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BOWSHER V. SYNAR: THE EMERGING JUDICIALIZATION OF THE FISC†

William C. Banks*
Jeffrey D. Straussman**

INTRODUCTION

The budget process is one of the central edifices of modern government. Because it is the mechanism which transforms demands for government action into public purposes, the budget process has held a fascination for both researchers and former participants in the process who, having left office, have put their reflections in print.¹ For economists, budgeting represents one type of non-market resource allocation which may stand to benefit from improved methods for the distribution of scarce resources.² Students of public administration often have recommended changes in budget procedure to enhance the performance of the process.³ Political scientists view budgeting as a decision-making process to be understood in terms of the forces that yield winners and losers from the allocation of public resources.⁴ Legal scholars see the budget process as a focal point for major constitutional tenets such as federalism, judicial review, and the separation of powers. For the citizen, the budget process has become increasingly visible both because of media coverage that results from political struggles over the distribution of the public's money, and the resolution of the issue that has received the most attention in the past several years — the federal deficit.

In theory, budgeting is like a three-person game. The major players in this game include executive agencies that prepare budgets, a central agency that reviews agency budget requests, and a legislature that actually appropriates funds. The game is well scripted: agencies request funds to support their respective programs. Because the sum of all agency requests invariably would be larger than the resources available to fund all claims, the central budget office must review these requests with an eye toward fiscal constraint. Thus, the budget office recommends cuts in agency requests and insures that the chief executive's policy priorities are reflected in the agencies' budgets. Because the legislature has the constitutional appropriations powers, it scrutinizes the executive bud-

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¹ See e.g., D. STOCKMAN, *THE TRIUMPH OF POLITICS* (1986).

² See generally, C. SCHULTZE, *THE POLITICS AND ECONOMICS OF PUBLIC SPENDING* (1968).

³ See A. WILDAVSKY, *HOW TO LIMIT GOVERNMENT SPENDING* (1980); Hartiss, *Control of Federal Spending*, 35 *ACAD. POL. SCI. PROC.* no. 4, 1 (1985). Program budgeting and zero-based budgeting are two reforms that have been tried, and eventually abandoned at the federal level. For an explanation of program budgeting, see Schick, *The Road to PPB: Three Stages of Budget Reform*, 26 *PUB. ADMIN. REV.* 243 (1966). For an explanation of zero-base budgeting, see Phyr, *The Zero-Base Approach to Government Budgeting*, 37 *PUB. ADMIN. REV.* 1 (1977). For a discussion of the problems involved in implementing budget reforms, see Straussman, *A Typology of Budgetary Environments*, 11 *ADMIN. & SOCIETY* 216-26 (1979).

⁴ A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (4th ed. 1984).

get and sometimes alters it if, in the exercise of its oversight role, the legislature disagrees with the chief executive's policy objectives as reflected in the budget.

This brief description of the budget process reifies a process that has evolved over two centuries. The current budget process — not nearly so tidy as the above portrait would have it — did not begin this way. Part I of this article will review briefly the origins of our constitutional tradition of democratizing the budget process and of insulating spending decisions from the executive's political influences.⁵ Then this article will relate the evolution of the federal budget process, which Congress enlisted to facilitate its appropriations task, by noting the emergence of the executive as a key player in the budget game.⁶ Part I concludes by emphasizing that budgeting has been reformed to its contemporary condition largely free from judicial intervention. As this article later argues,⁷ this reform is as it should be given the constitutional primacy of Congress in fiscal matters, and given the sharing of powers among the elected branches which is permitted by the Constitution and separation of powers principles.

In Part II, this article will describe some fiscal developments in post-New Deal government⁸ that may foreshadow recent efforts at budget reform and a judicialization of the fisc.⁹ Especially since the New Deal, courts have been asked to review local and national spending decisions because of the conflicting characterizations of spending allocation as either a government entitlement or an individual right. In reviewing claims — ranging from inadequate conditions at prisons and hospitals, to segregated schools, to summary denials of entitlements — the courts have entered decrees that effectively have mandated new government spending. Arguably, regardless of the underlying rights or entitlement claim's merits, the judicial decrees in these cases have usurped prerogatives of the elected branches and often have revealed the courts' misunderstanding of the budgeting process.

Some judicial forays into budgeting, however, do more damage than others. Those decisions that simply affect budget outcomes are less disruptive and not as constitutionally suspect as those which alter the roles played by participants in the budget process. Unfortunately, the "least dangerous branch"¹⁰ has the potential to undermine democracy and separation of powers unnecessarily when it intrusively examines political accommodations which concern how fiscal decisions are made. Indeed, the thesis of this article is that courts should not assume an active role in reviewing political accommodations concerning the allocation of budgeting tasks. Because, as Madison remarked, "the legislative department alone has access to the pockets of the people . . .,"¹¹ federal courts should respect the congressional means chosen for exercising fiscal powers and should not overturn these means unless Congress clearly has usurped a coordinate branch's power, or performed that branch's core function.

Parts III, IV, and V support this thesis through an evaluation of Congress's most recent response to burgeoning budget deficits — the 1985 Gramm-Rudman-Hollings

⁵ See *infra* notes 16–51 and accompanying text.

⁶ See *infra* notes 52–63 and accompanying text.

⁷ See *infra* notes 224–71 and accompanying text.

⁸ See *infra* notes 65–87 and accompanying text.

⁹ The fisc represents the activities of government that involve the receipt and the spending of the public's money.

¹⁰ This description of the judiciary is from THE FEDERALIST NO. 78 (A. Hamilton).

¹¹ THE FEDERALIST NO. 48 (J. Madison).

legislation¹² — and through a critique of the Supreme Court's 1986 decision in *Bowsher v. Synar*.¹³ In *Bowsher*, the Court invalidated important provisions of the Balanced Budget and Emergency Deficit Control Act concerning the roles the participants play in the budget process. This Act was a dramatic departure from past budgeting schemes — and perhaps an ill-advised attempt at political buck-passing — but this departure should not have led the Supreme Court to decide that the Act is unconstitutional. This article offers two basic conclusions. First, the Court erred in deciding the constitutionality of Gramm-Rudman-Hollings because it based its decision on a never exercised provision that allows congressional removal of the Comptroller General — an official assigned important duties under the Act. The removal provision is in a 1921 statute¹⁴ and never contemplated consideration of Gramm-Rudman-Hollings. Thus, the Court undermined congressionally assigned roles for the players in major budgeting legislation without dealing with the real subject matter of the challenged Act. Second, the Court's decision does damage to the separation of powers principles. The Court applied a wooden version of the separation commands which simplified and supported its reliance on the removal statute but which misstated the role that separation of powers plays under our Constitution. A properly limited separation inquiry would have found neither an explicit constitutional limit nor a usurpation of executive branch power in Gramm-Rudman-Hollings. The legislation took nothing from the President that the Constitution assigned to the executive branch.

The *Bowsher* decision is thus a disturbing illustration of this article's thesis: active judicial intervention into the process of budgeting undermines the effective functioning of government, democracy, and our separation of powers. The Court's *Bowsher* opinion revealed the Court's superficial understanding of how the budget process works. Instead of candidly conceding the judiciary's limited institutional capacity in this area, the Court entered the fiscal thicket¹⁵ and cut an important feature out of the Act without ever coming to grips with the budgeting process prescribed in the Act.

I. A BRIEF HISTORY OF FEDERAL BUDGETING

A. Early Congressional Primacy and the Birth of Shared Powers

In fashioning the new government, the Framers were keenly aware of the importance of specifying who controlled the nation's money. The British legacy provided desirable lessons such as the well-known principle of no taxation without representation. This idea evolved from the demand that the money for the royal executive be authorized by the legislature; eventually this became the lower house of the United States Congress.¹⁶ On the other hand, the colonial governors' exercise of the taxing and spending powers

¹² Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. § 901 (Supp. III 1985)).

¹³ — U.S. —, 106 S. Ct. 3181 (1986). See *infra* notes 134-45 and accompanying text for a discussion of the case.

¹⁴ Budget and Accounting Act of 1921, ch. 19, 42 Stat. 20, 23-24 (codified at 31 U.S.C. § 703(e)(1) (1982)).

¹⁵ This phrase is inspired by Justice Frankfurter's phrase, "political thicket," from *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

¹⁶ F. MOSHER, *THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT* 18-19 (1979).

then held by the King fanned the Americans' revolutionary flame.¹⁷ The colonial experience provided an essential lesson: the fear of the executive power, when translated to the power of the purse, required that such power rest with elected representatives in a legislative body.¹⁸ The first state constitutions set the tone for the distrust of executive prerogatives over public funds by implementing measures to curb executive control: independent officials and legislative committees were appointed to audit executive accounts, and prohibitions against spending public funds without warrants signed by legislative representatives were imposed.¹⁹

The preconstitutional national government also implemented various devices for insuring that fiscal decisions were reserved for legislators. At first, the Continental Congress tried to perform all the functions of government. When it became apparent that this was impossible, the Congress formed committees, named boards made up of lay persons and, by 1781, appointed executive officials who assumed specialized administrative assignments.²⁰ In the same year, the Congress created the office of Superintendent of Finance and replaced the existing Board of Treasury with a comptroller, a treasurer, a register, auditors, and clerks.²¹ Even then Congress sought to retain control over the executive officials by prescribing statutory powers of appointment and by making certain financial decisions of the comptroller final.²² After the Revolutionary War ended, Congress returned to its prior Treasury Board System, and the Board managed the nation's money until Hamilton became Secretary of the Treasury in 1789.²³

While the Constitution clearly gave the power of the purse to the Congress, it made no explicit statement concerning the estimate of future expenses or the supervision of appropriations once made.²⁴ At the Convention, the Framers rejected the Committee of Detail's recommendation that one of Congress's enumerated powers should be "To appoint a Treasurer by ballot."²⁵ While the Framers, in principle, may have approved the idea that the supervision of the fisc is an executive function, the legislative constraints on the Board of Treasury suggest that neither the Continental Congress nor the Framers were willing to allow even post-enactment control over appropriations to become an exclusively executive domain.²⁶ Furthermore, the Framers were not entirely comfortable with delegating the task of estimating the fisc to executive officials. Although the Framers initially gave the task of budget estimation to the new Secretary of the Treasury, the

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 19.

¹⁹ *Id.* at 20.

²⁰ Fisher, *The Administrative State: What's Next After Chadha and Bowsher?* (paper presented at American Political Sciences Association Meeting, Sept. 1986).

²¹ *Id.*

²² *Id.*

²³ F. MOSHER, *supra* note 11, at 21. These influences on the Framers were translated into the text of the Constitution. First, "[a]ll Bills for raising Revenue shall originate" in the House of Representatives. U.S. CONST. art. 1, § 7, cl. 1. Second, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* at § 9, cl. 7. Third, the Congress, having been "vested" with "[a]ll legislative Powers," *id.* at § 1, cl. 1, also was given explicit power "to lay and collect Taxes . . . to pay the Debts" *id.* at § 8, cl. 1, "[t]o borrow money on the credit of the United States," *id.* at § 8, cl. 2, and the "necessary and proper" clause power to enact legislation appropriate for the exercise of any constitutional power. *Id.* at § 8, cl. 18.

²⁴ F. MOSHER, *supra* note 11, at 22.

²⁵ *Id.* The Board of Treasury continued to supervise finances until 1789.

²⁶ See *infra* notes 29-36 and accompanying text.

statutory obligations imposed on the Secretary²⁷ — and early skirmishes between Alexander Hamilton and Congress — harmonize with the notion that the Framers intended that Congress have a hand in both budget estimation and post-enactment supervision.²⁸

Early executive branch involvement in the budget process consisted of Secretary of the Treasury Alexander Hamilton's active involvement in preparing revenue and expenditure estimates and, more generally, in his personal style of executive financial management.²⁹ While Hamilton's tenure generally has been interpreted in terms of strong executive dominance, the creation of the Treasury Department in 1789 represented shared responsibility for the administration of the public fisc.³⁰ For example, the Departments of War and Foreign Affairs (now State) were created at the same time as Treasury. While the former two explicitly were called executive departments, Treasury was not.³¹ While Foreign Affairs and War statutes created only a Secretary and a Chief Clerk, the Treasury Department's organic statute created a Secretary, a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary.³² The Secretary appointed only the Assistant to the Secretary. In addition, while the statutes creating the Foreign Affairs and War Departments directed the Secretaries to "perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President,"³³ the Act establishing the Department of the Treasury did not mention the President. Instead, it directed the Secretary to prepare various reports for the Congress.³⁴ After Vice President Adams cast a tie-breaking vote in the Senate, the Secretary of the Treasury was made removable by the President.³⁵ In the event of removal, however, Congress would cabin other Treasury officers through statutory obligations not unlike those required of the current Comptroller General under the 1921 authorizing legislation.³⁶

The overall message is one of early shared responsibility for the fisc's administration; notwithstanding the subservient position of the Treasury Department to the President, Congress would insulate some budgetary decisions from the executive branch, as well as from political influences in general. In addition, any initial spurt of executive dominance in budgeting, mainly attributable to Alexander Hamilton's tenure as Treasury Secretary, soon ended with the development of the committee system in Congress.³⁷ In particular, once the House Committee on Ways and Means was established in 1802, it dominated the budget process throughout the first half of the nineteenth century.³⁸ Passing complex appropriations — sufficiently detailed so as to circumscribe executive discretion and thereby insure executive branch accountability — served to manage conflicts between the executive and legislative branches.³⁹

²⁷ See L. FISHER, *PRESIDENTIAL SPENDING POWER* 12 (1975).

²⁸ See generally *id.* at 12–13.

²⁹ See J. BURKHEAD, *GOVERNMENT BUDGETING* 9 (1959).

³⁰ See *id.*

³¹ L. FISHER, *supra* note 27, at 10–11.

³² F. MOSHER, *supra* note 11, at 26.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 25.

³⁶ See Budget and Accounting Act of 1921, ch. 18, § 312, 42 Stat. 20, 25–26.

³⁷ See J. BURKHEAD, *supra* note 29, at 10.

³⁸ See *id.* at 10–11.

³⁹ F. MOSHER, *supra* note 11, at 23.

This early budgetary history is at odds with a textbook description of the separation of powers doctrine which assumes a sharp demarcation of responsibilities. Such a notion — which assumes that separation *requires* a rigid delineation between the branches — conflicts with a special legislative prerogative over the fisc as an evolved bedrock component of democratic government. This conception of the separation of powers doctrine is seriously undermined because the supervision of the fisc involves executive and, perhaps, judicial functions. But as Parts IV and V posit, separation of powers was never intended to confine the management of the fisc. The sharing of functions by the Board of Treasury before 1787, and the continuation of the sharing of powers after 1789 effectively were sanctioned in the Constitution.⁴⁰ The Constitution represented a confirmation of existing arrangements. The administrators were responsible for assisting the Congress in estimating the expense of government and assuring that appropriations were administered according to law; simultaneously, the Congress retained control over the appropriations themselves, including supervision of officials active in the appropriations process.

In fact, the shifting dominance of the legislative and executive branches in the management of the public's money reflects the absence of a sharp constitutional demarcation of fiscal responsibilities. Congressional dominance of the budget process continued throughout the remainder of the nineteenth century.⁴¹ If, in the evolution of budgeting, the period was in any way remarkable, it was that the birth of the Appropriations Committee in 1865 — and the subsequent growth of standing committees that took on authorizing responsibilities — dispersed the congressional power of the purse.⁴² During this period, neither Congress nor executive branch departments were motivated primarily by a concern for budget control — the effort to insure that department spending be brought in line with continually revised revenue estimates.⁴³

Standard historical accounts of the federal budget process conclude that, if the nineteenth century was evidenced by congressional dominance of the process, the twentieth century reversed the pattern.⁴⁴ This is, of course, an exaggeration. The Anti-deficiency Acts of 1905–1906⁴⁵ represented a reaction to the lack of budget control. To prevent overspending of appropriations, the Acts required department heads to prepare expenditure plans.⁴⁶ The Taft Administration initiated efforts to exert budget control. Taft's Commission on Economy and Efficiency issued a report, *The Need for a National Budget*, which established the intellectual groundwork for a strong executive budget process.⁴⁷ After a hiatus during World War I, interest in budget control resumed and culminated in the Budget and Accounting Act of 1921.⁴⁸ While in the constitutional challenge to Gramm-Rudman-Hollings, the Budget and Accounting Act's recent prominence has centered entirely on the removal issue surrounding the Comptroller General of the United States, the Act is more properly thought of as a vehicle for modern *executive* budgeting. In particular, the 1921 Act created the Bureau of the Budget and

⁴⁰ See J. BURKHEAD, *supra* note 29, at 10–11.

⁴¹ See *id.* at 10.

⁴² See *id.* at 11.

⁴³ See *id.* at 12.

⁴⁴ See F. MOSHER, *supra* note 11, at 38–40.

⁴⁵ Anti-Deficiency Act, ch. 510, 34 Stat. 27 (1906).

⁴⁶ Anti-Deficiency Act, ch. 610, § 3679, 34 Stat. 27, 49.

⁴⁷ J. BURKHEAD, *supra* note 29, at 18–19.

⁴⁸ See *supra* note 9 and accompanying text.

gave the Bureau responsibility for coordinating the President's budget. This coordinating role would provide future presidents with a method for integrating the various spending agencies' disparate budget requests with the programmatic and fiscal objectives of the administration.⁴⁹ Meanwhile, the newly created General Accounting Office (GAO) would monitor the delegation of legislative powers of the purse.⁵⁰ The Comptroller General, as head of the General Accounting Office, is charged with the responsibility of investigating "all matters relating to the receipt, disbursement, and application of public funds"⁵¹

B. *Strengthening the Executive in the Budget Process*

The evolution toward a strong executive role in the budget process continued over the next two decades, and became even stronger during World War II and its aftermath. The shift in the federal government's intervention in the economy, and the central place the budget occupied in this shift, strongly affected the process's evolution. In particular, President Roosevelt's New Deal, which initiated the government's countercyclical activities, included the adoption of a series of programs designed to maintain the purchasing power of individuals in the face of economic downturns. With the passage of the Social Security Act of 1935,⁵² the federal government began an era wherein individuals are granted entitlements in the form of guaranteed government benefits. The Social Security Act established the basis for an expanded role for government. The Social Security Act — and the new possibility of constitutional and statutory claims to government benefits — paved the way for judicial intervention in the fisc.⁵³

The original Social Security Act provided three major categorical grant programs: old age assistance,⁵⁴ aid to the blind,⁵⁵ and aid to dependent children.⁵⁶ Over the next five decades, a number of amendments created additional benefits: the food stamp program,⁵⁷ black lung payments,⁵⁸ supplemental security income,⁵⁹ and the medicare⁶⁰ and medicaid programs.⁶¹ In addition, some existing entitlement programs — Aid to Families with Dependent Children, for example — were expanded substantially.⁶² The

⁴⁹ Budget and Accounting Act of 1921, ch. 18, § 207, 42 Stat. 20, 22.

⁵⁰ See H. MANSFIELD, *THE COMPTROLLER GENERAL: A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION* 65 (1939).

⁵¹ Budget and Accounting Act of 1921, ch. 18, § 312(a), 42 Stat. 20, 25.

⁵² The Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C. (1982)).

⁵³ For a discussion of the evolution of constitutional claims to government entitlements, see Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

⁵⁴ Social Security Act of 1935, ch. 531, §§ 1-6, 49 Stat. 620, 620-22.

⁵⁵ Social Security Act of 1935, ch. 531, §§ 1001-06, 49 Stat. 620, 645-47.

⁵⁶ Social Security Act of 1935, ch. 531, §§ 401-06, 49 Stat. 620, 127-29.

⁵⁷ Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. §§ 2011-2029 (1982)).

⁵⁸ Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (codified as amended at 30 U.S.C. §§ 901-1945 (1982)).

⁵⁹ Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (codified in scattered sections of 5, 7, 42 U.S.C. (1982)).

⁶⁰ Health Insurance for the Aged Act of 1965, Pub. L. No. 89-07, 79 Stat. 290 (codified as amended in scattered sections of 42 U.S.C. (1982)).

⁶¹ Grants to States for Medical Assistance Programs Act of 1965, Pub. L. No. 89-97, 79 Stat. 343 (as codified in 42 U.S.C. § 1396 (1982)).

⁶² Social Security Act of 1935, ch. 531, 49 Stat. 620, 627.

expansion of entitlement spending exemplified the federal government's major commitment to provide cash and in-kind benefits to large segments of the population; it was not until the 1970's that the fiscal ramifications of the expansion's cumulative effect became a major political issue.⁶⁵ Nevertheless, entitlements represent two historically important threads in the budget process. First, entitlement programs played an important role in changing the character of the federal budget. Second, entitlements provided a basis for the first significant judicial activity with budgetary consequences.

II. AN EMERGING JUDICIALIZATION OF THE FISC

The courts did not play a significant role in the history of the budget process described up to this point. The fact that the judicial branch has no constitutionally delineated role in the budget process accounts for this absence. In addition, the budget process, as it has evolved over many decades, had not found an overt place for the judicial branch in the formulation and implementation of budget policies.⁶⁴ This absence of judicial involvement with the fisc, however, has changed in recent years.

A. Entitlement Programs and Hearing Rights

Entitlement programs have provided one avenue for judicial intervention in the fisc. By the early 1960's, a line of reasoning emerged which asserted that government benefits are so essential to the recipients' well-being that the benefits represent a new form of property and, therefore, should receive constitutional protection.⁶⁵ In 1970 the Supreme Court accepted this theory in the decision of *Goldberg v. Kelly*.⁶⁶ The *Goldberg* Court held that the Fourteenth Amendment protected the right to a fair hearing before public assistance benefits could be terminated.⁶⁷ While the *Goldberg* Court did not consider the budgetary consequences of its decision, it is reasonable to assume that increased spending for public assistance is one result of the decision.⁶⁸ The Supreme Court's 1976 decision *Mathews v. Elridge*,⁶⁹ however, recognized that not all entitlement benefits were equal and, thus, tempered the *Goldberg* holding.⁷⁰ *Mathews* established the principle that social costs must be balanced against the claims of the beneficiaries.⁷¹ Both these cases are notable as "back door" judicial involvement in fiscal matters.

B. Institutional Reform Litigation

Institutional reform litigation is another area in which judicial decisions have influenced government spending. Decisions mandating minimum cell space, right to treatment, and adequate medical care, for example, have required increased state government

⁶⁵ See *infra* notes 97-100 and accompanying text.

⁶⁴ See *Mathews v. De Castro*, 429 U.S. 181, 185 (1976).

⁶⁵ See Reich, *supra* note 53, at 733.

⁶⁶ 397 U.S. 254 (1970).

⁶⁷ *Id.* at 266-71.

⁶⁸ See e.g., J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 193-94 (2d ed. 1985). The hearing process delays termination for some percentage of beneficiaries. Thus, in the aggregate, spending probably is higher than it would be otherwise in the absence of the due process protection. See *id.*

⁶⁹ 424 U.S. 319 (1976).

⁷⁰ *Id.* at 340-43.

⁷¹ *Id.* at 347-49.

spending.⁷² One study which examined the impact of overcrowding cases on state spending showed that in the five years following the initial judicial decisions, capital expenditures increased.⁷³ Similarly, judicial school desegregation decisions have influenced state and local spending.⁷⁴ It is difficult to locate firm estimates of the budgetary costs required by the desegregation orders. But while precise and reliable estimates of state and local spending attributable to court decisions is unavailable, criticism of judicial interference with executive and legislative prerogatives deserve some attention: it serves to forewarn of the dangers created by the courts' active role in the budget process.

Initially, criticism directed at the exercise of judicial power in institutional cases seem self-evident.⁷⁵ Judicial orders to spend necessarily involve the courts in making decisions constitutionally entrusted to elected officials. Indeed, critics of the so-called "imperial judiciary" base some of their criticisms on what they perceive to be illegitimate judicial encroachments on legislative or executive powers.⁷⁶ According to this view, finding constitutional rights violations is not a sufficient reason for judicial action of the type and magnitude inherent to the institutional cases.⁷⁷ Because only the elected branches constitutionally may raise and spend funds, excessive judicial activity in the institutional cases illustrates the judicial power of the purse.

Because some expenditures are earmarked for a particular program, specific judicially mandated services force the legislature either to raise revenues needed to finance the court-ordered spending, or to reallocate planned expenditures.⁷⁸ This alleged usurpation of legislative and executive budgetary authority makes institutional cases unique. By implication, institutional suits fundamentally alter the budget process in states where defense of such a suit has been unsuccessful.

Although institutional cases were once novel, from a budgetary standpoint their novelty is somewhat circumscribed: the executive and legislative branches have always experienced periodic "shocks" to the system — exigent circumstances that required specific spending and thereby narrowed options. An obvious example is the budgetary requirements needed during a period when the nation is at war. The courts must

⁷² See Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 718-30 (1978). See also e.g., *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977) (required to give inmates a minimum amount of square feet of living space); *Wyatt v. Stickney*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reversed in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (persons civilly committed to state mental institutions have a constitutional right to treatment); *Davis v. Watkins*, 384 F. Supp. 1196, 1197 (N.D. Ohio, 1974) (mental institutions which commit patients have a responsibility to treat the patients, until the patients regain their sanity). See L. Harriman & J. Straussman, *Do Judges Determine Budget Decisions? Federal Court Decisions in Prison Reform and State Spending for Corrections*, 43 PUB. ADMIN. REV. 343 (1983).

⁷³ See L. Harriman & J. Straussman, *supra* note 73, at 343-51 (1983).

⁷⁴ See Frug, *supra* note 73, at 762-67.

⁷⁵ Gerald Frug has stated, "[I]f the courts were to have plenary power to define constitutional values, command sufficient appropriations to support those values, and then control by equitable decree the spending of the money appropriated, they would be exercising all power of government — judicial, legislative, and executive. Such a concentration of power was never contemplated by the Constitution." Frug, *supra* note 73, at 733.

⁷⁶ "[T]he court orders involve a subject matter that is the very foundation of the discretion lodged in the other branches: the raising, allocation, and spending of governmental funds." *Id.* at 735.

⁷⁷ *Id.* at 736.

⁷⁸ See *id.* at 741.

appreciate the legislature's dilemma that competing demands are always going to be greater than available resources. As Professor Frug points out:

Judicial requirements of expenditures must, in short, meet the test of feasibility, and feasibility is in the first instance a legislative judgment, subject to the requirement that the legislature's attempt to meet the constitutional standard is in good faith. If the courts allow the legislature this time to comply, interference with democratic decisionmaking will be minimized to the point that judicial confrontations with legislative power will become unlikely.⁷⁹

The recent history of institutional cases suggests that legislatures have adopted this view, for it follows naturally from the resource constraints all governments face.⁸⁰

C. School Finance Litigation

Several suits have alleged that the unequal financial condition of school districts violate the equal protection clause of the fourteenth amendment.⁸¹ The federal and state school finance cases have had mixed outcomes.⁸² Nevertheless, taken together, the school finance cases can be distinguished from the institutional cases in terms of their ramifications for the budget process. On the surface, both institutional reform and school finance cases affect the targeted states' budget process. The institution cases probably have caused increased state spending.⁸³ Similarly, in at least one school finance case,⁸⁴ a court's ruling — concerning the unconstitutional nature of the state financing for public education — altered the state's revenue mix.⁸⁵ Both cases stimulated the state legislature to act in ways that it probably would not have acted in the absence of litigation.

Underlying these surface similarities, however, from the budget process standpoint, the institution cases and the school finance decisions are not substantially the same. In the institutional reform cases, administrators retained latitude to implement decisions so that administrative discretion was preserved. In the school financing context, however, only a limited number of revenue options that will satisfy the court decisions are available to the state legislature: essentially the income tax and the state sales tax.⁸⁶ Moreover, the legislature cannot cut spending in other parts of state government. While a legislature

⁷⁹ *Id.* at 789.

⁸⁰ For a review of institution cases and their fiscal ramifications, see Straussman, *Courts and Public Purse Strings: Have Portraits of Budgeting Missed Something?* 46 *PUB. ADMIN. REV.* 345, 345-51 (1986).

⁸¹ See *Martinez v. Bynum*, 461 U.S. 321 (1983) (requirement of bona fide legal residence in a school district, before reception of a free public education, did not violate the constitutional right of interstate migration); *Plyer v. Doe*, 457 U.S. 202 (1982) (exclusion of undocumented children from free public education violated the equal protection clause of the fourteenth amendment); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (Texas system of financing public education through local property taxes was not violative of the equal protection clause).

⁸² These cases confirm what has been called "interjurisdictional equity" — fiscal treatment among governments. See D. Rubinfeld, *Judicial Approaches to Local Public Sector Equity: An Economic Analysis*, 542-76, in P. MIESZKOWSKI & M. STRASZHEIM, *CURRENT ISSUES IN URBAN ECONOMICS* (1979).

⁸³ Frug, *supra* note 73, at 727-28.

⁸⁴ *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

⁸⁵ For a history of the *Robinson* case, see generally R. LEHNE, *THE QUEST FOR JUSTICE* (1978).

⁸⁶ Other revenue sources, such as state lottery proceeds earmarked for public education, simply do not yield adequate revenues.

responding to prison overcrowding can resort to mechanisms such as early parole, analogous options do not exist in the school finance cases.⁸⁷ In other words, judicial involvement in school finance comes much closer to the *source* of legislative responsibility than does the mandating of services to alleviate unconstitutional conditions in state institutions. In the state institution cases, executive and legislative prerogatives are not unalterably affected.

In sum, judicial decisions influence budget outcomes. The court decisions have a significant impact on the roles participants play in the budget process. Because these roles have evolved over a long period of time — and are instrumental in providing budgeting with its stability and predictability — judicial “intrusions” could upset this delicate governmental balance. At root is the impact of the fisc’s judicialization on democracy and the separation of powers. It is surely debatable whether judicial “encroachments” in the institutional cases or judicial interference in school financing constitute a judicial intrusion into the responsibilities of the other branches. In any event, it is a categorically greater intrusion into the constitutionally assigned powers of the purse to reorder judicially the process of budgeting. To appreciate the significance of Gramm-Rudman-Hollings and the *Bousher* decision in light of the threatened judicial usurpation of fiscal powers, it is instructive to review briefly the budgetary history that gave rise to the legislation in the first place.

III. DEFICITS AND CONGRESS

The decade of the 1970’s was a bundle of contradictions from the vantage point of budgetary history. The decade began with a series of budget process frustrations. These frustrations included the growing inability of Congress to complete appropriations actions on time,⁸⁸ an increasing amount of “backdoor” spending that did not go through the normal appropriations process,⁸⁹ the inability to evaluate the budget from the vantage point of broad political and economic objectives⁹⁰ and, perhaps most importantly, the belief that the excessive use of presidential impoundments strained the constitutional framework of the budget process.⁹¹ These frustrations led to the enactment of the Budget and Impoundment Control Act of 1974.⁹²

The 1974 Budget and Impoundment Control Act was passed overwhelmingly in Congress, but it represented different things to different supporters of the legislation. Some supporters saw the Act as a way of reasserting congressional influence in the budget making process by establishing Budget Committees in both the House and the Senate that would evaluate the budget “as a whole.” Other supporters viewed the Act as a means of curtailing the President’s ability to impound congressionally appropriated funds and as providing Congress access to budgetary expertise by creating the Congressional Budget Office to provide professional assessment independent from the executive branch. While the Act’s supporters welcomed the reassertion of congressional influence

⁸⁷ Frug, *supra* note 73, at 728–30.

⁸⁸ See J. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 211 (1981).

⁸⁹ See D. IPPOLITO, *CONGRESSIONAL SPENDING* 25 (1981).

⁹⁰ See Ullman, *Federal Spending and the Budget Crisis*, 35 *ACAD. POL. SCI. PROC.* no. 4, 38, 41 (1985).

⁹¹ See A. SCHICK, *CONGRESS AND MONEY* 45–48 (1980).

⁹² Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332 (codified at scattered sections of 31 U.S.C. (1982)).

in the budget process as a laudable achievement in itself,⁹³ others thought that the test of the Act's effectiveness would be the ability of Congress to use its rejuvenated influence to curtail deficit spending. Those who held this expectation were to be disappointed.⁹⁴

Federal budget deficits did not become a major political issue in Congress until the later 1970's. One reason for Congress's increased political concern over the budget deficit was its size, whether measured in current dollars, constant dollars, or as a percentage of gross national product (GNP).⁹⁵ For example, the deficit as a percentage of GNP — which is perhaps its best measure — went from 3 percent in 1970 to 6.2 percent in 1982 before dropping to 4.5 percent in 1985.⁹⁶

The composition of the federal budget was also changing. The defense share declined during the 1970's as entitlement spending as a percentage of the total budget increased sharply.⁹⁷ Much of the budget was effectively outside the appropriations committees' annual review. Procedural changes brought about by the Budget Control and Impoundment Act of 1974 provided Congress the ability to evaluate budgetary trends. These procedural changes, however, had no impact on the size of the budget, or on the size of the deficit.⁹⁸ One can interpret the congressional groundswell which produced Gramm-Rudman-Hollings, therefore, as the collective frustration of Congress over the deficit impasses. With deficits mounting — and increased partisan wrangling over the budgetary ramifications of President Reagan's decision to both cut domestic spending and increase defense spending — Congress turned, in the fall of 1985, to Gramm-Rudman-Hollings as the mechanism that would do what all else had failed to do.

IV. GRAMM-RUDMAN-HOLLINGS AND THE *BOWSER* DECISION

A. *The Statutory Framework of Gramm-Rudman-Hollings*

Gramm-Rudman-Hollings is a deceptively simple piece of legislation. The legislation's objective of eliminating the federal deficit is specified as a six year phaseout with the following deficit reduction targets:

1986	\$171.9 billion
1987	144.0 billion
1988	108.0 billion
1989	72.0 billion
1990	36.0 billion
1991	0

These targets represent the maximum deficit allowable for the respective years.⁹⁹ Part A of the Act prevents Congress from considering specific appropriations bills or overall

⁹³ See A. SCHICK, CONGRESS AND MONEY, *supra* note 91, at 71-72.

⁹⁴ A. SCHICK, CRISIS IN THE BUDGET PROCESS 7-8 (1986).

⁹⁵ *Id.* at 5.

⁹⁶ See EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, HISTORICAL TABLES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1987, Table 14.6.

⁹⁷ Schick, *The First Five Years of Congressional Budgeting*, in THE CONGRESSIONAL BUDGET PROCESS AFTER FIVE YEARS 25-26 (R. Penner ed. 1981).

⁹⁸ For a review of the federal budget's history since the passage of the 1974 Act, see L. Fisher, *Ten Years of the Budget Act: Still Searching for Controls*, 5 PUB. BUDG. & FIN. 3 (1985).

⁹⁹ Pub. L. No. 99-177, § 201, 99 Stat. 1038, 1039-40.

budget resolutions that would surpass the maximum deficit prescribed for that year.¹⁰⁰ Similarly, Part B requires that the annual budget submitted by the executive branch be within the targeted deficit amounts.¹⁰¹

If Parts A and B fail to produce the prescribed declining deficits, Part C of the Act becomes operative.¹⁰² Under Part C, if the projected deficit in each fiscal year exceeds the target, automatic spending cuts are triggered that reduce total spending to the prescribed deficit amount.¹⁰³ Thus, projecting the deficit becomes the critical task under the automatic spending cut mechanism in the Act. To assure that deficit projections be performed in an unbiased manner as possible, Congress named three offices to share the task: the Congressional Budget Office (CBO), the Office of Management and Budget (OMB), and the General Accounting Office (GAO).¹⁰⁴ To assure that its wishes were effectively carried out, Congress specified, in careful detail, how the projections are to be made.¹⁰⁵

The Act establishes that if the deficit target is not met, budget reductions must be determined on a program by program basis. Most programs become subject to uniform, across-the-board percentage reduction.¹⁰⁶ Half of the needed reduction must come from defense and nondefense programs respectively.¹⁰⁷ Some programs, such as Medicare, are subject to limited reduction;¹⁰⁸ other entitlement programs are exempted from the cuts.¹⁰⁹

In order to assess the constitutional challenge to Gramm-Rudman-Hollings in *Bowsher*, it is necessary to describe in some detail the particular roles the CBO, OMB, and GAO play in estimating the deficit and program-cutting requests. The Act originated in the Senate, in a form which gave the reporting functions to the OMB and CBO.¹¹⁰ Because many House members objected to potential presidential influence on the cuts through the OMB, they proposed the resulting GAO.¹¹¹ The proposed GAO role was to wall out the President's political influence and to take "these decisions out of the hands of the President and the Congress."¹¹² Congress felt that the GAO was effectively an independent body. A contemporaneous report affirming the status of the GAO as an independent agency supported this conclusion.¹¹³ Indeed, throughout consideration of the Act and its passage, not one of the Act's opponents questioned either the constitutionality of the GAO role, or the conclusion that the GAO role effectively would fence the Congress out of the reporting process.¹¹⁴

¹⁰⁰ Pub. L. No. 99-177, §§ 201-32, 99 Stat. 1038, 1039-62.

¹⁰¹ Pub. L. No. 99-177, §§ 241-42, 99 Stat. 1038, 1063.

¹⁰² Pub. L. No. 99-177, §§ 251-57, 99 Stat. 1038, 1063-93.

¹⁰³ Pub. L. No. 99-177, § 251, 99 Stat. 1038, 1063-72.

¹⁰⁴ *Id.*

¹⁰⁵ Pub. L. No. 99-177, §§ 251(a)(5)-(6), 255-57, 99 Stat. 1038, 1067-68, 1082-93.

¹⁰⁶ Pub. L. No. 99-177, § 251(a)(3)(B)-(C), 99 Stat. 1038, 1064-65.

¹⁰⁷ Pub. L. No. 99-177, § 251(a)(3)(B), 99 Stat. 1038.

¹⁰⁸ Pub. L. No. 99-177, § 256, 99 Stat. 1038, 1086-92.

¹⁰⁹ Pub. L. No. 99-177, § 255, 99 Stat. 1038, 1082-86.

¹¹⁰ See 131 CONG. REC. S12, 082 (daily ed. Sept. 25, 1985) (statement of Sen. Gramm).

¹¹¹ See 131 CONG. REC. S14, 924 (daily ed. Nov. 6, 1985).

¹¹² 131 CONG. REC. H9846 (daily ed. Nov. 6, 1985) (statement of Rep. Gephardt).

¹¹³ See CONG. REC. H9846 (daily ed. Nov. 6, 1985); HOUSE COMM. ON GOV'T OPERATIONS, THE PRESIDENT'S SUSPENSION OF THE COMPETITION IN CONTRACTING ACT IS UNCONSTITUTIONAL, H.R. REP. NO. 138, 99th Cong., 1st Sess. 8-13 (1985).

¹¹⁴ See, e.g., 131 CONG. REC. S17, 404-06 (daily ed. Dec. 11, 1985) (statement of Sen. Glenn); *id.* at H11, 888 (statement of Rep. Conk); *id.* at H11, 879.

Except for special rules regarding the already passed fiscal year 1986,¹¹⁵ the deficit reduction process begins with a joint OMB/CBO report issued in August that estimates the deficit for the next fiscal year.¹¹⁶ The key elements of the joint report are its estimates of economic growth and its determination that the deficit will or will not be more than \$10 billion in excess of the prescribed maximum level.¹¹⁷ If the OMB and CBO are unable to agree on common estimates, their estimates are averaged.¹¹⁸ Their joint report also estimates — for each nondefense account and for each defense program, project, and activity — the base from which reductions are to be taken and the dollars and percentages by which reductions are to be made to lower the estimated deficit to the required level.¹¹⁹

The OMB/CBO report must be submitted to the GAO on August 20th.¹²⁰ By August 25th, the Comptroller General "shall review and consider" the joint report and, "with due regard for the data, assumptions and methodologies" must issue a report to the President identifying the excess deficit. If the deficit exceeds the target by more than \$10 billion, the Comptroller General must specify the base from which reductions are to be made and the dollars and percentage reduction in each account.¹²¹ The Comptroller General's report "shall be based on the estimates, determinations, and specifications"¹²² of the OMB and CBO, and the report must use the same assumed budget base, criteria, and guidelines which the OMB and CBO used in their report.¹²³ Finally, the Comptroller General's report "shall explain fully any differences"¹²⁴ between it and the joint OMB/CBO report.

If the Comptroller General's report to the President identifies an excess deficit, the Act requires that the President issue an order by September 1 that eliminates the excess deficit and conforms with the Act's above described sequestration requirements.¹²⁵ Except for some defense reductions in 1986,¹²⁶ the Act gives the President no discretion to modify the estimates or determinations of the Comptroller General's report.¹²⁷ Then a forty-five day period begins in which Congress may pass measures to alter the deficit.¹²⁸ The amounts sequestered by the September 1 order are withheld from obligation but are not finally sequestered until October 1st.¹²⁹ Thereafter, a second round of OMB/CBO and Comptroller General reports to the President may result in the issuance of a final sequestration order on October 15 which implements changes in needed reductions

¹¹⁵ See Balanced Budget and Emergency Deficit Act of 1985, Pub. L. No. 99-177, § 251, 99 Stat. 1038, 1063-72.

¹¹⁶ See Pub. L. No. 99-177, § 251(a)(1)-(2), 99 Stat. 1038, 1063-64.

¹¹⁷ See Pub. L. No. 99-177, § 251(a)(3), 99 Stat. 1038, 1064-66.

¹¹⁸ See Pub. L. No. 99-177, § 251(a)(5), 99 Stat. 1038, 1069.

¹¹⁹ See Pub. L. No. 99-177, § 251(a)(1)-(6), 99 Stat. 1038, 1063-68.

¹²⁰ See Pub. L. No. 99-177, § 251(a)(2), 99 Stat. 1038, 1064.

¹²¹ See Pub. L. No. 99-177, § 251(b)(1), 99 Stat. 1038, 1068.

¹²² *Id.*

¹²³ *See id.*

¹²⁴ See Pub. L. No. 99-177, § 251(b)(2), 99 Stat. 1038, 1068.

¹²⁵ See Pub. L. No. 99-177, § 252(a)(1), 99 Stat. 1038, 1072-73.

¹²⁶ See Pub. L. No. 99-177, § 252(a)(2), 99 Stat. 1038, 1073-74.

¹²⁷ See Pub. L. No. 99-177, § 252(a)(3), 99 Stat. 1038, 1074.

¹²⁸ See Pub. L. No. 99-177, § 251(c), 99 Stat. 1038, 1068-69.

¹²⁹ See Pub. L. No. 99-177, § 252(a)(6)(B), 99 Stat. 1038, 1075.

by taking into account legislation enacted and regulations promulgated after submission of the August report.¹³⁰

B. *Bowsher v. Synar*

Although President Reagan had supported the Act throughout its consideration in Congress, his subsequent signing statement questioned the GAO role.¹³¹ A challenge to Gramm-Rudman-Hollings came within hours of the President's signing statement.¹³² The congressional plaintiffs, some who had voted against the Act, and union plaintiffs — which had lost cost-of-living benefit increases as a result of the automatic deficit reduction process — argued that the Act unconstitutionally delegated legislative powers to the GAO.¹³³ The plaintiffs further alleged that the exercise of "executive powers" by the Comptroller General, an official removable by the Congress, violated constitutional separation of powers.¹³⁴ A three-judge district court, in an opinion written by now Justice Scalia, sustained the delegation of power¹³⁵ but agreed with the plaintiffs that

since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented.¹³⁶

Upon direct review,¹³⁷ the Supreme Court affirmed the district court decision,¹³⁸ although the majority declined to decide the delegation question.¹³⁹ The Court adopted Judge Scalia's reasoning concerning the removal provision. Accepting separation of powers as the playing field,¹⁴⁰ Chief Justice Burger did not focus on whether the Comptroller

¹³⁰ See Pub. L. No. 99-177, § 252(b)(1), 99 Stat. 1038, 1077.

¹³¹ While the House of Representatives considered the bill, the Director of the OMB stated that the President strongly supported it and that the existing reservations concerned the role of the CBO, not the GAO. *The Balanced Budget and Emergency Deficit Control Act of 1985: Hearing Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 100-102 (Oct. 17, 1985); President's Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1490, 1491 (Dec. 12, 1985).*

¹³² *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, ___ U.S. ___, 106 S. Ct. 3181 (1986).

¹³³ See *id.* at 1377. The plaintiffs contended that the Act's delegation to the GAO of the power to make the economic calculations that determine the estimated deficit and the resultant required budget cuts violates the constitutional provision vesting "all legislative power" in the Congress. See U.S. CONST. art. I, § 1.

¹³⁴ See *Synar v. United States*, 626 F. Supp. at 1377.

¹³⁵ See *id.* at 1391.

¹³⁶ *Id.* at 1403.

¹³⁷ The Act provides that any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under section 274(a)(1)-(3) of the Act, is reviewable by direct appeal to the United States Supreme Court. Pub. L. No. 99-177, § 274(b), 99 Stat. 1038, 1098-99.

¹³⁸ *Bowsher v. Synar*, ___ U.S. ___, 106 S. Ct. 3181, 3194 (1986).

¹³⁹ See *id.* at ___, 106 S. Ct. at 3193 n.10.

¹⁴⁰ See *id.* at ___, 106 S. Ct. at 3184. Chief Justice Burger stated: "The question presented . . . is whether the assignment by Congress to the Comptroller General of the United States of certain functions under the . . . Act . . . violates the doctrine of separation of powers." *Id.*

General's powers under Gramm-Rudman-Hollings had the Congress performing a task more properly reserved for the executive or had the Congress usurping an executive power vested under the Constitution.¹⁴¹ Rather, the separation of powers inquiry focused on whether a never exercised provision in a 1921 statute, which permitted Congress to remove the Comptroller General, violated the Constitution by creating a "here-and-now subservience"¹⁴² of the Comptroller General to the Congress in his exercise of "executive" duties under the Act.¹⁴³

To answer that question, the Chief Justice returned to the syllogistic reasoning which supported his 1983 opinion for the Court in *Immigration & Naturalization Service v. Chadha*.¹⁴⁴ The Chief Justice's major premise was that the Constitution permits neither Congress nor its agents to exercise executive power. The syllogism's minor premise was that Gramm-Rudman-Hollings vests executive power in the Comptroller General who is an agent of Congress. The *Bowsher* Court, therefore, concluded that Gramm-Rudman-Hollings was unconstitutional. Like the opinion for the Court in *Chadha*, such a simplistic approach to the *Bowsher* challenge is internally flawed and obscures the more meaningful inquiry which a separation of powers challenge merits.¹⁴⁵ The following section critiques Chief Justice Burger's syllogism.

1. Major premise: The Constitution permits neither Congress nor its agents to exercise executive power.

According to the former Chief Justice, "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the law it enacts A direct congressional role in the removal of officers charged with the execution of the laws beyond [impeachment] . . . is inconsistent with separation of powers."¹⁴⁶ In other words, the power to remove officials who perform executive tasks "would, in practical terms, reserve in Congress control over the execution of the laws The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."¹⁴⁷

The majority first found support for its general denial of congressional power to execute the laws in the oft-quoted paraphrasing of Montesquieu from Madison in *Federalist* 47: "there can be no liberty where the legislative and executive powers are united

¹⁴¹ We later argue that such an inquiry would be proper for the court to have undertaken in *Bowsher*. See *infra* notes 260-64 and accompanying text.

¹⁴² *Synar v. United States*, 626 F. Supp. at 1392.

¹⁴³ *Bowsher* —U.S. at —, 106 S. Ct. at 3188-89.

¹⁴⁴ 462 U.S. 919 (1983). *Chadha* concerned the constitutionality of a one house legislative veto which had been exercised to reverse an administrative decision to suspend an alien's deportation order. *Id.* at 923. Chief Justice Burger decided the constitutionality of the legislative veto device by first stating the truism that all "legislation must comply with the presentment and bicameralism requirements of Article I," then asserted simply that the veto constituted "legislation" because it altered rights of persons outside the legislative branch, and concluded that the veto violated the Article I requirement. See *id.* at 952.

¹⁴⁵ The *Chadha* decision has been heavily criticized. See, e.g., Symposium, *Reactions to Chadha: Separation of Powers and the Legislative Veto*, 35 SYRACUSE L. REV. 685 (1984); Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Sirauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L. REV. 789.

¹⁴⁶ *Bowsher*, —U.S. at —, 106 S. Ct. at 3187.

¹⁴⁷ *Id.* at —, 106 S. Ct. at 3188.

in the same person, or body of magistrates'"¹⁴⁸ Thus, according to the Court, separation of powers and its system of checks and balances "were the foundation of a structure of government that would protect liberty."¹⁴⁹ Second, the Court reasoned that the checking and separation which the Framers intended to protect liberty manifested themselves in the system the Constitution established for administering government.¹⁵⁰ The Constitution provides that Congress legislates to create offices and officers and the President then appoints "Officers of the United States" with "the Advice and Consent of the Senate."¹⁵¹ The *Bowsher* Court found that because the only role mentioned in the Constitution for Congress after confirmation is impeachment, any additional role "is inconsistent with separation of powers."¹⁵² Third, the Court cemented its major premise by reference to the so-called "Decision of 1789."¹⁵³ In 1789, the First Congress debated and eventually rejected a congressional role in the removal process as inconsistent with the Constitution.¹⁵⁴ Finally, Chief Justice Burger cited his *Chadha* opinion and found that by removing or threatening to remove the Comptroller General, the Congress could in effect veto the execution of Gramm-Rudman-Hollings.¹⁵⁵ According to the *Bowsher* Court, such a veto, like the one house veto at issue in *Chadha*, would be lawmaking in violation of the presentment and bicameralism requirements of Article I of the Constitution.¹⁵⁶

Chief Justice Burger's assessment of the role Congress has in our system of separation of powers is a caricature, an exaggeration which bears little resemblance to how the federal government works. Over a 200 year period the President has become active in supervising the passage of legislation, and he unilaterally makes law by issuing Executive orders and proclamations. None of these "legislative" roles for the chief executive are contemplated in the Constitution. Further, while Congress itself does not execute laws, for the same 200 years it has engaged in oversight or supervision of agency affairs, regardless of the agency's status as independent or constituent of the executive branch. In addition, the Court's idealized conception of the legislative role fails to acknowledge the real control Congress maintains over execution of its laws through hearings, investigations, appropriations, subpoena, and contempt power, as well as through the day-to-day informal, nonstatutory controls arising from contacts between Members of Congress and appointed officials.¹⁵⁷

Moreover, the philosophical parents of contemporary separation of powers ideals did not envision a purist model. Chief Justice Burger's quotation from the *Federalist* is misleading.¹⁵⁸ In the *Federalist* No. 47, Madison reasoned that Montesquieu meant no more than: "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a

¹⁴⁸ *Id.* (quoting THE FEDERALIST NO. 47, at 325 (J. Madison) (J. Cooke, ed. 1961)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at —, 106 S. Ct. at 3186–87.

¹⁵¹ U.S. CONST., art. II, § 2, cl. 2.

¹⁵² *Bowsher*, —U.S. at —, 106 S. Ct. at 3187.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Bowsher*, —U.S. at —, 106 S. Ct. at 3189–92.

¹⁵⁶ *Id.*

¹⁵⁷ See generally L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1985).

¹⁵⁸ See *supra* note 148 and accompanying text.

free constitution are subverted."¹⁵⁹ Justice Jackson's formulation in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁶⁰ better captures the separation principle. In his concurring opinion, Justice Jackson reasoned that: "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."¹⁶¹

Next, the *Bowsher* majority's reliance on the "Decision of 1789" and the Court's construction of Article II are also wide of the mark. First, we accept many things which were not contemplated in the Constitution as being harmonious with our constitutional concepts. Second, Chief Justice Burger has once again earned low marks as a legal historian.¹⁶² As section I of this article revealed, the "Decision of 1789" was far more complex than portrayed by the Chief Justice.¹⁶³ The "Decision of 1789" concerned the Treasury Department as well as Departments of War and Foreign Affairs. The Decision had its own history which included extensive legislative supervision of the administration of the fisc — a legislative role unique to questions of finance. In addition, the debates concerning the removal power themselves were far more contentious — and the outcomes far less predictable — than the Chief Justice implies. A statutory ban on removing the Secretary of Treasury by the President was defeated only after the Vice President broke a tie vote in the Senate.¹⁶⁴ Moreover, when the debate turned to the Comptroller, Madison, who argued effectively in favor of the President's power of removal of the department heads, stated that because the office was not "purely of an Executive nature . . . there may be strong reasons why an officer of this kind should not hold his office at the pleasure"¹⁶⁵ of the President. Thus Madison, unlike Chief Justice Burger, demonstrated an understanding of the then recent history concerning the role of the Comptroller during the Continental Congress and the general concern of the people in insulating fiscal decision making from executive perogatives.

Perhaps the best evidence of the majority's mischaracterization of congressional power is the Constitution itself and the shared legislative-executive arrangements which it promotes. As will be more fully developed in the last part of this article, both separation and its checking arrangements contemplate congressional supervision of executive officials.¹⁶⁶ In 1787, the implicit approval of the executive removal power was intended to unify and strengthen the newly created executive branch.¹⁶⁷ From the beginning, however, Congress has had the power to participate effectively in and condition removal decisions through various means. Congress's sole power to create offices and attach statutory constraints on them illustrates this power.¹⁶⁸ Congress may remove an officer by simply abolishing the office or by statutorily reducing or eliminating the term of

¹⁵⁹ THE FEDERALIST NO. 47, at 326 (J. Madison) (Cooke ed. 1961).

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

¹⁶¹ *Id.* at 635 (Jackson, J., concurring).

¹⁶² See Banks, *Efficiency in Government: Separation of Power Reconsidered*, 35 SYRACUSE L. REV. 715, 717 (1984).

¹⁶³ See *supra* notes 30-36 and accompanying text.

¹⁶⁴ See L. FISHER, *supra* note 157, at 65.

¹⁶⁵ 1 ANNALS OF CONG. 611-12 (J. Gales ed. 1789).

¹⁶⁶ See *infra* notes 224-64 and accompanying text.

¹⁶⁷ See L. FISHER, *supra* note 157, at 94.

¹⁶⁸ See *id.* at 94-95.

office.¹⁶⁹ Indeed, the theoretical responsibility of the President for management of the executive branch is no more realistic today than is the notion that only Congress engages in lawmaking. The sheer size of the bureaucracy and the decisions by Congress to vest decision making powers in a wide range of subordinate government entities have operated to shrink considerably presidential removal power,¹⁷⁰ at no cost to the separation of powers. At least since the Court's *Madison v. Marbury*¹⁷¹ decision in 1803, the doctrine that Congress may compel subordinate executive officials to carry out its wishes notwithstanding objections by the President has been well established.¹⁷² The President is obligated to "take Care that the Laws be faithfully executed . . ." ¹⁷³ If Congress makes an independent officer's judgment conclusive on any matter which does not otherwise usurp Article II power, the President has no role to play once the officer passes judgment.¹⁷⁴

It is astonishing that none of the nine members of the United States Supreme Court would challenge the quixotic portrait of government enshrined by the majority opinion. Nonetheless, it is possible to accept an antiquated view of separation of powers and find fault with both parts of the critical minor premise.

2. Minor premise (part one): Under Gramm-Rudman-Hollings, Congress vested executive power in the Comptroller General.

Perhaps the best that may be said of the argument that the Comptroller General possesses executive power under Gramm-Rudman-Hollings is: so what? If true, the argument does nothing to advance the proper inquiry into the constitutionality of Gramm-Rudman-Hollings. The minor premise is simply an assertion which calls for an abstract characterization of what a government official does. To label the Comptroller General's duties under Gramm-Rudman-Hollings as "executive," or "judicial," or "legislative" does not begin to answer the question whether Congress has violated the separation of powers in assigning tasks to the Comptroller General. As the next section of this article will develop, the usurpation required to offend separation ideals can and should be decided without reference to any abstract characterization of the Comptroller General's Gramm-Rudman-Hollings responsibilities. Indeed, as has often been the case, Congress could have constitutionally vested legislative, executive, and judicial powers in the Comptroller General under Gramm-Rudman-Hollings.¹⁷⁵

The majority's characterization of the Comptroller General's duties is reminiscent of *Chadha* in which Chief Justice Burger simply asserted that the one-house legislative veto was a "legislative" act because it altered "the legal rights, duties, and relations of

¹⁶⁹ See *Crenshaw v. United States*, 134 U.S. 99, 104 (1890) (naval officer appointed to office for definite time did not have claim under any contract right when Congress abolished his office by statute).

¹⁷⁰ See L. FISHER, *supra* note 157, at 95.

¹⁷¹ 5 U.S. (1 Cranch) 137 (1803).

¹⁷² See *Kendall v. United States ex. rel Stokes*, 37 U.S. (12 Pet.) 523 (1838).

¹⁷³ U.S. CONST., art. II, § 3.

¹⁷⁴ See *Marbury*, 5 U.S. (1 Cranch) 137; *Kendall*, 37 U.S. (12 Pet.) 524. The Article II section 3 charge that the President "shall take care that the Laws be faithfully executed" is not a direction to the President to carry out the laws. If Congress creates an independent office and directs that the officer's judgment shall be final on a given matter, once the officer "faithfully executes" the assignment, the President's duty ends.

¹⁷⁵ The prototypical modern regulatory administrative agency acts in legislative, executive, and judicial capacities in carrying out its delegated task. Such delegations are routinely upheld. See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *Field v. Clark*, 143 U.S. 649 (1892).

persons . . . outside the Legislative Branch."¹⁷⁶ In *Chadha*, the Chief Justice could at least work from the presumption that the legislature's task is to legislate. Even so, his characterization of the veto in *Chadha* was essentially an unsupported assertion, exposed by the fact that all three branches act routinely to alter the legal rights of persons outside the legislative branch.

Similarly, the attempt at finding fault with Gramm-Rudman-Hollings by characterizing the nature of the Comptroller General's task as executive lacks support. Justice Stevens exposed the weakness of the majority's reasoning on this point in his concurring opinion.¹⁷⁷ Justice Stevens agreed that the Comptroller General is "not merely a clerk wearing a 'green eye shade.'"¹⁷⁸ Justice Stevens also reasoned that the Comptroller General's powers "must be recognized as having transcendent importance."¹⁷⁹ But not all important government tasks are executive in nature. Justice Stevens referred to Justice Brandeis' dissent in *Myers v. United States*:¹⁸⁰ "The separation of powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial."¹⁸¹ Thus, the Constitution contemplates the futility of abstract characterizations of government power. In Justice Stevens' words: "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."¹⁸² Under the provisions of Gramm-Rudman-Hollings, in the event that the Comptroller General's role in reporting to the President is declared unconstitutional, the Congress declared that the very same report would be prepared by Congress itself under the Act's so-called "fallback provision."¹⁸³ Even though such a report would have precisely the same legal effect as a report issued by the Comptroller

¹⁷⁶ *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983).

¹⁷⁷ See *Bowsher*, —U.S. at —, 106 S. Ct. at 3200 (Stevens & Marshall, JJ., concurring).

¹⁷⁸ *Id.* at —, 106 S. Ct. at 3199 (Stevens & Marshall, JJ., concurring).

¹⁷⁹ *Id.* at —, 106 S. Ct. at 3200 (Stevens & Marshall, JJ., concurring).

¹⁸⁰ 272 U.S. 52 (1926).

¹⁸¹ *Bowsher*, —U.S. at —, 106 S. Ct. at 3200 (Stevens & Marshall, JJ., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting)).

¹⁸² *Id.* at —, 106 S. Ct. at 3200.

¹⁸³ Section 274(f) of the Balanced Budget and Emergency Deficit Control Act of 1985 provides, in part:

Alternative Procedures for the Joint Reports of the Directors. —

(1) In the event that any of the reporting procedures described in section 251 are invalidated, then any report of the Directors referred to in section 251(a) or (c)(1) shall be transmitted to the joint committee established under this subsection.

(2) Upon the invalidation of any such procedure there is established a Temporary Joint Committee on Deficit Reduction, composed of the entire membership of the Budget Committees of the House of Representatives and the Senate The purposes of the Joint Committee are to receive the reports of the directors as described in paragraph (1), and to report (with respect to each such report of the Directors) a joint resolution as described in paragraph (3).

(3) No later than 5 days after the receipt of a report of the Directors in accordance with paragraph (1), the Joint Committee shall report to the House of Representatives and the Senate a joint resolution setting forth the contents of the report of the Directors.

(5) Upon its enactment, the joint resolution shall be deemed to be the report received by the President under section 251(b) or (c)(2) (whichever is applicable).

General, the Congress obviously would be performing a "legislative" task.¹⁸⁴ Thus, in *Bowsher*, Justice Stevens found that "the function at issue is 'executive' if performed by the Comptroller General but 'legislative' if performed by the Congress."¹⁸⁵ If Congress may delegate the powers at issue — and neither the district court nor the majority doubted the validity of the delegation¹⁸⁶ — any attempt thereafter to characterize them breaks down. The relevant question is whether the Comptroller General is exercising power that the Constitution vests in the President, not whether the Comptroller General's power is "executive," or as Justice Stevens argued, is instead "legislative."¹⁸⁷

Further, the majority's conclusion that no agency independent of presidential control could "exercise judgment concerning facts that affect the application of the [law]"¹⁸⁸ is flatly contradicted by several Supreme Court decisions since 1935, none of which was overruled in *Bowsher*.¹⁸⁹ The Comptroller General's duties under Gramm-Rudman-Hollings, even accepting the majority's description of them as involving "interpretation of the law" and "application of the law" to facts,¹⁹⁰ are the quintessential functions which independent commissions have performed regularly.¹⁹¹

3. Minor premise (part two): The Comptroller General is an agent of Congress because he is removable by Congress.

According to the *Bowsher* majority, the removal provision in the 1921 Budget and Accounting Act is the "critical factor" demonstrating that the Comptroller General is subservient to Congress.¹⁹² Although the President appoints the Comptroller General, the Comptroller General may be removed "only at the initiative of Congress"¹⁹³ through a joint resolution for various listed causes.¹⁹⁴ After quoting selected statements from the legislative history of the 1921 Act which suggest that the legislators intended removability to insure that the Comptroller General owed his fealty to Congress,¹⁹⁵ the majority found that the grounds for removal under the statute "are very broad,"¹⁹⁶ and are capable of sustaining removal of a Comptroller General "for any number of actual or perceived transgressions of the legislative will."¹⁹⁷ Finally, in addition to the "here and now subservience"¹⁹⁸ of the Comptroller General imposed by the removal provision, the Chief Justice asserted that "[i]t is clear that Congress consistently viewed the Comptroller

¹⁸⁴ See *Bowsher*, ___U.S. at ___, 106 S. Ct. at 3201 (Stevens & Marshall, JJ., concurring).

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* notes 136-39 and accompanying text.

¹⁸⁷ See *Bowsher*, ___U.S. at ___, 106 S. Ct. at 3201 (Stevens & Marshall, JJ., concurring).

¹⁸⁸ *Id.* at ___, 106 S. Ct. at 3192.

¹⁸⁹ See, e.g., *United States v. Nixon*, 481 U.S. 683 (1974); *Weiner v. United States*, 357 U.S. 349 (1958).

¹⁹⁰ *Bowsher*, ___U.S. at ___, 106 S. Ct. at 3192.

¹⁹¹ See, e.g., *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *But see Myers v. United States*, 272 U.S. 52 (1926) (the purely executive function of the Postmaster did not require independence from the executive).

¹⁹² *Bowsher*, ___U.S. at ___, 106 S. Ct. at 3189. See also 31 U.S.C. § 703(e)(1).

¹⁹³ *Bowsher*, ___U.S. at ___, 106 S. Ct. at 3189.

¹⁹⁴ The statutory causes are: permanent disability, inefficiency, neglect of duty, malfeasance, or a felony or conduct involving moral turpitude. See 31 U.S.C. § 703(e)(1).

¹⁹⁵ *Bowsher*, ___U.S. at ___, 106 S. Ct. at 3190.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at ___, 106 S. Ct. at 3193-94.

General as an officer of the Legislative Branch."¹⁹⁹ The Court alleged that the Comptroller General shares this view.²⁰⁰

Inexplicably, the majority misstated the impact of the removability provision on the Comptroller General's independence and mischaracterized the actual working relationship between the Comptroller General and the legislative and executive branches of government. First, the President participates in any removal decision affecting the Comptroller General by signing the joint resolution or exercising his veto. If the President vetoes the resolution, two-thirds of the Congress must vote to override. The two-thirds requirement for a congressional override is more demanding than the requirement for impeachment and conviction.²⁰¹ Thus, it is unlikely that Congress acting alone would remove a sitting Comptroller General.²⁰² Second, as Justices Stevens and White pointed out, the bases for removal listed in the 1921 Act, along with a pre-removal hearing and post-removal judicial review, operate to limit significantly congressional control over the Comptroller General.²⁰³ In addition, no one contended that Congress has ever removed, or threatened to remove, the Comptroller General.²⁰⁴

The Court's reliance on congressional removability to deny the independence of the Comptroller General flies in the face of the Court's 1935 decision in *Humphrey's Executor v. United States*,²⁰⁵ a decision left undisturbed by the *Bowsher* Court. By statute, the President has the power to remove members of the Federal Trade Commission for "inefficiency, neglect of duty, or malfeasance in office,"²⁰⁶ which are comparable to the bases for congressional removal of the Comptroller General. In *Humphrey's Executor*, President Roosevelt removed an uncooperative FTC commissioner before his term expired without asserting the statutorily required conditions. Yet no one contended in *Humphrey's Executor* that presidential removability threatened the FTC's status as independent of the President.²⁰⁷ Indeed, the Court emphasized the Commission's independence from the President when it sustained congressional restrictions on presidential removal.²⁰⁸ Thus, the Court unequivocally endorsed the independent agency in 1935.

¹⁹⁹ *Id.* at ___, 106 S. Ct. at 3191.

²⁰⁰ *Id.* The majority asserted: "Over the years, the Comptrollers General have also viewed themselves as part of the Legislative Branch." *Id.*

²⁰¹ Impeachment requires a majority vote in the House in approving the Articles of Impeachment and a two thirds vote of members present in the Senate to obtain a conviction. See U.S. CONST., art. I, §§ 2-3. For a comparison of the relative difficulty of impeachment and veto override see *Bowsher*, ___U.S. ___, 106 S. Ct. 3193 n.10 (White, J., dissenting.)

²⁰² See H. MANSFIELD, *supra* note 50, at 75-76; F. MOSHER, *supra* note 11, at 242 ("Barring resignation, death, physical or mental incapacity, or extremely bad behavior, the Comptroller General is assured his tenure if he wants it . . .").

²⁰³ *Bowsher*, ___U.S. at ___, 106 S. Ct. at 3213-14 (White, J., dissenting); *id.* at ___, 106 S. Ct. 3194-95 (Stevens & Marshall, JJ., concurring).

²⁰⁴ Indeed, Justice Blackmun maintained that because the Congress had not sought removal of the Comptroller General in *Bowsher*, plaintiffs were not entitled to the relief requested. *Id.* at ___, 106 S. Ct. at 3215 (Blackmun, J., dissenting). Justice Blackmun stated: "However wise or foolish it may be, [the Deficit Control Act] unquestionably ranks among the most important federal enactments of the past few decades. I cannot see the sense of invalidating legislation of this magnitude in order to preserve a cumbersome, 65-year-old removal power that has never been exercised and appears to have been all but forgotten until this litigation." *Id.*

²⁰⁵ 295 U.S. 602 (1935).

²⁰⁶ 15 U.S.C. § 41 (1982).

²⁰⁷ See *Humphrey's Executor*, 295 U.S. at 631-32.

²⁰⁸ See *id.*

"Control" of administration is one of Congress's most important roles.²⁰⁹ Congress exercises its "control" of administration through legislation that regularly imposes substantive limitations on an "officer of the United States" regardless of the officer's placement inside or outside the executive branch. Such exercise of power is clearly constitutional.²¹⁰ The removal provision in the 1921 Act simply contains one set of substantive constraints on the Comptroller General's discretion, complementary to — and less threatening than — other limits which Congress may impose: "reducing the Comptroller's salary, cutting the funds available to his department, reducing his personnel, limiting or expanding his duties, or even abolishing his position altogether."²¹¹

Nor is it true that an officer that is required by statute to perform duties for the Congress becomes an agent of Congress for separation of powers purposes. While the Comptroller General prepares reports and performs other tasks for Congress,²¹² he also performs tasks for the President: dictating an executive agency's accounting techniques, for example, and auditing federal spending.²¹³ Statutes obligate officers ranging from the President to the independent Federal Trade Commissioners to provide reports to Congress.²¹⁴ Further, unlike the Director of the Congressional Budget Office — who is appointed by Congress — the Comptroller General is an officer of the United States, appointed by the President.²¹⁵ In terms of any agency relationship with Congress, the Comptroller General is similar to a Federal Trade Commissioner: both are presidential appointees performing tasks "in aid of the legislative power."²¹⁶

In short, "[i]f Congress in 1921 wished to make the Comptroller General its lackey, it did a remarkably poor job."²¹⁷ The removal provision requires "the procedural equivalent of a new public law."²¹⁸ Consistent with congressional intent, the removal provision is not only tightly controlled and unlikely ever to be exercised, but it is less effective in directing the Comptroller General than many other devices available to the Congress.²¹⁹ In keeping with the long American tradition of insulating fiscal decisionmaking from short-term political wrangling,²²⁰ the Comptroller General was created to be, and has always been, independent from the President and the Congress.²²¹ Accordingly, the Comptroller General and not the CBO or OMB was assigned the reporting functions under Gramm-Rudman-Hollings because Congress sought to create "a wall . . . that takes the decisions out of the hands of the President *and the Congress*."²²² The fact that four

²⁰⁹ See generally L. FISHER, *supra* note 157 at 100–23.

²¹⁰ See *id.*

²¹¹ *Bowsher*, ___ U.S. at ___, 106 S. Ct. at 3212 (White, J., dissenting).

²¹² See *id.* at ___, 106 S. Ct. at 3197–98.

²¹³ See *id.* at ___, 106 S. Ct. at 3198.

²¹⁴ See *id.* at ___, 106 S. Ct. at 3213 n.13 (White, J., dissenting); *id.* at ___, 106 S. Ct. at 3215–16 n.1 (Blackmun, J., dissenting).

²¹⁵ Compare 2 U.S.C. § 601(a)(2) (1982) (Director of the Congressional Budget Office appointed by Speaker of House of Representatives and President pro tempore of the Senate) with 31 U.S.C. § 703(a)(1) (Comptroller General appointed by the President).

²¹⁶ See U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

²¹⁷ *Bowsher*, ___ U.S. ___, 106 S. Ct. at 3219 (Blackmun, J., dissenting).

²¹⁸ *Id.*

²¹⁹ See *supra* notes 157 and 169 and accompanying text.

²²⁰ See *supra* notes 13–14 and accompanying text.

²²¹ See F. MOSHER, *supra* note 11, at 240–44.

²²² 131 CONG. REC. H9846 (daily ed. Nov. 6, 1985) (remarks of Rep. Gephardt) (emphasis added).

members of the Supreme Court recognized the fallacy of equating removability with subservience is small solace.²²³

V. GRAMM-RUDMAN-HOLLINGS DOES NOT VIOLATE SEPARATION OF POWERS

The Court in *Bowsher* conceded that Gramm-Rudman-Hollings does not violate any specific constitutional prohibition.²²⁴ Rather, the assignment of the Act's reporting functions to the Comptroller General was found to violate the separation of powers because of the Comptroller General's "here and now subservience" to Congress manifested in the 1921 removal provision.²²⁵ The Court's conclusion, however, misinterprets separation of powers in three basic ways. First, Gramm-Rudman-Hollings in no way threatened the checking arrangements which the Constitution embodies to further the Framers' separation ideals. Second, the Constitution does not contemplate a rigid separation of powers. Even accepting the unlikely characterization of Chief Justice Burger that the Congress was somehow involved in executing the law, a proper interpretation of the role of a system of separation of powers in our government tolerates a sharing of powers in the ongoing accommodations among the elected branches. Third, those few instances where the Court has embraced an idea of separation that requires a rigid division of powers have concerned clear violations of a specific limitation in the text of the Constitution. These cases, however, did not call for application of a rigid model of separation to the *Bowsher* challenge.

A. *Gramm-Rudman-Hollings Did Not Threaten the Checking Mechanisms in the Constitution*

Part I of this article described the tradition of governmental efforts to assure that spending decisions are made by legislative bodies.²²⁶ These efforts sought to insure the broadest possible scope of citizen accountability, and to free spending decisions from political influences, because of feared corruption. As Part I reveals, the best answer to the claim that Gramm-Rudman-Hollings violates separation of power precepts is that Congress and its delegates were doing just what such a tradition, embodied in our Constitution, contemplates. Gramm-Rudman-Hollings is quintessentially legislative. With its imperfections, Congress remains the only institution capable of making spending decisions which are accountable to the public.²²⁷

Today, the Comptroller General serves as an important check on presidential impoundment and procurement.²²⁸ His role throughout our history has been similar to and consistent with his central contemporary role in helping Congress insulate spending decisions from political control pursuant to the requirement in Article I that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."²²⁹ Prior to the Constitution, both the Continental Congress and the Parliament

²²³ The four are Justices Stevens, Marshall, White, and Blackmun.

²²⁴ See *Bowsher*, —U.S. —, 106 S. Ct. at 3194 ("We conclude . . . that the powers vested in the Comptroller General . . . violate the command of the Constitution that the Congress play no role in the execution of the laws."); *id.* at —, 106 S. Ct. at 3184 ("The question . . . is whether [the Act] . . . violates the doctrine of separation of powers.")

²²⁵ *Id.* at —, 106 S. Ct. at 3193–94.

²²⁶ See *supra* notes 16–51 and accompanying text.

²²⁷ See Frug, *supra* note 73, at 739–40.

²²⁸ See F. MOSHER, *supra* note 11, at 304–06.

²²⁹ U.S. CONST. art. I, § 9, cl. 7.

had established independent commissioners to exercise the comptroller function.²³⁰ Then, during the First Congress in 1789, Madison successfully argued that cabinet officials, such as the Secretaries of War and Foreign Affairs, should be removable at the will of the President.²³¹ A week later, however, when the First Congress discussed the Treasury Department — and specifically the comptroller — Madison opined that because the duties of the office were not purely executive — but partook of a judicial quality as well — a different rule in respect of executive removal might well apply.²³²

The Supreme Court has endorsed distinctions of the kind drawn by Madison since 1803. In *Marbury v. Madison*, Chief Justice Marshall noted his support for the First Congress's determination that the Secretary of Foreign Affairs served at the pleasure of the President.²³³ But for *Marbury*, the plaintiff in the case who had been appointed for a five-year term as justice of the peace, the Court declared a different status: "as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."²³⁴ Accordingly, the Court recognized that Congress may create statutorily an office independent of unfettered presidential control. Thus, the nineteenth century Supreme Court harmonized with the Congress's wishes and the Framers' desire for an independent Comptroller.²³⁵

A crisis occurred around the beginning of this century which served to cement the independence of the Comptroller. President Cleveland threatened to remove a Comptroller for declining to follow an opinion of the Attorney General.²³⁶ The threat accomplished its desired purpose: Congress sought to repair the Comptroller's independence when it considered the various budget reform measures of 1919 to 1921.²³⁷ Indeed, in the eventual bill which transferred the Comptroller of the Treasury's functions to the Comptroller General — and added investigative and reporting duties to its prior auditing responsibilities — Congress was so determined to ensure that the new Comptroller General be independent that it provided for no presidential role in removal of the Comptroller General.²³⁸ The bill required instead a concurrent resolution by the two Houses of Congress.²³⁹ When President Wilson vetoed the bill because of the removability provision, Congress substituted the present joint resolution requirement. The President signed the revised bill without objection.²⁴⁰

The 1926 Supreme Court decision in *Myers v. United States*²⁴¹ temporarily threatened the reestablished independence of the Comptroller General. The *Myers* Court held that the President could remove at will officers with purely executive functions, such as Mr.

²³⁰ See McGuire, *Legislative or Executive Control Over Accounting for Federal Funds*, 20 ILL. L. REV. 455, 466-68 (1926).

²³¹ See F. MOSHER, *supra* note 11, at 22-27; see *Myers v. United States*, 272 U.S. 52, 111-31 (1926).

²³² 1 ANNALS OF CONG. 611-12 (J. Gales ed. 1789).

²³³ See 5 U.S. (1 Cranch) at 165-66.

²³⁴ See *id.* at 162.

²³⁵ See *St. Louis, Brownsville & Mexico Ry. v. United States*, 268 U.S. 169, 174 (1925); *United States v. Harmon*, 147 U.S. 268 (1893).

²³⁶ See H. MANSFIELD, *supra* note 50, at 60 & n.97.

²³⁷ See *id.*

²³⁸ See 59 CONG. REC. 8609 (1920).

²³⁹ *Id.*

²⁴⁰ This episode is recounted in F. MOSHER, *supra* note 11, at 47-57.

²⁴¹ 272 U.S. 50 (1926).

Myers the postmaster. Although this holding was consistent with past opinion and the Framers' understanding, in dicta former President and Chief Justice Taft asserted that removal at will was appropriate even for a comptroller.²⁴² Because he saw that his view was inconsistent with *Marbury v. Madison*, Chief Justice Taft sought to overrule that aspect of *Marbury*.²⁴³

The force of Taft's dicta in *Myers* lasted only until 1935 when the *Humphrey's Executor* Court expressly rejected it, based upon *Marbury* and Madison's statement in the 1789 Congress.²⁴⁴ *Humphrey's Executor's* central premise was that officers intended by Congress to carry out quasi-legislative or quasi-judicial tasks could be made independent and free from removal at will by the President.²⁴⁵ The *Humphrey's Executor* decision, therefore, reaffirmed the independence of the Comptroller General, which was not doubted until *Bowsher*.

Prior to *Bowsher*, President Nixon's runaway presidential impoundments posed the most recent threat to congressional primacy on fiscal matters.²⁴⁶ During that episode, the President repeatedly ignored appropriations which had broad popular support. Until 1974, Congress had no device for controlling presidential impoundments, although the courts overwhelmingly decided against presidential power in cases challenging specific impoundments.²⁴⁷ In response to President Nixon's actions, the Congress passed the Congressional Budget and Impoundment Control Act of 1974.²⁴⁸ The 1974 Act explicitly denies the President the discretion to impound appropriated funds without congressional approval.²⁴⁹ In light of the adverse court decisions, the President did not challenge the new limits on his power to alter spending decisions. Thus, the Congress reclaimed a portion of its Article I fiscal power which it had allowed to slip away. Because Congress arrived at Gramm-Rudman-Hollings in exercise of its undisputed Article I powers, and because Congress relied on the independent Comptroller General to perform the reporting functions in Gramm-Rudman-Hollings — which is entirely consistent with the role envisioned by the Framers — neither Gramm-Rudman-Hollings itself nor the limitation on the Comptroller General's removal contained in the 1921 Budget Act violate the separation of powers.

B. *The Constitution Does Not Contemplate a Rigid Separation of Powers*

It is too soon to tell whether Gramm-Rudman-Hollings will be effective. Many have charged that it is a foolish trick or, worse yet, an effort at deficit reduction with mirrors which is doomed to fail.²⁵⁰ Others have noted that deficits are falling, perhaps because

²⁴² See *id.* at 135.

²⁴³ See *id.* at 139-41.

²⁴⁴ *Humphrey's Executor v. United States*, 295 U.S. 602, 629-32 (1935).

²⁴⁵ *Id.* at 628. Moreover the Court recently recognized with perfect consistency that "[t]he GAO is an independent agency within the Legislative Branch that exists in large part to serve the needs of Congress." *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983).

²⁴⁶ The episode is described in J. SUNDQUIST, *supra* note 90, at 201-09. A possible exception is the role of the President and the Director of the OMB in pressing a fiscal agenda before Congress in 1981. See L. FISHER, *supra* note 157, at 231.

²⁴⁷ See J. SUNDQUIST *supra* note 90, at 201-09.

²⁴⁸ 2 U.S.C. § 681 (1982).

²⁴⁹ 2 U.S.C. § 683 (1982).

²⁵⁰ See, e.g., *Congressional Quarterly*, Nov. 15, 1986, at 2879-82.

of Gramm-Rudman-Hollings.²⁵¹ These issues, however, are irrelevant to the constitutional inquiry. To be sure, Gramm-Rudman-Hollings was a dramatic measure, and a bold experiment in fiscal management that sought to attack directly what has become an intractable and alarmingly serious national problem. But the Constitution wisely leaves the resolution of such matters to the political branches which pass laws and budgets.²⁵²

The few fundamental truths about our Constitution and the separation of powers have been thoroughly documented.²⁵³ The text of the Constitution describes the powers of the principal government institutions in discrete Articles, but it does not otherwise impose a separation requirement. The absence of more explicit reference to separation in the Constitution is explainable in light of the fact that separation of powers itself is an unmatched set of ideas encompassing elements of mixed government, shared powers, and checks and balances.²⁵⁴ Not surprisingly, separation meant different things to different people in America in the 1780's. Indeed, in the 1780's checks and balances supplanted separation as an ideal,²⁵⁵ and this phenomenon was translated into the text of the Constitution.²⁵⁶ Further, to the extent that separation of powers did animate the Constitution, three dominant versions of, or reasons for, separation can be, and were, supported: to insure against tyranny, to promote the government's legitimacy, and to further governmental efficiency.²⁵⁷ Because these separation theories may be in competition in a given dispute, the Court sometimes has spoken as if only one theory of separation exists.²⁵⁸ For example, in some cases the Court's assertion that separation was intended first and foremost to protect against tyranny supports a result that could have as readily been reached directly through the constitutional text.²⁵⁹ Unfortunately, the *Bowsher* Court dragged out its one-dimensional version of separation of powers to invalidate Gramm-Rudman-Hollings where there was no constitutional violation.

The archaic view of the separation of powers as requiring three air-tight departments of government has no place in our jurisprudence,²⁶⁰ particularly when the dispute is among the elected branches and concerns a matter having no direct bearing on important individual rights.²⁶¹ Instead, a separation inquiry should focus on the extent to which Gramm-Rudman-Hollings "prevents the Executive Branch from accomplishing its constitutionally assigned functions,"²⁶² or it should focus on whether the removability of the Comptroller General in the context of Gramm-Rudman-Hollings constitutes a genuine

²⁵¹ See, e.g., Congressional Quarterly, Oct. 25, 1986, 2255-56.

²⁵² See generally Frug, *supra* note 73.

²⁵³ See generally W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967); Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935).

²⁵⁴ See G. WILLS, *EXPLAINING AMERICA* 109 (1981).

²⁵⁵ See sources cited *supra* note 253.

²⁵⁶ See Banks, *supra* note 162, at 722.

²⁵⁷ See *id.* at 720-23.

²⁵⁸ See *id.* at 723-26.

²⁵⁹ See *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (presentment); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Article III); *Buckley v. Valeo*, 424 U.S. 1 (1976) (Appointment Clause); *United States v. Brown*, 381 U.S. 437 (1965) (Bill of Attainment); *Meyers v. United States*, 272 U.S. 52 (1926) (Appointment Clause).

²⁶⁰ *Nixon v. Administrator of General Services*, 433 U.S. 52, 425, 443 (1977).

²⁶¹ See generally Redish, *Judicial Review and the "Political Question"*, 79 Nw. U.L. Rev. 1031 (1985); Frug, *supra* note 73.

²⁶² *Nixon*, 433 U.S. at 443.

threat of "encroachment or aggrandizement of one branch at the expense of the other."²⁶³ The earlier parts of this article demonstrate that no such threat or usurpation is present in the Gramm-Rudman-Hollings scheme because the removal provision in the 1921 Act renders the Comptroller General independent rather than subservient to either Congress or the President.²⁶⁴

In short, whether or not Gramm-Rudman-Hollings is good policy, it is not unconstitutional. Congress passed the Act to carry out its constitutionally assigned power of the purse. Congress's delegation of reporting functions to the Comptroller General, an "officer" appointed by the President under Article II, was "necessary and proper" to the exercise of this power. The *Bowsher* Court should have looked for the existence of a threat or usurpation of executive branch powers. Because Gramm-Rudman-Hollings took nothing from the Executive which is constitutionally assigned to it, there is no separation of powers violation.

C. Buckley, Northern Pipeline, and Chadha Do Not Require Invalidation of Gramm-Rudman-Hollings

In *Bowsher*, no one argued that Gramm-Rudman-Hollings violated any explicit constitutional prohibition. Rather, the *Bowsher* majority argued an ill-reasoned extension of the *Myers* dicta that the President's power to remove is implicit and is incident to his Article II powers of appointment. In the few earlier cases which applied the rigid separation model to invalidate an act of Congress, each Act was found to violate clear and unambiguous textual commands in the Constitution. For example, in the 1976 case of *Buckley v. Valeo*, the Court found that Congress ran afoul of the Appointments Clause itself when it sought to appoint members of the Federal Election Commission.²⁶⁵ Then, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that Congress, in the Bankruptcy Act of 1978, sought to confer judicial power on bankruptcy judges in conflict with the clear direction of Article III that all "judicial power" be exercised by life-tenured judges.²⁶⁶ Finally, in *I.N.S. v. Chadha*, the Court found that the legislative veto of an I.N.S. suspended deportation order violated the explicit requirements of bicameralism and presentment in Article I.²⁶⁷

²⁶⁵ *Buckley*, 424 U.S. at 122.

²⁶⁴ As Justice White stated in his *Bowsher* dissent:

The power over removal retained by the Congress is not a power that is exercised outside the legislative process as established by the Constitution, nor does it appear likely that it is a power that adds significantly to the influence Congress may exert over executive officers through other, undoubtedly constitutional exercises of legislative power and through the constitutionally guaranteed impeachment power. Indeed, the removal power is so constrained by its own substantive limits and by the requirement of presidential approval "that, as a practical matter, Congress has not exercised, and probably will never exercise, such control over the Comptroller General that his non-legislative powers will threaten the goal of dispersion of power, and hence the goal of individual liberty, that separation of powers serves."

Bowsher, —U.S.—, 106 S. Ct. at 3213-14 (White, J., dissenting) (quoting *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 895 (3d Cir. 1986) (Becker, J., concurring in part)).

²⁶⁵ 424 U.S. at 124-37.

²⁶⁶ 458 U.S. at 57-62.

²⁶⁷ 462 U.S. at 944-59.

The *Myers* dicta concerning removal power incident to the Appointments Clause²⁶⁸ is not controlling in view of *Marbury v. Madison* and *Humphrey's Executor*. Moreover, the *Bowsher* Court in no way disavowed either *Marbury* or *Humphrey's Executor*. In short, the Appointments Clause has never by itself been held to prohibit Congress from conditioning removability when it enacts the laws creating and defining all offices not provided for in the Constitution.

Gramm-Rudman-Hollings does not violate any other grant of executive power in Article II. The Court has not construed the general grant of "executive power" in Article II to confer some undefined host of executive prerogatives not elsewhere listed in the text.²⁶⁹ Further the requirement that the Executive shall "take care that the Laws be faithfully executed"²⁷⁰ serves to limit the Executive and certainly does not grant power for the President over independent officials. As Justice Holmes stated: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his powers."²⁷¹

CONCLUSIONS

The Court's misdirected effort at hemming in what the majority saw as a separation of powers violation by Congress simply may be due to the Court's demonstrated poor understanding of spending and the budget process. Thus the Court may have set its own trap in *Bowsher* — a fiscal thicket. To be sure, the budget process has become a most complex and convoluted exercise. But the Court could have avoided the fiscal thicket had it properly applied separation of powers principles and its own precedents. Instead, the Court wallowed in a sea of misconceptions about the nature of the GAO and the Comptroller General, their relationship to other government actors, and the duties charged to the Comptroller General under Gramm-Rudman-Hollings. Instead of con-

²⁶⁸ U.S. CONST. art. II, § 2, cl. 2. See *Myers*, 272 U.S. at 164.

²⁶⁹ Article II, Section 1 of the Constitution states: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Justice Jackson summarized the limited scope of this language:

If [the clause granted such powers], it is difficult to see why the forefathers bothered to add several specific items [to Article II], including some trifling ones.

The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image . . . I cannot accept the view that this clause is a grant in bulk of all conceivable executive power . . .

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring).

²⁷⁰ U.S. CONST. art. II.

²⁷¹ *Myers*, 272 U.S. at 177 (Holmes, J. dissenting). Ironically, the Court shunned the rigid separation model in another decision announced the same day as *Bowsher*. In *Commodity Futures Trading Comm'n v. Schor*, ___ U.S. ___, 106 S. Ct. 3245 (1986), the Court held that the CFTC's adjudication of counter claims did not violate Article III's vesting of judicial power in the federal courts. *Id.* at ___, 106 S. Ct. at 3261. As an independent agency created by Congress in 1974, CFTC promulgated a rule in 1976 allowing it to decide a broker's counterclaim to a customer's claim against the broker for violating the Commodity Exchange Act. In upholding the Commission, the Court refused to apply "formalistic and unbending rules" to decide whether separation of powers had been violated, because such an approach could constrict "unduly" Congress's ability to take needed and innovative action pursuant to its Article I powers. *Id.* at ___, 106 S. Ct. at 3258. Instead, the Court focused on "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.* at ___, 106 S. Ct. at 3255-56.

ceding the complexities of budgeting and deferring to the expertise and accountability of the elected branches in making spending decisions,²⁷² the Court sometimes pretended that the complexities were not there, sometimes simply misstated how budgeting works, and decided *Bowsher* on the basis of a never-exercised removal provision that had, at best, tangential relevance to the new Act.

Unfortunately, the Court rushed to decide the *Bowsher* challenge before anyone had a chance to see how the key participants in budgeting would react to the deficit reduction goals. Perhaps the goals would be met by new-found restraint on the part of Congress and the executive branch. The automatic reduction mechanism was intended as a procedure never to be used, but whose presence Congress determined essential to attain the deficit reduction objectives.²⁷³ A member of the Senate Budget Committee remarked that the Congress will act to avoid the automatic mechanism "because the penalties for inaction will be so great, and the demands for a creative and sensitive response will be correspondingly great."²⁷⁴ If the goals are not met, additional time would have permitted a record to emerge from the CBO-OMB-GAO reporting required under the automatic reduction process. Surely, just what the Comptroller General does under the Act would then be more clear. Additional budgeting under the Act would no doubt have further highlighted the unimportance of the 1921 removal provision both to the Comptroller General's behavior and to the operation of Gramm-Rudman-Hollings. It is true Gramm-Rudman-Hollings is still functioning. Perhaps *Bowsher's* impact on budgeting will be minimal. There remains an unfolding budgeting scenario which has as its goal deficit reduction. Short term budget outcomes aside, however, the *Bowsher* decision could significantly impact the long term goal of insulating some fiscal decisions from political influence.

That the Supreme Court is not expert in budgeting is hardly surprising. Indeed, there is no reason to ask the judiciary to become students of the budgeting process. Even if it were desirable for judges to understand the budgeting process, courts are not institutionally equipped for such a role. While the Constitution does not permit the judicial branch to decline constitutional questions when properly presented,²⁷⁵ institutional limitations — as well as separation of powers principles and democratic theory — command that such a judicial role be limited and deferential to the political branches.²⁷⁶ Until *Bowsher*, the Supreme Court had not deviated from its deference to the political branches in matters of domestic policymaking except when an explicit constitutional prohibition had arguably been violated. In *Bowsher*, the Court entered the fiscal thicket without such a constitutional prohibition in hand and disserved all of us: our elected officials who are seeking to lower the budget deficit, the courts which must try to place the poorly reasoned decision in a line of cases into which it does not fit, and the people, who learn that bold efforts to trim the budget deficit do not comport with the Constitution. Meanwhile, the deficit remains and we all suffer the consequences.

²⁷² See, e.g., Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 325-26 (1976).

²⁷³ See 131 CONG. REC. S12,574 (daily ed. Oct. 3, 1985) (remarks of Sen. Gorton).

²⁷⁴ *Id.*

²⁷⁵ See, e.g., Redish, *supra* note 261, at 1059-61.

²⁷⁶ See generally Frug, *supra* note 73.

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