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How Separation of Powers Protects Individual Liberties

Cynthia R. Farina

Cornell Law School, crf7@cornell.edu

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change and progress. They must also have a chance to address and change the world they inherit.

Thus, as we ponder the various interpretive possibilities presented by separation of powers questions, it is, perhaps, wise to recall the following folktale:

There is an Indian story—at least I heard it as an Indian story—about an Englishman who, having been told that the world rested on a platform which rested on the back of an elephant which rested in turn on the back of a turtle, asked: what did the turtle rest on? Another turtle. And that turtle?

“Ah, Sahib, after that it is turtles all the way down.”²²

D. CYNTHIA R. FARINA*

Unlike Professor Aman, my purpose here *is* to join issue with what he calls the formalist approach to separation of powers. One might also call it the “literalist” approach; that is, a notion that the sum and substance of this concept are captured in the words themselves—“separation of powers”—and mean nothing more, or less, than a division of distinguishable strands of governmental authority traditionally conceived of as the executive, the legislative and the judicial powers.

My thesis is that the literalist approach is both wrong and dangerous: wrong as an historical matter, and dangerous as an analytic framework for approaching issues of interbranch relations in contemporary government. Let me begin with the “wrong.”

Discussions of the meaning of separation of powers in our Constitution almost always start with the man that Hamilton and Madison refer to in *The Federalist* as “the celebrated Montesquieu.”¹ You are probably familiar with the often quoted passage of Montesquieu’s work in which he argues:

When the legislative and executive powers are united in the

22. C. GEERTZ, *THE INTERPRETATION OF CULTURES* 28-29 (1973).

* Assistant Professor of Law, Cornell University. For fuller treatment of many of the ideas discussed here, see Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

1. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961); THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

same person, . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.²

He concludes with a dire warning: "There would be an end of every thing, were the same man, or the same body . . . to exercise those three powers. . . ."³

This passage certainly supports a literalist interpretation of separation of powers. It conceives the task of governing as comprised of three distinct functions and insists that those functions must be divided and given to separate organs of government if the liberty of the people is to be secure. Other portions of *The Spirit of Laws* support a different interpretation but, without doubt, the literalist vision of separation of powers does find a home in Montesquieu's works. And it was this vision that was enormously attractive to the Americans in 1776. In the years immediately preceding the Revolution, they had tried to understand what went wrong with the British Constitution, that British rule could have become so abusive. Ultimately, they concluded that the king, with the help of his ministers, had managed to subvert the independence of Parliament. By gaining control of Parliament, he had gained control of the legislative power; when this power was joined with his own executive power, he could then become tyrannical.⁴

Thus, the early Americans believed they had witnessed the proof of what Montesquieu said: evil results when you fail to maintain a separation, a division, between the executive and legislative powers. When they set out to design their own systems of government—which as of 1776 would have been primarily the state constitutions, for there was yet no sense of anything but a loose confederation on the federal level—they were determined to learn from Britain's mistakes. Although the precise structure differed from state to state, these early constitutions tended to share key characteristics. At least formally, they provided for a strict division of powers,⁵ and they deliberately denied the chief execu-

2. MONTESQUIEU, *THE SPIRIT OF LAWS* 174 (T. Nugent trans. 1873).

3. *Id.*

4. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 33-34, 42, 79, 143-48, 156-58 (1969).

5. See M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 119-20 (1967).

tive, the governor, powers such as the veto power and the appointment power, which the early Americans believed had enabled the king to subvert the independence of Parliament.⁶

But what a disillusionment. Under these early divisionist constitutions, the state legislatures not only made and changed laws, with abandon, but they began to take over executive and judicial tasks as well.⁷ As the decade after the Revolution proceeded, political observers increasingly concluded that these early constitutions had, quite unwittingly, created a new species of dangerous concentration of powers—this time in the hands of the legislature.⁸ They also began to recognize the weakness of a structural theory that focused on formally dividing power without providing any affirmative mechanism to restrain usurpationist behavior and to counteract the gradual movement of power over time.⁹ What was their solution? Ultimately they went back to another ancient structural theory of government, the theory of mixed government.

In its classical form, mixed government tries to achieve stable, controlled government by assuring that the major orders of society—the king, the aristocracy, and the common people—each have power in the government sufficient to prevent any one order from imposing on any of the others.¹⁰ Like separation of powers, the theory of mixed government tries to control power through a structural device. But unlike the literalist interpretation of separation of powers, which focuses on parceling out government functions to different hands, mixed government tries to avoid tyranny by ensuring that different hands are jointly responsible for the performance of key functions.¹¹

In 1776, the message of mixed government—that you could restrain government by forcing authority to be shared so that power counterbalances power—was rejected by most Americans. After all, the theory seemed rooted in assumptions about the natural order of things—that society was a three-tiered hierarchy of a king, aristocracy, and common people—that were antithetical to a people who thought they were establishing a democracy. But with

6. *See id.* at 134-35.

7. *See id.* at 143; T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (W. Reden ed. 1955).

8. *See* T. JEFFERSON, *supra* note 7, at 120; THE FEDERALIST No. 47, *supra* note 1, at 334-43.

9. *See generally* M. VILE, *supra* note 5, at 143-44; G. WOOD, *supra* note 4, at 446-53.

10. *See* M. VILE, *supra* note 5, at 33-35.

11. *See id.* at 33.

the failure of the early divisionist constitutions, influential political thinkers began to reassess the theory of mixed government.¹²

I will not detail here the process by which American political thought managed to cut loose the critical idea of shared, counterbalancing power from the class-based roots of mixed government. What is important for our present discussion is that by 1787, the cutting loose had been accomplished. Once the idea of shared, counterbalancing power became, if you will, "available" to American political theorists, it could become the affirmative mechanism of restraint that separation of powers in its literalist interpretation lacked. The result was to create, by 1787, a new and uniquely American vision of what separation of powers means.

Thus, we see Madison urging the delegates in Philadelphia to look beyond the goal of simply dividing power and, instead, to craft a governmental structure that affirmatively seeks balance. He says to them:

If a Constitutional discrimination of departments on paper were a sufficient security to each agst. encroachments of the others, all further provisions would indeed be superfluous. But experience has taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper.¹³

Later, the Constitution is attacked for disregarding separation of powers by allowing, in several instances, one branch to share a form of power not rightfully its own. What is Madison's response in *The Federalist*? He turns that argument around on itself. He says: "[U]nless these departments be so far connected and blended, as to give each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained."¹⁴

Balance was the recurring theme in how the Framers talked about what they created. James Wilson, the influential delegate from Pennsylvania, says: "[I]n government, the perfection of the whole depends on the balance of the parts. . . . Each part acts and is acted upon, supports and is supported, regulates and is regulated by the rest."¹⁵ Alexander Hamilton, speaking to the

12. See *id.* at 145-48.

13. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77 (M. Farrand ed. 1911).

14. THE FEDERALIST No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

15. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 416 n.59 (1935).

New York Ratifying Convention, states: "The true principle of government is this: make the system complete in its structure; give a perfect proportion and balance to its parts; and the powers you give it will never affect your security."¹⁶

This history suggests that our tendency to talk about the constitutional structure as one of separation of powers *and* checks and balances can be misleading, for it implies a distinction between those two ideas which, for the Framers, did not really exist. By the time of the ratification, the prevailing understanding of "separation of powers" was no longer a simplistic call for dividing conceptually distinct government functions. It had come to connote something far more subtle and intricate than mere abstractly logical division. It had come to connote the expectation that, through the carefully orchestrated sharing of power, power would, over time, be able to counterbalance power.

In sum, the literalist interpretation is wrong as an historical matter. It is a conception of separation of powers that may accurately reflect where American political thought was in 1776, but this conception had been rejected, or at least radically modified, by 1787 in favor of a more complex, and more effective, vision of separation of powers. In the 1787 vision, the critical concept is not the *division* of powers, but the *balance* of power.

Now, why does any of this matter? This brings me to my second objection to the literalist interpretation, which is that it is a dangerous conception upon which to approach issues of inter-branch relations in contemporary government. It is dangerous for two reasons.

In the first place, if the literalist interpretation of separation of powers is correct, then the reality of contemporary American government cannot be squared with the Constitution. It is hardly a revelation to point out that the modern administrative state is a world where the three traditional "powers" are commingled regularly and on a grand scale. This is a reality which, even with the present momentum in favor of deregulation, is not likely to significantly change. It is a reality that is hopelessly at odds with the literalist conception of separation of powers. If legal theory becomes hopelessly at odds with reality, something is going to give. And, since the reality of the administrative state is unlikely to

16. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 331 (J. Elliot ed. 1836).

change, the real risk is that we will come to regard separation of powers as an anachronism: It was a simple and elegant theory suited to the simple and elegant eighteenth century, but life in the twentieth century is never simple and rarely elegant, and separation of powers is a luxury America can no longer afford. If we reach the point of paying only lip service to separation of powers, we will have abandoned one of the principal constitutional devices for controlling government at a time when the level of extant federal power is greater than at any point in our history, without having adopted any alternative theory of constraint. And that is dangerous.

If, however, we recognize the essence of separation of powers *not* as an obsession with maintaining a particular division of powers *but rather* as an ongoing striving for a balance of power among the power centers of government, then we have a legal theory that can deal with the fact that regulatory statutes have radically altered the pattern of government power. Then we can say that it is all right that these new configurations of power have evolved, *provided that* new patterns of counterbalance emerge to provide restraint.

Now, I do not mean to suggest that this more fluid, contextually-sensitive conception of separation of powers makes for easy answers to contemporary questions of interbranch relations. It is enormously difficult to determine whether new concentrations of powers are adequately counterbalanced and, if not, where and how counterbalance is to be found. But this is an interpretation of separation of powers that has a chance to survive and meaningfully function as a theory for controlling government power in the twentieth century because, unlike the literalist interpretation, it is a theory that can accommodate and respond to the reality of the administrative state.

The second sense in which the literalist interpretation is dangerous is that is typically put forth as a predicate for arguing that the President's position is being unconstitutionally undermined by a particular statutory arrangement. On its face, of course, the literalist interpretation does not favor any one branch over the others. In fact, however, it almost always *becomes* a president-favoring interpretation because its proponents conjoin it with (1) an expansive view of the scope of the executive power and the meaning of the Take Care Clause, and/or (2) an historical reference to the Framers' fear of usurpation by the legislature and

their concomitant determination to provide for a strong president. So, for example, the literalist interpretation is often advanced to insist that the only constitutional salvation for the independent agencies is increased presidential control.

I will not dwell here on whether the literalists are being internally inconsistent when they demand that the President have control over entities much of whose power would be categorized as "legislative" and "adjudicative" if the traditional labels were applied. For the moment, I simply want to focus on the fact that the literalist interpretation is now generally invoked to favor the President in interbranch power struggles. Because of this fact, the literalist interpretation has the capacity to propel us towards precisely the danger the Framers were trying to avoid.

The Americans' experience, first with Britain and then in the Confederation period, taught them that power becomes dangerous when it is disproportionately concentrated; that is, when a government system is out of balance. Whether the imbalance is in the executive branch (the King who had subverted Parliament) or in the legislative branch (state legislatures who wielded power with abandon) the consequence is the same—abuse of power and oppression. So they set up a system that tried to place the parts of government in balance and contained mechanisms to maintain that balance.

But, over two hundred years, American society changed. In particular, the national government moved to intervene in virtually every aspect of our economic and social life, thus greatly increasing the level of extant federal power. Especially important is the manner in which this intervention has been accomplished: Congress has delegated a considerable portion of its power to make public policy to agencies. If Congress then policed how agencies use this power, if it monitored them and intervened to correct their policy judgments in a regular and systematic fashion, we might conclude that although the *absolute level* of federal power has increased, the *relative distribution*—that is, the balance of power—has not significantly changed. But what has tended to happen instead is that the President is far more successful than Congress in directing the course of regulatory policymaking by administrative agencies.

Several things contribute to the President's edge over Congress. Some are constitutional, some are statutory, and some are customary. One of the most important is the structural difference

between the two branches. Congress is a collegial body operating under a complicated set of procedures. To speak its mind, it must mobilize a majority of several hundred people. By contrast, the President is one individual, acting as the undisputed head of a group of people whose job it is to see that his policies are pursued, by cajolery where possible and arm-twisting where necessary. The Framers very deliberately structured the Office of the President in this way. They recognized that the executive branch had to be capable of decisive action, expeditiousness, consistency and coordination if it were going to be successful in conducting foreign policy and maintaining domestic law and order. The very qualities that make a unitary president good at those tasks can prove just as effective when turned to the task of directing regulatory policymaking.

In other words, one of the most constitutionally significant consequences of the creation of the administrative state has been that power which Congress gives away to administrative agencies tends to be power which flows towards the President. The bigger the pool of regulatory power up for grabs, the more serious the shift in the balance of power may become. The literalist interpretation of separation of powers not only fails to recognize and deal with the entirely new set of power dynamics created by broadly delegative regulatory statutes, but also, through its consistently pro-president stance, exacerbates the likelihood of government moving dangerously out of balance.

Now it is true—as proponents of the literalist interpretation often point out—that when the Framers thought about the future, they expected the threat of imbalance to come from the legislature. But their fears must not be divorced from the context. They saw the legislative power as, in Madison's words, "more extensive and less susceptible of precise limits" than the executive or judicial powers.¹⁷ Therefore, the body that would hold this power was much more dangerous than any other branch. Two hundred years later, however, much of the legislative power has moved away from Congress through delegation. The Framers would be the first ones to tell us that the threat follows the power. As Madison once wrote to Jefferson, "Wherever the real power in a Government lies, there is the danger of oppression."¹⁸ Unless this recog-

17. THE FEDERALIST No. 48, *supra* note 14, at 334.

18. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *quoted in* G.

dition is the animating core of our theory of separation of powers, we will have lost sight of one of the most important lessons the Framers tried to pass on to us.

E. JONATHAN R. MACEY*

Much is said about the separation of powers by liberals and conservatives alike. It is high on the list of sacred cows in American political life. On the one hand, everybody is for it, and nobody is against it. On the other hand, nobody ever seems to be able to articulate precisely why this vague, almost ritualistic incantation is entitled to the veneration it appears to receive. This lack of provenance feeds upon itself because people all along the political spectrum are able to justify whatever political outcome they prefer simply by claiming that those views somehow are mandated by the separation of powers.

For example, the outcome of *INS v. Chadha*,¹ an important separation of powers case involving the legislative veto, has been defended by a colleague of mine on the grounds that the legislative veto that was declared unconstitutional violated the human rights of certain foreign graduate students who had obtained the permission of the Immigration and Naturalization Service to remain in the country after their visas had expired, only to have this suspension of deportation vetoed by a resolution of the U.S. House of Representatives. This is an example of the incoherence that surrounds the separation of powers.

After all, human rights are one thing and the separation of powers under the Constitution is quite another. Indeed, in theory it would be quite possible to have a system of government that systematically denied individuals their basic human rights, but retained a rigid separation of powers; just as it is conceivable that a system of government that had no separation of powers might provide its citizenry with a wide range of individual liberties. Individual rights and the separation of powers are distinct attrib-

WOOD, *supra* note 4, at 410.

* Professor of Law, Cornell University.

1. 462 U.S. 919 (1983).

utes of our constitutional regime, and as such, they serve specialized functions. To defend the *Chadha* decision on the basis that it vindicated the individual rights of the plaintiffs is not to defend it at all, since the case purports to be about whether the legislative veto violates the Constitution by upsetting the system of checks and balances that comprises a core element of the Constitution.

The lack of understanding surrounding the purposes that the separation of powers is supposed to serve within the constitutional scheme makes it clear to me that a better appreciation of the theoretical underpinnings of the separation of powers is sorely needed. Without such a theory, cases like *Chadha* will never be properly understood and, perhaps more importantly, the separation of powers will never assume its proper place within constitutional theory.

It is my thesis that the separation of powers in the U.S. Constitution is one of a number of constitutional features designed to make rent-seeking² more difficult by raising the decisions costs of government activity. Constructing a government of separated powers raises the decisions costs of governmental action because the checking and balancing performed by the judiciary and the executive requires interest groups seeking to obtain favorable legislation to obtain the consent of these rival branches at some point in the process. Obtaining such consent is costly. Therefore, a system of separated powers characterized not by compartmentalization, but by checks and balances, will raise the costs of governmental action and will result in a relatively lower level of interest group wealth transfer activity. This diminution in wealth transfer activity, in turn, will lead to an increase in aggregate national wealth.

The American vision of a constitutional separation of powers differed significantly from the continental vision of separation of powers in one fundamental respect. Under the continental theory, a government of separated powers was a government characterized by a functional *compartmentalization* of power, with each branch operating independently of the others in virtually all re-

2. Rent-seeking refers to the attempt to obtain economic rents (*i.e.*, payments for the use of an economic asset in excess of the market price) through government intervention in the market. A classic example of rent-seeking is the attempt by domestic automobile companies to obtain protective tariffs against the importation of automobiles manufactured abroad.

spects.³ The American approach to constitutional governance parted significantly from the continental vision. Rather than being characterized by a system of functionally separate powers, after much debate, the American Constitution substituted a model of mutual inter-dependency in place of the continental model of strict compartmentalization. Under the American model, "each power center would remain dependent upon the others for the final efficacy in its social designs."⁴

Thus, with the defeat of the Anti-Federalists, who advocated the highly compartmentalized approach,⁵ and the ratification of the American Constitution, a distinctly American conception of the separation of powers emerged. The best way to view the role of the separation of powers within this conceptual framework is as *a part of a larger overall system of checks and balances*. And it is the operation of this system of checks and balances, of which the separation of powers is a part, that has made the American Constitution an original document of genius.

At the core of the American system of separating powers through a regime of checks and balances was the idea that governmental actors could not be trusted. Indeed, as I have argued elsewhere, the only coherent explanation for the system of checks and balances in general and the doctrine of separation of powers in particular is to *raise the decisions costs of government* in order to force economic activity out of the public domain and into the private domain.⁶ Checks and balances could also provide for the protection of individual citizens by making it more difficult for government to pass laws. In other words, if the system of checks and balances does nothing else, it makes it more difficult to enact statutes.

Under the American system of separated powers, the federal government would serve as a check on the states; the states, aided

3. 2 C. DE MALBERG, CONTRIBUTION A LA THEORIE GENERALE DE L'ETAT § 1, at 23-34 (1922).

4. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 3 (2d ed. 1988).

5. Gordon Wood has argued that the Anti-Federalists' position on the separation of powers was motivated by strategic, rather than political considerations. Specifically, he argues that after the Anti-Federalists had lost the battle against the adoption of a federal constitution, "[a]ll they could do was attack the federal government in those mechanical Enlightenment terms most agreeable to the thought of the Federalists: the division and balancing of power." G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 at 548 (1969).

6. See Macey, *Transactions Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

by municipal authorities, would serve as a check on each other; and, at the federal level, the legislative, executive and judicial branches would restrain one another. But for a system of checks and balances to work, there must be a *sharing of power*. And it is this sharing of power that befuddles many who find it difficult to reconcile the *mutuality* inherent in the checking and balancing function with the *separation* that is the inevitable byproduct of the compartmentalization that is an implicit part of a separation of powers.

The notion of a government of separated powers at first appears fundamentally inconsistent with the notion of a government of checks and balances because, after all, a government cannot very well have separate powers if those powers are dependent in very significant ways on the cooperation and support of the other branches. But the tension between the idea of separation of powers and the idea of a government of checks and balances disappears once we recognize that a system of separated powers is a necessary precondition to a properly functioning system of checks and balances. After all, one branch of government cannot very well check another branch unless it has at least some measure of independence and separateness. It is in this sense that the U.S. Constitution embraces the idea of separation of powers. The U.S. Constitution provides for a separation of powers in order to give each branch the ability to curb the activities of the others. Thus, under the American system of checks and balances, the federal judiciary has the power to declare acts of Congress unconstitutional. Similarly, the chief executive has the power to veto congressional acts for any reason he sees fit. These independent powers are, at the same time, manifestations of a government of separate powers as well as essential elements in the system of checks and balances.

The very existence of a system of separation of powers within our constitutional framework is attributable to the fact that such a separation is a necessary precondition to a system of checks and balances.⁷ This system of checks and balances was in turn instituted in order to raise the costs of governmental decision-making. Thus, while the continental variety of separated powers results in

7. Separation of powers in the Continental system preserved procedural regularities by ensuring that laws applied equally to all. This too, of course, was retained in the American Constitutional regime.

a strengthening of individual branches, the U.S. variety results in a diminution of the independent authority of the branches because cooperation among the branches must be obtained in order for the government to act.

The Framers had two very good reasons for concluding that raising the costs of governmental action was crucial to the welfare of the new republic. First, the Framers recognized that politicians, like other people, are rational economic actors. As such they can be counted upon to act self-interestedly when making governmental decisions. The Framers' famous observation that "enlightened statesmen will not always be at the helm" of government⁸ was only the tip of the iceberg. The central motivating force behind the Constitution was the desire to form a government that would protect individual freedom and liberty against the systematic incursions of self-serving government officials.

Implicit in this idea is not only the obvious point that government should be limited, but a rather more subtle point, which has virtually disappeared from mainstream approaches to constitutional theory over the past fifty years; namely, that the Framers recognized that "the future of American politics will not be one long, glorious reenactment of the American Revolution."⁹ The implication of this observation is that, with the exception of a few, largely unrepresentative activists and academics, people for the most part want to ignore politics and pursue happiness and self-fulfillment in a private rather than a public setting. Such pursuits are impossible in the presence of a monolithic central government run by selfish politicians who, by and large, are intent on transferring wealth from the politically uninterested to the politically well-connected at every turn.

As the Framers recognized, a strong system of checks and balances would curb politicians' ability to make such wealth transfers by raising the decisions costs of government. In doing so the constitutional scheme would serve as a deterrent to the natural proclivity of most voters in a liberal democracy to "try to turn the government toward serving" their "immediate well being."¹⁰ Citizens could thus be left alone to pursue happiness and fulfillment in the private sphere except in times of genuine national crisis.

8. THE FEDERALIST No. 10, at 60 (J. Madison) (J. Cooke ed. 1961).

9. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1020 (1984).

10. Malbin, *Factions and Incentives in Congress*, PUB. INT., Winter 1987, at 91, 92.

Thus a system of checks and balances implemented through a separation of governmental powers protects individual citizens from pernicious wealth transfers effectuated by self-serving politicians, and thereby frees the citizenry to pursue happiness and self-fulfillment in the private sphere, rather than in the public sphere where happiness and self-fulfillment for one group generally comes at the expense of another, less politically astute group.

When the Founders began to think about the theoretical underpinnings of the Constitution they were devising, it was their view that a "new science of politics" was needed for the new world.¹¹ The system of checks and balances that emerged in the Constitution reflected this new political science. What was new about the Framers' political science was its complete abandonment of reliance on public spiritedness and the virtue of governmental actors as sources of good government, and its embrace of the view that American citizens must be protected from the lesser motives of politicians if the new government was to survive. It was this philosophy that led to the emergence of a government of checks and balances.

As Daniel Patrick Moynihan has observed, it is unfortunate that the Founding Fathers placed so much emphasis on their practicality, and called so little attention to their belief that they were proceeding on what they saw as a *science of politics*.¹² The scientific underpinnings of the Framers has been refined over time and is inconsistent with what economists have come to call the "economic theory of regulation" or public choice. This theory begins with the same economic premises endorsed by the Framers, namely that "individuals, regardless of the decision-making environment, are motivated primarily by private interests rather than the public interest."¹³ As with the Framers, public choice economists have been able to use the economic assumption of rational self-interest "to develop new insights into the operation of the political process."¹⁴ As has been developed extensively elsewhere, the basic implication of this theory is that laws are products which are supplied and demanded by interested groups in

11. Moynihan, *The New "Science of Politics" and the Old Art of Government*, PUB. INT., WINTER 1987, at 22, 22.

12. *Id.* at 24.

13. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 191 (1988).

14. *Id.*

precisely the same way as other economic goods. The market for law is dominated by those special-interest groups that are able to provide political support and other favors to politicians in the most efficient way. The lowest cost providers of political support are generally small, well-organized special interests able to overcome the free-rider and other collective action problems that typically plague disaggregated individuals involved in the political process.

Recognizing the phenomenon of special-interest group domination of the political processors (which the Framers referred to as the problem of faction),¹⁵ the separation of powers, like the rest of the system of checks and balances, was designed to mitigate the problem of interest group domination of the political process. Thus the Presentment Clause, the bicamerality requirement, the presidential veto, the power of judicial review, the fact that the President and the members of both houses of Congress have unique political constituencies, are all easily understood in light of the public choice model.¹⁶ The goal of the Framers was to make governmental decision-making more difficult in order to reduce the power and domination of special interest groups in the political process. The Framers, in other words, fully anticipated Buchanan and Tullock's classic 1962 work, *The Calculus of Consent*, which provides a concise model of how a system of checks and balances serves to retard the pace of governmental decision-making by raising the decisions costs of government.

Thus it seems clear that the separation of powers serves three distinct but inter-related purposes within the constitutional scheme. First, it is designed to effectuate a strong system of checks and balances by reducing the power of individual politicians in order to ensure that political power is divided and shared among the various branches of government. Second, by making it more difficult for Congress to pass laws, individual citizens are not forced into a preoccupation with political life, and are able to lead private lives free from fear of government intervention and the need to lobby for forbearance from excessive regulation. Finally, the system of checks and balances, of which the separation of powers is a part, serves to reduce the problem of special-inter-

15. THE FEDERALIST No. 10 (J. Madison).

16. For a fuller explanation of the public choice underpinnings of the structure of government, see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

est group activity by making it more difficult for such groups to obtain legislation that transfers wealth to themselves from less politically active elements in society.¹⁷

The above discussion of the theoretical underpinnings of the separation of powers has significant practical implications for constitutional lawmaking. I wish to focus attention on two of those implications. The first concerns the so-called "line-item veto," and the second concerns the legislative veto discussed above. It is generally believed that both of these types of veto provisions would, for differing reasons, be unconstitutional. Indeed, as mentioned earlier, the legislative veto has already been declared unconstitutional by the Supreme Court. But in light of the discussion above, any constitutional analysis of these provisions must center around the extent to which such provisions raise the decisions costs of government by strengthening the constitutional system of checks and balances. Consistent with the discussion above, if these provisions represent an attempt by one branch to deprive another of its ability to act within its constitutionally mandated sphere of influence, then they should be viewed as highly suspect. On the other hand, if these provisions simply reflect an effort by one branch or the other to exercise its traditional checking function over another branch, then they should be upheld as consistent with the constitutional scheme. In other words, instances of negative control should be respected, but they must be distinguished from instances of over-reaching by one branch or another that reflect attempts to deprive a rival branch of its ability to act within its proper sphere. Negative authority, which the separation of powers brings to the forefront of the system of checks and balances, must be distinguished from positive authority. The Federalists were "convinced of 'the neces-

17. The above description of the role of the separation of powers within the constitutional scheme is consistent with the idea that the legislature was a source of special concern to the Framers:

In the new system, however, said Madison, the very structure of the government was designed to prevent "those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands," particularly in those of the legislature, which had become to the Federalists, "the real source of danger to the American Constitutions." Since "experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex," the Federalists, like the constitutional reformers in the states, had become convinced of "the necessity of giving every defensive authority to the other departments that was consistent with republican principles."

G. Wood, *supra* note 5, at 550.

sity of giving *every defensive authority* to the other departments that was consistent with republican principles.'"¹⁸

It is clear that the presidential veto power has been used very sparingly in recent years. The most likely reason for this is the ability of Congress to pass bills it knows to be important to the President by bundling them with riders containing unrelated appropriations full of pork barrel projects and other side payments to interest groups. Often, the President must accede to these wasteful interest group wealth transfers in order to obtain the enactment of essential governmental programs. As Clinton Rossiter has pointed out,

the President often feels compelled to sign bills full of dubious grants and subsidies rather than risk a breakdown in the work of whole departments. While it salves his conscience and cools his anger to announce publicly that he would veto these if he could, most Congressmen have learned to pay no attention to his protests.¹⁹

An obvious means to resolve the problem of strategic packaging by Congress is the adoption of the so-called "line-item veto," which would permit the President to veto the particular portions of larger bills that he finds objectionable, rather than being forced to "accept or reject the entire thing, swallowing the bitter with the sweet."²⁰ Most commentators have concluded that the line-item veto would be unconstitutional.²¹ Their grounds for this determination are quite vague, however, focusing on such generalities as whether Congress may statutorily expand the meaning of the term "bill,"²² and whether a line-item veto would unconstitutionally constrain the ability of each house to control their own procedural rules.²³

But once the separation of powers is seen as a method of reducing governmental power by encouraging the "negative exercise of

18. *Id.* (emphasis added).

19. C. ROSSITER, *THE AMERICAN PRESIDENCY* 254 (1956).

20. L. TRIBE, *supra* note 4, at 265.

21. *See id.* at 265-66; Note, *Is a Presidential Item Veto Constitutional?*, 96 *YALE L.J.* 838 (1987); HOUSE COMM. ON RULES, 99TH CONG., 2D SESS., *ITEM VETO: STATE EXPERIENCE AND ITS APPLICATION TO THE FEDERAL SITUATION* 164-76 (Comm. Print 1986).

22. L. TRIBE, *supra* note 4, at 266 (calling this the "core issue" in the line-item veto debate).

23. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings."). Of course, if each branch of Congress agreed to present its statutes to the President individually, this problem would disappear.

power" and thereby forcing the sharing of power among co-equal branches, the constitutionality of the line-item veto becomes clear. The line-item veto does not enhance the power of the President in the sense of giving him control over the legislative agenda or over the internal workings of Congress. The line-item veto enhances the power of the President only in the negative sense that it enables him to thwart the ability of Congress to effectuate narrow, interest group wealth transfers that do not have the support of the only elected official who represents a nationwide constituency.

An additional reason for supporting the constitutionality of the line-item veto, besides the fact that it deprives the President of a valuable tool for checking Congress, is that it deprives Congress of the incentive to pass legislation that is popular with the President solely in order to package it with legislation disfavored by the President, but popular with Congress. In other words, the line-item veto not only results in an increase of legislation favored by Congress, but in an increase in legislation favored by the President, but disfavored by Congress. Such legislation will be passed to "buy" the President's vote on other legislation. Thus the absence of a line-item veto should be viewed as impermissible log-rolling at the presidential level. The lack of a viable line-item veto increases the stranglehold of special-interest groups and results in fewer checks on the lawmaking process. These results are wholly inconsistent with the theory of the separation of powers presented here. Because a line-item veto provision would strengthen the system of separation of powers, it should be held constitutional if enacted by Congress.

Finally, I wish to note that the analysis of the line-item veto presented here is in sharp contrast to the occasional Congressional pronouncements that implementation of a line-item veto procedure would somehow deprive the federal judiciary of jurisdiction to hear constitutional challenges to certain of its enactments. Unlike the line-item veto, any statute purporting to deprive the judiciary of jurisdiction to pass upon the constitutionality of an act of Congress would reflect an attempt to thwart the system of checks and balances and undermine the separation of powers inherent in the constitutional scheme by eliminating the important check on Congress performed by Article Three judges. But by the same token, efforts by the judiciary to enter the spheres of the executive or legislative branches should

be viewed with suspicion, as should efforts by Congress to tell the President how to veto laws.

No case has brought the subtle issues surrounding the separation of powers into sharper focus than the legislative veto case, *INS v. Chadha*. A legislative veto permits one or both branches of Congress to review and invalidate the actions of federal agencies and executive departments. The constitutional test of the legislative veto arose because Congress had given the Immigration and Naturalization Service limited discretion to suspend the deportations of aliens whose visas had expired. The power of the INS to suspend such deportations was limited by Congress in that both the Senate and the House of Representatives retained the right to veto a decision by the INS to suspend deportation.

Chadha was a foreign graduate student who had prevailed upon the INS to permit him to remain in the U.S. after his visa expired, only to have his stay of deportation vetoed by a House resolution. The Supreme Court invalidated the legislative veto on the grounds that all action taken by Congress that is legislative in character must be the result of a "single, finely wrought and exhaustively considered procedure"²⁴ that is consistent with the "explicit and unambiguous provisions" of Article One.²⁵

At first, the case appears to be wrongly decided when viewed from the public choice perspective on the separation of powers presented here, because the legislative veto appears simply to function as an arrangement under which Congress, exercising negative authority, can invalidate the activities of overly aggressive administrative agencies that sometimes exceed the boundaries of their authority. But applying the public choice approach to the separation of powers presented here, I believe Justice Burger's opinion in *Chadha* was correct for two reasons.

First, once the separation of powers is properly seen as an important component of the larger system of checks and balances, the *Chadha* decision is defensible on the grounds that it strengthens the separation of authority that exists within the procedural rules of Congress itself. As has been detailed elsewhere, the Article One process provides a mechanism for solving some of the seemingly intractable problems associated with collective deci-

24. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

25. *Id.* at 945.

sion-making.²⁶ As Buchanan and Tullock have shown, the bicamerality requirement introduces what is, in effect, a supermajority voting requirement into the law-making process.²⁷ Thus, the structure of Article One itself was designed to prevent the "facility and excess of law-making" that the Framers recognized as "the diseases to which our governments are most liable."²⁸

From a public choice perspective, any attempt by Congress to act without fully conforming to the decision-making framework described within Article One is itself a violation of a fundamental separation of powers principle because the creation of a bicameral legislature, whose members serve different constituencies and are subject to a number of procedural constraints when passing laws, is an important and effective source for diffusing legislative power.²⁹ In other words, the checking and balancing effectuated by the separation of powers occurs within Congress itself just as it occurs among the various branches. Bicamerality raises the decisions costs of government, and is thus an important facet of the system of separation of powers.

Thus the majority opinion in *Chadha* bolstered the integrity of the constitutional separation of powers by extending that principle to the bicamerality requirement. In addition, the decision, by invalidating the legislative veto, rendered unconstitutional a practice that "offered lawmakers a way to delegate vast power to the executive branch or to independent agencies while retaining the option to cancel particular exercises of such power—and most importantly, to exercise this oversight without having to pass new legislation or to repeal existing laws."³⁰

The point here is that the legislative veto ought to be viewed as a manifestation of Congress' propensity to make broad delegations of legislative authority to administrative agencies. Clearly, Congress should not be permitted to delegate to an administrative agency its legislative powers. Such broad delegations should be declared unconstitutional. If the enabling legislation under which the INS was acting had been an impermissible delegation

26. See Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948.

27. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 232-48 (1962).

28. *THE FEDERALIST* No. 62, at 417 (J. Madison) (J. Cooke ed. 1961).

29. See Macey, *supra* note 16, at 247-50.

30. L. TRIBE, *supra* note 4, at 214.

of legislative power (which it does not appear to have been), then the original statute empowering the INS to suspend deportations was invalid. But similarly, Congress can delegate to an administrative agency the authority to effect the purposes of the statutes it enacts.³¹ If the initial grant of authority to the INS was a proper legislative delegation, then it clearly is impermissible for a small subgroup within Congress to impede the operation of a valid statute.

In other words, the legislative veto appears to have made it easier for Congress to effectuate broad, unconstitutional delegations of authority to administrative agencies. Declaring the legislative veto unconstitutional makes it more costly for Congress to make broad delegations of power, and thus the decision should be applauded. In cases like *Chadha*, where Congress attempts to retain a legislative veto after making an otherwise valid delegation to an administrative agency, the veto should be struck down as a violation of the procedures mandated by Article One.

In sum, the constitutionality of the legislative veto can only be understood within the context of the delegation doctrine. If the initial delegation by Congress was constitutional, then the case was correctly decided. If the initial delegation was overbroad, then the statute itself should have been invalidated on those grounds.

Thus the Court's reasoning in *Chadha* was consistent with the checks and balances approach to the separation of powers presented here. As the above discussion points out, the legislative veto came about as a result of Congress' increasing proclivity to make broad delegations of legislative authority to administrative agencies. Such broad delegations are unconstitutional under the analysis presented here because they permit laws to be passed that have not been through the intricate Article One refinement process. Thus not only should the legislative veto be declared unconstitutional, but legislation that contains legislative veto provisions should be scrutinized closely to determine whether it contains impermissible delegations of legislative power to administrative agencies.

While at first blush the doctrine of separation of powers appears to be an arid, even anachronistic formalism, in fact it serves an important role within the constitutional scheme that deserves

31. U.S. CONST. art. I, § 8; *Lichter v. United States*, 334 U.S. 742, 778 (1948).

to be better understood. It is my belief that the theoretical justification for the separation of powers is that it protects individual liberty by raising the decision costs of government. As the costs of governmental decision-making goes up, the grip of special-interest groups on the legislative process weakens, and such groups are induced to take more of their activities out of the legislative sphere where the focus is on wealth transfers and into the private market, where the focus is on wealth creation.

Merely because the separation of powers is a structural component of the Constitution should not mean that it is not entitled to protection by the judiciary. Indeed, the structural components of the Constitution are its very foundation, in part because they are less subject to legislative tinkering and to subsequent invalidation through legislative interpretation. As such, they are entitled to special respect. Such protection should come by respecting the constitutionality of legislation permitting a line-item veto, and by invalidation of the legislative veto. In addition, it seems clear that the separation of powers would also be strengthened by increased judicial scrutiny of broad delegations of legislative power to administrative agencies, whose actions are not subject to the finely wrought deliberative process envisioned by Article One.

F. QUESTIONS AND ANSWERS

MR. CARVIN: This is for Professor Farina. I certainly do not mean this literally, but your invocation of *The Federalist* really does prove that the devil can quote scripture, because you took entirely out of context the remarks that you quoted. Separation of powers has two components, the purposes of which are to diffuse powers. One is you break up governmental functions into three different power centers. The second is to say that some things are so important, we are not going to entrust them to any one branch. The most obvious examples are treaties and the appointment of judges which are subject to the advise and consent function, and as for legislation, you give the President the veto power, and those are truly shared powers. But the Constitution prescribes that those will be shared powers. It says that this is the legislative role and you are going to share it in this way with the executive.

You extrapolate, quite falsely in my view, from comments reflecting that there are these shared powers, a far different notion that where the Constitution has given to one branch exclusive authority over a particular governmental function, another branch can share it with that branch.

I would like you to explain how that follows and what constitutional source you can find for that proposition other than it would mean the decline of the administrative state, because that may be, in my view, an argument for it, not against it.

PROFESSOR FARINA: I would start from Professor Aman's point that separation of powers is not a doctrine which has a defined content in the text of the Constitution. Now, one might respond to that by saying, "Of course it does: Article One talks about 'legislative powers' being vested in Congress; Article Two talks about the 'executive power' being vested in the President; and Article Three talks about the 'judicial power' being vested in the courts." But this assumes that these constitutional terms have some self-evident, definite, shared meaning. That is often a very problematic assumption. For example, Mr. Cooper's broad view of what the "executive power" means leads him to insist that the President ought to have control over independent agencies, and that if we really put the literalist interpretation of separation of powers up against the administrative state, the result would not be what I predicted, which is the theory falls, but rather a wonderful answer to the problem of reconciling administrative agencies with the Constitution: We will move them under the control of the President because, after all, he is entrusted under Article Two with the power to take care that the laws be faithfully executed.

I respond by asking how, under a literalist interpretation that sees the Constitution as dividing power into discrete categories, you can justify taking an agency like the Securities and Exchange Commission, the Federal Trade Commission, or the Interstate Commerce Commission—each of which has enormous amounts of power that, under traditional labeling, would be legislative and adjudicative—and putting that agency under the umbrella of the President on a theory that it's his constitutional job to execute the law. If, as the literalist interpretation must assume, "executive power" has some determinate meaning, surely that meaning cannot be simply "doing whatever Congress in the statute says

the agency can do—even if this happens to be what we would otherwise call ‘lawmaking’ or ‘adjudicating.’”

In other words, you cannot have it both ways. If one is going to take a formalistic interpretation and say, “We can define what these categories are: We know ‘legislating’ when we see it; we know ‘adjudicating’ when we see it; we know ‘executing’ when we see it,” then you cannot take these entities that combine all three powers and purport to solve the constitutional problem they pose by simply sticking them under the President’s wing.

So that is a specific example of why you do not find in the text of the Constitution much help as to what separation of powers really means. You have to ask more broadly: What did the Framers think, in a larger sense, they were doing in the constitutional structure? Were they creating a static division of powers on the assumption that the dividing lines would always be clear? Or did they have a sense that life changes, society moves on, and the important thing to do is to create a mechanism that can move forward? It seems to me that if you look at what they said and did against the backdrop of history, you find ample support for the more fluid, contextually sensitive, balancing interpretation of separation of powers I have suggested.

PROFESSOR MILLER: I wanted to ask any of the panelists what they thought of the Supreme Court’s approach to separation of powers. If you look at the decisions in the past ten years, the Court seems to resemble the drunken sailor veering from side to side on the deck of a ship. One opinion will be a strict constructionist-type opinion like *Chadha*¹ or *Bowsher*,² and the next opinion will be like *Schor*³ or *Morrison*.⁴ It is just an embarrassment that the Supreme Court cannot decide what its methodology is, or is there any reason for its grossly inconsistent methodology from case to case?

PROFESSOR AMAN: There is a lot of inconsistency to be sure, and *Morrison* must have come as a shocker, at least the vote in *Morrison*—seven to one. On the one hand, you can argue it’s a political decision. Perhaps Chief Justice Rehnquist has decided

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

2. *Bowsher v. Synar*, 478 U.S. 714 (1986).

3. *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

4. *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

that the Rehnquist Court is not going down in history as appearing as an automatic supporter of Reagan Administration positions. But, of course, that gets you nowhere analytically.

I think one of the things going on, to the extent that these differences are driven by principle, is that there are different conceptions of liberty that underlie the starting points that these various justices are taking. Coupled with these different analytical concepts of liberty is also some historical baggage. For example, Justice Brennan is a very stern taskmaster when it comes to formalism, particularly when the courts are involved. Very clearly, his judicial role in the civil rights movement was a very important one. I believe he sees the judiciary as the thin, black band between injustice and justice.

So, the concept of liberty that Justice Brennan brings to some of those cases is very much grounded in a kind of individual liberty that rings true with the kinds of civil rights cases that dominated the Warren Court. Perhaps Justice Scalia's concept of liberty is more libertarian, and more of a minimalist notion of the federal and national government. If it is going to do anything, it had better jump through every single hoop and do it absolutely right. Justice Scalia not only has a different analytical concept of liberty, but has a different historical orientation. One could go down and look at the various individual opinions, and to some extent, that falls out and adds a little bit of order to this chaos, but it is not perfect.

PROFESSOR RABKIN: This is for Professor Farina. If the problem is concentrated power, and if we are free to reinterpret and adapt the Constitution because society changes and the times change, do you think Congress, without a constitutional amendment, could just assert that there is too much power in the hands of the Supreme Court? Five judges can legalize abortion on demand, which is something the President could never do. It is more dramatic than anything the President ever has done. One judge can run a Boston school district for a decade. That is more power than the President has. You have this enormous concentration of power, and since basically the theory of the Constitution is balance, could Congress pass a law saying that no judicial decision, at least no constitutional decision, will take effect until the majority of Congress or the majority of one House, or, to have the kind of balancing you are in favor of, one committee in Congress

has agreed to it? Would you think that would be constitutional in light of the changing and evolving of the adaptation of the Constitution?

PROFESSOR FARINA: If you are suggesting that adopting a contextually sensitive, balancing approach commits us to accepting any conceivable reorganization of power any branch wishes to embark on, my answer is, "No, of course not." The balancing approach does not lead you to a predictable, predetermined set of answers. Instead, it frames the separation of powers inquiry as a set of questions: How does the balance of power in our government now lie; is there an inordinate concentration in some area; if so, how should we remedy that. These are extraordinarily difficult questions, and I am not suggesting that this approach gives you easy answers. What I am suggesting is that it is a theory of separation of powers that can accommodate the reality of a twentieth century America where the configuration of power is enormously different than it was in the eighteenth century. It can accommodate that reality, not simply by rubber stamping it, but by giving us an analytic approach in which we can think about problems of control of power. Is control going to be easy? Will this approach give us quick, predictable answers to hard questions? Of course not. But the consequence of any theory that purports to offer those sorts of answers is going to be to devalue the concept of separation of powers, because you cannot have a legal theory that gives simplistic answers in such a complex society.

MR. COOPER: I have to interrupt to say that answers like the one we have just heard make me an originalist. It is that answer—that there is no predetermined set of answers—that in the end, makes me someone who is in favor of something called "the rule of law"—the notion that we can predict and define with some reasonable measure of certainty, how it is we and our elected representatives, and those in positions of power in government are to behave.

DEAN BENNETT: I have two questions for Jon Macey, a little one and a medium-sized one. First, I was puzzled by your assertion, which I believe you have previously made in writing, that the decision costs of government are raised by having two houses of Congress of different sizes. I do not understand why that is so

as opposed to having two houses of Congress that represent different configurations of interests. That's the little question.

The second question is whether your analysis of the constitutionality of the line-item veto, which sounded like a very functional, consequentialist analysis, leads you to conclude that the independent prosecutor law is also constitutional.

PROFESSOR MACEY: I appreciate the credit. I do mention these arguments in my earlier writings, but I am going to make it clear that the origination of these ideas lies with Kenneth Arrow, who actually won the Nobel Prize in part for developing these views, and also James Buchanan and Gordon Tullock later in their classic book, *The Calculus of Consent*.⁵

Essentially it has to do with diminishing decisions costs and increasing decisions costs. Imagine you have two legislative houses, with fifty people in one and fifty in the other, and keeping the total size of the legislature constant, you then put eighty people in one and twenty in another. By increasing the size of one house from fifty to eighty, the costs of making a decision in that department go up at a more rapid rate, Arrow modeled, than they decrease by moving from fifty to twenty in the other.

So, there are two countervailing forces—increased decisions costs by moving from fifty to eighty and decreased decisions costs by moving from fifty to twenty in the other. The argument is simply that because of problems of transactions costs, log rolling, *et cetera*, the decisions costs go up more rapidly than they go down, so the total of decision-making is increased.

I really do not have an answer to your second question on the independent prosecutor because my own values in this area are very much in formation. Tying in the separation of powers and the system of checks and balance to the line-item and legislative veto was as much as I could muster for today.

MR. COOPER: If I could just add a point along the lines of your second question. So “doctrinaire” is my “textualism,” that after studying the question, I have concluded publicly that there is no constitutional basis in the text or in the history of the Constitution for the line-item veto. It got me in quite a bit of trouble with some of my good friends, including inspiring public denunci-

5. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962).

ations of me as timid in my role as protector of the President's prerogative. But such are the wages of formalism and the rule of law.

MR. CROVITZ: Your position is that the Constitution does not, as written, provide for a line-item veto. I am not sure you determined that a line-item veto, if passed in statute form, would be unconstitutional.

MR. COOPER: No. I have not looked at that.

PROFESSOR FRIEDMAN: My question is for Professor Aman, and that is that you repeatedly converted "deregulation" into a "global world." I find this very puzzling. I know many people who are in favor of moving the United States towards a more capitalist society. None of the ones I know would change their views if the rest of the world sunk under the waves.

I know that there are some bad arguments for deregulation based on international competitiveness, but those all depend on economic ideas that have been obsolete for about 160 years: pre-Ricardian trade theories. Furthermore, identifying deregulation with global economy is a curiously parochial notion because the movement towards *laissez-faire* exists not only in the United States, but in Great Britain, which has been part of a global economy for two centuries, during which it went from mercantilism to *laissez-faire* to socialism and back to *laissez-faire*. It is a phenomenon in New Zealand which, given its size, has always been a part of a global economy, but has started swinging towards *laissez-faire* only in the last couple of years. It is a phenomenon in China.

It seems to me that globalism has nothing to do with it. What has happened is that people around the world have concluded that socialism does not work very well. The result has been a general tendency towards less socialism. This has happened to occur at a time when world trade is increasing some, but they are unrelated phenomena. I am curious as to how you would relate them.

PROFESSOR AMAN: One day you wake up in the morning and people around the world decide that something is amiss, and they all begin to change their minds.

PROFESSOR FRIEDMAN: It took a few years. It took a dec-

ade or so.

PROFESSOR AMAN: Yes. My major point is that what drives these kinds of changes and what creates the kind of ferment that makes certain kinds of legal arguments lively and interesting again are various socio-economic forces, and the philosophical changes of perspective that accompany them. All of these are forces that lay outside the Constitution. You may decide on strictly philosophical grounds that deregulation is right because the national government interferes with your liberty. I may decide deregulation is right because it is costly and raises consumer prices. I may decide for purely New Deal reasons that deregulation is a pragmatic policy.

My point is that all of these forces that are pushing the law, that are driving these kinds of issues, lie outside the law and I am saying we should be cautious here. Let us change things. If socialism is dead, if we need a new way, let us change things. But this idea of a rule of law being tied into a rigid constitutional doctrine, one which is going to take that political discourse out of politics and put it in a courtroom is what is troubling me.

So, I can accept your point that there are many reasons that account for a movement towards deregulation, although I would say that included among these is the increasingly competitive nature of the world economy, the increase in trade, and the fact that there is now so much more trade and competition world-wide that national regulatory regimes can no longer reliably deliver benefits to any particular constituency. This makes it politically difficult to sustain that kind of regulatory regime. The global economy has done much to undermine national regulation. But for whatever reason that deregulation is occurring, my main point is the law does not bring about change, law channels it. I have great difficulty with the narrowness of the constitutional doctrine set forth by Mr. Cooper, and trying to reify it in terms of legislative, judicial or executive, is a little bit like asking whether complicated governmental issues are to be characterized as "animal, vegetable or mineral." I do not want to trivialize it, but that is where I am coming from.

MR. COOPER: I take it your answer to Professor Rabkin's question is in truth "yes" because obviously you would not be willing to see that very political issue taken out of the political

realm and into the courts.

PROFESSOR AMAN: There is a kind of judicial activism that I think is spawned by this kind of formalism which troubles me, yes, indeed.

MR. CROVITZ: We will end this with my rhetorical question of what would the world look like if the Court had decided *Lochner*⁶ that morning and had decided a move toward regulation was not within the purview of the courts?

6. *Lochner v. New York*, 198 U.S. 45 (1905).