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Reply to Professor White's "Coterminous Power Theory"

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Abstract

Public confidence in the Supreme Court's performance rests to a large extent on the perception that the justices engage in a process of reasoned elaboration of the Constitution, applying and developing discernible rules and principles to resolve justiciable controversies.

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Public confidence in the Supreme Court's performance rests to a large extent on the perception that the justices engage in a process of reasoned elaboration of the Constitution, applying and developing discernible rules and principles to resolve justiciable controversies. In the process, justices are expected to transcend personal predilections, while considering not only the pertinent demands of justice, public policy, the structure and text of the Constitution, and the gloss of precedent embedded in historical context, but also the social antecedents and consequences of a particular decision. Unfortunately, for a variety of reasons, the public no longer perceives the justices as objective and impartial judges applying neutral principles that transcend their personal values.¹ Indeed, as Professor White suggests, "some of us may smile" when we read Justice Marshall's statement in *Osborn v. Bank of the United States*:²

Courts are the mere instruments of the law and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.³

It is unnecessary to cite the impressive array of great judges who have made similar asseverations of commitment to the rule of law—so many come to mind. Most recently, the latest appointee to the Court,

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1. In *Linkletter v. Walker*, 381 U.S. 618 (1965) the Court, in justifying prospective overruling, accepted the view that "judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite or generic statutory or common-law terms that alone are but the empty crevices of the law." *Id.* at 623-24. See generally Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. U.L. REV. 528 (1968).

2. 22 U.S. (9 Wheat.) 738 (1824).

3. *Id.* at 866.

Justice Kennedy, in his concurring opinion in *Texas v. Johnson*,⁴ stated: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."⁵

Justice Kennedy's comment may, as with Justice Marshall's quoted passage, "provoke a wry smile,"⁶ since we are aware that when such arguments are "advanced by judges the arguments may well be skillful rhetorical devices, designed to conceal the partisan nature of judging . . . [although] we may admire their wiliness or even believe that they are ultimately necessary in a culture in which the rule of law ideal is deeply embedded"⁷

Given Professor White's thesis that Justice Marshall and his contemporaries operated enthymematically—the coterminous power theory, the inarticulate premise—then just as with Justice Kennedy, it appears that they felt constrained to make decisions they did not like. Consider what must have been Marshall's stance, given Professor White's contention that one strategy for expansion of federal judicial power and concomitantly congressional legislative power, was to establish a federal common law of crimes. The suggestion is that this was why Oliver Ellsworth, who was involved significantly in drafting both Article III and the Judiciary Act of 1789, in 1799 in *United States v. Williams*⁸ assumed that individuals could be prosecuted by the federal government for commission of a common law crime.⁹ Professor White notes that Jefferson, in a letter in 1800 discussing this issue, concluded that if the federal judiciary had the power to enforce common law then "it would possess the general government at once of all the powers of the state governments and reduce us to single consolidated government."¹⁰ Clearly Justice Marshall then, like Justice Kennedy, felt compelled to accept a decision he did not like when the Court held in *United States v. Hudson & Goodwin*.¹¹

Certain implied powers must necessarily result to our Courts of

4. 109 S.Ct. 2533 (1989).

5. *Id.* at 2548.

6. White, 14 NOVA L.REV. 155, 193 (Fall 1989).

7. *Id.* at 193.

8. Connecticut Courant, April 30, 1799.

9. Professor White also cites *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (1798) as establishing a federal common law of crimes.

10. White, *supra* note 6, at 178.

11. 11 U.S. (7 Cranch.) 32 (1812).

justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—enforce the observance of order, & c. are powers which cannot be dispensed within a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.¹²

How ironic if federal courts possessed jurisdiction to fashion a federal common law of crimes, when the Judiciary Act of 1789 was promulgated in the same year that the National Assembly of France, after extensive consultation with Thomas Jefferson, approved the Declaration of the Rights of Man and of the Citizen. The Declaration prohibits common law crimes in Article 8, stating that "no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense."¹³

Again, Marshall must have concurred with some difficulty in *Green v. Neal's Lessee*,¹⁴ where Justice McLean concluded that:

Apparent inconsistencies in the construction of the statute laws of the states, may be expected to arise from the organization of our judicial systems; but an adherence by the federal courts to the exposition of the local law, as given by the courts of the state, will greatly tend to preserve harmony in the exercise of the judicial power, in the state and federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority.¹⁵

When the Court recently found it necessary to fashion federal common law,¹⁶ subsequent congressional action superseding the Court's rule was accepted, since "federal common law is 'subject to the paramount au-

12. *Id.* at 34.

13. M. VIORST, *THE GREAT DOCUMENTS OF WESTERN CIVILIZATION* 191 (1965).

14. 31 U.S. (6 Pet.) 291 (1832).

15. *Id.* at 300-301.

16. *Illinois v. Milwaukee*, 406 U.S. 91 (1972). It is well-known that Justice Brandeis determined that the issue of apportionment of the water from an interstate stream was a matter for resolution under Federal common law. *Hinderlider v. La Plata R. & Cherry Creek D. Co.*, 304 U.S. 92 (1938). On the same day he also delivered his opinion in *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938).

thority of Congress.'"¹⁷ It is noteworthy that the Court cites for the proposition that federal courts are not general common-law courts two cases: *Erie R.R. Co. v. Tompkins*¹⁸ and *United States v. Hudson & Goodwin*.¹⁹

Justification based on the original intent of the framers is just that—and the justices are at liberty to choose the particular historical documentary evidence that suits their view. Professor Jacobus tenBroek has commented that:

Luther Martin's commentary on the Constitution appears infrequently in the reports, and then generally with disparaging comment. Likewise, the able series of articles written over the name of "Brutus" by Judge Robert Yates has never, to my knowledge, been cited by the Supreme Court We must conclude, therefore, that the difference in the position of Madison and Hamilton, on the one hand, and Martin and Yates, on the other, lies not in any difference of opportunity to know the will of the fathers, nor yet possibly in any difference of merit. It lies rather in the not altogether incidental fact that Madison and Hamilton were on the side which turned out to be victorious, and this fact, taken together with their entire careers, has made them great in the eye of posterity—a fact which has given their words a quality of persuasion which has never attached to the utterances of Martin and Yates. It is this circumstance which explains the pre-eminent popularity of *The Federalist* with the United States Supreme Court as against all other contemporary partisan commentators, and not the judicially asserted fact that they possessed peculiar opportunity to inform themselves on the issue of formulative intent.²⁰

If coterminous power was the inarticulate premise buried in Marshall's interpretation of the Necessary and Proper Clause, Article I, Section 8, clause 18, then the premise was arguably realized when the Court concluded in *Katzenbach v. Morgan*,²¹ that Section 5 of the fourteenth amendment imbued Congress with the same broad power as

17. *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981).

18. 304 U.S. 64 (1938).

19. 11 U.S. (7 Cranch) 32 (1812).

20. tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 157, 164 (1939) (footnotes omitted). Just as the right thing to do is what future generations will say we should have done, so too the past is what historians say it was. G. ORWELL, 1984 (1949).

21. 384 U.S. 641 (1966).

sumed in Marshall's classic formulation: "Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."²²

In *Morgan* the Court also concluded that Section 5 authorized preemptive federal enactments even where the state law is not prohibited by substantive provisions of the fourteenth amendment.²³ Obviously where the Court has expanded the reach of equal protection and of substantive due process—e.g., privacy,²⁴ interstate travel,²⁵ the right to marry²⁶—ratchet-like Congress' Section 5 power concomitantly has increased.

The striking contrast between the article I *enumerated* power language and the unqualified executive and judicial power language of Articles II and III is effectively obliterated with such a sweeping necessary and proper interpretation, coupled with a judicial expansive program of substantive constitutional rights. One searches in vain, however, for any justification of such an expansion of federal power based on precedent from the Marshall era, explicitly relying on a coterminous power theory. Of course, if Professor White can persuade us that the justices of that era did subscribe to that doctrine, then we would certainly read their opinions in a different light. The jury is still out on this question. Whether it would make any significant difference in the precedential value of the classic Marshall Court jurisdiction is highly doubtful.

22. *Id.* at 650. Congress under the *Morgan* rationale can set aside Eleventh Amendment immunity and impose on the states liability for damages and attorneys' fees for unlawful discrimination, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), even including compensation for delay in payment of attorneys' fees. *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989).

23. 384 U.S. at 650.

24. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973). Some constriction has occurred recently: *See Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). A similar oscillation is occurring in the Court's interpretation of civil rights statutes. *Contrast e.g., Runyon v. McCrary*, 427 U.S. 160 (1976) with *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

25. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

26. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

The Separation Doctrine — Prescription for Conflict or Cause for Creative Constitutionalism?

John B. Anderson*

Old habits die hard; and so in my morning meditation and musing, instead of carefully revising my presentation for this morning's session as I should have, I had to pick up the newspaper and find out what had happened in Washington since I left there. Of course, one of the big stories that is making the rounds there is about the confirmation, or perhaps the crucifixion, of Senator Tower in his effort to become Secretary of Defense. I read the story about his physician who had prescribed two drinks—two glasses of wine. I could not help but think that if that prescription ever really takes hold in Washington, one of the most venerable institutions in that city—the Washington cocktail party—will certainly go the way of all flesh. More importantly, and perhaps more pertinently, it reminded me of the fact that according to Biblical lore, when people had the wedding feast and other celebratory events in those times, they first would bring out the truly rare wines, and it was only when the guests at the banquet or the function were thoroughly besotted, that they would bring out the less rare vintages. Well, if you were here yesterday, you had the rare wines in the four sessions that were held between 9:00 and 5:30. You had the truly rare vintages, and now you come to me. Fortunately, Tony has suggested that coming from the political world, I may have a somewhat different perspective on some of the topics that have been discussed at this Symposium.

Having been a member of the legislative branch for twenty years, I have always been very conscious of the interplay that goes on among the three great departments of government: the executive, legislative and judicial departments. I will talk about the subject of separation of powers and, at least tentatively, I will call it: "Old Structures and New Modalities, Conflict Or Creative Constitutionalism?"

Separation of powers is something to be taken very seriously. As we learned yesterday from Professor Kutler, when Madison introduced

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an amendment in that very first Congress of 1789, that would have elaborated upon this doctrine to which there is actually no textual reference in the Constitution itself, Madison's amendment failed. Yet it is a very important subject, one that may be of even more importance in the future.

Several generations of law students, including some that I have been privileged to teach here at the Nova Law Center, have customarily referred to a 1935 case, *Schechter Poultry Corp. v. United States*,¹ as the "sick chicken" case. In that case, Chief Justice Hughes noted that extraordinary conditions may call for extraordinary remedies, but that extraordinary conditions do not create or enlarge constitutional powers. The case involved an unconstitutional delegation of legislative power to the President, section three of the National Industrial Recovery Act,² passed in the throes of the Great Depression. The Court said Congress was not permitted to abdicate or transfer to others the essential legislative functions with which it is vested. Even Cardozo agreed, although he was certainly at the other end of the political spectrum from some of the other members of that unanimous Court. His concern, as expressed in his concurring opinion, was that what had been established under General Hugh "Iron Pants" Johnson, was a roving commission to inquire into evils and, upon discovery, to correct them. It was noteworthy that neither the opinion of the Chief Justice nor Justice Cardozo makes any specific reference to the doctrine of separation of powers, although certainly in passing on this unwarranted and unconstitutional abdication of legislative power to the President, that doctrine lies at the very heart of the Court's decision. The delegation doctrine, as it was expounded in that case, was laid aside in the judicial revolution of 1937. I guess most people thought the doctrine was dead. Yet, that subject was revisited, forty-five years later.

The present Chief Justice, then Justice Rehnquist, wrote a concurring opinion in *Industrial Union Department v. American Petroleum Institute*,³ This 1980 case involved the question of whether an official of the executive branch, the Secretary of Labor, had exceeded his power in promulgating a benzene standard under section six of the Occupa-

1. 295 U.S. 495 (1935).

2. 15 U.S.C.S. § 703 (Law. Co-op. 1984), National Industrial Recovery Act of 1933, § 3, 48 Stat. 195 (1933) (omitted from Code because Act was held to be unconstitutional).

3. 448 U.S. 607 (1980).

tional Health and Safety Act.⁴ Had he thereby exercised legislative power in a constitutionally impermissible manner? Justice Rehnquist came to the question of separation of powers immediately in his concurring opinion. It was interesting that, unlike in the *Schechter* case where the doctrine of separation of powers is not discussed at all, Justice Rehnquist came to that doctrine very quickly in striking down the authority of the Secretary of Labor to issue that particular standard. It is also interesting that he does not talk about the *Schechter*⁵ case. His chief reference is to another case, *Field v. Clark*,⁶ decided in 1892 on an entirely different set of factual circumstances. I mention this because although the other two plurality opinions discussed the delegation principle, they do so without any explicit reference to the separation doctrine. This indicates that a Court led by Chief Justice Rehnquist is going to be more inclined to use the analytical framework of separation of powers in looking at the legislative/executive branch relationship.

Justice Jackson, in his deservedly famous concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*,⁷ the steel seizure case, provides the rationale that workable government cannot be posited on a totally narrow and formalistic construction of the separation doctrine. At this point, it might be well to point out that there is respectable legal opinion to the effect that the invocation of the separation doctrine is not necessary, at least in the name of preserving the checks and balances provided for by our Constitution. Professor Jesse Choper, the author of *Judicial Review in the National Political Process*,⁸ is probably the most prominent exponent, if indeed not the author of this notion of judicial review. His laissez-faire approach to the separation doctrine is based on the conviction that a democratic polity can work out suitable cooperative mechanisms that are needed to keep our system of national government operable and responsive, both to the Constitution and to the need to adapt government to the constantly changing needs of our society. He does not, therefore, favor frequent recourse to the separation doctrine to limit national power, or the exercise of power by one of the political branches.

I frankly believe, after twenty years of experience in the House of Representatives, that Choper's is a somewhat idealized version of the

4. Occupational Health and Safety Act § 6, 20 U.S.C. § 655(b)(5) (1970).

5. *Schechter*, 295 U.S. at 495.

6. 143 U.S. 649 (1892).

7. 343 U.S. 579 (1952).

8. J. CHOPER, *JUDICIAL REVIEW IN THE NATIONAL POLITICAL PROCESS* (1980).

ability of the legislative branch to do exactly what he seems to envisage. This is true however much one might be inclined to agree with Dean Choper's prescription, that interbranch conflict should be left to the political process and rendered non-justiciable by the judicial branch. He believes that the Supreme Court should concentrate on cases involving individual rights. That does not seem to be the line of reasoning which the present Supreme Court will adopt. Indeed, quite to the contrary, predictions are currently and freely being offered that cases involving the separation doctrine, particularly, although not exclusively, as it refers to the legislative/executive relationship, will perhaps be featured prominently on the future docket of the Court for some time to come.

There may obviously be more than one reason for this. Having been part of the political scene for a quarter of a century, I feel that a divided government is certainly one very pragmatic reason. The Democratic Party has not yet been totally confirmed in the role assigned to it by Professor Samuel Huntington, who described it as the party of access as opposed to a party of governance. This was his description in talking about parties at the national level. There is certainly some warrant for the belief that there is almost a permanent Congress controlled by Democrats, and it is equally true that after winning five of the last six Presidential elections, the Republicans enjoy a preferred status as occupants of the executive branch. My friend, Senator Chris Dodd of Connecticut, said the other day that "if we Democrats ever elect a President, we are going to have to call on the Republicans to help us stage the Inaugural, we've forgotten how." I point out these well-known political facts, because it seems to me that the possibility for interbranch conflict is exponentially greater the longer that kind of divided government continues, and these various frustrations are compounded. The Speaker of the House and his forays into foreign policy during the 100th Congress, and the intense irritation that it produced in the executive branch, is only one of many examples that could be offered of the potential for conflict.

In sum, the political process on which commentators like Dean Choper would rely as a substitute for judicial intervention in interbranch disputes is skewed in favor of a continuing struggle and disjunction between the executive and legislative branches. The political or the electoral process may not necessarily resolve that problem in a time of divided government.

Some eminent lawyers like Lloyd Cutler, former White House counsel during the Carter Administration, have proposed a way out,⁹

We could move toward a modified parliamentary system by amending the Constitution and by providing for a block vote so that voters could only vote for a Chief Executive and legislative representatives in both the House and the Senate who ran together on the same party ticket. We would thereby cure the present anomaly which has produced a divided government, for the most part, over the past several decades. Unfortunately, the last time I looked at the committee for constitutional revision, it was looking extremely moribund. So I fear that we are driven to the necessity of accepting the role of the courts as mediatorial when questions of executive and legislative constitutional prerogatives inevitably contend. We could, of course, have an extremely deferential court that would yield to an extremely activist and determined legislative branch. Such a Court formed in the post-Civil War period and brought with it an era which historians have described as an era of congressional government with correspondingly weak executives. It could certainly be argued that this caused no long term or irreparable damage to our constitutional system. Again, however, the realities are that despite the rise and, if not the fall, at least the decline, of the imperial presidency, our political culture does not seem attuned in this present age to the kind of one branch supremacy that we accepted in that earlier period.

The very dichotomy of political power which we have been describing seems to show a strong public predilection, if not demand, for a balance between the two branches of government, rather than untrammelled influence by one or the other. If I am correct in that reading of the popular will, it seems to me that we are driven back on the necessity of finding new modalities of interbranch cooperation, in both domestic and foreign affairs. To the extent that these represent new, untried, and even novel approaches, there is going to be an adjudicatory dimension which the judicial branch is obligated, under the doctrine of separation of powers, to address.

Professor Stephen Carter of Yale recently wrote on this subject in a column for the *Wall Street Journal*. Professor Carter believes that initially the Congress and the President make their own interpretation of what is permissible under the Constitution. I accept his premise, but it seems to me that also ultimately the Court may be called upon to decide the conflicts of that nature. In recent times, such cases as *Buckley v. Valeo*,⁹ *United States v. Nixon*,¹⁰ *Nixon v. Administrator of*

9. 424 U.S. 1 (1975).

10. 418 U.S. 683 (1974).

General Services,¹¹ and many other cases decided in the seventies, have yielded legal precedents which set the stage for a group of equal, perhaps even more notable cases in the eighties. These include *Immigration and Naturalization Service v. Chadha*,¹² on the legislative veto, *Bowsher v. Synar*,¹³ which dealt with the Gramm-Rudman-Hollings Deficit Reduction Act,¹⁴ and, more recently (just a little over six months ago), *Morrison v. Olson*,¹⁵ upholding the constitutionality of the Independent Counsel Law. Also, within the last few days, *Mistretta v. United States*,¹⁶ involving the sentencing commission which Congress chose to lodge within the judicial branch, was decided. There are several other cases as well.

The wide-ranging debate over whether the affairs of the modern administrative state can be conducted more efficiently and more effectively through the adoption of a functional approach to the doctrine of separation of powers, as opposed to a formalistic approach to that doctrine, has seen present members of the Supreme Court swing both ways. The most recent prominent examples of this are *Bowsher v. Synar*¹⁷ and *Commodities Futures Trading Comm'n v. Schor*.¹⁸ In *Bowsher*, the majority clearly relied on formalism as the analytical framework for their decision that an official who is subservient to the legislative branch, in this case the Comptroller General, who was assigned executive duties in an effort by Congress to legislate a deficit reduction mechanism, could not constitutionally carry out such a congressional mandate.¹⁹

The *Schor* case presented a far less weighty issue involving the hearing officer of a federal administrative agency, the Commodities Futures Trading Commission. The Court decided that the officer had the right to adjudicate a counterclaim when he was conducting a hearing arising under the common law of the state, without trespassing on the jurisdiction of an article III court.²⁰ This was a conflict involving pow-

11. 433 U.S. 425 (1977).

12. 462 U.S. 919 (1983).

13. 478 U.S. 714 (1986).

14. Balanced Budget and Emergency Deficit Control Reaffirmation (Gramm-Rudman-Hollings Act of 1985, §§ 251, 274(f), 2 U.S.C. §§ 901, 921 (1985)).

15. 108 S.Ct. 2597 (1988).

16. 109 S.Ct. 647 (1989).

17. 478 U.S. 714 (1986).

18. *Id.*

19. *Bowsher*, 478 U.S. at 734.

20. *Schor*, 478 U.S. at 833.

ers of the judicial branch. That case was decided, in contrast to *Bowsher*, on a functional and very prudential basis. Here was a different kind of encroachment case less dramatic and less likely to arise.

It was Justice O'Connor in *Schor* who wrote that the Court had rejected formalism as an approach to the specific question of whether confiding jurisdiction over common law claims in an administrative agency was a threat to article III courts. Congress "had rejected the formalistic approach in favor of a functionalistic approach because Congress had to remain free to take needed and innovative action pursuant to its article I powers."²¹ In contrast with this is a case involving perhaps a far more significant issue, the budget deficit. In that case, the Court took the more crabbed view that it had to very formally apply the doctrine. One commentator, Professor Strauss, has suggested that it was a liberal Justice Brennan who took the formalistic approach in the *Schorr* case involving the Commodities Futures Trading Commission. Justice Brennan seemingly departed from a more expansive and flexible view, which he usually espoused, of powers granted to the branches of government under the Constitution. He probably did so because of his concern over the possibility of the growth of measures that would limit the role of the judicial branch as the antidote for overcrowded court dockets. In other words, he was set on protecting the judicial branch against possible further encroachments.

Leaving aside the judicial branch of our tripartite system—which deprived of either sword or purse, in the late Alexander Bickel's words, is the least dangerous branch—it seems that potential clashes in the future involving the separation doctrine are more likely to be those over article I and article II powers of the political branches of government. Furthermore, it seems to me that a jurisprudence in this area, which largely evolves around the question of defending one branch against the other, or that is confined principally to the test of whether aggrandizement of power by one branch has occurred at the expense of the other, is fraught with some difficulty and even peril. The difficulty is that a formalistic application of the separation doctrine, relying on that analytical approach, will be at the expense, to go back to Jackson's phrase, of workable government which must be increasingly innovative if it is to deal with an ever changing set of challenges to our democratic system.

The peril lies in an ever increasing exacerbation of interbranch

21. *Id.* at 851.

tensions if a judicial imprint is placed upon a paradigm which centers around maintaining a system where political power is viewed as a kind of zero sum game. In other words, formalism would take the view that the President can only gain power at the expense of the legislative branch or vice versa. Functionalism would seem to offer a better way out, though it may not actually provide a rationale that could serve to banish conflicts of the kind just mentioned. However, it seems that this kind of analytical approach would tend to at least dampen the fires of contention that are fueled by a naked struggle for political power at the expense of the broader public interest in seeing that problems are solved.

Chief Justice Burger, in *Bowsher v. Synar*, decried the suggestion that efficiency and convenience are hallmarks of democratic government.²² The Court rather tacitly observed in that case that these are not the primary objectives or the hallmarks of democratic government. Well, how does one get around that? It has been suggested that maybe Congress could simply invoke the Necessary and Proper Clause. Surely it did so in the chartering of the National Bank, which we heard of in such an interesting a fashion and at great length yesterday. As in the case of *McCulloch v. Maryland*,²³ Congress could amplify its various powers under article I, by a resort to the Necessary and Proper Clause. However, the very broad parameters of that approach will surely not satisfy everyone as the kind of judicially manageable standard that will constitutionally canalize legislative power without damming it up. Such an approach would, in effect, dam up the legislative power by so narrowly confining that power that the legislature would be unable to provide the innovative and imaginative solutions that I have referred to or at least implied could be achieved under creative constitutionalism.

Madison was certainly speaking as a pragmatist when in the Federalist Paper # 37 he likened any effort to draw an immutable line of division among the three branches to an effort to rigidly separate the animal and vegetable kingdoms.²⁴ My own concern, after spending a good deal of my adult life in the legislative branch, is that a Congress cowed by linedrawing, based on the separation doctrine, could do one of two things. On the one hand, it could utterly rebel and thereby provoke a constitutional crisis. On the other hand, it could become so ac-

22. *Bowsher*, 478 U.S. at 736 (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983)).

23. 17 U.S. 316 (1819).

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comodationist in its approach to difficult and novel issues of public policy that, like the salt that has lost its savor, it would become increasingly irrelevant. Certainly neither of those bleak alternatives is desirable. Surely there would be a rush of executive power into any such vacuum created by a complacent Congress. In areas of both foreign and domestic policy this could lead to less accountability and, ultimately, to a frustration of one of the principal aims of the separation doctrine: the ability of one department, through a vigorous exercise of its constitutional powers, to serve as a vital part of the system of checks and balances.

Two decisions of the Supreme Court, dealing with the proper application of the separation doctrine in interbranch disputes are *United States v. Nixon*²⁵ and *Nixon v. Administrator of General Services*.²⁶ In the former case, the so-called first Nixon tapes case, the Court correctly used a balancing test between the need for presidential confidentiality and the requirements of the judicial branch to oversee the fair and partial administration of the criminal justice system.²⁷ In the latter case, Congress had passed the Presidential Recordings and Material Preservation Act in 1977.²⁸ It was challenged by the then-resigned President Nixon as an unconstitutional attempt by Congress to delegate to a subordinate official, the Administrator of General Services, a decision which could only be made by the executive branch itself. It was not for Congress to decide to whom the power should be delegated. Only the executive branch could make that decision. The argument was based essentially on the premise that certain business is so inherently executive in nature that it must be impervious to any attempt by Congress to reach it.

The Supreme Court properly found that the executive power asserted by President Nixon had swept too broadly, and a much more refined two-part test was required. First, in the face of a challenge based on the doctrine of separation of powers, there was an anterior question: to what extent did the power asserted by Congress prevent the President from carrying out a responsibility or duty assigned to him by the Constitution? In other words, the first part requires more than a mere generic protection of executive power as a general principle to a

25. 418 U.S. at 683.

26. 433 U.S. at 425.

27. *Nixon*, 418 U.S. at 707.

28. Presidential Recordings and Material Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974).

finding that potential for disruption of that power does exist. And even if there is the potential for disruptive impact, the President can establish a justification by showing an overriding need to tolerate such a disruption in order to carry out and promote objectives which are properly within the constitutional grants of legislative power or authority. The operative words are "overriding need." These are the kind of parameters which are both judicially manageable and coherent standards for decision making, and are the antithesis of this purely formalistic approach.

To use the terminology that is employed in M. J. C. Vile's work on this subject, *Constitutionalism and the Separation of Powers*, creative constitutionalism can reconcile conflict by legitimating the use of new modalities while preserving the architectural structures which are the essence of our form of government.²⁹ Incidentally, it is Vile who has noted that in the late 18th century and in mid-19th century France, the employment of a formalistic approach to the separation of powers yielded the Constitutions of 1791 and 1848. They were written with a very formal approach to that doctrine.

The first Constitution eventually gave way to the self-crowned Napoleon Bonaparte and his imperial designs. The constitution of 1848 brought about the Second Empire. One must be careful not to oversimplify history in this regard, but it ought to be at least food for thought for those who as recently as 1986, in *Bowsher v. Synar*, seemed ready to reject new modalities to deal with chronic and dangerous problems of deficit reduction and to rather rigidly and formally apply the doctrine of separation. Again, to refer to Justice Jackson and his decision in the steel seizure case, while the Constitution diffuses power the better to serve liberty, it also contemplates that the practice would integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but also interdependence, autonomy but also reciprocity.

Louis Fisher, of the Congressional Research Service, who has authored *Constitutional Conflicts between Congress and the President*,³⁰ has undertaken to correct what often has seemed to be a misinterpretation of the earlier pronouncements by the Supreme Court—that convenience and efficiency are not the primary objectives or hallmarks of a democratic government. The Chief Justice at that time, Warren Bur-

29. M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967).

30. L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (1967).

ger, had said in the *Chadha* case that the Framers placed a much higher premium on other values.³¹ Fisher points out that if this carries with it the implication that there is somehow an incompatibility between separation of powers and efficient government, that is a very arguable proposition to say the least. For fourteen years, from the very first Continental Congress until the Constitutional Convention convened in 1787, there had been a search for a more efficient government. The Framers could have continued the same inefficient, unworkable, one-branch type of government they had under the Articles of Confederation, but they deliberately abandoned that to set up this tripartite system in search of a workable, more efficient, and more effective government again. The phrase "of a workable government" is very significant.

I do believe that we face new and unprecedented problems, both with respect to our position in the world economy and in our external political affairs. This is not a class on current events, but I want to touch on some events of recent times, such as the doctrine of Perestroika, which raises the prospect of a very dramatic reconsideration of our traditional rivalry with the other superpower. Turning to the West, as we race towards 1992, we see the emergence of one huge economic bloc in the form of a highly integrated European Economic Community. Swinging back to the East, Japan, with a population less than half our own and an infinitely smaller share of the world's natural resources, now has a gross national product which is fully two-thirds of that of the United States. It seems to me that we have to be prepared to face unprecedented challenges of that nature. And we have to address these very highly complex diffuse issues at the same time within a very traditional-minded approach to governance. We must accomplish the changes which are the central presiding realities of our time with some dispatch, unless we are simply overtaken by the events. Yet we must do it within the revered mold of the old structures that I referred to in the title of these remarks. We must accomplish our goals at a time when the two political branches will find themselves in conflict because of the political situation that I described earlier: this bifurcated political system which divides control. That situation imposes great responsibilities upon the judicial branch of our government which we are dignifying and honoring with this symposium here at Nova. That branch has the great responsibility of serving as arbiter of ques-

31. *Chadha*, 462 U.S. at 944.

tions which go to the very heart of the nature of our constitutional system.

I would have great fear if there were ever to be a de facto alliance between the high court and the executive branch, against the legislative branch, which was consciously grounded in making a common ideological front or in deliberately exalting the combined power of the two for the abasement of legislative power. Some historians insist that there is considerable warrant for the belief that in President Jackson's struggle with the Congress over the matter of the U.S. National Bank, he sought exactly that kind of arrangement. The present Court shows no predilection towards any such design. For that we should be profoundly grateful.

I mentioned *Morrison v. Olson*,³² which involved the constitutionality of the statute establishing the office of independent counsel within the judicial branch to prosecute derelictions in the executive branch. In the majority opinion, there are reassuring signs of the independence of the judicial branch and its rejection of any invitation to employ the doctrine of separation in a purely mechanistic and formalistic way. That case was decided just a little over six months ago, and, with the exception of the *Mistretta* case, is almost literally the last word by the Court on that very important subject.

There was a very impassioned dissenting opinion by Justice Scalia. The lone dissenter, he came to the opposite conclusion and charged that unless the President had exclusive control over the exercise of what he called a purely executive function, then the equilibrium of separation of powers ordained by the Constitution was impermissibly disturbed and violated. What Justice Scalia ignored was that a new modality had to be found in a situation where the executive branch was otherwise simply investigating itself in a formalistic way; to insist on a total and exclusive appointment and removal authority in the President under those circumstances was to risk the loss of the legitimating force or trust and confidence by the people in the integrity of their institutions.

In closing, within the past several weeks the Supreme Court, in the *Mistretta* case, ended a year of turmoil by upholding the constitutionality of the seven member sentencing commission created within the judicial branch, by an act of Congress which also provided for the naming of three federal judges to the panel, which was delegated wide-

32. 108 S.Ct. at 2597 (1988).
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ranging powers to reform sentencing procedures.³³ Again, Justice Scalia bitterly dissented and said that, in effect, the act presented a danger of creating a kind of Junior Varsity or a subordinate Congress—something outside of the legislative branch—by blending power in this particular way.³⁴ In a different context, it was Kenneth Culp Davis who once said that if one is truly concerned with the problem of tyranny and the undue concentration of power, it is the unchecked power that one has to worry about, not the blending power.

Again, the use of the expertise of the judicial branch in this area represents the kind of thoughtful and innovative new modality and blending of power that does no violence to our form of government.

Jefferson wrote that the executive branch may act outside the law when necessity demands it, explain its actions, and ask the legislature for acquittance. The key, of course, to what Jefferson was saying can be summed up in the word "accountability." New modalities of inter-branch cooperation which have accountability as their talismanic approach are yet another goal of creative constitutionalism that I hope will mark the third century of the Judiciary Act of our country.

33. *Mistretta v. United States*, 109 S.Ct. 647 (1989).

34. *Mistretta*, 109 S.Ct. at 683.