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Mistakes Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best

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MISTAKES, PRECEDENT, AND THE RISE OF THE ADMINISTRATIVE STATE: TOWARD A CONSTITUTIONAL THEORY OF THE SECOND BEST

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INTRODUCTION

A little over forty years ago, Justice Jackson characterized the rise of the administrative state as "probably the most significant legal trend of the last century."[1] He coined the term "Fourth Branch" to describe administrative agencies and contended that this fourth branch "has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking."[2] Today, forty years later, our legal theories remain deranged. Current approaches to separation of powers problems remain inadequate to the task of coping with the administrative state.

The reason is simple. The structural Constitution[3] sets forth a system of government that allocates power among three depart-

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1 Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

2 *Id.*

3 Traditionally, commentators have distinguished between structural provisions of the Constitution—which allocate powers among the various branches of government and between the federal and state governments—and individual rights provisions—which guarantee individual rights. Some have argued that different interpretive methodologies are appropriate for analyzing these two different types of provisions. *See* MICHAEL PERRY, THE CONSTITUTION, THE COURT, AND HUMAN RIGHTS 37-60 (1982) (defending "noninterpretive" review of "human rights" provisions of the Constitution while rejecting such review with respect to separation of powers issues). Akhil Amar has criticized the distinction between structural and individual rights provisions, arguing that the Bill of Rights has significant structural components. *See* Akhil R. Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131 (1991) (contending that the Bill of Rights and the structural constitution have more in common than is often believed).

ments.[4] This division is intended to ameliorate the corrupting effect of power. Thus, the powers delegated to each department are carefully limited in scope, and each of the three departments acts as a check on the power of the others. In Madison's justly famous words, "[a]mbition must be made to counteract ambition."[5] There is no room for a fourth branch within this tripartite scheme of governance. In exercising executive, legislative, and judicial power, administrative agencies combine powers that the Constitution separates; moreover, agencies are subject to none of the checks imposed upon the three traditional departments. In short, the administrative state is unconstitutional.

Nevertheless, the Supreme Court has not invalidated the post-New Deal administrative state as inconsistent with the constitutional text. The Court's unwillingness to do so is, in large part, pragmatic. Even if the Court were disposed to order the task of dismantling the federal bureaucracy, it might not have the political capital necessary to realize its objective. Moreover, to declare the administrative state unconstitutional would require the Court to overrule an immense and deeply rooted body of precedent. It is easy to understand that the Court would be unwilling to adopt a constitutional theory with such far-reaching implications.

This Article proposes a form of constitutional damage control: the constitutional theory of the second best.[6] Under this theory, the Court should adhere to constitutional structures whenever possible—the first best solution, as it were. Nonetheless, the Court should toler-

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4 I use the term "department" rather than the more commonly used term, "branch," because the Constitution does so. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1156 n.6 ("The Constitution uses the word 'Department' to refer to the three institutions of our national government.").

5 THE FEDERALIST No. 51 at 322 (James Madison) (Clinton Rossiter ed., 1961).

6 The term "theory of the second best" has its origin in economics. The first fundamental theorem of welfare economics is that when the economy meets the stringent requirements of complete and perfectly competitive markets, the market equilibrium will be Pareto optimal. If these stringent requirements are not met, however, correcting a single market imperfection may not enhance welfare. The theory of the second best attempts to evaluate how one might try to maximize welfare in the face of market imperfections. *See* Kevin Lancaster & R.G. Lipsey, *The General Theory of the Second Best*, 24 REV. OF ECON. STUD. 11 (1956). Thus, under standard economic theory, the best economy is one in which industry is perfectly competitive (or in which all monopolists are perfect price discriminators). *See* KENNETH W. CLARKSON & ROGER L. MILLER, INDUSTRIAL ORGANIZATION, THEORY, EVIDENCE, AND PUBLIC POLICY 132 (1982). However, where there are already some distortions, the theory of the second best suggests that a monopoly in a second industry *can*, but does not necessarily, make the economy more efficient. *Id.* The term "second best solution" has been more generally used to refer to solutions to problems that take into account existing imperfections in the world and seek compensating imperfections. *See, e.g.*, Daniel D. Polsby, *Equal Protection*, REASON, Oct. 1993, at 34, 38 (defending widespread gun ownership by law-abiding citizens as a "second best solution" that would compensate for the problem of gun ownership by predatory criminals).

ate structures or practices that are conceded to be unconstitutional when such structures or practices have become institutionalized. In so doing, however, the Court should recognize that it is condoning developments that would be unconstitutional if considered as an original matter. Where unconstitutional institutions are allowed to stand based on a theory of precedent, the Court should allow (or even require) the creation of compensating institutions that seek to move governmental structures closer to the constitutional equilibrium. Indeed, the Court should allow or require these compensating institutions even where they would have been unconstitutional if considered standing alone. This approach, which permits the Court to fulfill its obligation to constitutional principles, is a second best solution.

My example of an institution designed to compensate for prior error is the legislative veto. The legislative veto would be unconstitutional if considered as an original matter. However, open-ended delegation of legislative authority to administrative agencies is also unconstitutional. Nonetheless, such delegations have become sufficiently entrenched in our society that it would be imprudent, if not impossible, to invalidate them. Allowing the legislature to veto a regulation enacted by an agency pursuant to such an open-ended delegation serves constitutional objectives by imposing a check on agency power. Moreover, such a veto operates as a surrogate for the bicameral approval required to enact legislation. Thus, an open-ended delegation of legislative power together with the legislative veto is less unconstitutional than an open-ended delegation of legislative power standing alone. Accordingly, insofar as it compensates for an unconstitutional delegation, the legislative veto should be allowed.

Part I of this Article discusses two current methods for analyzing separation of powers issues—functionalism and formalism.[7] The Court has vacillated between these two methods of interpretation, but, in fact, neither offers a satisfactory answer to the problems raised by the administrative state. Functionalism should be rejected because it amounts to no judicial review at all. Formalism offers rigorous judicial review but is untenable because the gap between the formalist model and our existing government is simply too wide. Of the two, however, formalism is the more satisfactory approach.

Part II then offers an alternative theory—"modified formalism"—that tries to solve the problems associated with the formalist approach. Modified formalism integrates formalism with a "minimalist" theory of precedent. Modified formalism requires that the Court adopt a formalist method whenever possible. In some cases, however, precedent

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[7] Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 857-61 (1990) (terms formalism and functionalism have become terms of art in the separation of powers context).

has already departed from a formalist understanding of the Constitution. The formalist's response would be to seek the first best solution of overruling wrongly decided precedent and returning to an interpretation more consistent with the text. But because the modified formalist adheres to a minimalist theory of precedent, which requires a court to follow precedent that has become firmly entrenched, the first best solution is not open to the formalist. The modified formalist, therefore, adopts the second best solution of accepting such textual infidelities as given but subsequently interpreting the Constitution to counteract the unconstitutional effects of the questionable precedent. Put simply, the modified formalist seeks to restore the constitutional equilibrium by allowing compensating institutions whose purpose is to mitigate the effect of unconstitutional institutions sanctioned by wrongly decided precedent. These compensating institutions may be permitted under the theory of the second best *even if, standing alone, a formalist would be compelled to invalidate them as unconstitutional.*

Finally, Part III applies the theory of the second best to the issue of the legislative veto. The legislative veto was declared unconstitutional by the Supreme Court in *Immigration and Naturalization Service v. Chadha.*[8] However, where Congress has unconstitutionally delegated legislative power to an agency, the delegation plus a legislative veto is closer to the constitutional baseline than the unconstitutional delegation would be standing alone. Accordingly, the legislative veto should, under certain circumstances, be allowed.

I

SEPARATION OF POWERS AND THE ADMINISTRATIVE STATE: THE INADEQUACY OF CURRENT INTERPRETIVE TECHNIQUES

In recent years, the Supreme Court has faced a plethora of important separation of powers cases.[9] Indeed, one commentator has

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8 462 U.S. 919 (1983).

9 Since 1976, such cases include Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) (upholding constitutionality of allowing "Article I" tax court judges to appoint "special trial judges"); Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991) (holding unconstitutional a statutory provision creating airport board of review including members of Congress); Mistretta v. United States, 488 U.S. 361 (1989) (upholding constitutionality of U.S. sentencing commission's authority to promulgate sentencing guidelines); Morrison v. Olsen, 487 U.S. 654 (1988) (upholding constitutionality of law creating independent prosecutor not subject to executive department control); Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (upholding constitutionality of statutory provision authorizing the Commission to hear some state law counterclaims); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating portion of Gramm-Rudman-Hollings Act giving executive authority to Comptroller General, a legislative department official); INS v. Chadha, 462 U.S. 919 (1983) (holding legisla-

referred to the decade of the 1980s—when most of these cases were decided—as "the most varied and sustained assault on the institutional structure of the federal government in half a century."[10] One might expect that, with so much attention focused on separation of powers issues, the Court would have developed a coherent separation of powers jurisprndence. It has not done so.

There is general consensus among scholars that the Court has exhibited a "split personality" in separation of powers cases.[11] The Court has alternated between an anything-goes functionalist method that "appears to be designed to do little more than rationalize incursions by one branch into the domain of another,"[12] and a rigid but principled formalist method that almost always leads to invalidation of the challenged governmental action.[13] There has been little explanation or apparent rationale for the Court's flipping between these two methods of analysis.

Moreover, neither functionalism nor formalism represents a completely satisfactory approach to separation of powers issues. Of the two, functionalism poses the greater threat to the constitutional structures designed to protect individual liberty, check the exercise of

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tive veto unconstitutional); Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) (holding unconstitutional portions of Bankruptcy Act giving judicial power to non-Article III judges); Buckley v. Valeo, 424 U.S. 1 (1976) (holding unconstitutional a statutory provision giving rulemaking and adjudicative power to a commission including members appointed directly by Congress).

10 Lawson, *supra* note 7, at 855. Professor Lawson's article was published prior to the Supreme Court's decision in *Freytag*, 501 U.S. 868. That decision suggests that the assault on the institutional structure of the federal government may continue in this decade. Nonetheless, the recent spate of separation of powers cases should not be read to suggest that the foundations of the administrative state have come under attack. They have not. As Professor Lawson has observed, "the essential features of the modern administrative state have, for half a century, been taken as unchallengeable postulates by virtually all players in the legal and political worlds, including the Reagan and Bush administrations." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994).

11 Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Cases*, 41 DUKE L.J. 449, 450 (1991). *See also* Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (characterizing the Court's separation of power jurisprudence as "an incoherent muddle"); E. Donald Elliot, *Why Our Separation of Powers Jurisprudence is so Abysmal*, 37 GEO. WASH. L. REV. 506, 507 (1989) (criticizing the Court for failing to develop a "coherent and useful" theory or "law" of separation of powers); Lawson, *supra* note 7, at 854 ("These often sharply divided decisions employed a bewildering array of inconsistent methodologies, alternately raising and dashing the hopes both of formalists . . . who advocate strict adherence to the Constitution's particular tripartite structure and of functionalists who urge flexibility to accommodate the modern administrative state."); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 226 ("The Court has alternated between the formal and functional constructions . . . .").

12 Redish & Cisar, *supra* note 11, at 450.

13 *See* Lawson, *supra* note 10, at 1233-49 for a discussion of the original ways in which the administrative state is inconsistent with a formalist constitutional model.

power, and assure governmental accountability. Formalism, while faithful to constitutional text, is incomplete—or inadequate—because it fails to bridge the gap between modern administrative government and the formalist paradigm.

A. Functionalism Rejected

Functionalists purport to be concerned with whether a particular exercise of power by one department illegitimately interferes with the "*core* function"[14] of another department. Central to this inquiry is the issue of whether one department is attempting to "aggrandize" itself at the expense of another.[15] Thus, functionalists are not inclined to worry about the exercise of governmental authority by actors *outside* of the three named departments.[16] Likewise, functionalists are willing to accommodate substantial innovation *below* the apex of governmental structure.[17] Ultimately, the functionalist model accepts any distribution of power so long as it does not "undermine the intended distribution of authority" among the President, Congress, and the judiciary.[18]

The "Fourth Branch" therefore does not trouble the functionalists.[19] Because it takes most of the administrative state as a given, functionalism is more "realistic" than formalism—or at least more consistent with the status quo. Despite the Court's wavering,[20] func-

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14 Harold Krent, *Separating the Strands In Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988).

15 *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 382 (1989) (focussing on the aggrandizement issue).

16 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596 (1984).

17 *Id.* at 580 (Because the heads of regulatory bodies purportedly do not "present the threat that led the framers to insist on a splitting of the authority of government at its very top[,] . . . it is not terribly important to number or allocate the horses that pull the carriage of government.").

18 Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 494 (1987).

19 *See id.* at 518.

20 Personnel changes alone cannot account for the Court's doctrinal split personality. The Court has, within short spans of time, decided cases using both formalist and functionalist methods. The Court's most recent formalist decision was Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991), where the Court struck down a statute allowing nine Members of Congress to serve as a Board of Review with veto power over decisions made by a regional airport authority. Ten days after deciding *Metropolitan Airports*, the Court handed down Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991), in which the Court employed a functionalist approach to allow the Chief Judge of the United States Tax Court (a so-called "Article I court") to appoint special trial judges. In Bowsher v. Synar, 478 U.S. 714 (1986), the Court, using a formalist approach, struck down portions of the Gramm-Rudman-Hollings Act. *Bowsher* was decided the same day as Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), where the Court applied a functionalist approach to uphold the jurisdiction of the Commission to hear certain state-law counterclaims.

tionalism has been somewhat more prevalent than formalism in the Supreme Court's separation of powers jurisprudence.[21]

Nevertheless, the functionalist approach should be rejected for three reasons. First, functionalism lacks sufficient critical bite: Once a court adopts a functionalist methodology, "no meaningful limitations on interbranch usurpation of power remain."[22] For example, Justice White, who adopted the most consistently functionalist methodology of any member of the Court,[23] consistently refused to hold that separation of powers principles had been violated, except in the most extreme circumstances.[24] The reason for the functionalists' unwillingness to strike down almost any institution on separation of powers grounds is simple. The functionalist notions of "core functions" and "aggrandizement" are so vagne and indeterminate that "the judicial reaction will almost always be to defer to the judgments of other branches when separation of powers controversies arise."[25] Thus, functionalism is tantamount to a complete lack of judicial review.

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21 *See* Lawson, *supra* note 7, at 856 n.12 ("[T]he Functionalists clearly won the decade [of the 1980s], at least in the Courts and Congress, by a TKO."). Of the important separation of powers cases cited *supra* note 9, *Synar*, *Chadha*, and *Metropolitan Airports* employ a formalist approach; *Freytag*, *Mistretta*, *Morrison*, and *Schor* use a functionalist methodology, and *Northern Pipeline* is difficult to categorize (although categorizing *Northern Pipeline*, in which the Court rejected a delegation of Article III power to non-Article III judges may be a moot issue in light of the Court's willingness to legitimate the exercise of the judicial power by Article I courts in *Freytag* and *Schor*). *Cf.* Lawson, *supra* note 7, at 854 n.4 (classifying the Court's leading separation of powers cases according to whether the decisions are formalist, functionalist, both or neither). Although the Court has occasionally applied a formalist methodology, it is worth observing that the Court has not applied such a methodology in any case where doing so would imperil the existence or power of the administrative state.

22 Redish & Cisar, *supra* note 11, at 454.

23 *See* Merrill, *supra* note 11, at 227 n.11 (describing Justice White as "the one Justice who has steadfastly endorsed a functional approach").

24 The only such extreme case of which I am aware is Buckley v. Valeo, 424 U.S. at 271 (White, J., concurring in part and dissenting in part), where Justice White agreed that a statute giving Congress the power to select members of the Federal Election Commission violated the Appointments Clause. In every other case, however, Justice White was willing to give substantial leeway to Congress to shape the structure of the government. *See, e.g.*, *Freytag*, 501 U.S. at 868 (Blackmun, J., Opinion of the Court, joined by Justice White) (voting to uphold statutory provision giving "Article I judges" power under the Appointments Clause); *Metropolitan Airports*, 501 U.S. at 277 (White, J., dissenting) (dissenting from Court's invalidation of statute requiring state to create regional airports authority with members of Congress serving as members); *Mistretta*, 488 U.S. at 362 (Blackmun, J., Opinion of the Court, joined by White, J.) (voting to uphold U.S. Sentencing Commission); *Morrison*, 487 U.S. at 658 (Rehnquist, C.J., Opinion of the Court, joined by White, J.) (voting to uphold independent counsel law); *Schor*, 478 U.S. at 835 (O'Connor, J., Opinion of the Court, joined White, J.) (voting to allow CFTC to adjudicate state-law counterclaims); *Bowsher*, 478 U.S. at 759 (White, J., dissenting) (dissenting from Court's decision preventing Congressional official, Comptroller General, from exercising executive authority); *Chadha*, 462 U.S. at 967 (White, J., dissenting) (dissenting from Court's decision holding legislative veto unconstitutional); *Northern Pipeline*, 458 U.S. at 92 (dissenting from decision holding unconstitutional Article I Bankruptcy Courts).

25 Merrill, *supra* note 11, at 234-35.

Second, despite its superficial worldliness, functionalism does not appreciate the corrupting effect of power. Functionalism accommodates well-intentioned innovations designed to circumvent the constitutional system of balanced and separated powers in order to overcome a complex, cumbersome, and inefficient method of governance. In the process, however, functionalism has allowed concentrations of virtually unchecked power to pervade a system whose design was largely driven by an almost paranoid distrust of political power: "Almost every aspect of [the Framers'] political structure was in some way related to their implicit assumption that, simply put, 'power corrupts.' "[26] The functionalist insistence that concentrations of power below the apex of governmental authority are not important is, consequently, inconsistent with the Framers' understanding of the tendency of officials to abuse their power. The functionalist notion of aggrandizement and its tendency to accommodate violations of separation of powers principles below the apex of governmental authority therefore fails adequately to protect the constitutional structures that protect individual liberty.

Finally, functionalists only worry when one department tries to take power at the expense of another. They do not worry when a department has some power taken away from it—as long as that power does not go to one of the other coordinate departments. Yet the abdication of power and its corresponding responsibilities is as serious a problem as aggrandizement. The decision of the German *Reichstag* to relinquish power in 1933 was lamentable not merely because it allowed the Chancellor—Adolph Hitler—to aggrandize his position at the expense of the legislature but also because it involved legislative abdication.[27] If the Congress were to cede all power to an administrative agency in a single legislative act, its decision to do so would be lamentable because it would spell the end of legislative accountability, and therefore of constitutional self-government. The principle remains the same if abdication is accomplished piecemeal. Thus, because it fails to appreciate and counteract the danger inherent in abdication, functionalism should be rejected outright.

B. Formalism: A Qualified Defense

The traditional alternative to functionalism is formalism. As in legal discourse generally, formalism in the separation of powers context involves the application of more or less rigid rules, rather than

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26 Redish & Cisar, *supra* note 11, at 451.

27 *See* KARL D. BRACHER, THE GERMAN DICTATORSHIP 210-11 (1970); WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 273-78 (1950).

flexible standards, to legal problems.[28] Although the formalist might agree that the separation of powers serves certain goals, the goals are not directly invoked by the formalist in resolving separation of powers cases. Rather, the constitutional text is seen as an "instruction manual" which prescribes particular allocations of power.[29] The three "vesting" clauses[30] "establish[ ] a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive, and judicial institutions."[31] Formalism "uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial. It assumes that all exercises of power must fall into one of these categories and takes no ostensible account of the practicalities of administration in arriving at this determination."[32] Thus, under the formalist paradigm, "the constitutional validity of a particular branch action, from the perspective of separation of powers, is to be determined not by resort to functional balancing, but solely by the use of a definitional analysis."[33] No commingling of legislative, executive, or judicial power is permissible, except where specifically provided in the constitutional text.[34]

Any defense of formalism will encounter some resistance.[35] Nonetheless, a formalist approach to separation of powers problems

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28 *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) ("At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to rule.").

29 Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON U. L. REV. 21, 22 (1988).

30 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

31 Lawson, *supra* note 7, at 857-58. Ever the functionalist, Justice White could always be counted on to decry the Court's unwillingness to take into account pragmatic administrative concerns whenever it undertook one of its periodic forays into formalism. *See, e.g.*, *Metropolitan Airports*, 501 U.S. at 277 (White, J., dissenting) ("Today the Court strikes down yet another innovative and otherwise lawful governmental experiment in the name of separation of powers."); *Bowsher*, 478 U.S. at 759 (White, J., dissenting) (characterizing majority decision as "distressingly formalistic"). The formalist response to such pragmatic arguments is that they are irrelevant. *See 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.").

32 Lee S. Liberman, Morrison v. Olsen: *A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989).

33 Redish & Cisar, *supra* note 11, at 454.

34 The Constitution does provide for some interaction between the three departments of government. Most notably, the so-called "presentment" provision, U.S. CONST. art. I, § 7, cl. 3, gives the President a role in lawmaking. *See infra* note 37.

35 *See* Redish & Cisar, *supra* note 11, at 453-54 ("Any call for a return to 'formalism' in constitutional interpretation will naturally expose one to the barrage of ridicule and disdain traditionally reserved by moderu scholars for what is almost universally deemed to be an epistimologically naive methodology.").

has much to commend it. Most importantly, a formalist approach is the one most consistent with the text of the Constitution.[36] The structural provisions of the Constitution *look* like an instruction manual. They set forth the role of each department and the modes of interaction among the three departments.[37] There would be no point to these elaborate provisions if Congress were free to prescribe extra-textual modes of governance.

Moreover, the formalist approach furthers the policies behind the separation of powers more than functionalism, which requires the Court to determine on a case-by-case basis if the policies behind the separation of powers are threatened.[38] The constitutional system of balanced and separated powers serves primarily to protect against abuse of governmental authority, or "tyranny." However, it is unclear,

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36 Regardless of their view of the proper method of reading the Constitution, most scholars would agree that the constitutional text is a *source* of authority. *See*, MICHAEL PERRY, MORALITY POLITICS & LAW, 131 (1987) ("[I]n American political-legal culture it is axiomatic that the constitutional text is authoritative—indeed supremely authoritative—in constitutional adjudication.").

37 Some have argued that formalism is unworkable because it is impossible, in principle, to ascertain whether a particular exercise of power is legislative, executive, or judicial. *See* Brown, *supra* note 11, at 1524 (dismissing the formalist view that tasks can be defined as legislative, executive, or judicial as a "highly questionable premise"). To be sure, certain tasks may not obviously pertain to any particular department. In such instance, characterization of the task as legislative, executive, or judicial turns on the identity of the actor charged with that task. I believe, however, that it is possible, within certain limitations, to define the nature of legislative, executive, and judicial power and therefore definitively to allocate certain tasks to one or another particular department. Such an undertaking is, however, beyond the scope of this Article.

The Constitution itself provides for some blending of tasks. For example, the President's power to sign or veto legislation, U.S. CONST. art. I, § 7, cl. 3, appears more legislative than executive. *See* Lawson, *supra* note 7, at 858 n.19 (noting that the President's power to veto legislation would normally be characterized as legislative and crediting Bob Bennett with this insight). In fact, however, Woodrow Wilson beat them both to the punch. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT 53 (World Pub. Co. 1956) (1885) ("For in the exercise of his power of veto, which is, of course, beyond all comparison, his most formidable prerogative, the President acts not as the executive but as a third branch of the legislature.").

There is, of course, a deeper objection to any rule-based theory of constitutional interpretation. Some have argued that it is either impossible or undesirable for judges to employ more or less rigid and determinate rules to resolve legal disputes. *See* Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990); Mark Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781 (1983). Others have taken issue with the claim that legal rules are radically indeterminate. *See* Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). Any discussion of this issue is obviously well outside the scope of this Article. Suffice it to say that I believe that reasonably determinate rules are both possible and desirable, and will proceed on that assumption.

38 This argument is similar to arguments advanced by rule utilitarians. Rule utilitarians argue that one should follow utility-maximizing rules rather than attempting to determine, in each individual instance, the utility-maximizing course of action because it may be difficult or impossible to make this determination in a particular case. *See* JOHN HOSPERS, HUMAN CONDUCT 217-32 (2d ed. 1961).

in advance, whether a structure that violates the constitutional blueprint is a benign innovation or a malignant threat to liberty. Consequently, as Martin Redish and Elizabeth Cisar have pointed out, the constitutional principle of separation of powers is "inherently prophylactic."[39] "The concept of a prophylactic is that it prevents the creation of a critical situation by proceeding on the assumption that it will be impossible to determine, in the individual instance, the existence of a real threat to the values sought to be fostered."[40] It is therefore unwise to resolve separation of powers cases according to the functionalist model, on a case-by-case basis. Rather, the *point* of separation of powers jurisprudence is to be rigid and inflexible. The very rigidity of formalism, then, recommends it as the proper mode of interpretation in separation of powers cases.

There is, however, one overriding problem with formalism as a method for evaluating current structures. Under a pure formalist approach, most, if not all, of the administrative state is unconstitutional. Agency rulemaking and adjudication—indeed, the very existence of some agencies—is inconsistent with the formalist model.[41] Formalism, therefore, is "simply incapable of describing the government we have."[42] A useful theory of interpretation must, however, take at least *some* of our current government as a given. Prudence dictates some accommodation of administrative government. At this point, then, application of undiluted formalism would be unsound and unworkable.

In sum, the problem is that formalism is too principled and rigid while functionalism is not principled or rigid enough. Of the two, however, formalism is the more promising. Formalism is both more consistent with the constitutional text and better able to satisfy the goals of separation of powers—accountability and, most importantly, protection against governmental tyranny. The trouble with formalism is the distance between the formalist view and currently accepted practices. The gap can, however, be bridged by a theory of precedent—a theory which this Article will now proceed to outline.

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39 Redish & Cisar, *supra* note 11, at 477.

40 *Id.*

41 *See* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 96-97 (applying the "neoclassical approach," which is at least in the same ballpark with formalism, to conclude that "[t]he independent agency is a constitutional sport, an anomalous institution created without regard to the basic principle of separation of powers upon which our government was founded").

42 Strauss, *supra* note 18, at 526.

II

TOWARD A CONSTITUTIONAL THEORY OF THE SECOND BEST

Most formalists are willing—at least implicitly—to accept some notion of precedent.[43] What formalists have failed to do, however, is to develop a theory of precedent that explains how precedent should interact with the formalist approach in deciding separation of powers questions. This Part proposes a theory of precedent—the "minimalist" theory of precedent—and integrates that theory of precedent into the formalist model, resulting in what I have labelled "modified formalism."

A. The Minimalist Theory of Precedent

Under the minimalist theory of precedent, the Court normally ignores precedent in deciding constitutional cases. However, where a decision approving an unconstitutional structure or practice has become institutionalized, the Court allows that decision to stand. Nonetheless, in so doing, the Court acknowledges that the structure or practice would be unconstitutional if it were considered as a matter of first impression. The minimalist theory of precedent accurately describes the Supreme Court's approach to precedent in constitutional cases. In addition, that theory is justified on normative grounds.

1. *The Supreme Court and Precedent: A Descriptive Analysis*

In recent years, the Supreme Court has demonstrated a willingness to depart from the doctrine of stare decisis by overturning or significantly modifying its own precedents. Indeed, Earl Maltz states baldly that "[i]t seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe."[44] Professor Maltz bases his conclusion largely on statistical data purportedly demonstrating an increased willingness of the Court to ignore its own

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43 *See* Merrill, *supra* note 11, at 234 ("[F]ormalists are forced to adopt a grandfather strategy, preserving past deviations from formalist purity (like administrative agencies) based on stare decisis or a principle of historical settlement, while subjecting new innovations to scrutiny under a rigorous exclusive functions canon."). One exception to this rule is Gary Lawson, who is convinced that following wrongly decided precedent is affirmatively unconstitutional. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23 (1994). A detailed response to Lawson's view of precedent is outside of the scope of this Article. It is worth noting, however, that were it not for his idiosyncratic view of precedent, Lawson would agree with the thesis of this Article. *See* Lawson, *supra* note 10, at 1253 ("If there is any proper role for precedent in constitutional theory, McCutchen is probably right; if an incorrect precedent creates a constitutional disequilibrium, it is foolish to proceed as though one were still in an equilibrium state.").

44 Carl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WISC. L. REV. 467, 467.

precedent.[45] However, Justice Stevens has taken issue with this claim.[46] While conceding that the Court has overruled itself more frequently in recent years, he nonetheless contends "that the report of the death of the doctrine [of stare decisis] is exaggerated."[47]

Both Professor Maltz and Justice Stevens have a point. But who is right? There is no widely accepted, doctrinally coherent theory of constitutional stare decisis.[48] Certainly, plenty of cases make laudatory noises about stare decisis.[49] But these cases do not specify when the Court is obliged to follow precedent. Rather, the decision to invoke stare decisis is a "prudential" one, which means that it is generally not governed by rules.[50] And, to the extent that there is a

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45 Professor Maltz noted that:

> In the twelve-year period from 1937 to 1949, for example, the Court overruled earlier constitutional decisions in twenty-one cases—nearly as many as in the 140 years preceding *Coronado Oil & Gas*. By 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions.

Id. (footnotes omitted). Professor Maltz provides a compendium of cases overruling constitutional precedent between 1960 and 1979. *Id.* at 494-96. *See also* Payne v. Tennessee, 501 U.S. 808, 828 n.1 (1991) (listing 33 constitutional cases during 1971-1991 terms in which the Court overruled itself). I will leave to other toilers in the scholarly vineyard the task of compiling a comprehensive tabulation of all the constitutional cases in which the Supreme Court has overruled itself. In any event, such a compendium of cases that have been overruled may understate the Court's willingness to ignore or significantly alter precedent. For example, when read together, *Freytag*, 501 U.S. 868, and *Schor*, 478 U.S. 833, leave the status of *Northern Pipeline*, 458 U.S. 50, in doubt. *See supra* note 21. Accordingly, the issue of whether a case has been overruled or limited may, itself, be ambiguous.

46 John P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 4 (1983).

47 *Id.*

48 *See* ROBERT BORK, THE TEMPTING OF AMERICA 155-57 (1990) (The question of precedent lies "[a]t the center of the philosophy of original understanding," but "[t]he law currently has no very firm theory of when precedent should be followed and when it may be ignored or overruled."); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988) ("[A]lthough the academy is awash with competing theories of substantive law, there is no contest in the theory of stare decisis. . . . [N]o one has a principled theory to offer."). Judge Reinhardt has suggested that the problem of stare decisis is at least as complex as the problem of judging generally. Stephen Reinhardt, *The Conflict Between Text and Precedent in Constitutional Adjudication*, 73 CORNELL L. REV. 434, 435 (1988) ("[Stare decisis] raises *all* the issues inherent in the question, 'How should a judge reach decisions?' "). Despite the lack of any coherent theory of stare decisis, however, most commentators, even originalists, are willing to accept some notion of stare decisis. *See* BORK, *supra*, at 155-59 (arguing that some notion of precedent is consistent with originalist theories of constitutional law); Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (same).

49 *See, e.g.*, Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1986) ("[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law."); Akron v. Akron Center for Reprod. Health, 462 U.S. 416, 419-20 (1983) ("[T]he doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.").

50 *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808 (1992) ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior

doctrine of constitutional stare decisis, that doctrine leans in favor of overruling.

The modern trend is to deemphasize stare decisis in constitutional cases. Justice Brandeis, in his frequently quoted dissent in *Burnet v. Coronado Oil & Gas Co.*,[51] identified two competing values that must be balanced in determining whether or not to invoke stare decisis, and suggested that the proper resolution of the conflict between them might depend on the character of the case:

> *Stare decisis* is not, like the rule of *res judicata*, a [rule of] universal, inexorable command. "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.[52]

Thus, in confronting questions of stare decisis, courts face a choice between getting the rule right and getting the rule settled. Justice Brandeis's dissent in *Coronado* suggests that the Court has particularly wide latitude to get the rule right and overrule precedent in constitutional cases.

In a number of recent high-profile cases, the Court has done just that.[53] *Payne v. Tennessee*[54] exemplifies this willingness to overrule a prior case solely on the basis that it was wrongly decided, thereby bolstering Professor Maltz's argnment. In *Payne*, the Court held that "victim impact" evidence could be admitted during the sentencing phase of a capital punishment proceeding.[55] In so doing, it overturned a

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decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."). In other words, the Court can do whatever it wants.

51 285 U.S. 393, 405-07 (1931) (Brandeis, J., dissenting).

52 *Id.* (quoting Hertz v. Woodman, 218 U.S. 205, 212 (1910)) (citations and footnotes omitted).

53 *See, e.g.*, Payne v. Tennessee, 501 U.S. 808 (1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers 490 U.S. 805 (1989)); Miller v. California, 413 U.S. 15 (1973) (overruling A Book Named John Clelund's Memoirs of a Woman of Pleasure v. Attorney General, 383 U.S. 413 (1966)). The Court has even accomplished a particularly noteworthy double reversal. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1989) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)) and National League of Cities v. Usery, 426 U.S. 833 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)).

54 501 U.S. 808 (1991).

55 *Id.* at 808.

rule announced only four years before in *Booth v. Maryland*,[56] which was subsequently reaffirmed in *South Carolina v. Gathers*[57] in 1989. The Court did make noises about stare decisis.[58] But it then took full advantage of the considerable slack in stare decisis jurisprudence. First, the Court cited *Coronado* to minimize the import of stare decisis in constitutional law.[59] Then, because both *Gathers* and *Booth* "were decided by the narrowest of margins, over spirited dissents, challenging the basic underpinnings of these decisions"[60] the Court determined that it was free to overrule them.

This rationale for overruling is pretty thin. Justice Marshall, ostensibly dissenting on stare decisis grounds, correctly observed that nothing had changed since *Booth* and *Gathers* were decided except the personnel of the Court.[61] Still, Justice Marshall's reverence for stare decisis rang a bit hollow. Justice Marshall himself never hesitated to call for overturning precedent that he thought wrongly decided.[62] In fact, he voted to overrule precedent in *every* capital case to come before the Court, despite clear and repeated holdings that capital punishment was *not* cruel and unusual under all circumstances.[63] It is

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56 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

57 490 U.S. 805 (1989).

58 *Payne*, 501 U.S. at 827 ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

59 501 U.S. at 809 (citing Burnet v. Coronado Oil & Gas Co. 285 U.S. 393, 406-07 (1933) (Brandeis, J. dissenting)).

60 *Id.* at 810. The Court also cited an Ohio decision, State v. Huertas, 553 N.E.2d 1058, 1070 (Ohio 1990) for the proposition that "[t]he fact that the majority and two dissenters all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of law in this area." *Id.* If disagreements about the implications of a decision constitute a sufficient basis for overruling, then a lot of decisions are in danger. Moreover, *Booth* was decided only a few years prior to *Payne*. If doctrinal coherence were the real issue, the Court could have clarified the doctrine rather than eliminate it. There was certainly no evidence that the Court was somehow incapable of developing a coherent body of law on the issue of victim impact evidence in the sentencing phase of capital cases.

61 501 U.S. at 844 (Marshall, J. dissenting).

62 *See id.* at 833 (Scalia, J., concurring) (citing examples where Justice Marshall called for the overruling of precedent). The Justices who composed the majority voting to overrule *Booth* and *Gathers* differed somewhat in the degree of respect that they exhibited toward constitutional stare decisis. Predictably, Justice Scalia showed the least respect for precedent. He explicitly rejected the contention advanced by the dissent that a "special justification" is required to overturn wrongly decided precedent. *Id.* He thought it sufficient that the rule announced in *Booth* "significantly harms our justice system and is egregiously wrong." *Id.* Thus, Justice Scalia is effectively on record as defending, on normative grounds, the position advanced by Professor Maltz as a description of Supreme Court practice. Justice Souter, by contrast, agreed with Justice Marshall that a "special justification" is required to overrule constitutional precedent, but he believed that such justification was present in *Payne*. *Id.* at 842 (Souter, J., concurring). A cynic might wonder whether Justice Souter will ever fail to find such a justification when he wants to overrule a prior case.

63 In Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring in the judgment), Justice Marshall expressed his view that the death penalty is cruel and unusual

highly unlikely that Justice Marshall would have refused to join four other justices willing to abolish the death penalty if changes in the Court's personnel had led to a Court more amenable to his philosophy. In sum, there is little question that Justice Marshall would have dissented in *Payne* even if precedent had pointed in the opposite direction. Accordingly, it seems fair to conclude that precedent did not control *anyone's* vote in *Payne.* As in many other constitutional cases, the discussion of precedent was nothing more than a rhetorical sideshow.[64]

Nonetheless, precedent may at times have a real impact on the Court's decisions. An excellent example of a case where precedent did appear to influence the outcome is *Planned Parenthood v. Casey.*[65] In *Casey,* a sharply divided Supreme Court chose not to overrule *Roe v. Wade.*[66] In so doing, the plurality opinion devoted a great deal of attention to the doctrine of stare decisis. The Court found that cultural and societal reliance interests that had clustered around the protection of abortion rights required the application of stare decisis.[67] Of course, it is impossible to know for sure whether stare decisis was a necessary condition for the decision or merely rhetorical justification for it. But it seems unlikely that Justice Kennedy, for example, would have voted with the majority if he had been a member of the Court when *Roe* was decided.[68] It is therefore reasonable to infer that stare

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punishment under all circumstances. This view was rejected by the Court in Gregg v. Georgia, 428 U.S. 153 (1976). Justice Marshall called for the overruling of precedent from then on, based solely on his view that the Court was wrong. Justice Marshall went so far as to dissent from the denial of certiorari in every death penalty case. *See, e.g.,* Mapes v. Ohio, 498 U.S. 977 (1990) (Marshall, J., dissenting from denial of petition for writ of certiorari) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would grant the application for stay of execution and the petition for a writ of certiorari and would vacate the death sentence in this case.") (citation omitted).

64 *See, e.g.,* Allied-Signal, Inc. v. Director, Div. of Taxation, 112 S. Ct. 2251 (1992); Harmelin v. Michigan, 501 U.S. 957 (1991); Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); *see also supra* note 53 (listing a few of the recent cases where the Supreme Court has overruled itself).

65 112 S. Ct. 2791 (1992) (O'Connor, Kennedy, & Souter, JJ., plurality opinion).

66 410 U.S. 113 (1973).

67 112 S. Ct. at 2809. As the Court explained, "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion .... The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* The Court conceded that such reliance was difficult to quantify. *Id.* Still, the Court believed that it was real enough to require that it be respected. *Id.*

68 Justice Kennedy joined the Court's decision in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), which came to the brink of overruling Roe v. Wade, 410 U.S. 113 (1973), but postponed direct reconsideration of the issue for another day. Justice Kennedy and Justice White were the only ones who joined one portion of Chief Justice

decisis concerns influenced him to vote with the five-justice majority, and that, by extension, the outcome of the case turned on stare decisis.

Taken together, *Payne* and *Casey* reveal that the Court has, in practice, adopted what might be called a "minimalist" theory of constitutional stare decisis. Under this theory, the Court will not hesitate to overrule a case that it believes to have been wrongly decided unless that case has spawned numerous subsidiary institutions and created reliance interests and settled expectations.

Thus, there are a number of cases that, no matter how wrongly decided, will not be overturned. A credible argument could be made, for example, that the *Legal Tender Cases* were wrongly decided.[69] But governmental policy, our banking system, and the economy as a whole are all premised on the holding that the government may print paper money which is legal tender. The *Legal Tender Cases* are integral to the shape of our political, constitutional, and economic order institutions. Thus, even if five members of the Supreme Court (or nine, for that matter) were to "see the light" with respect to the *Legal Tender Cases*, the Court is not about to require the federal government to withdraw paper money from circulation and begin minting gold coins.[70] As Robert Bork—a man less than enamored with stare decisis—has put it, "Whatever might have been the proper ruling shortly after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian."[71]

Likewise, the cases that have allowed the administrative state to flourish will not be overruled. Neither the cases sanctioning open-ended delegations of legislative power[72] nor those broadly interpreting the commerce clause[73] will be overturned. Nor will such lumi-

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Rehnquist's opinion. *Webster*, 492 U.S. at 513-22. Notably, then-Justices Rehnquist and White were the sole dissenters in *Roe*, 410 U.S. at 171.

69 79 U.S. (12 Wall) 457 (1871). Whether the *Legal Tender Cases* were decided correctly is irrelevant. Rather, my point is that, assuming the cases to have been wrongly decided, they will not be overruled.

70 Indeed, it seems highly unlikely that the Court would even grant a petition for a writ of certiorari in a case in which a party challenged the issuance of paper money.

71 BORK, *supra* note 48, at 155.

72 *See infra* notes 150-79 and accompanying text for a discussion of the nondelegation doctrine.

73 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding that grain raised on a farm for household use "affects" interstate commerce and is therefore within Congress's power under the commerce clause). The scope of power now exercised by the federal government is difficult to justify on constitutional grounds. The powers granted to the federal government by the Constitution do not "alone or in combination, grant[ ] the federal government anything remotely resembling a general jurisdiction over citizens' affairs." Lawson, *supra* note 10, at 1234. *See also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA L. REV. 1387 (1987) (arguing for a limited reading of the commerce

naries as Richard Epstein,[74] Bernard Siegan,[75] or Steven Macedo[76] convince the Court to return to *Lochner*[77] era invalidation of economic regulation. Even Justice Scalia—the Justice most receptive to the formalist approach—has demonstrated no willinguess to attack the basic tenets of the administrative state.[78]

Thus, the Court has implicitly adopted a "minimalist" theory of constitutional stare decisis. Under the minimalist theory, stare decisis is relevant to a constitutional case only to the extent that patterns of institutional, cultural, and private reliance interests have clustered around a particular decision, and then only to the extent of such reliance interests.

2. *When the Court Should Do the Wrong Thing: A Normative Analysis*

In addition to being an accurate description of Supreme Court practice, the minimalist theory of stare decisis is also justified on normative grounds. As noted above, the traditional approach had been to deemphasize the importance of precedent in constitutional law. In balancing Justice Brandeis's two competing values—the value of getting a rule settled and the value of getting it right—the traditional approach had elevated accuracy far above stability in constitutional cases. While it is important to get the rule right, the traditional approach is inferior to minimalist theory because only the minimalist theory gives sufficient weight to the need for certain constitutional issues to be settled. Indeed, the interests that underlie Article V's dif-

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clause). Yet, despite the commands of the text, few today take the enumerated powers doctrine seriously. Indeed, "in this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds." Lawson, *supra* note 10, at 1236. Even the most minimal challenges to the federal government's power meet powerful opposition. For example, the United States Court of Appeals for the Seventh Circuit recently held that the Environmental Protection Agency (EPA) could not regulate as 'wetlands' a small depression that sometimes filled with rainwater in which birds *might* stop to have a sip (there was no evidence that any birds had actually availed themselves of this opportunity). Even this modest limitation was too much; the opinion was vacated and the EPA lost on grounds that did not undermine its power. *See* Hoffman Homes, Inc. v. EPA, 961 F.2d 1310 (7th Cir.), *vacated*, 975 F.2d 1554 (7th Cir. 1992).

74 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

75 *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

76 *See* STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987).

77 Lochner v. New York, 198 U.S. 45 (1905) (holding that a state law regulating the hours of bakery workers violated substantive due process rights). This case ushered in an era in which the Court limited the states' ability to regulate economic matters.

78 Although Justice Scalia has dissented in a number of separation of powers cases, he has demonstrated at least some willingness to accommodate the administrative state. For example, in his dissenting opinion in *Mistretta*, Justice Scalia indicates an unwillingness to find a violation of the nondelegation doctrine based solely on the vagueness of a congressional mandate. *Mistretta*, 488 U.S. at 416.

ficult amendment process counsel in favor of a rule of constitutional stare decisis.[79] One purpose of the Constitution was to provide a stable set of institutions around which political interactions could take place. This purpose militates in favor of a strong doctrine of constitutional stare decisis: "Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules. The reasons making amendment hard apply also to overruling."[80] To the extent that certain constitutional rulings establish structural ground rules, political actors must be able to rely upon the stability of these rulings. Hence, the minimalist theory of stare decisis is more consistent with constitutionalism than is the traditional approach.

The minimalist theory of precedent also has parallels in other areas of the law. Justice Scalia has described the continuation of wrongly decided precedent as "a sort of intellectual adverse possession."[81] He may have meant this comment as a quip, but adverse possession might be an instructive way to think about the question of precedent. The rnles of adverse possession insulate an adverse possessor who is, by definition, a usurper against the claims of the true owner.[82] While it may seem "wrong" to allow an adverse possessor to take possession of—and title to—property, we do so in order to protect reliance interests and settled expectation.[83] It is also efficient to do so because adverse possessors can make both financial and personal investment in a piece of property.[84] Moreover, another level of reliance is added when third parties, such as creditors, rely on the adverse possessor's property interest.[85]

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79 *See* Easterbrook, *supra* note 48, at 431. *See also,* Note, *Constitutional Stare Decisis,* 103 HARV. L. REV. 1344, 1355-59 (1990).

80 Easterbrook, *supra* note 48, at 431.

81 Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 265 (1987).

82 Adverse possession, at common law, must be "1) actual, 2) open and notorious, 3) hostile, 4) exclusive, and 5) continuous." ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 758 (1984). Some courts also require that a claim be based on a claim of right, or that it be made in good faith. *Id.* As a practical matter, courts generally do not allow an adverse possessor to take title where there has been bad faith. R.W. Heimholz, *Adverse Possession and Subjective Intent,* 61 WASH. U. L.Q. 331, 347 (1983).

83 *See generally* Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights,* 64 WASH. U. L.Q. 723 (1986) (discussing inconsistency of adverse possession and perpetuities law with libertarian conceptions of property rights).

84 For a good discussion of both types of reliance, see Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession,* 79 NW. U. L. REV. 1122, 1131 (1985). *See also* Margaret Radin, *Time, Possession, and Alienation,* 64 WASH. U. L.Q. 739 (1983) (discussing relationship between property and personhood).

85 Merrill, *supra* note 84, at 1132.

Similarly, precedent insulates wrongly decided cases (the adverse possessor) from the correct decision (the true owner). While this obstacle to faithful interpretation may seem "wrong," the minimalist theory of constitutional stare decisis serves to protect reliance interests that have built up around particular decisions. Decisions that have created institutional structures integral to the form of the federal government as we know it have become effectively irreversible because they are so deeply rooted in our political and legal culture that to overrule them would undermine the very social stability that the Constitution is supposed to foster.

B. Modified Formalism

The minimalist theory of precedent provides the mediating principle between the formalist method of analyzing separation of powers issues and the reality of the modern administrative state. Under what I call the "modified formalist" approach, the Court begins, as it does in applying the formalist approach, by determining whether a challenged practice is consistent with a formalist interpretation of the constitutional text. But unlike formalism, modified formalism does not end there. If a court applying modified formalism determines that a practice is not consistent with the formalist understanding of the constitutional text, it must next ask if the practice at issue is one that has been sanctioned by prior constitutional doctrine and if the practice has become institutionalized. If both questions can be answered in the affirmative, the Court, applying the minimalist theory of precedent, should allow the challenged practice to continue. The Court, therefore, follows wrongly decided precedent (that is, precedent inconsistent with a formalist reading of the text) only when a failure to do so would cause significant institutional disruption.

C. Textual Fidelity and the Search for Second Best Solutions

Under modified formalism, then, there is a range of cases where the Court should knowingly, intentionally, consciously, and honestly do the wrong thing for the sake of institutional stability. The modified formalist accepts the necessity of following wrongly decided precedent but does not relish that necessity or consider it a virtue. Nor does the Court assert the correctness of incorrect decisions. Instead, the Court recognizes that the chosen path would be unconstitutional if considered as a matter of first impression.

Following wrongly decided precedent is particularly troublesome in the separation of powers context. In order to prevent tyranny, the Constitution divides power both between the state and federal govern-

ments, and among the three departments of the federal government:[86]

> By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people. By dividing power on a vertical as well as lateral plane (i.e. between the state and federal governments), they sought to assure that not all policy decisions would be made at one political level. And by implementing a diluted form of popular sovereignty, they assured that those in power would be generally responsive to those they represent while reducing the danger of a tyrannical majority.[87]

This well-crafted allocation of power is disturbed by wrongly decided precedent. Decisions that either realign power among the three departments or alter the powers of one department endanger this balance.

The modified formalist responds to this threat to liberty with a constitutional theory of the second best. The constitutional theory of the second best seeks to preserve the constitutional structure by offsetting institutions that have been erroneously strengthened and by strengthening institutions weakened by a prior error. Invocation of the constitutional theory of the second best is triggered by an institution or practice that is both unconstitutional under formalism and irreversible under modified formalism. If such a "triggering error" throws the system as a whole out of balance in a systematic and predictable manner, the second best solution is to establish an institution or practice capable of compensating for the triggering error (a "compensating institution").[88]

The Court is *required* to seek a second best solution because its duty is to the balance of power embodied in the constitutional text. As several commentators have recognized, fidelity to the constitutional text can require adjustments in the application of textual principles in light of changes in the social or legal context.[89] Lawrence

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86 *Compare* U.S. CONST. art I, § 1 *and* U.S. CONST. art II, § 1 *with* U.S. CONST. amend. X.

87 Redish & Cisar, *supra* note 11, at 451.

88 The "first best solution" would, of course, be to strike down the challenged institution or practice as unconstitutional and return to the constitutional baseline. The minimalist theory of precedent assures that second best solutions will be invoked only when doing so is absolutely necessary.

89 *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 85-106 (1994) (discussing theory of the unitary executive in light of changed circumstances); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

Lessig uses a musical metaphor to illustrate how alteration of context may require changes in interpretation in order to maintain fidelity to the text:

> A concert pianist plays a series of outdoor concerts. On the third night, the temperature falls dramatically, causing the piano to fall "out of tune." Is it more faithful to Beethoven to leave the piano out of tune? Would tuning the piano be the same kind of infidelity as adding a couple of bars to the end of the first movement? Is there no difference between tuning so the music sounds "the same" (the same?) and changing the tempo or cutting some particularly dark passages so the music sounds better?[90]

Likewise, the task of the Court is to make the Constitution "sound the same" in the face of changes to the legal context.[91] It is important, however, not to add any new bars at the end or to confuse the song that we would like to hear with the song that the Constitution intends.

In sum, by choosing to ignore the text in favor of precedent, the Court departs from the constitutional baseline. In so doing, it gives a person or a group of persons more political power at the expense of another person or group of persons. The Court then has a duty to create or allow the creation of institutions that help to realign the power relations as close to the original baseline as possible.

The constitutionality of compensating institutions cannot, therefore, be examined in isolation. The Court should instead engage in a comparative constitutional analysis. The total package of institutions—triggering error plus compensating institution—should be compared to the triggering error if allowed to stand alone. If the former is more consistent with constitutional baseline than the latter, the compensating institution should be allowed. This is true even where the compensating institution would, if examined in isolation, itself violate the Constitution. The Constitution is not a particular set of isolated provisions; it is a particular balance among institutions. If one provision is misread, the balance is upset. If, for reasons of stare decisis, that misreading cannot be undone, it makes sense to systematically misread other provisions if doing so will restore the constitutional balance.[92]

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90 Lessig, *supra* note 89, at 1170.

91 *See, e.g.*, Ollman v. Evans & Novak, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (Bork, J., concurring) (discussing proper scope of First Amendment protection in light of changed legal context).

92 Steve Calabresi and Kevin Rhodes have argued for what they call a "holistic" method of interpreting structural provisions of the Constitution. Calabresi & Rhodes, *supra* note 4, at 1157. They argue that the debate over the nature of the President's power under Article II is relevant to, and should be considered in connection with, the debate over Congress' power to control federal court jurisdiction under Article III. *Id. See also id.* at 1157 n.7 (discussing various commentators who have pointed out the relationship between Article II and Article III). Their argument is fairly intuitive: The reading of one

This Article will now turn to an examination of the legislative veto as an example of a compensating institution. I will argue that its constitutionality should be considered in conjunction with the delegation of legislative power.

III
THE LEGISLATIVE VETO: AN ACCEPTABLE SECOND BEST SOLUTION TO THE PROBLEM OF LEGISLATIVE ABDICATION

The so-called legislative veto was conceived as an instrument for securing congressional control over administrative agencies. At the same time Congress delegated power to an agency, it would reserve to itself the authority to "veto" the agency's exercise of that power in specific instances. In many situations, a legislative veto required the approval of only one House of Congress. The Supreme Court, however, held the legislative veto unconstitutional in *Immigration and Naturalization Service v. Chadha*.[93]

This Part analyzes the legislative veto using the doctrine of modified formalism and the constitutional theory of the second best. It concludes that the legislative veto is a legitimate second-best solution to the triggering error of excessive delegation of legislative power to administrative agencies. By evaluating the concrete example of *Chadha* and the legislative veto in light of the constitutional theory of the second best, I hope to clarify the theory and to demonstrate its strength and utility.

A. *Chadha*

1. *Background*

Chadha involved an unusual application of the legislative veto. Mr. Chadha was an East Indian born in Kenya who held a British passport.[94] He had entered the United States on student visa which expired in 1972,[95] and failed to leave the country at that time.[96]

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provision should affect the reading of provisions with similar language. My argument is similar: The *mis*reading of one provision should affect the *reading* of other provisions; or, alternatively, the *mis*reading of one provision in a particular context should affect the *reading* of that provision in other contexts.

93 462 U.S. 919 (1982). As I discuss below, *Chadha* itself was actually a rather unusual case. However, in subsequent cases, the Court summarily affirmed the view that the legislative veto was unconstitutional in the regulatory context. *See* Process Gas Consumer Group v. Consumers Energy Council of Am., 463 U.S. 1216 (1983), *aff'g* 673 F.2d 425 (D.C. Cir. 1982); United States Senate v. FTC, 463 U.S. 1216 (1983), *aff'g* 691 F.2d 575 (D.C. Cir. 1982).

94 *Chadha*, 462 U.S. at 923.

95 *Id.*

96 *Id.*

Accordingly, in 1973, the Immigration and Naturalization Service (INS) initiated appropriate procedures to deport him for overstaying his welcome.[97] Chadha conceded that he was deportable but filed an application for suspension of deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act.[98] This provision authorized the Attorney General to suspend deportation and to put an alien on track to become a permanent resident of the United States.[99]

Under the statutory provisions then in effect, an alien in Chadha's position would be eligible to remain in the U.S. and seek permanent-resident status if he met three conditions: (1) He had to have remained in the United States for a period of not less than seven years; (2) he had to be of good moral character; and (3) deportation would have had to result in a hardship to the alien or to a close relative who was either a citizen or legal resident of the United States.[100] The Attorney General's decision to suspend deportation was, in accordance with the statute, conveyed to Congress; if *either* the House of Representatives *or* the Senate passed a resolution disapproving the suspension, the Attorney General would be required to deport the alien.[101]

In Chadha's case, the Immigration Judge (to whom the Attorney General's authority was itself delegated) determined that Mr. Chadha met all three statutory requirements.[102] Accordingly, the Immigration Judge ordered the suspension of Chadha's deportation.[103] That decision was, as required by the statute, conveyed to Congress.[104] At the last possible session in which Congress could have exercised its legislative veto in Chadha's case, Representative Eilberg, Chairman of the relevant congressional committee, introduced a resolution opposing the decision to suspend the deportation of six aliens, including Chadha.[105] This resolution was passed without debate or a recorded vote, solely on the strength of Representative Eilberg's statement that the Committee did not believe Chadha and the other five aliens had met the statutory criteria.[106] Following the House veto of the order suspending Chadha's deportation, the INS reopened Chadha's depor-

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97 *Id.*

98 8 U.S.C. § 1254(a)(1) (1988). *See Chadha*, 462 U.S. at 919, 923.

99 8 U.S.C. § 1254(a)(1) (1988).

100 *Id.* § 1254(a)(1).

101 *Id.* § 1254(c)(2); *Chadha*, 462 U.S. at 925.

102 *Chadha*, 462 U.S. at 924.

103 *Id.*

104 *Id.*

105 *Id.* at 926.

106 *Id.* at 926-27.

tation hearings.[107] Chadha challenged the decision, and the case ultimately found its way to the Supreme Court.[108]

The Supreme Court found the legislative veto provision of section 244(c)(2) unconstitutional. Chief Justice Burger wrote the majority opinion, which commanded six votes; Justice Powell concurred in the judgment, but on different grounds;[109] Justices White and Rehnquist dissented.[110] In ruling as it did, the Court allowed Chadha to remain in the United States and, at least by implication, found over 200 other statutory provisions unconstitutional.[111]

2. *The Majority Opinion*

Chief Justice Burger's opinion is a textbook application of the formalist approach. The Court found that the legislative veto violated both the "presentment" and "bicameralism" clauses[112] of the Constitution.[113] Presentment and bicameralism are the familiar and, to the formalist, mandatory mechanisms by which a bill becomes a law. The bill must first be passed by a majority vote of both Houses of Congress[114] and then presented to the President.[115] The President may sign the bill or veto it. If the President signs the bill, it becomes a law. If the President vetoes the bill, it does not become a law unless both

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107 *Id.* at 928.

108 The Immigration Judge reopened the proceedings and ordered that Chadha be deported. *Id.* Chadha appealed to the Board of Immigration Appeals, arguing that § 244(c)(2) was unconstitutional. *Id.* The Board did not reach this issue, concluding that it lacked the authority to hold an Act of Congress unconstitutional. *Id.* Chadha then appealed the decision to the United States Court of Appeals for the Ninth Circuit, where the INS conceded that § 244(c)(2) was unconstitutional. *Id.* The Ninth Circuit invited both the House and Senate to file *amicus* briefs, which they did, arguing that the legislative veto provision was constitutional. *Id.* The Ninth Circuit held the legislative veto provision unconstitutional and ordered the INS to cease and desist from deporting Chadha. *Id.* Despite the fact that the INS had actually argued in the Court of Appeals that § 244(c)(2) was unconstitutional, the Supreme Court found that the Ninth Circuit's reversal of the INS's action left it "sufficiently aggrieved" to appeal the decision. *Id.* at 930-31.

109 *Id.* at 959 (Powell, J., concurring).

110 *Id.* at 1013 (Rehnquist & White, J.J., dissenting).

111 *Id.* at 967 (White, J. dissenting).

112 *Id.* at 955-59.

113 *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* House of Representatives.") (emphasis added); U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives *and* the Senate, shall, before it becomes a Law, be *presented* to the President of the Unites States . . . .") (emphasis added); U.S. CONST. art. I, § 7, cl. 3 ("*Every* Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary . . . *shall be presented* to the President of the United States; and before the Same shall take Effect, *shall* be approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives . . . .") (emphasis added).

114 U.S. CONST. art. I, § 7, cl. 3.

115 *Id.* cl. 2.

Houses of Congress approve it by a two-thirds majority.[116] To the formalist, this is the way—the only way—that a law may be enacted.[117]

Relying on these textual provisions, the Court concluded: "It is beyond doubt that lawmaking was a power to be shared by both Houses and the President."[118] Each element of this shared grant of power serves a specific purpose. "The President's role in the lawmaking process . . . reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."[119] Likewise, the bicameralism provision serves to divide legislative power, making its abuse more difficult.[120] All legislative action must meet these dual requirements.[121] Thus, the Court reasoned that if the House's action with respect to Chadha was properly characterized as "legislative in its character and effect," then that action violated the presentment and bicameralism provisions.[122]

According to the Court, Congress had "the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[123] The Court therefore found the legislative veto *was* "legislative in its character and effect." Because the action by Congress did not fall within any one of the "express constitutional exceptions authorizing the House to act alone,"[124] the Court accordingly held the legislative veto unconstitutional.

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116 *Id.* cl. 3.

117 *See* Lawson, *supra* note 7, at 900-01.

118 *Chadha*, 462 U.S. at 947.

119 *Id.* at 947-48 (*citing* THE FEDERALIST No. 73 (Alexander Hamilton)).

120 *See id.* at 949-51 (discussing contemporaneous sources that emphasize the need to divide legislative power between two Houses of a bicameral legislature).

121 *See id.* at 951 ("It emerges clearly that the prescription for legislative action in art. I., §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

122 *Id.* at 952. As the Court explained:

> Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether 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) (other citation omitted).

123 *Id.* at 952.

124 *Id.* at 956. The Court noted four constitutional exceptions to the bicameralism and presentment requirements, under which one House was given the power to act alone:

> a. The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 5;
>
> b. The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 6;
>
> c. The Senate alone was given final, unreviewable power to approve or disapprove Presidential appointments: Art. II. § 2, cl. 2;

3. *The Powell Concurrence*

Justice Powell concurred separately. Initially, he expressed reservations about the scope of the Court's reasoning. Noting that the Court's reasoning would entail striking down every single legislative veto, Justice Powell stated that "[t]he breadth of this holding gives one pause."[125] He therefore suggested a narrower, and, he argued, more appropriate ground for decision. The majority had characterized the action by Congress as legislative in character. Justice Powell disagreed, arguing that Congress had unconstitutionally assumed a judicial role.[126]

Justice Powell noted, as did the majority, that the Framers believed the combination of legislative, executive, and judicial power in a single organ to be a grave threat to liberty.[127] However, Justice Powell focused on different abuse, "prevalent during the Confederation," that the majority did not discuss: "the exercise of judicial power by state legislatures."[128] Combining legislative and judicial power in one department enabled that department "unilaterally to impose a substantial deprivation on one person."[129] In order to prevent such abuses on the national level, "the Framers vested the executive, legislative, and judicial power in separate branches."[130] This separation was accomplished by both the general provisions relating to separation of powers and specific provisions such as the Bill of Attainder Clause.[131] These provisions "reflect the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power."[132]

Justice Powell concluded that Congress' action with respect to Chadha was just such an abuse. He noted the course of proceedings:

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d. The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Chadha, 462 U.S. at 955. Notably, none of these provisions allow truly unilateral action. Items a and b should actually be read together, as removal from office requires both impeachment and trial. Similarly, the Senate's power to give its advice and consent to Presidential appointments and to ratify treaties gives the Senate the power to review and check Presidential action—not to initiate action on its own. In no case can either the Senate or the House act unilaterally to exercise governmental power.

125 *Id.* at 959 (Powell, J., concurring in the judgment).

126 *Id.* at 960 ("When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.").

127 *Id.*

128 *Id.* at 961.

129 *Id.* at 962.

130 *Id.*

131 *Id.*; *see* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

132 *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment). If legislatures are, as Justice Powell apparently concluded, institutionally incapable of providing a fair trial, one wonders why the Framers gave the Senate the power to conduct trials in cases of impeachment. *See* U.S. CONST. art. I, § 3, cl. 6.

Chadha's deportation was suspended; a report was sent to Congress; and the House, without hearing or debate, decided that six of 340 persons should not have their deportation suspended.[133] The reason given for the action by the House was that "the aliens did not meet [the] statutory requirements."[134] Such congressional action was, Justice Powell believed, "clearly adjudicatory."[135] Instead of adopting a general rule, the House "made its own determination that six specific persons did not comply with certain statutory criteria."[136] Moreover, Justice Powell noted, Congress made this decision absent any "internal constraints" or "procedural safeguards."[137] Consequently, he concurred with the majority that the legislative veto, as to Mr. Chadha and other similarly situated individuals, was unconstitutional. Unlike the majority opinion, however, Justice Powell's concurring opinion had no implications for the legislative veto as applied to agency rulemaking.

4. *Justice White's Dissent*

Justice White dissented.[138] Like Justice Powell, Justice White believed that the Court should have decided the case on narrower grounds.[139] Justice White attributed the rise of the legislative veto to the rapid growth of the administrative state during the New Deal.[140] He explained that the legislative veto provided a mechanism "by which Congress could confer additional authority [upon the Executive] while preserving its own constitutional role."[141] The legislative veto "is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[142] The legislative veto, therefore, served to "balance[ ] delegations of

133 *See Chadha*, 462 U.S. at 963-69.

134 *Id.* at 969.

135 *Id.*

136 *Id.* at 968.

137 *Id.* at 966.

138 Justice Rehnquist also dissented, but did not join White's dissent (Justice White did join Rehnquist's dissent). *See id.* at 1013 (Rehnquist, J., dissenting). Justice Rehnquist's opinion is not discussed separately because the grounds for his dissent—that Chadha lacked standing—are not relevant to this Article.

139 *Id.* at 967 (White, J. dissenting) (The Court "would have been well advised to decide the cases, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency rulemaking, some of which concern the independent regulatory agencies.").

140 *Id.* at 968 ("The legislative veto developed initially in response to the problems of reorganizing the sprawling Government structure created in response to the Depression.").

141 *Id.* at 969.

142 *Id.* at 972-73.

statutory authority in new areas of governmental involvement."[143] Thus, Justice White saw the legislative veto as crucial to the constitutional legitimacy of the administrative state.[144]

Justice White's dissent also noted the tension between the Court's flexibility with respect to the nondelegation doctrine and its rigidity with respect to the legislative veto. The notion that all exercises of legislative authority require compliance with the presentment and bicameralism requirements "ignores that legislative authority is routinely delegated to the Executive Branch, to the independent regulatory agencies, and to private individuals and groups."[145] Thus, consistent application of the majority's formalist approach would have required the invalidation of the administrative state. The Court, however has not preferred a consistent application of formalist jurisprudence. Justice White criticized this inconsistency, saying that "[i]f Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself."[146]

Justice White's dissent is therefore a textbook application of functionalism. His defense of the legislative veto appealed directly to the goals of separation of powers, rather than a strict understanding of the separate roles of each department. He contended that the legislative veto was not a threat to these goals because it has not historically "been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches."[147] Rather, the legislative veto has served as "a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art. I as the Nation's lawmaker."[148] In true functionalist fashion, his opinion also stressed the "history of accommodation and practicality"[149] in the separation of powers doctrine, but failed to specify the mechanism by which that history can be reconciled with the constitutional text and structure.

Because the majority opinion and the White dissent start with such different premises, the two opinions argne past each other. Had

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143 *Id.* at 969-70.

144 *Id.* at 978 ("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 if not the only means to insure its role as the Nation's lawmaker.").

145 *Id.* at 984.

146 *Id.* at 986.

147 *Id.* at 974.

148 *Id.*

149 *Id.* at 999. Justice White argued that the Court should invalidate governmental action "only when the challenged action violate[s] some express provision in the Constitution." *Id.* Apparently, Justice White does not consider the Vesting Clauses to be express provisions of the Constitution.

Justice White been armed with the theory of the second best, however, he could have attacked the majority opinion on its own terms, by demonstrating that textual fidelity actually requires that the legislative veto be allowed, at least in certain limited circumstances. It is to such a demonstration that I now turn.

B. Second Best Theory to the Rescue: Salvaging the Legislative Veto

The constitutional theory of the second best offers a framework within which the legislative veto can profitably be analyzed. If the legislative veto had arisen absent broad delegations of legislative power to administrative agencies, the Court would have been correct in concluding that the legislative veto violates the presentment and bicameralism provisions. As the *Chadha* majority demonstrated, the legislative veto is not consistent with a formalist reading of the constitutional text. Thus, standing alone, the legislative veto should not be allowed. However, the legislative veto is an appropriate method of compensating for the prior, irreversible error of allowing the open-ended delegation of legislative authority. In my parlance, the legislative veto serves as a legitimate compensating institution for the triggering error of open-ended delegation of legislative authority.[150]

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150 Abner Greene has advanced a position that is similar to my own with respect to the implications of open-ended delegation of lawmaking authority. Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994). Greene's argument is similar to that made here in that we both believe that "if we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers' principles . . . we must also accept some (though not all) congressional efforts at regulating presidential lawmaking." *Id.* at 124. In forwarding this proposition, Professor Greene has made a valuable contribution to the literature.

There are, however, at least two significant flaws in his analysis. First, although Greene is correct in concluding that the nondelegation doctrine really is dead, *see id.* at 154-55, he does not provide a theory of precedent to legitimate his claim. Modified formalism, by contrast, incorporates a theory of precedent that provides a standard for concluding that the original "instruction manual" has been superseded. Moreover, Greene appears, at least in tone, too willing to accept modifications to the constitutional scheme that are not absolutely necessary. For example, he suggests at one point that we should "take[ ] the framers seriously, but metaphorically rather than literally." *Id.* at 129. I am not exactly sure what this means. But, in any case, the prophylactic goals of separation of powers require that the Constitution be taken literally, except when doing so is institutionally impossible. *See supra* notes 22-42 and accompanying text.

Second, Greene's proposed solutions do not adequately restore the balance of power between departments. Greene argues, for example, that Congress should be able to block Presidential lawmaking by joint resolution. *See* Greene, *supra*, at 187. However, a one-House veto more nearly restores the prior balance of power—bicameral approval. *See infra* notes 186-87 and accompanying text.

1. *Allowing the Open-Ended Delegation of Legislative Power Is a Significant Constitutional Error*

Congress cannot delegate legislative power. Article I, Section 1 of the Constitution provides: "*All* legislative Powers herein granted shall be *vested* in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[151] The text of this Vesting Clause suggests that legislative powers are nondelegable: *"All"* legislative powers (not just some) are *"vested"* in Congress. Moreover, nowhere does the text accord Congress the express authority to give this lawmaking power to anyone else. Nondelegation is further supported by constitutional structures. Neither the presentment nor the bicameralism provisions, nor, for that matter, the detailed provisions regarding the makeup and mode of election of Congress, would make sense if legislative power could be transferred to a body not so encumbered.[152]

Supreme Court precedent recognizes the principle of nondelegation, although it is honored mostly in the breach. As the Court put it in *Field v. Clark*, "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[153] Despite "lenient" review of claimed violations of the nondelegation doctrine, the Court has never explicitly repudiated the nondelegation principle.[154] Even cases that allow extensive delegations pay lip service to it.[155] Nonetheless, the Court has applied the nondelegation principle to strike down impermissible delegations in only two cases, *Panama Refining Co. v. Ryan*[156] and *A.L.A. Schechter Poultry Corp. v. United States.*[157] These cases have been widely interpreted as the Supreme Court's attempt to undermine the New Deal, and neither has much vitality today.[158]

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151 U.S. CONST. art. I, § 1 (emphasis added).

152 The presentment and bicameralism provisions are discussed *supra* at notes 112-24 and accompanying text. Relevant provisions regarding the makeup of Congress include U.S. CONST. art. I, § 2, cl. 1 & 2 (describing makeup of House of Representatives); art. I, § 2, cl. 3 (mode of election of House); art. I, § 3 cl. 1 & 3 (makeup of Senate); art. 1, § 3, cl. 1 & 2, and amend. XVII (mode of election of Senate).

153 143 U.S. 649, 692 (1892). *See also* Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.").

154 David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 29.

155 *See* Mistretta v. United States, 488 U.S. 361, 371-72 (1989) ("[W]e have long insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (quoting Field v. Clark, 143 U.S. at 692).

156 293 U.S. 388 (1935).

157 295 U.S. 495 (1935).

158 *See* Stephan L. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 729.

Regardless of any political motive the Court may have had in these cases, however, both *Panama Refining* and *Schechter* represent a relatively straightforward application of the nondelegation principle. Both cases involved provisions of The National Industrial Recovery Act, a broad-ranging statute enacted in response to the Depression. The provision at issue in *Panama Refining*, allowed, but did not require, the President to prohibit the interstate transportation of oil that exceeded the mandatory quotas of oil production allowed by particular states.[159] However, the President's discretion to enforce such prohibitions was left effectively unfettered.[160] The Court was willing to allow some leeway for interstitial executive rulemaking, conceding that Congress could "lay[ ] down policies and establish[ ] standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."[161] However, the Court found that "the Congress has declared no policy, has established no standard, has laid down no rule."[162] The executive, therefore, was not charged with the making of "subordinate rules" within a policy set by Congress; rather, it was charged with making the policy itself. Accordingly, the statute was held to constitute an unconstitutional delegation of legislative power.

In *Schechter*, the Supreme Court held unconstitutional another provision of the National Industrial Recovery Act. That provision allowed the President to approve "codes of fair competition"—essentially cartel agreements promulgated by industry groups and then enforced by the government.[163] The statute provided in general terms that a code was to meet some general goals, but it did not specify the mechanism by which these general goals were to be achieved.[164] Accordingly, as in *Panama Refining*, the Court found that the statute violated the nondelegation doctrine:

> [I]n that wide field of legislative possibilities, the proponents of a code . . . may roam at will and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code "will tend to effectuate the policy of this title." While this is called a finding, it is really but a statement of an opinion as to the general

159 *Panama Refining*, 293 U.S. at 406.

160 *Id.* at 415 ("[The statutory provision] does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission.").

161 *Id.* at 421.

162 *Id.* at 430.

163 *Schechter*, 295 U.S. at 521-22.

164 *Id.* at 534.

> effect upon the promotion of trade or industry of a scheme of laws.[165]

In short, the statute at issue in *Schechter* was unconstitutional because it failed to constrain the President in any manner.

In the years following *Schechter* and *Panama Refining*, however, the Court has not enforced the nondelegation doctrine scrupulously. Indeed, one commentator has characterized the Court's attitude regarding the nondelegation doctrine as being one of "complete abandonment."[166] In order to see how thoroughly the Court has reversed its field on the nondelegation doctrine, one need only examine a case decided about fifty years after *Schechter Poultry* and *Panama Refining*. In *Mistretta v. United States*,[167] the Supreme Court demonstrated its willingness to approve a statutory scheme giving a commission the power to "roam at will" through various possible sentencing schemes and "approve or disapprove" such schemes "as [it] may see fit." Indeed, it did so by an eight to one vote.

In *Mistretta*, the Court upheld the Sentencing Reform Act, which created an agency—the United States Sentencing Commission (the Sentencing Commission)—with the sole task of writing laws, and gave that agency virtually free reign to write them as it saw fit. The sole purpose of the Commission was to promulgate guidelines that would limit the discretion of sentencing judges.[168] The Sentencing Commission could not exceed certain maximum penalties set forth in the statute.[169] The Commission was to use current average sentences as a "starting point"[170] from which to establish sentences, but it could make the new sentences either more or less severe than before.[171] In addition, the statute listed four very general purposes that were to guide the Commission's deliberations.[172] Finally, the Commission was

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165 *Id.* at 538 (quoting the National Industrial Act, ch. 90, 48 Stat. 195, 198-99 (1933) (repealed 1966)).

166 Lawson, *supra* note 10, at 1241.

167 488 U.S. 361 (1989).

168 28 U.S.C. § 991(a) (1988) (establishing U.S. Sentencing Commission, "an independent commission in the judicial branch of the United States"). The statute also set forth the terms of Commissioners, eligibility criteria for Commission membership, and established conditions for removal of Commissioners. *Id.*

169 *Id.* § 994(b)(1).

170 *Id.* § 994(m).

171 Indeed, Congress apparently intended it do so. The statute provided that "[t]he Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." *Id.* The statute does not, however, indicate in which cases the then-current sentences failed to reflect the seriousness of the offense or the direction of this failure (whether current sentences are thought to be too harsh, not harsh enough, or some of both).

172 18 U.S.C. § 3553(a)(2) (1988) lists four goals that sentencing is supposed to accomplish:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

instructed to consider seven factors in developing offense categories[173] and eleven factors in developing categories of defendants.[174] In sum, the Commission was bound to use current sentences as a "starting point" and to consider four purposes and eighteen different factors in developing its guidelines.

The choices made by the commissioners were very similar to the choices a legislature might make. Although Congress gave the Commission some things to think about, these assorted considerations certainly did not operate to constrain it or set a policy for it to apply. The only constraint on the Commission was mathematical: Within a par-

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(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

The Sentencing Commission was to take these goals of sentencing into account in developing its guidelines. 28 U.S.C. § 994(g). Furthermore, it had the task of discovering the implications of each of these general goals on the sentencing scheme.

173 The seven factors to be considered, "among others," with respect to offense categories were:

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

Id. § 994(c). The Commission was to consider the extent to which these factors were relevant and to "take them into account only to the extent that they do have relevance." *Id.*

174 The 11 factors to be considered, "among others," in developing offender categories were:

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

28 U.S.C. § 994(d). Again, the Commission was to determine whether these factors were relevant, and to consider them "only to the extent that they do have relevance." *Id.*

ticular guideline range, the maximum term could exceed the minimum by no more than "the greater of 25% or 6 months."[175]

The Court upheld this statute, finding that Congress had articulated an "intelligible principle."[176] The words used in the Sentencing Reform Act are certainly "intelligible," at least in the sense that they appear to be standard English words arranged in complete sentences. The statute is not gibberish. It is, however, difficult to ascertain any *controlling* principle. So long as the Commission left a paper trail to demonstrate that it "considered" the statutory purposes and factors, virtually the only way that the Commission could have failed to meet the statutory requirements would have been to refuse to issue any guidelines at all. The standards to be applied by the Commission were formulated so generally that virtually any result would have satisfied them. Thus, the *Mistretta* Court allowed the Sentencing Commission to exercise unconstrained policy judgment.

Although the Court has not expressly recognized the death of the nondelegation doctrine, many other doctrines would be incomprehensible if the Court really applied it. For example, the rule laid down by the Court in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*[177] only makes sense if one assumes that legislative power is being delegated. *Chevron* addressed the issue of whether the EPA's organic statute permitted it to use the so-called "bubble" method in dealing with certain environmental problems.[178] The Court held that

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175 28 U.S.C. § 994(b)(2). An exception to this rule provided that the maximum could be a life sentence where the minimum sentence within the range was 30 years or more. *Id.*

176 488 U.S. at 372 (describing the test as whether Congress has articulated an "intelligible principle"). The "intelligible principle" language originated in J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1927), an early nondelegation case. There, the Court ruled on a statute giving the President the duty to set tariff rates in order to "equalize" the cost of production in the United States and foreign countries. *Id.* at 401. The Court determined that Congress' purpose was to "secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country . . . and the cost of producing and selling like or similar articles in the United States." *Id.* at 404. The Court conceded that it might be difficult to make the relevant factual determination, but it nonetheless believed that "the difference which is sought in the statute is perfectly clear and perfectly intelligible." *Id.* Accordingly, *J.W. Hampton* did not involve a statute that was merely "intelligible" in a loose sense of the term. Rather, the statute *required* the President to make an admittedly difficult factual determination and then act on that factual determination in a prescribed manner. The action that the President was required to take was "perfectly clear." *Id.* Thus, the statute did not delegate policymaking authority to the President. Nor did the language of the case purport to allow such a delegation, despite the Court's unfortunate use of the word "intelligible."

177 467 U.S. 837 (1984).

178 The EPA had allowed the states "to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.' " *Id.* at 840. The issue in the case was whether this policy was consistent with the statutory term "stationary source." *Id.*

the EPA's interpretation of its organic statute was entitled to deference.[179] The purported constitutional underpinning for this rule, according to the Court, was that such interpretations involved a policy decision best not made by the judiciary.[180] This analysis only makes sense once one concedes that the agency is making policy judgments akin to those that Congress makes. Were the agency really "bound" by its statute—if, as the nondelegation doctrine supposedly requires, the statute made the policy calls—then the Court would not be usurping a political function by interpreting the statute de novo.

In a practical sense, then, the nondelegation doctrine is dead. Agency regulations have the force of law and set general rules governing the conduct, rights, and obligations of citizens.[181] Justice White's *Chadha* dissent was therefore quite accurate in its observation that, despite the failure of the Supreme Court to renounce the nondelegation doctrine outright, agencies make "law" all the time.[182] What Justice White failed to recognize, however, is that this state of affairs is unconstitutional.

2. *Open Ended Delegations of Legislative Power Are Here to Stay: Applying the Minimalist Theory of Precedent*

Under the formalist paradigm, open-ended delegations of legislative power are unconstitutional. Nonetheless, the minimalist theory of precedent built into modified formalism requires an examination of institutional reliance interests that have built up around a particular practice before that practice may be rejected as unconstitutional. The administrative state is a paradigm case for application of the minimalist theory of precedent. Widespread institutional and cultural reliance interests have formed around the ability of Congress to delegate its power to executive and independent agencies. Were it not for the collapse of the nondelegation doctrine, the federal government could not conduct the wealth transfers and regulatory activity that have become integral to economic and social expectations in our society. Eliminating the rulemaking authority of agencies such as the SEC, the FTC, the FCC, and others by resurrecting the nondelegation doctrine would create chaos. Thus, the minimalist theory of precedent coun-

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179 *Id.* at 843-44.

180 *Id.* at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.' ") (citation omitted). For a thoughtful critique of the claimed constitutional underpinnings of *Chevron*, *see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

181 *See* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (regulations have the force of law).

182 *Chadha*, 462 U.S. at 986 (White, J., dissenting) ("There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.").

sels against overruling the cases that form the foundations of the administrative state.

Indeed, these changes have been so entrenched that they led Bruce Ackerman to defend the constitutionality of the administrative state on grounds very similar to intellectual adverse possession. Although Professor Ackerman appears to be a fan of the administrative state, he is intellectually honest and therefore willing to admit that the administrative state raises troublesome constitutional issues.[183] Thus, in defense of the administrative state, he argues that the structural changes that have occurred since the New Deal (and the widespread acquiescence to those changes) amount to a constitutional amendment.[184] However one conceptualizes the constitutional change that took place in the late 1930s, Professor Ackerman is certainly correct in observing that all three departments have acquiesced in this change over a significant period of time.[185] For the Court blithely to attempt to returu to the original understanding of the Constitution today would be politically impossible as well as imprudent. It would undermine the institutional stability that courts and legal systems are supposed to enhance. Accordingly, like it or not, agencies will have—and should be allowed to retain—effective lawmaking authority.

3. *The Legislative Veto Is a Legitimate Second-Best Solution to the Problem of Excessive Delegation*

Open-ended delegations are both unconstitutional and entrenched. Accordingly, while the Court should not overrule prior cases allowing such delegations, it should consider them a triggering error and allow Congress to create compensating institutions.

The legislative veto is one such compensating institution. As Justice White sensed, the legislative veto is a move closer to the proper constitutional balance.[186] The constitutional baseline requires trilateral approval (or bilateral approval with a supermajority) of any law.[187] Delegation of legislative authority to the executive department represents a move away from that baseline. As Justice White pointed out, however, the legislative veto represents a move back toward that baseline. Once the executive chooses to depart from the status quo, the legislative veto allows a majority of either House of Congress to block that departure. Thus, under a scheme combining delegation

183 *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1053-54 (1984).

184 *Id.* at 1055.

185 *Id.*

186 *Chadha*, 462 U.S. at 994-95 (White, J., dissenting).

187 *See supra* notes 112-24 and accompanying text (discussing presentment, bicameralism, and veto provisions).

with a legislative veto, bicameral approval is still required; it is just that most actions will be approved tacitly rather than explicitly.

At the very least, giving Congress the right to veto administrative actions increases the number of distinct bodies that can disapprove of a particular proposal before it becomes "law." Increasing the number of people who must agree on a particular action has a certain liberty-enhancing value. As Alexander Hamilton explained in defending the propriety of giving the President veto power: "The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation . . . ."[188] Administrative action that is subject to a legislative veto will be exposed to greater scrutiny, which may improve the quality of that action or prevent ill-conceived action. Thus, the legislative veto is consistent with the constitutional principle of protecting liberty by setting the ambitions of various institutions against each other.

By contrast, the result of the Court's current nondelegation jurisprudence, together with the *Chadha* decision, is to concentrate in an unelected administrative agency more power than is given to either the House or the Senate. This result seems odd. Just as the danger of unchecked authority led to the creation of a bicameral legislature and a careful crafting of the executive power, that danger counsels in favor of the imposition of checks on the power of administrative agencies. The legislative veto provides one possible check. Like any human institution, the legislative veto works imperfectly; nonetheless, it provides at least *some* viable means of checking agency action.

4. *What About the Text?*

The legislative veto is a compensating institution intended to counterbalance the triggering error of allowing excessive delegation. But, under the formalist paradigm, the legislative veto is itself unconstitutional. Thus, the legislative veto is not exactly a "compensating institution," but rather a "compensating error." This Article argues that, in this case, two wrongs may not quite make a right, but that two wrongs are better than one alone.

A skeptic might ask how it could ever be justifiable for the Court to ignore specific textual provisions. After all, the Court itself rejected Justice White's functionalist argument partly on the ground that neither convenience nor utility can suffice to uphold the legislative veto.[189] While it is true that the legislative veto is unconstitutional if

188 THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

189 *See supra* note 31 (discussing formalist unwillingness to take into account pragmatic considerations in deciding separation of powers cases).

measured against the formalist constitutional baseline, it is not at all clear that formalism provides the right standard here.

The constitutionally relevant baseline is not the formalist Constitution but is instead the *modified* formalist Constitution. The constitutional analysis must, in other words, take into account changes in the constitutional context. The legislative veto must be measured against the actual alternative—a world of open-ended delegation—not against a hypothetical ideal. The legislative veto, by countering the error of excessive delegation, serves the separation of powers scheme considered as a whole. Agencies are now allowed to promulgate regulations under statutes that offer little or no constraint. "Laws" are passed without approval of either House of Congress, and, in the case of some agencies, even without the effective consent of the President. Such a system itself violates the presentment and bicameralism provisions of the Constitution. Under a system that includes the legislative veto, "laws" are *still* implemented in violation of the presentment and bicameralism provisions, but Congress retains a functionally similar (although not identical) check that can operate to torpedo such laws. Thus, a system of delegation of legislative power with the legislative veto is a less serious violation of these provisions than a system of free-standing delegation. The legislative veto is therefore more consistent with constitutional principles than its real-world alternative. Accordingly, it should be upheld.

Put somewhat differently, the legislative veto works, at least when exercised, to block the implementation of regulations that were promulgated in an unconstitutional manner. What could possibly be wrong with that?

C. Applying the Theory of the Second Best to *Chadha*

The application of the theory of the second best to *Chadha* itself is interesting. *Chadha* may not have involved the typical legislative veto designed to curb excessive delegation of truly legislative authority. The INS' decision to suspend Mr. Chadha's deportation could be characterized as a legislative, executive, or judicial act. Whether the theory of the second best can be invoked to save the particular legislative veto exercised in *Chadha* turns on that characterization.

If the decision with respect to Mr. Chadha was properly characterized as inherently legislative, then the initial delegation to the Attorney General was an unconstitutional delegation and, because it would be irreversible, a triggering error. Thus, the Court would have been wrong in striking that legislative veto because it would compensate for a prior, ingrained error.

Alternatively, if the decision to suspend Chadha's deportation could properly have been left to the executive department, then the

Court was correct. If the delegation was constitutional in the first instance, then the legislative veto would be unconstitutional. If there is no triggering error, then there is nothing to compensate for, and, therefore, no justification for the legislative veto.

Finally, it is possible that Chadha's claim was inherently within the purview of the judicial department. If that is the case, then there would be a triggering error since, under the formalist model, the transfer of an inherently judicial task to the executive department is as unconstitutional as the transfer of an inherently legislative power to the Executive.[190] Nonetheless, the legislative veto would not serve as a compensating institution. Giving the legislature a say in the decision to allow Mr. Chadha to remain in the United States would not result in a move toward the constitutional baseline if the decision in *Chadha* was inherently judicial in nature. Indeed, for all of the reasons discussed in Justice Powell's concurrence,[191] legislative involvement in an inherently judicial function would probably be worse than its involvement in a purely executive decision.

Accordingly, the constitutionality of the legislative veto that would have resulted in Chadha's deportation depends on how that veto is characterized. Only where the Constitution has already been flouted in a particular manner—where there has been an unconstitutional delegation of inherently legislative power—is the legislative veto a legitimate option.

CONCLUSION

Administrative governance has two fundamental characteristics: delegation and combination. Legislative and adjudicative tasks are delegated to an independent or executive agency, where those tasks are combined. I have applied the theory of the second best to one particular triggering error—delegation of legislative authority—and suggested one particular compensating institution—the legislative veto. But the theory of the second best can have broader application than the legislative veto. Let me offer a few tentative thoughts on further applications of this theory, with the caveat that I have not subjected these thoughts to the necessary rigorous analysis.

Perhaps the theory of the second best might require the judiciary to take a more—gasp—activist role in forging compensating institutions. For example, an alternative second best solution to the triggering error of legislative delegation would be to require that more

190 *See* Lawson, *supra* note 7, at 879 (arguing that, under the formalist model, all exercises of "the judicial power" must be by Article III judges). For whatever reason, however, the Supreme Court has not agreed with Professor Lawson. *See Freytag*, 501 U.S. at 888-90 (non-Article III courts may exercise the judicial power).

191 *Chadha*, 462 U.S. at 959 (Powell, J., concurring).

rulemaking take place in formal, on-the-record proceedings. Perhaps requiring that the agency meet procedural requirements could substitute for presentment and bicameralism.[192]

Nor is the delegation of legislative power the only possible triggering error. Just as the administrative state involves the unconstitutional delegation of legislative power, so too does it involve the unconstitutional delegation of judicial power.[193] Such delegations are as central to the administrative state as delegations of legislative power. Furthermore, the courts currently review factual determinations by administrative agencies under a very deferential standard.[194] Nobody today challenges this practice, but it nonetheless raises a serious Article III problem. Perhaps additional procedural safeguards, or a harsher standard of review, would be appropriate.

Even more importantly, the administrative state involves the combination of these improperly delegated powers with each other and with the exercise of proper executive powers.[195] One of the most troubling combinations is the combination of prosecutorial and adjudicative functions. Perhaps a judicially imposed doctrine of separation of functions within agencies would serve to ameliorate this difficulty. In particular, the Court might consider requiring that, as in the NLRB, prosecutorial and adjudicative functions be kept separate, or that Administrative Law Judges be given protections akin to salary and tenure protections.[196]

Administrative bodies exercise governmental authority outside of the constitutional mechanisms designed to regulate that exercise of power. That is not going to change any time soon. With the exception of a few curmudgeons, most people seem reasonably satisfied with the system. At least politically, the abolition of administrative

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192 This would call into question a number of Supreme Court cases, including, most notably, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (holding that an agency was not required to provide procedural protections greater than those set forth in the Administrative Procedure Act (although it was free to do so if it wished)).

193 *See supra* note 190 (discussing requirement that only Article III judges exercise "the judicial power").

194 Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951) (holding that findings of fact by administrative agencies in formal proceedings will be upheld if supported by "substantial evidence").

195 *See* Lawson, *supra* note 10, at 1248 ("The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body.").

196 Some have argued that due process values require adjudicative independence. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 499 (1986) (discussing independence of Administrative Law Judges). While I might reach some of the same conclusions on this issue as would Professors Redish and Marshall, I would reach those conclusions by a separation of powers path rather than a due process path.

agencies and a return to the formalist system of constitutional governance has become unthinkable.

This unwillingness to challenge the underpinnings of the administrative state accounts for the Supreme Court's unwillingness to face up to the challenges raised by its growth. If the Court were to address these problems honestly, the Court might be forced to face the prospect of refighting the battle that it lost over the New Deal. I would agree that the Court could not win, and should not attempt such a battle. It is better, however, for the Court to concede that our current government is, in many respects, inconsistent with the structural Constitution. If the Court were to adopt a minimalist theory of precedent in combination with a constitutional theory of the second best, such a concession would not require the Court to attempt unilaterally to abolish the New Deal. By adopting this approach, however, the Court could address the issues raised by the "Fourth Branch" in an honest and straightforward manner. Even people who wholeheartedly approve of the administrative state should be at least a little troubled by the degree to which it compromises constitutional values. At the very least, we should try to limit the damage to these values as much as possible.