A sturdy house built on shifting soil: Separation of powers Interpretations from the bench

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A STURDY HOUSE BUILT ON SHIFTING SOIL: SEPARATION OF POWERS

INTERPRETATIONS FROM THE BENCH

by

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Bachelor of Arts
University of Michigan
1990

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ABSTRACT

A Sturdy House Built on Shifting Soil: Separation of Powers Interpretations from the Bench

by

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This thesis explores the development of the separation of powers doctrine and its application by the United States Supreme Court. Its analysis will focus upon the six different approaches to the doctrine that the Court has employed over the past two hundred years. Moreover, it will show that these six methods of analysis; which include the textual, original intent, structural, institutional competence, historical practice, and values approaches, have often been mixed single cases.

The approach that is employed is these separation of powers cases often dictates their outcome. In many of these cases, a different approach may have led to a substantially different outcome. Thus, it will show that the doctrine has grown to have an ambiguous nature. This is both confusing and constraining to law makers and has led to the argument that the separation of powers doctrine no longer has a place in our modern political world.
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CHAPTER I

HISTORIC FOUNDATIONS

The separation of powers doctrine has long been considered one of the most fundamental and unique principles of the American Constitution. At the same time, it seems to be one of the most misunderstood. Debate continues today in regard to the original nature and intent of this mechanism. Moreover, it is highly contested whether or not the separation of powers, as it exists in the United States government today, is true to that purpose. Before examining whether current judicial analysis regarding the doctrine is in line with the functions that the framers of our Constitution had intended it, two fundamental questions must be answered: What is the relationship, if any, of separation of powers to the older concept of mixed government and what is the connection between the organization of the government through separation of powers and the political goal of checks and balances? The answer to both of these questions can be discovered through an inquiry into the evolution of the separation of powers doctrine. In order to understand the separation of powers which is paramount to our Constitution, it is important to analyze the conceptual models from which it derived.

The theory of mixed government seeks to divide political authority on the basis of social classes, mixing within one government several different types of government.
Although this mixture takes different forms, its intent is to create a balance which will provide political stability and protection against abuses of political authority. (Diamond in L. Strauss 1981, 587) Institutions, social classes and principles that were believed to be inherent within these classes were combined in the hope of achieving a sensible balance. Essential to this balance was the prescribed relationship of the classes in the constitutional framework, and the role of each class within the governing process. (Knight 1989, 2).

In contrast to the more modern system of separation of powers that our constitutional framers devised, mixed government derives from classical Greek, Roman, and Medieval thought. In perhaps its earliest version, Plato proposed a combination of monarchy and democracy to achieve balance. In *Laws*, Book III, he notes that “there are two mother forms of states from which the rest may be truly said to be derived; and one of them may be called monarchy and the other democracy”. The balance which he believes to be crucial comes from the combination of friendship, which is derived from democracy, with wisdom, from the monarch. (Plato 1952, 672) In Plato’s view, moderation was the key to effective government, and when it was lost so were lost the rights of the individual citizen.

Drawing upon the teachings of his mentor, Aristotle wrote of the mixed regime, or polity in his *Politics* as the solution to discovering the most feasible form of government. His mixture was that of the oligarchs and the democrats, the few rich and the many poor but free. He believed that through this mixture, justice would be most fully obtained. The “good man” would also be the “good citizen”, because of a coincidence of qualities that were both ethnically and politically appropriate. (Aristotle 1943, 130) Moreover, he
believed that it was only the mixed regime that would withstand the perversion of arbitrary power that was prevalent in the pure forms of government.

Aristotle claimed to have found a way in which citizens would rule for the good of all. Both classes of citizens would be accommodated, while both principles of legitimacy, rule by wealth and numbers, would also be satisfied. These factors being combined in one government would achieve political stability and thus, halt the cycles of political decay. (Diamond 1992, 60)

According to this arrangement, each class possessed complete governing power. Each acted as if it alone had the final political decision making power, having an absolute veto over the other class. Each class was believed to contribute its own particular sense of justice to the system, benefiting the whole by achieving a moderate body of law. The mixed regime, as so described, thereby lacked any of the sense of give and take that is employed in modern systems of checks and balances. (Gwyn 1965, 24)

Aristotle wrote of the “functions” of government; however, those functions differed from our conception of legislative, executive, and judicial functions. Although Aristotle’s concept of “judging” was very similar to our judicial functions, his “deliberative” and “that of the magistrates” are quite different. “Magistrate” derives from the word “master”, and they were to act as rulers. “Executive”, on the other hand, originally meant only “him who follows out the laws”. Even more striking is the fact that deliberation for Aristotle included not only lawmaking, but also all strategic, policy and
moral decisions of the regime. (Diamond 1992, 62) Moreover, these functions could be shared by the different elements within the government.¹

In Book III of his Politics, Aristotle redefines Plato’s true forms of government by stating that: “The true forms of government, therefore, are those which the one, or the few, or the many govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many, are perversions.”(Aristotle 1943, 139) By adding a third element into the range of viable governments, Aristotle opened the door for a new view of the mixed regime. Aristotle, however, hardly deserves credit for the development of mixed government. The first developed tripartite combination gets presented in the Greek historian Polybius’ model.

Living in Rome when writing his History, Polybius confronted what he believed to be the natural cycle of governments (constitutions), from kingship to tyranny, from aristocracy to oligarchy, and from democracy to mob rule.(Knight 1989, 3) His solution, based on the Spartan model, was to adopt a mixed regime that combined monarchy, aristocracy, and democracy. Moreover, Polybius was the first to connect the idea of a division of power with that of a mixed government.

By dividing both the regime, and the power within that regime amongst particular institutions that were assigned to each class of citizen, Polybius believed that he could avoid the seemingly inevitable deterioration of government that had plagued Rome. Particularly, he coordinated the monarchy with the consulate, giving two consuls the power of commanding the army, and directing the government. They had the power of life and death over citizens in time of war and had great powers in peacetime as well.

¹ For example, the assembly and the magistrate both shared deliberative powers.
These consuls, however, could only serve one year terms with no possibility of being re-elected for ten years. They were further constrained by the other consul, who held an absolute veto over any of their actions. The aristocracy was matched with the senate, who, made important decisions on both domestic and foreign policy. Finally, the democratic element was coordinated (but remotely) with the popular assemblies. Only citizen-soldiers were allowed to attend these assemblies and their decisions were only used in an advisory capacity by the senate. (in L. Strauss 1981, 416-7)

Although doomed to failure, this scheme which created the Roman Republic promoted the ideas of mixed government and separation of powers in two respects. First, it coordinated a need for the separation of various 'functions' with the idea of successful government, thus, progressing from reliance upon the "moderation" proposed by both Plato and Aristotle. Secondly, it gave importance to the division of "legislative power" into a "bicameral" body that became a focal point of the eighteenth century statesmen who would devise our current separation of powers doctrine.

Cicero also speaks of the mixed regime as the best form of government. In his own words: "... as in music, harmony is produced by the proportionate blending of unlike tones, so is a state made harmoniously by agreement between dissimilar elements brought about by a fair and reasonable blending of the upper, middle and lower classes just as if they were musical tones." (in Knight 1989, 3) He believed that this was true even though he writes after the fall of the Roman Republic. He faulted the government of the Republic not upon its mixed constitution, but rather, on his view that the kingship in

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2 This is quoted from On the Commonwealth, translated and edited by G. S. Sabine and S. B. Smith; Ohio State University Press; Columbus, OH; 1929.
Rome had already begun to degenerate into a tyranny prior to the institution of the mixed regime. Further, he faults the people of Rome for not seeing that "wisdom" has the absolute right to rule. He believes that if the "true aristocracy" had ruled the senate and that if the one man who was pre-eminent in wisdom and virtue had held the kingship, the mixed regime would have succeeded. Although he fails to adequately discuss how these "wise" men are to be found, his support of Polybius' division of both the government and its power are clear. (in L. Strauss 1981, 142)

After this period, the concept of mixed government seems to have gone into something of a decline for about 1300 years. At that time Thomas Aquinas began to re-examine the classic writings of Aristotle. As he did, he considered the idea of a mixed regime. Although he favored the monarchy -- under ideal conditions, he found that "the stability afforded by a combination of monarchy, aristocracy, and democracy provided valuable tempering for a stable regime." (in L. Strauss 1981, 233)

During the later Middle Ages and in Renaissance times, mixed government was seldom referred to. When it was, it was done so only in passing. That is, with the exception of Machiavelli's writings. Although in the Prince he advocates a powerful monarch to lead the state into a unified condition, he cites both the Spartan and Roman examples of mixed regimes favorably in the Discourses. This treatise, is a commentary on the works of the Roman historian, Titus Livy; who had drawn his conclusions from Polybius' works. Machiavelli was quite impressed with the ancient Spartan government and its founding legislator, Lycurgus, for having combined three powers into one government. He believed that this government directly resulted in stability, tranquillity, and endurance for the regime. The prince, the nobles and the people brought the elements
of the one, the few, and the many together into one mixed republic. Moreover, in 
Machiavelli’s view, this republican mixed regime was the government which was best 
suited for long term governance. This is contrary to the rule by one man which he 
advocates in the *Prince*, as that form of government is only appropriate for the founding 
stage of a state or for withstanding serious political crisis.

Machiavelli’s analysis of the mixed regime included several facets which were 
later employed by James Madison as he worked to perfect a scheme of separated powers in the American system. First, he advocated the importance of democratic elements in the mixture. Second, he defended the conflict and competition of opposing elements within society as a means of political stability. The mixture and counterbalancing of classes is only of secondary interest to him. Instead, he focuses on the democratic ideal of political competence amongst “ordinary” citizens. Although he has a quite limited definition of who qualifies as a citizen, he nevertheless points the way toward political competitiveness as a source of governmental strength.(Germino 1972, 45-56) This concept, more than any other set forth by Machiavelli will be embraced by James Madison in his vision for the American governmental structure.

Underlying each of these analyses of the mixed regime, from ancient to renaissance times are the theoretical concepts of mixture, balance, moderation, and justice. Contained in them are the values of stability and permanence. These early speculators were searching for something that would be permanent, some form of government that could withstand the fluctuation, decay, and continual change that they perceived to exist within their world.
Concern with the "cycles" of government led to their metaphorical idea that the
state was a biological organism. This imagery of the state implied that "... the parts had
a prescribed, constitutional relationship and combined to make a clearly definable
whole". (Diamond 1992, 60) It followed then that the process of change which plagued
the "organic state" could only be halted by combining all of the classes of people and
kinds of government known to them into one mixed constitution. That way they would
be able to counter any force that tried to throw the state out of balance.

To politic thinkers of the middle ages, an important image was that of a neat and
unchanging hierarchical order that encompassed the entire universe. This permanently
fixed order, sometimes called the "great chain of being" (in L. Strauss 1981, 302) ran
from God at the top all the way down to the lowest form of life. This was combined with
a view of the universe as existing solely for man, with man at the center in every respect.
Nature was thought to exist only for the sake of man, therefore, it was also thought to be
immediately and fully intelligible to his reason. (Knight 1989, 5) A similar idea was
applied to the state, with a king at the top and the classes arranged in a hierarchical
fashion beneath him. Through this worldview that there was a divine plan to the
universe, theories of monarchical rule like the "divine right of kings" were fostered. In
light of this, theories that involved the sharing of power at the apex of the government
seemed to deceive the natural order of things. Thus, the idea of mixed government lost
much of its earlier importance.

As governmental theories and other works of political science are inherently
influenced by their author's view of the world, it required the destruction of the Ptolemaic
view of the universe upon which the "great chain of being" was based to remind political
thinkers of the mixed regime. The work of sixteenth century scientists such as Nicholas Copernicus, Johannes Kepler, and Tycho Brahe shattered this geocentric view. Their mathematical discoveries concerning the earth’s motion and astronomy, led Galileo to expand upon Descartes’ earlier conviction that mathematics held the key to the secrets of the natural world. At the same time, William Harvey’s study of the circulation of blood in the human body led many to view the body as a mechanical object. Although these findings conflicted with the early world view of a hierarchy with god at the top, they were justified by the work of Robert Boyle. Boyle, a chemist, worked zealously to combine the view of god as divine providence and the concept of the world as an immense clock-like machine. A machine that God had originally set into motion and which subsequently runs on its own. (Deustch 1963, 24)

Boyle’s concept of the world was still too radical for most religious zealots, but as that work was supplemented by Isaac Newton, it became more widely accepted. Newton conceived of God as the chief mechanic of the universe, the cosmic curator of Boyle’s Strasbourg clock, working to preserve the perfect status quo. (Deustch 1963, 26) Newton’s notion of balance helped change the normative assumptions that guided political order. This in turn, led to a shift away from mixed government and toward separation of powers as the organizing governmental principle. (Casper 1989, 209) Like a clock, if the parts of government could be assigned a particular function, they could be mechanically manipulated to keep the state in balance.

In this mechanistic model, the state is understood as an instrument created to perform certain functions. This is much different from the earlier biological images in that they saw the regime as the essential base from which all activities of society
emerged. As the new model took hold, the concept of the state ceased to be inclusive of all activities. Thus, the political realm narrowed, eventually resulting in the concept of negative government. (Knight 1989, 17)

It has been observed that in spite of the momentous issues of the day in England, between the time of James I's death in 1625 and the English Civil War in 1642, there was a poverty of political ideas. This was true in both the royal and the parliamentary camps. However, once the Civil War broke out, political and constitutional ideas began to pour out of England like never before. Among the doctrines attaining some prominence at that time was the separation of powers. This doctrine arose out of dissatisfaction with the manner in which the Long Parliament had been governing England. Most of the supporters of this new doctrine were not in favor of an independent executive - as the king had been. Instead they favored an executive that was both subordinate and legally responsible to the legislature. In short, they did not advocate the separation of the executive and legislative branches. Rather, they were very much concerned with controlling the Long Parliament's ability to act in what modern political scientists would call a judicial capacity along with their legislative duties. This problem and its relation to the separation of powers seems to have had its origins in the mind of Leveller leader John Lilburne. At least, a first version of separation of powers can be seen in an anonymous pamphlet that has generally attributed to Lilburne, published in 1645. (Gwyn 1965, 37)

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3 For more on this, see Margaret A. Judson, The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England, 1603-1645; Rutgers University Press; New Brunswick, NJ; 1949.
4 There is a facsimile copy of this document in: W. Haller: Tracts on Liberty in the Puritan Revolution; vol. III; New York; 1933; p. 257-307.
Through Lilburne’s writings, one can see four defined views of the separation of powers doctrine. The earliest can be found in his pamphlet, *England’s Birth-Right*, as he poses a number of questions to “our learned Lawyers.” In the twelfth of these questions, he asks:

12. Whether it not be agreeable to Law, justice, equitie and conscience, and the nature of a Parliament mans place, that during the time of his being a member, he should lay aside all places of profit in the Common wealth, and tend only upon that function, for which he was chosen.

In this “common interest version” (Gwyn 1965, 39) of the doctrine, Lilburne notes that if members of Parliament could not afford to support themselves in Parliament, then the medieval practice of payment being made to members should be restored. He believed that the possession of “great and rich Places” (positions) prevented members from pursuing the common interest, since such offices “bred factions and stopped men from speaking freely for the Common-wealth”, for fear that they may lose their offices. Thereby, he feared that Members of Parliament would “set up an interest of their owne, destructive of that common Interest and Freedoms whereof the poorest free man in *England* ought to be the possessor.” (Gwyn 1965, 39) This “common interest version” describes a separation of powers in which a legislator should not be allowed to hold an executive title. Its purpose was to assure that the legislator’s attention was properly focused on the common welfare of the citizens. Lilburne believed, as many still do today, that if these legislators were allowed to put their private interests ahead of the common interests, then they were not properly performing their function as a Member of the

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5 These four versions are defined by W. Gwyn in pages 39-51 in *The Meaning of Separation of Powers*. Similar definitions are found in M. J. C. Vile’s account.
Parliament. Moreover, he believed that there needed to be formal regulations stipulating this as a “function” that Members were responsible to.

The argument for this separation of powers seems to have arisen from the recent enactment of the Self-Denying Ordinance. According to Oliver Cromwell, as he spoke on behalf of the Ordinance, military officers in Parliament were prolonging the war for their own advantage. (Cromwell 1989, 43) Lilburne believed that a formal separation such as this would alleviate these abuses.

Another distinct separation of powers argument can be found in this same pamphlet. This argument, which arose from Lilburne’s own philosophical difficulties with Parliament, also involves his belief that executive officers should not be allowed to hold legislative positions. Originating an “accountability version” of separation of powers, Lilburne writes in *England’s Birth-Right* that:

> It is one of the most unjust things in the world, that the Law-makers should be the Law executors, seeing by that meanes, if they do never so much injustice and oppression, a man may spend both long time, and all he hath besides, before ever he can get any justice against them, yes, and it may be, hazard he losse of his life too. And therefore it were a great deal better for the Common-wealth, that all the executors of the Law should be such persons as doe not in the least belong to Parliament, that so may not be able to make any factions to save their Lives and Estates, when they doe injustice.  

( in Gwyn 1965, 40)

Separation of powers in this light, declares that government officials will be more accountable to the people of the state if they are confined from holding positions in more than one branch, or being responsible to more than one function. Lilburne believed that this would allow the citizen to be a check on the use of arbitrary power.
To further define this separation of power, Lilburne, in a later pamphlet entitled *A Defiance to Tyrants* attempts to lay out exactly what he believes should be the proper functions of Parliament:

> The Parliaments worke is to repeale old Laws and to make new ones, to pull down old courts of justice and erect new ones, to make warre and conclude peace, to raise money and see it rightly and providently disposed of (but themselves are not to finger it) it being their proper work to punish those that inbezle and wast it, but if they should finger it and waste it, may not the kingdome easily be chetted of its treasure, and also be left without meanes to punish them for it: and most dishonorable it is, and below the greatness of Legislators to stoop to be executors of the Law, and indeed it is most irrational and unjust they should, for if they do me injustice I am rob'd and deprived of my remedy, and my appeal it being nowhere to be made, but to them, whose work it is to punish all male or evill administrators of justice.

(in Gwyn 1965, 43)

Within this definition of function lies two important points; first, that to satisfy this separation of powers, government must be administered under the law and to the letter of the law. Secondly, that legislative supremacy should govern the separation. Thus, there would be no balance or check between the branches, only the letter of the law to maintain political boundaries, and the citizens to check that the law was being followed.

The third version of separation of powers that is brought to light by John Lilburne’s writings can be called the “rule of law version”. Although this is closely related to the “accountability version”, it is nevertheless distinct. In this account, as each power is separated and their functions defined, rules of law should be established which force individual members of the various branches to perform those functions. In other words, each individual Member of Parliament would be responsible for upholding the
common welfare and the public interest, and held legally responsible for not doing so. He fails to clearly define how this would be implemented; however, he does believe that it would be another valuable check on government officials. (Gwyn 1965, 43)

The final rendition of the doctrine that comes out of Lilburne's pamphlets is the "efficiency version". (Gwyn 1965, 45) This version, which is most famously re-argued and developed by John Locke, explains how government can run more efficiently with the separation of the powers. Lilburne answers that as people find the work that suits them best, they should confine themselves to becoming experts at that job. If they do not, they will poorly execute their work and end up with an inferior product. Thereby, within the government, the Parliament should confine itself to its given functions, less the entire state suffer as a consequence.

For Lilburne and the Levellers, the doctrine of separation of powers became one of their most powerful ideological weapons for attacking what they considered to be Parliamentary tyranny. In March of 1649, both the monarchy and the House of Lords were abolished by the sixty remaining members of the House of Commons.® From then until their dissolution by Oliver Cromwell in 1653, the "representatives of the people in Parliament" were, in their own words "the supreme authority" in England. (Gwyn 1965, 42) However, for Lilburne and the other Levellers, this unicameral body remained as tyrannical as the body that it had replaced. This was true because none of the necessary separations between the legislature and the executive had been adopted. Before long, his protests found him before the new executive branch of the government, the Council of

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® The House of Commons had been reduced to only 60 after Pride's Purge in December, 1648.
State. Standing trial for high treason in 1652, Lilburne was banished from England and
condemned to die as a felon if he returned. (Gwyn 1965, 49)

Before leaving Lilburne and the Levellers, there are a few points that should be
made about their idea of the separation of powers doctrine. Most importantly, their
second Agreement of the People, published in 1648 and submitted to the Council of
State, became the first written constitution to describe a mandated separation of powers
doctrine. Although by today’s standards the separation called for was incomplete and
vague, its importance to later documents is immeasurable. Secondly, the Levellers
rejected the idea of the mixed monarchy, in that it was contrary to republican principals to
have one non-elected person serve as the head of the state for a nonspecific length of
time. Their primary fear in this arrangement was the possibility of arbitrary power being
wielded against the people. Finally, they agreed with the commonly held idea that the
legislature should be superior to the executive. With this in mind, they provided no
intergovernmental means of checking the power of the law making body. 7

Although the separation of powers doctrine owes its origination and propagation
to John Lilburne, it lived past the fall of the Levellers. This is because many other
republicans, including those who opposed other Leveller ideas, accepted it. John Milton
employed it against the king having a negative in the legislative process. “In all wise
nations,” he observed, “the legislative power and the judicial execution of that power,
have been most commonly distinct, and in several hands; but yet the former supreme. the
latter subordinate.” (Gwyn 1965, 52)

7 For a full account of the works of John Lilburne, see T. C. Pease; The Leveller
Movement; Washington; 1916.

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To add to the doctrine, Milton favorably compared the Puritan Commonwealth to the system praised by Polybius for the power and grandeur of Rome. He believed that the success of the English government could be attributed to its mixed character. Personally, he advocated the "free Commonwealth" and rejected all monarchies. He thought that by combining Polybius' ideas and the doctrine of separation of powers, he could achieve a balance in government. His plan called for magistracy or monarchy embodied in the Council of State, aristocracy in the Grand Council - or legislature, and democracy in the electoral process for local offices and for seats on the Grand Council. (Knight 1989, 8)

Reiterating Aristotle's theory, Milton believed that this mixture of the few who were concerned with their private interests and the many who were concerned with the common good would result in the rule of the "middle sort". He thought that this 'middle sort' of man, being prudent, noble, and trustworthy, would embody his "true aristocracy". (in L. Strauss 1981, 419)

In 1654, a well-known Cromwellian pamphleteer named John Hall tried to use one of the Levellers' own arguments against them to defend triennial parliaments. In the process, he defended their doctrine of separation of powers. The Levellers' had opposed infrequent sessions of the assembly on the grounds that they would allow the executive to escape accountability to the assembly. This would break down the separation of legislative and executive power. Hall used the same argument to claim that frequent sessions would allow the legislature to usurp the power of the executive. In Confusion

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8 Triennial sessions of Parliament only had to be called once every three years, and the Lord Protector could end the session at any time after five months.
Confounded he clearly uses the Leveller’s rule of law version of the doctrine when he writes:

Let us then consider how impolitick and dangerous a thing it is for to have a Supreme Legislative Power always sitting and exercising itself. For such great Assemblies, like high medicines, should be used very seldom, or but upon great extremity, otherwise they lose not only their vertue and vigour, but grow dangerous and contemptible. Besides, Assemblies of this nature are only to make Laws, not execute them, for being unlimited, they are not fit to judge as inferior Courts, nor is it reason to take away without evident necessity from any man, the benefit of Laws already established. It is to be added that the ends of their Calling being principally two, the making of Laws, and the imposition of Taxes, it is impossible to imagine that any Nation can be so constantly and perpetually vicious or ill-settled, as to need a perpetual Making of Laws, or so wealthy as to be able continually to be cajol’d into Taxes. Neither is it impossible, that men coming to know one another, may make factions; nay, do many exorbitancies to keep their Power in exercise.

(Gwyn 1965, 54)

Besides restating the Leveller argument, Hall seems to provide an insight into Locke’s later doctrine that Legislative and Executive power should be separated because law takes a short time to make, yet is perpetual in its execution.

A much fuller account of the separation of powers can be found in John Sadler’s 1649 work, the Rights of the Kingdom. In this work Sadler explains his belief that the original English Constitution had consisted of three estates, each of which possessed a specific governmental function. In accordance with the law of nature, the early English had placed the legislative power in the Commons, the judicial power in the lords, and the executive power with the king. He notes that this system worked well until it began to break down. As the Lord’s primary responsibility was to “Judg the King”, their efficiency in this depended on being separate from him. As they became dependent
upon the king for titles, their efficiency broke down. Likewise, the Commons were then forced to take over part of the Lord's judicial responsibilities.

The breakdown of the separation that had existed led to many problems for the English government. The enumeration of these problems follows the Levellers theories in that there was a loss of efficiency in the government and a loss of accountability amongst the various estates. More importantly, Sadler also adds to the doctrine by touting the "balance of power version" of the doctrine. In expressing this, he proclaims that checks and balances had existed in this governmental structure, so that his readers could easily deduce the dangers of such a system. He believed that as it is man's nature to look out for his private interests, an internally balanced system would inevitably lead to the cooperation of two or more of the branches at the expense of the Commonwealth. (Gwyn 1965, 55)

Perhaps the most complete example of separation of powers during the Interregnum came from Isaac Penington, the Younger. In three pamphlets, *A Word for the Commonweale* (1650), *The Fundamental Right* (1651), and *Safety and Liberty of the People* (1651) he reacted to the threat of arbitrary power that was posed by the House of Commons after the abolition of the monarchy and the House of Lords in 1649. Penington was a moderate constitutionalist who stressed the need to limit government officials through "set and known laws." As William Gwyn notes: "Advocates of the separation of powers and the rule of law are sometimes criticized for being so concerned with limiting government to prevent the abuse of power that they have not left public officials enough power to achieve the legitimate ends of government." (Gwyn 1965, 58) However, this seems not to be the case with Penington.
Like Rousseau, Penington believes that laws should only be made when there is a matter of obvious common interest. Likewise, he and many of his contemporaries would be appalled at the extensive and continuous legislative activity of the modern world. His views also paralleled those of Thomas Aquinas four hundred years earlier in that he saw government as something that needed to change with the times.\(^9\)

To implement his principles of the rule of law and separation of powers, Penington makes explicit suggestions. So that the people would be represented as much as possible he calls for frequent elections. Moreover, he believed that representation should be equal in the sense that every county, city, and borough should have representatives. Also, he thought that a written constitution was necessary to prevent misunderstandings between the people and the Parliament. He believed that such a constitution would also keep the Parliament within its proper functions. More directly, he describes the elements that should be contained in this constitution in the following excerpt from *The Fundamental Right* (23-4):

> A clear distinction between the administrative or executive power, and the legislative or judicative: that as they have in themselves, so they may retain in their course, their clear and distinct natures, the one not intermixing or intermedling with the other: That the administrative may not intermingle it self, or medle with the legislative, but leave it to its own free course; nor the legislative with the administrative by any extemporary precepts, directions or injunctions, but only by set and known Laws. Things which are severed in their nature must likewise be severed in their use and application, or else we cannot but fail of reaping those fruits and effects which we desire from them, and which otherwise they might bear, and we enjoy.

(Gwyn 1965, 61)

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\(^9\) See *Summa Theologica*, I-II. Q. 97, A. I.
It should be noted that Penington was an advocate of the mixed monarchy. Moreover, he fully supported the idea of an executive veto. (Gwyn 1965, 64) Though never being able to fully answer to the critics of such a negative, he believed firmly that balance in the government could not be achieved without it. It was questions like this that would be left to future constitutionalists.

From 1653, when the army forced the much criticized Rump to dissolve, until 1660 when Charles II was restored to the throne, England underwent a series of constitutional experiments. Summarizing the role of separation of powers during this era, M. J. C. Vile writes:

> By the year of the execution of Charles I . . . the doctrine of the separation of powers, in one form or another, had emerged in England, but as yet it was still closely related to the theory of mixed government. It had been born of the latter theory but had not yet torn itself away to live an independent life . . . The execution of the king, and the abolition of the House of Lords destroyed the institutional basis of the theory of mixed government and any justification of the new constitution which was to be framed for England would have to rest on a different theoretical basis. (Vile 1967, 40)

Both of the written constitutions of this period – the Instrument of Government (December, 1653) and the Humble Petition and Advise (June, 1657) – were defended on the basis of their separation of powers. (Wormuth 1949, 68) However, both of these documents seem to lead England back towards a constitutional monarchy. Concluding the period, the royalist Sir Roger L’Estrange declared in his 1660 publication, *A Plea For Limited Monarchy*, that mixed monarchy far better achieved the separation of powers and assured civil liberty than any pure form of republican government. (Gwyn 1965, 65)

After this time, the doctrine slipped into a temporary eclipse. It seems that the
tremendous popularity of the doctrine of mixed monarchy overshadowed its reliance upon the “rule of law” and “accountability” versions of separation of powers. Curiously, of the three major “republican” theorists who had been adults during the Interregnum and who could not have possibly been ignorant of the separation of powers doctrine, Algernon Sydney and Henry Nevile, did not use the doctrine. The third and most famous, John Locke, did.

Although his Concerning Civil Government, Second Essay is often criticized for only providing a logical analysis of the functions of government rather than actually separating them, the treatise taken as a whole seems to expunge the claim. Others, like Peter Laslett, think that Locke’s acceptance of royal participation in the legislative process, his omission of the judicial function, and his reliance on trust to provide for the proper functioning of governmental power demonstrate that he was not talking about separation of powers. (Laslett 1979, 142-60) However, as previously shown through the works of the Commonwealth writers, these conditions do not necessarily preclude the separation of powers doctrine. Moreover, several parts of Locke’s work clearly point to the fact that he was concerned about the separation of powers.

In looking at Locke’s work, the often quoted Chapter XII needs to be taken in the context of the previous eleven. In chapters I through IX, Locke argues that men should obey government because it preserves them by providing “an established, settled, known law, received and allowed by common consent to be the standard of right and wrong”. Secondly, it provides “a known and indifferent judge, with the authority to determine all

10 For more on this see the works of Louis Fisher, particularly The Politics of Shared Power; 1981.
differences according to the established law." Thirdly, it requires a "power to back and support the sentence when right and give it due execution." (Locke 1952, 53-4) He also notes that if governments do not provide for these prerequisites of individual and public good, they violate the trust put in them by the people. Therefore, they may be disobeyed. Among such deficient governments are absolute monarchies, which frustrate the possibility of achieving an impartial administration of the law because "he being supposed to have all, both legislative and executive power in himself alone, there is no judge to be found, . . . who may fairly and indifferently decide". (Locke 1952, 45)

Locke states that absolute monarchy is "inconsistent with Civil Society, and so can be no Form of Civil Government at all." (Locke 1952, 45) The form of monarchy that he advocated was that of the "moderate monarchy", a legitimate form of government in which "the Legislative and Executive power are in distinct hands." (Locke 1952, 62) It is with these conditions in mind that chapter XII must be read. In paragraph 143, Locke observes that because law-making requires little time while the execution of the law is a continuous activity, "there is no need that the Legislative should be always in being, not having always business to do." This "efficiency version" argument follows the aforementioned seventeenth century idea that Legislation was an exceptional activity. However, he believed that long legislative sessions would result in more evils than the waste of the legislator's time.

And because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their private advantage, and thereby to come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government: Therefore in all well
order'd Commonwealth, where the good of the whole is so considered, as it ought the legislative Power is put into hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they are done being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for public good.

(Locke 1952, 58)

In this sentence, Locke clearly emphasizes the “rule of law version” of the separation of powers doctrine. His emphasis on all people being held to the letter of the law adds strength to the argument that he was a supporter of the doctrine.

Much of the separation of powers controversy regarding this section of the treatise comes from Locke’s difficulty conceiving of a legislature being supreme, but at the same time being limited by a higher constitution to operating only through general rules or as a special court to try delinquent officials. For this reason, he stressed short legislative sessions. He believed that the legislature must “naturally” possess executive power whenever it met. Thereby, violating the separation of powers whenever it chose to exert this power during meetings. He leaves us then, with the conclusion that men’s liberty is only secure and free when their legislatures are not in session. (Gwyn 1965, 76)

In the next section, while writing on the special position of the king in a mixed monarchy, he observes that when the supreme executive power was vested in a single person having a share in the legislative function, the supreme executive “has no distinct superior Legislative to be subordinate and accountable to, farther than he himself shall consent: so that he is no more subordinate than he himself shall think fit, which one may certainly conclude will be but very little.” (Locke 1952, 60) This being the case, Locke seems to observe that short legislative sessions were not necessary to maintain the separation of powers in a moderate, mixed monarchy. (Gwyn 1965, 76)
Locke also invokes the “accountability version” of the doctrine when he writes that: “The Executive Power placed any where but in a Person that has a share in the Legislature, is visibly subordinate and accountable to it, and may be at pleasure changed and displaced.” This is true even in the mixed monarchy, where, even though the king himself cannot be held accountable, all “other Ministerial and subordinate Powers” are. (Locke 1952, 60)

Locke’s version of the three powers of government is defined as the legislative, the executive and the federative powers. In this schema, the executive looks over domestic concerns, while the federative is concerned with foreign affairs. Criticism of his argument comes in that he makes no attempt to separate these latter two powers and indeed declares that they should be held by the same man. (Locke 1952, 58) Moreover, he combines judicial activity with the executive function. However, this does not deny the fundamental separation which he calls for between the executive and the legislative functions. Indeed, one of his conditions for enjoying liberty and security under government is the separation of the legislature and the executive; in the absence of this separation, he believes life and liberty will be even less secure than in the pregovernmental condition. (Knight 1989, 9)

In discussing the historical and theoretical antecedents of the separation of powers doctrine, most scholars jump from Locke’s 1690 work, to that of Montesquieu in 1748. There are however, three important scholars who added to the doctrine during this time. At the turn of the seventeen century writers and politicians commonly referred to Old Whigs or Commonwealthsmen began to analyze the government of William III. In doing so, they began to express their love for liberty and their distaste for arbitrary power.
Probably the most influential statement of separation of powers at this time came from John Trenchard, who would go on to jointly author *Cato's Letters* with Thomas Gordon. In his preface to *A Short History of Standing Armies in England*, which dealt generally with matters of government, Trenchard condemns the abuses that had crept into the constitution.

His main contention was that the House of Commons had become corrupt by placemen who had been given membership by the king. He believed that as long as the Commons preserved its independence, its interest would be “so interwoven with the Peoples, that if they act for themselves (which every one of them will do as near as he can) they must act for the common interest of England.” He adds that in the past, if a few members were to abuse their authority, they would have been punished by the rest. Unfortunately, beginning with the reign of Charles I, the king had begun to use public officials to influence voting in the House. Recently, the number of offices had been so multiplied that the Constitution and English liberty were in great danger. His view of separation of powers entailed that it would be fatal to have too many placemen in parliament:

> for all wise governments endeavour as much as possible to keep the Legislative and Executive Parts asunder, that they may be a check upon one another. Our government trusts the King in no part of the Legislative but a Negative Voice, which is absolutely necessary to preserve the Executive. One part of the Duty of he House of Commons is to punish Offenders, and redress the Grievances occasion'd by the Executive Part of the Government; and how can that be done if they should happen to be the same Persons, unless they would be publick-spirited enough to hang or drown themselves? (in Gwyn 1965, 85)

This preface, often called the “incomparable preface”, deserves its praise in that it summed up Whig constitutional thought of the eighteenth century so well. Trenchard’s
version of separation of powers first shows the negative effect that association with mixed monarchy had had upon the doctrine. Secondly, it begins to develop the more modern idea of checks and balances out of the older accountability argument.

Henry St. John Bolingbroke, one of the leading Tories of his day, took over many of the “Old Whig” principles and advanced the separation of powers doctrine. He did so in *The Craftsman*, an anti-ministerial newspaper aimed at unseating Robert Walpole. Although his writings in this paper are the subject of great debate amongst political scholars in regard to whether or not he supported separation of powers, his work was nevertheless indisputably important to the doctrine.

Bolingbroke’s novel observation that liberty is more endangered in a mixed monarchy than in a republic inspired later theorists, including Montesquieu. He justified his claim upon the fact that magistrates in a republic are under continual control and are appointed for short terms, their actions being subject to future revisions. Further, he combined the ideas of separation of powers ("independency") and the idea of checks and balances ("dependency") by saying that they were simply two aspects of the same constitutional arrangement; balanced government.

The constitutional Dependency, as I have call’d it for Distinction’s Sake, consists in this; that the Proceedings of each Part of the Government, when they come forth into action and affect the whole, are liable to be examin’d and controul’d by the other Parts. The Independency pleaded for consists of This; that the Resolutions of each Part, which direct these Proceedings, be taken independently and without any Influence, direct or indirect, on the others. Without the first, each Part would be at Liberty to attempt destroying he Ballance, by usurping, or abusing Power; but without the last, there can be no Ballance at all.

(in Gwyn 1965, 95)

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As it has been well documented, Montesquieu knew Bolingbroke and became very familiar with *The Craftsman* during his visit to England in 1729-1731. (Cohler 1989, XV - in Montesquieu) Moreover, it is obvious that these ideas were translated into his *The Spirit of the Laws*, in 1748.

Writing in opposition to *The Craftsman*, ministerial writer James Pitt – under the pseudonym “F. Osbourne” – assailed Bolingbroke week after week in the *London Journal*. Nonetheless, he too added to the separation of powers doctrine and Montesquieu’s view of English government. In rejecting the claim that the king should have no hand in legislation Pitt writes:

> Our Constitution consists indeed of Three Powers absolutely distinct; but if it were also as absolutely independent, no Business would ever be done: There would be everlasting Contention and Dispute till one had got the better of the other, ‘Tis necessary, therefore, in Order to the due Exercise of Government, that these Powers which are distinct, and have a Negative on each other, should also have a mutual Dependence, and Mutual Expectations.

(Gwyn 1965, 98)

This “constitutional dependent independency” that Pitt speaks of was much preferred to Bolingbroke’s independency. In addition, it foreshadowed the complaint of later critics of the separation of powers who have attacked the doctrine for creating governmental deadlock and inefficiency. Pitt’s most important point, however, lies in the fact that the version of separation of powers that he rejected, refused to allow the executive a coordinate part in the legislature. He believed that this would discourage the cooperation between the legislature and executive needed for effective government and promotion of the common good.
There is no one theorist who is more closely related with the separation of powers and checks and balances, than Montesquieu. However, the question remains as to whether Montesquieu's work was a novel venture, or if he merely dealt with existing theories in a more systematic fashion. In truth, both novelty and systematic summary can be seen in a book that is as much a journey through the development of a theory as it is theory itself.

One of his goals in writing *The Spirit of the Laws* was to discover the constitutional principles which best promoted political liberty. To discover this, he looked to the English Constitution, which he believed to be the only one in the world having liberty as its chief objective. The chapter on the Constitution of England begins with a classification of the division of power that is reminiscent of John Locke. He declares that "In each state there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over things depending on civil right." (Montesquieu 1989, 156) Invoking Locke's legislative, federative, and executive powers respectively, Montesquieu goes on to rename the latter two powers, "the executive" (federative) and the power of judging (executive). It is odd that he puts this classification at the beginning of the chapter, as the one which he goes on to employ is quite different.

His second classification, in which the power of judging is truly independent and the executive becomes responsible for both domestic and foreign affairs is unique to Montesquieu. It is worth noting, however, that at the time of his trip to England in 1728 it was common practice that those who acted as judges in civil and criminal cases would not be allowed to exercise either legislative or other executive functions. This was true
despite the fact that they were part of the executive arm of the government. (Gwyn 1965, 101)

The legislative power, according to Montesquieu, is the activity of declaring "the General will of the state," and to inform the people of their general obligations towards one another. This power should be held by the body of all citizens, for in a free state "every man is supposed to be a free agent out to be governed by himself." Albeit, an argument for popular sovereignty, Montesquieu placed three limitations on the reign of the people. First, as a large mass of people are unfit for discussing public affairs, they should elect representatives to act as legislators. Secondly, those who are in "so mean a condition that they are accounted to have no will of their own" should be excluded from suffrage. Finally, since "persons distinguished by birth, riches, or honors" will in every society always be in a minority, they should be protected. If they are not protected, they will be exploited by the masses. Thus, there should be an aristocratic as well as a popular chamber in the legislature. Each of these checking the threatened encroachments of the other. (Montesquieu 1989, 176)

The legislature was to perform the traditional English legislative duties with one glaring addition. They were also "to examine in what manner the laws that it has made have been executed. This function seems to include the power of calling public officers to account and potentially impeach them. (Gwyn 1965, 102) If this were true, it stands at odds with the English example, in that constitutionally, the king could not be held accountable for his actions by the legislature.

The "executive power", which broadens by the end of Book XI, Chapter 6 to include all foreign and domestic affairs, is that of "executing the public resolutions"
embodying the will of the legislature. Montesquieu defines the executive as consisting
"more in action", and hence, directs the army and navy. As was the tendency of the
English writers of the day, Montesquieu saw the executive as primarily a foreign affairs
position. This may account for his two seemingly different variations of the division of
power.

Montesquieu saw the judicial function as the most dangerous to liberty. This was
so because he believed that although the legislature could pass a law and the executive
could put it into effect, it had no bearing on the individual citizen until a judicial decision
had been made. In this case, he uses the English system as a model, and thereby notes
that guilt or innocence was decided by other citizens. Therefore, the people may fear the
judicial office, but they need not fear the men who hold that position. (Montesquieu 1989,
180) This view of the primacy of petty juries, however, does not do justice to the role of
Judges in the system.

Besides the distinct definition of functions and separation of powers that
Montesquieu employs, he is also very intrigued by the doctrine of balanced government.
(Gwyn 1965, 108) He gave great importance to England's mixed constitution and its use
of checks and balances. Moreover, he saw these as two of the institutional prerequisites
of liberty in the English system. English constitutionalists like Trenchard and
Bolingbroke were so taken by the idea of balanced government that they revised the
separation of powers doctrine. Their versions separated the legislative and executive
functions in an arrangement which would allow these two parts of the government to
check one another's activities. According to this position, the separation of powers is
simply one aspect of balanced governmental institutions.
Although influenced by its merits, Montesquieu did not adopt this position. Instead, he developed the two doctrines separately. He did so to show that they were both necessary to assure political liberty. The difference between the two is demonstrated by the differences in two sections of *The Spirit of the Laws*. In Book XI, Chapter 6 he sums up his separation of powers doctrine by saying:

> All would be lost if the same man or the same body of leaders, either of the nobles or of the people exercised these three powers: that of making laws, that of executing the public resolutions, and that of judging criminal and civil cases.

(Montesquieu 1989, 165)

This is a doctrine that is totally different from his summary of checks and balances in the English government.

> Here then is the fundamental constitution of government of which we are speaking. The legislative body being composed of two parts, the one restrains the other by the mutual power of rejection. They are both bound by the executive power, which itself is bound by the legislative. These three powers are inclined to form a state of repose or inaction. But as they are obliged to move by necessary movement of human affairs, they are forced to move in concert.

(Montesquieu 1989, 160)

The three powers mentioned in this doctrine are clearly different from the three in the previous paragraph. In keeping with the theory of mixed constitution, Montesquieu insisted that the aristocracy and the common people be given a coordinate part in the law making process. This idea, essential to mixed government, has nothing to do with separation of powers. According to Montesquieu, it is nonetheless another prerequisite to political liberty. While this account of the checks and balances of the English Constitution introduces powers unknown to the separation of powers doctrine, it also
omits a power which forms the essential third branch of Montesquieu’s division of power. This omission may be explained in the following excerpt:

Of the three powers of which we have spoken, the judicial is in a sense nothing. There remain only two; and as they are in need of a regulating power to moderate them, the part of the legislative body composed of the nobility is very proper to produce this effect.

(Montesquieu 1989, 176)

This can be further explained by recalling that Montesquieu’s vision of the judiciary was primarily that of the petty jury. As this body was continually changing membership, it could hardly be relied upon to keep the government in balance. Besides, to bring the judiciary into the equation would be to contradict the English government that he so admired.

In spite of viewing these doctrines as two separate entities, he also saw important relationships between them. (Cohler 1988, 86) As experience had taught, possessors of power will strive for more power unless checked by other power holders. Thereby, separation of powers could only survive if it were accompanied by checks and balances. This was true for both the legislature and the executive. If the legislature were unchecked, the fact that they are not limited by law would allow them to destroy the liberty of the people. On the other hand, if they could not check the executive, “the people could never obtain any satisfaction for the injustices done to them.” (Montesquieu 1989, 162)

Secondly, he believed that they were tied together by the use of the executive veto. This negative allowed the executive to check the legislature. However, because of the separation of powers, he had no right to amend any proposal. Thus, constrained in his function, the executive could only prevent change and encourage stability.
Montesquieu's logical analysis of these principles was probably his greatest contribution to the separation of powers doctrine. He took the varied writings and ideas from Polybius to the contemporary English theorists and created a complete product. However, the escape of separation of powers from mixed monarchy was incomplete. For it to truly stand on its own legs it had to cross the Atlantic Ocean. There, as its ideas were merged with the experiments in constitutional government that were occurring in the colonies, it would grow to maturity.
CHAPTER II

DEVELOPMENT OF THE DOCTRINE IN AMERICA

"At Present", wrote Dr. William Douglas of Boston in his *Summary of Historical and Political development of the British settlements in North America*. The governments of the colonies in British North America:

in conformity to our legislature in Great Britain . . . consist of three separate negatives; thus, by the governor, representing the King, the colonies are monarchical; by the Council, they are aristocratical; by a house of representatives or delegates from the people, they are democratical: these three are distinct and independent of one another, and the colonies enjoy the conveniences of each of these forms of government without their inconveniences, the several negatives being checks upon one another. The concurrence of these three forms of government seems to be the highest perfection that human civil government can attain to in times of peace . . .; if it did not sound too profane by making too free with the mystical expressions of our religion, I should call it a trinity in unity.  

(Bailyn 1965, 59)

Although his comments comparing colonial governments to the holy trinity were condemned as the "most complete and undisguised system of atheism that was ever dared to be published in a Christian country" by the *Boston Weekly News Letter* his comparison of those governments to England's constitution was very indicative of the thinking of the times. There was a fundamental belief in both America and in Great Britain that a direct correspondence existed between the English constitution and the governments in the colonies. This idea gained speed in America from the conjunction of
two independent developments. On the one hand, we find the appearance almost everywhere in the colonies of bicameral legislative bodies. This came about, not as a response to constitutional theories, but, as a way to deal with the immediate needs and problems in their localities. (Bailyn 1965, 60) On the other hand, in England of the concept of mixed government was generally accepted in the terms laid down by Charles the first in his *Answer to the XIX. Propositions of Both Houses of Parliament* (1642). (Lutz 1988, 20)

By the early eighteenth century English constitutional theory was commonly applied to American institutions. In all three types of colonies; royal, corporate, and proprietary, there existed a single executive. The lower houses of the colonial legislatures came to be associated with the local, popular interests. At the same time the upper houses or “colonial councils” appeared to resemble the House of Lords. Although both Crown and propriety officials down played the idea that the colonial institutions were analogous to England’s Parliament, they still helped to recreate the system of mixed government in America. Moreover, they believed that time would narrow the differences between the two constitutional systems. (Bailyn 1965, 62)

By mid-century, it was clear that the formal organs of government and the constitutional structure of the colonial communities were strikingly similar to England’s. However, there was also something fundamentally different about their operation. While the mixed and balanced constitution in England seemed to produce a high degree of public harmony and the peaceful integration of political forces, similar institutions in the colonies created the opposite. Within the provincial governments there was persistent
and often bitter strife. There was conflict first of all, between the executives and the legislatures. Their battles were so constant that they became more noteworthy when they were absent, than when they were present. Furthermore, they were so intense that they often lead to the total paralysis of the government. The conflict, however, did not reside entirely within the government. Rather, a factionalism existed that transcended institutional boundaries and at times reduced the politics of certain colonies to an almost absolute chaos between competing groups. (Lutz 1988, 66)

These conflicts resulted from what eighteenth century politicians called the role of power in government and what we, today, more commonly refer to as the role of the executive. Legally, in all but the two charter colonies of Rhode Island and Connecticut, the power of the executive was far stronger than it was in England. The governors in the royal and proprietary colonies held the power of an absolute veto over the colonial legislatures. Those legislatures were further limited by the fact that the Privy Council or the proprietors in England could also disallow their legislation. The governors and the Privy Councils used this power, which no English monarch had used over the Houses of Parliament since 1707, frequently and on the most sensitive issues. (Wood 1969, 29)

Moreover, the use of the executive veto over colonial legislation continually increased as a result of three factors. First, orders were sent from England to the colonial governors spelling out mandatory vetoes over whole categories of legislation.

Secondly, the area of prerogative power that had been significantly reduced in England after the Glorious Revolution was reproduced in the colonies in all of its archaic force. The royal governors generally had the power to prorogue and dissolve the lower
houses of the Assembly, and they became accustomed to using these powers freely. In most of the royal colonies, there was no minimum frequency with which the Assemblies were required to meet and no minimum time length of time for their sessions. Indeed, they lacked the self-determination of the English House of Commons and were dependent upon the executive will for their very existence. (Bailyn 1965, 68)

Thirdly, and perhaps most interestingly the executive in the colonies had powers over the judiciary which were explicitly denied the crown in England. The English Act of Settlement of 1701, which created permanent tenure for crown appointed judges was determined to be inoperable in the colonies. Not only were judges at all levels, from justices of the peace to chief justices of the supreme courts, appointed only upon nomination by the governors, but they were also dismissible at the governor's command. Similarly, the executive could create courts without statutory empowerment. While it was true that both the governors and the home governments accepted tribunals created by the colonial legislatures, they never gave up their authority over the creation of courts.

These prerogative tribunals that were created by the colonial governors through their powers as chancellor offended the colonists on many fronts. Most notably, they sat without juries and made decisions that were as binding as legislation. Furthermore, they were concerned with such unpopular matters as the collection of arrears on quit rents. (Wood 1969, 72)

Along with a variety of lesser powers, including power over the elections of speakers of the lower houses of the legislature (Lutz 1988, 28), these three areas of legal power that the executive in the colonies held were seen to be the most threatening to
individual liberty. Official explanations were offered to the colonists for this non-conformity in the re-creation of England's mixed and balanced constitution in America. nevertheless, those who were committed to the idea that the colonists should enjoy the full benefits of English citizenship saw the anomalies between the two constitutions as unbearable. (Bailyn 1965, 71)

These arbitrary and threatening executive powers were sources of political controversy in the colonies. They tended to mobilize the forces associated with the legislature against those associated with the executive. However, what assured the actual conflict of these forces even more than the exaggeration of the executive authority was the array of other circumstances that effectively turned these executives into pawns of a higher authority. Moreover, although the colonial constitutions were archaic by eighteenth century standards in important respects, these circumstances led them to be radically reformed in other respects.

The political influence of government was weak in the colonies because the executive lacked the flexibility it needed for successful engagement in politics. (Wood 1969, 64) The royal governors arrived in the colonies with a commission that outlined their duties and with an explicit instruction book. This book filled in the details so minutely and with such finality that in many of the most controversial and sensitive public issues they were left politically immobilized. The result was that on many of these issues, the executive position was so rigid and prescribed that it was easily anticipated by the legislatures. Thus, though they were legally stronger than the assemblies, the governors were by this fact alone politically weaker.
Patronage, which had been one of the most effective weapons of leaders like Walpole in England to combat against the democracy in mixed government was prevalent in the colonies at the beginning of the provincial period. In the course of half of a century, however, it was so ground away by the forces at either extreme of the political spectrum that ultimately the governors were left without “the means of stopping the mouths of the demagogues.” (Bailyn 1965, 72) Through this competition, the colonial governments began to see distinct and separate functions being attended to by these two branches of government. The judiciary, on the other hand remained tied to one of the other two branches in terms of both its existence and its function.

Formal separation of these functions began with the adoption in the colonies of Place Acts. The New Jersey Place Act of 1730 copied the exact wording of the English Place Act of 1707, but then added:

That every person who, by reason of any office, pension, or salary from the crown, are by the laws of Great Britain disabled to be elected or to sit or vote in the House of Commons there, shall be and are hereby disabled to be elected or to sit or vote in any house of Representatives hereafter to be summoned in this province . . .

(Lutz 1988, 63)

In Virginia the principle was taken even further, to the extreme position long since defeated in England, of flatly excluding all executive officeholders from seats in the lower house whether or not their constituents were willing to re-elect them after their appointment. (Wood 1969, 19) These provisions, incorporated after Independence in the first state constitutions, have been perceived by many as a clear expression of the American doctrine of separation of powers. In fact, none of these provisions was written in regard to that doctrine as we now understand it. They derive instead from an
intellectual context that was not concerned with the balance of functioning branches of
government, but with the concept of perfecting mixed government. Their primary focus
was to control the dangers of influence and corruption that infected the English system.
(Gwyn 1965, 113)

The separation of powers along functional rather than class lines started to
become a core concept of constitutionalism in America about the time of the American
Revolutionary War. However, as Philip Kurland concludes: "The inefficacy of resorting
to a general notion of separation of powers to resolve contests between two branches of
government has long since been demonstrated by our history."(Kuriand 1986, 608)
Despite this "inefficacy" as soon as the Declaration of Independence was signed, we
became dedicated to the awesome task of defining exactly what the "Legislative",
"Executive", and "Judicial" powers were so that we could keep them separate.(Casper
1997, 26)

Actually, the reference to separation of powers as a general normative principle of
American constitutionalism began in tandem with the writing of the state constitutions.
Some of its earliest references come from the respective "bills of rights" that were put
into law in Maryland and Virginia. Article VI of the Maryland Declaration of Rights of
1776 provides "that the legislative, executive and judicial powers of government ought
to be forever separate and distinct from each other." (Wormuth 1949, 112) In Virginia’s
Bill of Rights the wording is even more explicit. It states that "The legislative, executive
and judiciary department, shall be separate and distinct, so that neither exercise the
powers properly belonging to the other: nor shall any person exercise the powers of more
than one of them, at the same time." (Wormuth 1949, 113) Other states which adopted similar phrases into their constitutions included Massachusetts, New Hampshire, and North Carolina.

All of these constitutions saw a link between the separation of powers and the idea of "liberty". That linkage was most probably provided by the writings of Montesquieu. In *The Spirit of the Laws*, he writes that:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch should enact tyrannical laws, to execute them in a tyrannical manner.

> Again, there is no liberty, if the power of judging be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

(Montesquieu 1989, 47)

With this in mind, the founding fathers in the various states saw that they had a difficult task at hand. As the systems of government that had developed in the colonies had been most closely related to the "mixed regime" in England, they were confronted with the challenge of using the system that they had become accustomed to and basing it upon popular sovereignty. (Adams 1980, 213-15) The issue was no longer the separation of differently based powers, but the separation of power that flowed from one source: the people. If the separation of powers was indeed a necessary condition of liberty, the true task was to reconcile it with the popular sovereignty that was being explicitly and dramatically invoked by the majority of the new state constitutions and which was itself the foremost expression of that liberty. (Casper 1997, 11)
In Gordon S. Wood’s award winning book, *The Creation of the American Republic, 1776-1787*, he explains how truly formidable the task of dividing power was for the newly free states. He believes that “Overnight modern conceptions of public power replaced older archaic ideas of personal monarchial government . . . As sovereign expressions of the popular will, these new republican governments acquired an autonomous public power that their monarchial predecessors had never possessed or even claimed . . . In other words, did it any longer make sense to speak of negative liberty where the people’s positive liberty was complete and supreme?” (Wood 1969, 132, 135) This situation left the framers of the state constitutions to sort out exactly how to protect the people as citizens from the people as rulers. (Black 1969, 76) They, further, had to resolve whether or not the structures of government would be hierarchically organized. Finally, they had to decide how and if the system of separated powers would be integrated with its apparent contradiction – checks and balances. (Kurland 1986, 607)

Overall, as the separation of powers doctrine was implemented into the first state constitutions from 1776 to 1787 one thing stands out – how extremely weak those versions of the doctrine are. Most of them simply made distinctions between the three branches and enumerated areas in which the powers of each were not supposed to reach. However, they left vast areas of undefined territory where the three branches were left to overlap and compete for power. The most distinct of these areas was the amount of dependence that the executive had on the legislature. (Casper 1997, 13)

This dependence can be clearly seen on four levels. First, only in New York, Massachusetts, and New Hampshire were the executives elected by the voters. Even so,
in the latter two states the choice reverted to the legislature if no candidate received a majority of votes in the popular election. As it was seldom that there was but one or two candidates running for the position of governor, this rarely failed to occur. The other constitutions granted the legislature the power to elect the governor or president, typically on an annual basis. This left the executive at the annual control of the legislature. If he were to stay in office, his first loyalty had to be to the desires of the legislative body. The state of Pennsylvania tried to get around this predicament by having the executive chosen jointly by the legislature and "the supreme executive council", which was popularly elected. (Bondy 1897, 43) Their efforts, though unique, failed to keep the executive from having to show loyalty to their legislative selectors.

Secondly, only Massachusetts and New York recognized an overridable executive veto. Even with this, the veto power in New York was held by the Council of Revision inside the legislature. The other states either recognized no veto power or so limited the power that it did not serve as a check upon the legislature.\(^\text{12}\)

Third, all of the states called for an executive or privy council that was elected by the legislature. These councils served to advise the executive and in many cases effectively prostrated him by having to approve his decisions before they went into effect.\(^\text{13}\) This once again left the executive as subordinate to the legislature.

\(^\text{12}\) It should be noted that South Carolina's first constitution split legislative power between the executive, the assembly and legislative council. The executive thus had an absolute veto. This constitution had a very short life.

\(^\text{13}\) In New York, the system was very complicated, but allowed the governor a great deal of autonomy.
Fourth, the traditional power of appointment that modern Americans so associate with the executive was nearly taken out of his control. In most of the states, either the legislature had the sole power of appointment or it was given to the privy council that they had already appointed. Only for very minor positions did the governors have any control over the appointment. (Fisher 1981, 24)

In order to add insult to injury, even though governors were authorized to exercise the “executive powers of government”, subject to council participation, they were confined to exercising those powers in accordance with the laws of the state. (Rakove 1996, 250) Virginia even added to this by stating that the governor “shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute or custom in England.” (Crosskey 1981, 342) This made the state legislature the sole and ultimate power that the governors were to respect.

Within the first years of their existence, many of the state constitutions of 1776 met with criticism for their lack of adequate separation of powers. In 1777 New York amended its constitution to provide for more separation of the branches. In 1778, the new draft of the Massachusetts constitution was rejected on the basis of complaints lodged by the towns of Essex County. The Essex Result of 1778 was a detailed critique of the new document that admonished its authors for both the lack of “proper” executive authority and the intermingling of executive, legislative and judicial powers. (Handlin 1966, 324)

The Essex Result stated, in part, that: “A little attention to the subject will convince us, that these three powers ought to be in different hands, and independent of one another, and so balleanced, and each having a check upon the other, that their
The insight that checks and balances were needed to maintain the independence of each of the branches revived the concept of balanced government. It did not, however, realize the complexity that the idea of combining "checking" and "separating" would cause. The problem had changed from the one that they knew in England, primarily because they were separating the power that flowed from one source – the people. In England, the problem was simpler because they were merely balancing the various factions within the organization of government.

(Casper 1997, 14) In its newly added Bill of Rights, Massachusetts' Constitution of 1780 attempted to attack the problem. Its wording, which became the prototype for other states, stated the principle in these terms: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."  

The Bill of Rights in the 1784 New Hampshire constitution expressed a clear separation of powers. However, it added the idea that neither separation of powers nor checks and balances could supply a neat formula of arrangements that would keep proper governmental organizational arrangements automatically in line. Article XXXVII of that document shows a deeper appreciation of the complexity of the problem than other state constitutions when it declares that: "In the government of this state, the three essential powers of thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of free government will admit,

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14 Massachusetts Declaration of Rights of 1780, Article V
or as consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."(Adams 1980, 216)

As Merrill Jensen notes, although this provision obviously views the separation of powers as an essential part of free government, it also notes how the concept of separate and independent powers is limited by the notion of free government. The necessity of maintaining “the whole fabric of the constitution” requires that separation, coordination, and cooperation are all met to the necessary level. The definition of these levels would prove to be one of the most complex issues for the federal constitutional convention as they tried to implement the separation of powers doctrine.(Jensen 1950, 353)

As the states wrangled with the concept of separations of powers, the central government nearly avoided the issue. Although formal political parties did not exist during the Revolution, there were broad differences of opinion on the subject of a central government. Radical republicans generally trusted their state governments and had a marked distrust for any distant central authority. Conservatives, on the other hand, hoped to construct a strong central government that could regulate trade, control western lands, settle interstate disputes, and protect property rights. (Jensen 1950, 409)

In 1777, when Congress adopted the Articles of Confederation and sent them to the states for ratification, they created a government that had various lawmaking and governing powers. They did not, however, give that authority any way to either fund or enforce their decisions. The body’s president, committees, and civil officers had duties
which would qualify as executive functions.\textsuperscript{15} They also established a court of appeals for cases of capture in 1780. Regardless, the Confederation could hardly be considered to possess the characteristics of a tripartite government. (Shane, Bruff 1996, 5)

Congress had created more of an alliance than a nation. The articles cannot be said to have not dispersed power effectively, for they contained very little real power. Congress, having no power to make rules binding citizens, was less a legislative branch than an executive or administrative one. Under the pressures of wartime necessity, however, that body substantially evolved. Eventually, Congress became less of an administrator and more of a policy making body for a set of permanent subordinate bodies. Through this necessity, they created mixed boards composed of their own members and outsiders. These boards oversaw admiralty, war and finance but still relied upon the states for the implementation of their decisions. Even with this progress, men like George Washington and John Adams pressed for further reform.

The need for a separate executive branch was becoming very clear. Alexander Hamilton complained extensively about the:

\begin{quote}
Want of method and energy in the administration \ldots and the want of a proper executive. Congress have kept the power too much in their own hands and have meddled too much with details of every sort. Congress is, properly, a deliberative corps, and it forgets itself when it attempts to play the executive. It is impossible such a body, numerous as it is, and constantly fluctuating, can ever act with sufficient decision or with system. \\
\textit{(in Frisch 1991, 64)}
\end{quote}

Thomas Jefferson later expanded on this argument:

\begin{flushright}
\textsuperscript{15} The "civil officers" were the Postmaster General after 1775, and the Secretary of Foreign Affairs, the Secretary of War, and the Secretary of Finance (replaced by the Board of Treasury in 1784) after 1781.
\end{flushright}

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I think it very Material to separate in the hands of Congress the Executive and Legislative powers, as the judiciary already are in some degree . . . The Want of it has been the source of more evil than we have experienced from any other cause. Nothing so embarrassing as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes the place of everything else.

( in Peterson 1975, 170)

Finally, in 1781, the first truly executive departments were formed. These included the department of foreign affairs, war, marine, and treasury. nevertheless, as the war ended the states allowed Congress to wither back down to a powerless body. As they needed nine states delegates to be present to pass any legislation, they were without a quorum for all but fourteen days during the 1785-6 session. (Shane, Bruff 1996, 6)

As early as July of 1783, Alexander Hamilton was calling the lack of a separation of powers in the Articles of Confederation to be one of its major weaknesses. He criticized it mainly on the grounds that it was “confounding legislative and executive powers in a single body” and for lacking a federal judicature “having cognizance of all matters of general concern.”(Frisch 1991, 86) Hamilton was one of the first to draft resolutions calling for a convention to amend the Articles. He wrote that the Confederation’s structure was “Contrary o the most approved and well founded maxims of free government which require that the legislative executive and judicial should be deposited in distinct and separate hands.” (Frisch 1991, 87) Hamilton had intended to submit these resolutions to the Continental Congress; however, he abandoned the project because of the lack of support that it had. (Casper 1997, 17)

In his book on the origins of the Constitution, Forest McDonald concludes that the “doctrine of separation of powers had clearly been abandoned in the framing of the
Constitution.” (McDonald 1985, 258) When he discusses this “doctrine”, he refers to the “pure doctrine” that is illuminated in the work of M. J. C. Vile. (Vile 1967, 13) This analysis assumes that there actually was a doctrine prior to the Federal Convention that the framers could have abandoned. As the previous discussion of state constitutions has revealed, there was no sense of a definitive doctrine that could be agreed upon between 1776 and the opening of the convention. Thus, there was no specific doctrine to abandon.

As the convention began, there was only one thing that all of the delegates agreed upon in terms of separation of powers. Without it, there would be tyranny.

In early 1787, James Madison began to see the inherent problems in a system of separation of powers that included legislative supremacy. In his memo entitled *Vices of the Political System of the United States* he focused on what he believed to be the fundamental problems in our system of state dominance and weak central authority. Included in the defects that he saw in state governments were the noncompliance with congressional requisitions, encroachment on national authority, violation of treaties, trespass on each other, and a lack of guarantees against internal violence. (Wormuth 1949, 478) Within the memo, Madison urged that the only solution to the tyranny that had developed in the states was to strengthen the national government.

In his *Notes on the State of Virginia* Thomas Jefferson complained that: “All the powers of government, legislative executive and judiciary, result to the legislative body.” It seemed to him that “173 despots would surely be as oppressive as one.” Indeed, the Virginia Constitution had forbidden any branch to exercise the power of another, “but none was provided between these several powers.” In Virginia, the executive and
judiciary were dependent on the legislature for subsistence, and even continuance. Jefferson, thus argued that power should be so divided and balanced among several bodies . . . that no one could transcend their legal limits, without being effectually checked and restrained by the others.” (Peterson 1975, 157) Noting the influence that Mr. Jefferson had on the mind and theories of James Madison, it is not surprising that once the convention started, Mr. Madison was advocating a similar opinion on the separation of powers.

As the substantive debate of the 1787 Convention began, John Randolph delivered an address enumerating the defects of the Confederation, omitting any reference to the separation of powers. (Solberg 1990, 37) In the minds of many of the delegates who were in attendance on that day, the separation of powers was not amongst the major issues that needed to be resolved by the Convention.

It made a subtle appearance, however, in the proposal made by Virginia delegate James Madison. Drafted on the eve of the Constitutional Convention, Madison’s Virginia Plan effectively set the agenda for the assembly. Although it only implied a separation of powers, the Virginia plan would set a course of debate that continually revolved around the issue. Fundamentally, this debate set up a vague yet complex doctrine that would prove to be troublesome for future generations of legislators.

The Virginia Plan separated legislative and executive personnel through an eligibility clause. It created a chief executive that would be elected by the legislature without the possibility of re-election, but failed to specify how many people would make up that body. It further created a council of revision that would be made up of both
executive and judicial members. This body was to hold a qualified veto over national
laws and an absolute veto over state laws. Overall, in Madison’s original schema,
separation of powers was much less prominent than was the amount of power that would
be concentrated in Congress. (Baade 1991, 1003)

On May 30, the day after the Virginia Plan was first introduced, the Committee of
the Whole overwhelmingly adopted a resolution stating “that a national government
ought to be established consisting of a supreme Legislative, Judiciary, and Executive.”
(Solberg 1990, 38-9) This point marks both the beginning and end of formal separation
of powers debate. It was indirectly, through the rest of the Convention, that the doctrine
would come to life. In the subsequent discussion of the structure and powers that would
be assigned to each of the respective branches, in the repeated debates over the council of
revision, and in the numerous comments and discussions concerning independence,
encroachments and the need for checks and balances the doctrine grew into one of the
fundamental principles of the Constitution. (Casper 1997, 18)

Even in Madison’s notes, the most complete record of the Convention, it is
difficult to identify the decisive influences on a text that evolved from a series of
compromises. The process that was employed to reach a final document was far from
being free of error. Decisions were made by a majority vote of the states. These
decisions were marked by internal divisions in the delegations, close votes, and
fluctuating outcomes. (Shane, Bruff 1996, 7) Often, it was even difficult to identify what
interests a particular state had at heart when they voted for a proposed structural feature
of the new government. (Fisher 1981, 176)
By 1787, both separation of powers and checks and balances were widely accepted as general principles throughout American government. Arguing that parchment rarely stops men from taking power, James Madison provided a key link between the two principles. He believed that checks were the only effective way to maintain separation. Effectively checking ambition with ambition, no one would allow another to take a portion of his power.

There was, however, lively disagreement over the institutional arrangements that could satisfy the separation of powers. The Constitution’s major attribute of formal separation of powers is its separation of personnel. As important as that formal separation may be, it is equally important that there is an independent political base established for the presidency. That base, combined with executive nomination and guarantees of tenure for the judiciary, effectively created three independent branches of government. By severing dependence on the legislature, the other branches became free to act as independent entities.

Despite this step towards more clearly separated powers, those who wanted neither a king nor another confederacy, believed that the executive power established in the Constitution remained too vaguely defined. The Convention’s most important limitations of executive power were the conditional nature of the veto and the senatorial checks on appointments and treaties. This left a great deal to be decided by time and precedent. (Adams 1980, 285)

“Corruption” in the system was prevented by a compromise forbidding the joint holding of legislative and executive office. This was weakened only slightly by their
decision to allow former legislators to be appointed to executive offices. The framers, armed with their new theory of executive responsibility to the people, saw no reason to adopt the responsibility to the legislature that England was still struggling to accomplish. (Bailyn 1965, 112) The biggest check on the executive would now come from the educated and virtuous citizenry.

The judiciary received the least attention, because it was regarded as having the least power. (Flaherty 1996, 1725) There was agreement that the Court should be independent, with Justices holding tenure during good behavior. Congress was left free to create lower courts and to determine the size of the Supreme Court. Although there was no formal debate over judicial review of legislation, at least eight delegates, including James Madison and James Wilson, did remark that the judicial function would include the review of legislation. When this issue was raised, no one argued to the contrary. (Solberg 1990, 36-48)

As the finished Constitution was presented to the states, New York became a pivotal domino in its ratification. James Madison, Alexander Hamilton and John Jay joined forces in an attempt to win public support for the document in New York. Their product, the Federalist Papers, had many obstacles to overcome. It seemed that for many of the citizens of the United States, the evil that they knew was a better option than the one that they had not yet encountered. One of the most formidable of these tasks was to justify the abandonment of strict separation of powers in favor of a system that relied heavily on checks and balances.
James Madison took on this task personally in *Federalist* 47-51. In Number 47 he states that separate branches are needed to prevent undue concentrations of power. However, this discussion moves on to the value of checks and balances by the third paragraph. His core argument in *Federalist* 47 is actually the "impossibility and inexpediency of avoiding any mixture" as demonstrated by the state constitutions and as supported by the "oracle who is always consulted and cited on the subject . . . the celebrated Montesquieu." Montesquieu according to Madison, did not mean to suggest that the three departments "ought to have no partial agency in, or no control over, the acts of each other." (Rossiter 1961, 301) Instead, he emphasized the importance of determining the levels and areas in which independence, cooperation and competition should be employed.

In *Federalist* 48, he explains that "parchment Barriers" such as those that had been erected by the states in their constitutions could not ensure that separation would be put into practice. Only constitutional controls explicitly placed in each of the branches that could be held over the other branches could assure separation. Further, each branch needed to have adequate defenses against the others so that none could enjoy the right of superiority by setting the boundaries. He concludes that multiple representation plus separation of powers and checks and balances would prevent corruption of the overall balance of government. It would achieve this by preventing any officer from acquiring power over officers in the other branches.

In *Federalist* 49, Madison begins by according credit to the ideas of his friend Thomas Jefferson. The purpose of Number 49 seems to be quite philosophical in nature.
He sets the people as the ultimate overseer of the separation of powers within government. He then goes on to question the reason and reliance on passion of those same people. Finally, he uses the controversy that he has created to put forth the idea that dominance by the popular assembly would be a grave error. Overall, his argument here is against the legislative supremacy that had dominated the state constitutions and for a government balanced by internal checks. (Rossiter 1961, 314-17)

At the core of the argument made in *Federalist 50* is the question of whether or not the Constitution should be periodically reviewed by the people either directly or through a board of censors. However, the arguments involved have a great bearing on a crucial part of Mr. Madison's scheme of separation of powers. Within his defense of the Constitution's amendment procedures is the argument that internal checks are the only ones that will keep a government from becoming tyrannical. If an external body were formed to oversee the balancing of government, they would be prone to corruption and the influence of factions. Being the chief enemy of Madisonian Republicanism, he surmises that the presence of such factions would surely destroy the institutional balance within the government. (Rossiter 1961, 318-19)

This argument is continued in *Federalist 51*. Here, he extends the argument that external checks would not effectively balance the branches of government by explaining why internal checks would. He explains that the ability of ambition to check ambition within the branches would remedy "the defect of better motives" and allow private interest to "be sentinel over the public rights" (Rossiter 1961, 324), thereby, creating a
system that could not fail unless the basic human quality of wanting power should disappear.

The courts provided the Federalists with a possible stabilizer to keep the other two branches in balance. The prospect of judicial review, however, forced the spectre of judicial supremacy to raise its head. In his Federalist 78, Alexander Hamilton tried to relieve those fears. Here he argues that the courts would provide healthy checks on Congress. He notes that the interpretation of statutes could serve as one check. Furthermore, outright invalidation of legislation was justified by the supremacy of the Constitution. If the Constitution had faults, the proper amendment process could be invoked which would bypass the Court all together. Indeed, the absence of a Court would violate the “celebrated maxim” of separation of powers, because lawmakers would be left to judge their own cause. (Rossiter 1961, 468) He further argues in Federalist 81 that impeachment threats would be sufficient to prevent Justices from abusing their power. (Rossiter 1961, 482)

The Federalist Papers were met head on with zealous opposition. The Anti-Federalists feared that a president could become king for life because of their long (4 year) term, re-election eligibility, absence of a council, powers as commander-in-chief and appointment powers. They believed that the Senate could become “a fixed and unchanging body” that was allied to the President through shared powers over legislation, treaties, and appointments. If these evils befell our government, we would be forced into a worse situation than already existed under the Articles of Confederation. (Storing 1981, 37)
These fears led to a close battle for the ratification of the new Constitution. Even after the new nation was technically formed by nine of the thirteen states signing the Constitution into law, it was still not viable. In order to have a chance at success, the Federalists needed New York and Virginia to join their cause. If they had refused to sign, the country would have been fundamentally divided into three sections with powerful enemies between their fragmented borders. Luckily, Virginia joined after a promise was made to add a bill of rights to the Constitution during the first session of Congress. New York, which had long been leaning towards the side of the anti-federalists, was weakened by the intense efforts of Alexander Hamilton in its ratifying convention. Finally, it too ratified the Constitution, although by a slim margin. (Shane, Bruff 1996, 10)

The issue of separation of powers was not to lie dormant for long. In 1789, James Madison proposed a constitutional amendment to incorporate the separation of powers into the Constitution as a formal doctrine. The amendment, which would have been included as Article VIII, read: “The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.” (Veit 1991, 96) This amendment, ingeniously included the concept of checks and balances without explicitly stating that it did. The separation of powers provision in Roger Sherman’s draft bill of rights, also dating from the summer of 1789, captured even more clearly the point made by Madison’s proposal: “The legislative, executive and judiciary powers
vested by the Constitution in the respective branches of the Government of the United States shall be exercised according to the distribution therein made, so that neither of said branches shall assume or exercise any of the powers peculiar to either of the other branches."

(Veit 1991, 104)

The House adopted Madison's proposal despite objections that it was unnecessary and "subversive to the Constitution". (Veit 1991, 105) Madison believed that "the people would be gratified with the amendment, as it was admitted that the powers ought to be separate and distinct; it might also tend to an explanation of some doubts that might arise respecting the construction of the Constitution." (Veit 1991, 103) It was quite an interesting suggestion that the Congress should adopt a measure that would make a vague concept easier to interpret. Nevertheless, the Senate rejected the amendment. Gerhard Casper believes that the Senate was not eager to adopt separation of powers as an independent doctrine because of the subtle "mixing" decisions that had been made by the framers, many of which benefited the Senate.

From this point forward, the Supreme Court was left with little to guide them on matters of separation of powers. The doctrine was ambiguous enough to allow a great deal of leeway, yet important enough that little leeway should be allowed. Since that time the Court has developed six different ways to interpret the doctrine. Those methods often stand at odds with each other and result in varying decisions. At other times, they are used in conjunction with each other in the same decision. In order to understand the different perspectives and the way that those perspectives have affected the institution of
government in this nation, it is only appropriate to look at the cases that have established a doctrine of separation of powers for the year 2000 A. D. and beyond.
CHAPTER III

THE TEXTUAL APPROACH TO THE DOCTRINE

Since our nation is founded on a written constitution, it is only natural for the Court to at least lay some stress upon the meaning of the text. The question becomes how much emphasis and in what fashion that emphasis should be applied. The interpretive strategies that are often thought appropriate for the constitutional guarantees of due process and equal protection are often referred to as "open-textured". (Shane, Bruff 1996, 11) This means that it is generally agreed that the text was intentionally left vague, to be more explicitly defined by precedent.

The question then becomes whether or not these same strategies should be employed in separation of powers issues. If the text seems clear, then it must be questioned how much other interpretive techniques should be employed. If the text seems ambiguous, the justices must decide if it should confine their decision at all. In the end, Justices make this determination for themselves.

Textually speaking, the Separation of Powers Doctrine is not easily identified. Its premises are spread throughout the document and can be easily separated from the whole. Thus, one must examine not only if a Justice is adhering to the text, but if he/she is adhering to the entire text. This can help the examiner to determine which school of
textualism the Justice belongs to. If the Justice sees the Separation of Powers Doctrine as a number disjointed ideals, then his approach to the text will be "clause bound". If they see the Doctrine as a coherent whole, then their approach will be from the "structural" school. On the other hand, there are those who adhere to "purposive" textualism, and see the doctrine as part of a group of larger Constitution goals. (Murphy, Fleming and Barber 1995, 386)

Although it may seem unconvincing to argue that the "clause bound" approach to the Doctrine has been widely used, and it may well be that no Supreme Court Justice has consistently adhered to the approach; Professor Charles L. Black argues to the contrary. He claims that, "in dealing with the questions of constitutional law, we have preferred the method of purported explication or exegesis of the textual passage considered as a directive of action, as opposed to the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part." (Black 1969, 7) If this analysis is true, it may lend some understanding to why interpretation of the separation of powers has been so muddled.

As Judge Learned Hand noted that "a melody is more than the notes", textual "structuralists" see the "clause bound" interpreters as failing to see the big picture that the Constitution renders. Nevertheless, they may themselves be caught in a "hermeneutic circle" in that it is impossible to understand the parts without understanding the whole, but it is also impossible to understand the whole without understanding the parts. (Murphy, Fleming and Barber 1995, 387) Thereby, both schools are faced with the

16 See Helvering v. Gregory (U.S.C.A., 2d Cir. 1934)
problems of fit, conflict, and reconciliation that a complex doctrine like the separation of powers presents.

Though it may be complementary to either, "purposive" textualism differs from both the "clause bound" and "structural" approaches. This approach was best described by James Madison in his *Federalist 40* when he writes that:

> There are two rules of construction, dictated by plain reason, as well as founded on legal axioms. The one is that every part of the expression ought, if possible, be made to conspire to some common end. The other is, that where the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means.  

(Rossiter 1961, 89)

Those who adhere to this approach would argue that as long as the goals of accountability and balance were achieved, it would make no difference whether those actions were explained by a single clause or the entire document.

Beyond looking at which school of textualism an interpreter is reading from, it is also necessary to examine whether she is confining the Constitution to the words written within its articles. If not, the Justice may be including the preamble and amendments, or perhaps a number of other documents in their textual interpretation. It is seldom agreed upon that the Constitution only includes the document proper. Thereby, many interpreters also choose to include things like Madison’s notes from the Constitutional Convention, the *Federalist Papers*, the works of men like Blackstone and Locke who influenced the Framers, and even transcripts from the ratification debates of the various states. The inclusion and/or exclusion of these various documents further complicates our reading of the intent of the American doctrine of separation of powers.
Beyond all of this confusion, looms the ominous fact that once a Justice has decided which school of textualism that they belong to, and once they have decided exactly what they are going to include in their interpretive processes, they still must define the words that they are basing their decision upon. This interpretive problem is hardly a recent one. James Madison identified the problem in *Federalist 37* as he contemplates that: “When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.” (Rossiter 1961, 86) Words often fail to clearly communicate thoughts. Moreover, in the words of Chief Justice John Marshall, “Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common that to use words in a figurative sense.”

In considering these two viewpoints, one must be led to believe that the Framers of the Constitution, even through all of their debates, did not leave the constitutional convention with an agreed upon definition of exactly what the Separation of Powers Doctrine entailed. If this is accepted, it must then be pondered whether anyone can read the text and truly decipher its writer’s intended meaning.

This is not to argue from a “deconstructionalist” viewpoint that the text has no meaning. (Murphy, Fleming and Barber 1995, 115) Rather, it should help to shed light on the fact that although interpretations of the Separation of Powers Doctrine have resulted in decidedly different and often conflicting viewpoints, the decisions were all thought to be firmly founded upon the text itself. This begins our inquisition into how these conflicting decisions have come about and how to use the Doctrine in the future.

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17 *McCulloch v. Maryland* 17 U.S. (Wheat.) 316, 4 L.Ed. 579 (1819)
As all constitutional interpretation inevitably begins with the text, it is only appropriate to start by looking at the beginning of the conflict over separation of powers. Despite going down in history as the case that established judicial review, the case of Marbury v. Madison\(^8\) was also the first time that the Supreme Court was asked to resolve a significant conflict between Congress and the President. Moreover, this decision set the stage for textualism to be the basis for separation of powers decisions for the next hundred years. (Carter 1985, 821)

The case itself, ultimately decided that although Mr. Marbury may be entitled to the commission of Justice of the Peace, the Court could not issue a Writ of Mandamus forcing the Secretary of State James Madison to deliver the commission. Moreover, they could not force him to deliver the commission because the statute which empowered them to hear Mr. Marbury's case was unconstitutional. The opinion, which was written by Chief Justice John Marshall, has become a pillar of constitutional law.

Essentially, Marshall's argument that the act was unconstitutional came down to a "clause bound" textual interpretation of Article III of the Constitution. He believed that the language of Article III restricts the original jurisdiction of the Supreme Court to certain limited types of cases. Specifically, those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State may be a Party." Thereby, as section 13 of the Judiciary Act of 1789 attempted to expand the Court's original jurisdiction beyond the limitation provided in Article III, it was "repugnant" to the Constitution.

A more "structural" reading of Article III does not discover any such explicit statement providing that the Court's original jurisdiction cannot be expanded to absorb

\(^8\) 5 U.S. (1 Cranch) 137 (1803)
some cases that might otherwise fall only within its appellate jurisdiction. Instead, it only explicitly states that there are certain cases that must be treated within their original jurisdiction, and that Congress has no right to make laws that would remove them from that jurisdiction. (Van Alstyne 1987, 605)

Marshall acknowledges this point and attempts to answer it within his opinion in the following fashion:

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give the court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it.

Here, Marshall's essential point is that any interpretation other than the one he uses would leave the text without any significance and would thereby, serve no useful purpose. ¹⁹

From a more "structural" viewpoint, Article III, section 2, clause 2, readily supports the interpretation that the Court's original jurisdiction may not be reduced by Congress, but that it may be supplemented. This supplementation would naturally come

¹⁹ Article III's division of jurisdiction may serve another useful purpose. Had Congress not adopted the Judiciary Act of 1789, or taken another action describing the Supreme Court's jurisdiction, the original division would have provided the Court with a guideline to follow until Congress could or did take action.
by adding to the original jurisdiction, cases that would normally fall within their appellate jurisdiction. (Van Alstyne 1987, 606) This reading makes sense and in no way makes any part of the clause "surplusage". Thus, it might be supposed that certain kinds of cases like "those affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party" (Article III, 2, 2) could have been regarded by the Framers as being of such importance that they should at all times enjoy original access to the Supreme Court. Cases affecting Ambassadors might have been felt to involve too sensitive of issues involving relations with foreign countries to have been heard by any other authority. Likewise, cases in which a state is a party may have been believed to involve too sensitive of issues involving federalism and interstate relations. It could, thereby, be argued that these cases merely constituted an "irreducible minimum" of Supreme Court original jurisdiction. (Corwin 1950, 56)

The very next sentence after the establishment of original jurisdiction provides that "in all the other cases before mentioned (including cases arising under 'the Laws of the United States' such as Marbury's case), the Supreme Court shall have appellate jurisdiction, both as to Law and Fact;" however the comma is followed immediately by a distinct qualification. That qualification reads: "with such Exceptions, and under such Regulations as the Congress shall make." It is thus reasonable to read the entire clause as saying that the Congress may exclude certain cases that would otherwise be part of the Court's appellate jurisdiction by adding them to their original jurisdiction. (Van Alstyne 1987, 607) That is exactly what Congress attempted to do with section 13 of the Judiciary Act of 1789. Moreover, contrary to Chief Justice Marshall's reading, this interpretation would leave nothing to "mere surplusage".

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If Chief Justice Marshall had chosen to take the “purposive” approach to the text, he once again may have come to a different conclusion than the one that he did. Through this approach, it would have to be noted that the Judiciary Act of 1789 was adopted by the first Congress organized under the new Constitution, just two years after the Constitution was proposed and in the same year that it took effect. Many of the same men who participated in the Constitutional Convention also participated in the enactment of the Judiciary Act. The “purposive” approach would beg the Court to believe that the first Congress was in tune with the purpose and goals of separation of powers that Article III, section 2 was trying to achieve. Furthermore, Marshall himself would use this approach to uphold a federal statute in *McCulloch v. Maryland*\(^{20}\). Here, he noted that:

> “The power now contested was exercised by the first Congress elected under the present constitution. . . . It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.”

Through this opinion, one of two things becomes clear: that Chief Justice Marshall was inconsistent in his use of textualism, or that he views the issues of separation of powers and those regarding federalism in very different lights.

One of the more significant criticisms of Marshall’s opinion is that it fails to establish that independent judicial review, rather than relying on Congress to police themselves on the constitutionality of their laws, is more consistent with the text and structure of the Constitution. Still, no one has formulated a stronger textual argument for

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\(^{20}\) 17 U.S. (4 Wheat.) 316 (1819).
the proposition that Congress' interpretation should be final, or for any other alternative. (Tribe 1988, 25)

The Case of *Marbury v. Madison* is paramount to the current American Doctrine of Separation of Powers; however, it did little to resolve the matter of how the doctrine should be interpreted. As a matter of fact, none of the cases arising under the separation of powers for the next hundred years would use "clause bound" textualism as their primary method of interpretation. The failure in this case to firmly establish what, textually speaking, separation of powers entailed, left the door open for various other interpretive techniques to forge their own strongholds on the doctrine. As will be argued later, this has left our government today with little predictability regarding how the Court will view a given separation of powers issue. As Justice Stone iterated in his now famous dissent in the A.A.A. Case: "While unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check on our (the Supreme Court) exercise of power is our own sense of self-restraint." (Corwin 1950, vii) As the following case will show, that restraint wears decidedly different faces when judicial modes of interpretation change.

Hugo Black is often referred to as the greatest of the textualists. (Murphy, Fleming and Barber 1995, 113) He lived up to this title as he wrote the opinion in the case of *Youngstown Sheet and Tube v. Sawyer*. The case itself revolved around Executive Order 10340, but the decision is instrumental in understanding how many different interpretations can be employed in one case.

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21 For a list of these cases, see note 28
22 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952)
In 1952, during the Korean Conflict, President Truman directed the Secretary of Commerce Charles Sawyer to seize and operate the steel mills that had been under the control of the United Steel Workers. This order was given because of the eminent possibility that the steel workers would go on strike and the country's steel production, which was vital to the war effort, would be halted.

The constitutional question that evolved was whether or not the President had the power to seize the mills in violation of the Labor Management Relations Act of 1947 (The Taft-Hartley Act). In a 6-3 decision, the Court decided that indeed, President Truman had violated the separation of powers by seizing the mills. An analysis of the majority opinion will show the mixed nature of the decision and the awkward precedent that it established.

Justice Black, who wrote the opinion for the Court, delivered a decidedly "clause bound" interpretation of the text. His relatively short opinion is based upon two clauses from the Constitution. First, he stands firm on Article II, section 1, clause 1, which states that "The executive power shall be vested in a President of the United States of America." From this he notes that "The constitution is neither silent nor equivocal about who shall make the laws which the President is to execute." He further qualifies this when he states that: "There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." By strictly following this clause and his definition of the words that it contains, Justice Black is able to reduce the problem to a much simpler one; did the President act in a legislative capacity in violation of the Constitution?
Secondly, he invokes Article II, section 3 of the Constitution which states that the President should “take care that the laws be faithfully executed”. From this, he notes that: “When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency . . .” From this he easily deduces that the President clearly acted in violation of his assigned function within the separation of powers.

Although five of the Justices sided with Black, an analysis of their concurring opinions shows how disjointed the decision actually was. Two of the Justices, Black and Douglas, found no power in the President to seize manufacturing sites in time of emergency unless the seizure was expressly authorized by Congress. Three of them, including Justices Frankfurter, Jackson and Burton found power in the President to take such action unless the power was expressly prohibited or disaffirmed by Congress. The final Justice, Justice Clark, affirmed the power of the President to deal with emergencies but found it to be negatived because Congress had strictly prescribed procedure that specifically excluded the President’s actions. (Kauper 1952, 157)

To put the matter into perspective, the first two Justices based their opinion on a “clause bound” interpretation of the Constitution. The following three Justices tried to resolve the matter by looking by taking a “purposive” approach to the document and deciding that its intention was to allow the President a great deal of freedom where Congress had not established other prescriptions. The final Justice sees the situation in a “structural” capacity. His view is that the structure of the Constitution allows the President a great deal of latitude in pressing matters. Moreover, he believes that the President’s freedom in such situations can only be suppressed by acts of Congress.
Before leaving this case, it is also important make note of Mr. Justice Jackson's unique opinion. Although he concurs with the decision, he poignantly disapproves of Justice Black's "clause bound" interpretation. In doing so, he writes that: "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context." He further argues that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Within this clear contradiction to the "opinion of the Court" Justice Jackson was still able to concur with the decision. It is mixed interpretations like these that have led to confusion on the actual meaning of the Separation of Powers Doctrine.
CHAPTER IV

FORMALISM: IN SEARCH OF ORIGINAL INTENT

Alexander Hamilton, in the guise of Publius, wrote that the judiciary was "the least dangerous" branch of the government.\(^{23}\) (Rossiter 1961, 465) James Madison, under the same pen-name told his readers of the most dangerous: "The legislative department" he wrote, "is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."\(^{24}\) (Rossiter 1961, 309) With these boundaries set, and the executive lying somewhere in between, the Framers of our Constitution set forth to establish a government the likes of which the world had never seen. In that Constitution, the Framers tried to set up the functional duties and boundaries that each of the respective branches would enjoy; however, they only did so for the pinnacles of each of those branches. Moreover, they became less specific in their definition as they moved down the ladder of "dangerousness" from the legislature to the judiciary.

According to the Constitution, judicial power is to "extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority."\(^{25}\) This statement of jurisdiction is relatively all, within

\(^{23}\) The Federalist No. 78
\(^{24}\) The Federalist No. 48
\(^{25}\) U. S. Const. Art. III § 2
the Constitution, that defines the functions of that branch. The question that arises is whether the lack of definition of duty in Article III of the Constitution was intentional, or whether it is merely indicative of the role that the Framers thought that the judiciary would hold.

In the quest to determine whether the separation of powers doctrine in the United States today is still the one that our forefathers had envisioned, we must look at their intentions in regard to the role of the various branches of the government that they established. It may be that the Framers of the Constitution were purposefully non-specific about the role and duties of the "third branch" because they were unsure of the whole function that they would have to serve in order establish and regulate the new government. More importantly, the poor definition that those Framers gave for separation of powers has left today's Supreme Court Justices to guess what was actually intended by the doctrine.

To begin to study the question of "original intent" with regard to the judiciary in the United States, one must step back into the history and experience of those who founded this nation. The scholarship on this subject focuses in particular on the ideas of "separation of powers" and "checks and balances". These ideas more than any others guided the Framers toward a framework that they believed would establish balance

26 Donald S. Lutz puts forth the idea that the judiciary being listed last in the tripartite separation of powers was intentional and showed that the judiciary served a subservient role. (see Lutz 1988, 158)
27 ORIGINAL INTENT here is used to mean what was expected in a historical sense at the time of the framing of the Constitution from the Judicial Branch, not to be confused with the method of Constitutional interpretation employed by Justices Scalia, Thomas and Rehnquist
among the branches, responsibility or accountability to the electorate and energetic, efficient government. (Flaherty 1996, 1730) Of these, they looked at 'balance' as being the most crucial.²⁸

Despite this emphasis, an analysis of our nation's history reveals relatively little controversy over the issue of separation of powers. (Flaherty 1996, 1732) Prior to 1926, the Supreme Court had only considered seven separation of powers cases which directly involved Congress and the President.²⁹ The importance of this lies in the lack of conflict that needed an arbitrator for resolution. In contrast to the federal government and the states, the President and the Congress seem to have been able to work out methods to keep the government efficiently functioning without the need for the Supreme Court to referee their disputes.

This apparent harmony has diminished since the Myers v. United States³⁰ decision, which promoted a unitary presidency. That case, which must have given comfort to the ghost of impeached president Andrew Johnson, forbade Congress from passing legislation that extended their power of advise and consent in regards to presidential appointments and his power of removal. Although the case revolved around

²⁸ These three general objectives are put forth by Wood, McDonald, and Rakove in the works which have been cited as the most fundamental goals of the new Constitution. Further, they employ the idea that since 'balance' was cited more often during the Convention that it was first in the Framers minds.

²⁹ These cases are as follows: Parsons v. United States, 167 U.S. 324 (1897); United States v. Perkins, 116 U.S. 483 (1886); Butterworth v. United States ex rel. Hoe, 112 U.S. 50 (1884); United States ex Rel Goodrich v. Guthrie, 58 U.S. (17 How.) 284 (1854); In re Hennen, 38 U.S. (13 Pet.) 230 (1839); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This list compiled from Flaherty, pp 1733-5.

³⁰ 272 U.S. 52 (1926)
a minor position, that of postmaster, it established a precedent based on formalism in
regard to the removal power. More explicitly, Chief Justice Taft believed that no branch
should have implied powers to participate in the functions assigned by the Constitution to
another; because removal is an executive function, the Senate may not share it.
Therefore, the President has an unlimited power to remove those executive officers that
he has appointed. (Shane, Bruff 1996, 417)

The case of *Humphrey's Executor v. United States*\(^3\) nine years later, refuted that
idea. This case, which decided whether or not President Roosevelt could remove a
member of the Federal Trade Commission for decidedly political reasons, allowed the
Congress to limit the President's removal powers. In doing so, the Court effectively
established a fourth branch of government. This fourth branch, performing "quasi-
judicial and quasi-legislative functions distinguishes them from the activities performed
by purely executive officers." (Shane, Bruff 1996, 423) In a total reversal of the
formalistic interpretation in *Meyers* the Court seemed determined to avoid the formalistic
idea of original intent. They did not, however, overturn the *Meyers* decision to dispel the
ambiguity that they had created. Instead, they justified their decision on the basis that the
two positions in question were decidedly different in their nature.

Inconsistent decisions like these have accelerated during recent years. As recently
as 1995, in the decision in *Plaut v. Spendthrift farm, Inc.*\(^4\) the point was once again
confirmed that the Supreme Court is undecided about where to draw the line of separation
of powers between the Congress and the President. (Shane, Bruff 1996, 90) This has

\(^3\) 295 U.S. 602 (1935)
\(^4\) 114 S. Ct. 1447 (1995)
made it much more difficult for the two branches to work towards common goals.

Previously, agreements between these two branches had been the norm since the implementation of the Constitution.(Corwin 1950, 6) However, as more and more controversies have arisen over such agreements, the issue of the Framer's intent with respect to separation of powers has become paramount. Thus, the Supreme Court's interpretation of that intent has allowed them to wield a great deal of power. This, in effect, has turned the table in the debate over the 'least dangerous branch'. More importantly, the power to interpret that intent without anyone to check their power, has had awesome implications for our government. In light of the disagreement over the meaning of separation of powers and the drastically different explications that are currently being employed by the bench, the President and Congress are left in limbo with regard to the doctrine.

In nearly all of the cases that have arisen in the last two decades, the Court has employed one of two basic approaches to the Constitution in justifying their confounding decisions. The first, which supports the idea of a unitary executive, is generally referred to as the formalistic approach. This perspective on the Constitution was originally put forth by Chief Justice Taft in the *Meyers* decision. Today, its best known followers have been Chief Justice Burger, along with current Justices Scalia and Thomas.(Smith 1995, 49). This approach, is easily the Court's most dominant. However, its own success has forced controversial aspects of the approach to come to light. This, in turn, has led to a Court which has seen the opportunity to usurp more power for itself over the other two branches by forcing them to rely upon judicial approval to effectively institute public policy.
It is fairly obvious why formalism is highly regarded by many judges. Its roots lie in what “every school child learns”.(Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)) about separation of powers. This learning proposes that there are three discrete branches of government, each exercising one of three distinct powers. Within it, the legislative, executive, and judicial each controlling their own sphere of government without hindrance or infringement by either of the other two branches. Within this schema, it is supposed that the powers which mark the respective domains of each branch are readily definable and easily identified. The domain of the executive is especially broad under this approach, amounting nearly by default to any governmental action outside of passing a law or adjudicating a case.(Flaherty 1996, 1828) The need to contain this executive power and limit it to a manageable sphere lies at the heart of the arrangements made between Congress and the President. The Supreme Court is now trying to nullify many of these arrangements through their use of formalist principles. This has led to nothing less than judicial activism by the Supreme Court through the overturning of long held and carefully contrived methods which Congress and the executive had worked out for the functional maintenance of government.

Much of the judicial activism in this area has sprung from two major decisions handed down by the Burger Court.(Flaherty 1996, 1735) The first of these decisions came from the landmark Immigration and Naturalization Service v. Chadha case (462 U.S. 919(1983)) The opinion in this case was written by the Chief Justice himself. As an admitted formalist, Chief Justice Burger wrote an opinion which set the tone for the strict formalism that is being employed today as precedent.
The case itself dealt with a fairly simple immigration issue. Jagdish Chadha was born in Kenya to Indian parents holding British passports. He came to the United States for the purpose of study, in the late 1960's. When his student visa expired, neither Kenya nor Great Britain would let him return. Chadha then applied for permanent residency in the United States. After a lengthy application process, the Immigration and Naturalization Service (INS) approved his application. Two years later, the U.S. House of Representatives voted to "veto" the INS decision. Thus, Chadha faced deportation proceedings.

In this instance, the Congress attempted to utilize a "legislative veto" (462 U.S. 919 @ 956). This concept had been employed since the early 1930's when Congress invented it to retain some control over the power delegated to the President in the reorganization of the executive branch agencies. By the mid 1970's, in the aftermath of the Watergate scandal and the Vietnam War, the use of the legislative veto to control excesses by the President became an attractive option.

At the same time, regulations began to pour out of these executive agencies like flood waters over a breaking dam. These regulations were part of the implementation process for all of the environmental, consumer, and other social legislation that had been passed over the preceding decade. As Congress saw it, Washington bureaucracies were trying to expand their power through these regulations. Moreover, they saw the use of the legislative veto as their only recourse to contain their activity. With the legislative veto, Congressmen were able to respond to the complaints of powerful businesses and industrial interests. Public interest, however, was on the side of the regulations. In fear that they would lose ground if the legislative veto were to be allowed to continue,
consumer advocate Ralph Nader appointed his chief litigator, Alan Morrison to Chadha's case.

This case moved from the realm of being important to one man, to a level of importance for all businesses and consumers, then finally to the point of being crucial to our entire governmental system. The pinnacle was reached when Department of Justice attorneys from both the Carter and Reagan administrations joined the case to support the decisions of the INS. By joining Morrison and his attempt to strike down legislative veto powers they put Congress in the 'hot seat'. To counter, Congress intervened to defend the constitutionality of the process that had been in practice for over forty years. Thereby, this small case had turned into a clash of the titans: the President and the Congress.

In the opinion, Chief Justice Burger made his formalist point by stating that the Constitution provides “a single finely wrought and exhaustively considered procedure” (462 U.S. 919 @ 951) for the legislature to follow. He goes on to note that the “Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”(462 U.S. 919 @ 945) All actions by the Legislature must follow the legislative process established in the Constitution and “contain matter which is properly to be regarded as legislative in character and effect.”(462 U.S. 919 @ 952) This “legislative character and effect” includes actions which have the “purpose and effect of altering the legal rights, duties and relations of persons outside the legislative branch”. (462 U.S. 919 @ 952) Most importantly, he notes that legislative vetoes represent an attempt by the Congress to subvert the “step-by-step deliberate and deliberative process.” (462 U.S. 919 @ 959) and are thereby, unconstitutional.
Concurring opinions in this case also emphasized that Chadha’s constitutional rights had been violated in a similar analysis. They concurred that the Constitution had been violated, but on narrower grounds. In this analysis, the immigration authority could not be overruled without sending the matter before both houses of Congress and proper presentment to the President. Thereby, justification for both of these opinions lie in the formalist explication of the Constitution.

In one stroke of the pen, the Court had overturned more congressional enactments, than it had in its entire history prior to Chadha. (Barbara Craig in Hall 1992, 422) It had taken the practice of allowing Congress and the Executive to work out as many of their differences as possible on their own, and forced them to meet a strict formalist doctrine. Through this formalist interpretation the judiciary has increased its power over the other branches of government and perhaps moved itself into the position of no longer being deemed the “least dangerous branch.”

This opinion and approach to separation of powers was reinforced and drawn upon in another Burger Court decision three years later. In Bowsher v. Synar\(^\text{33}\), the Supreme Court struck down a key provision of the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985. This statute provided that there would be progressive cuts in the federal budget deficit as directed by Congress. The point of contention came in respect to the solution that the act employed when Congress could not reach an agreement. In such an instance, the Comptroller General would be authorized to specify which cuts would be made. It was at this point that the defined spheres of authority within the formalist perspective became offended. The Comptroller

\(^{33}\) (478 U.S. 714 (1986))
General was regarded as a legislative position in that the person who held the office could only be removed through a joint resolution of both houses of Congress. (Thomas O. Sargentich in Hall 1992, 80) In the formalist perspective, it was agreed that the specification of budget cuts was an executive branch function. In light of that, the act called for a legislative officer to perform executive duties, thereby, violating the separation of powers. (Haltom 1989, 135) More specifically, as the Comptroller was given a power that "plainly entailed execution of the law in constitutional terms", (478 U.S. 714 @ 732) rather than the formation of law she had stepped out of her constitutional sphere.

These cases have provided the Court with a framework of separation of powers that has endured, and probably will continue to do so. Its influence was seen in the 1991 case of Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise\textsuperscript{34}, which demonstrated both the perspective's current strength and its internal weaknesses. The case considered the constitutionality of a review board that was to be composed of nine members of Congress that would have 'veto' power over major decisions made by a joint authority established by Virginia and the District of Columbia to act as administrators for National and Dulles Airports. These airports had previously been run by the Federal Aviation Authority (FAA); however, control had been handed over to the regional authorities in 1989. (Calebresi, Prakash 1994, 628)

In this decision, the Court found that formalist separation of powers had been infringed upon twice over. If the Court held that the joint airports authority exercised legislative powers, then the review board violated the precedent set in Chadha. In this

\textsuperscript{34} (501 U.S. 252)
capacity, the nine members of Congress that sat on the board, made law without adhering to the rules of bicameralism or presentment. Moreover, they did so without even gaining the assent of one house of Congress. On the other hand, if the authority held executive power, then the review board violated *Bowscher*. (501 U.S. 252 @ 275-276) Within this view, the law was not only being ‘executed’ by congressional authorities, the authorities themselves were members of Congress. In the formalist viewpoint, there was no way for Congress to win.

Justice White’s dissent allows a glimpse into the weaker parts of this argument. He is quick to note that “The majority never makes up its mind whether its claim is that the Board exercises legislative or executive authority.” (501 U.S. 252 @ 290) As previously noted, this is exactly the determination that formalism believes will be so easy and will always be so clear. At the center of the formalist belief is the idea that the three disparate branches exercise three distinct powers, in three absolutely divided spheres. If this were true, then the same power could not violate both the sphere of the Executive and of Congress at once. The Court’s lack of definition on this point may simply be indecision; however, it is more likely the case that the tasks of agencies like the FAA simply do not fall into any of the three rigidly defined formalist categories. (Flaherty 1996, 1736)

It has been proposed that bureaucracies like the FAA and the INS have taken on characteristics that would place them in a fourth branch of government. (Tarr 1994, 73) Regardless, ignoring the special place that these agencies have grown to occupy in our governmental system seems to be a grave error on the part of the Supreme Court. In the search for the originally intended role that the judiciary should play, the Court has fallen...
prey to an oversimplified idea that the Framers knew exactly what they meant and were able, unlike the rest of us, to put it down on paper leaving no need for interpretation.

Thus, it is only appropriate to inquire whether the Framers 'intended' formalism the way that Justice Scalia and his followers presume. As an executive branch lawyer, Justice Scalia helped to formulate the unitarian strategy for the *Chadha* case. (Flaherty 1996, 1742) Since becoming a Justice, he has become the Court’s strictest follower of the formalist doctrine. As the only dissenting justice in *Mistretta v. United States* he refused to budge on the idea that judges could work together with legislators, even on the ideas of sentencing reform. As a scholar, Justice Scalia has sung the praises of presidential and legislative accountability, and he has done so in the name of the Framers. (Smith 1995, 51)

Perhaps the clearest evidence of the justice’s unwavering devotion to this dogma was his lone dissent in *Morrison v. Olson*. In this case the issue of whether statutory limitations could be placed on the removal of executive officials was examined. The Court found that they could -- at least in the case of independent counsel. Justice Scalia, however, kept full faith that the Constitution assigns three clearly defined powers to three distinct branches. He thereby chastised the majority’s opinion for “avoiding the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States, it is void.” (487 U.S. 654 @ 705) In striking contrast to his individual rights jurisprudence which is strictly textual, Justice

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36 488 U.S. 361 (1989)
Scalia bases his separation of powers beliefs on inferred ideas from the tripartite structure of the Constitution and the Vesting Clauses\textsuperscript{38} of Articles I, II, and III. He then supplements this inference with history, particularly through the use of bits and pieces of the \textit{Federalist Papers}. In addition, he continually relies upon Article XXX of the 1780 Massachusetts Constitution.\textsuperscript{39} This contains an express separation of powers provision that fully supports modern formalism; however, its impact seems to be lost in its conspicuous absence from the Federal Constitution.(Adams 1980, 76)

Two noted political scientists have endeavored to advance this line of thought on a historic basis. Their works argue that the Founders clearly intended that the President alone, as a unitary actor, would be accountable for the execution of federal law.(Prakash 1993, 992-4) They base their opinion on two points. First, the drafting of various clauses of the Constitution. These include, the Vesting Clause\textsuperscript{40}, the Take Care Clause\textsuperscript{41}, the Opinions Clause\textsuperscript{42} and the Necessary and Proper Clause.\textsuperscript{43} (Calabresi, Prakash 1994, 582 - 634) Secondly, they rely on various \textit{Federalist Papers} excerpts to clarify the idea that the President was intended to act as a unitary actor. Within this framework, they try to prove that the Framers intended that there would be a formal separation of powers into three distinct spheres. Their research however, seems to ignore

\textsuperscript{38} U.S. Const. Art II, § 1, cl. 1
\textsuperscript{39} "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men"
SEE both his Morrison and Mistretta dissents
\textsuperscript{40} U.S. Const. Art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States")
\textsuperscript{41} U.S. Const. Art. II, § 3 ("He shall take Care that the Laws be faithfully executed ...")
\textsuperscript{42} U.S. Const. Art. II, § 2, cl. 1 ("He may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices ....")
\textsuperscript{43} U.S. Const. Art. I, § 8, cl. 18 ("To make all Laws which are necessary and proper for carrying into Execution the foregoing powers, and all other Powers . . .")

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the formation of the bureaucratic state in which we now reside. Perhaps, they would argue that adherence to the strict formalism that the founders intended would have prevented the formation of such a state in the first place. Nonetheless, now that the condition is upon us, having a judiciary which ignores its existence and the relative lack of power that the 'unitary Executive' has over them has created a situation in which the Court has afforded the bureaucracies more power by not allowing the Congress to help in their control and maintenance. (Prakash 1993, 1012)
CHAPTER V

FUNCTIONALISM: THE STRUCTURAL APPROACH TO SEPARATION OF POWERS INTERPRETATION

Although formalism has dominated the Bench's ideology with respect to the Separation of Powers Doctrine for at least the last twenty years, there are those both inside and outside of the judiciary who view history, the Constitution, and the intended role of the Supreme Court quite differently. The model that many of them advocate, which can best be called functionalism (Flaherty 1996, p. 1736), which views the separation of powers doctrine as both undeveloped and pragmatic. Like Justice White's dissent in Metropolitan Washington Airports Authority, functionalists reject the idea that there is some global framework that can identify the nature and place of all powers in advance. This view does not try to argue against the idea of structure in government; rather, it recognizes that the Constitution sets forth "certain fundamental boundaries among the three branches, mostly in clear text, and mostly at the highest level" (Casper 1997, p. 212). Examples can be seen as follows: only the President can, subject to the advise and consent of the Senate, appoint ambassadors and judges to the Supreme Court; Only the Supreme Court, subject to congressional regulation, shall have appellate jurisdiction in federal cases.

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44 U.S. Const. Art. I, § 7, cl. 2
45 U.S. Const. Art. III, § 2, cl. 2
Despite these instances, the functional approach is not strictly textual. It is concerned with the maintenance of equilibrium in the separation of powers system through the control of governmental goals and the devices used to achieve them. In light of this, if the goal of Congress were to maintain equilibrium in the system, rather than disrupt it through the use of the legislative veto then it should have been found Constitutional. Thus, even though the device may have been in violation of some of the finer points of the separation of powers doctrine, if its function was to support the doctrine, then it would be functionally sound. Before alarms begin to go off shouting that the "ends are justifying the means" or that the "tail is wagging the dog", one must first re-evaluate original intent in this matter. The formalist sees all devices that are not fully congruent with the rigid tripartite division of powers as destructive to the ideal of separation of powers; the functionalist is not quite so sure.

In the functionalist schema, the Constitution does not preclude, and may even invite, the legislature, the executive and the judiciary to share power in creative ways. "So long as what emerges does not upset the specified design at the top of the structure, and so long as they do not infringe the basic and strongly implied goals of separation of powers, whatever emerges is fair game."(Flaherty 1996, p. 1737) Thus, Congressional regulation of the executive can be a valid exercise of power. This is true even if the limitation takes "the form of a legislative act short of a statute" (462 U.S. 919 @ 967) as was the case in Chadha, or if the regulation "is more like an executive measure undertaken by agents answerable to Congress"(478 U.S. 714 @ 760) as in Bowsher. These appearances are of little regard to functionalists. What matters is whether the
arrangement undercuts a more fundamental value that the division of powers was meant to advance in the first place. This viewpoint is clearly expressed by Justice White in his dissent against the formalist reasoning used to decide the *Chadha* case. Here he writes that:

> . . . The Constitution does not directly authorize or prohibit the legislative veto. Thus, our task should be to determine whether the legislative veto is consistent with the purposes of Art. I and the principles of Separation of Powers which are reflected in that Article and throughout the Constitution. We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence. From the summer of 1787 to the present the government of the United States has become an endeavor far beyond the contemplation of the Framers. . . . But the wisdom of the Framers was to anticipate that the nation would grow and new problems of governance would require different solutions . . .

He then goes on in that dissent to point out the gaps that the Formalist’s easily definable and clearly identifiable spheres of authority leave for the bureaucracy to fill. Through a number of different cases[^45], he shows that the Court’s formalistic analysis provides that “legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation.” However, the limitations of Article I are similarly understood as “forbidding Congress from also reserving a check on legislative power for itself.” In the end, his analysis shows that the effects of formalism have been to allow Congress to delegate lawmaking powers to agencies that it does not have the power to perform itself. Logically, he believes that this could not have been what the Framers intended.

Framers intended from separation of powers, nor could it possibly be sound constitutional law.

Justice White would agree that the Formalist's positive reading of the Constitution seems to contradict the "structure" structure of the Constitution. These positive analyses treat "The separation as an end, but it was designed as a means to prevent usurpation and to promote efficiency." (Haltom 1989, 132) Despite this, the Functionalist view of separation of powers has only seen modest victories in comparison to its formalist counterpart. However, the fact that it has seen any success at all reinforces the idea that there is ambiguity in Court decisions on this issue. More importantly, there is not even a definable point that the Court rotates its opinion around. An analysis of functionalist Court victories will solidify this argument.

As previously mentioned, *Morrison v. Olson*[^46] was decided in favor of a less rigid separation of powers. The decision not only allowed an independent counsel to be appointed by a court to perform the Executive function of investigating government officials under Title VI of the Ethics of Government Act of 1978, but also allowed that this official's dismissal, being rendered by joint Congressional action, was not an unconstitutional limitation of executive authority. This muddying of the waters between the spheres demonstrates a turn from *Chadha* and *Bowsher*’s formalism.

In spite of this apparent change of heart in regard to strict formalism, the functionalist perspective was clearly born long before that decision. The perspective may

have emerged from the opinion written by former President and then Chief Justice William H. Taft in *Myers v. United States*\(^{47}\). This opinion which took a hard formalistic approach which gave the President unlimited removal power of all government employees on the ground that the President is ultimately responsible for seeing that the laws are faithfully executed. In a time when administrative agencies were proliferating, the decision threatened the policy making functions of Congress by allowing policy to be made through regulations of the bureaucratic agencies. Most importantly, the hard stand which was taken by Chief Justice Taft opened a Pandora's box on the subject.

From that time on, the Court was pressured to alleviate the potential disaster of executive supremacy which loomed from the *Myers* decision. Arguments that such a formalistic reading of the separation of powers doctrine disrupted checks and balances while giving the Executive a disproportionate share of the power in government led to the unanimous decision in *Humphrey's Executor v. United States*.\(^{48}\)

In this case, the issue of whether President Franklin D. Roosevelt had the power to remove any government official was re-evaluated. Justice Sutherland, speaking for a unanimous Court held that an unqualified removal power violated the 'intent' of separation of powers. He asserted that the commissioner whom the President was trying to remove served a quasi-legislative and quasi-judicial role, unlike the postmaster in the *Myers* case. Therefore, it would be extralegal for the President to try to remove someone

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\(^{47}\) 272 U.S. 52 (1926)

\(^{48}\) 295 U.S. 602 (1935)
from such an office. Side-stepping the fact that they were overturning precedent, the Court now established a functionalist precedent that could not logically coexist with that from the *Myers* decision. Thereby, the ambiguity through which the Court today is able to use separation of powers at its leisure was born.

Perhaps the most influential case involving the functionalist viewpoint was that of *Mistretta v. United States*. This case shows how through functionalism, the overlapping of the various spheres of the separation of powers doctrine can benefit both government and society. In 1972, an influential federal judge by the name of Marvin E. Frankel made a proposal that excited some, yet scared many more. He proposed the formation of an expert rule-making agency that wrote guidelines for criminal sentences. Interest, despite the skeptics, was great enough for three states - Minnesota, Washington, and Pennsylvania - to adopt sentencing commissions that would set guidelines for criminal sentencing in their respective states. (Hirsch, Knapp, Tonry 1987, p. ix) The work of these sentencing commissions was applauded by the public and legislators alike as the answer to unwarranted disparity in criminal sentencing. With the success of these commissions at the state level, Congress enacted the Crime Control Act of 1984, which included the Sentencing Reform Act of 1984, and with it, the United States Sentencing Commission:

> to establish sentencing policies and practices for the federal criminal justice system that provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences

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49 488 U.S. 361(1989)
when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

Thus, the policy of indeterminate sentencing, in which judges had relatively no one to answer to in regard to the length of the sentences they imposed, was about to encounter a drastic change. With the commission would come a new age of severe restrictions on the discretion of both judges and prosecutors with respect to their ability to influence the sentences of those accused and/or convicted of crimes.

Although this reform was to be a drastic change for everyone who participated in the sentencing process, its concepts were far from new. Mandatory punishments were first used in America as the colonial legislatures began to affix penalties to most criminal offenses. Moreover, they allowed courts little or no flexibility in regard to the imposition of penalties in individual cases. This practice, however, became increasingly rare by the turn of the nineteenth century. Most states began to see the rigid colonial sentencing schemes as tools of government oppression and thereby, began sentencing reforms. These reforms often restricted capital punishment, abolished many forms of corporal punishment, and made imprisonment the principal method of punishing offenders. Many early nineteenth century legislatures set maximum permissible punishments for various offenses, depending on the seriousness of the offense. Beyond these maximums, sentencing judges were allowed to determine the actual duration of the sentence on a case by case basis. Therefore, the trial judge could impose any sentence that did not exceed

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50 Legislatively determined punishments in British colonial courts included fines, whipping, forced labor, the pillory, and death. The French Penal Code of 1791 is another example of this.
the maximum allowable sentence, based on "the nature and aggravation of the offense". With this, the precedent of indeterminate sentencing in America was born.\(^{51}\) (Lowenthal 1993, p.68)

Mandatory punishments disappeared for the next century, until 1926 when the state of New York enacted a statute requiring a life sentence for any person convicted of a felony offense who had two prior felony convictions. In the years between the world wars, most states enacted similar laws aimed at habitual offenders. Most of these required courts to impose life sentences for third or fourth time felony convictions.\(^{52}\) Other than these early recidivist laws, and one provision enacted during the 1950's, the major elements of today's mandatory sentencing scheme did not begin to surface until the 1970's.\(^{53}\) (Meierhofer 1992, p. 893)

In the early 1970's, the civil rights battle commanders of the previous decade began to focus their attention on inequities within our justice system. It was (and still is) a universally held belief that criminal offenders, with similar criminal histories, who committed similar offenses under similar mitigating circumstances, should receive similar sentences.(Hirsch, Knapp, Tonry 1987, p. 14) This did not seem to be the case, especially for young, black, male offenders. Karl N. Llewellyn Professor of Jurisprudence at the University of Chicago Law School, went so far as to conclude his 1978 study by saying that:

\(^{52}\) By 1949, 43 of the 48 states had enacted habitual offender statutes.  
\(^{53}\) In 1953, California enacted a statute requiring that if a person used a firearm in the commission of a felony, the court was to impose a 5 to 10 year sentence on top of the sentence for the original offense.
Obviously, judicial decisions are not made uniformly. Decisions are made according to a host of extralegal factors, including the age of the offender, his race, and social class. Perhaps the most obvious example of (misuse of) judicial discretion occurs in the handling of persons from minority groups. Blacks in comparison to whites, are convicted with lesser evidence and sentenced to more severe punishments.

(Tonry, Zimring 1983, p. 116)

Thereby, the most fundamental theme in the indeterminate sentencing scheme that begged for reform was the issue of sentence disparity. Legislators were then faced with a number of ongoing and serious complaints about the performance of the justice system, with racial disparity at the forefront. Additional complaints centered around the goals of sentencing. These goals, which include deterrence, incapacitation, just punishment, and rehabilitation, were all failing to be met in the public’s eyes. This created a substantial amount of pressure on legislators to make the people of our nation regain confidence in our federal judiciary.

All of this leads inevitably back to the theory of just punishment - it is, after all, where the controversy began. If judges had given out just sentences, our justice system would not have been in the turmoil in which it found itself - or so the argument goes. The reality is that no two people, let alone judges, have exactly the same concept of justice. Without the same concept of exactly what justice is, how could anyone expect them to come up with the same sentences under an indeterminate sentencing schema? One must understand that as each judge formed his/her opinion of what constituted a just punishment and then sentenced under those guidelines, it was inevitable that disparities

54 These four basic purposes of sentencing are taken from 18 U.S.C. § 3551 & 3553.
would exist. Solving this problem became a major emphasis of the Sentencing Commission. (Hirsch, Knapp, Tonry 1987, p. 6)

In 1984, the legislature identified the preceding problems within our justice system as being in dire need of remedy. Without the fundamental knowledge required to establish "just" sentencing guidelines, they created an administrative agency to be located within the judicial branch, called the United States Sentencing Commission, to establish mandatory sentencing guidelines for all federal district court judges to follow. This commission was to be made up of seven voting members who serve six year terms and who may not serve more than two terms. The members of the Commission are appointed by the President, and at least three of them must be federal judges. Their original job was to create a set of universal sentencing guidelines that established limited sentencing ranges, but within which, judges would still retain some discretion. The guidelines were also to provide for upward and downward adjustments to sentences with respect to mitigating factors which warranted the adjustment.\(^55\) This project was completed in 1987 and put into effect. (Hirsch, Knapp, Tonry 1987, pp. 16-18)

At this point the opponents, mainly judges, of sentencing reform made their move. Between 1987 and 1989, the sentencing guidelines were found to be unconstitutional over a hundred different times by federal district courts. The majority of these findings were based on the fact that the Sentencing Commission was a legislative agency, placed in the judicial branch, and given the executive powers of enforcement. Many judges thought

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\(^{55}\) For a complete list of these adjustments, see 28 U.S.C. § 994.
this to constitute a clear violation of Article III of the Constitution and refused to use the Sentencing Commissions guidelines.

Article III, Section 1 of the U.S. Constitution states that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." It was argued by these judges that as the Constitution makes no provision for Congress to establish anything within the judicial branch other than inferior courts, that the establishment of the Sentencing Commission there was a violation of the Separation of Powers Doctrine. Therefore, any rules made by this organization should be considered null and void by virtue of it being an illegal body. (Meierhofer 1992, p. 896) Moreover, many of these judges felt that the establishment of the United States Sentencing Commission was actually a legislative "Marbury v. Madison". They believed that Congress was trying to establish legislative supremacy over the judicial branch in one of their most important duties; sentencing. To refer back to the words of Learned Hand:

Indeed, it is to be understood that the three "Departments" were separate and coequal, each being, as it were, a Leibnizian nomad, looking up to the heaven of the Electorate, but without any mutual dependence. What could be better evidence of complete dependence than to subject the validity of the decision of one "Department" as to its authority on a given occasion to review and reversal by another whose own action was conditioned upon the answer to the answer to the same issue? Such a doctrine makes supreme the "Department" that has the last word. (Smith 1995, p. 48)

Not all judges believed this line of reasoning; however, it was sufficient to put doubt in their minds about the Guidelines. In order to make sure that they were sentencing in a
constitutional fashion, the majority of these judges continued with their traditional indeterminate sentencing schema, until the matter was resolved by the Supreme Court. (Weis 1992, p.829)

In a case argued on October 5, 1988, John M. Mistretta brought suit against the United States challenging the constitutionality of the Sentencing Commission. The United States District Court for the Western District of Missouri determined that the sentencing guidelines were constitutional. Notice of appeal was then filed by Mistretta. Prior to the judgment of the Court of Appeals, certiorari was granted by the Supreme Court. The case was decided eight to one in favor of the United States and the Sentencing Commission. In the opinion of the court, authored by Justice Blackmun, it was admitted that the Commission was “an unusual hybrid in structure and authority”; however, it did not “affect the integrity or independence of the judicial branch”. Justice Scalia was the sole dissenter on the court, dissenting on the grounds that Article III of the Constitution was violated when federal judges served in a policy-making position in the executive branch. With this judgment, the Sentencing Guidelines took on the full force of law.

The Mistretta case stands as a clear example of an evil that had developed in government, which was resolved through an agreement between the executive, the judicial, and the legislative branch. Even though this agreement violated the formalistic concept of separation of powers, it helped to maintain balance and preserve justice.

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through the joint effort. Had Justice Scalia prevailed in his analysis of the case, the American people would be stuck with the disparate system of justice that had developed over the past two hundred years.

In terms of the historical debate, functionalist analysis is actually more deeply rooted than the formalist approach. The functionalists argue that the Founders themselves mainly employed a functional approach. (Flaherty 1996, p. 1744) They argue this along the lines that the Framers only specified a relationship amongst the branches at their respective peaks, therefore, leaving Congress ample room to structure the implementation of law below those peaks. (Greene 1994, p. 138) Both Abner Greene and Gordon Wood emphasize that the bottom line to the Framers was the idea of balance. Moreover, they would have been apt to abandon separation of powers at all but the highest positions if that abandonment were necessary to maintain balance. Through the use of The Federalist Papers, correspondence from the framers themselves, and other primary sources along with the Constitution; their analysis points to the probability that separation of powers doctrine is held in much too high regard by those who represent the formalist camp. More poignantly, a study of the first years of our nation under the Constitution, shows “frequent and robust Congressional involvement in the implementation of the laws, including criminal prosecution, the structure of executive departments, and opinions and administration.” (Solberg 1990, p. 397) All of this evidence points to the idea that the Framers supported a tripartite model of balance rather than a strict separation of powers.

A reconstruction of the founding period refutes the formalist claim even more
dramatically. Analysis of the times show that those who lived in the American political world at this time did not share the same definitions of words like "separation of powers", "execute the laws", or "legislate"; nor did they come to a consensus that a modern day formalist can easily identify. Along these lines, one must remember that a young John Adams called the English Constitution, "the most perfect combination of human powers in society which finite wisdom has yet contrived and reduced to practice for the preservation of liberty and the production of happiness."(Solberg 1990, p. 47) Screaming the praises of Montesquieu’s "mixed government" is hardly the same as supporting a rigidly structured "separation of powers".

Finally, it should be noted that the generally agreed upon lack of theoretical success with the Articles of Confederation was that there was too much reliance upon simple accountability\(^{58}\), not enough concern for efficiency and little or no sense of balance.(Wood 1969, p.153-54 ) As Willi Paul Adams notes, for the framers "Separation of powers served balance rather than balance serving a rigid, formalistic view of separation of powers."(Adams 1980, p. 185) This balance was believed by the Framers to signify a move away from the simple accountability which had proven to be so dangerous. Under simple accountability, our states saw the rise of legislatures run by demagogues, localism, and factions.(Wood 1969, p. 158) As James Madison wrote in a privately circulated memorandum entitled *Vices of the Political System of the United States*, "The short period of independence has filled as many pages as the century which proceeds it with ill-considered, unjust, and unrepresentative laws."(Solberg 1990, p. 124)

\(^{58}\) Accountability only to the electorate
Today’s Supreme Court, which embraces the formalist schema, returns us to the idea of simple accountability – at least in the executive branch. The refusal of the Court, in most cases, to allow the transcendence of the legislative and executive spheres for functionally sound reasons has allowed bureaucracies to run amuck. Moreover, in a masquerade of maintaining these spheres, the Court has volleyed back and forth between the formalists' dogma and that of the functionalists. The Judiciary is thereby playing the game of the *Prince*, making the other two branches subservient by keeping them unsure about the laws of the land. With the Court’s indecision, the easiest thing for Congress and the President to do has been to avoid the issue – which they have.

As Abraham Lincoln warned in his first inaugural address:

> The candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal.

*(DeHart, Meese 1997, p. 55)*

The American people may have become pawns of the federal judiciary and their proxies the executive branch bureaucracies. If this is so, it is a flaw that may prove fatal before it can be cured.

This is not to suggest that the Supreme Court or those who believe in rigid formalism act in bad faith. Rather, it suggests how even the purest intentions may lead to ill fated paths. In this case, the elimination of a muddling of the branches which had occurred since the Framers of that document were actually in political offices has increased the power of bureaucracies in our government. Perhaps, these men truly were
gifted with the power to see into the future. However, the purity of their intentions on this issue has not avoided a plethora of problems for American government. Problems, moreover, that have no simple solutions.

At the least, our Supreme Court needs to set us back on a path; whether it be the formalist path or the functionalist path, they need to make a clear decision. In this vein, Conservatives and Liberals alike should take their hats off to Justice Scalia. He, at least, has stood rigidly by his formalist viewpoint. An unwavering stance like this would allow the Congress and President to know exactly what they are up against so that they can attempt to find agreeable solutions. With this matter set aside, the government should be able to function with a little less ambiguity and put control back into the hands of the original three branches of government.
CHAPTER VI

HISTORIC PRACTICE and INSTITUTIONAL COMPETENCE: HOW THE BALANCE OF POWER HAS BEEN ALLOWED TO SHIFT

In Federalist 47, James Madison undertook the job of answering the Anti-Federalist Charge that the “the several departments are (not separated but) blended in such a manner as to at once destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.” (Wallace Mendelson in Hall 1992, 774) His answer was that Montesquieu, the proclaimed “oracle” of separation, did not mean that “departments ought to have no partial agency in, or control over, the acts of each other.” (Rossiter 1961, 301) The benefits of this “blending”, according to Madison, were that along with bicameralism and federalism it produced the safety of a checked and balanced system of government.

Through historically developed practices, the three branches of our government have attempted to provide answers for many of the Constitution’s ambiguities and silences. These arrangements have been particularly prevalent in the area of separation of powers. Like the proverbial snowball that rolled down a mountain and triggered an avalanche, the legislative practice of delegating a portion of their power to the executive has put the Supreme Court in a position of not being able to quell the tide without undoing years of precedent.

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One would naturally assume that a corollary to the Separation of Powers Doctrine would be that one branch of the government would not have the power to delegate its particular function to another branch. Moreover, by virtue of their power of judicial review, the Supreme Court Justices have the last word short of constitutional amendment on the allocation of authority among the three branches of the federal government. Still, in 1813 the Supreme Court rolled the snowball that would eventually lead to an avalanche of legislative powers being delegated to the executive branch.

The concern that underlies such delegation of powers surfaced as early as the Constitutional Convention. Madison moved that the President be authorized "to execute such powers (not legislative nor judicial in their nature) as may from time to time be delegated by the national Legislature." (Kammen 1986, 56) The suggestion, however, was defeated after an argument that the phrase was "surplusage". Although Madison was defended by Charles Pinckney who argued that it might "serve to prevent doubts and misconstructions" along with the delegation of "improper powers", the motion was defeated. (Kammen 1986, 58)

Regardless, the Framers must have thought that Congress would need to delegate discretion to the executive, within some limits, even though those limits were not explicitly identified. (Fisher 1981, 24) Analyses of both early congressional actions and the fragmentary case law of the Framers' generation are consistent with this general attitude. Between 1794 and 1810, Congress repeatedly authorized the President to lay or remove trade embargoes despite arguments that such power may be an exclusive legislative function that could not be delegated. (Fisher 1981, 26). The Supreme Court was asked to pass a first judgment on the subject in 1813, when it heard *The Brig Aurora*
v. The United States. Here, despite the argument that Congress had unconstitutionally transferred its legislative power to the President by allowing him to lift embargoes when France and England "ceased to violate the neutral commerce of the United States," the Court upheld the action. Justice Thomas Johnson justified the decision of the Court when he stated that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the statute either expressly or conditionally, as their judgment should direct." (Glennon 1984, 109)

Chief Justice Marshall's contribution to the subject of delegation occurred in Wayman v. Southard, which involved the delegation of power to the courts rather than the executive. The case, which questioned the constitutionality of the portion of the Judiciary Act of 1789 that gave the courts authority to make rules for the conduct of their business, was rejected by Marshall. In his opinion he writes that:

It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates these important subjects, which must be entirely regulated by the legislature itself, from those less interested, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details. . . . The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.

(23 U.S. (10 Wheat) 1 at 42-43, 46)

As later cases have shown, the limits of permissible delegation have definitely

59 11 U.S. (7 Cranch) 382 (1813)
60 23 U.S. (10 Wheat.) 1 (1825)
raised a "delicate and difficult inquiry". Until well into this century, with the exception of the *Wayman* case, delegation cases all involved direct grants of power to the President in the field of foreign relations (Shane and Bruff 1996, 112). The Court has consistently upheld legislation that has passed power to the President in this area. This has most consistently been related to the argument that because the Presidency enjoys advantages in "energy, dispatch, and responsibility," the executive is more institutionally competent to deal with foreign relations. Moreover, the basis of these decisions has been related to the historic practice that was established in *The Brig Aurora*, a practice that has been furthered by subsequent delegations and the Court decisions that have upheld them.

The confusion in this area as to the proper separation of powers begins to be illuminated by one of its most often quoted cases, *Field v. Clark*. This case questioned the constitutionality of a statute that granted the President power to suspend the free import of foreign goods if he found that the importing country was not granting American goods the same freedom. (Currie 1990, 18) For the Court, Justice John Harlan, delivered an opinion that stated a strict rule: "That Congress cannot delegate legislative power to the President is a principal universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Despite this, he went on to uphold the statute on the grounds that as the President's role in this instance was limited to fact finding and therefore execution: "He was the mere agent of the

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61 143 U.S. 649 (1892)
62 This is the Justice John M. Harlan who was appointed by President Hayes and served from 1877-1911; not to be confused with the Justice John M. Harlan who was later appointed by President Eisenhower.
lawmaking department to ascertain and declare the event upon which its expressed will was to take effect.'

This functional distinction between policy-making as a legislative function and fact-finding as an executive function clearly does not show distinction within the statute. Specifically, the statute called for the President to act when he believed that foreign duties were "reciprocally unequal and unreasonable." More than anything else, this decision pointed to the fact that a new doctrinal formulation was needed to allow Congress to grant substantial policy-making discretion to the growing federal bureaucracy. (Bruff 1987, 493)

By early in this century, that new doctrine was formulated and put into effect by the various powers of government. At this point, they shifted to a requirement that delegated legislative powers contain "standards" to limit the scope of executive discretion. The precedent for this was established in J. W. Hampton, Jr. & Co. v. United States, in which the Court upheld another statute allowing the President to equalize tariff rates. Here, the Court held that "if Congress shall lay down by legislative act an intelligible principle to which the (delegee) is directed to conform, such legislative action is not a forbidden delegation of legislative power." (Wallace Mendelson in Hall 1992, 777)

This "standards requirement" seemed to be an ideal compromise between principle and necessity. Since Congress cannot legislate in advance for every eventuality, and the executive may have a greater capacity to respond to unfolding events, the rule of

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63 276 U.S. 394 (1928)
law could be preserved through this requirement. Nevertheless, the Court quickly began reducing the “standards requirement” to one that held little meaning. In doing so, it approved a series of extremely broad delegations of power to executive agencies. For example, the Court allowed railroad regulation under “just and reasonable rates,” broadcast licensing in the “public interest, convenience, or necessity,” and trade regulation of “unfair methods of competition” (Shane and Bruff 1996, 112). Thereby, the rule was criticized for lacking teeth; however, the onset of the Great Depression gave it some strength as it came to be more strictly enforced.

The first delegation cases of the 1930’s involved the National Industrial Recovery Act of 1933 (NIRA), at one time President Roosevelt’s flagship legislation. To understand these cases (as with all major cases) they must be viewed in their extraordinary historical context. As this particular turn of events is unique in our history, it is worth examining in some detail. As the “Hundred Days” came upon our country, it was highlighted by the fact that “only at the level of the presidential office were the various party interests, the crisscrossing legislative blocs and the bustling bureaucrats, given some measure of integration in meeting national problems.” Furthermore, “nothing better exemplified this pragmatism – both in the manner it was drawn up or in its major provisions – than the National Industrial Recovery Act.” (Friedman 1985, 128)

The National Recovery Administration (NRA) had it origins with several congressmen, working independently to introduce bills that would modify the antitrust laws. Their goal was to prevent “unfair and excessive” competition by establishing councils in the main sectors of industry, trade, and finance, with some powers of self-government. The resulting bill was ambushed by all different kinds of groups, who
asserted that the antitrust laws must not be relaxed. Some said that the bill was a "sellout" to industry, others argued that it regimented industry too much, while still others believed that it failed to provide for currency inflation.

The final version, which became law, was a compromise between the various groups and theories. Accordingly, industrial councils could draw up codes of fair competition, but these had to be approved by the President. These codes were exempted from antitrust laws, but monopolistic practices were still prohibited. Having full force of law once the President signed them, the codes were enforced by a code authority for each industry established as part of the National Recovery Administration. The resulting codes were supposed to stop wasteful competition, bring about more orderly pricing and selling policies, and establish higher wages, shorter hours and better working conditions.

Roosevelt almost immediately lost control of the NRA. In the first rush of industrial enthusiasm, NRA coverage was extended so far that the machinery was nearly swamped. Within two years of the delegation of huge policy-making powers to businessmen (who may or may not have represented the myriad interests of their industries), Roosevelt trimmed the NRA's powers and limited its jurisdiction. By the time the Supreme Court could consider the NRA's constitutionality, it was near administrative and political collapse. (Friedman, 1985, 129-42)

The two cases that resulted from this legislation stand as anomalies in the arena of the Supreme Court declaring delegations of power by the legislature to the President invalid. It may have required something this bold, expansive and far reaching for the Supreme Court to realize how dangerous such delegations could be. Regardless, it was against this backdrop that the Supreme Court decided the challenges to the NIRA. The
first involved the NIRA's attempt to protect the petroleum industry from a flood of newly
discovered oil that was depressing the market. Part of the statute authorized the President
to prohibit interstate transport of petroleum produced in excess of the amount permitted
by any state law. President Roosevelt issued an executive order prohibiting such "hot
oil". Oil producers and refiners sought an injunction against the program. In *Panama
Refining Co. v. Ryan* the Supreme Court found that Section 9 (c) of the statute was
unconstitutional. Chief Justice Hughes took it upon himself to write the opinion of the
Court; which states:

in every case in which the question has been raised, the Court has
recognized that there are limits on the delegation which there is no
constitutional authority to transcend. We think that § 9 (c) goes beyond
those limits. As to the transportation of oil products in excess of state
permission, the Congress has declared no policy, established no standard,
has laid down no rule . . . If § 9 (c) were held valid, it would be idle to
pretend that anything would be left of the limitations upon the power of
the Congress to delegate its law-making function . . .

In that same session, another challenge to NIRA legislation struck directly at the
heart of the statute. *Schechter Poultry Corp. v. United States* asserted that Section 3 of
the statute provided that trade associations could promulgate codes of "fair competition,"
which, upon approval by the President, would have the force of law. The President was
only authorized to approve the code if he found that the trade association was
representative of the industry, that the code was not designed to promote monopolies, and
that the code would carry out the general policies of the Act. A trade group proposed a

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64 Section 9(c), 48 Stat. 200 (1933)
65 293 U.S. 388 (1935)
66 295 U.S. 495 (1935)
“poultry code”; the President approved it; the Schecters were convicted for violating it. They subsequently appealed the decision. (Hall 1992, 757)

In another opinion rendered by Chief Justice Hughes, the Supreme Court unanimously invalidated the statute, on three grounds. First, that the legislation could not be justified on the grounds of a national economic emergency. This was in spite of the fact that the Court had recently accepted the claim that the current agricultural emergency had justified mortgage relief for Minnesota farmers in *Home Building & Loan Assn. V. Blaisdell*; they now held that “extraordinary conditions do not create or enlarge constitutional power.” It is also important to note that the lone dissenter in the *Panama Refining Co.* case, Justice Cardozo, who had dissented on the grounds that the law had been justified by the current economic emergency, now sided with the Court.

Chief Justice Hughes’ second argument was that the statute had once again, as in *Panama Refining Co. v. Ryan*, unconstitutionally delegated legislative power to the President. In this case, the statute had given industry groups, with the cooperation of the President, authority to draft regulations covering the entire economic life of the country. Here, on his change of heart, Cardozo noted that “this . . . is delegation run riot.”

The third argument that Hughes uses against the statute was that the poultry code established regulation of local transactions, not interstate commerce that would be under Congressional control. Despite previous rulings that local transactions could be regulated by Congress if they had a direct effect on interstate commerce, the Court held that the effects cited here would be indirect rather than direct. Despite the difficulty in drawing a

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67 290 U.S. 398 (1934)
line between what was "direct" or "indirect", the Schechters' business was so clearly local that it would have been difficult for anyone to find their connection to interstate commerce. (Wallace Mendelson in Hall 1992, 757)

These two cases established what became known as the "non-delegation doctrine"; however, that doctrine stood only in relation to the NIRA and its unique provisions. Though this doctrine would raise its head again from time to time, it never gained the full force of law. More importantly, it failed to undo two things that its predecessors had done. First, it did not establish a reason to abandon the historic practice of the previous one hundred years in which the Congress had enjoyed free exercise over which powers that it could delegate. Secondly, it failed to prove either that the Congress was incapable of deciding which of their powers to delegate or that the President was incapable of executing those delegated tasks. With that in mind, it is only appropriate to examine how the previous doctrine of little or no judicial interference in Congress' delegation of power to the executive came back into favor.

The process actually began as the Court struggled with the idea of whether or not the delegation of legislative powers was fundamentally different in domestic and foreign affairs. Chief Justice Marshall saw no Constitutional distinction between foreign and domestic policy. If Congress had the power to enact laws that were necessary and proper to carry out its enumerated powers, then it had the power whether or not the subject was foreign policy. (Grimes 1955, 212) If Marshall were correct, then the Court had to struggle with finding a common ground in which efficient and energetic policy could be made to satisfy our foreign policy needs without granting the President too much control over domestic policy.
This dichotomy began just a year after the establishment of the “non-delegation doctrine”. In *United States v. Curtiss-Wright Export Corp.*\(^{68}\), the Court upheld a delegation of power to the President to prohibit arms sales to countries that were engaged in armed conflict in South America. The case is often quoted as the one that gave prerogative power to the President in the area of foreign affairs. Justice Sutherland’s often quoted opinion of the Court expresses their belief that legislation in “the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” This decision, which brings us full circle, back to the arguments for “federative” power that both Locke and Montesquieu grappled with, never explains why foreign relations should hold such a unique place in their jurisprudence. In looking at the decision, one begs to ask the Court to answer why other situations, like domestic emergency, may not deserve the same “exceptional” treatment. Regardless, the decision virtually reversed the “non-delegation doctrine” that the Justices had themselves established. They thus returned the Court to the earlier philosophy of allowing nearly any delegation of legislative power by the Congress – especially in the area of foreign affairs.

Beyond this consequence, in the attempt to maintain a formalist analysis in his decision, Justice Sutherland effectively created a separate sphere of authority for the President in the realm of foreign affairs. He explains this sphere as “the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress.” These two portions of the *Curtis-Wright* decision have

\(^{68}\) 299 U.S. 304 (1936)
lifted it up to the status of being an “oracle”. (Adler 1989, 160-1) It has led the judiciary to defer to “executive judgment” in cases involving executive agreements, travel abroad, treaty termination, and the war power.

In 1944, a 6-3 decision by the Court would extend the wholesale ability of Congress to delegate their legislative power to the domestic arena. Relying upon “war powers” the Court, in *Yakus v. United States*, rejected a delegation challenge to the World War II price controls that were administered by the Office of Price Administration.

The opinion by Chief Justice Stone clearly presents the Court’s belief:

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here . . .

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator’s permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices . . .

After justifying the decision on the basis of “war powers” and effectively returning to the historic practice before the two NIRA cases, Chief Justice Stone then goes on to explain why the details of this case were different than the ones considered in those earlier cases.

Here he explains that:

The act is unlike the National Industrial Recovery Act considered in *Schechter Poultry Corp. v. United States*, which proclaimed in the broadest terms it purpose “to rehabilitate industry and to conserve natural

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69 321 U.S. 414 (1944)
resources.” It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated.

At this point, the Chief Justice gets to the main purpose in his argument: to grant the legislature the fairly autonomous ability to delegate their power. In doing so, he also defines to Court’s purpose in this transaction of power, as being to assure that Congress’ goals in delegating power are met by their delegees. In his words:

Acting within its constitutional power to fix prices it is for the Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of the courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks within which the Administrator is to act so that it may be known whether he has kept within it compliance with the legislative will. Only if we could say that there is an absence of standards for the guidance of the Administrator’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation. The standards prescribed by the present Act, with the aid of the “statement of the considerations” required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards.

(Shane and Bruff 1996, 118)

Clearly, the majority of the Court’s reasoning in this case had little reliance on congressional war power. Moreover, in countering the Schechter Poultry decision, it set the Court back onto the path of using historic practice and institutional competence as the basis for its decisions regarding the delegation of legislative power. Indeed, Yakus initiated a string of decisions that rejected challenges to domestic legislation on the basis
of improper delegation. This trend, in turn, has continued unbroken to the present.

(Choper 1980, 76)

In the past twenty years, as formalism with respect to the Separation of Powers Doctrine has dominated the Bench, two cases have arisen that have cemented the legislature’s ability to delegate power. The weight of decisions by Congress to delegate such authority has also been increased through another. It is with these three decisions and the formalistic decisions already discussed in mind, that the ambiguous nature of today’s Separation of Powers Doctrine can truly be seen.

The first of these cases, *Immigration and Naturalization Service v. Chadra* 70, indirectly asked the Congress to be certain that they wanted and/or needed to disperse the powers that they were delegating. In overturning the historic practice of a one House “legislative veto” over executive department actions, the Court effectively said that once a power has been handed out, only the slow and deliberative process of approval by both Houses and presentment to the President can return that power to Congress. In eliminating Congress’ “check” on their own actions, the Court has quietly asked them to cut back on the amount of legislative power that they were delegating to the executive branch and its agencies. In Justice White’s biting dissent in the case, he notes that: “restrictions on the scope of the power that could be delegated (by Congress) have diminished and all but disappeared.” He adds that this formalistic reading of the Constitution was incompatible with the historic practice of allowing the Congress to delegate powers when he notes that the Court’s decision destroyed “an important if not

70 Previously discussed in pages 75 - 78 of this Thesis.
indispensable political invention that allows the president and Congress to resolve major constitutional policy differences, assures the accountability of independent regulatory agencies and preserves Congress's control over lawmaking.” If the intentions of the Supreme Court were to force Congress to decrease the amount of power that it was delegating, the Court has failed. More importantly, the outcome of the decision has been to allow executive agencies to make policy decisions without being hampered by the threat of the legislative veto. This, if anything, has increased the amount of legislative power that the bureaucracies are able to wield. (Bruff 1987, 518)

In both *Morrison v. Olson*71 and *Mistretta v. United States*72 the Court approved the creation of positions, located within other branches of the government, which were accountable only but remotely to the branches that they were located in. To each of these positions (in the case of *Mistretta*, a board) the Congress delegated substantial powers. However, since in both cases, the Act that established the positions set forth adequate minimum standards, their creation was upheld. To those who advocate a formal separation of powers (like Justice Scalia), both of these creations would appear to be the monstrosities of a government that was abandoning the separation of powers altogether. However, they also stand as proof that the use of historic practice and institutional

71 487 U.S. 654 (1988) upholding a statute that provided for an independent counsel (under the Attorney General) to investigate possible federal criminal violations by senior executive officers. This officer was only to be removed for “good cause” by the Attorney General.
72 For a full discussion of *Mistretta*, see pages 86 - 93 of this Thesis.
competence hold at least equal weight to the formalistic approach that has arguably dominated separation of powers Court decisions over the past two decades.\(^7\)

The Supreme Court has not invalidated a Congressional delegation for over half a century. It seems obvious that some broad and even careless standards have survived. (Shane and Bruff 1996, 127) Primarily, this has been due to the Court's inability to define a sufficient standard for delegation. As it refused to follow the lead of the "New Deal" cases, the Justices opened the door for immense policy making authority to be transferred to executive agencies. Their inability to reach a consensus on the approach that they are using to interpret the Separation of Powers Doctrine has also led to more judicial legislating than ever before in our history.

Under present conditions, when Congress delegates without any guidance from the courts, the courts usually end up rewriting many of the statutes in the course of "construction." Since the Court's present procedure is always to try to find an acceptable meaning of a statute in order to avoid invalidating it, the Court is legislating constantly. Thus, it would seem that a return to the Schechter rule would be more consistent with the Court's general formalistic approach. Such a return would also act as a general Court order for the Congress to do their own work. In this scenario, the rule of law would act as a restraint upon rather than an expansion of judicial power.

Historically, rule of law, especially statute law, is the essence of positive government. (Choper 1980, 28) A bureaucracy in the service of a strong and clear statute would be more effective than ever before. (O'Toole 1987, 19) Granted, the rule of law

\(^7\) For a further example of the use of historic practice as the basis for decisions in recent years, see Touby v. United States 500 U.S. 160 (1991)
requirement would likely make the framing and passing of some policies more difficult.

Regardless, it only makes sense that if a program is to be acceptable, its backers should be able to reasonably state its purpose and means.
CHAPTER VII

THE VALUES APPROACH AND THE FUTURE OF THE DOCTRINE

Given the ambiguities and unclear intentions that the Framers' doctrine of separation of powers has presented the Supreme Court, the number of different perspectives from which a Justice could logically approach the Doctrine is astounding. Not only could the Justices argue that the answers to the questions that the Doctrine poses lie purely in text, or in original intent, or the structure of the Constitution, they may also argue that the Doctrine is rooted in historic practice, or even in the institutional competence of the various branches. Beyond these basic options, they may attempt to mix the various approaches into a unique new creation that they think truly gets to the heart of the Doctrine. As Philip Bobbitt so eloquently put it in his book, *Constitutional Fate*:

If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when you finished. . . . Furthermore, in a multi-membered panel whose members may prefer different constitutional approaches, the negotiated document that wins a majority may, naturally, reflect many hues rather than the single bright splash one observes in dissents.

If you take up my suggestion and try this sport you will sometimes find that there is nevertheless a patch of uncolored text. And you may also find that this patch contains expressions of considerable passion and conviction, not simply the idling of the judicial machinery that one sometimes finds in dictum. It is with those patches that I am concerned here.

(Bobbitt 1982, 94)
The type of analysis that should be considered here, can be termed “value based”. This type of argument is meant to cover a host of effects on interpretation that stem from values that the interpreter holds, but that are not necessarily related to one of the more conventional methods of constitutional interpretation. These values can, of course, have many sources, such as a sense of necessity in a particular situation or a person’s own political philosophy. The use of such values are not as prevalent in separation of powers cases as they are in individual rights cases, where their presence and effects are so often openly debated. Although their effects and usage may be more obscure, the presence of such interpretation deserves merit.

Not surprisingly, value judgments live in the Supreme Court’s efforts to draw the line between law and politics. It is here that the Justices may allow outside values to creep into their interpretation of a given statute. Furthermore, it is through these values that judges often decide exactly which approach to the separation of powers doctrine they are going to employ.

Individual Justices continue to engage in debates, traceable to Hamilton and Jefferson, over whether there is a strict or loose construction to the Constitution. They also struggle between interpretations that concentrate and those that disperse the powers of the national government. Similarly, in defining executive power, the Court is forced to weigh the comparative values of rules and discretion. This is particularly true as they examine the delegation of legislative power by the Congress to the Executive branch. The tradeoffs that Justices make to stay true to their values in such situations are often complex, yet subtle at the same time. For example, even when they recognize the need for discretion, the Court can compensate by implying requirements for legal controls that
assure accountability. Further, Justices can hide these value judgments in the language of
textual analysis, historic practice, or undefined powers. In the end, these values are either
well hidden in acceptable jargon or the Justices who employ them are regarded as
disreputable. (Shane and Bruff 1996, 14)

Although a cynical commentator could argue that “that is all that real ‘judging’ is
about,” it is more useful to see how such values have been employed in separation of
powers cases, in particular, their employment in two cases surrounding the Nixon
administration. The first of these cases, New York Times Co. v. United States74, is better
known as the Pentagon Papers Case. In this 6-3 decision, the division of the Court was
obvious in that each Justice wrote a separate opinion on the case. It revolved around
events that began on June 13, 1971. On that day, the New York Times published the first
installment of the “Pentagon Papers,” a classified, seven thousand page document
commissioned by President Lyndon Johnson’s secretary of defense, Robert McNamara.
The documents, which had been leaked by a dissident former bureaucrat in the national
security apparatus, revealed the deception and secrecy that revolved around the Vietnam
conflict.

Nixon administration officials originally only saw the documents as embarrassing
to previous administrations. However, with Henry Kissinger as his National Security
Advisor, Nixon realized that the publication endangered his own policies, patterns of
secrecy, and credibility. Most importantly, Nixon feared that future Presidents would
lose control of classified documents like these and potentially embarrass their
predecessors.

74 403 U.S. 713 (1971)

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The administration thereby secured a lower court order on June 15th, temporarily restraining publication. Three days later, the judge denied a permanent injunction, but a circuit court judge blocked publication until the government’s case could be appealed. On June 25th, the Supreme Court agreed to hear an expedited appeal on the case. (Stanley Kutler in Hall 1992, 588)

The government contended that publication of the documents would endanger lives, the release of prisoners of war and the peace process. Through these points, they tried to make the argument that without any statutory authorization, the President, in his role as commander-in-chief and steward of foreign relations, could create a legal norm of secrecy. They further argued that through these roles, he also had the ability to enlist the injunctive powers of the federal courts to enforce his norm against publications that posed a “grave and irreparable damage” to national security. (Shane and Bruff 1996, 672)

The government lawyers, by making this an issue of foreign affairs, caught the Court between its general leniency for executive discretion in that arena and its firm stand that there must be specific statutory delegation of such power in domestic decisions. This is compounded by the fact that as Justice Thurgood Marshall points out: “on at least two occasions, Congress (had) refused to enact legislation that would have . . . given the President the power that he sought in that case.” Despite all of this, the Court used conventional First Amendment analysis to decide against the permanent injunction that the government sought. In somewhat of a triumph in avoidance, the Court clearly ignored the textual argument that the First Amendment does not apply to actions of the President. (Bobbitt 1982, 101)
Through this decision, the argument can clearly be made that the Court was working on a value based interpretation of the Separation of Powers Doctrine. Looking at the particular functions, and the powers associated with those functions, that had been specifically delegated to the President by the Congress seems to be glaringly absent in the Court’s decision. The President’s ability to control information collected solely by and solely for the Executive reflection and decisionmaking in an area, foreign affairs, largely committed to the President, would seem reasonable. Taking into consideration past Executive action, there would appear to be a very strong case against using the First Amendment as a lever by which to alter the direction of such control and dissemination. (Bobbitt 1982, 103)

In sum, each Justice used his own value-based interpretation because the case raised a novel situation in which no prior doctrine had been established. To avoid establishing a doctrine, they failed to explicitly consider the first Amendment’s application to the Executive. The result was to simply add more confusion to the definition of the proper function of the executive in the separation of powers.

Three years later, President Nixon was once again on the ‘hot seat’. The case of *United States v. Nixon*\(^\text{75}\), allows another look at how the values approach can and has been used to justify Court decisions. The part of this case that value judgment revolves around is the concept of “executive privilege.” More precisely, the claim that was made by Nixon’s attorneys that he somehow had the privilege to withhold evidence on the grounds that confidential conversations were integral to the President’s decision making process and constitutional function. They further argued that the independence of the

\(^{75}\) 418 U.S. 684 (1974)

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Executive Branch within its own sphere, insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications through the doctrine of separation of powers. (Shane and Bruff 1996, 297)

This case, in many respects, put the Supreme Court on trial as much as it did President Nixon. It was asked to not only define the boundaries of Executive and Legislative function, but were also asked to decide where their own boundary lines were to be laid. Their response to the arguments for executive privilege is based on the following assertion:

Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

That is, without relying on evidence or precedent, and giving no reasons for avoiding either, the Court has determined that presidential confidentiality is not too diminished if the only people privileged to intrude upon it are federal district judges. From this assessment that the President's confidentiality would only be slightly damaged by such intrusions, the Court moves to explain why this trivial inconvenience is necessary. Chief Justice Burger surmises that this inconvenience is being offset by the duty of the Judicial Branch to do justice in criminal prosecutions. As he locates that duty in Article III, he has at once answered both the first and the second objections of the President. Not only is the President's interest in confidentiality outweighed by the interest the Court has in achieving a just criminal process, but his claim against the judicial subpoena is answered as well.
This argument, in itself, puts forth a value laced interpretation in that nowhere in Article III does it mention such a responsibility of the Court. Moreover, to place it there seems to exclude the responsibilities of the state courts, whose primary duty is to do justice in criminal prosecutions. The value, however, is explained when he writes that: “To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense.” Of course, this statement is either plainly false, since the prosecution has never been able to avail itself of compulsory process to get privileged material, or it is trivial, since it really means, “except when the evidence is privileged.” (Bobbitt 1982, 215)

The Court implies in its decision that matters of foreign and defense policy are privileged. It also observes that there is no precedent precisely on this point. Later, it announces that executive conversations and papers are constitutionally privileged materials, but only to the extent that they relate to the effective discharge of the President’s powers. Regardless, the Justices believe that to permit such privilege in this case would gravely impair the function of the courts: “The Constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the . . . administration of justice.” (Bobbitt 1982, 216)

The Constitutional bases that the Court relies on here are in the Fifth and Sixth Amendments. These, however, have always been construed to protect defendants rather than to be used against them. Even though privilege to information by the defendant nearly always makes things more difficult for the prosecution, the Court goes on to say that: “without access to certain facts, a criminal prosecution may be totally frustrated.”
Through this position, the Court infers a constitutional right of prosecutors to obtain evidence, a right that they further justify by invoking the "due process of law."

In sum, the Court held that any time a prosecutor reasonably demands the private tapes and/or papers of a sitting President, the President must give them to a district judge so that their relevancy can be determined. (Bobbitt 1982, 217) This decision has clearly not been held as precedent, if it were, our current President's legal problems would have been handled much differently. Moreover, such practice would have totally changed the process by which presidential decision making takes place.

The preceding argument should not be construed to say that the decision in United States v. Nixon was wrong. To the contrary, it was based on the essential American constitutional values that we have "a government of laws, not men" and "equal justice under the law." It just goes to show that traditional methods of interpreting the Separation of Powers Doctrine, or any other part of our Constitution, are not always the most appropriate.

Most importantly, The use of the values approach may be what saves the American doctrine of separated powers from becoming obsolete. As strict formalism has dominated the jurisprudence of the Court in recent years, many have begun to wonder what the future may hold for a doctrine that fails to adequately deal with one of the most powerful forces in our government - the bureaucracy. Others have questioned whether the historic practices that have gone along with doctrine have only created a monster, based on precedent, that no longer has a place in our government. Still, the Doctrine lives on mostly because our Supreme Court Justices have never lost sight of the fundamental values that underlie it. Those values, established by the framers of our Constitution as
“balance” and “accountability”, will allow the doctrine to live. They may even be what
will allow our government to survive the fate of every other empire that has existed in
world history.

The framers of our Constitution established much of that document for a relatively
small and simple nation. They were, however, privileged with enough foresight to
establish powerful doctrines that could be fruitfully modified by future generations. The
Separation of Powers Doctrine is but one example of this. Despite much criticism, our
Courts have not abandoned this doctrine. Nor have they tried to employ it as an iron clad
and absolute principle. This flexibility in the application of the Doctrine has indeed
established shifting soil upon which the great house has been built. I would contend here
that in the same vision as Chief Justice Rehnquist’s “living Constitution,” the Separation
of Powers doctrine needs to be able to mold itself into a shape that can coexist with
nature of the times. That shifting foundation, like one built to withstand earthquakes, will
express the evolving needs and desires of the populous, yet hold the great house together.


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