University of Virginia Law School
Public Law and Legal Theory Working Paper Series

Year 2004 *Paper* 6

The Revolution that Wasn't

Elizabeth Magill*

*University of Virginia School of Law, mem2a@virginia.edu

The Revolution that Wasn't

Elizabeth Magill

Abstract

The Revolution that Wasn't: A principal legacy of the Rehnquist Court is its revitalization of doctrines associated with federalism. No similar evolution occurred in separation of powers doctrines. Commentators do not perceive important shifts in the doctrine. Nor should they – the reasoning and results in the Rehnquist Court cases are of a piece with what came before. Lack of "revolution" was not for lack of opportunity. And, from the perspective that the Supreme Court has invoked in explaining many of its federalism cases, there is much–very much, in fact–that is not right about the structure of the federal government and the constitutional rules that permit that structure.

Using the federalism decisions as a point of comparison, this paper asks why there has been no "revolution" (using the term loosely) in separation of powers jurisprudence during the Rehnquist Court. The paper argues that internal and external factors that drive separation of powers jurisprudence diverge from the factors that drive federalism jurisprudence. The paper focuses on four factors: judicial incentives; the positive law that the Court is applying; the external factors that influence doctrinal developments; and the likely results of shifts in doctrine.

The Revolution that Wasn't

M. Elizabeth Magill*

A principal legacy of the Rehnquist Court is its revitalization of doctrines associated with federalism. That jurisprudence has many critics and many defenders. They disagree about how to describe what has happened, the importance of what has happened, and the wisdom of what has happened. But they all agree that *something* has happened. There has been genuine innovation in the doctrine.

Not so with separation of powers doctrine. Commentators do not perceive important shifts in the doctrine. Nor should they – the reasoning and results in the Rehnquist Court cases are of a piece with what came before. Lack of "revolution" (using the term loosely) was not for lack of opportunity. The Court had many opportunities to revise its doctrines. And, from the perspective that the Supreme Court has invoked in explaining many of its federalism cases, there is much–very much, in fact–that is not right about the structure of the federal government and the constitutional rules that permit that structure.

This paper asks why there has been no "revolution" in separation of powers jurisprudence during the Rehnquist Court. For a variety of reasons, many would predict that doctrinal developments in the two areas would track one another. My claim, however, is that the internal and external factors that drive doctrinal developments in the two areas are quite divergent.

---

*Professor of Law, John V. Ray Research Professor. Thanks to John Harrison, Mike Klarman, Daryl Levinson, Jennifer Mnookin, Jim Ryan, and Larry Walker for helpful conversation. Emil Barth, Jeremy Byrum and Anne Ralph provided helpful research assistance. The title of this article echoes the book on the Burger Court edited by Vince Blasi, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Yale, 1983). This paper was prepared for an April 2004 conference on the Rehnquist Court held at Northwestern University School of Law. I am grateful for the thoughtful and useful commentary provided by Professor Steve Calabresi. A revised version of the paper will appear in the Northwestern Law Review.

I. Reading the Rehnquist Court

A. A Federalism Revolution

The Rehnquist Court has worked important changes in the doctrines relating to federalism. For the first time since the post-New Deal period, the Court has invalidated some acts of Congress as beyond the scope of the commerce power, making clear in the process that there are some judicially enforceable outer limits on the scope of that power. It has also invalidated some acts of Congress on Tenth and Eleventh Amendment grounds. And it has held invalid some exercises of the Congress' power under Section 5 of the Fourteenth Amendment. While the long-range effect of these rulings is still not entirely clear, taken together the Court's rulings restrict the scope of federal power.

B. Separation of Powers

The Rehnquist Court had a steady diet of separation of powers cases, [1] and it becomes a full plate if one includes all of the Article III standing cases.[2] Several of the cases were high-profile and politically salient. The Court validated the Independent Counsel Act and the creation of the U.S.

---

[1]Starting from the beginning of the Rehnquist Court to today, other than Article III standing cases, my count includes the following: Morrison v. Olson, 487 U.S. 654 (1988): Mistretta v. United States, 488 U.S. 361 (1989); Skinner v. Mid-America Pipeline Co., 490 U.S. 210 (1989); Touby v. United States, 500 U.S. 160 (1991); Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991); Freytag v. Commissioner, 501 U.S. 868 (1991); Weiss v. United States, 510 U.S. 163 (1994); Plaut v. Spendthrift Farm, 514 U.S. 211 (1995); Loving v. United States, 517 U.S. 748 (1996); Edmond v. United States, 520 U.S. 651 (1997); Clinton v. Jones, 520 U.S. 681 (1997); Clinton v. City of New York, 524 U.S. 417 (1998); Miller v. French, 530 U.S. 327 (2000); Whitman v. American Trucking, 531 U.S. 457 (2001).

[2]The most important include: Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 553 (1992); Raines v. Byrd, 521 U.S. 791 (1997); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998); FEC v. Akins, 524 U.S. 11 (1998); Friends of the Earth v. Laidlaw Environ. Servs., 528 U.S. 167 (2000); Vt. Agency of Natural Resources v. U.S. ex rel Stevens, 529 U.S. 765 (2000);

Sentencing Commission; it invalidated the line-item veto and rebuffed President Clinton's executive-power based claim that he was entitled to a stay in a civil suit arising out of actions he took before he was President. There were low-profile cases as well, some of them as consequential as the higher-profile cases. The Court invalidated a statute extending the statute of limitations for securities fraud cases;[3] it rejected a challenge to a statute on Origination Clause grounds;[4] it sustained delegations of authority from Congress to the executive[5] and the judiciary;[6] and it evaluated several appointments clause cases.[7]

In contrast to the Rehnquist Court's federalism cases, these cases did not change the doctrine in notable ways. The claim that there have been no important developments is of course difficult to prove. To take one example, perhaps some years hence the line-item veto case will be the centerpiece of an invigorated separation of powers jurisprudence. Quixotically, that invigorated doctrine could go in two different directions. If the competing view (Justice Scalia, Justice Breyer) of what was at stake in the case–namely, that the case was about the permissible scope of delegations to the

---

[3]Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). See also Miller v. French, 530 U.S. 327 (2000).

[4]United States v. Munoz-Flores, 495 U.S. 385 (1990).

[5]Whitman, 531 U.S. 457 (2001); Loving, 517 U.S. 748 (1996); Touby, 500 U.S. 160 (1991); Skinner, 490 U.S. 210 (1989).

[6]Mistretta, 488 U.S. 361 (1989).

[7]Metropolitan Wash. Airports Authority v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991); Freytag v. Comm'r, 501 U.S. 868 (1991); Weiss v. US, 510 U.S. 163 (1994); Edmond v. US, 520 U.S. 651 (1997). Morrison v. Olson also involved the appointments clause and *Morrison* and *Mistretta* both involved "inter-branch" appointments.

executive--the invalidation of the veto could conceivably later be read to restrict the sort of authority Congress can delegate to the executive. And the case might also later be read as a pro-legislative power opinion in the sense that the functional complaint about the veto was that it diminished legislative power relative to the President. The President's power was enhanced, so went the argument, because the line-item veto undermined Congress' ability to get what it wanted by bundling proposals together and forcing the President to an all-or-nothing choice on a Congressionally-designed package. On that reading, the invalidation of the line-item veto could portend other Congress-friendly decisions.

These speculative predictions notwithstanding, no commentator perceives a dramatic change in the doctrine or, given the arrangements that the Court approved and those that it did not, the results in the cases. As for the moving parts of the doctrine itself, none of the cases (save *Morrison*, discussed shortly) self-consciously adjusted the existing doctrine in the way that is evident in some federalism cases. Nor are there signals of a quiet revolution. The court decided several delegation cases, applying the "intelligible principle" test and upholding all of the delegations. It evaluated several appointments arrangements, largely applying the pre-existing framework. The line-item veto case, *Mistretta*, and *Clinton v. Jones* all pretty much applied the pre-existing frameworks. Of course, the court can subtly change the framework by applying it in a new way, but the outcomes in those cases are unremarkable. The Court validated the U.S. Sentencing Commission with much agony–or, at least, with many words–but, in light of the legitimacy of independent agencies (both the work they do and that their "independence" is constitutional), that was not such a shock. The Court invalidated

the narrowly drawn line-item veto but, in doing so, the Court applied pretty standard tools of analysis. Justice Steven's opinion for the Court, in fact, reads much like Chief Justice Burger's opinion in *Chadha*–both the legislative and the line-item veto ran afoul of formal requirements of the Constitution. Whether the line-item veto (or the legislative veto for that matter) violated the relevant Constitutional rules was open to question, but the similar decision-making method in the two cases is the point here. Finally, Clinton v. Jones, for all its political salience, was a pretty routine application of principles developed in earlier executive privilege cases.

Morrison is, I think, the only case that (arguably) does not fit this ho-hum description. The case actually adjusted the doctrine in the sense that it explicitly changed the line between *Myers* and *Humphrey's Executor*. After *Morrison*, a constitutional requirement of at-will removal for the President does not turn on whether the officer is exercising "purely executive" authority.[8] Instead, the question is whether the tenure protection interferes with the President's ability to perform his executive functions, including to "take care that the laws be faithfully executed." This is an important change in the doctrine and the result of the change--the idea that there can be an "independent" prosecutor in the executive branch--is one to sit up and take notice of.

But *Morrison* does not a revolution in separation of powers doctrine make. The doctrinal adjustment does not seem that consequential because it was already implicit in the arrangements sanctioned by *Humphrey's Executor.* Independent agencies like the Federal Trade Commission, in addition to their "quasi" legislative and judicial functions also perform some "purely executive"

[8] 487 U.S. at 689.

functions. The Court's 1958 decision in Weiner v. United States is consistent with this reading. One could characterize the determination of which claimants would be entitled to compensation for personal or property losses sustained in World War II as an executive function. Yet, the Court held that it was *Humphrey's*, and not *Myers*, that governed.[9] To the extent that for-cause limitations could be imposed on officials that performed any executive functions, even if they did not perform solely executive functions, the *Myers* line was diminished, if not ignored. *Morrison* admitted what had been true in practice.

Morrison also importantly respected the pre-existing *Myers/Humphrey's* framework. That framework distinguished between direct (*Myer*s tenure-in-office act type arrangement) and indirect Congressional involvement with removal (*Humphrey's Executor* for-cause tenure protection). The independent counsel's tenure was protected by the indirect method and in that sense it is not surprising that the Court viewed it as permissible. Finally, to focus on the question of this paper, to the extent that *Morrison* does represent important evolution in the doctrine, it is away from the evolution evident in the federalism cases, that is, *Morrison* is evolution *away* from historical arrangements rather than toward those traditional arrangements, which in the federalism cases are some form of dual sovereignty and here would be some form of unitary executive. As a whole, then, the Rehnquist Court's separation of powers cases cannot be described in the way one would describe the federalism cases.

The lack of jurisprudential innovation is not because there is no work to do, at least from

[9] 357 U.S. 349, 356 (1958).

certain perspectives. Take the most obvious arrangements that are out-of-step with historical constitutional commitments. The elephants in this room are administrative and independent agencies that operate with broad delegations from Congress, delegations of authority that outstrip any that early Congress', much less Framers of the Constitution, could possibly have imagined. Those agencies not only issue general rules that resolve questions that one might think should be resolved in statutes (trade-offs between health benefit and cost, for instance), but they are permitted to adjudicate individual controversies. Clearly important features of the federal government, the actions these agencies perform are constitutionally permissible under the nondelegation doctrine and the doctrines that legitimate so-called Article I courts. Second, the officers that direct independent agencies (and independent prosecutors) can be insulated from the President in one way or another. Again this is permitted by the Court's interpretation of the Constitution. These are only the most talked-about examples, but one could mention others. Congress now routinely approves omnibus bills, which in turn diminishes the power of the President's veto. The scope and breadth of Presidential lawmaking, through Executive Orders primarily, has grown dramatically over time. Federal courts now hear cases that some would argue would not be consistent with earlier notions of what counts as a case or controversy.

Indeed, reviewing the Rehnquist Court's separation of powers cases, one is struck by just how tame they are. In a period where the Court seems willing to upset some old assumptions about institutional arrangements, the Court shrinks from any interpretation that would work a serious change in either the doctrine or in the structure of the government. Two outliers are Justice Thomas

and Justice Scalia. Justice Thomas, writing for himself, has asked whether the test that has long served as the touchstone of the non-delegation doctrine–which asks whether Congress has provided an "intelligible principle" to guide the exercise of discretion--served to prevent "cessions of legislative power." "I believe," he wrote, "that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than `legislative.'"[10] Justice Thomas' doubts are a notable development, but it is just as notable that he is alone. Justice Scalia, too, has played the lone wolf. He dissented by himself in the cases validating the Independent Counsel Act and the U.S. Sentencing Commission. He has also expressed qualified support for notions of a unitary executive in *Morrison* and other cases, arguments that have attracted few adherents.[11]

Lack of modification is not for lack of opportunity. The Court had a sufficient number of cases that it could have used as opportunities to revise the doctrine along any of the possible dimensions–the proper relationship between the legislature and the executive; the proper relationship between the legislature and the courts; and the proper relationship between the executive and the

[10]Whitman v. American Trucking, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

[11]The most obvious case here is Justice Scalia's solo dissent in Morrison. But there are others. See Young v. United States, 481 U.S. 787, 815 (1987) (Scalia, J., concurring) (prosecution is an executive function and that is the reason that a federal court cannot appoint private citizen to investigate and prosecute criminal contempt); Printz v. United States, 521 U.S. 898, 922-23 (1997) (Brady Act is constitutionally problematic, inter alia, because President cannot control state officers who administer the law); Id. at 959-60 (calling Justice Scalia's Article II argument "colorful hyperbole") (Stevens, J,. dissenting). See also Vt. Agency of Natural Resources v. United States ex rel Stevens, 529 U.S. 765, 778 n. 8 (2000) (case holds that qui tam relators can have Art III standing, but majority, Justice Scalia writing, reserves the question whether qui tam relators violate the appointments clause or the take care clause of Article II).

courts. In particular, there were a number of non-delegation doctrine cases that could have been opportunities to re-think that doctrine[12] and several cases evaluating appointment and removal arrangements for officers that could have permitted the Court to re-think its stance there as well.[13]

II. Why no revolution?

One might have thought that developments in separation of powers doctrine would mimic developments in federalism doctrines. If the evolution evident in federalism doctrines is a result of evolving methods of interpretation–the rise of more historically or textually minded constitutional interpretation, for instance--wouldn't that also suggest changes in other areas of law? Some have explained federalism developments as part of the Court's new-found confidence, even arrogance, about its exercise of judicial review, a confidence that makes it more willing invalidate the acts of the legislature without any angst about the counter-majoritarian nature of its decisions. But, if jurisprudential trends are changing or the Court is newly bold, such developments should affect other areas of doctrine and, in particular, such developments should have implications for separation of powers doctrine. Federalism and separation of powers doctrines are structural aspects of the constitution, aspects that are thought to channel authority to government decisionmakers rather than place substantive limits on any and all government decisionmaking. Just as some have argued that

[12]Touby v. US, 500 U.S. 160 (1991); Loving v. United States, 517 U.S. 748 (1996); Whitman v. American Trucking, 531 U.S. 457 (2001).

[13]Morrison v. Olson, 487 U.S. 654 (1988), is the most important case. There, the Court went beyond the existing precedent rather than revised it. In FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994), the Court held that the FEC did not have the authority to litigate on its own behalf in the Supreme Court. It was a statutory, not constitutional, holding. In that case, though, the lower court has considered three challenges to the structure of the FEC inspired by theories of the unitary executive.

the balance between federal and state power should be worked out by politics, so too have some argued that the division of authority among the three branches of the national government should be left to politics. If the evolution in federalism doctrine is best explained by external influences on the Court, why haven't external changes influenced separation of powers doctrine as well? At least as a starting point, then, federalism and separation of powers doctrines can both be considered apples. Why don't they ripen and fall off the tree together?

This Part stakes out answers to that question. It identifies both internal and external influences on separation of powers doctrine, suggesting that, while there may be important analogies between the two areas of law, it is the disanalogies that help explain the distinctive patterns in the Rehnquist Court.

* * *

I will first argue that the Court is unlikely to forsake judicial enforcement of many of the separation of powers provisions of the Constitution. These arguments focus on judicial incentives and the nature of the relevant positive law that the Court is applying. The argument is that these factors help explain why the Court is likely to be continuously in parts of the separation of powers business, and by that I mean adhering to or developing doctrines that will sometimes result in the invalidation of the actions of other governmental actors. These reasons suggest that the Court is unlikely (with respect to certain parts of separation of powers doctrine in any event) announce, as in *Garcia,* the explicit nonjusticiability of these separation of powers questions or, as in *Wickard/Darby*, an implicit announcement that anything goes. Those federalism decisions set the stage for the

Rehnquist Court's revisions in Tenth Amendment and commerce clause doctrines. Given the factors identified below, parts of separation of powers doctrine are likely to be more static across time than federalism doctrines.

A. Judicial Incentives and the Protection of the Independent Judiciary

The most straightforward reason we are unlikely to see a full retreat from the enforcement of separation of powers provisions of the Constitution is the unique interest that the Court has in this field. To put the point simply: When the Court perceives a threat to the exercise of federal judicial power it will act to protect the exercise of that authority. As I explain below, fulfillment of that function alone would count as a separation of powers jurisprudence; more speculatively, I suggest that the Court's instinct to protect its own interests may make it more willing to seriously entertain other separation of powers claims.

If the Court perceives the exercise of judicial power to be threatened or the judiciary compromised, the Court will act to protect itself. There are many cases historically that provide evidence for that proposition, and there are a striking number of cases in the Rehnquist Court that provide evidence for it well. The most straightforward is *Plaut v. Spendthrift Farm, Inc.*, where the Court held that Congress' extension of the statute-of-limitations to for a class of securities fraud claims constituted an invasion of the judicial power because it required the re-opening of final judgments.[14] Sometimes threats to the judiciary do not come from statutes. In *Young v. United*

[14]The statute at issue in *Plaut* was enacted in response to Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991), in which the Supreme Court established a statute of limitations for certain securities fraud suits; the suits had to be filed within one year after the discovery of the facts constituting the basis for the claim and within three years after the violation. As a result of *Lampf*, some suits that had been

States, the Court held that a federal court can appoint, subject to some limitations, a private prosecutor in order to prosecute a criminal contempt. Such authority, the Court reasoned, prevented court dependency on the cooperation of the executive for the investigation and prosecution of criminal contempts.[15]

Protection of the interests of the judiciary also pops up in all sorts of not-so-on-point situations. The Court's reading of Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores* bristles with indignation over Congress' perceived attempt to challenge what the Court views to be its superiority in the interpretation of the Constitution. As a matter of statutory interpretation, the Court held that the Federal Election Commission cannot seek cert in the Supreme Court without the Solicitor General's advance permission. The Court held the same with respect to the private prosecutor that it authorized District Courts to appoint in *Young*; in that case, the holding went against the views of the SG itself. But such a rule is easily explicable; it serves the interest of the Court by making sure it hears a single, familiar, and credible voice. Finally, one last example comes from the Court's invalidation of statutory restrictions on the types of claims that Legal Services Corporation-funded lawyers can bring. There, the Court reasoned that the restrictions were invalid

---

timely filed under the pre-*Lampf* regime had to be dismissed on the authority of *Lampf*. Congress reversed the *Lampf* holding for cases that had been filed prior to *Lampf* and were under pre-*Lampf* rules timely. Under the statute, such suits could be reinstated upon the filing of a motion.

[15]Young v. US, 481 U.S. 787 (1987). United States v. Providence Journal, 485 U.S. 693 (1988) is the follow-on case. Interestingly, in that case the Soliciter General argued that the private prosecutor did not need his approval to seek cert.

in part because they might limit the arguments that lawyers could make to a court.[16] If one is looking for judicial attention to the interests of the courts, one finds it in all sorts of places.

To understand some Rehnquist court cases from this "court protection" perspective is a little more complicated. The Court's Article III standing cases–*Lujan* and *Akins*, for instance--should in my view be understood as about the protection of the judiciary's interests. Of course, in *Lujan*, the Court is declining to hear a category of cases, which on one view might be considered contrary to its interest in maximizing its power. But that is naive. One must notice that the Court is deciding not to hear cases that Congress, through broad citizen suit provisions, would like it to hear. An important explanation for the standing cases is that the Court will not hear cases that undermine what the Court views to be its appropriate role. *That* is about protecting the judiciary even if, narrowly understood, it is about not hearing a particular case.

Sustaining the U.S. Sentencing Commission is likewise not straightforwardly understood from a "protection of the judiciary" perspective. The claims against that Commission were that Congress delegated legislative power inappropriately (a claim the Court easily dismissed) and, more particularly, that Congress could not assign this particular task to an entity in the judicial branch because it was not the exercise of a judicial power and the assignment threatened the independence of the judiciary. How could it be protecting the exercise of the judicial power and the judiciary more generally to sustain such an arrangement?

One can plausibly understand *Mistretta* as protecting judicial interests by focusing on the

[16]LSC v. Velazquez, 531 U.S. 547, 545-46 (2001).

internal hierarchy of the courts. A more objective sentencing system is something that district court judges might resist, but not necessarily something that appellate courts would resist. Objectivity in sentencing makes review of sentencing decisions easier. If one thinks of appellate courts as managers, the Sentencing Commission is a manager's dream. All the better that it is housed in the judiciary and run in part by judges. As for the Supreme Court's evaluation of the structure and location of the Commission, the Court was certainly concerned about the potential for the Commission to threaten the independence or the integrity of the judicial branch. It was just not persuaded that the Commission presented such a threat.

Whether one can understand the standing cases, *Mistretta*, or *Morrison* as objectively consistent with the protection of judicial power or the judiciary as an institution is distinct from whether the judiciary *perceives* itself to be protecting itself. It is not easy, in my view, to deduce a positive theory of what counts as a threat to the judiciary and what does not. To take some of the most deeply puzzling cases of the Rehnquist Court, the Court viewed the statute at issue in *Plaut* to invade the judicial power while the statute at issue in *Miller v. French* did not. Nor did the Court view the courts' role in the appointment of the Independent Counsel, or the structure and location of the Sentencing Commission, to be a threat. All are a bit puzzling. But whether we can endorse, or even understand, the Court's implicit vision of what counts as an invasion of the judicial power or a threat to the independence of the judiciary, that question is distinct from the more basic point here: Regardless of how "threat" is defined, when it is perceived, the Court will rebuff it.

It matters for separation of powers doctrines that the Court will reliably protect what it

perceives to be its interests. In the first place, as long as the Court is willing to police the boundary between judicial power and legislative or executive power, and ask whether some assignment threatens the independence or integrity of the judicial branch of government, then, viola, that *is* a separation of powers jurisprudence. If the Court will always reliably protect itself, in other words, there will never be a *Garcia* in certain parts of separation of powers law. That is because, given its interests, the Court will never retreat from policing the boundaries of judicial power (from threats by the Congress or the executive) and identifying threats to the integrity and independence of the judiciary.

A stronger form of the argument is that, when the Court is policing the boundaries of judicial power and protecting the integrity of the judicial branch, it is also more likely to be in the separation of powers business generally speaking. That is, it will be more willing to consider, and even protect, what it considers to be the interests of the other institutions of the federal government. This is the sort of claim one cannot prove but, nonetheless, it is plausible. If the Court is protecting its own authority (*Plaut* is an example) and carefully inspecting arrangements to make sure its integrity and independence are not undermines (*Morrison, Mistretta*), then it would be a little odd for the Court to explicitly or implicitly state that the boundaries of the powers of other branches and the integrity of those branches are beyond judicial ken. If this is right, the Court will hear the claim that the line-item veto diminishes the authority of Congress; it will hear and take seriously the claim that the Independent Counsel threatens to undermine the executive by weakening the President's control over the exercise of executive power.

By comparison, there is no equivalent judicial interest with federalism doctrines. At one time, perhaps there was. If the authority of the federal courts was linked to the authority of the federal government more generally, then federal courts interested in protecting their prerogatives would also have an interest in expansive interpretations of federal legislative or executive power as well. But that connection seems to have been broken today. Limitation on Congress' commerce power, for instance, carries no necessary implication that federal judicial power will also be restricted. Thus the federal courts do not have the interest identified here in federalism cases.

B. The Positive Law and the Existence of Rules

1. The Eminent Justiciability of Appointment and Removal Arrangements

Separation of powers doctrine has long been populated with a large share of cases that evaluate how officials exercising governmental power are appointed and/or removed. The Court has evaluated arrangements that grant officers the right to be terminated only for cause (*Humphrey's Executor*), that include tenure-in-office-like removal restrictions (*Myers*), that involve Congress or the judiciary in the appointment or removal of the officer (*Morrison, Mistretta, Buckley, Bowsher*), and those that actually appoint a judge or a Member of Congress to exercise governmental authority *(Mistretta, Metropolitan Airports Authority*). Over the years, there have been many such arrangements and the Supreme Court has been willing to evaluate their constitutionality.

Is this obsession with appointment and removal evidence of lawyers' capacity for paying attention to the trees and not the forest? As a result of the toothless nondelegation doctrine, the court does not police what many government officials are authorized to do, but is for some reason intensely

interested in how those officers are appointed and/or removed. As I suggest below, this criticism is off-the-mark; these cases should be understood to be evaluating part of the forest. But, more significantly, whether these cases are essential to maintaining our system of separated powers is not the point. The point rather is that the existence of such arrangements and the Court's willingness to develop a body of doctrine that evaluates them helps explain why important parts of separation of powers doctrine have not gone through periods, as federalism doctrines have, of official or effective nonjusticiability.

A striking number of the Supreme Court's separation of powers cases have always been about the appointment or removal of various officers. It surprises many to find out that a pillar of the law (*Humphrey's Executor*) making independent agencies constitutional turns on whether the appointment arrangements–and, specifically, the restrictions on the President's authority to remove such officers--for such officers are constitutional. Under *Humphrey's Executor*, Congress can insulate certain officers--those that perform quasi-judicial and quasi-legislative functions--from the President by providing them a form of tenure.[17] While less clear, Congress can also apparently limit the President's appointment by specifying bi-partisanship (half from each party) on multi-member commissions[18] or require the President to choose from a limited list of appointees (*Mistretta*). But more direct Congressional control over the officer, through actual appointment (*Buckley*), removal (*Bowsher*), or consent to the removal by the President (*Myers*), it is clear, does not comport with the

[17]Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[18]FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994) (challenge to bi-partisanship requirements nonjusticiable).

Constitution.[19]

This pattern of appointment/removal cases continued in the Rehnquist Court. The crucial first holding in *Morrison* is that the independent counsel is an "inferior" officer for purposes of the appointments clause, meaning that his appointment does not require the advice and consent of the Senate. That of course is not the end of the evaluation, but that holding is a necessary starting point if the statute is to have a chance of being constitutional. Only thereafter can one reach the question whether the Special Division's involvement in the appointment or the limitations on the ability to remove the independent counsel are permissible. There were several other cases about the line between a principal and inferior officer. (*Freytag, Weiss, Edmond*). *Mistretta* too involved a creative appointment arrangement of another sort, namely, the appointment of three federal judges as Commissioners of the Sentencing Commission. So too with *Metropolitan Washington Airports*, where Congress created a Board of Review that included Congressmen and had veto power over the operations of Reagan National and Dulles Airports.

Leave aside for now why the rules about appointment and removal are what they are. Focus on a narrower question: Why has the Court been generally willing to evaluate appointment and removal arrangements, identifying constitutionally proper and improper appointments arrangements? Contrast this with *Garcia* and *Wickard/Darby*'s announcements that the Court will not be in the

[19]Myers v. United States, 272 U.S. 52 (1926) (requirement that Senate approve removal of postmaster first class unconstitutional); Buckley v. Valeo, 424 U.S. 1 (1976) (appointment by House and Senate to FEC not constitutional nor is requirement that both houses approve all appointments); Bowsher v. Synar, 478 U.S. 714 (1986) (unconstitutional for Congress to retain power to remove Comptroller General, who performs executive function under Gramm-Rudman-Hollings Act).

business of identifying and enforcing limitations in those areas.

Why is the Court willing to evaluate these arrangements? The character of the appointments clause must be part of the answer.[20] In contrast to many areas in federalism doctrine (and some in separation of powers doctrine), the appointments clause sets forth a rule that is amenable to judicial enforcement. The clause itself is specific. There are principal officers who must be appointed with the advice and consent of the Senate; there are inferior officers that Congress can dictate be appointed by the President alone, a court of law, or a head of department; and perhaps there's an implicit distinction between officers (either principal or inferior) and employees. In terms of clarity, the clause is not akin to the requirement that the President be thirty-five years old and fourteen years a

[20]A generalized version of this claim would be that the character of constitutional doctrine is explained by the character of the constitutional text that is being interpreted. More particularly, the argument would be that the more specific the constitutional rule, the less likely there is to be judicial creativity and, with that, evolving constitutional doctrines. While most would take the example in the text–President be 35 years of age–as a noncontroversial example that generally supports the broader claim, the broad claim is controversial. And for good reason. There are some obvious counter-examples that seem to disprove the claim. The Eleventh Amendment, which sets forth what looks like a specific rule but has been interpreted as if it sets forth a standard about protection of state sovereignty, is one counter example. Many constitutional theorists have written on this question. For a characteristically thoughtful discussion of the claim about the relationship between constitutional text and constitutional interpretation by judges, see Frederick Schauer, *Constitutional Invocations*, 65 FORD. L. REV. 1295 (1997).

The claim I am making is much narrower. My claim is that the existence of a rule like the appointments clause helps explain the effective *justiciability* of the appointments questions. It is not that the appointments rule is likely to be enforced in some particular way–say, consistently with its "literal" terms. If its literal terms are violated, I think it likely that it would be literally enforced. *(Buckley* is probably the best example.) But, as the appointments clause cases make clear, most arrangements do not violate the literal dictates of the clause; they test the areas where there is wiggle room in the appointments clause, and that room permits interpreters to take different views of its dictates. The bottom line claim here, however, is not about the *result* that will be reached in appointments cases; it is that the judicial response to the appointments clause will be to enforce it in some way.

resident of the United States.[21] Nor is it as clear as its cousin, the incompatibility clause.[22] Even so, the appointments clause is a different kind of legal rule than the 10th Amendment or Section 5 of the Fourteenth Amendment. It seems designed for courts to answer questions about it. The provision is ambiguous enough to generate cases–the difference between a superior office and an inferior officer, the difference between an officer and an employee, what counts as a head of department or court of law--but not so open-ended as to permit any interpretation at all. It is hard to imagine the Court confronted with a case that presents an appointments clause question holding that the question is best left to the free play of politics.

One needs more than a rule amenable to judicial enforcement, however, to generate cases. One needs appointments arrangements that push at the boundaries of the rule. Congress has more than satisfied this requirement historically and continues to do so. The legality of Congress'[23] arrangements does not always turn solely on the appointments clause. Congress has also rested such arrangements on the necessary and proper power and resistance to these arrangements is rooted in claims about infringement on executive power or more general concerns about separation of powers. That said, many challenged arrangements over the years, and in the Rehnquist Court as well, have required evaluation of the appointments clause.

The Tenure in Office Act–which, in effect, required the Senate's consent before an officer

[21]Art. II, §1, cl. 4.

[22]Art. I, §6, cl. 2.

could be removed from office–is the grandaddy of these "creative" arrangements.[24] It was approved, in part, on a theory rooted in the appointments clause. The argument in its favor was that the method of removal followed the method of appointment; this meant that if the Senate provided advice and consent for appointment it also provided advice and consent for removal. There are also many cases that straightforwardly test the internal workings of the appointments clause or its applicability. The Independent Counsel Act is only constitutional if the counsel is an inferior officer for purposes of the appointments clause. In *Freytag*, a special trial judge appointed by the Chief Judge of the tax court must be an inferior officer and the Chief Judge must be either a Court of Law or a head of department for the arrangement to comport with the appointments clause.[25] In *Buckley*, Congress attempted to appoint government officials in ways that were inconsistent with the appointments clause on many grounds;[26] the Court determined that, given the functions they exercised, they were officers of the U.S. and therefore had to be appointed consistently with the clause.

Some cases about the structure of an office do not involve the appointments clause. The

---

[24]*The* Tenure in Office Act, of course, was an 1867 statute dictating that an officer appointed with Senate consent held office until the Senate approved the officer's successor. President Johnson was impeached, but not convicted, for discharging the Secretary of War in violation of the statute. The constitutionality of such an act was not decided by the courts until 1926, when the Supreme Court decided Myers v. United States, 272 U.S. 52 (1926). *Myers* held unconstitutional a statute that required a postmaster's removal to be approved by the Senate.

[25]See also Weiss, 510 U.S. 163 (1994) (military officers serving as military judges as inferior officers and their commission from President makes them properly appointed); Edmond v. US, 520 U.S. 651 (1997) (judge of Coast Guard Court of Criminal Appeals is inferior officer and thus appointment by Secretary of Transportation is permissible).

[26]There were six voting members. Two were appointed by the President pro tempore of the Senate; two were appointed by the Speaker of the House; and two were appointed by the President. All six of the voting members had to be confirmed by *both* houses of Congress.

Court could evaluate the structure and appointment of the Sentencing Commission without much consideration of the appointments clause. And, while the clause speaks to the appointment of an officer, it does not explicitly speak to the officer's removal. Although tenure-in-office restrictions on removal were, as noted above, rooted in a negative implication of the appointments clause, other cases were not defended on that theory. Where Congress kept removal power, as in the *Bowsher* case, evaluation did not involve the appointments clause. And the several cases involving what I've termed indirect restrictions on removal–illustrated by *Humphrey's Executor* and *Morrison*–through for-cause limitations on the removal of an officer were justified under the necessary and proper power. One could conceivably understand them as a "lesser included power" to a tenure-in-office power which was itself rooted in part on the Senate's role in advice and consent. But they have not generally been defended on that ground.

Why does Congress establish these arrangements? Because rules that structure the appointment and removal of an officer help shape the incentives of that officer. There is probably not a one-to-one relationship here; government officials have many other pressures and demands on them that might swamp the incentive created through appointment and removal rules. But appointment and removal arrangements must have some effect otherwise Congress wouldn't keep adopting them. Congress' interest is to arrange it so that the official will care about Congress' views (see Tenure in Office Act, *Bowsher*, or *Buckley*) or has insulation from the President (the independent counsel, independent agencies generally, the U.S. Sentencing Commission). Some might argue that these are the same thing–that is, to the extent the officer is independent of the President, the officer

is more dependent on the Congress. But whether that is accurate is not the point for present purposes. The point is that Congress adopts creative appointments arrangement for reasons that implicate separation of powers concerns–these are efforts to assert Congressional influence over the officer or to insulate the officer from an institutional competitor, the President.

I have argued that the nature of the appointments clause as a legal rule helps explain the Court's willingness to develop a body of law in this area. I have also argued that evaluation of appointment and removal arrangements cannot be considered nitpicking form with no substance. In its narrowest form, the argument here is that the Court *will* evaluate arrangements that explicitly test the reach of the clause and that such evaluation matters. As in the earlier argument about the protection of judicial protection of judicial prerogatives, if the Court did nothing but evaluate claims under the appointments clause, *that* would constitute a separation of powers doctrine. Put the two together–protection of the judicial power and the integrity of the judiciary, and evaluation of appointment or removal arrangements that involve the appointments clause–and you've got a pretty large body of separation of powers law.

As is the case with the judicial incentives argument offered earlier, there is a broader argument here as well. Given the appointments clause cases that the Court will evaluate, the court will also be inclined to evaluate a broader set of appointment and removal arrangements, including those that don't directly involve the clause. Assume that I am right and the courts are always and everywhere willing to consider claims brought to them that test the appointments clause. Those very cases will often be bound up with other claims. The defense of the act in *Myers* was rooted in part

in the appointments clause and in part in the necessary and proper power; those defenses were met with claims that removal is an executive power and that Senate consent to removal interferes with the exercise of executive power. To reject one claim (advice and consent to removal is not implied by advice and consent to appointment) may also be to embrace the other (advice and consent to removal interferes with the exercise of executive power). And, once the court has decided, for instance, that certain actions can interfere with the exercise of executive power, then that jurisprudence takes on a life of its own, doing work in cases where the appointments clause is not itself involved. *Myers* and *Humphrey's Executor* illustrate of the point. In *Myers* the appointments clause was in play, but the Court rejected the argument. It seems unlikely that the Court would then say less than a decade later that it will not evaluate the for-cause limitation, which is defended as an exercise of necessary and proper power and attacked on the ground that it interferes with the executive power. One could make a similar point about *Morrison*. Evaluation of the independent counsel required the Court to interpret the appointments clause, but there were other questions in the case–the validity of an inter-branch appointment, the President's removal ability–that did not involve the clause but that it would have been awkward for the Court to avoid.

If the existence of a specific rule like the appointments clause helps explain the regular appearance of cases that adjudicate appointment and removal arrangements, then the provisions of the constitution that touch on federalism (for the most part) provide a contrast. The Tenth Amendment and Section 5 of the Fourteenth Amendment provide the sharpest contrast. Such provisions do not of their own terms provide a judicially enforceable rule; unlike the appointments

clause, it is not easy to imagine statutes that would unquestionably violate the terms of those provisions. The meaning of those provisions is created after judges take it upon themselves to interpret them by whatever method. The commerce clause is closer to a rule, but it is still a far cry from the appointments clause. Indeed, of the doctrines associated with separation of powers, the commerce clause seems closest on the generality/specificity dimension to the allocation of legislative power to the Congress. The fact that the nondelegation principle is essentially toothless and that the interpretation of the commerce power meant, for at least some decades, that Congress could reach nearly any activity, is supportive of, not resistant to, the claims made here. Both the nondelegation doctrine and the commerce power are rules that are open-ended enough (when compared to other legal rules of interest here) to vest a great deal of discretion in the interpreter, which leaves space for varying interpretations, including effective nonjusticiability. Other influences can, as I suggest below, importantly affect the interpretation of legal commands like the vesting of legislative authority in Congress or the granting of commerce power to Congress. The point for now, though, is that such rules do not permit the court to do a *Garcia* or a *Wickard/Darby*--treat something as explicitly or implicitly nonjusticiable. Finally, the Eleventh Amendment is also supportive of this claim. It is indisputably an appointments clause-type legal rule. And though the Eleventh Amendment has been interpreted quite differently across time, at its core it has never been nonjusticiable.

2. The Existence of Comparatively Many Rules

The point made in the last part about the appointments clause can be made more broadly. When compared to the provisions of the constitution that touch on federalism doctrine, the separation

of powers provision of the constitution are comprised of a large number of rules. Separation of powers commentators tend to focus on the vesting clauses, which are, at their outer edges anyway, allocations of authority that can be difficult to distinguish from one another and hence difficult for judges to enforce in a straightforward way. Even so, the vesting clauses tell us more about what the rules are than the Tenth Amendment or Section 5 of the 14th Amendment.

But look beyond the vesting clauses and the first three articles of the constitution are literally riddled with "appointments clause-like" rules about how the institutions of the national government will be designed and staffed. Because governmental actors do not often take actions that violate the literal terms of the Constitution, these provisions do not generate a lot of cases. But their mere existence means, I think, that the Court is unlikely to announce that the allocation of authority between the institutions of the national government will be left to politics.

Of the rule-like provisions of the constitution the ones that have generated some cases are the rules about bicameralism and presentment. Both the legislative veto and the line-item veto were invalidated, in opinions animated (rightly or wrongly) by the conviction that the political branches had attempted to make an end run around the Constitutionally-mandated procedures by which legislation is to be made. To the Court, the legislative veto threatened to permit the enactment of legislation by a subset of Congress without bicameralism and presentment. To the majority in the line-item veto case, there was a similar problem. If Congress could not constitutionally give the President an actual line-item veto–defined as the ability to single out certain provisions of a legislative package and refuse to affix his signature to those individual provisions, while making the

rest law–then Congress could not in effect do that same thing by providing for a time lapse and calling the veto cancellation. Neither characterization is entirely satisfactory. It is contestable to say that the rejection of Chadha's deportation was itself a legislative act; and it is contestable to say that the President's cancellation authority was the equivalent of a repeal. But that focuses attention away from the more basic point: The existence, and arguable applicability, of the specific requirements that could be mechanically enforced was important to the disposition of those cases.

To emphasize once again, the point here is narrow: Given the presence of a fair number of constitutional rules about how institutions of the national government are to work, rules that are specific enough that their application can be relatively straightforward, it is unlikely that we would see a Court opinion that explicitly or in effect treated questions about the allocation of authority among the branches of government as to be decided by politics.

* * *

The two explanations offered so far are in the service of the rather modest claim that the Court is unlikely to ever retreat in important parts of this field in the way that it did with respect to important aspects of federalism doctrine. Though modest, this claim may be important in explaining the disjunction between the Rehnquist Court's movement in federalism doctrine and the lack of movement in parts of separation of powers doctrine. But the explanations offered so far do not explain the *content* of that doctrine. Yes, the Court will be involved in adjudicating appointments clause cases, but why has it settled on particular rules? The next set of arguments focus on that question.

It is first important to draw conclusions about the substantive content of separation of powers doctrine. Some cases do not easily generate broad conclusions about the Court's position on the structure of government. Some (for example, evaluation of the line-item veto or President Clinton's claim of immunity) are best understood as individualized, perhaps even sui generis, judgments, not notes toward a general theory about the proper allocation of authority among the institutions of the national government.

There are, however, some broad lessons to take from the Court's cases. Two patterns stand out. In important respects, the Court has resisted claims that the Constitution establishes a unitary executive. Congress, for instance, is not permitted direct involvement in appointment or removal of officers, but it is apparently permitted to limit the President's appointment powers in general ways and is definitely permitted to insulate certain officers from removal at will by the President. Of more significance is the second pattern. Congress can delegate significant policymaking authority to expert bodies–in the executive and the judiciary–and the Court will not police those delegations to determine whether they are so loosey-goosey as to constitute a give-away of legislative authority. Despite many arguments in favor of revitalization of the nondelegation doctrine, and many opportunities, the Court will not--emphatically will not--revitalize that doctrine. Why, then, hasn't the substantive content of the separation of powers law changed in a period where the Court is willing to revisit some old commitments? The following explanations focus on that question.

C. External Influences on Federalism and Separation of Powers Doctrine

Many have written on the external changes–economic, political, demographic, sociological,

intellectual–that have made the late 20th Century a period where devolution to the states as a matter of policy and of law is possible. Keith Whittington has provided one of the most comprehensive accounts.[27] His work is nuanced and I cannot do it justice here, but the rough outlines illustrate. He first traces the forces that pushed in the earlier part of the 20th Century toward a centralized, federal state–the rise of an expertise model of governing, of the positive state committed to economic regulation and redistribution, and of commitment to regulating public morality. These centralizing forces reached their height in the 1960s, but were from that point on starting to be overtaken by factors that raised doubt about the efficacy and wisdom of centralized action and at the same time rehabilitated the states. In tracing that changing environment on federalism questions, Whittington first argues that many factors combined to make liberalism recede as the dominant vision, and with liberalism went the governing ideology that "underwrote the modern state." So too did economic forces–the rise of globalism, the structure of post-industrial economic entities--combine to diminish the efficacy of any government's control over the economy. As for the federal government as a keeper of the public morality, that calculation changed as well because the federal government's stature as a moral force was diminished and the states "gradually recovered public confidence."[28]

---

[27]Keith E. Whittington, Dismantling the Modern State: The Changing Structural Foundations of Federalism, 25 Hastings Constl. L.Q. 483 (1997-98); Keith E. Whittington, Taking What they Give Us: Explaining the Court's Federalism Offensive, 51 Duke L.J. 477 (2001). See also Howard Gillman, Reconnecting the Modern Supreme Court to the Historical Evolution of American Capitalism, in The Supreme Court in American Politics: New Institutionalist Interpretations (Howard Gillman and Cornell Clayton, eds, 2002).

[28]See Whittington. Christopher Schroeder supplements the account by pointing to the ways in which distrust of the federal government has grown dramatically in recent years. Christopher H. Schroeder, Causes of the Recent Turn in Constitutional Interpretation, 51 Duke L.J. 307, 334-51 (2001).

Whittington's is not a deterministic story; none of the factors he identifies make a devolutionary trend in policy or law inevitable. But they do make it possible in a way that he argues would not have been possible, say, in the 1940s, 1950s, or even the 1960s.

Most would agree that separation of powers doctrines can be influenced by external events, including ones of the sort Whittington recounts as facilitating centralization and then making decentralization possible. It is now a fairly conventional claim that views, including judges', of Presidential power tend to expand during wartime. Consider the primary separation of powers question being evaluated here--the delegation of authority to administrative agencies. External events of the type Whittington and others identify must have played a role in engendering the view that such administrative agencies operating under broad delegations from the Congress were constitutionally acceptable. Many of the forces Whittington identifies as pushing in the direction of a centralized state suggested that the state should wield power through a particular form, that is, the expert bureaucracy. If those forces could play a role in constitutionally blessing this federal form, a position operationalized in law through a toothless nondelegation doctrine, couldn't external events create conditions that would make that governmental structure less appealing and hence less constitutionally acceptable?

Yes, of course they could, at least theoretically. But to see why that hasn't occurred it is important first to clarify what such an external factor would have to suggest in order to influence the constitutional rules. Obviously, the external forces that may have helped facilitate the devolutionary trend have little influence on separation of powers in general and legislative delegation to other

federal actors in particular. Those "federalism forces" speak to the relative appeal and efficacy of the federal government as an actor as compared to the states. They speak to the overall scope of federal power not, as separation of powers questions do, what (whatever the scope of federal power) the distribution of authority should be as among the institutions of the national government.

Trends capable of influencing views on delegations would also have to do more than cast doubt on regulation in general. That is because the alternative to administrative agency regulation under vague mandates is surely not no regulation. If a court invalidated a regulatory scheme on nondelegation doctrine grounds, the likely result would be that Congress would re-adopt the legislation and provide for private enforcement (delegate to the courts as it were) or it would cure the lack of intelligible principle, re-enact the legislation, and re-delegate to the same administrative agency. So factors that might have the capacity to influence nondelegation rules would need to cast doubt not on the federal government generally, not on regulation generally, but rather on something very specific: actions taken by administrative agencies.

The constitutional doctrine facilitating delegations has stubbornly refused to move. Does this mean that the courts are enchanted by administrative agencies?[29] To the contrary. If the New Deal period started with enormous enthusiasm about the capacity for expert administration, that attitude was quickly replaced by skepticism about the possibility of the talented and public-spirited regulator.

[29]Eric Claeys has thoughtfully argued that the Supreme Court's case law can be explained by commitment to a progressive theory of apolitical administration. When apolitical administration is advanced, the Court upholds the arrangement; when apolitical administration is undermined, the Court invalidates the arrangement. See Eric Claeys, The Living Constitution and Separation of Powers Law on the Burger and Rehnquist Courts, paper available on SSRN. As I suggest in the text, I think the argument misses the serious skepticism of agency decisionmaking that is now reflected in administrative law doctrines.

That agency official rather quickly came to be viewed as incompetent or, worse, in the business of delivering rents to the parties he was supposed to regulate. Judicial doctrines, mostly in the field of administrative law, evolved rather dramatically to take account of this new vision.[30]

Why didn't such skepticism lead to a revision in the nondelegation doctrine? Let me offer some admittedly speculative suggestions. First, the rise in disenchantment with administration came at the wrong time given the overall jurisprudential commitments of the Supreme Court. The concern that agencies might be captured manifested itself in the courts by the mid to late 1960s. But that was a period where the post New Deal settlement–about the scope of federal power, about deference to social and economic legislation--was not open for re-negotiation. A revitalized nondelegation doctrine, remember, would mean sweeping invalidation of significant parts of the apparatus of the federal government. To take some examples, the EPA, the FCC, the FDA, the FTC, the OSHA, and the SEC all administer some vague mandates; parts of each of those agencies' mission might have to be invalidated. Sweeping judicial invalidation of parts of the federal government was not in the realm of the possible at the point at which skepticism of agency behavior seeped into the courts for real. More than that, it was not (and is not) clear what would be achieved by revitalizing the doctrine and invalidating major parts of the administrative state. This is another distinction from the forces Whittington identifies in federalism. Compared to the increasing appeal of the states, the alternative

[30]Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi-Kent L. Rev. 1039 (1997); Reuel E. Schiller, Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 53 Admin. L. Rev. 1139 (2001); Reuel E. Schiller, Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 53 Vand. L. Rev. 1389 (2000); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975).

that would result from the judicial invalidation of parts of these agencies' missions may not have seemed much better. That alternative was not, as just discussed, the end of regulation of those fields. In the face of an invalidation, Congress might re-enact statutes and have them privately enforced or re-delegate to the administrative agency with more specific instructions.

Finally, the nondelegation doctrine was not the only space in which courts could express their concerns. There were in fact many outlets for judge's skepticism because courts had sub-constitutional tools available to tame that incompetent or captured agency. These were tools that courts used with vigor. Through the workaday mechanisms of administrative law, courts transformed what agencies were required to do in order to survive judicial review of their actions. Agency actions had to be transparent, participatory, and reasonably justified for the court. So tamed, when it does become possible to reconsider old commitments, the administrative agency does not look like a candidate for reform.

D. The Normative/Political Valence of Federalism and Separation of Powers

Aside from those who describe the changing conditions that make movement toward devolution possible, many commentators stake out more normative positions on the Court's federalism decisions. They argue that the Court's federalism revival is explained by some factor and then they either decry or celebrate that development. Several commentators, for instance, have characterized the Rehnquist Court federalism revival as politically conservative.[31] Political

[31]Herman Schwartz, *The States' Rights Assault on Federal Authority*, in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 155-167 (Herman Schwarz ed., 2002) (asserting that the Rehnquist Court's federalism jurisprudence is a "states' rights resurgence" and should be understood as a masked "assault on those shortchanged by birth and by fortune").

conservatives are fans of federalism, so goes the argument, because state governments are less likely to enact certain types of regulation and wealth redistribution regimes. Given interjurisdictional competition, for example, redistribution of wealth is systematically less likely to occur at the state level. Others explain that the court has rightly become more persuaded of the traditional virtues of a federalist system–experimentation and inter-state competition yielding superior approaches (races to the top), diversity (with it the possibility of satisfying more preferences), and/or the intrinsic value of decentralized government decisionmaking.[32]

These arguments, it should be said, paint too broadly. It is hard to achieve much of anything out of the checkerboard of the Court's federalism "revolution." Piece together the Court's decisions on the commerce clause, Section 5 of the 14th Amendment, the anti-commandeering rule rooted in the 10th Amendment, and state immunity from damage actions rooted in the Eleventh Amendment. These movements in the direction of the states are a strange mishmash that hardly add up to a full-scale shift of government authority to the states.[33] Compared to the results one might hope to achieve, or fear would result, from a thorough-going devolution of federal authority to state governments, the Court's decisions seem a thin reed indeed. Nonetheless, I shall take as a given that–at the margins, as the economists like to say--federalism decisions can be understood, as well as defended or critiqued, along such dimensions as consistency with a politically conservative

[32]Steven Calabresi, Federalism and the Rehnquist Court: A Normative Defense, 574 Annals Am. Acad. Of Pol. And Soc. Sci. 24 (2001); John O. McGinnis, Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery, 90 Cal. L. Rev. 485 (2002).

[33]Richard H. Fallon, Jr. The Conservative Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 469 (2002).

preference for state instead of federal action, or for the traditional values of federalism–experimentation, diversity, and localized decisionmaking.

What is striking about all these perspectives on federalism is that, despite their differences, they are committed to the notion that limitations on federal power, and comparative enhancement of state power, have predictable consequences. They then bemoan or celebrate those consequences. But the universal assumption is that it *really* matters whether states decide something or the federal government decides something. The specific views underlying the assumption are that states will be more politically conservative; or they will experiment by pursuing diverse responses to social problems, which can tell us something about the best response or at least permit people to match with the state regime that most suits their preferences; or states satisfy a deep need for decisionmaking that is close to the people.

The shared assumption seems quite plausible. Shifting authority away from federal actors and to state actors is to send authority to a systematically different set of decisionmakers. State political systems are genuinely different political systems than the national political system. Consider just the formal differences one notices in a survey of state governmental structures. Many governors have line-item veto authority; many state judiciaries are elected; many states have traditions of referenda. There are systematic ideological differences that map on to states; there are detectable and profound regional differences; the levels of state regulation and state redistribution vary even though there is pressure toward national uniformity.

Those who write about separation of powers like to think that it really matters too whether,

for instance, Congress or the executive branch decides some question. And on many important levels, it probably does. They are different institutions with different ways of doing business. While these differences are often overstated because there are important variations on these matters within each institution, generally speaking, the executive and the legislature are structured and staffed differently. Add the judiciary and one sees even further variation. Not only are these institutions structured differently. They have different jobs to do, different ways of doing those jobs, and different internal norms. And to return to the Congressional/executive choice, from a democratic theory perspective, the choice between Congress and an administrative agency is the choice between decisionmakers with electoral connections and those without direct electoral legitimacy.

But those who think about separation of powers can exaggerate these differences and the comparison to federalism well makes the point. To take up the primary delegation question, if one compares the choice between Congress and the executive on the one hand and the choice between the federal government and state governments on the other, the consequences of the intra-federal choice seem small because the differences by comparison look lilliputian. Despite all the emphasis on the differences among the institutions of the national government, the federal political system is first and foremost a federal system. When compared to the federal/state choice, the incentives of decisionmakers in the federal system–and especially the two democratic institutions–are more similar than different; the constituencies that care about what government does are active in, have access to, and influence in the whole range of federal institutions.

This matters because it means it is difficult to predict what the outcome would be of a shift

of authority from one institution to the other.[34] If the President had a line-item veto, would the world look a lot different? If Congress specified regulatory trade-offs instead of administrative agencies specifying regulatory trade-offs, would the world look a lot different? The answers to these questions are far from clear. Those choices would channel decisionmaking to different decisionmakers (to the President from Congress; to the Congress from the agency). But no matter where the decision is lodged, the decisionmaker that doesn't have the authority will exist, will express its views, and is a repeat player in a federal system where there are thousands of occasion for inter-branch negotiation and compromise. More than that, the constituencies that care about the choice that is being made will energetically press their views to the decisionmaker, no matter where he is located. Thus a predictable set of pressures will come to bear on the decisionmaker, wherever he sits. It is for these reasons that the allocation of authority as between Congress and the executive, for instance, does not have the sort of systematic valence as does the choice between the federal government and state governments. And, without such predictable consequences to either celebrate or worry about, it will be much harder for external forces to influence in major ways doctrines like the nondelegation doctrine.

III. Lessons of the Comparison

This comparison has some broader lessons. The first lesson is that we should be cautious of some of the global explanations that have been offered for the Rehnquist Court's decisions. A turn toward historically informed constitutional interpretation cannot explain what has happened in

[34]The argument here is more comprehensively developed elsewhere. See M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. Penn. L. Rev. 603, 632-649.

separation of powers law. Nor can an explanation that emphasizes the Court's confidence about its exercise of judicial review explain the Court's resistence to revising some parts of separation of powers doctrine.

Two other lessons re-confirm oldies but goodies. The judiciary can be reliably expected to protect what it views to be its interests when it perceives itself to be under attack. Second, writers of positive law who are thinking about judicial enforcement should make that positive law look as much like the appointments clause as they can. Sometimes, of course, that will not be possible. Perhaps there is no appointments clause-like way to state the principle of the 10th Amendment or the principles of the vesting clauses. In such a case, drafters must look to second-best solutions that can be formulated in rule-like ways. That may be one way to understand the rules about separation of powers. The real parchment barriers are the vesting clauses. It is bicameralism, presentment, the veto and the return, the appointments clause and the incompatibility clause that are the second-order way of achieving what the vesting clauses are seeking to achieve.

The most important lesson, though, is that federalism and separation of powers are not siblings. They might not even be cousins. Yes, they are both about channeling decisionmaking authority to particular institutions and they are not about placing substantive limits on government decisionmaking generally. But they are fundamentally different as a matter of positive law and political economy. For those reasons, the internal and external pressures that generate the doctrine should be expected to produce different patterns. In other words, the main lesson here is that the federalism and separation of powers *are* apples and oranges. They will not ripen and fall off the tree together and we

shouldn't expect them to.