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# On Knowing One's Place: Constitutional Roles and the Separation of Powers

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# ON KNOWING ONE'S PLACE: CONSTITUTIONAL ROLES AND THE SEPARATION OF POWERS

GEORGE J. ALEXANDER\*

In the course of the time since its decision in *Buckley v. Valeo*<sup>1</sup> the Supreme Court has taken a wrongheaded and now dangerous position on the relative roles of the President and Congress. As Justice Jackson so well pointed out in his masterful concurrence in the *Steel Seizure Case*,<sup>2</sup> the roles of the two branches are reciprocal.<sup>3</sup> In reducing the power of Congress, it has strengthened the President's power and it has done so at a time when the country suffers from excess rather than inadequate executive power.<sup>4</sup> The early decisions of this line were relatively unimportant because they attempted to defy political reality and were, consequently, largely ignored. The last of them, however, did great damage in declaring unconstitutional a last gasp effort by both branches to come to grips with the national deficit. If Gramm-Rudman<sup>5</sup> turns out to have been the last successful effort to deal with the national debt before a crisis occurs, *Bowsher v. Synar*<sup>6</sup> could become noted as the *Schechter Poultry*<sup>7</sup> case of the end of the century.<sup>8</sup>

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1. 424 U.S. 1 (1976).

2. 343 U.S. 579, 633 (1952) (Jackson, J., concurring).

3. He opined that presidential power was considerably stronger in the gray area between congressional authorization and congressional prohibition than it was when Congress had addressed an issue and declined to give him power to react. *Id.*

4. See generally A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

5. Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings or Gramm-Rudman) Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, 2 U.S.C. § 901-922 (Supp. III 1985).

6. *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

7. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

8. Congress has fixed the law by providing for an exclusive penultimate cutting role for the Office of Management and Budget but the health of the act seems in question. Pub. L. No. 100-119, 101 Stat. 754 (1987).

In *Valeo*,<sup>9</sup> the Court reviewed the Election Campaign Act which, among other things, provided public funds for presidential campaigns and set standards for the 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 of the members would be appointed by the President and others by Congress. In its decision, the Supreme Court struck the latter provisions, indicating that the President had the exclusive authority to appoint officers of the United States. The statute was altered to allow the President to make all appointments.

In *Immigration and Naturalization Service v. Chadha*,<sup>10</sup> the Supreme Court ruled that one-house vetoes were unconstitutional. In a statute allowing the Attorney General to stay deportation for deportable aliens, Congress provided that such a stay could be reversed by a vote of either house of Congress. Congress can only act bicamerally and with presentment to the President, the Court ruled, declaring the one-house veto provision unconstitutional. It was not dissuaded by the large number of bills containing similar one- or two-house veto provisions.<sup>11</sup>

Neither decision had drastic repercussions. The political composition of the Elections Commission had been agreed upon in the underlying act and presidential appointment of the members presented no problems. *Chadha* was even more trivial in application. Every act which provided for congressional veto did so as a matter of political compromise with the executive branch. The executive branch got broader authority than Congress would have provided in return for the power in Congress (or even a congressional committee) to alter unwanted results. The arrangement proved so politically useful that it continued in only slightly altered form after the case. Congress and commentators competed in naming ways around

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9. 424 U.S. 1.

10. 462 U.S. 919 (1983).

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

the decision.<sup>12</sup> As a result, the decisions did not create lasting political turmoil.

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 that laws are faithfully executed.<sup>13</sup> He and the head of his departments must generally direct the officers who carry out that obligation. It is also not unreasonable to think of his authority to control as fairly absolute vis-a-vis those whose primary task is ministerial such as postmasters.<sup>14</sup> An earlier Court was able to distinguish between such officers and others whose role was more complex, and who would be unable to serve their function if they were not independent. Thus federal administrative commissioners were held to be immunized from summary presidential dismissal by an act of Congress.<sup>15</sup> Had that decision been the opposite, 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 some type of article III specialized court had been established.<sup>16</sup> As things turned out, losing independent administrative agencies would have damaged presidential power more than undermined the power of Congress since, in the main, such agencies are more beholden to the executive branch and its agenda than to Congress. It is significant to note, however, that they are able to maintain a degree of independence from both branches. This is despite the fact that they are theoretically at least as much in the control of Congress, which sets their agenda and provides them funds, as is the Comptroller General who, the Court said was a legislative agent.<sup>17</sup> The point is, they could not perform

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12. See, e.g., Levitas & Brand, *Congressional Review of Executive and Agency Action after Chadha: 'The Son of Legislative Veto' Lives On*, 72 GEO. L.J. 801 (1984). Elliot H. Levitas is a member of the House of Representatives.

13. U.S. CONST. art. II, § 1, cl. 8.

14. *Myers v. United States*, 272 U.S. 52 (1926).

15. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

16. *Cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (non article III bankruptcy court held unconstitutional).

17. *Bowsher*, 106 S. Ct. 3181.

in the manner in which they are expected to function but for 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 which did not end in the White House. The appointment power expressly recognizes the competence of courts to appoint officers of the United States.<sup>18</sup>

More recently, based partially on the cases sketched above, the Court struck down a central provision in the Gramm-Rudman Budget Reduction Act<sup>19</sup> because the Comptroller General of the United States was designated to put dollar figures to the percentage budget cuts provided in the act. The Comptroller General was held by the Court majority to be too beholden to Congress to serve constitutionally in what it characterized as an executive function.

The author has been a consultant to the two incumbent Comptrollers General for the last eleven years. That fact makes the opinion seem especially curious.<sup>20</sup> It is the gist of

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18. U.S. CONST. art. II, § 2, cl. 2. It is interesting to note that the Attorney General who has been so forceful in insisting that the Constitution be read literally denies the authority of Congress 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 that concern and has taken an appointment to the Department of Justice to assure his legitimacy. Russell, *Still Probing for Answers*, TIME, March 16, 1987 at 27. As the author has indicated in an op ed piece, the second appointment leaves open the problems which faced Special Prosecutor Archibald Cox when President Nixon fired him. Alexander, *Special Prosecutor Trap*, L.A. Daily J., April 9, 1987, at 4. The concern is unwarranted as the independent counsel law has survived all challenges to date. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987); *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987); *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987). Cf. *North v. Walsh*, 656 F. Supp. 414 (D.D.C. 1987). Now Mr. Meese himself is being investigated by an independent counsel (the title Special Prosecutor has been euphemized in the current version of law). It is unknown whether that special counsel will seek or be offered a position in Mr. Meese's department.

19. 2 U.S.C. §§ 901-922 (Supp. III 1985).

20. The opinions in this commentary are, of course, the author's. Nothing in it has been discussed with the Comptroller General or with anyone in his office. In fact, he does not know that the commentary is being written.

the majority opinion 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. Nothing the author has ever observed in the functioning of the office gives the slightest clue that the Comptroller General or any of his principal subordinates shares those conclusions. Nor need they. In the entire history of the office, no Congress has ever dismissed an incumbent. No proceedings to do so have ever been initiated and, as far as the author has been able to discover, none have been publicly suggested. That fact should seem all the more surprising to those who believe the majority's account of the functioning of the office, because it is often the case that control of Congress shifts during the term of a Comptroller General. Committee chairs are routinely replaced in such shifts. The Comptroller General, who is appointed by the President, never is replaced despite the fact that dismissing the incumbent would (if one accepts the Court's view of the office) give the new party in power a person beholden to their perspectives rather than to the perspectives of the deposed political party.

One reason for the job security of the office is that it serves the interests of both parties to have a semi-independent research and investigative office for Congress. Members already have their own staffs and the staffs of their assigned committees. For many tasks, they need a non-partisan opinion, and they get it from the General Accounting Office which the Comptroller General heads. It is then not surprising that the Comptroller General was chosen for the important penultimate step in budget reduction in the likely event that Congress would default on its agreement to cut the budget to meet Gramm-Rudman targets.<sup>21</sup> The President would not have agreed to this role had he been perceived as a congressional agent. The Congressional Budget Office might then as well have been given the job. Congress also saw him as neutral and thought he could contend with the anticipated executive department oriented views which might come from the Office of Management and Budget. He was given a minor role. In five days he had to reconcile two views of supposedly

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21. 2 U.S.C. §§ 902-922.

automatic cuts: those of the Office of Management and Budget and of the Congressional Budget Office.<sup>22</sup> In the eyes of the realists on Capitol Hill, he was the natural person for the job. His role seemed so well tailored to their perception of what was needed that no other agent was named in the event the Court decided as it ultimately did.

For the Court, the ability of Congress to remove the Comptroller General by impeachment or by joint resolution grounded in inefficiency, neglect of duty or other listed causes,<sup>23</sup> made him a legislative official while requiring him to make the budget cutting recommendations involved him in executive functions. To permit Congress to remove the Comptroller General would effectively give Congress control over enforcement of laws he administered, the Court announced. It would be similar to a legislative veto since Congress could remove an offending Comptroller General.

At least in one sense, removal is similar to the result of the legislative veto case. In a practical sense, the Court misses the realities of government cooperation and dispute resolution. 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 in which it can hamstring any branch of government. It can cut his appropriations so as to effectively eliminate his work. Perhaps it can even eliminate the position of Comptroller General despite his present fifteen year contract. Alternatively, they can increase his 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 is no different from any other federal employee. All of these restrictions can be applied to the President and 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 in more moderate form accustomed ac-

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22. *Id.*

23. The statute provides the following removal grounds: permanent disability, inefficiency, neglect of duty, malfeasance, commission of a felony, or conduct involving moral turpitude. Budget and Accounting Act of 1921, 31 U.S.C. §§ 701-779 (1982).

tions,<sup>24</sup> is a far more pressing threat to the Comptroller General than the threat of outright dismissal which it has never attempted. All require bicameral action and presentment as does dismissal. Actually there is even one discharge procedure through which Congress can constitutionally avoid presentment: impeachment. The Court makes no reference to that threat presumably because impeachment is a clearly constitutional legislative process for controlling executive and judicial officers.<sup>25</sup> It happens to require a lower mass of legislative agreement than a veto override which might be anticipated if Congress attempted to fire a Comptroller General who had ingratiated himself to the President since the House need only vote the articles of impeachment by a majority.<sup>26</sup> Indeed, if one were inclined to see political interaction by the worst case analysis used by the Court, one might note that the Court itself could presumably be silenced, at least prospectively,<sup>27</sup> by the same arsenal of congressional tools. Should the decision in *Bowsher* be disregarded because the Court's independent functioning is compromised by congressional power? The reader will insist, and should, that the illustrations drawn are far-fetched and unrealistic. Indeed they are. Equally so is the control Congress exercises through the power to fire the Comptroller General.

The Court's insistence on characterizing the Comptroller General's Gramm-Rudman functions as executive is equally unpersuasive. For the majority, the act is executive because it requires the actor to "interpret the provisions of the Act to

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24. See, e.g., the President's duty to report to Congress under the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, (1973). Congress can get tougher than that. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (removing Supreme Court jurisdiction as it was about to hear a case).

25. The causes constitutionally acceptable for impeachment are more restrictive than the causes allowing removal of the Comptroller General by joint resolution but their definition is left to the Court in impeachment (the Senate plus the Chief Justice in case of presidential impeachment). For a Comptroller General supposedly fearful of congressional punishment, being impeached for a fancied high crime or misdemeanor might rank as high as being found inefficient.

26. In both cases a two thirds vote of the Senate is required. U.S. CONST. art. I, § 3, cl. 7 (impeachment); § 6, cl. 3 (veto override).

27. Compare *McCardle*, 74 U.S. (7 Wall.) 506 with *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

determine what budgetary calculations are required.”<sup>28</sup> Succinctly put: “Each of the three constitutional branches of government, as well as administrative agencies, perform duties that require interpreting statutory directives as well as exercising judgment that affects the application of the law.”<sup>29</sup> Is the Court’s *Bowsher* decision an executive act? Characterizing governmental acts as executive and legislative is both futile and unrealistic.<sup>30</sup>

The essential problem in the Court’s approach to separation of power is a misperception as to the constitutional design. The Court has apparently conceptualized the three branches as essentially independent and has branded crossing over to the functions of another branch 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. As all branches need the other two in some respect, that need constrains their power. Of course, the three branches *are* designed to keep each other from arrogations of power and in part that 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 has already been mentioned. It would appear to be a judicial function but it is given to the legislature. When Congress sits in its most intrusive capacity, that is when it is charging the President, the third branch participates as well through the Chief Justice who presides at the trial.<sup>31</sup> 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.<sup>32</sup>

The examples abound. At least one important control is given each branch in the operation of the others. Legislation is

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28. *Bowsher*, 106 S. Ct. at 3192.

29. *The Supreme Court, Leading Cases*, 100 HARV. L. REV. 100, 226 (1986).

30. *Id.*

31. U.S. CONST. art. I, § 3, cl. 7.

32. We might know more about this process than we do had the Supreme Court not arrogated the impeachment inquiry in President Nixon’s case by resolving the central question of the ability of the public to hear his taped office conversations. *United States v. Nixon*, 418 U.S. 683 (1974).

presented to the President not only for execution but initially for his approval.<sup>33</sup> If he fails to approve it, the legislature is forced to repass it by a two thirds vote if it is to become law.<sup>34</sup> Thus, in effect, the President is the most important legislator because his vote counts as much as the votes of one person less than one sixth of each house. The courts are equally controlled by Congress. The Constitution expressly allows Congress to make exceptions to the appellate jurisdiction of the Supreme Court.<sup>35</sup> The Supreme Court, in turn, acts as the final arbiter of the constitutionality of congressional legislation<sup>36</sup> and presidential action.<sup>37</sup> The President, with the advice and consent of the Senate, fills the Court's vacancies.<sup>38</sup>

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

The tragedy does not, however, lie simply in the Court's misperception of reality. The isolation from political life which generates such problems is closely linked to an essential function which the Court performs when it must hold out for constitutional values against the prejudices of the day.<sup>39</sup> It is the isolation that allowed it to break the logjam of racial discrimination in *Brown v. Board of Education*.<sup>40</sup> It broke suburban dominance in political representation by announcing that the Constitution required "one man, one vote."<sup>41</sup> It allowed

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33. U.S. CONST. art. I, § 7, cl. 3.

34. *Id.*

35. U.S. CONST. art. III, § 2, cl. 2.

36. That power is not to be found in the express language of the Constitution. It dates from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), but it has become part of the conventional wisdom of our culture.

37. *Youngstown Sheet & Tube v. Sawyer* (Steel Seizure case), 343 U.S. 579 (1952).

38. U.S. CONST. art. II, § 2, cl. 2.

39. The fact that was recognized by the drafters. *See, e.g., THE FEDERALIST* No. 78 (A. Hamilton).

40. 347 U.S. 483 (1954). Of course, it was the same isolation that had allowed it to create the problem by announcing that separate equality was constitutionally sufficient. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

41. *Reynolds v. Simms*, 377 U.S. 533, 588 (1964).

people sexual expression which in many states had been suppressed by legislative enactment of majoritarian morality.<sup>42</sup> Of course, its major human rights blunders must be thrown into the balance.<sup>43</sup> Even so, the Court's record of protection of individual rights over time is remarkable and its role in doing so was pioneering. One can define the autonomy about which Americans are proud partially in having a Constitution and a Supreme Court that insists it be followed even when its edicts are unpopular.<sup>44</sup>

In the protection of other rights, the record of the Court is less enviable. *Lochner v. New York*<sup>45</sup> stands out as an agreed example of a prior Court's excesses in pursuing its view of ordered liberty.<sup>46</sup> There are many other examples of 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. It struck down a number of key laws.<sup>47</sup> The story of its change of heart after President Roosevelt's

42. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965). It later also dampened the effects of changing sexual mores. See, e.g., *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (homosexual sodomy); *Hollenbaugh v. Carnegie Free Library*, 578 F.2d 1374, cert. denied, 439 U.S. 1052 (1978) (adultery).

43. See, e.g., *Bowers*, 106 S. Ct. 2841 (approving criminalization of homosexual sex); *Koromatsu v. United States*, 323 U.S. 214 (1944) (approving Japanese-American citizen wartime forced relocation); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (treating freed slaves as property). Its lack of hold on political reality has led it astray in other fields as well. See, e.g., *United States v. Krass*, 409 U.S. 434 (1973) (bankruptcy foreclosed to those who cannot pay filing fee); *Appalachian Coals v. United States*, 288 U.S. 344 (1933) (low price of coal during Great Depression was largely due to necessary coal byproducts and aggressive marketing); *Lochner v. New York*, 198 U.S. 45 (1905) (employees had liberty to alter the conditions of employment by contract).

44. See *supra* text accompanying notes 40-42.

45. 198 U.S. 45.

46. See, e.g., Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983); Garfield, *Privacy, Abortion and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293 (1986).

47. E.g., *Railroad Retirement Board v. Alton Ry. Co.*, 295 U.S. 330 (1935) (act exceeds congressional commerce power); *Schechter Poultry*, 295 U.S. 495 (National Industrial Recovery Act exceeds congressional commerce power and amounts to excessive delegation of authority); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (regulation of coal production improper because it is local activity); *United States v. Butler*, 297 U.S. 1 (1936) (Agricultural Act beyond congressional commerce power).

landslide victory in 1936 is well known.<sup>48</sup> It demonstrates the unremarkable fact that even an isolated Court cannot defy the focused disagreement of the executive and legislative branches indefinitely.<sup>49</sup>

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 has been footnote four of *United States v. Carolene Products*,<sup>50</sup> which distinguishes between general regulation on the one hand and the rights of discreet and insular minority populations on the other.<sup>51</sup> The Court's role is seen as a reciprocal to the political process. Where the political process is viewed as providing protection against excess in 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 under-represented in and by those sent to Congress and in the benefits enacted.<sup>52</sup> The Court found itself justified in acting more forcefully on their behalf.<sup>53</sup> Had the Court concerned itself

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48. Following his inauguration in January of 1937, President Roosevelt launched an attack on the Court and proposed that a new justice be appointed for any judge who remained on the Court after he reached 70. He pleaded his case to Congress and to the public through his radio addresses. See SEN. REP. No. 711, 75th Cong., 1st Sess. (1937). President Roosevelt's plan was rejected by the Senate Judiciary Committee in June, 1937 but already the Court had begun to sustain New Deal legislation. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

49. One can speculate about the role President Roosevelt's proposal to pack the Court had in bringing about the change of heart. S.1392, 75th Cong., 1st Sess. (1937). 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*, SEN. REP. No. 711, 75th Cong., 1st Sess. (1937).

50. 304 U.S. 144 (1938).

51. See, e.g., Powell, *Carolene Products Revisited*, 82 COL. L. REV. 1087 (1982).

52. See, e.g., *Bowling v. Sharpe*, 347 U.S. 497 (1954) (declaring racial school segregation in Washington, D.C., unconstitutional).

53. The difference is perhaps best seen in the standards applied in equal protection cases. When a statute is attacked because its classification is economically unfair to one group or another, the Court reviews the statute under the rational relationship standard which is so weak that not a single statute has been invalidated under it since World War II (except for *Morey v. Doud*, 354 U.S. 457 (1957) itself overruled in *New Orleans v. Duke*, 427 U.S. 297 (1976)). If, on the other hand, the classification is racial, a compelling interest standard is applied. It can rarely be met. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

with a similar reciprocal role theory during the heyday of its review of economic regulation, it might well have concluded that a strong role was not called for. Unless one considers the wealthy to be a discreet 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 expenses 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.<sup>54</sup> 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.<sup>55</sup> 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 to the conclusion that the Court is grossly overexerting itself in this field. Based simply on the ability of the competing sides to persuade the people to their respective positions, the Court is clearly not needed. Anyone interested in the views of either the administration or Congress respecting Gramm-Rudman issues has but to consult the newspapers of the time. The President of the United States is capable of taking issue with congressional perspectives publicly and articulately and Congress is not shy about responding. The recent public hearings concerning funding of the Contra forces is a good illustration. If those two branches can reach an accommodation, as they did in the passage of 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? To say so

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54. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating law which placed limit on personal contributions to support or oppose ballot measures). *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating law restricting expenditures by banks and other corporations on referendum issues). *But see Valeo*, 424 U.S. 1 (upholding spending limits in Federal Election Campaign Act).

55. Senator Nelson Rockefeller, Jr. of New York and Governor Pierre DuPont of Delaware are prominent examples.

is not to imply that the two branches are equal in power. They are not, and true scales would show that presidential power overwhelms congressional power.<sup>56</sup> That, of course, makes the *Bowsher* decision worse.

It would, in any event, be one thing for the Court to insist on some clear and contrary position respecting legislative functions expressed in the Constitution. If, for example, the Constitution expressly vested in the executive branch power to control the federal budget, one might argue for a Court rule 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 which is quite inexplicit on the point, the Court might better defer to the other branches which 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 the position of either the President or Congress in such matters.

The Court has often discussed separation of power as though the balance was to be struck between two branches rather than among three.<sup>57</sup> Doing so obscures the fact that the document indicates at least equal concern that the courts be limited. The judicial power of the United States is the most modestly endowed power of the three. 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.<sup>58</sup> Perhaps in recognition of its powerlessness, the Court's principal functionaries are given lifetime appointments and salary guarantees.<sup>59</sup> The Court is awarded so little authority in constitutional adjudication by the express language of the

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56. "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, *supra* note 4, at x.

57. Occasionally, it sees its own role in perspective. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Court is improper branch to evaluate congressional determination of essential state functions).

58. U.S. CONST. art. III, § 1.

59. *Id.*

Constitution that it took its own self-adjudicated claim in *Marbury v. Madison*<sup>60</sup> to make it a major participant.

One might review a number of prior cases from that perspective. Two suffice to make the point. In *United States v. Nixon*,<sup>61</sup> 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 considerations of a bill of impeachment, the House of Representatives had become aware that the President had secretly taped conversations in the oval office; it wanted to hear them to help resolve issues under consideration. Nixon refused to release some of the tapes requested. The tapes were also being requested by the defense in the cases of several Watergate defendants. The defendants brought the issue to the courts.<sup>62</sup> The President raised the stakes, when the case had reached the Supreme Court, by indicating that he would only be bound by a "definitive" opinion of the Court.<sup>63</sup> The Court met his challenge by issuing a unanimous opinion that he release the tapes.<sup>64</sup> Shortly thereafter, President Nixon resigned, never having been impeached.<sup>65</sup>

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.<sup>66</sup> There is no other role prescribed for the Court. To be sure, the Court was not speaking directly to impeachment but it was on notice throughout the presentation of the case that it was central to the process of impeachment.

In other contexts, the Court has invoked its self-imposed doctrine of avoiding political questions to allow issues to be resolved by a more appropriate branch.<sup>67</sup> Caught in the

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60. 5 U.S. (1 Cranch) 137.

61. 418 U.S. 683.

62. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* 287 (1979).

63. *Id.* at 292.

64. *Nixon*, 418 U.S. 683.

65. *THE BRETHERN*, *supra* note 62.

66. U.S. CONST. art. I, § 3, cl. 7.

67. *See, e.g., Mora v. McNamara*, 389 U.S. 934 (1967) (Court refused to hear challenge to Vietnam War).

limelight of national publicity, it did not use it here.<sup>68</sup> 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, it 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 it had no power to do so as he met the three express qualifications of office: age, citizenship and residence.<sup>69</sup> It did not appear to trouble the Court that judging the qualifications of members of Congress is expressly allocated to Congress in the Constitution.<sup>70</sup> Again, the provision appears far more clearly expressed than the prohibition on using officers such as the Comptroller General for duties such as Gramm-Rudman budget cuts.<sup>71</sup>

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68. The resulting opinion was weak, probably because the Court felt a need to avoid the presidential challenge of disobedience to a small majority. It also incidentally established grounds for invoking a theretofore underdeveloped doctrine of executive privilege which will make it harder to reach presidential papers in the future. Whatever the other merit of the opinion, however, it accelerated the departure of Richard Nixon.

69. *Powell v. McCormack*, 395 U.S. 486 (1969).

70. "Each House shall be the Judge of the . . . Qualifications of its own Members . . ." U.S. CONST. Art. I, § 5, cl. 1.

71. It is true that the provision for 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. If a mere majority could refuse to seat, the party in power might in the future use the provision to disadvantage the minority party. There are three responses to that concern. It was not this case and had never happened. The vote not to seat in fact carried by more than the two-thirds majority required to expel though one cannot be sure that all of those voting for it 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.

Contemporary judicial activism began innocently enough in the hallowed tradition of negative judicial power, but the absence of constraint proved its undoing. Guided only by notions of policy, the Court could find no reason to refrain from "legislating" as to how its constitutional interpretations were to be administered. Basking under the umbrella of "equity" jurisdiction, the Court proceeded to direct

In both cases, the Court did more than to assume a role that the 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 tasks. In depriving Congress of the experience of dealing with them, the Court also diminished the role of the legislature as a responsible body. The decisions that needed to be made were difficult and many in Congress were no doubt pleased that they did not have to have their votes on these matters recorded but if they were the body to have done so, the Court should have permitted them to act, perhaps to fail.

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the manner and means of such large-scale projects as gradual school desegregation and the implementation of "one-man, one-vote" reapportionment of every conceivable voting unit. Even Bentham would have to have been impressed by such massive positive power. But where is the answer to the framer's question: If the courts are exercising positive (legislative) power, what branch is exercising negative (judicial) power in reviewing the judiciary's legislation? No answer is necessary to that question if one lacks conviction that the genius of the framers is reflected in their grasp of the importance of negative power. If proponents of "liberal" activism are inclined to ignore that question, they may soon face a true test of their disdain for negative power: the deployment of positive power by "conservative" judicial activists.

Advocates of judicial legislation in the guise of constitutional interpretation may, nonetheless, assert that they are true Benthamites in their advocacy of positive power. But Bentham has one final point to pose for their consideration: the notion that the true foundation of all power including judicial power is to be found in the habit of obedience. Activists do not like to be reminded of the constraints imposed on judicial power by the limits of public toleration. But public opinion can be ignored only temporarily and at the peril of eroding the legitimacy of judicial action. Judges such as Felix Frankfurter, sensitive to the costs of reckless judicial gambits, warned against the follies of such adventures.

Our past teaches that when the Court wanders too far from the path laid out by public opinion, the public reaction usually results in such a reining in of the Court as to make it largely a non-factor in public life for a few decades. Such was the fate of the Court in the reconstructionist backlash following the Civil War. Either following or in the place of a period of "conservative" activism, such a period of nascence may perhaps be getting underway for the Court once again. If so, Bentham would understand why. Public opinion can be ignored, but not forever.

Meanwhile, the Court during its period of recuperation will have an opportunity to reflect on the significance of negative power and the importance of judicial philosophy. In so doing, they will learn that there is often wisdom to be found in the misunderstandings of others. The comprehension of the American Constitutional structure by both Bentham and Dicey was admittedly defective. On the other hand, the wisdom to be found in studying their errors makes studying them more profitable in a way than if their understanding had been more complete.

It should not be forgotten that the Court is the least democratic branch of government. It is intentionally insulated to make countermajoritarian decisions when the majority threatens a minority interest protected by the constitution. When there does not appear to be a 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 is arrogation.

It cannot be asserted that Congress is expressly constitutionally entitled to use the Comptroller General in implementing its legislation, but it can be noted that the Court is asserting its role in an undemocratic resolution of a matter which democratic process had adequately resolved. Further, the decision comes after a line of cases in which the Court has expressed its indifference to its own arrogation of power.

