMAN, THE POLITICAL PROCESS: EXECUTIVE BUREAU-LEGISLATIVE COMMITTEE RELATIONS (rev. ed. 1965); A. FRITSCHLER, SMOKING AND POLITICS: POLICYMAKING AND THE FEDERAL BUREAUCRACY (3d ed. 1983); H. HECLO, A GOVERNMENT OF STRANGERS (1977); G. HODGSON, ALL THINGS TO ALL MEN: THE FALSE PROMISE OF THE MODERN AMERICAN PRESIDENCY (1980). *See generally* THE NEW AMERICAN POLITICAL SYSTEM (A. King ed. 1978) (discussing tendencies toward fragmentation and decentralization said to attend subsystem dominance in American politics).

173 Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984).

174 *Id.* at 211.

175 *See* E. REDFORD, DEMOCRACY IN THE ADMINISTRATIVE STATE (1969); Stewart, *supra* note 68, at 1723 (discussing "interest representation" model of administration, which may be seen as aspect of larger democratic process ideal). *See generally* J. LIVELY, DEMOCRACY (1975); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970).

176 *See* J. ELY, *supra* note 68 (positing representation reinforcing theory of judicial review). For critical appraisals of Ely's views of judicial review, see Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). For general debate about judicial review, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Tushnet, *supra* note 93. For discussion of legal interpretation in general, see Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). *See also* Note, *Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama)*, 73 CALIF. L. REV. 158 (1985).

177 For the pluralist view of American politics, see A. BENTLEY, THE PROCESS OF GOVERNMENT (1908); R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY (1982); D. TRUMAN,

The democratic process ideal, like the rule of law and the public purposes ideals, has diverse manifestations. These include a commitment to direct public participation in administrative decision making ("interest representation")[178] and less direct means of imposing a popular, political check on bureaucracy such as presidential and legislative oversight of administration.[179] Again, there is no denying the distinctions among this ideal's various themes. Yet these themes share confidence in a process-based conception of legitimacy.

This third ideal also provides a basis for doubt about the separation of powers. Fundamentally, this ideal supports separation only if it advances the goal of representative decision making. Thus, whenever strict separation likely impedes the ability of the legislative or executive branch to make its own views seriously felt, the democratic process approach challenges the underlying value of separation itself.[180]

At the same time, process idealists envision a certain alliance between their vision and that aspect of separation doctrine which stresses checks and balances. Checks and balances imply a kind of rough-and-tumble representative system in which differently constituted institutions and interests jockey for position in the name of at

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THE GOVERNMENTAL PROCESS (1951); G. WILSON, INTEREST GROUPS IN THE UNITED STATES (1981). For criticism, see T. LOWI, *supra* note 68; R. WOLFF, THE POVERTY OF LIBERALISM (1968).

178 *See generally* Stewart, *supra* note 68.

179 For discussion of presidential oversight of the regulatory process, see Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). *See also* Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601 app. at 92-93 (Supp. III 1985); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 431-34 (1982). *See generally* AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 68-88 (1979); Bruff, *supra* note 9; Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830 (1982); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235 (1981); Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). For a recent dialogue on presidential oversight, see *A Symposium on Administrative Law: "The Uneasy Constitutional Status of the Administrative Agencies": Presidential Oversight of Regulatory Decisionmaking*, 36 AM. U.L. REV. 443-599 (1987) (articles by Professors McGarity, Bruff, Diver, Houck, and Shane and by practitioner Philip Harter). For discussion of congressional oversight, see 2 SENATE COMM. ON GOVERNMENTAL OPERATIONS, STUDY ON FEDERAL REGULATION: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES, S. DOC. NO. 26, 95th Cong., 1st Sess. (1977); J. SUNDQUIST, *supra* note 59; Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 ADMIN. L. REV. 415 (1976).

180 Such doubts have been reflected in argumentation on behalf of the legislative veto device, which, for some, seemed an effective way for Congress to impose accountability on the bureaucracy. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting).

least minimally responsive government.[181] This picture of politics is consonant with that underlying the process-based approach to administrative legitimacy.

These diverse theoretical currents demonstrate that the tension between the separation and checks and balances themes coexists not only with the rule of law ideal, but also with clashing conceptions of bureaucratic legitimacy. These larger clashes find their own perpetuation, and attempted resolution, in legal doctrine dealing with the constitutional place of administration in American government, most notably the law of legislative-executive separation of powers.

2. *The Illustration of the Legislative Veto*

To judge by the outpouring of critical comment on the Supreme Court's 1983 legislative veto decision, the Court's formalistic ratification of the separation theme touched a sensitive nerve.[182] In discussing this decision I elaborate one view of why that may be so. In particular, I suggest that the decision perfectly illustrates the larger conceptual battles underlying separation doctrine. I begin by sketching the background regarding legislative vetoes. I then connect this topic to the conflicts of concern here.

The term legislative veto refers to a statutory provision that seeks to assign to the legislature the power to halt or redirect—if you will, to veto—some action by the executive.[183] The veto resolution might be passed by one House, two Houses, a committee, or other groupings in the legislative branch depending on the mechanism specified in the statute.[184] The common characteristic of such provisions is that they do not call for bicameral passage and presentment to the President, the procedural formalities required by article I, section 7. Even if bicameral passage is accomplished, as in the

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181 *Cf. id.*

182 For discussion of the legislative veto decision, see sources cited *supra* note 4. *Cf.* R. SUMMERS, *supra* note 7, at 278 (noting that from instrumentalist perspective, "[v]irtually all agree that to characterize a judge or lawyer's analysis as formalistic is seriously to condemn it").

183 *See generally Chadha,* 462 U.S. 919 (1983); Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1250 (1983), *aff'g mem.* Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (striking down legislative veto provision affecting FERC's natural gas pricing power) and Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (striking down legislative veto provision affecting FTC's power to promulgate its used car rule). These summary affirmances in the regulatory context involving action by "independent" agencies indicate the Supreme Court's broad understanding of *Chadha*'s reach.

184 For lists of statutes with various types of legislative veto provisions, see *Chadha,* 462 U.S. at 1003 app. (White, J., dissenting); *The Supreme Court Decision in* INS v. Chadha *and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 23-102 (1983).

case of two-House vetoes, the relevant resolution is not presented to the President for approval or veto.[185] The key question in the long-running legislative veto debate had been whether this was a constitutionally fatal flaw. The Supreme Court concluded in *INS v. Chadha* that it was.[186]

At first glance this might seem to be a rather technical question. But in reality it implicates the basic boundary issue of legislative-executive separation. One cannot know whether the procedures specified in article I, section 7 apply unless one has some reasonably definite, or at least articulable, notion of what legislative action for this purpose entails. Simply stated, how does it differ from executive behavior, not to mention steps taken by the legislature (like the issuance of subpoenas) that do not have to comply with the bicameralism and presentment requirements?[187]

Such an inquiry virtually begs for dispute about the relative importance of the separation and checks and balances themes. Those who support a reasonably firm line of demarcation between the legislative and executive spheres object to the tendency of legislative vetoes to blur such a line. After all, proponents of legislative veto mechanisms defend a device that renders affected delegations to the executive conditional by authorizing future legislative resolutions that may halt or redirect the agency's actions.[188] This transforms the executive sphere into one of contingent authority. Not only does that predictably inflame the executive branch, but also it conflicts with the underlying belief in a definite demarcation between the realms of legislative and executive power, with each branch supreme and secure within its relevant domain. To that extent, faith in the centrality of the separation theme prompts one to challenge legislative vetoes.[189]

On the other hand, those stressing the primacy of checks and balances reach a different result. What could be a more promising check on the executive than a legislative veto? In an age of broad delegations, when public laws only vaguely direct agencies, it can be argued forcefully that the legislative veto helps balance the powers of the two branches by giving the legislature more clout.[190]

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185 *See Chadha*, 462 U.S. at 946-48.

186 *Id.*

187 *See id.*; *see also* Elliott, *supra* note 4.

188 *See Chadha*, 462 U.S. at 989 (White, J., dissenting).

189 *See, e.g.*, Brief for the Immigration and Naturalization Service, *Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171).

190 *See, e.g., Chadha*, 462 U.S. at 967-68 (White, J., dissenting) (viewing legislative veto as "a central means by which Congress secures the accountability of executive and independent agencies"), 972 (seeing legislative veto as "an important if not indispensable political invention").

This oscillation between the main themes of separation doctrine is apparent in the contrast between the majority opinion and the leading dissent by Justice White in *Chadha*. The majority embraced the separation theme with a vengeance.[191] It stressed the importance of protecting whatever structural integrity remained in the separation of powers from further erosion by legislative vetoes.[192] In contrast, Justice White, who wrote the principal dissent on the bicameralism and presentment issues, took pains to underscore the flexibility, practicality, and balance created by legislative vetoes.[193] He emphasized the theme of checks and balances, and invoked its rhetoric in arguing for pragmatic acquiescence to this major institutional innovation.[194]

This debate about the legislative veto also proceeds at a deeper, more theoretical level. In that regard, the debate implicates the three major competing ideals of the administrative process.

The main lines of the rule of law critique of legislative vetoes are as follows. As an initial matter, Congress has special authority because it is the national legislature.[195] Its sphere of authority must remain separate from executive authority even though certain constitutionally specified overlaps concededly exist in our system of checks and balances.[196] Because it is difficult to differentiate between the two branches in terms of their substantive functions,[197] they are distinguished in sequential terms. That is, the legislature grants some authority, and then the executive acts pursuant to that grant.[198] This formulation in effect posits a temporal line of separation between the branches. When Congress later returns to the subject of a delegation by adopting a legislative veto resolution, it interrupts a presumptively settled state of statutory rights and duties.[199] All other things being equal, Congress thereby acts by means of a legislative veto resolution in a manner tantamount to that occasioned by ordinary legislation. Therefore, it should have to comply with full legislative procedures.[200]

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191 *Id.* at 951-59 (majority opinion).

192 *Id.*

193 *Id.* at 967-1003 (White, J., dissenting).

194 *Id.*

195 *See* U.S. CONST. art. I, § 1.

196 *See Chadha*, 462 U.S. at 955-56.

197 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602 (1935). *See generally* Strauss, *Place of Agencies*, *supra* note 4.

198 *See Chadha*, 462 U.S. at 952-54; *see also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws . . . ."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-87 (1952); Yakus v. United States, 321 U.S. 414, 425 (1944).

199 *Chadha*, 462 U.S. at 952-54.

200 *Id.* at 954-57.

Criticisms of the Court's rationale reflect both the emphasis of the public purposes ideal on policy rationality and the stress of the democratic process ideal on democratic accountability as competing legitimating visions of administration. Each ideal embodies premises critical of the formalism that is central to the rule of law ideal informing *Chadha*'s analysis. To that extent, both alternative perspectives benefit from general attacks on *Chadha*'s formalistic reasoning.

It is thus unsurprising that *Chadha*'s critics have urged that the Court's approach is unduly definitionalist.[201] In particular critics have noted that the Court's discussion[202] presupposes an understanding that something is legislative action for purposes of bicameralism and presentment if Congress has done it and if it has the effect of lawmaking—that is, if it is in practice indistinguishable from normal legislative action. This chain of reasoning pushes analysis back to the level of determining what is the effect of lawmaking. The Court suggests that legislative action is action by Congress that alters the rights and duties of persons or officials outside the legislative branch.[203] Commentators have raised at least two major questions about this postulate.

First, a legislative veto alters established rights and duties only if rights and duties were settled prior to the exercise of a legislative veto. *Chadha*'s view accepts the rule of law's image that delegations to agencies establish a legally delimited sphere of executive power which a legislature cannot transform into conditional authority by means of a legislative veto provision in an authorizing statute. To that extent, *Chadha* rests on apparently circular reasoning. It takes for granted the very line of demarcation between the branches that it sets out to establish.[204]

Second, the statement that legislative action occurs when the rights and duties of persons outside the legislative branch are al-

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201 *See, e.g., The Supreme Court, 1982 Term*, 97 HARV. L. REV. 1, 189-90 (1983) ("[T]he Court's definitional analysis left no room for realistic or practical considerations.").

202 *Chadha*, 462 U.S. at 951-52.

203 The Court stated that "[w]hether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' " *Id.* at 952 (quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897) [hereinafter S. REP.]). The quoted Senate Judiciary Committee report was the culmination of a study of the scope of the presentment clause. The report "is regarded widely as an authoritative statement of the meaning of art. I, § 7, cl. 3." Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 296 n.107 (1982).

204 *See, e.g.*, Strauss, *Legislative Veto*, *supra* note 4, at 796 ("To say that [*Chadha*] has acquired a right which the House is now purporting to take away is to assert a conclusion, not to support it by reasoning."); *see also* Elliott, *supra* note 4, at 134 ("The legislative veto 'alters legal rights' . . . only because the Court chooses to characterize its effect that way." (paraphrasing *Chadha*, 462 U.S. at 952)).

tered seems overly broad. After all, the executive and judicial branches, acting within their authority, alter the rights and duties of persons outside the legislative branch. What principle, then, is actually doing the work of separating the different branches from one another?[205] If, as appears from *Chadha*, the key notion is that a governmental actor presumptively acts within its sphere of authority simply when it acts—and thus Congress exercises legislative power every time it acts—this analysis appears to collapse the concepts of the action involved (lawmaking) and the actor undertaking the action (Congress). What, then, has one learned about the underlying character of the lawmaking power?[206]

Believers in both the public purposes and the democratic process ideals may launch additional attacks on the analytical basis of *Chadha*'s separation of the legislative and executive branches. The public purposes ideal emphasizes the need for a rational and instrumental pursuit of policy in given areas.[207] From this standpoint the legislative veto is a valuable tool to the extent that it forces agencies to consider a wider range of alternatives than they otherwise would evaluate. This contention draws sustenance from the notion that agencies are often unduly single-minded and less than creative in their consideration of different means to given policy objectives.[208] To the extent that the legislative veto enables Congress to shake agencies out of their asserted complacency, it enhances the entire system's rationality and effectiveness.

One possible response is that rationality is unlikely to inhere in the political context in which the legislative veto must operate. Indeed, the device might actually threaten whatever rationality otherwise exists in the administrative process. This view draws strength from the idea underlying the public purposes ideal itself that agencies, not Congress, are the repositories of rationality in government, such as it is.[209] On this view, ad hoc legislative interventions could favor slanted political interests, thereby upsetting any achieved rationality.[210] If that would occur, *Chadha*'s formalistic separation be-

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205 *See* Elliott, *supra* note 4, at 137; Strauss, *Legislative Veto*, *supra* note 4, at 746.

206 *See* Strauss, *Legislative Veto*, *supra* note 4, at 796-801 (considering idea that definition of legislative action depends on characterization of action, not identity of actor).

207 *See supra* text accompanying notes 167-70.

208 *See, e.g.*, M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 88-90, 155-63, 270 (1955) (suggesting that without prodding from the White House, a commission is likely to take a rather narrow view of its responsibilities); R. NOLL, REFORMING REGULATION 99-100 (1971) (agencies too easily submit to demands of regulated industries).

209 *See* Bruff, *supra* note 173, at 244-50 (comparing rationality of agencies with formality of legislative directions).

210 *See generally* Bruff & Gellhorn, *supra* note 4, at 1413 (concluding in context of major study of legislative vetoes in five federal programs that "[i]n certain subtle ways,

tween the "political" branches would be preferable, even if one were to supplement it with the managerialist image of administration.

The ideal of the democratic process is even more prominent in debate about *Chadha*. For critics of this school, the legislative veto device makes the administrative process more legitimate by making it more accountable to the legislature.[211]

At the same time, an operating legislative veto is likely to interject ad hoc, unrepresentative political factors into the administrative process. On this basis, the legislative veto may not support the democratic process ideal because it may not be a method of imposing the legislature's will on agencies. Rather, it could be a means for a few members of Congress to impose a potentially parochial position. To the extent that the latter is the case, the legislative veto actually undermines the broad democratic accountability of the administrative process.[212]

To all of these objections and alternatives, the rule of law proponent of *Chadha* also has responses, the main thrust of which reaffirms the commitment to the rule of law vision and to the separation theme underlying *Chadha* itself. Accordingly, to the argument proclaiming a need for a more rational and efficient policy-making system, the rule of law defender would respond—as did the Court—that efficiency is simply not the main objective.[213] On this view the primary need is to comply with the vision of separation between the branches. That is not to say the rule of law proponent embraces inefficiency. Rather, the rejoinder attempts to disable the claim that *Chadha*'s formalism is inherently contrary to the requisites of effective constitutional government.[214]

Moreover, *Chadha*'s rule of law defender would respond to the

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the presence of congressional review allowed the influence of special interest groups in Congress to affect the substance of rules outside the comment process").

211 This theme underlies Justice White's dissent in *Chadha*. 462 U.S. at 967-68 ("[T]he legislative veto . . . has become a central means by which Congress secures the accountability of executive and independent agencies.").

212 *See* Bruff & Gellhorn, *supra* note 4, at 1379, 1410, 1413-20 (influence of committees and interest groups reduces accountability).

213 *Chadha*, 462 U.S. at 944 ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."); *see* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was [designed] not to promote efficiency but to preclude the exercise of arbitrary power.").

214 *Cf. Chadha*, 462 U.S. at 944 ("[T]he 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 contrary to the Constitution."), 945 ("[P]olicy argnments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.").

argument favoring more political responsiveness of agencies to Congress by urging that such a contention undermines the larger norm of legal accountability. A chief aim of the rule of law theorist is to achieve an underlying distinction between the legislative and executive roles, with law controlling the latter.[215] To adopt a vision of the administrative process as fundamentally political in nature is arguably to undermine the rule of law itself.

The advocate of the rule of law also must respond to the several specific challenges to *Chadha*'s underpinnings. In addressing the attack on the opinion's formalism, the decision's defender could reiterate the rule of law faith in formal separation between the legislative and executive realms. On this view, there is no reason for embarrassment about the rather assertive character of the Court's reasoning. After all, a definition of the basis of the separation of powers is exactly what the rule of law approach seeks to achieve. To decry the Court's undertaking as definitionalist, then, is to apply a label that by itself establishes no defect for one who adheres to the Court's underlying vision.[216]

Chadha's advocate could advance a similar response to the charge that the Court's rationale is circular. Again, the complaint is that the Court simply presumed correct the vision of a separation-of-powers structure under which the legislature, when it acts, creates a presumptively settled state of legal rights and duties that it generally cannot later interrupt without undertaking formal legislative action requiring bicameralism and presentment.[217] A response is that the legislative veto's proponents also assume as their starting point the conclusion they seek to reach. In particular, the argument supporting legislative vetoes takes for granted that such provisions properly authorize executive action in a contingent fashion.[218] Because the choice appears to be between this starting point or the Court's, the rule of law advocate could proclaim that the result is clear. The Court chose the correct point of departure because that point most closely coheres with the rule of law ideal itself. If this imports a certain circularity into the analysis, one could respond: so be it.

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215 *See supra* text accompanying notes 97-102, 107 & 110-12.

216 *Cf. Chadha*, 462 U.S. at 945 ("But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised.").

217 *Id.* at 951-52; *see also supra* text accompanying note 204.

218 *See Chadha*, 462 U.S. at 980, 986-87, 990-98 (White, J., dissenting) (considering such issues as bicameralism, presentment, and propriety of reserved congressional power without seriously doubting validity of contingent executive authority); *see also* Spann, *supra* note 4, at 509 (arguing that Justice White in *Chadha* dissent "improperly assumed the validity of the legislative veto as one of the steps in his argument to establish its validity" by urging that it does not change the legal status quo).

The further argument that the Court's analysis collapses any distinction between Congress as an actor and lawmaking as its action creates additional problems for *Chadha*'s defender. After all, the Court indicates that when the legislature acts, it presumptively does so within its assigned sphere.[219] By itself, this presumption says little about the composition of the realm assigned to the legislative branch. Moreover, the postulate that legislative action alters rights and duties does sweep within its literal terms actions by the other branches that have a similar effect.[220]

The rule of law defender could respond that such difficulties are inherent in the project of achieving a sequential legislative-executive separation in an era in which the traditional substantive categories—lawmaking, execution, and adjudication—are inadequate. A defense conceding overlap in the substantive functions of the branches might even be viewed as relatively enlightened. A definition of separation that is somewhat unclear about the distinctive character of lawmaking may be unavoidable. In the end, it may be better to admit the problems of positing any ground of separation in an effort to realize the aspirations of the rule of law ideal, rather than to pretend that they do not exist. After all, the separation notion requires some basis if it is to have any integrity. If one persists in doubting that such a basis exists, one will continually call into question the doctrine itself.

To be sure, the rule of law proponent's responses will not satisfy all those who agree with the critique of formalism or with competing conceptions of the administrative process. Yet such responses illustrate the depth of the theoretical debate surrounding *Chadha*. Much more is ultimately at issue than narrow technicalities of interpreting article I, section 7.

D. The Advantages of a Competing Ideals Perspective on the Contemporary Debate

Having traced the connections between the separation of powers and the rule of law, the relations between critiques of the formalism underlying the rule of law and the separation theme, and the ties between alternative ideals of administration and legislative-executive separation, I now consider the larger values of such a perspective. One might ask whether it leaves us with even more doubt than we might otherwise have about the normative underpinnings of separation doctrine. In my view, the answer is no, for we are now

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219 *Chadha*, 462 U.S. at 951-52.

220 *See, e.g.*, Tribe, *supra* note 4, at 9-10 (executive and judicial branches, independent agencies, private individuals, and groups all exercise delegated power and in such cases alter legal rights and duties).

able to see the deeper structure of controversies that separation problems continue to reflect.

1. *General Advantages*

An understanding of the boundary issues central to legislative-executive separation has at least two notable advantages. First, it demonstrates that no simple, unidimensional answers exist to such questions within the confines of present doctrinal and theoretical premises. Each simple position is readily countered by an opposing one inspired by either a critique of formalism, some competing ideal of administration, or a return to formalism.

Second, this perspective helps to explain why some consider separation doctrine quite important and central, while others find it peripheral and even trivial. One who cares especially about the rule of law ideal is more likely to accept the notion that separation doctrine matters greatly. One who is disinterested in that ideal or accepts critiques of the formalism underlying it is likely to see separation of powers as less critical. I consider each of these points in turn, and then illustrate the discussion in terms of the recent decision about the Gramm-Rudman-Hollings Act.[221]

Separation-of-powers commentary persistently seeks simple and clear answers to the most fundamental structural questions about our system of national government; for example, what is the legislative branch, and how exactly does it differ from the executive? These basic inquiries, and the boundary issues that spin off from them, cry out for uncomplicated responses. If the answers to them lack clarity, it is difficult for many to take seriously our own first principles of constitutional government.[222]

For instance, one commentator has argued with force that ideas, such as separation of powers, that govern the functioning and structure of government should and do have a degree of definiteness often lacking in other constitutional precepts,[223] adding that the Constitution's framers, "[w]ith respect to the structure of government, . . . were at pains to be as precise as they could."[224] The

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221 Bowsher v. Synar, 106 S. Ct. 3181 (1986).

222 This concern does not presuppose that constitutional theory necessarily will yield a single, unqualified answer. It is entirely consistent to see ambiguity in the law while striving for some degree of clarity.

223 *See* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 857 (1985) (seeing system of governmental checks and balances as "a reasonably clear framework within which the muddling [of government] can be contained"), 861 (arguing that "[u]nderstanding of the manner in which the Framers expected the government to function comes much more easily than an understanding of which rights they expected individuals to retain").

224 *Id.* at 853.

burden for those holding this position is to distinguish between fields of deep contention in constitutional theory—such as the meaning of due process or equal protection—and the assertedly more precise structure of government designed to foster value choices through legislation and policy making.[225]

My concern about such a picture is that, even assuming that the separation-of-powers doctrine is more clear in certain respects than other constitutional principles, nevertheless it does not speak with one voice at all. As I see it, the boundary questions of separation doctrine illuminate deep divisions that differentiate contrasting approaches to basic separation issues.

Accordingly, one view stresses the rule of law ideal and the formalism associated with it. This position notes a need for definitional separation between the legislative and executive branches. It finds support both in the case law and in liberal democratic theory.[226] However, it is not alone. The critics of formalism are many and forceful.[227] Their emphasis on checks and balances, and their tolerance for ambiguity in the underlying points of division between the branches, constitute another powerful theme of separation doctrine.[228] Moreover, competing ideals of the administrative process lie behind the law, providing deeper complexities in an area that one might wish could be approached with common premises.[229]

The competing ideals perspective thus reveals that, despite shared rhetoric, the field of legislative-executive separation churns with theoretical conflict. This conflict is so central to efforts to come to terms with the status of the modern administrative state that it cannot magically disappear or become muted by the desire for legal definiteness. The competing ideals perspective explains why simple answers to separation problems do not exist.

The second major value of this perspective is to demonstrate that the puzzling status of separation-of-powers doctrine, however denigrated or exalted, is in line with its larger conceptual position. Again, some commentators state that the separation principle is an obsolete impediment to effective policy making or even a cultural embarrassment that should be cured, perhaps by moving toward a parliamentary form of government.[230] On the other hand, some hold with equal force that the separation notion is of great importance to our continued liberty, a beacon of hope in an age of doubt

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225 *See id.* at 865-72.

226 *See supra* text accompanying notes 92-127.

227 *See supra* text accompanying notes 128-39.

228 *See supra* text accompanying notes 154-64.

229 *See supra* text accompanying notes 165-220.

230 *See* Cutler, *supra* note 90, at 132 ("[W]e . . . need to find a way of coming closer to the parliamentary concept of 'forming a Government' . . . .").

about constitutional norms, a bedrock of American constitutionalism the loosening of which is tolerated at our peril.[231] Such rhetorical extremes may amuse, but something must account for such strikingly divergent assessments of the principle's role in our legal system.

In my view, the answer lies in the complex interplay of themes and visions in the doctrine. From the rule of law perspective, the separation theme is indeed highly important, for it acts as an institutional embodiment of the larger ideal. Emphases on the separation theme draw sustenance from this larger conception, and seek to parry the critiques of formalism on its terms.[232]

The chief problem with a simple rule of law commitment is that it too easily obscures the weaknesses of formalism. Also, it often fails to answer critiques of that formalism, which buttress the checks and balances theme in literature expounding the separation doctrine. Moreover, it risks ignoring the degree to which competing images of the administrative process illuminate alternative views of the separation of powers itself.

A moderate checks and balances approach borrows ideas from the public purposes ideal of administration. This ideal underlies efforts to make the administrative system more rational in its attempt to maximize public ends.[233] The ends of checks and balances perhaps could best secure such rationality if different branches of government use their complementary resources to identify and solve social problems.

The limits of a moderate checks and balances position viewed by itself, however, are also deep-seated. From the rule of law perspective, it is insufficiently directed toward identifying the basic boundary between the legislative and executive branches.[234] Moreover, omnibus balancing may become a cover for an untidy status quo, thereby losing its ability to serve as a vehicle for the criticism and reform of existing institutions. If it is to critique the status quo, one still needs to know what structural principles underlie the assumption that different branches exist and are identifiable, such that they may more effectively check and balance one another.[235]

An extreme checks and balances approach also borrows in particular from one of the competing conceptions of administration: the democratic process ideal. Again, this ideal stresses the notion of

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231 *Cf.* 1 ANNALS OF CONG. 581 (J. Gales ed. 1834) (Rep. Madison referring to separation of powers as "sacred" principle).

232 *See supra* text accompanying notes 92-127.

233 *See supra* text accompanying notes 167-70.

234 *See supra* text accompanying notes 41-50, 92-127.

235 *See supra* text accompanying notes 47-50.

a representative process by which different groups in society, and different institutions of government, compete in the policy-making system. It also downplays the necessity for legal doctrine that enunciates the separation principle and imposes it on an unruly political reality.[236] Such an attempt to avoid doctrinal elaboration of the separation of powers is attractive because it can divert attention from the law of particular cases[237] and avert bringing to the forefront deep conflicts over basic normative principles.[238]

Yet, as the competing ideals perspective indicates, it is not possible ultimately to avoid the theoretical complexity underlying separation doctrine. Just as the extreme checks and balances theorist applauds judicial abstention,[239] the rule of law critic argues strongly for judicial elaboration of guiding norms in this area. The moderate checks and balances perspective also questions the suggestion that courts should abstain completely, as that would preclude judicial balancing of the competing values in contested cases.[240]

In short, alternative positions in the separation debate find deep support in ideals of administration that are themselves in contest. The alliances that sometimes can form among these ideals, although important, do not provide a harmonized, wholly complementary theoretical system. As such, it is understandable that some consider the separation principle to be important, and others view it as overrated and too easily imposed at the expense of other values. Each view finds worthy and idealistic grounding in differing doctrinal and theoretical visions that illuminate this area of law.

2. *The Illustration of the Gramm-Rudman-Hollings Act*

The Supreme Court's decision striking down the Gramm-Rudman-Hollings deficit reduction legislation, *Bowsher v. Synar*,[241] illustrates the swirl of doctrinal themes and larger conceptual positions in this field. In discussing the decision I seek to illustrate the basic tensions in the law in terms of the major divisions among the Justices in this case.

The case involved a constitutional challenge to the Balanced

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236 *See supra* text accompanying notes 175-81.

237 *See supra* text accompanying notes 51-64.

238 Assigning disputes about normative principles to the rough-and-tumble of the political process is a frequent proposal of those concerned about the functional limitations of courts. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

239 *See supra* text accompanying notes 51-58.

240 For examples of courts applying rule of law and moderate checks and balances theory, see, respectively, *supra* notes 94 & 49.

241 106 S. Ct. 3181 (1986). For earlier discussion, see Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131 (1985); Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986).

Budget and Emergency Deficit Control Act of 1985,[242] popularly known as Gramm-Rudman-Hollings after its sponsors. The statute created a mechanism for establishing across-the-board reductions in spending for fiscal years 1986 through 1991. The key provision required the directors of the Congressional Budget Office and the Office of Management and Budget to estimate independently the amount of the deficit for the coming fiscal year.[243] If the projected deficit exceeded a maximum allowable amount, the two directors would calculate independently the reductions needed to bring the budget into line with the prescribed ceiling.[244] They would then jointly report their estimates and reductions to the Comptroller General.[245] That official, after reviewing the reports, would in turn report his recommended reductions to the President.[246] The President would be required under the Act to issue a "sequestration" order mandating the spending reductions specified by the Comptroller General.[247] This order would become effective unless Congress passed superseding legislation making the reductions.[248]

The primary constitutional challenge, aside from a question concerning the breadth of the overall delegation, was directed at the assigned role of the Comptroller General. That official's constitutional status has long been questioned.[249] It is not surprising that this issue came to the forefront in the Gramm-Rudman-Hollings context. The dispute focused on whether the Act illegitimately assigned to a legislative official executive tasks by giving the Comptroller General power to establish reductions in spending that the President must follow. A three-judge district court, after rejecting the delegation challenge, concluded that the Act violated the separation of powers.[250]

The Supreme Court affirmed the judgment of the district court.

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242 Pub. L. No. 99-177, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1037 (codified in scattered sections of 2, 31 & 42 U.S.C. (Supp. III 1985)).

243 2 U.S.C. § 901(a)(1) (Supp. III 1985).

244 *Id.* § 901(a)(2).

245 *Id.*

246 *Id.* § 901(b).

247 *Id.* § 902.

248 *Id.* § 904(b).

249 *See, e.g.*, Ameron, Inc. v. Army Corps of Eng'rs, 787 F.2d 875, *aff'd on other grounds on rehearing*, 809 F.2d 979 (3d Cir. 1986), *aff'g and modifying* 607 F. Supp. 962 (D.N.J. 1985); *see also* United States *ex rel.* Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94, 96-97 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964). *See generally* R. BROWN, THE GAO: UNTAPPED SOURCE OF CONGRESSIONAL POWER (1970); F. MOSHER, THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT (1979); J. POIS, WATCHDOG ON THE POTOMAC: A STUDY OF THE COMPTROLLER GENERAL OF THE UNITED STATES (1979); W. WILLOUGHBY, THE LEGAL STATUS AND FUNCTIONS OF THE GENERAL ACCOUNTING OFFICE OF THE NATIONAL GOVERNMENT (1927).

250 Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986).

The majority centered its analysis squarely on the separation theme. In the opening paragraph of its discussion of the constitutional question, the majority quoted *Chadha*'s language that the "Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."[251] Although the rhetoric of checks and balances was used, the majority stressed the special importance of definitional separation. In particular, the executive is to be "a separate and wholly independent" branch of government.[252] The majority also invoked the liberal and democratic elements of the separation theme. According to the majority the aims secured by separation include "checks on the exercise of governmental power" and "full, vigorous and open debate on the great issues affecting the people."[253]

Having embraced the separation theme, the majority developed a syllogistic chain of reasoning leading to the conclusion that the Comptroller General's role under the Act is unconstitutional. A key step in this chain is the conclusion that the Comptroller General's functions are "executive" in character. In so concluding, the majority emphasized that the official must exercise discretion under law when making budget reduction estimates. This task was seen not as ministerial or mechanical, but "as plainly entailing execution of the law in constitutional terms."[254] Indeed, for the majority, interpretation of a law "is the very essence of 'execution' of the law."[255]

One must ask how the majority determined that the Comptroller General's responsibilities are specifically executive in nature and do not comprehend the functions of other government branches, which of course also exercise judgment and even interpret statutes. The majority's answer is consistent with the formalistic approach taken in *Chadha*. By definition, for the majority the key distinction between the legislative and executive branches is a sequential one. That is, the legislative branch first enacts a statute by complying with the bicameralism and presentment requirements. Then, any action implementing it in the first instance is presumed to be "execution" of the law and hence "executive" in character.[256] The majority highlighted this point by saying that in placing responsibility for implementing the Act in the hands of an officer deemed (on other grounds) to be legislative, "Congress in effect has retained control over the execution of the Act and has intruded into the exec-

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251 *Bowsher*, 106 S. Ct. at 3186 (quoting *Chadha*, 462 U.S. at 951).
252 *Id.*
253 *Id.* at 3187.
254 *Id.* at 3192.
255 *Id.*
256 *Id.*

utive function."[257] The main premise is that once legislation has been passed, action pursuant to it is a task for the executive.

The majority supplemented this premise with the separation axiom that executive and legislative essences shall not overlap in the sense that a legislative officer is charged with executing the law.[258] The key question then becomes whether the Comptroller General, given "executive" functions under the Act, is in reality a "legislative" officer.

The majority's analysis of this issue relied on the notion that a longstanding statutory provision permitting removal of the Comptroller General by joint resolution of Congress indicates, along with other evidence, that the Comptroller is a legislative officer.[259] The majority conceded that the provision limits removal to the following five situations: "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude."[260] For the majority, these limitations are not a major constraint on congressional control over the Comptroller General's fate. "These terms are very broad," the Court argued, and "could sustain removal . . . for any number of actual or perceived transgressions of the legislative will."[261]

Moreover, the majority generally viewed removal power as a vital incident of ongoing supervisory authority over an officer. Thus, the removal provision here "dictate[s] that [the Comptroller General] will be subservient to Congress."[262] The majority thereby echoed a central premise of *Myers*, which also assumed that the ability to remove an official is part and parcel of ongoing control—or at least mighty influence—over the conduct of that officer's duties. The *Bowsher* majority relied on this premise to support its conclusion that a "direct congressional role in the removal of officers charged with the execution of the laws" other than by means of impeachment is definitionally inconsistent with the separation of powers.[263]

Accordingly, the majority concluded that a legislative officer—the Comptroller General—has been assigued executive functions under the Act in violation of the separation axiom. The Court sought to remedy this defect by striking the assignment of functions to this officer, thereby voiding the key provision of the Gramm-Rudman-Hollings Act. The majority regarded the alternative possibility

257 *Id.*
258 *Id.* at 3186-87.
259 *Id.* at 3189-91.
260 *Id.* at 3189 (quoting 31 U.S.C. § 703(e)(1) (1982)).
261 *Id.* at 3190.
262 *Id.* at 3191.
263 *Id.* at 3187.

of recasting the Comptroller General as an executive branch actor as too disruptive of settled statutory patterns and practices and, in any event, unnecessary given the Act's specific "fallback" provision that takes effect if any of its sections is invalidated.[264]

Not surprisingly, this line of analysis has been attacked as unduly formalistic. In particular, both the concurrence by Justice Stevens and the dissent by Justice White criticized the majority's definitional approach. They focused, respectively, on the two key tenets of the Court's reasoning: that the functions assigned to the Comptroller General are "executive," and that he is a "legislative" agent.

For Justice Stevens, the majority's principal error consisted of its "labeling" of the tasks assigned to the Comptroller General as "executive."[265] In a critical portion of his opinion, he urged that such characterization of the Comptroller General's tasks "rest[ed] on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power."[266] This certainly reaches the heart of the matter. The majority invoked a separation axiom that seeks, above all, to distinguish the field of executive action from that of legislative responsibility. To Justice Stevens, things are not so simple. There exists a degree of overlap and ambiguity that must be tolerated without seeking always to characterize government power "with only one of those three labels."[267]

On the one hand, because this approach is outwardly critical of formalistic reasoning, it will win plaudits from those suspicious of the majority's definitional approach. There is, to such critics, an elusive and unsatisfactory character about defining the functions of an officer like the Comptroller General as "executive." Such definitions suggest an absolutism in the separation between the branches that is considered hopelessly naive.

On the other hand, Justice Stevens' approach ultimately may frustrate certain of his initial admirers, for his approach fails to reach the logical conclusion that there is no sense in advancing any definitions of the roles of the two branches. On the contrary, Justice Stevens himself embraced a general definition of "legislative" action, which rests on the premise that the tasks of government have a "chameleon-like quality"[268] in that they "take on the aspects of the office to which [they are] assigned."[269] Because, in Justice Stevens'

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264 *Id.* at 3192-93; *see* 2 U.S.C. § 922(f) (Supp. III 1985).

265 106 S. Ct. at 3194 (Stevens, J., concurring in judgment).

266 *Id.* at 3200.

267 *Id.*

268 *Id.* at 3201.

269 *Id.* at 3200.

view, the Comptroller General is an agent of Congress, his actions under the Act constitute legislative action for constitutional purposes.[270] However, this reasoning is subject to the same charge leveled at the *Chadha* majority: it collapses the concept of an action into that of an actor.

Justice Stevens addressed this concern by borrowing *Chadha*'s own formalistic definition of the legislative function: that which is "intended to make policy that will bind the Nation and thus is 'legislative in its character and effect.' "[271] Such action, he noted, must comply with the full article I requirements of bicameralism and presentment.[272] In his view, the Comptroller General's responsibilities have a policy-making character. Because the Comptroller General is "legislative" in status, the official's actions need to comply—as of course they do not—with bicameralism and presentment.[273] Hence, for Justice Stevens the constitutional infirmity involves not a substantive intrusion by the legislative branch on the executive's domain, but rather a failure to comply with the procedures governing legislative action.

Justice White in dissent took the third major position in this case.[274] He argued that the Comptroller General is not an agent of Congress for constitutional purposes. Justice White saw the threat of removal as insufficient to transform this official from one charged by law with statutory duties to one beholden to Congress in what he does,[275] especially because the underlying statute places specific limits on removal. Limitations on removal power in other contexts are generally "deemed to protect the officers to whom they apply and to establish their independence from the domination of the possessor of the removal power."[276] Justice White saw no reason why analogous reasoning could not apply to the Comptroller General.[277]

Moreover, he pointedly argued, Congress's constrained removal power over the Comptroller General "will undoubtedly be less of a spur to subservience" than its unquestioned legislative power to reduce the Comptroller's salary, to reduce the agency's

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270 *Id.* at 3196-3202.

271 *Id.* at 3204 (quoting S. REP., *supra* note 203, at 8).

272 *Id.*

273 *Id.*

274 Justice Blackmun wrote a fourth separate opinion in dissent. He focused on the issue of relief, concluding that any incompatibility between the Act and the separation of powers "should be cured by refusing to allow congressional removal—if it ever is attempted—and not by striking down the central provisions of the Deficit Control Act." *Id.* at 3215 (Blackmun, J., dissenting).

275 *Id.* at 3208-15 (White, J., dissenting).

276 *Id.* at 3211 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 625-26, 629-30 (1935)).

277 *Id.*

budget, to cut its personnel, or even to abolish the position altogether.[278] In addition, he noted that a joint resolution removing the Comptroller General must be presented to the President, who could veto it. Justice White concluded that the need for a two-thirds override of such a veto obviates the possibility that the Comptroller General "will perceive himself as so completely at the mercy of Congress that he will function as its tool."[279]

Underlying Justice White's assault on the majority is his basic tolerance for officials and agencies that are "independent" and do not "fit" easily into one or the other of the political branches.[280] Justice White's focus is on preventing major structural imbalances between the legislative and executive branches. An independent officer or agency does not concern Justice White because it does not pose a threat to the basic structural balance of the system. This acceptance of the Comptroller General's independence is central to Justice White's larger approach to the separation of powers, in which his major goal is to police the concept of checks and balances, not to become formalistically preoccupied with elaborating definitions of the separation theme.[281]

Thus, the Gramm-Rudman-Hollings decision elaborated a series of major competing positions in the larger separation debate. The majority and Justice Stevens sought a definitional starting point, but disagreed on which one to choose. Justice White, in sharp contrast, emphasized checks and balances, and remained unconcerned with defining the tasks of the branches. As in other contexts, larger conceptual commitments can be seen to buttress these positions. In particular, the rule of law vision of administration supports the majority's view, which presupposes that under law executive officials will perform executive functions. Justice Stevens challenged the doctrinal basis of the majority's view, but embraced a similarly formalistic conception of the legislative role. Justice White, in contrast, adopted a view based upon a democratic process vision. According to Justice White, the separation doctrine should attempt to realize the goal of free-wheeling political bargaining in the absence of major imbalances of power.

I do not mean to suggest that the detailed doctrinal positions taken in this case are designed specifically to work out the larger ideals. My point is that the conflicting positions may be seen to have deep associations with those ideals. To that extent, the decision fur-

278 *Id.* at 3212.

279 *Id.*

280 *See id.* at 3213.

281 *See id.* at 3213-15.

ther illustrates the larger divergences that permeate the separation-of-powers debate.

CONCLUSION: LEGISLATIVE-EXECUTIVE SEPARATION OF POWERS IN PERSPECTIVE

This article has explored legislative-executive separation of powers in terms of basic conflicts in the law and the visions that surround it. No claim has been made that these are the field's exclusive themes; yet they are pervasive and central, as the illustrations confirm. Clearly the area is complex and fraught with difficult choices. The sheer recognition of complexity, however, tells us little about the nature of that reality.

In my view, the topic's complexity exists at the most basic doctrinal and theoretical levels. Doctrinally, the field is a zone of contention among strict separation theorists, moderate checks and balances proponents, and extreme checks and balances adherents.[282] This spectrum has a rough correlation to the methodological continuum running from legal formalism to functionalism, but it goes beyond that. Moreover, these tensions involve substance, not just method, and are integral to the contemporary debate.

Theoretically, the field is rife with conflict about the rule of law ideal of administration, which has deep associations with our notion of separation. This ideal often is chided as naive, on the one hand, and praised as the heart of liberal political theory, on the other hand. Moreover, the conflicts about the legal formalism underlying the rule of law vision have become associated with a range of controversies involving alternative images of the administrative process. The public purposes and the democratic process ideals are major contrasting, while partially complementary, visions. This complex of ideas animates the doctrinal debate, often at the level of unarticulated premises.

The central objective of this study has been to illuminate doctrinal and theoretical tensions underlying this field. Their recognition, however, does not lack general prescriptive implications. A systematic effort to come to grips with legislative-executive separation suggests that we should grapple directly and self-consciously with the major alternative images the law has produced as it has evolved. In analyzing particular issues we should eschew narrow, partisan positions that fail to take account of other notions predicated on competing premises. It is important also that we recognize the existence of a complex structure underlying the different perspectives re-

282 *See supra* text accompanying notes 11-87. Of course, eclectic positions are well represented.

flected in this field. Courts, in particular, should be aware of the central warring views, and address them in a more open fashion than often has been the case. A more complete discussion of doctrinal and theoretical premises would serve further to illuminate these positions and render the choices courts make more explicit.

None of this is to suggest that there are no answers to separation-of-powers problems. Rather, there are no simple answers that somehow can be walled off from underlying theoretical debate. This realization calls for additional investigation into the competing legitimating visions of administration. Our institutions are often seen to be in a legitimation crisis.[283] Indeed, that seems an apt description of the fundamental condition of the modern administration system. We should continue to inquire into the first premises that inform our law regarding the status of the executive bureaucracy in order to deepen our appreciation of the question of its legitimacy.[284]

This is not to presuppose that with enough hard work we will eventually achieve a normative utopia of doctrinal harmony and theoretical concord.[285] The lesson here may be that an internally riven doctrine and theory is to be expected. Certainly, such a divided system exists today and likely will remain tomorrow. In any case, recognizing the deep structure of this complexity is, in my view, an important goal of its own. To do so is to put in perspective the contemporary debate about legislative-executive separation, a major area of administrative and constitutional law.

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283 *Cf.* J. HABERMAS, LEGITIMATION CRISIS (1975).

284 *Cf.* Frug, *supra* note 88 (discussing four models of bureaucratic legitimacy in administrative and corporate contexts: formalist model, expertise model, judicial review model, and market/pluralist model). Professor Frug envisions his models as designed to tell the following story to listeners: " 'Don't worry, bureaucratic organizations are under control.' " *Id.* at 1284. The rule of law ideal discussed here incorporates key aspects of the formalist model, along with the proceduralist rule of law notions underlying the judicial review model. The public purposes ideal incorporates the expertise model as well as the economic critique underlying the market/pluralist model. The democratic process ideal includes the political representational aspects of the pluralist model. For elaboration of "core" and "alternative" versions of the three competing ideals discussed here, see Sargentich, *supra* note 10, at 397-438.

285 *See* Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 191-94 (1984) (characterizing contradictory practices and theories as normal in our legal system). *Compare* Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1192-1217 (1983) (arguing that there is need to struggle with complexity and contradiction in legal and social worlds) *with* Frug, *supra* note 88, at 1377-88 (arguing against the necessity of contradictory beliefs while advocating a commitment of energy to perceive possibilities beyond the status quo).