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SEPARATION OF POWERS AFTER THE INDEPENDENT COUNSEL DECISION

George J. Alexander*

In the recent past, the Supreme Court has invented solutions to separation of powers problems that are notable for their lack of political reality. It has invalidated election reform, congressional legislative vetoes and a version of the Gramm-Rudman (deficit reduction) Act, all in the purported interest of preserving executive power from legislative interference. Faced with a need to condemn review by independent counsel of alleged administration misconduct, it finally, in *Morrison v. Olsen*,¹ gave up its rigidity and adopted a balancing test.

While the rationale of *Morrison* is dubious, its result seems correct. This article suggests that the new “test” proposed in *Morrison* could have provided different (and better) results in other recently decided cases and that it may do so in future cases. It also suggests that the Supreme Court should decline to hear cases presenting separation of powers issues in favor of allowing one of the other two branches of government to resolve them.

THE INDEPENDENT COUNSEL DECISION

In *Morrison*, the Supreme Court upheld the Ethics in Government Act² against challenges which included infringement of the

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presidential appointment power and violation of separation of power guarantees. An independent counsel appointed under the Act was vindicated in challenges to her authority.

Under the Act, an independent counsel is appointed by a Special Division of the United States Court of Appeals on petition by the Attorney General. The Attorney General is compelled to conduct a preliminary investigation if he receives information which is "sufficient to constitute grounds to investigate whether [specified people have] . . . violated any Federal criminal law." If, after investigation, he concludes that no further inquiries are necessary, he is required to report that fact to the Special Division. Otherwise, he must petition for an independent counsel.

The Special Division of the Court of Appeals which appoints the independent counsel also frames his or her authority. The Act essentially gives counsel the power of the Attorney General to investigate and prosecute within the jurisdictional limits established. Counsel's action is not unbridled in that he or she is obligated to follow Department policy "except when not possible." Further, he or she is subject to removal by the Attorney General for good cause. Otherwise, counsel serves until he or she resigns or is terminated by the Special Division acting on its own or on a suggestion by the Attorney General.

In Morrison, three former government employees challenged the constitutionality of the Act. The United States district court rejected their claims but the court of appeals, in a divided opinion, reversed and held the law unconstitutional. The Supreme Court reversed again, rejecting several arguments in reaching this decision.

4. See, e.g., Kilbourn v. Thompson, 103 U.S. 168 (1880).
6. Id. § 49. Section 592(f) requires that the decision must be made and reported to the court within ninety days. Failure to conclude the preliminary investigation by the end of ninety days authorizes the appointment of a special counsel without a petition by the Attorney General. Id. An Attorney General's decision not to seek independent counsel is expressly made non-reviewable by federal courts. Id. § 592(f).
7. Id. § 593(b).
8. Id. § 594(f).
9. Id. § 596(a)(1). If counsel is removed for cause, a report of the removal and facts leading to the removal must be submitted both to the Special Division and to Congress. Id. § 596(a)(2). Although counsel may obtain judicial review of the decision to remove, the Special Division is expressly barred from hearing the case. Id. § 596(a)(3).
10. Id. § 596(b)(2).
Chief among these arguments was that the law violated the appointments clause and offended separation of powers principles by abridging the President’s executive powers.

Speaking to a central consideration respecting separation of power, the Chief Justice opined, “We first observe that this case does not involve an attempt by Congress to increase its own power at the expense of the executive branch. . . . Unlike some of our previous cases, most recently Bowsher v. Synar, this case simply does not pose a ‘[danger] of Congressional usurpation of Executive Branch functions.’” The majority opinion itself will be explored in detail later in this article.

In his dissent, Justice Scalia not only disagreed with the decision but thought the contrary response self-evident. He challenged many aspects of the majority decision, but was primarily concerned that the President’s exclusive executive power had been invaded by both the judicial appointment of the independent counsel and by judicial and congressional supervision of such independent counsel. Although he was alone in his dissent, it is easy to find support for Scalia’s perspective in the recent history of Supreme Court adjudication.

The Shift of Power Test Contrasted with the Exclusive Function Test

Morrison purported to abandon the exclusive function test (for which Justice Scalia continued to argue) in favor of an approach which balances multiple factors. The latter scheme represents a shifting of power test in which one of several measures of a separation of powers violation is the extent to which power is actually shifted from one branch of government to another. Thus, the im-

13. U.S. Const. art. II, § 2, cl. 2. “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”


16. “If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning.” Id. at 2625 (Scalia, J., dissenting).

17. Id. at 2622.

18. Justice Kennedy did not participate. All other Justices, except Justice Scalia, joined the opinion.

19. Although the opinion never used “power shifting” language, the three factors addressed in the opinion included: (1) no congressional usurpation of executive branch functions;
portance of the Chief Justice's comment that there had been no usurpation of power by Congress in *Morrison*.

Applying the exclusive function test in *Immigration & Naturalization Service v. Chadha*, the Supreme Court ruled that one house vetoes are unconstitutional. *Chadha* involved a statute allowing the Attorney General to stay the deportation of deportable aliens. Congress had provided that such a stay could be reversed by vote of either house of Congress. The Court found the one-house veto unconstitutional and declared that Congress can only act legislatively by bicameral action and with presentment to the President. By attempting to supervise executive action, Congress had usurped presidential power. It had assumed an aspect of executing laws by retaining the power to overrule specific applications of executive power.

This article proposes that rigid lines of division among the three branches are not constitutionally established. Assuming this argument to be correct, the exclusive functions test would often have to yield to other considerations, suggesting a lack of rigid division. However, in *Chadha*, such other considerations were rejected. For example, the Court was unpersuaded by the large number of bills containing similar one or two house veto provisions. Also unconvincing was the fact that the legislative veto provision (as every legislative veto provision) was established by a law which itself complied with the formalities the Court found lacking in its administration (i.e., bicameral adoption and presentment).

The test proposed in *Morrison* would not have supported the result in *Chadha*. Further, that test does not support the result in *Morrison* itself. In *Morrison*, the Court said, "[w]e observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive branch." That statement seems incorrect as applied to the independent counsel law but is surely a correct description of the one-house veto invalidated in

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(2) no judicial usurpation of executive functions; and (3) the absence of an impermissible undermining of executive powers. *Morrison*, 108 S. Ct. at 2620-21. A similar approach was used in a later case decided while this article was in revision. *Mistretta v. United States*, 109 S. Ct. 647 (1989).

22. Id. cl. 2 & 3.
23. See infra notes 48-55 and accompanying text.
24. Justice White pointed out that the decision invalidated more laws than the Court had declared void in its entire history. *Chadha*, 462 U.S. at 967, 1002 (White, J., dissenting).
Chadha.

Justice Scalia carefully explained how the independent counsel law enlarges the power of Congress. In short, he thinks the law provides an opportunity for a majority of Congress to harass an administration of the other party by initiating criminal investigations of key personnel. While Congress gains that power, for whatever it is worth, the President does not gain any power he did not have before the law, unless the additional guarantee of lawful governance could be considered power. Power is shifted away from the President toward Congress. Applying the Court's test, as Justice Scalia points out, leads to a result opposite the one the Court actually reached.

Each legislative veto provision, on the other hand, is an example of a quid pro quo bargain between the two branches. The executive branch obtains, without strings, broader authority than Congress would be inclined to grant. Congress is relieved of the burden of passing laws which foresee and prescribe remedies for future problems in administering the law. Thus, if the shift of power test is appropriate, Chadha is also incorrectly decided.

Indeed, most legislation could be upheld against constitutional challenge in a similar manner using the shift of power test. Unless Congress has passed a law over the President's veto, it is likely that the law deals fairly with the powers of both branches. Otherwise, the disadvantaged branch would have prevented its passage. However, as Justice Scalia has suggested, the Ethics in Government Act may be an exception. It may have been so politically expensive to reject such an Act that the President was forced to sign it.

On the other hand, if Justice Scalia is correct in applying the exclusive functions test, his dissent appears to have overlooked exclusive legislative functions. Both he and the Court seem to have sanctioned the delegation of legislative power to the Attorney General in the administration of the Independent Counsel Act. Yet, legislative power is given to Congress in exactly the language used to give executive power to the President. How can it be unconstitutional for

26. Id. at 2625, 2630, 2638, 2640 (Scalia, J., dissenting).
27. Id. at 2630.
30. Compare U.S. Const. art. I, § 7, cl. 2 ("All legislative Powers herein granted shall be vested in a Congress of the United States.") with, U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States.").

The delegation cases purport to distinguish delegation with an "intelligible purpose" from actual grants of legislative power to other branches, said to be unconstitutional. In fact, of course, the dearth of cases striking down laws on delegation grounds attests to the fact that the
the President’s executive authority of prosecution to be diminished while it remains acceptable for Congress to shift its power to the President?

**THE APPOINTMENTS CLAUSE**

Similar separation of powers principles have resulted from interpretations of the Appointments Clause. In *Buckley v. Valeo,* the Court reviewed the Election Campaign Act which, among other things, provided public funds and set standards for Presidential campaigns. One of the issues in the case concerned the appointment of the supervising members of the Federal Election Commission. The Act provided that some members would be appointed by the President and others by Congress. In its decision, the Supreme Court struck the provisions for congressional appointment, indicating that the President has the exclusive authority to appoint officers of the United States.

To say that the President is given power not shared by Congress to appoint officers of the United States says nothing particularly startling. In the scheme of the Constitution, the President’s role centers on his obligation to see laws faithfully executed. He and the heads of his departments must generally direct the officers who carry out that obligation. It is also not unreasonable to consider his authority as fairly absolute vis-a-vis those whose primary task is ministerial, such as postmasters. In *Humphrey’s Executor v. United States,* the Court was able to distinguish between such officers and others whose roles were more complex and who would be unable to serve their functions if they were not independent. Thus, federal administrative commissioners were held to be immunized from summary presidential dismissal by act of Congress. Had that decision been different, administrative agencies would not have become a significant factor in legal development. Many decisions made by them would have been left to the courts. The advantage of specialized consideration and adjudication would have been lost unless

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article I provision has been read far less rigidly than article II. See generally Mistretta v. United States, 109 S. Ct. 647 (1989).

34. The statute was later altered to allow the President to make all appointments.
35. U.S. Const. art. II, § 1, cl. 8.
some type of article III specialized court had been established. As things turned out, losing independent administrative agencies would have damaged presidential power more than it would have undermined the power of Congress. Such agencies are more beholden to the executive branch and its agenda than to Congress. It is significant to note, however, that agencies are able to maintain a degree of independence from both branches despite the fact that they are at least theoretically as much under the control of Congress, which sets their agenda and provides them funds, as is the Comptroller General who, the Court has said, is a legislative agent. In short, these agencies could not perform in the expected manner without some independence from both branches.

It would be foolish to argue that the drafters of the Constitution or the voters who adopted it had a fourth branch of government in mind. Even the branches they described were offices of limited scope. But to admit that an idea would not have occurred to Americans two hundred years ago is hardly to say it is unconstitutional now. Even in that distant past, the Constitution was made flexible enough to allow for lines of executive responsibility that did not end in the White House.

Applying the Appointments Clause and the exclusive functions test, the Court in Bowers v. Synar struck down a central provision of the Gramm-Rudman Budget Reduction Act that allowed the Comptroller General of the United States to apply dollar figures to the percentage budget cuts provided in the Act. The Court found

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39. "[T]he President [has power] to affect rulemaking by transferring programs among agencies, by abolishing some rulemaking functions, by deferring spending, by withholding the administration's support from agency budget and legislative requests, and by selecting agency chairmen. These powers allow the President to exert indirect but significant influence on agency policymaking." Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 494-95 (1978-79); see also Strauss, The Places of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).
40. "The power to make independent choices permits an agency, within its mandate, not only to act on its own initiative, but also to resist being directly checked by those who disagree with its decisions. . . . Freed from the interference of all but large majorities, an agency can undertake ongoing regulation through a process of low-consensus—and hence relatively unaccountable—decisionmaking." Note, Delegation and Regulatory Reform: Letting the President Change the Rules, 89 Yale L.J. 561, 571 (1980).
42. See infra note 13 and accompanying text.
43. 478 U.S. 714 (1986).
the Comptroller General too beholden to Congress to serve constitutionally in what it characterized as an executive function.45

For the Court, the ability of Congress to remove the Comptroller General by impeachment or by joint resolution on grounds of inefficiency, neglect of duty or other listed causes46 made him a legislative official. However, requiring him to make the budget cutting recommendations involved him in executive functions. The Court announced that to permit Congress to remove the Comptroller General would effectively give it control over enforcement of laws he administered. This result would be similar to a legislative veto, since Congress could remove an offending executive functionary by its own action.

APPLYING THE SHIFT OF POWER TEST

By the time Morrison was decided, the Court had lost its enthusiasm for applying the exclusive function test to executive functions. Indeed, it seems to have lost its conviction that it could clearly identify those functions. The Court in Morrison surprisingly quoted with approval Justice White’s dissent in Bowsher which had indicated that the powers of FTC Commissioners (which the Court held were not subject to peremptory removal by the President) “would at the present time be considered ‘executive,’ at least to some degree.”47 Morrison adopted what this author has called the shift of power test and what Justice Scalia condemned as a “totality of the circum-

45. The majority opinion argues that the Comptroller is a congressional agent both because of the nature of congressional control over his tenure and because he has been held out so to serve. For the last twelve years this author has been a consultant to the two incumbent Comptroller Generals. The opinion therefore seems especially curious to him. Nothing the author has observed in the functioning of the office gives the slightest clue that the Comptroller General or any of his principal subordinates shares those conclusions. In the entire history of the office, no Congress has ever dismissed an incumbent. No proceedings to dismiss have ever been initiated and, as far as the author has been able to discover, none have been publicly suggested. That fact may seem surprising to those believing the majority’s account of how the office functions because it is often the case that control of Congress changes during the term of a Comptroller General. Committee chairs are routinely replaced in such shifts. The Comptroller General, who is appointed by the President, is never replaced, despite the fact that dismissing the incumbent would (if one accepts the Court’s view of the office) give the new party a person attuned to their perspectives rather than to the perspectives of the deposed political party. Alexander, On Knowing One’s Place: Constitutional Roles and the Separation of Powers, 12 OKLA. CITY UNIV. L. REV. 807, 810-11 (1987).
46. The Budget and Accounting Act of 1921 provides for removal on the following grounds: permanent disability, inefficiency, neglect of duty, malfeasance, commission of a felony, or conduct involving moral turpitude. 31 U.S.C. §§ 701-779 (1982).
47. 108 S. Ct. 2597, 2618 n.28 (1988) (citing Bowsher, 478 U.S. at 761 n.3 (White, J., dissenting)).
Applying this less absolute standard, can Bowsher stand?

As in Chadha, the Court's opinion in Bowsher missed the realities of governmental cooperation and dispute resolution. It again incorrectly opined that the law involved a congressional arrogation of power wrested from the President. Viewed realistically, the function of the Comptroller General was, as in the legislative veto instance, the result of a necessary compromise between the two branches. Both wanted the Act and neither trusted the other to have final dispositional authority. They found someone who seemed—to this author as well—to be a relatively neutral party. Right or wrong, there is no reason to believe that a power shift would have taken place had there been no Supreme Court intervention.

Furthermore, even if the Comptroller General had drawn some power from the President, there is little reason to identify that power as shifting to Congress. To call him a legislative officer on the basis of the right of Congress to remove him for cause makes far too much of the removal power. There are many ways in which the Comptroller General is beholden to Congress. Congress can hamstring his work by legislation in exactly the same manner it can hamstring any branch of government. It can cut his appropriations so as effectively to eliminate his work. Perhaps Congress can even eliminate the position of Comptroller General despite his present fifteen year contract. Alternatively, it can increase the Comptroller General's work, require him to make additional reports to Congress or to its committees, or provide that additional steps be taken prior to the completion of work. In all of these respects, the Comptroller General bears no distinction from any other federal employee. All of these restrictions apply to the President and to the courts. Surely the threats of such reprisals do not convert either the executive branch or the courts into legislative agents. Yet the power to impose such draconian measures, which are customary in more moderate forms, is a far more imposing threat to the Comptroller General than the threat of outright dismissal, which Congress has never attempted.

Morrison is equally curious when it discusses the issue of the Appointments Clause. The Chief Justice's opinion attempts to limit the holding by stating that the President has retained some control

48. 108 S. Ct. at 2641 (Scalia, J., dissenting).
49. For example, the President has a duty to report to Congress under the War Powers Resolution. 50 U.S.C. § 1543 (1982). Conceivably, Congress can get tougher than that. See Ex Parte McCordle, 74 U.S. (7 Wall) 506 (1868) (removing Supreme Court jurisdiction as it was about to hear a case).
over independent counsel through a variety of provisions. Among such provisions is the Attorney General’s ability to dismiss independent counsel for cause. As Justice Scalia pointed out in *Humphrey’s Executor v. United States*, the Court approved limiting presidential removal power by requiring that he have good cause before dismissing Federal Trade Commissioners. In the same way, the Attorney General’s “control” in terms of his ability specifically to request independent counsel is so circumscribed that a failure to exercise that power might leave him quite politically vulnerable.

Unlike the previously discussed cases, it is not enough to point out that the Ethics in Government Act was enacted with bicameral passage and the President’s signature. Perhaps the President was weakened by the realization that to oppose the law might give credence to the “sleaze factor” arguments put forth by his critics. Perhaps Congress finally did pass a law which reassigned a portion of the President’s power. Justice Scalia argued that such a reassignment would invade separation of powers doctrine. The majority seemed to agree that such a result would occur but for the aspects of “control” discussed above. However, both conclusions take too simplistic a view of separation of powers.

**Separation of Powers and Checks and Balances**

The essential problem in the Court’s approach to separation of power is a misperception of the constitutional design. The Court has apparently conceptualized the three branches of government as essentially independent and has branded any functional overlap a violation of separation of powers. The power which checks usurpation by another branch is, presumably, the inability of that branch to reach into the functioning of a sister group.

Checks and balances in the Constitution function differently. All branches need the other two in some respects; this need constrains their power. Of course, the three branches are designed to

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50. 295 U.S. 602 (1935).
51. Justice Scalia prefers a more colorful description as evidenced by his statement, “This is somewhat like referring to shackles as an effective means of locomotion.” *Morrison*, 108 S. Ct. at 2627 (Scalia, J., dissenting).
52. The Attorney General must specifically request independent counsel even though he is directed to do so barring “no reasonable grounds to believe” that further investigation is required. 28 U.S.C. § 592(b)(1) (Supp. 1988). The independent counsel is directed to follow Justice Department general policy; the only exception being when such allegiance is not possible. This results in a somewhat ambiguous standard. *Id.* § 592(f).
prevent arrogations of power in the others and in part this is accomplished by separating their functions and providing a place for each. In important respects, however, just the opposite is true. One branch has a specific significant role in the functioning of another branch. Impeachment, which has already been mentioned, serves as an example. Impeachment would appear to be a judicial function, but is given to the Legislature. When Congress sits in its most intrusive capacity, that is, when it is charging the President, the Supreme Court participates through the Chief Justice, who presides at the trial. If the President does not follow the law, Congress need not function through bicameral legislation and present its findings to the object of its inquiry for approval.

Other examples abound. At least one important control is given each branch in the operation of the others. Legislation is presented to the President not only for execution but initially for approval. If he withholds his approval, the Legislature is forced to repass the legislation by a two-thirds vote to make it law. Thus, in effect, the President is the most important legislator because his vote counts as much as the votes of one sixth of each house, less one member of that house. The courts are equally controlled by Congress. The Constitution expressly allows Congress to make exceptions to the appellate jurisdiction of the Supreme Court. The Supreme Court, in turn, acts as the final arbiter of the constitutionality of congressional legislation and presidential action. The President, with the advice and consent of the Senate, fills the Court’s vacancies.

In the grand design of the Constitution, balance of power is in significant part created precisely by cooperative integrated roles. To force any one of the three branches into the strict compartmentalization sought by the Court would dramatically alter the structure the founders and voters created.

55. We might have learned more about this process had the Supreme Court not arrogated the impeachment inquiry in President Nixon’s case by resolving the central question of the public’s ability to hear his taped office conversations. United States v. Nixon, 418 U.S. 683 (1974).
56. U.S. Const. art. I, § 7, cl. 3.
57. Id.
59. That power is not found in the express language of the Constitution but dates from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and has become part of the conventional wisdom of our culture.
60. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (popularly known as the Steel Seizure case).
61. U.S. Const. art. II, § 2, cl. 2.
The tragedy of the *Morrison* decision does not, however, lie simply in the Court's misperception of reality. The isolation from political life that generates such problems is closely linked to an essential function the Court performs when it must hold out for constitutional values against the prejudices of the day.\(^6\) It is such isolation that allowed the Court to break the log jam of racial discrimination in *Brown v. Board of Education of Topeka*.\(^8\) The Court's isolation likewise broke suburban dominance in political representation by announcing that the Constitution required "one man, one vote"\(^6\) and allowed sexual expression that in many states had been suppressed by legislative enactment of majoritarian morality.\(^6\) Of course, the Court's major human rights blunders must be thrown into the balance.\(^6\) Even so, the Court's record of protection of individual rights over time is remarkable and its role in these endeavors was pioneering. One can partially attribute the autonomy about which Americans are proud to the Constitution and a Supreme Court that insists the Constitution be followed even when its edicts are unpopular.\(^8\)

In the protection of other rights, the record of the Court is less enviable. *Lochner v. New York*\(^6\) stands out as an agreed example of a prior Court's excesses in pursuing its view of ordered liberty.\(^6\)

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\(^6\) That fact was recognized by the drafters. See, e.g., *The Federalist* No. 78 (A. Hamilton). Ironically, Justice Scalia invokes it in *Morrison* to suggest that the Court is the only branch of government politically capable of opposing The Ethics in Government Act. *Morrison v. Olson*, 108 S. Ct. 2597, 2639 (1988) (Scalia, J. dissenting).

\(^63\) 347 U.S. 483 (1954). Of course, the same isolation allowed the Court to create the problem by announcing in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that separate equality was constitutionally sufficient.


\(^67\) See, e.g., cases cited *supra* notes 53, 59-60.

\(^68\) 198 U.S. 45 (1905).

\(^69\) See, e.g., Wonnell, *Economic Due Process and the Preservation of Competition*, 11
There are many similar examples from an era in which the Court thought its protection of individual economic autonomy required it to oppose public regulation. The ultimate focus of the Court's position became the extensive regulation proposed by the Roosevelt administration during the New Deal period. The Court struck down a number of key laws. The story of the Court's change of heart after President Roosevelt's landslide victory in 1936 is well known. This era demonstrates the unremarkable fact that even an isolated Court cannot defy the focused disagreement of the executive and legislative branches indefinitely.

In the post-World War II period, the Court has notably tried to reconcile its confessed error in the economic rights cases with an increasingly aggressive position in the protection of non-economic individual rights. The touchstone was footnote 4 of United States v. Carolene Products Co., which distinguishes between general regulation on the one hand and the rights of discrete and insular minority populations on the other. The Court's role is seen as reciprocal to the political process. Where the political process is viewed as providing protection against excess economic regulation, the Court can maintain a weak role in which it rarely interferes with Congress. Minority groups, especially blacks because of their ancestry of American slavery, were historically underrepresented in Congress and in the benefits enacted. The Court found itself justified in act-

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71. Following his inauguration in January 1937, Franklin D. Roosevelt launched an attack on the Court and proposed that a new justice be appointed for every justice who remained on the Court after he reached the age of seventy. He pleaded his case to Congress and to the public through his radio addresses. See S. Rep. No. 711, 75th Cong., 1st Sess. (1937). Even though Roosevelt's plan was rejected by the Senate Judiciary Committee in June 1937, the Court had already begun sustaining New Deal legislation. E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

72. One can speculate about the role President Roosevelt's court packing proposal, S. 1392, 75th Cong., 1st Sess. (1937), played in bringing about the Court's eventual change of heart. It is, in fact, a tribute to the strength of the Court that the proposal was defeated in Congress. Conclusion of Adverse Report of Senate Judiciary Committee, June 14, 1937, S. Rep. No. 711, 75th Cong., 1st Sess. (1937).

73. 304 U.S. 144, 152 n.4 (1938).

74. See, e.g., Powell, Carolene Products Revisited, 82 Colum. L. Rev. 1087 (1982).

75. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954) (declaring racial school segregation
ing more forcefully on their behalf. Had the Court concerned itself with a similar reciprocal role theory during the heyday of its review of economic regulation, it might well have concluded that a strong position was not called for. Unless one considers the wealthy to be a discrete and insular minority in need of protection from the hordes who would otherwise strip them of their wealth, it is difficult to find a power imbalance worthy of Court strength. The wealthy have been called on to provide a disproportionate share of national revenues through progressive taxation, but have also been protected in the use of their wealth to express their political ideas and to reward those who agree with them. Indeed, the high costs of communication have given some edge to candidates who can draw on personal wealth in their campaigns. A number of well known multi-millionaire political figures hold office today. The author is not aware of a significant wail of political impotency made either by or for the wealthy.

Applying a theory of reciprocal strength to the issues of separation of power leads this author to conclude that the Court is grossly overexerting itself in this field. Based simply on the ability of the competing sides to persuade the people about their respective positions, the Court is clearly not needed. Anyone interested in the views of either the administration or Congress respecting independent counsel has but to consult the newspapers of the time. The President of the United States is capable of taking issue with congressional

in Washington, D.C. unconstitutional).

76. Perhaps the difference is best seen in the standards applied in equal protection cases. When a statute is attacked because its classification is economically unfair to a group that is not otherwise specially protected, the Court reviews the statute under the rational relationship standard which is so weak that only a single statute has been invalidated under it since World War II. Morey v. Doud, 354 U.S. 457 (1957). In New Orleans v. Dukes, 427 U.S. 297 (1976), the Court overruled Morey. (While this article was in revision, the Court declared a West Virginia property tax formula unconstitutional on equal protection grounds. Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 109 S. Ct. 633 (1989). This probably did not change the bite of rationality review substantially however.) On the other hand, if the classification is racial, strict scrutiny is applied requiring the government to justify the classification by demonstrating a compelling interest. Under strict scrutiny, the classification is presumed unconstitutional and the government rarely meets its heavy burden of proof. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969).


78. Senator Jay Rockefeller of West Virginia and Governor Pierre DuPont of Delaware are prominent examples.
perspectives publicly and articulately and Congress is not shy about responding. If those two branches can reach an accommodation, as they did in the passage of one house vetoes or Gramm-Rudman, in whose interests need the Court intercede? Does anyone believe that either Congress or the President would press a position that they believed unconstitutional in the absence of a Court to correct them?

This is not to imply that the two branches are equal in power. They are not—true scales would show that presidential power overwhelms congressional power. This fact, of course, makes the Buckley, Chadha and Bowsier decisions worse.

It would, in any event, be one thing for the Court to insist on a clear and contrary position respecting legislative functions expressed in the Constitution. If, for example, the Constitution expressly vested in the executive branch the power to control the federal budget, one might argue for a Court role in insuring adherence to the document irrespective of whether the other branches needed bolstering. It is difficult to imagine, however, that under such circumstances a President would have acquiesced in Gramm-Rudman.

Especially when the constitutional issue is based on an interpretation of language quite inexplicit on the point, the Court might better defer to the other branches that have experience in such matters. Its insistence on being the decision maker is, in fact, a larger breach of a proper doctrine of separation of powers than are the positions of either the President or Congress in such matters.

In its cases discussing separation of powers, the Court has often discussed separation of power as though the balance was to be struck between two branches rather than among three. This position obscures the fact that the Constitution indicates at least equal concern that the courts be limited in power. The judicial power of the United States is the most modestly endowed power of the three branches. Aside from limited original jurisdiction, the Supreme Court is only given appellate power subject to congressional limitation and provided only with a set of such lower courts as Congress establishes.

79. "The first concern is that the pivotal institution of the American government, the Presidency, has got out of control and badly needs new definition and restraint." A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY X (1973).

82. 478 U.S. 714 (1986).
83. Occasionally, the Court sees its own role in perspective. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Court is the improper branch to evaluate congressional determination of essential state functions.).
Perhaps in recognition of its powerlessness, the Court's principal functionaries are given lifetime appointments and salary guarantees. The Court is awarded so little authority in constitutional adjudication by the express language of the Constitution that its own self-adjudicated claim in *Marbury v. Madison* was needed to make it a major participant.

One might review a number of prior cases from this perspective. Two suffice to make the point. In *United States v. Nixon*, the Court nominally considered whether the President could be compelled to give testimony in a criminal prosecution of his former aides. The case was understood by all concerned to have a far different purpose. During the course of its consideration of a Bill of Impeachment, the House of Representatives had become aware that the President had secretly taped conversations in the oval office. They wanted to hear the tapes to resolve issues under consideration. Nixon refused to release some of the tapes requested. Defense counsel to several Watergate defendants also requested the tapes. The defendants brought the issue to the courts. The President raised the stakes after the case had reached the Supreme Court by indicating that he would be bound only by a "definitive" opinion from the Court. The Court met his challenge by issuing a unanimous opinion that he release the tapes. Shortly after, President Nixon resigned, never having been impeached.

The Constitution is quite explicit as to how the impeachment of a President is to take place. The process involves both houses of Congress serially with the Chief Justice sitting in the Senate to preside over the trial. There is no other role prescribed for the Court. To be sure, the Court was not speaking directly to impeachment in *Nixon*, but it was on notice throughout the presentation of the case that it was central to the process.

In other contexts, the Court has invoked its self-imposed doctrine of avoiding political questions to allow some issues to be resolved by a more appropriate branch. Caught in the limelight of

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85. *Id.*
86. 5 U.S. (1 Cranch) 137 (1803).
89. *Id.* at 292.
93. *E.g.*, Mora v. McNamara, 389 U.S. 934 (1967) (The Court refused to hear challenge to Vietnam war.).
national publicity, it did not use that tactic in Nixon.\textsuperscript{94} In a manner far more blatantly circumventing constitutionally established procedures than was true of the Gramm-Rudman scheme, the Court decided it was the appropriate branch to act.

Similarly, in \textit{Powell v. McCormack}\textsuperscript{95} the Court asserted the right to resolve the question of who was to be seated in Congress. Adam Clayton Powell was elected to a seat in Congress. His career was colorful in many respects. He was thought to be eluding civil process in his home state and allegedly had misapplied House funds. That he was black probably added to the furor in Congress. The House of Representatives voted to refuse to seat him based on his misdeeds. The Supreme Court ultimately held that the House possessed no power to unseat Powell because he met the three express qualifications of office: age, citizenship and residency.\textsuperscript{96} It did not appear to trouble the Court that judging the qualifications of members of Congress is expressly allocated to Congress in the Constitution.\textsuperscript{97} Again, the pertinent provision appears far more clearly expressed than the Constitutional prohibition against using officers such as the Comptroller General for such duties as Gramm-Rudman budget cuts or court appointment of independent counsel.\textsuperscript{98}

In both \textit{Nixon} and \textit{Powell}, the Court did more than assume a role this author asserts was given to another branch. In both cases, the Court undermined Congress by patronizingly performing its functions. Neither impeachment nor the refusal to seat a black representative from a black district are politically easy actions. By depriving Congress of the experience of dealing with such tasks, the Court

\textsuperscript{94} The resulting opinion was weak, probably because the Court felt a need to avoid the presidential challenge of disobedience to a small majority. Incidentally, the Court established grounds for invoking an underdeveloped doctrine of executive privilege, which will make it harder to reach presidential papers in the future. Notwithstanding the weakness of the opinion, it accelerated the departure of Richard Nixon.

\textsuperscript{95} 395 U.S. 486 (1969).

\textsuperscript{96} U.S. CONST. art. I, § 2, cl. 2.

\textsuperscript{97} "Each House shall be the Judge of the . . . Qualifications of its own members . . ." U.S. CONST. art. I, § 5, cl. 1.

\textsuperscript{98} The constitutional provision that authorizes a refusal to seat allows House resolution by a mere majority rather than the two thirds vote required to expel, U.S. CONST. art. I, § 5, cl. 2. A mere majority could refuse to seat a member and the majority party might in the future abuse the provision, disadvantaging the minority party. Such abuse is, of course, purely speculative since it never happened. The vote in favor of refusing to seat was carried by more than the two-thirds majority required to expel. However, it is not clear that all of those voting would have also voted to expel. If the Court had indicated that the matter was not justiciable because of the constitutional allocation of power to Congress, the majority party trying to unseat their opponents would be forced to defend their political action politically. That is, they would not have the Court's imprimatur on their interpretation of their own power.
also diminished the role of the Legislature as a responsible body. The decisions that needed to be made were difficult and many members of Congress were no doubt pleased that their votes would not be recorded. However, if those people were part of the body constitutionally empowered to perform such tasks, the Court should have permitted them to act, perhaps even to fail.

It should not be forgotten that the Court is the least democratic branch of government. It is intentionally insulated to make counter-majoritarian decisions when the majority threatens a minority interest protected by the Constitution. When there is no apparent minority in need of protection, and especially when the Constitution has itself expressly reserved the matter for resolution by a democratically responsible branch, Court resolution equals arrogation.

**Resolving Problems Without Supreme Court Intervention**

If the Court ought not to dispose of issues such as the independent counsel dispute, how are they to be resolved? The Court's notion that compartmentalization, with or without consideration of all of the circumstances, provides the right answer is dubious. Why the two great strict constructionists who wrote the majority and dissenting opinions in *Morrison* both avoided leaving the issue to the people is difficult to understand. The possibility of partisan bias exists no matter which branch is directed to appoint prosecutors to investigate those too close to the administration, or to Congress, in order to assure the appearance of fairness. Of the three branches, the least threatening is the Court because, as a matter of history and self-description, it has always performed the task best. So the present solution seems to be a wise one. Even if Congress shifts the balance unfairly against the presidency, would not the electorate be able to respond to that unfairness? The Reagan administration was not shy in opposing the application of the independent counsel law and supporting a political as well as legal challenge to it. Congress has


It is interesting to note that the former Attorney General who has so forcefully insisted that the Constitution be read literally, seems doubtful of the congressional authority to authorize courts to appoint independent counsel to prosecute executive misconduct. Tragically, the primary independent counsel in charge of matters related to the Iran-Contra controversies, Lawrence Walsh, has agreed with the former Attorney General's concern and has taken an
been forced to make its rationale explicit to the public as well as to the Court. If, in some future act, Congress truly passes an unfair law, cannot the victimized President marshall support? At least in recent history, it has not appeared to this author that any President has been so powerless. Justice Scalia may be right that the central issue in *Morrison* is “power.” Perhaps the real difference between him and his colleagues is that he alone can bring himself to complain that the President of the United States is, as a practical matter, unable to defend himself.

appointment to the Department of Justice to assure his legitimacy. *Still Probing for Answers*, *Time*, Mar. 16, 1987, at 27. As the author has indicated, the second appointment leaves open the problems that faced Special Prosecutor Archibald Cox when he was fired by President Nixon. Alexander, *Special Prosecutor Trap*, L.A. Daily J., Apr. 9, 1987, at 4, col. 3. Ironically, Mr. Meese was, at the time, himself being investigated by an independent counsel.