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The Most Dangerous Branch

Martin S. Flaherty

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Articles

The Most Dangerous Branch

Martin S. Flaherty†

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† Associate Professor of Law, Fordham Law School. Thanks for valuable discussions and suggestions to Bruce Ackerman, R.B. Bernstein, Jill Fisch, Jim Fleming, Mike Gerhardt, Abner Greene, Bob Kacorzowski, Jim Kainen, Mark Killenbeck, Larry Kramer, Larry Lessig, Alan Meese, Frank Michelman, Henry Monaghan, Bill Nelson, Liam O’Melinn, Russ Pearce, John Phillip Reid, Dan Richman, Paul Schwartz, Peter Shane, Peter Strauss, Steve Thel, and Bill Treanor. Thanks as well to the N.Y.U. Legal History Colloquium, at which I presented an earlier version of this piece. Also, thanks to Sanju Misra, Zane Hussain, Joe Laroski, and especially to Ed Shapiro for valuable research assistance.

I also wish to note Michael S. Paulsen’s The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 GEO. L.J. 217 (1994), which appeared as this Article was being written. I decided to retain the current title both because it is not identical with Professor Paulsen’s and because our two pieces deal with different topics. For a precedent, compare FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958) with BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).
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From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

—The Federalist No. 47 (Madison)

I. INTRODUCTION

Alexander Hamilton wrote that the judiciary was "the least dangerous" branch. But which was the most dangerous? James Madison, another alter ego of Publius, had no doubt. "The legislative department" he wrote, "is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." Publius therefore urged that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." Two centuries later, things look very different. Never has the executive branch been more powerful, nor more dominant over its two counterparts, than since the New Deal. Yet against this new vortex the Supreme Court has exhausted scarcely any constitutional precautions. To the contrary, the Court has done more to safeguard presidential power in the past two decades than at any time in our history. This inversion of the Founders' concern about the most dangerous branch—whichever branch that may be—hardly registers in modern separation of powers thinking. It should.

The dominance of executive power ought by now, to lift a phrase from Charles Black, to be a matter of common notoriety not so much for judicial notice as for background knowledge of educated people who live in this republic. The point holds, moreover, notwithstanding Congress's recent

3. Though he could claim to be still another alter ego of "Publius," John Jay contributed merely five of the 85 essays that make up The Federalist Papers.
5. Id.
resurgence, especially when the larger historical context is kept in mind. Over one hundred years ago, Woodrow Wilson could still write that "[t]he balances of the Constitution are for the most part only ideal. For all practical purposes . . . Congress [is] predominant over its so-called co-ordinate branches." Nor, ordinarily, did this state of affairs produce constitutional conflict or appreciable case law. But the government Wilson knew, "congressional government," is long gone, and with it the interbranch harmony that once prevailed. Today the President can treat even the most meager electoral victory as a national mandate to a degree unthinkable in Wilson's day. Even after the Cold War, the President commands the largest military establishment on earth and the massive security apparatus that goes with it. Finally, the President maintains either direct or primary control over the "administrative state," the colossal array of agencies that legislate and adjudicate under any but the broadest definition of "executing" the laws. The Supreme Court has little legitimately to say about claims to electoral mandates. It has chosen to say little about executive deployment of the military. Thanks to repeated congressional challenges, however, it has said a great deal about the President's authority to carry out laws at home. The more it has said, however, the less it has made clear.

The result has been not just confusion but stalemate. In part, case law and commentary greet the historic growth of presidential power with alarm and therefore approve various devices meant to keep it in check, including restrictions upon the President's removal authority, interbranch appointment of "executive" officials, and, least successfully, the legislative veto. But in larger part, the weight of precedent and scholarship rests with those who reject such

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8. As President, Wilson of course would later play a significant part in shifting the balance to the President. See generally ARTHUR S. LINK, THE HIGHER REALISM OF WOODROW WILSON 133 (1971); JOHN MORTON BLUM, WOODROW WILSON AND THE POLITICS OF MORALITY (1956).
9. As far as the victors are concerned, moreover, the fact of victory matters more than its size. President Clinton, who won by a 43% plurality, still claimed that the election represented a national consensus for a "new beginning." Robin Toner, Bush Pledges Help: Governor Given an Edge of 43% to 38%, With Perot Getting 18%, N.Y. TIMES, Nov. 4, 1992, at A1, B6.
11. The Court has managed to avoid saying much about executive deployment of the military in circumstances of questionable constitutionality. See Holtzman v. Schlesinger, 414 U.S. 1304 (1973) (Douglas, J.) (upholding stay of district court's injunction prohibiting Defense Department's military participation in Cambodia); Schlesinger v. Holtzman, 414 U.S. 1321 (1973) (Marshall, J.); id. at 1322 (Douglas, J., dissenting); Mora v. McNamara, 389 U.S. 934 (1967) (denying certiorari in challenge to drafting and deployment of troops to Vietnam); id. (Stewart, J., dissenting); id. at 935 (Douglas, J., dissenting). For a powerful argument that the Court should consider such issues, see JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).
controls. In an effort to break the impasse, each side has increasingly turned to history—in particular, to Founding conceptions regarding separation of powers. So far, however, this move has had nearly the opposite effect and made the stalemate even more intractable.

However long doctrine divided against itself can stand, both sides cannot be right. It is evident from the current impasse that both sides suffer from two basic problems in their treatment of the history of separation of powers. The more basic one is simply that they get their history wrong to begin with. This problem occurs most commonly when scholars and judges project onto early understandings of the doctrine a rigid set of formal categories or when they misconstrue the functions for which separation of powers was established. The other problem arises through incorrectly applying what insights the Founding does yield to the vastly different circumstances of today.

This Article seeks to dispense with the first problem and clear a path toward resolving the second. Accomplishing these goals requires new approaches, and this study offers two. First, this Article cuts the current historicist knot by rejecting the “forensic history” commonly practiced by lawyers and legal academics in favor of historical methods as undertaken by historians. In contrast to much of the writing on either side of the present divide, it seeks to construct a narrative of constitutional development based not solely or even principally on primary materials, but rather on the wealth of historical scholarship that has recently been devoted to the Founding. In this fashion, this study aims to avoid the usual result from the encounter between law and history that I have elsewhere dubbed “History ‘Lite.’” This method exposes the presidentialist account—advanced in its most powerful form by Justice Scalia and Professors Stephen Calabresi and Saikrishna Prakash—as incomplete and flawed. Put another way, it corroborates the core assertion advanced (but not demonstrated) by Lawrence Lessig and Cass Sunstein, that the unitarian executive attributed to the Founding is “just myth.”

Reconstruction faithful to the past in turn clears the way for breaking the juridical stalemate. The Founders embraced separation of powers to further several widely agreed-upon goals. Among these were certain ends or values

12. See infra Subsections II.A.1–2.
13. See infra Subsection II.A.3.
14. As the latest edition of a leading administrative law casebook puts it:
   Can the rich tapestry of government we have, the product of Congress's varying choices over the years, be squared with the Constitution we have? It may be surprising to see how deeply that question still divides the legal community. The early history is recounted in detail, and its implications hotly debated . . .
that today are commonly at the center of separation of powers debates, including balance among the branches, responsibility or accountability to the electorate, and energetic, efficient government. Currently, these goals are seen to be almost necessarily in tension, with balance cutting against a unitary presidency but accountability and energy cutting in its favor. The light shed by the Founding suggests that this need not be the case. On the one hand, an examination of the period only confirms the foundational importance of balance. In this light, the emergence of the administrative state renders congressional regulation of the executive branch more crucial than ever before, especially since Congress enjoyed extensive regulatory authority even when it was still the most dangerous branch. On the other hand, a better understanding of the Founding undermines current thinking about accountability and energy. Contrary to the usual scholarly assumptions—including those of Lessig and Sunstein—the Founders sought to tame, not further empower, those divisions of government that claim a special responsiveness to the electorate. On this basis, the need for congressional regulation becomes imperative precisely because of the modern presidency’s claim to electoral accountability. Conversely, many of the Founders did extol separation of powers as a way to accord government greater energy, much as modern constitutional thinkers do today. Viewed in context, however, that commitment was modest, especially given the sheer scope of modern governmental activity.

These basic strategies—first, a faithful reconstruction of the doctrine’s origins, and second, the attendant reconciliation of the purposes underlying separation of powers—confirm the initial intuition that there is something anomalous about the judiciary shielding what is now the most powerful office in the nation. These approaches refute the idea that the Founders had developed a thoroughgoing, tripartite baseline capable of resolving modern controversies. They demonstrate that balance favors a flexible approach, that accountability bolsters this view, and that energy in the modern context is largely irrelevant. They point, finally, toward doctrinal bases for congressional regulation that are more thoroughgoing than anything currently mooted in separation of powers scholarship.

To appreciate how thoroughgoing these bases are, Part II examines the current separation of powers deadlock, then suggests how looking at the past, which to this point has only exacerbated matters, can provide a way of cutting the judicial and scholarly knot. Accordingly, Part II first considers the persistence of certain themes in the Supreme Court’s recent separation of powers case law and examines parallel themes in related scholarship, both analytical and historical. Given the prominent invocations of history in this process, this part next argues that the historical record may show a way forward, but not without some conception of how to look at such a record properly. To do that requires, at a minimum, a strong sense of the current professional narrative of early constitutional history, from the Revolution
through Ratification—a sense conspicuously absent from most recent legal writing in the area.

Part III practices what Part II preaches. It traces the evolution of early American approaches to separation of powers from independence to the framing of the Constitution to the ratification debates (which have been largely ignored in this area). Out of this treatment, the foundational imperatives of balance, a different type of accountability, and comparative concern for energy plainly emerge. A rigid tripartite division of all government plainly does not. Previous attempts to resolve these matters, even those that have reached similar conclusions, have failed largely because they have been more concerned with justifying an appeal to history in the first place rather than with the difficult task of reconstructing Founding values themselves.

Those values reconstructed, Part IV suggests how they apply to the very different governmental structures that exist today. It first considers how two-hundred-year-old values are applicable to modern circumstances at all, arguing that in this case the familiar brand of originalism offered by Justice Scalia and Judge Bork actually undermines fidelity to the Founding while the models of “synthesis” advanced by Bruce Ackerman and “translation” set out by Lawrence Lessig present ways forward that do remain faithful to the past. Part IV then examines several principal changes since the Founding that affect any application of past imperatives to present conditions. These changes, each one dramatically accelerated by the New Deal, include: the shift in power from the legislature to the executive, especially in light of the administrative state; the presidency’s rise as not just the most dangerous branch, but the most accountable branch as well; and the expansion of federal governmental activity. Part IV ends with the doctrinal solutions that result from applying the imperatives derived from the Founding to the modern circumstances just examined. As an initial matter, there is no reason to abandon the apparent Founding strategy of leaving separation of powers controversies to be hammered out by the branches themselves, given that each is armed with explicit means of self-defense and negotiation. The part concludes by looking at whether the Court has been—or would be—justified in abandoning this strategy with regard to the legislative veto, removal, and the line item veto. The Article itself concludes by emphasizing that, whatever the precise doctrinal cash out, it should remain clear from now on that the history of separation of powers does not support the formalist assumptions too often taken for granted in present case law and scholarship.
II. "Marching Backward Into the Future" 18

A. Past Imperfect: The Modern Separation of Powers Stalemate

Separation of powers has an ancient pedigree. The debate it currently generates, however, has crystallized only recently. Since lawyers can fell great forests in little time, sketching even a recent debate runs the risk of oversimplification. The overall picture is nonetheless clear. The dominant unitarian position conceives of the executive branch as a separate entity ordinarily accountable to the President alone. This view receives its most powerful support, though not necessarily its most convincing justification, from jurists whose approach to separation of powers is best described as formalist. This brand of formalism in turn rests on an analytic foundation built by commentators who set out the larger values the formalist model advances—above all, the goal of greater accountability of an energetic and efficient government to the people it represents. The less successful trinitarian 19 position contends that the lawful activities of the executive branch may be regulated not only by the President, but by Congress and the judiciary as well. This approach enjoys its most significant support from Justices, often in dissent, best described as functionalist. Functionalist opinions are likewise elaborated in law review commentary, only here the larger values cited center on the goal of maintaining the three branches of government in balance.

1. Separation of Powers in the Supreme Court

The idea that government consists of distinct functions goes back at least to ancient Greece. 20 The argument that discrete institutions should discharge government's distinct functions goes back at least to seventeenth-century England. 21 During the eighteenth century, Americans hotly debated and refined these ideas in contesting the assertions of Parliament, in shaping the first state constitutions, and in designing the Federal Constitution. 22 For most of the nation's history, however, separation of powers prompted little controversy. Until recently the Supreme Court considered few separation of powers cases.

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18. The image comes from MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF 229-33 (2d ed. 1960). Here I use it in two senses: first, to refer to those turning backward to the past when analyzing modern separation of powers disputes; and second, to indicate those who, having done so poorly, have come up with backward answers.


21. Id. at 23–75, 98–118; see also W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 66–99 (1965).

22. See infra Part III.
powers cases of any sort—still less those involving Congress and the President.\textsuperscript{23} This is not to say that the lines between President and Congress went unaddressed.\textsuperscript{24} What stands out, however, is the lack of contention. In marked contrast to the federal government and the states, the President and Congress had apparently worked out ways to proceed with the business of government, or at least had done so enough so as not to wind up in court. From the republic’s earliest days, many of these arrangements involved some type of congressional meddling in the President’s direction of the executive branch.\textsuperscript{25}

The harmony diminished as government grew until, by the end of this century, it is all but inaudible. The contrasting dissonance at first emerged slowly, starting with \textit{Myers v. United States},\textsuperscript{26} which promoted the unitary presidency, and \textit{Humphrey’s Executor v. United States},\textsuperscript{27} which did not. Conflict accelerated, albeit in similar inconsistent fashion, when a campaign mounted by President Reagan’s constitutional brain trust attacked an array of accommodations that the legislature and the executive had previously worked out. This campaign led to a quick succession of landmark decisions, including \textit{INS v. Chadha},\textsuperscript{28} \textit{Bowsher v. Synar},\textsuperscript{29} and \textit{Morrison v. Olson}.\textsuperscript{30} Yet the conflicts have outlasted the campaign that made what had been rare judicial interventions in this field almost commonplace, as witness \textit{Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise}\textsuperscript{31} and this past Term’s \textit{Plaut v. Spendthrift Farm, Inc.}\textsuperscript{32}

In nearly all of these cases, the Court has employed one of two basic approaches in justifying its holdings. One, supporting the model of a unitary executive branch, has aptly been called formalistic. Initially championed by

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\textsuperscript{23} This list is not extensive. See, \textit{e.g.}, \textit{Parsons v. United States}, 167 U.S. 324 (1897) (finding that Congress conceded to President power to remove district attorney of United States); \textit{United States v. Perkins}, 116 U.S. 483 (1886) (holding that when Congress, by law, vests appointment of inferior officers in heads of departments, it may limit and restrict power of removal as it deems best for public interest); \textit{Butterworth v. United States ex rel. Hoe}, 112 U.S. 50 (1884) (holding that executive supervision that head of department may exercise over subordinates in administrative and executive matters does not extend to matters in which subordinate is directed by statute to act judicially); \textit{United States ex rel. Goodrich v. Guthrie}, 58 U.S. (17 How.) 284 (1854) (holding that no court has power to command withdrawal of money from treasury of United States to pay any claim against United States); \textit{In re Hennen}, 38 U.S. (13 Pet.) 230 (1839) (holding that appointment of clerks of courts properly belongs to courts of law); \textit{Kendall v. United States ex rel. Stokes}, 37 U.S. (12 Pet.) 524 (1838) (holding that it is President’s duty to see how and when laws are executed, and that such a power cannot be given to courts); \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{24} See \textit{Kendall}, 57 U.S. at 524; \textit{Marbury}, 5 U.S. at 137.

\textsuperscript{25} See \textit{Lessig & Sunstein, supra} note 17, at 11–38.

\textsuperscript{26} 272 U.S. 52 (1926).

\textsuperscript{27} 295 U.S. 602 (1935).

\textsuperscript{28} 462 U.S. 919 (1983).

\textsuperscript{29} 478 U.S. 714 (1986).


\textsuperscript{32} 115 S. Ct. 1447 (1995).
Chief Justice Taft, this approach has found its best-known exponents in Chief Justice Burger and Justice Scalia. Easily the Court’s dominant approach, formalism has recently betrayed certain serious limitations that have become evident in light of its very success. The Court’s other principal approach, invoked on behalf of congressional regulation, is functional. Echoing early defenses by Justices Holmes and Brandeis has been Justice White. Lacking the clarity of formalism, the functional approach has—despite some critical triumphs—lacked its rival’s success.

The Court’s formalist cases teach what “every schoolchild learns,” at least those schoolchildren who are headed to the Office of Legal Counsel. Formalist catechism posits three discrete branches, each exercising one of three distinct powers. The legislative, executive, and judicial branches, with certain carefully crafted exceptions, each controls its own domain, unconstrained by its counterparts. For the executive, ultimate control rests with the President. No less importantly, formalist precepts consider legislative, executive, and judicial powers, which mark the proper domains of their respective branches, to be readily identifiable. The domain of executive power is especially broad under this approach, amounting almost by default to any governmental action distinct from passing a statute or adjudicating a case.

Given this canon, any action Congress takes to limit the President’s control over the executive branch is presumptively invalid. This is true when those limitations take the form of congressional action that cuts too many corners to count as a statute. Chadha set forth the formalist defense to the first type of assault, otherwise known as the “legislative veto.” Likewise, congressional

33. Myers, 272 U.S. at 52.
34. Here I draw upon the formalist/functionalist dichotomy employed by Peter Strauss. See Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 CORNELL L. REV. 488 (1987). This Article, however, uses the term “functionalist” in a slightly different manner. Strauss employs “functionalist” to refer to functions of government—legislative, executive, and judicial—to argue, rightly in my view, that many administrative agencies engage in all three functions and therefore cannot fit into a rigid, tripartite structure, see id. at 492–94; I use the term “functionalist” to refer to the functions—for example, balance among the branches of government—for which the doctrine of separation of powers was developed, see infra text accompanying notes 44–46.
36. Congress had established a scheme, the Immigration and Nationality Act, in which it could oversee determinations on certain matters, such as the status of individual aliens, otherwise delegated to the executive branch through the resolution of either house of Congress. Chief Justice Burger’s formalist opinion rejected this setup without difficulty. Citing text and original intent, the opinion addressed the proposition that “as nearly as possible . . . each branch of government would confine itself to its assigned responsibility.” Chadha, 462 U.S. at 951. The legislative branch would therefore legislate subject to several intrabranch requirements, most notably bicameralism, and to the single interbranch requirement of presentment to the President. Id. at 944–51. The discreteness of the branches established, the Court next considered the formalist contention that “[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, Judicial, . . . [powers that are] functionally identifiable.” Id. at 951. For various reasons, the Court had little trouble labeling an attempt to alter the legal status of an alien as “Legislative.” The distinct power identified, the Court’s conclusion inexorably followed. A single house had tried to control the executive through a legislative act without either forwarding that act to the other house or presenting it to the President. By definition,
limitations are also presumptively invalid when they take the form of executive action through congressional agents. *Bowsher* refined the formalist defense to this second type of assault, the oversight of officials who execute the laws.37

Formalists have good reason to feel satisfied. Between them, *Chadha* and *Bowsher* have provided the Court with a framework for separation of powers analysis that endures. Judicial formalists, moreover, have even greater reason to cheer. When applied, the formalist framework has proven to be one of the more successful forms of judicial activism, almost invariably resulting in the invalidation of often carefully conceived arrangements forged by the so-called “political branches.”38 Even so, in legal analysis as in business, “[t]here is nothing more vulnerable than entrenched success.”39 In its success may lie formalism’s eventual downfall, as the Court’s extensions of the approach reveal its contradictions.

*Metropolitan Washington Airports Authority* illustrates both formalism’s current strength and its internal weakness. The case considered the constitutionality of a review board composed of nine members of Congress “sitting in their individual capacities” that would have “veto” power over major capital decisions made by a joint authority established by Virginia and the District of Columbia to administer National and Dulles Airports, which were previously run by the Federal Aviation Administration (FAA).40 In a formalist tour de force, the Court found—or at least suggested—separation of powers infringements twice over. If, the Court held, the joint airports authority exercised legislative power, then the review board violated *Chadha*. Not only could the nine members of Congress make law without comporting with the requirements of either bicameralism or presentment, they could do so without something less than Congress was attempting to encroach upon the President by doing something that only Congress with the President could do. *Id.* at 954–55.

37. This case arose when Congress assigned certain budgetary functions to the Comptroller General of the United States, a post Congress had earlier established to keep its own financial house in order as head of the General Accounting Office. Once more, a formalist opinion by Chief Justice Burger made short work of what might have been a thorny matter. Taking the discreteness of the branches as a given, the Court first determined that the Comptroller General was a creature of the legislative branch, mainly on the basis that Congress exercised the authority to remove him. The Court next considered the nature of the powers the office exercised. So long as the Comptroller General’s office merely served the informational needs of Congress, it did not wield the distinct powers of the other branches and in fact had not done so for over 50 years. Problems arose when Congress gave the Comptroller General the new power of using independent judgment to make an estimate that would bind the President in reducing the federal deficit. This new power, declared the Court, “plainly entail[ed] execution of the law in constitutional terms.” *Bowsher*, 478 U.S. at 732–33. Congress, in short, had created a post answerable only to it yet had later accorded it the type of authority that could be given only to officers answerable to the President.

38. See, e.g., *Plaut*, 115 S. Ct. 1447 (invalidating congressional attempt to “reopen” securities cases that had been finally adjudicated); *Metropolitan Wash. Airports Auth.*, 501 U.S. 252 (invalidating participation of Congresspersons on Metropolitan Airports Authority Board of Review); *Bowsher*, 478 U.S. 714 (invalidating Comptroller General’s participation in Gramm-Rudman-Hollings process); *Chadha*, 462 U.S. 919 (invalidating legislative veto).


40. 501 U.S. at 259–60 n.5.
gaining the assent of even one house of Congress. Conversely, if the authority wielded executive power, then the review board violated Bowsher. On this view, the law was being executed not only by congressional "agents" but also by agents who were themselves members of Congress. Either way, Congress lost.

As Justice White noted in dissent, "The majority never makes up its mind whether its claim is that the Board exercises legislative or executive authority." Yet making up one's mind whether a given power is legislative or executive is precisely the determination that formalism presumes will often be easy and must always be clear. The core formalist idea, after all, is that three disparate branches respectively exercise three different powers. If this is true, the same power cannot at once be the subject of a violation because the President alone can (ultimately) exercise it and because Congress alone (subject to presentment) can exercise it. The Court's readiness to treat the administrative tasks of the review board as either legislative or executive may simply show indecision. But it may also signal that, at least for the purposes of separation of powers, the tasks undertaken by agencies like the FAA or the joint airports authority do not really fall into any of the three rigid formalist categories.

That proposition is at the heart of the Court's other main analytic approach. The functionalist model views separation of powers doctrine as underdeveloped and pragmatic. Functionalists consequently reject any global framework that attempts to specify the nature and place of all powers in advance. This is not to say that the functional view repudiates notions of structure. To the contrary, the functional approach acknowledges that the Constitution sets forth certain fundamental boundaries among the three branches, mostly in clear text, and mostly at the highest level. Only Congress can (subject to presentment) enact laws. Only the President can appoint (subject to the advice and consent of the Senate) ambassadors or "judges" of the Supreme Court. Only the Supreme Court (subject to congressional regulation) shall enjoy final appellate jurisdiction in federal cases. Nor does the functionalist position hold that no separation of powers constraints exist other than specific, textual ones. The functional approach voices particular concern for maintaining a basic equilibrium among the branches. The very term "functionalist"—at least as I employ the term—stems from the inquiry into how a given device like the legislative veto functions to hinder this type of more broadly defined goal. The formalist views devices that do not comport

41. Id. at 276.
42. Id. at 275–76.
43. Id. at 290 (White, J., dissenting).
44. U.S. CONST. art. I, § 7, cl. 2.
45. Id. art. II, § 2, cl. 2.
46. Id. art. III, § 2, cl. 2.
with a rigid tripartite division as hindering the purposes of separation of powers by definition. The functionalist is not so sure. To her, the Constitution does not inhibit, and even invites, the legislature, the executive, and the judiciary to share power in creative ways. So long as the arrangements that emerge do 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, what emerges is fair game.

Given this approach, congressional regulation of the executive is presumptively valid. This is true regardless of whether the limitation appears to take the form of a legislative act short of a formal statute, as in Chadha, or whether the regulation seems more like an executive measure undertaken by agents answerable to Congress, as in Bowsher. For functionalists, these appearances are beside the point. What matters instead is whether a challenged arrangement directly undercuts that more fundamental value that a particular division of powers was meant to advance in the first place.

In comparison to their doctrinal rivals, functionalists have enjoyed only modest success. The presumption of validity was scarcely apparent with regard to the legislative veto, for example, Justice White's dissent notwithstanding. It fared better, however, when directed at congressional limitations on executive officials, most notably in Morrison.47 Even then, functionalist

47. See Chadha, 462 U.S. at 967–1013 (White, J., dissenting). As an initial matter, the dissent makes clear that "[t]he Constitution does not directly authorize or prohibit the legislative veto," id. at 977, a point that Justice White would later argue applies to nearly all of the devices at issue in separation of powers cases. See Metropolitan Wash. Airports Auth., 501 U.S. at 282 (White, J., dissenting); Bowsher, 478 U.S. at 760–64 (White, J., dissenting). The real question therefore becomes whether the legislative veto violates the principles of separation of powers functionally. About this Justice White had no doubt. For him, a device not specifically prohibited violates the Constitution only if it operates as a sword in the hands of one branch "to aggrandize itself at the expense of the other branches." Chadha, 462 U.S. at 974 (White, J., dissenting). Far from a congressional sword, he declared, the legislative veto functions as a shield. "[W]ithin the last half century," the dissent noted, "the complexity and size of the Federal Government's responsibilities [have] grown so greatly," id. at 978 (White, J., dissenting), that Congress has delegated vast areas of what is in effect lawmaking authority to administrative agencies formally within the executive branch, delegations the Court has approved, id. at 984–85 (White, J., dissenting). These developments mean that the executive branch in functional reality now makes laws where in formalist theory it could only execute them, a development that has increased the power of the executive branch exponentially. In this light, the legislative veto represents Congress's attempt to prevent the wholesale abdication of "its lawmaking function to the Executive Branch and independent agencies." Id. at 968 (White, J., dissenting). Whatever its analytic power, however, Justice White's approach did not convince any of his colleagues.

48. In Morrison, the Court considered whether Congress could establish an "independent counsel" within the executive branch by significantly curtailing the appointment and removal powers that the President would otherwise exercise over ordinary prosecutors. 487 U.S. at 660–69. Chief Justice Rehnquist answered yes—a significant result in and of itself. But at least as significant was the Court's functionalist approach, which was most significant in the Court's discussion of removal authority. While Congress, with one hand, had given the authority to discharge an independent counsel to the Attorney General, with the other it had specified that this authority could be exercised only "for good cause." Id. at 663. In considering these limitations, the Court found that the rigid discreteness of the branches did not matter. To the contrary, the majority opined that "[t]he analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President . . . . [T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." Id. at 689–91. The "for good cause" requirement did not. Nor did the limits on presidential authority taken together. In what amounted to a functionalist manifesto, the Court
victories are usually passive and self-denying from the point of view of the judges who win them for the simple reason that the application of functionalist analysis almost always upholds the results that the political branches produce.\textsuperscript{49} This, too, is hardly surprising since the flexibility of functionalism by definition accords with the flexibility of the political arrangements that the President and Congress reach so long as those arrangements do not violate an underlying functional goal.

Like formalism, functionalism also has its problems; unlike formalism, those problems are mainly external rather than internal. As noted, the Court's brand of formalism threatens to collapse of its own weight.\textsuperscript{50} Positing three distinct governmental powers, at least one majority has already found itself treating an agency's authority as both legislative and executive. By contrast, the Court's attempts at functionalism have not so much run into difficulties on their own terms as run up against the Court's dominant formalist mindset. Functionalists may plausibly claim Humphrey's Executor and Morrison, as well as Mistretta. But formalists can even more surely point to Myers, Buckley v. Valeo,\textsuperscript{51} Chadha, Bowsher, and—most recently—Metropolitan Washington Airports Authority and Plaut.

2. Separation of Powers in the Law Schools

Professors got into the separation of powers act even later than did judges. The great nineteenth-century treatises barely mentioned the topic, and gave it scant coverage when they did.\textsuperscript{52} This picture began to change with the advent of Progressivism, the New Deal, and, something truly momentous, law reviews. But it did not change dramatically. By the 1920s, both casebooks and treatises treated the relationship among the three branches under a separate rubric.\textsuperscript{53} With the early exception of Edward S. Corwin,\textsuperscript{54} however, scholars


\textsuperscript{50} See supra text accompanying notes 39-43.

\textsuperscript{51} 424 U.S. 1 (1976).


\textsuperscript{53} See, e.g., Henry Campbell Black, Handbook of American Constitutional Law (1927); Charles W. Gerstenberg, American Constitutional Law (1937); Howard Lee McBain, The Living Constitution (1927).

\textsuperscript{54} Edward S. Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353 (1927) [hereinafter Corwin, Tenure of Office]; see also Edward S. Corwin, The President: Office and Powers (1940) [hereinafter Corwin, The President].
avoided systematic discussions of that relationship, especially as between Congress and the President. The discussions that did find their way into print tended to deal with the particulars of the few separation of powers cases the Court had begun deciding. In the academy as in the courts, the arrangements that the legislature and the executive had worked out simply did not cause great scholarly concern.

All this changed, significantly if not utterly, thanks to the crises of President Nixon and the initiatives of President Reagan. The Nixon era brought a succession of confrontations among the White House, Congress, and the courts. For its part, the Reagan administration mounted a careful, self-conscious legal campaign to establish the “vision” of a unitary presidency. From both the crises and the initiatives came a torrent of case law where previously there had been a trickle. Watergate alone led directly and indirectly to a number of major precedents, including United States v. Nixon, Nixon v. Administrator of General Services, Nixon v. Fitzgerald, and Harlow v. Fitzgerald, not to mention Buckley. Somewhat more successfully, at least from an executive viewpoint, the Reaganite campaign led to Chadha, Bowsher, Morrison, and Mistretta, cases that in turn cleared the path for Metropolitan Washington Airports Authority.

The case law in turn produced a deluge of commentary, which shows no signs of receding. At various points the participants have included such eminent scholars as Stephen Carter, Lawrence Lessig, Suzanna Sherry, Peter Strauss, and Cass Sunstein, among many others. Much of this critical response is exactly that—criticism, often pointed, of the Court’s hopelessly inconsistent analysis. More importantly, much of this same commentary offers


56. As Charles Fried has written:

The Reagan administration had a vision about the arrangement of government power: the authority and responsibility of the President should be clear and unitary. The Reagan years were distinguished by the fact that that vision was made the subject of legal, rather than simply political, dispute. The battle to rearrange government power was fought in the Supreme Court.

As Solicitor General, I was in the front line of this struggle . . . .


60. 457 U.S. 800 (1982).


Buckley
underlying rationales that jurists have failed to supply. The resulting discussion may not be "as fully developed" as the debate over other topics, even other structural ones such as the power of Congress to restrict the jurisdiction of the judiciary. It is nonetheless abundant, enough so to signal a debate every bit as lively, if lopsided, as the one that persists in the Supreme Court.

The basic academic positions track the judicial ones. Scholars extolling formalist doctrine, not to mention its unitarian results, tend to view separation of powers in terms of such ultimate goals as governmental efficiency, deliberation, and self-government. Most often these goals collapse into what is easily the dominant constitutional value that commentators on this side of the aisle identify—the requirement that government remain accountable to the people. The minority of scholars who defend the functionalist case law, and its trinitarian consequences, see separation of powers in different, more negative terms. For them what matters most is preventing the tyrannical accretion of power in any one part of government. Most often this concern is pitched as a requirement to maintain balance among the branches. Nothing about the root values of accountability or balance places these goals in logical opposition. Up to now, however, this has been exactly their relation in the scholarly literature.

Accountability and energy, then, provide the ultimate justifications for the opposing side. Ostensibly, unitarians advocate plenary presidential control of the executive branch because separation of powers presupposes a clear formalist model of three discrete branches wielding three distinct powers. Yet neither is this model an end in itself. Rather, the formalist framework is simply the best means of making government more responsive to the people and for making that government efficient and energetic. By placing the execution of the laws in one department, by making those who execute the laws answerable to a single Chief Magistrate, and by making that Chief Magistrate responsible to the people, the formalist version of separation of powers promotes the Constitution's fundamental goals of accountability and energy. Unitarians, to be sure, point to complementary values as well, such as the mitigation of

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faction. Even so, reliance on these “root values” cuts across the spectrum of techniques for interpreting the Constitution. Some—like Kevin Rhodes and Steven Calabresi⁶⁴—see these values embodied in the text of a handful of controlling clauses. Others—like Saikrishna Prakash⁶⁵—see them in Founders’ statements and writings about the Constitution’s text. Some—again Rhodes and Calabresi⁶⁶—infer them from the structures and relationships in the document taken as a whole. Still others—like Geoffrey Miller,⁶⁷ Cass Sunstein, and Lawrence Lessig⁶⁸—contend that whatever their basis in 1787, these values have become imperative in light of the growth and development of the administrative state. These and other scholars point to other constitutional imperatives as well.⁶⁹ Many even acknowledge important values that cut in the opposite direction.⁷⁰ Still, for most unitarian scholarship, accountability remains a trump.

Most often opposing accountability and energy is balance among the branches, especially balance designed to prevent tyrannical accretions of power. As noted, trinitarians generally arrive at this goal first by arguing—with markedly less success—that congressional control of the executive branch logically results from a functional separation of powers model. As with formalism, it has fallen to scholars to emphasize that the functional tack is itself merely the means to a greater constitutional end. What functionalism promotes, they argue, is balance almost by definition. Functionalism serves balance as a general matter by permitting, even encouraging, any number of power-sharing arrangements subject to the one ultimate constraint that those arrangements do not render either the President, Congress, or the judiciary significantly more powerful than its counterparts. As applied, the functional inquiry promotes balance by enabling Congress to exercise some control over the vast policymaking authority that the executive branch would otherwise wield solely at the whim of the President.

Scholars positing balance as the ultimate goal likewise run the interpretive gamut. William Eskridge, Jr., and John Ferejohn, for example, rely on the text of Article I, Section 7 to argue that the Constitution privileges the status quo over intemperate policymaking assertions by any single branch or subset of a

⁶⁴. Id. at 1175–85.
⁶⁶. Calabresi & Rhodes, supra note 63, at 1215–16.
⁶⁸. See Lessig & Sunstein, supra note 17, at 85–106.
⁶⁹. See, e.g., Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 23, 37–41 (1995) (discussing separation of powers and governmental energy); Lessig & Sunstein, supra note 17, at 106–10 (discussing separation of powers and need to promote deliberation and discourage faction).
branch. William Van Alstyne likewise contends that the Necessary and Proper Clause furnishes Congress with a powerful source for controlling the executive. Edward Corwin and Peter Shane have both at least sketched originalist arguments for functional diffusion. Peter Strauss, Shane, and Abner Greene, among others, have suggested that the growth of the modern administrative state, far from triggering concern about accountability, should instead elicit fear of an imperial presidency and point to Congress as the only logical Brutus. Here, too, trinitarian scholars recognize other, complementary and competing values, including accountability. Yet the goal that drives this school of thought remains balance.

3. The Historicist Debate

In the last few years, both the judicial and scholarly debates have more and more become historical ones. The reasons for this recent turn are not hard to fathom. Many, if not most, of those originally responsible for the current unitarian renaissance have also been vocal proponents of original intent. Not surprisingly, trinitarian scholars soon realized that unitarian accounts should not go unchallenged, or at least unchecked. The resulting back and forth has been inconclusive on its own terms and has therefore failed to resolve the larger debate, even on the assumption that history should matter. Here, however, perhaps significantly, historicist work has yet to replicate the unitarian bent evident in decisions and articles.

This is not for want of trying, particularly by Justice Scalia. As an executive branch lawyer, he helped formulate unitarian strategy in Chadha; as a Justice, he has been the Court's foremost defender of formalist doctrine; as a scholar, he has sung the praises of presidential accountability—all in the name of the "Framers'" views. Typical of the Justice's approach is his lone dissent in Morrison. With full faith that the Constitution assigns three clearly defined powers to three distinct branches,
Justice Scalia castigates the majority 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." In stark contrast to his individual rights jurisprudence, Justice Scalia bases his conclusion not on the plain meaning of a precise text. Rather, he infers a formalist approach mainly based upon the Constitution's tripartite structure as set forth in the Vesting Clauses of Articles I, II, and III. He augments this inference with history, mainly snippets from The Federalist. To this he adds Article XXX of the 1780 Massachusetts Constitution, an express separation of powers provision that ostensibly supports the Justice's formalism in no uncertain terms but is conspicuous by its absence from the Federal Constitution.

Justice Scalia's academic counterparts have been Steven Calabresi and Saikrishna Prakash, who have done more to advance a historicist, unitarian view than perhaps any other separation of powers scholars. Recently, the two joined forces to argue that the Founders clearly intended that the President alone would be accountable for the execution of federal law notwithstanding congressional attempts to insulate executive officials. They base this case first on the drafting history of the key clauses commonly invoked to support the unitarian position, notably the Vesting Clause and the Take Care Clause, as well as those cited (erroneously, they say) on behalf of congressional regulation, including the Opinions Clause and the Necessary and Proper Clause. Relying next on The Federalist, Calabresi and Prakash contend that the Founding generation likewise practiced the coherent theory of presidential authority that the constitutional text preached. Their joint work not surprisingly confirms separate earlier efforts: on the one hand, previous historical work by Prakash; on the other, the textual exegesis of Calabresi and Steven Rhodes, who earlier argued that a comparison of Article II and Article III shows that the Framers established a "plural" judiciary but a unitary
executive. For that matter, it accords with the history set forth in *United States Reports*.

The other historicist school of separation of powers scholarship undermines the unitarian position. Here, the argument runs that the Founders themselves mainly possessed a functional approach, specifying the relation among the branches only at their respective peaks and therefore leaving to Congress ample room to structure the implementation of law below. Corwin apart, much of the initial work articulating this position comes in the form of hints, suggestions, and sketches. Yet recently a number of scholars have begun to do more. One, Abner Greene, going beyond the materials Calabresi and Prakash use, comes to nearly opposite conclusions. "The bottom line," he concludes, "was not strength in the executive, but rather balance between the branches."

Importantly, Greene frames his use of primary sources, whether *The Federalist* or the Constitution itself, with extensive references to the work of Gordon Wood, perhaps this generation's leading historian of Founding ideology. More recently, Cass Sunstein and Lawrence Lessig have carried Greene's work forward by presenting extensive useful research on the Founding generation's early practices. Their well-documented results show frequent and robust congressional involvement in the implementation of the laws, including criminal prosecution, the structure of executive departments, and opinions and administration. Puzzlingly, the two authors ultimately reject the trinitarian approach that their work implies on the ground that the Founding goal of accountability (which, unlike their descriptions of early practice, appears virtually without support) when applied to the modern administrative state, requires a strong, unitary executive. The bulk of their efforts, however, establishes the strong case that the Founders stood committed to the trinitarian model. That said, more work needs to be done.

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95. *Id.* at 138.
96. *Id.* at 139–53.
97. *See* Lessig & Sunstein, *supra* note 17, at 12–32.
98. *Id.* at 12–78.
B. Toward a Backward-Looking Solution: Pragmatic Fidelity

A lot more. This section argues that history should matter in separation of powers analysis, but only if credibly pursued. The first part of this section therefore justifies using history to begin with. Theorists have advanced many such justifications, each with different implications concerning the extent to which the past should count. Nearly every theory of constitutional interpretation, however, agrees that history merits some consideration. Given this agreement, this section then considers proper—or at least convincing—use of history. Pursuing history credibly in general requires following the canons of historians rather than the instincts of lawyers. These canons dictate, at a minimum, examining the larger context of the Founding first and only then examining particular puzzles, rather than leaping immediately to a handful of specific, shop-worn sources in a relative vacuum. This goal, in turn, means approaching the topic with a sufficient degree of breadth, which in this case means going back not just to the summer of 1787 but at least to the years leading to the Revolution. It also means looking at the major primary and secondary materials in at least a modicum of depth, which, compared to more than a few previous treatments, means looking at them all.

1. History and Theory

Then again, should any of this matter? The short answer is: not necessarily. History itself cannot justify guidance by history. As Ronald Dworkin has pointed out, it is circular to argue that the views of the Founders bind later generations simply because the Founders themselves thought their views should be binding.100 The longer answer must therefore come from theory. The question of how far history should bind, of course, has felled mighty forests. Few theorists, however, contend that history is irrelevant.101 Many more consider it significant, even essential.

The most obvious devotion to the past issues from thinkers who stress the Constitution’s commitment to democracy.102 An array of thinkers believes that the keys to the great constitutional mysteries can be discovered in the views of the Founders. Sometimes explicitly, more often implicitly, such theorists justify their reliance on this particular history with some variant of Hamilton’s famous passage in The Federalist No. 78. The “people” articulate

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100. RONALD DWORdIN, A MATTER OF PRINCIPLE 52-55 (1985).
101. For an argument, made by a professional historian, that “original intent is not a viable foundation for a jurisprudence of constitutional law,” see LEONARD LEVY, ORIGI1NAL INTENT AND THE FRAMERS’ CONSTRuCTION 298, 284-321 (1988).
102. For insightful discussions of major scholarship that develops themes of democracy, process, and self-government, see James E. Fleming, Constructing the Substantive Constitution, 72 TEX. L. REV. 211, 220-79 (1993); Fleming, supra note 83, at 6-29.
conventional law; subsequent generations govern themselves within the framework of that law; those generations must therefore consult the "people's" views when determining what the original framework leaves open—unless, of course, one of those subsequent generations itself successfully claims to act for "the people" and changes the framework.\textsuperscript{103} Originalists both Right\textsuperscript{104} and Left\textsuperscript{105} take this idea to its most extreme conclusion, holding that the historical understandings initially underlying constitutional norms are dispositive. A somewhat larger group, whom I call historicists, do not go this far, but still see early understandings as either authoritative or highly probative.\textsuperscript{106} Others, who are more embarrassed by the specter of "dead hand" control, nonetheless argue that original understanding, while not dispositive, should at least be privileged.\textsuperscript{107}

Reliance on the past also figures heavily in those theories that err on the side of rights and justice.\textsuperscript{108} The past that rights-oriented approaches invoke, however, is not only, or even primarily, the history underlying particular constitutional texts but also the evolving traditions that shape our constitutional culture.\textsuperscript{109} As with intentionalist reliance on history, justifications for invoking tradition are also often either left unstated or, when articulated, rest on some democratic foundation.\textsuperscript{110} More often, however, tradition appears to matter out of a concern for feasibility, that is, for determining which rights the society officially honors (even in the breach) to be candidates for judicial protection and which it does not. Accordingly, some theorists contend that the ideas of the Founders should matter because they were unusually able thinkers

\textsuperscript{103} The Federalist No. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This is not to say that all of these ideas necessarily result from Hamilton's treatment.


\textsuperscript{105} See, e.g., 1 Bruce Ackerman, We the People: Foundations 165–67 (1991); see also Suzanna Sherry, The Ghost of Liberalism Past, 105 Harv. L. Rev. 918 (1992) (reviewing Ackerman, supra).

\textsuperscript{106} Robert W. Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017 (1981).


\textsuperscript{108} For similarly useful discussions of theories that emphasize rights, justice, and autonomy, see Fleming, supra note 102, at 280–304; Fleming, supra note 83, at 6–43; James E. Fleming, We the Exceptional American People, 11 Const. Commentary 355, 357–73 (1994).

\textsuperscript{109} Tradition in this sense can predate the drafting of constitutional text by centuries and continue well beyond it. Nowhere is reliance on tradition more evident than in the Supreme Court's substantive due process jurisprudence, where tradition continues to play a dominant role in the definition of fundamental rights. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 846–51 (1992) (discussing role of tradition); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (discussing need to balance individual liberty and demands of society with regard to traditions "from which [the constitutional concept of due process] developed and the traditions from which it broke").

\textsuperscript{110} Perhaps the best known instance of democratic justification for a rights-based approach is Justice Brennan's reliance on evolving tradition as a means to maintain the people's ongoing consent to our constitutional order, including the work of the Supreme Court. See William J. Brennan, Jr., The Constitution of the United States, in Interpreting the Constitution: The Debate over Original Intent 23 (Jack N. Rakove ed., 1990).
with a wealth of practical experience, facing problems that endure.\textsuperscript{111} Others simply believe that history matters because we cannot intelligently develop new norms without comprehending old ones.\textsuperscript{112} Even Dworkin, not one to make frequent appeals to the past, articulates a commitment to history and tradition by positing "fit" to our constitutional culture \textit{and} past as a basic criterion of legitimacy.\textsuperscript{113}

This Article need not venture into this normative thicket further, at least not to justify the examination that follows. Given that almost every leading theory of constitutional interpretation accords at least some weight to history, two conclusions follow. First, it makes sense to undertake a historical inquiry. Next, it is worth pursuing that inquiry in a credible fashion on the theory that something worth doing at all is worth doing well. This last requirement should obtain, moreover, regardless of the weight a theory attaches to history, so long as it attaches any. Otherwise, the argument becomes that a theorist such as Dworkin is just as well off relying on a dated, error-ridden textbook as he would be devoting his time to finding a respected monograph, much less engaging in his own survey of the literature and sources, because his conception of fit is thin. Yet to the extent that Dworkin invokes the past to claim fit, however little, the claim would necessarily suffer.

Of course in practical terms, going the textbook route may make more sense to someone whose theory has only a limited place for history, because limited resources would be better served exploring language, economics, philosophy, or whatever else the theory places at a premium. But even these practical considerations do not obtain here. For one thing, the inquiry that follows aims to conserve the resources of precisely those constitutional scholars who do not have the time or inclination to undertake an extended historical treatment. After that treatment is presented, moreover, I will at least assume that norms from the Founding should be binding to some degree.\textsuperscript{114} That assumption may not be a necessary condition for pursuing a project such as this, but it does not hurt, either.

2. \textit{History and Historians}

This examination cannot proceed, however, without a word on method. Too often the resulting attempts to identify either history or tradition are deeply problematic. For all that various theories esteem the past, the actual estimation remains in the strictest sense theoretical, at least as far as historians

\textsuperscript{113} Dworkin, \textit{supra} note 100, at 143–45.
\textsuperscript{114} See \textit{infra} Sections III.A–B.
would be concerned. In part, the law’s substandard use of the past simply reflects the difficulties of interdisciplinary exchange. Historians seek explanations while lawyers make arguments, and from this basic distinction other methodological differences flow. But perhaps more troubling, the problem also results from imperatives inherent in constitutional discourse in particular. Those committed to democratic, intentionalist approaches make the stakes of defining the record so high. Conversely, those who are more directly rights-oriented at times sidestep any real inquiry into the past altogether perhaps because, one suspects, the messiness that such an inquiry yields inevitably does violence to neat, theoretical constructs.

Should constitutional theorists, then, forget the whole thing? The record has led a number to say as much, or at the very least to conclude that lawyers should simply employ historical arguments just as one more polemical technique. Then again, some of the same scholars who have come to this conclusion themselves had to display a command of historical scholarship to expose the chronic failings of their colleagues. Put more directly, they demonstrate how the past can be credibly pursued in asserting that it cannot. Many chronic failings, moreover, seem readily correctible with just a modicum of additional homework. At least on the practical level, perhaps we should not give up too hastily.

On a more fundamental level, however, perhaps we should. The law’s attempt to invoke the past may flounder not simply because lawyers appear ill-equipped to do it. Rather, the entire enterprise may be doomed to failure since no one, not even the most careful historian, is in a position to do it. The most influential challenges along these lines issue from postmodernism. Two particular objections seem worth raising for present purposes. The more radical critique holds that the past is almost entirely a construct of the present. On this view, neither history nor tradition can provide meaningful constraints because interpreting the past, like all interpretation, turns on the conditioning, desires, and whims of the interpreter. A more modest, yet still sweeping, challenge contends that while the past can yield certain constraints, it does not provide

118. Ronald Dworkin, for example, seldom makes historical assertions in his work. For a rare exception, see RONALD DWORKIN, LAW'S EMPIRE 360 (1986).
119. See TUSHNET, supra note 115, at 36.
enough to matter. In particular, even those interpretations based on the most rigorous study only rarely provide genuine guidance, and then usually fall to the revisionist accounts of later generations anyhow. Either way, the best we can do in the end is make a virtue of necessity and admit that the only real criterion for a constitutional lawyer's use of the past should not be whether a given event ever happened but whether it convinces anybody to go the lawyer's way.\textsuperscript{120}

In their provocative study addressing separation of powers, Lessig and Sunstein note that "there is no algorithm for deciding how to maintain fidelity with past instructions."\textsuperscript{121} Still less is there an algorithm for the prior question of figuring out what those past instructions, or traditions, are. Though rarely considered in the pages of law reviews, certain ways of making historical assertions are clearly better than others. These logically come from the discipline of history itself. This conclusion follows not so much because historians determine what is historically true,\textsuperscript{122} but because they commonly resolve what is historically convincing. Legal arguments relying on economics, philosophy, or sociology are more convincing when they comport with the standards set by those disciplines. Nothing prevents the same point from applying to arguments based upon history.\textsuperscript{123}

To the contrary, the logic of using the past compels it. Certain eminent scholars assert that the standards of historians need not apply to theorists because historians are historians and theorists are theorists.\textsuperscript{124} Elaborated, the claim is that what counts as credible in one interpretative community need not count as credible in a different interpretative community with different goals and concerns. However clothed, this argument seems hopelessly formalistic. Constitutional theorists do not ordinarily cite Madison, Hamilton, or Wilson simply because these thinkers had compelling ideas. Instead, they invoke authority that derives from something external to the substance of their thought, namely the fact that their ideas arose in a certain time and place that directly connects them to our constitutional history and tradition.\textsuperscript{125} Seeking such external authority entails playing by external rules. Or at least it entails

\textsuperscript{120} For a concise description of postmodern challenges to history, see Joyce Appleby et al., TELLING THE TRUTH ABOUT HISTORY 198–237 (1994).

\textsuperscript{121} Lessig & Sunstein, supra note 17, at 104.

\textsuperscript{122} Whether a matter can be deemed historically "true" in an objective sense need not be resolved to assert the utility of historical standards. For a discussion of historical objectivity, see Peter Novick, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988) and Thomas L. Haskell, Objectivity Is Not Neutrality: Rhetoric vs. Practice in Peter Novick's That Noble Dream, 29 HIST. & THEORY 129 (1990).

\textsuperscript{123} See generally Flaherty, supra note 16 (arguing that constitutional scholars often employ shoddy historical method).

\textsuperscript{124} For a recent defense along these lines, see Cass R. Sunstein, The Idea of a Useable Past, 95 COLUM. L. REV. 691 (1995); cf. Stanley Fish, PROFESSIONAL CORRECTNESS: LITERARY STUDIES AND POLITICAL CHANGE (1995) (arguing that literary criticism should remain removed from political efforts to work changes in society).

\textsuperscript{125} Flaherty, supra note 16, at 574.
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playing by external rules until it can be shown, as postmodernists claim they can, that the external rules themselves do not provide the authority that they promise.

The history that lawyers do has such a notoriously poor reputation, especially among historians, that it would represent a considerable improvement were the legal community to adhere to even just the most basic standards that historians practice. Of the precepts that might be mentioned, several stand out for present purposes, in large part because legal scholars are often indifferent to them, particularly with regard to separation of powers. Each standard not only calls for more rigor, but also for greater reliance on the work of historians themselves. One is evidentiary depth. Too often the legal community falls into the habit of looking only at a narrow range of sources around the constitutional provisions that ostensibly control. Absent a "separation of powers clause"—itself a significant omission—an enormous amount of the work focuses on a handful of scattered and cryptic texts and the barely more illuminating debates that led to them. Another precept is temporal breadth. Here, for example, virtually none of the even self-consciously historicist work on separation of powers begins the story much before the summer of 1787. One further canon prescribes an adequate historiographical grounding. Much ostensibly historical separation of powers

126. That reputation is abominable when it comes to the historical accounts judges provide. Id. at 524 n.5. It is not much better when it comes to the accounts made by legal academics. Id. at 524–26.

127. Robert Bork's The Tempting of America furnishes a rich deposit of just this type of noncontextual historical assertion. One in particular arises in his argument that the ratifiers of the Fourteenth Amendment did not understand the “privileges and [sic] immunities clause” to provide judicial protection for a range of fundamental liberties. BORK, supra note 104, at 180–81. This would have been unthinkable, he contends, because "the only significant exercise of judicial review in the past century had been Dred Scott," which gave the notion of judicial review for the protection of rights a bad name. Id. at 181. But making an inference from the undisputed fact that Dred Scott occurred slighted several larger points that, in context, render this ostensibly important fact, at best, irrelevant, and, at worst, cut the other way. The assertion overlooks the fact that, by 1867, the Union had won the Civil War and, in controlling Congress and the judiciary, commanded the mechanisms for enforcing national conceptions of fundamental rights dramatically different from a property right over human beings. It ignores the expansive role lower federal courts played in Reconstruction. And it omits an even glancing awareness that these and other matters uncongenial to his conclusions have been central to the past generation of scholarship. For sources addressing the larger context, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (1988); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. REV. 863 (1986).

128. See, e.g., Calabresi & Prakash, supra note 86, at 559–99 (concentrating on textual understanding of Constitution through close analysis of individual clauses); Calabresi & Rhodes, supra note 63, at 1175–85 (focusing on structural analysis of various constitutional provisions); Froomkin, supra note 19, at 1351–66 (offering structural analysis of specific constitutional clauses dealing with three branches).

129. See, e.g., Calabresi & Prakash, supra note 86, at 599–607 (giving "quick synopsis" of earlier history before focusing on Constitutional Convention and ratification debates there); Greene, supra note 77, at 138–53 (discussing original understanding from 1787–89 onward after cursory two pages on "pre-1787"); Lessig & Sunstein, supra note 17, at 12–84 (concentrating on Constitutional Convention and ratification debates after preliminary discussion of Montesquieu).
scholarship violates this precept by neglecting—or ignoring altogether—important historical monographs, to say nothing of essential general works. Many in the legal community would defend each of these practices. Constitutional text, after all, is the only thing that the Founding generation actually ratified, and it is best not to stray too far from it. Ratification itself only commenced in 1787. Lawyers, moreover, commonly make assertions about the past without reading relevant historians. But these are theoretical justifications. If the task is recapturing some notion of how the Founders thought the thing was going to work, perhaps the worst thing to do is to jump right to individual clauses. Doing so is not unlike trying to glean the meaning of the 1992 election by looking first—and last—at the Democratic Party’s platform and convention, with no mention of the Reagan/Bush years that came before. Jack Rakove, an eminent historian of both Madison and the Founding, aptly identifies the true outcome of such an approach. Whenever the law’s appeals to the past “are allowed to rest on crude and fragmentary caricatures of complex historical reality,” he observes, “we should recognize that it is our own political culture, more than that of ‘The Founders,’ which is being exposed.”

Historians themselves take almost exactly the opposite tack. They view—or at least attempt to view—events, ideas, and controversies in sufficient depth precisely to capture “complex historical reality.” This point applies with special force to complex texts and governmental frameworks. Consider the experience of Gordon S. Wood, whose *Creation of the American Republic* remains perhaps the leading work on the ideological origins of the Constitution. Of that work, Wood writes:

I began simply with the intention of writing a monographic analysis of constitution-making in the Revolutionary era; yet I soon found that I could make little or no sense of the various institutional or other devices written into the constitutions until I understood the assumptions from which the constitution-makers acted.


Wood found one solution in plumbing the sources deeply. As he explains, "I needed . . . to steep myself in the political literature of the period."\textsuperscript{136}

Wood found another solution in casting the net widely. *Creation*—like any good treatment of the Founding—defines the relevant period in broad terms. The account does not simply begin in the months leading up to the Federal Convention. Rather, it commences in the years leading up to the American Revolution.\textsuperscript{137}

Beyond these two types of rigor, neither Wood nor any other respected historian goes forward without also according the same type of scrutiny to the work of fellow scholars, as the citations and bibliographic essays of leading historians typically demonstrate.\textsuperscript{138} In doing this, historians are especially on the lookout either for accounts that their colleagues more or less generally agree upon or, failing that, at least a framework for further debate and research. Scholars commonly seek a dominant account or framework to follow it, to build upon the information and interpretation of those who have spent lifetimes in a particular field the better to focus upon the outstanding questions and locate the answers in a meaningful context. A select few also master the current paradigms to expose their weakness and debunk them.\textsuperscript{139}

There is, however, a rub. Recapturing the greater context of events in each of the ways discussed, like many other standards historians live by, is immensely labor intensive. As Wood suggests, a historian would take years steeping herself in both primary and secondary works before venturing forth with any type of authoritative overview of even the most modest event, much less one as momentous as the Founding.\textsuperscript{140} Wood's noted contemporary, Forrest McDonald, did not attempt to generalize about the Founding until he had "read virtually every line of virtually every extant American newspaper for the period and a large body of personal correspondence."\textsuperscript{141} Legal scholars, and still less practitioners, do not have the luxury of steeping themselves in a given period. Cases and controversies rage here and now; tentative answers must be advanced.

But they can rely on those who do. In this way, the challenges that these standards of professionalism present to the legal community also generate their own solution. Much as historians themselves do, constitutional professionals can at least look to prevailing historical accounts or debates when trying to resolve specific issues. While this is also time consuming, reading what are

\begin{footnotesize}
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\item \textsuperscript{136} WOOD, supra note 133, at viii.
\item \textsuperscript{137} Id. at vii–ix.
\item \textsuperscript{138} See, e.g., MCDONALD, supra note 135, at 313–41; WOOD, supra note 133, at 619–33.
\item \textsuperscript{139} See APPLEBY ET AL., supra note 120, at 129–51.
\item \textsuperscript{140} In my own experience at graduate school, I recall Conrad Russell, a leading historian of the English Civil War, telling a fellow student working in that field that the student would have to memorize the principal events that occurred during each day of the 1650s before he could attempt either his oral examinations or dissertation.
\item \textsuperscript{141} MCDONALD, supra note 135, at 67 n.25.
\end{enumerate}
\end{footnotesize}
acknowledged to be the leading books on a topic beats reading the thousands of sources that the authors of those books had to consult. Fortunately, the work of Wood, McDonald, Edmund Morgan, Bernard Bailyn, Jack Rakove, and many others has done much to reconstruct the Founding as never before and so made the task possible. Perhaps nothing furthers historical credibility more effectively, at least in a legal context, than turning to such works first, rather than proceeding directly to a few select primary texts in a relative vacuum. Doing so indirectly addresses the problems of depth and breadth since such scholarship itself rests on extensive research and wide-ranging inquiry. It also deals directly with the need to master a subject's historiographical context. More generally, this prescription by definition comports with the external standards through which the legal community seeks external guidance and authority. As such, the practice in fact seems to be the only practical hope.

But if so, it is a hope that also seems easy prey for a more fundamental, postmodern set of objections. Consider the following dilemma. Under the proposed approach, anyone hoping to interpret the Constitution by examining its origins has no credible choice but to rely in the first instance on historical scholarship, doubly so when a recognized body of scholarship offers a provisional account or framework. Fifty years ago that would have meant turning to the economic interpretations of Charles Beard, whose model dominated historiographical discourse for decades. Today the initial choice would be the very different narrative offered by Wood, McDonald, Bailyn, and Morgan. Fifty years from now it will probably be another account—crafted by scholars whose names are yet unknown. Surely such turnover exposes the fallacy of looking to the past for guidance. The constant shifts in the accounts that even professional historians create confirms that neither history nor tradition offers any real outside constraints for those who occupy the present. And at the very least it demonstrates that whatever does limit historiographical creativity does not limit it much, that those meager limits permit successive generations to reinvent the past even when there has been temporary agreement on a dominant framework, and that they leave anyone who would rely on any momentary paradigm with little more than a rope of sand. Trying to salvage the past, it appears, merely exposes the project's futility.

But a claim is not over 'til it's over. Further reflection suggests that the past can come out of the encounter not only unscathed, but stronger. The more
The more modest objection, moreover, actually supports the use of historical scholarship precisely because such scholarship changes.

Take the more radical objection. The shift from Beard to Wood (to a future scholar) demonstrates the strength of the constraints that operate upon historians rather than their malleability. The "Beardian view" went out of fashion for many reasons, but one of the most important was the discovery that Beard's thesis simply did not comport with newly accessible sources and more rigorous research. In particular, McDonald led the way—in fact made his reputation—by showing that wealthy creditors did not support the Constitution, nor embattled debtors oppose it, with anything like the consistency Beard posited.\textsuperscript{145} Now a postmodern critique might retort that the sources McDonald used to refute Beard are themselves malleable. And on a deeper level that may well be true. But that is not the level upon which people operate. Even the most cynical originalist stands willing to concede a point when a relevant source cuts directly against her.\textsuperscript{146} No less important, accepting such a radical indeterminacy for historical sources necessarily compels accepting the same type of indeterminacy for other materials that have been more easily manipulated, such as cryptic constitutional texts.

By contrast, the turnover of historical models does support the more moderate postmodern challenge, but this turns out actually to support following such models, or at least the most current version. Only a dinosaur of the most Whiggish sort would argue that history is a dispassionate search for truth immune from the social forces amid which historians live. Beard's Progressive views flourished while he was speaking to a society influenced by the Progressive movement.\textsuperscript{147} Wood's ideological interpretations arguably first came to dominate because his work first addressed an era steeped in the ideological competition of the '60s and the Cold War. Future historians will perhaps develop a multicultural framework to connect with the nation's growing pluralist and multicultural concerns.

Yet far from undermining the integrity of these models, this element of contingency furnishes all the more reason to employ them. As three pragmatic historians recently put it, "Successive generations of scholars do not so much revise historical knowledge as, they reinvest it with contemporary interest. . . . New versions of old narratives are not arbitrary exercises of historical imagination, but the consequence of the changing interest from

\textsuperscript{145} McDONALD, supra note 144, at 358, passim.

\textsuperscript{146} Or, to employ the pronoun descriptively, him. This phenomenon may explain why Justice Scalia, for example, is curiously silent in those areas where he has reason to believe that the weight of historical scholarship is against him. \textit{Compare} Harmelin v. Michigan, 501 U.S. 957, 961-85 (1991) (relying extensively on idiosyncratic version of English and American history in Eighth Amendment analysis) \textit{with} Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (not relying on history in First Amendment analysis).

\textsuperscript{147} Flaherty, supra note 16, at 533.
cumulative social experience.” Contemporary historians formulate questions and approaches that at some level reflect the concerns of the society in which they live. So, too, do contemporary constitutional interpreters. Following a current historiographical framework, therefore, speaks to present-day constitutionalists in a way that no previous or future account could. For now, it is better historical practice to rely on Wood rather than Beard, not just because Wood’s account brings us closer to an objective reality, though something like that is for most intents and purposes true. It is also better because the issues Beard pursued—class warfare, economic determinism, elitist misrule—at best engage our own concerns tangentially and sometimes not at all.

With all of this in mind, the overview that follows does not claim to be more than a sketch by the standards of the historical academy. By the standards of the legal academy, however, it at least begins a full-length portrait in an area in which even sketches so far have been few.

III. THE FOUNDING: INVENTING SEPARATION OF POWERS

Once this is done, an interesting, even counterintuitive story starts to emerge. What this narrative reveals, at the most general level, is people groping as best they could toward a workable conception of government from which only broad purposes can safely be inferred. No less important is what the narrative does not reveal. To take one of the most formalist accounts, Calabresi and Prakash argue that the Founding generation advanced something like the modern formalist conception of separation of powers, including a truly unitary executive. In the first instance, they advance this claim to refute Lessig and Sunstein’s contention that the Founders articulated a separate category of “administrative” power. More broadly, they make the argument to support the formalist view that the Founders rejected legislative involvement in the manner in which the executive executes the laws. But a genuine reconstruction of the Founding belies the contention that the Founders either always or primarily viewed the doctrine of separation of powers in modern formalist terms. Instead, the complex, messy, and at times contradictory ferment in constitutional thinking renders it unlikely at best that, by 1787, Americans had reached a consensus on the doctrine in anything like the precise, thoroughgoing manner that modern formalists prescribe. Beyond the pace of constitutional change, a reconstruction of the Founding refutes the formalist case even more dramatically in showing that contemporaries did not exclusively, or even usually, use the phrase “separation of powers” and related

148. APPLEBY ET AL., supra note 120, at 265.
149. Calabresi & Prakash, supra note 86, at 545–46.
150. Id. at 547–49.
terms in the literal fashion that formalists assume. To the contrary, even the most cursory examination reveals that when American constitutionalists said "separation of powers," "execute the laws," or "legislate," time and time again they meant something far different from the modern formalist conception.

A. Toward 1787

1. From Mixed Government to Separation of Powers

   a. Whig Mixed Government

   The American commitment to constitutional government did not begin with the Constitution. Nor did it begin with the constitutions of the several states. Colonists in America thought, debated, and wrote about how government ought to be framed almost from the founding of their first settlements.\textsuperscript{151} By the middle of the eighteenth century, Americans could and did draw upon a staggering array of sources to help them in their reflections: works of antiquity; Enlightenment thinkers such as Locke, Montesquieu, Beccaria, and Hutcheson; English common law; and the "Radical Whig" or "Commonwealth" tradition embodied by Harrington, Sidney, Trenchard, Gordon, and Bolingbroke.\textsuperscript{152} What these sources all tended to confirm was that, of all governmental arrangements on the globe, easily the best was the English Constitution—what a young John Adams called "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."\textsuperscript{153} One of the many things that made it so was its devotion, not


\textsuperscript{152} See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (1967); McDONALD, supra note 135, at 57-96; WOOD, supra note 133, at 3-45.

\textsuperscript{153} JOHN ADAMS, The Earl of Clarendon to William Pym, in 3 THE WORKS OF JOHN ADAMS 477, 477 (Charles F. Adams ed., Boston, Little, Brown & Co. 1851). It would be hard to overstate the extent to which English-speaking political speakers viewed the English Constitution as an isolated success amidst
to separation of powers, but to a more old-fashioned idea called “mixed government.”

The English Constitution, on the Whig view, reconciled power and liberty as successfully as it did by embracing a theory of mixed government. Mixed government reflected the idea that the balance between power and liberty could be struck through governmental structure. This idea, an ancient one, gained renewed vigor during the Renaissance. The mixed government approach, however, did not attempt to structure government around governmental functions. It instead attempted to structure government in order to balance the basic forces within society. Those forces consisted of three social orders, “each embodying within it the principles of a certain form of government: royalty, whose natural form of government was monarchy; the nobility, whose natural form was aristocracy; and the commons, whose form was democracy.”

Experience unhappily showed that each of these “pure” forms would almost inevitably degenerate into either an excess of power—monarch to tyranny; aristocracy to oligarchy—or an excess of liberty, or at least licentiousness—democracy to anarchy. The English Constitution escaped these traps in two ways. First, it developed institutions—the Crown, the House of Lords, and the House of Commons—that embodied each social estate. Next, it structured these institutions to insure that they would direct power not just to provide essential services, nor simply to preserve order, but to check each other. American Whigs saw their own colonial frameworks, each with a governor as well as an upper and lower house of the legislature, striking this same balance as mixed governments in miniature. Through this balance, both the English state and its colonial offspring could rule efficiently enough to satisfy the dictates of power, but protect rights sufficiently to satisfy the requirements of liberty.

an ocean of tyranny, oligarchy, and anarchy. One Rhode Island newspaper, reprinting an item from a London journal, put it this way:

There are 775,300,000 people in the World. Of these, arbitrary governments command 741,800,000, and the free ones (including 10 million Indians) only 33 1/2 million. Of these few, 12 1/2 million are subjects or descendants of the British Empire—1/3 of the freemen of the world. On the whole, slaves are three and twenty times more numerous than men enjoying, in any tolerable degree, the rights of human nature.

MCDONALD, supra note 135, at 9 (quoting PROVIDENCE GAZETTE & COUNTRY J., Nov. 11, 1786).

154. BAILYN, supra note 152, at 70.
155. Bailyn characterizes the Whig analysis of mixed government this way:

The result of this balanced counterpoise of social and governmental forces in the British Constitution was the confinement of social and political powers to specified, limited spheres. So long as the crown, the nobility, and the democracy remained in their designated places in government and performed their designated political tasks, liberty would continue to be safe in England and its dominions. But if any of them reached beyond the set boundaries of their rightful jurisdictions; if, particularly, the agencies of power—the prerogative, administration—managed, by corrupt practices, to insinuate their will into the assembly of the commons and to manipulate it at pleasure, liberty would be endangered.

Id. at 76.
Whigs on both sides of the Atlantic were virtually unanimous in extolling England's brand of mixed government as "a system of consummate wisdom and policy." So powerful was support for this system that when American Whigs became American patriots—when, that is, Americans in the 1760s began to resist parliamentary encroachment on their rights as Englishmen—the furthest thing from their minds was repudiating the English Constitution as they understood it. To the contrary, the patriots opposed Parliament not because the English Constitution oppressed them but because Parliament violated the English Constitution. Adams, for example, said as much on the eve of Lexington and Concord. Nor did the shooting change things, at least not at first. Even after independence appeared on the horizon as a genuine possibility, few Americans realized the profound implications that the break with Great Britain would have on their understandings of government.

They could not evade these implications for long. Thomas Paine, with typical gusto, was among the first to explore what independence would mean for mixed government. In Common Sense, the best-selling tract of the era, Paine lampooned what had been seen as the consummately wise and politic system, proclaiming as "farcical" the notion of the English government as a "union of three powers, reciprocally checking each other." Thanks in part to this "onslaught," Forrest McDonald points out, Americans tended to abandon the notion of mixed government. But Paine's onslaught was not the only reason. More fundamentally, it was independence itself that led to the abandonment of mixed government. Breaking the link with Britain in the first instance presented Americans with the problem of framing their own governments on the state level. Yet independence also deprived them of exactly those societal foundations on which the most successful framework that had ever been seen was built. Gone was the royalty. Gone was the nobility. Gone, therefore, was the chance of replicating the mixed government that the Whigs so prized.

b. Republican Experiments

With mixed government no longer an obvious option, Americans turned to the one possibility left—the democracy. For any but the smallest polity this choice meant experimenting not with democracy in its pure form, on the model

156. Id. at 71.
159. MCDONALD, supra note 135, at 84.
160. See BAILYN, supra note 152, at 274–82.
of Athens, but with democracy in the form of republics. Unfortunately, the same Whig political theory that taught Americans that republics were all they could realistically establish also taught that republics had little realistic chance for success. Without the checks of monarchy and aristocracy, republics had almost invariably fallen prey to that excess of liberty known as anarchy. But just as American society presented the problem, it also afforded a solution. America’s lack of a royal family or titled nobility—in fact its comparative lack of very rich or very poor in general—helped insure an abundance of civic virtue, the critical quality that made republican experiments feasible at all. Viewed roughly as a selfless, participatory commitment to the public good, civic virtue kept liberty in check from within the hearts of citizens themselves, preventing them from seeking self-interested goals based on their religious, class, or local commitments at the expense of the whole. Europe suffered from too many of these factional divisions for republics to succeed for very long. But Americans—or at least white Americans—prided themselves on their relative homogeneity; what Franklin called, “a general happy Mediocrity.”

Especially in the even more homogeneous context of each state, American republicans believed they could cheat the received political wisdom and successfully establish each state as what Samuel Adams famously described as a virtuous and republican “Christian Sparta.”

It followed that republics in America would have to emphasize certain political principles and downplay others. With respect to liberty, American republicans to a significant extent felt free to sacrifice balance, so critical to the English mixed constitution, in favor of accountability. Thanks to American virtue, balance no longer seemed crucial. One reason the English Constitution required balance as a means of turning power against

161. Most Americans never seriously considered literal democracy because it was impractical for any but the smallest polity, because it was the most unstable form of popular rule, and because of its leveling implications. For a discussion of Revolution-era American attitudes toward equality, see GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 229–43 (1992).
162. For the classic discussion of the role of American virtue in republican ideology, see WOOD, supra note 133, at 65–70.
163. Franklin’s famous passage reads, “The Truth is, that tho’ there are in that Country [the United States] few People so miserable as the Poor of Europe, there are also very few that in Europe would be called rich: it is rather a general happy Mediocrity that prevails.” Benjamin Franklin, Information to Those Who Would Remove to America, in BENJAMIN FRANKLIN, WRITINGS 975, 975 (J.A. Leo Lemay ed., 1987). Later in the same essay Franklin concludes, “The almost general Mediocrity of Fortune that prevails in America, obliging its People to follow some Business for Subsistance [sic], those Vices that arise usually from Idleness are in a great Measure prevented. Industry and constant Employment are great Preservatives of the Morals and Virtue of a Nation.” Id. at 982. For a brilliant discussion of the relative equality and liberty enjoyed by whites (and especially white males) and the slavery endured by African-Americans, as well as the effect of that relationship on the American commitment to republicanism, see EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 376–87 (1975).
164. WOOD, supra note 133, at 118 (quoting letter from Samuel Adams to John Scollay (Dec. 30, 1780), in 4 WRITINGS OF SAMUEL ADAMS 238 (Harry Cushing ed., 1904–1908)).
165. See id. at 150–58.
166. See id. at 65–70, 118–24.
itself was because it needed power to prevent anarchy. Sufficient virtue, however, could do much of the work traditionally set aside for power and itself prevent anarchy. Better still, it could do so without posing a threat to liberty in the way that power did. Americans could therefore promote liberty easily and directly by making government accountable to the people. As they knew better than anyone else, self-government was at once the best means for safeguarding individual rights and also a right in itself. Power had never seemed more likely to overawe liberty in their lifetimes than when an unrepresentative Parliament at the same time, often in the same measures, denied Americans both their individual rights and their right to control their own destiny. A self-governing people, in short, could only foster liberty rather than tyranny. As one New Jersey critic put the common formulation, “a virtuous legislature will not, cannot listen to any proposition, however popular, that came within the description of being unjust, impolitic or unnecessary.” When it came to liberty, as the title of a New England pamphlet succinctly stated, it was The People the Best Governors.

American republicans also had to reconsider the role of power. They acknowledged that insuring liberty through representative government, or accountability, came at the expense of government power, or efficiency. Unable and unwilling to replicate either the monarchical or aristocratic features of the English mixed government in any straightforward way, republicans realized that their own governments would be more modest, limited, and small. Accordingly, those governments might well deliver many services and preserve order less effectively. But this was a price that republicans were willing to pay. Their own experience of energetic government as England had practiced it—the suspension of the New York legislature, the closing of the port of Boston, the use of standing armies—made Americans even more leery of government power than they ordinarily might have been.

These principles became concrete in early state constitutions, most of which in some way featured legislative supremacy, radical representation, and


171. See REID, 3 CONSTITUTIONAL HISTORY, supra note 151, at 276–81.


Consider first those devices, both abandoned and embraced, that Whig constitutionalism traditionally viewed as fostering liberty. American republicans manifested their comparative retreat from balance by concentrating power in the legislatures. As Gordon Wood states, "The American legislatures, in particular the lower houses of the assemblies, were no longer to be merely adjuncts or checks to magisterial power, but were in fact to be the government—a revolutionary transformation of political authority . . ." Virginia's Constitution of 1776—in many ways typical of the first-generation state frameworks—provided that all legislation must arise in the lower house, prohibited the upper house from amending financial measures, empowered both houses to appoint most judges, and tacitly permitted the legislature to change the constitution by statute. Pennsylvania's first constitution, generally seen as the most radically republican ever produced, went further and concentrated these and other powers in the lower house of the assembly, abolishing the upper house altogether. Not only did these initial constitutions concentrate power in the assemblies, they prevented the other branches of government, especially the "kingly" governors, from checking the legislatures. The first constitutions consequently sought to prohibit the executive from corrupting the legislature through informal influence, commonly prohibiting any person holding government office or receiving government patronage from sitting in the assembly. More dramatically, they also removed formal checks on the legislature that the magistracy had traditionally wielded both in Parliament and in the colonial legislatures. In most states the republican governor, unlike his royal predecessor, could neither adjourn nor prorogue the assembly. Nor, more dramatically still, could he veto legislation.

In lieu of balance, American republicans embraced accountability, which in practice meant that the democratic part of government, the lower house of the legislature in particular, should represent the people as closely as possible. American republicans therefore employed an array of

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174. One important exception to these developments, at least with regard to magisterial importance, was New York. See infra text accompanying notes 237–54.

175. WOOD, supra note 133, at 163.

176. For discussions of Pennsylvania's extreme republicanism, see WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 178–80; WOOD, supra note 133, at 83–90.

177. See PA. CONST. of 1776, § 2. Georgia and Vermont did likewise. See GA. CONST. of 1777, art. VII; VT. CONST. of 1777, ch. II, § II; see also WOOD, supra note 133, at 163.

178. See, e.g., GA. CONST. of 1777, art. XVII; VA. CONST. of 1776, paras. 10.


180. See, e.g., DEL. CONST. of 1776, art. 10; PA. CONST. of 1776, § 20; VT. CONST. of 1777, ch. II, § XVIII; VA. CONST. of 1776, paras. 9.

181. See, e.g., DEL. CONST. of 1776, art. 7; PA. CONST. of 1776, § 20; VA. CONST. of 1776, paras. 8–10; see also WOOD, supra note 133, at 141.

182. See BANNING, supra note 168, at 99–100; MORGAN, supra note 167, at 245–54; WOOD, supra note 133, at 162–73, 209–14. Edmund Morgan provides a vivid characterization of the approach that
constitutional mechanisms long extolled by their Whig predecessors. Among these were annual elections,\(^{183}\) term limits to guarantee rotation in office,\(^{184}\) a relatively broad franchise,\(^{185}\) even a right of localities to issue nonbinding instructions to their representatives.\(^{186}\) Predictably, nowhere did the rage for representation proceed further than in Pennsylvania. In addition to all of the foregoing devices, that state's first constitution did its best to make the people part of the legislative process, providing that "[t]he doors of the house in which the representatives of . . . this state shall sit in general assembly, shall be and remain open for the admission of all persons,"\(^{187}\) that "[t]he votes and proceedings of the general assembly shall be printed weekly during their sitting,"\(^{188}\) and that "all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment."\(^{189}\)

Where the early constitutions traded one libertarian strategy for another, they sacrificed the traditional devices meant to insure adequate state power. Nowhere was this more clear than in the treatment accorded the magistracy, the body that for better and often for worse wielded power most efficiently. Not only did the early constitutions prevent the governors from checking the legislature, but time and again they empowered the legislatures to check the governors. The Virginia Constitution, once more reflecting the national trend, permitted the legislature to choose the state secretary, the attorney general,\(^{190}\) the governor's cabinet (styled the "Privy Council"),\(^{191}\) and finally, the governor himself.\(^{192}\) Virginia republicans further sought to limit magisterial power by prohibiting the governor "under any pretence, [from] exercis[ing] any

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American republicans took:

The colonists had been contending that a representative ought to think, feel, and act like his constituents. Now [in the early state constitutions] they began to practice what they preached by electing more ordinary men, men who did not talk in the highfalutin language of lawyers, merchants, and big landowners, men more like themselves, who knew about the problems of running a small farm and keeping the tax collector off your back.


183. See, e.g., DEL. CONST. of 1776, art. 3; GA. CONST. of 1777, arts. II, III, XVI, XXIII, LIII; MD. CONST. of 1776, arts. XXV, XXVI, XXVII; PA. CONST. of 1776, §§ 9, 31; VT. CONST. of 1777, ch. II, §§ VIII, X; VA. CONST. of 1776, paras. 4, 5, 8.

184. See, e.g., DEL. CONST. of 1776, art. 15; GA. CONST. of 1777, art. XXIII; MD. CONST. of 1776, art. XXVII; N.Y. CONST. of 1777, arts. XXIII, XXVII; PA. CONST. of 1776, §§ 8, 11; VT. CONST. of 1777, ch. II, § X; VA. CONST. of 1776, para. 5.

185. Willi Paul Adams provides useful tables that generally indicate a broadening of voting qualifications as each colony made the transition to statehood. See ADAMS, supra note 176, at 293–307.

186. See id. at 248; see, e.g., N.C. CONST. of 1776, Declaration of Rights, art. 18.


188. Id. § 14.

189. Id. § 15.

190. VA. CONST. of 1776, para. 14.

191. Id. para. 10.

192. Id. para. 8.
power or prerogative, by virtue of any law, statute or custom of England, specifying a three-year gubernatorial term limit, and subjecting the governor to impeachment for “mal-administration.” Pennsylvania, again pushing the limits of republicanism, simply got rid of a unitary governor altogether. In its place, Pennsylvania’s republicans created an unwieldy “supreme executive council” consisting of twelve persons directly elected by the people, but headed by a president and vice president chosen by the unicameral assembly.

c. **Toward Separation of Powers**

Americans quickly discovered that their republican solutions did not work as well as they had hoped. To many observers, the governments that operated under the first state constitutions had ushered in what John Quincy Adams called a “‘critical period,’” and what others simply referred to as a “crisis.” Of the many evils that had arisen, perhaps the most dismaying was the behavior of the legislatures. In state after state, self-interested and rapacious factions, it seemed, had managed to seize the assemblies and enact ill-advised laws that confiscated property, transferred wealth through schemes of calculated inflation, eliminated existing contractual obligations, and even limited the right of trial by jury. Most observers agreed that these and

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193. *Id.; see also MD. CONST. of 1776, art. 33 (same); cf. N.H. CONST. of 1776, paras. 2–3 (criticizing abuses of Great Britain but hoping for reconciliation); N.Y. CONST. of 1777, art. 35 (rejecting parts of common law that concern allegiance, supremacy, sovereignty, government, and prerogatives of Crown).*
194. *VA. CONST. of 1776, para. 8.*
195. *Id. para. 16. Impeachment of government officials by the legislature, an important aspect of removal authority, furnishes an especially rich and complex example of the republican approach. Drawing on English precedent, all but six states initially adopted impeachment procedures largely as safeguards against corruption by government officials and appointees. Such procedures, however, violated the separation of powers doctrine, or at least a rigid version of the doctrine, in at least two ways. First, impeachment authority obviously encroached on executive authority to control government officials. Second, it intruded upon judicial authority to the extent that the basis for impeachment shifted from general political grounds to the more narrow conception of wrongdoing, and impeachment procedures themselves resembled indictments and trials. From another viewpoint, rendering impeachment procedures more judicial in nature bucked the contemporary trend by placing limits on the power of the legislature. Where the British House of Commons had earlier exercised almost unfettered discretion in bringing impeachments, the republican conception confined the exercise of this power. In this way, the development of impeachment authority anticipated the disenchantment with legislative abuses that would become evident during the late 1770s and 1780s. By anticipating this disenchantment, impeachment became a device that constitutional reformers suspicious of legislative excess retained and defended. For a superb study of impeachment during the Critical Period and Founding, see Peter C. Hoffer & N.E.H. Hull, *Impeachment in America, 1635–1805*, at 59–109 (1984). For a concise account, see Gerhardt, *supra* note 62, at 10–18.*
196. *See PA. CONST. of 1776, § 19.*
199. *Id. at 405–09. In response, several state courts began to develop the doctrine of judicial review. *Id.* at 454–59; *see, e.g.*, Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782) (holding that lower house of Virginia legislature exceeded its power in granting pardon that upper house did not approve); Rutgers v. Waddington (N.Y. City Mayor’s Ct. 1784) (construing state statute as comporting with state constitution*
other ills arose because the American people were not so virtuous after all. In addition, many commentators predictably viewed these developments in classical republican terms and decried what surely appeared to be an inevitable popular degeneration into "anarchy and licentiousness."200 Others, however, diagnosed a novel and far more troubling malady. To these individuals, the problem was not an excess of liberty, but rather that the people, through the legislatures, were doing what Whig and republican theory posited as a solecism: They were tyrannizing themselves. As Forrest McDonald comments, the reason for the crisis facing the nation "in the eyes of many Americans, was that governments were now committing unprecedented excesses, even though—or precisely because—governments now derived their powers from compacts amongst the people."201 Americans, in short, began to consider that self-government and rights did not always go hand in hand.

With the republican model exposed as inadequate, a number of prominent thinkers groped toward new solutions, a search that included rethinking the hitherto "relatively minor eighteenth-century maxim" of separation of powers.202 Americans had long been familiar with the doctrine through the writings of English Commonwealth radicals, Locke, and, most of all, Montesquieu.203 Still, the development of the doctrine in seventeenth- and eighteenth-century Europe, to say nothing of its reception in America, is an enormous, complex, and often counterintuitive topic that merits a separate study in its own right. The often-invoked Locke, for example, spoke of legislative, executive, and "federative" power.204 The idea of a discrete "judicial power" came relatively late in the doctrine's development.205 Perhaps the best that can be said is that by the 1770s, Americans who invoked the separation of powers doctrine generally agreed that it turned on three now-familiar types of governmental power: legislative, executive, and judicial.

200. WOOD, supra note 133, at 403 (quoting MOSES HEMMENWAY, A SERMON, PREACHED BEFORE HIS EXCELLENCY JOHN HANCOCK 40 (1784)).

201. MCDONALD, supra note 135, at 154; see id. at 143–83 (discussing lessons learned from 1776–1787); see also WOOD, supra note 133, at 409–13.

202. WOOD, supra note 133, at 449.

203. See VILE, supra note 20, at 120–22; see also id. at 118–75 (describing separation of powers doctrine in America).

204. For a thoughtful discussion of Locke's contributions to separation of powers thinking, see GWYN, supra note 21, at 66–81.

According to Montesquieu, to whom such Americans usually turned, legislative power comprised the enactment, amendment, or abrogation of permanent or temporary laws; executive authority included the power to make peace or war and to establish public security; judicial power entailed punishing criminals and resolving disputes between individuals. Even here, at the core of the doctrine, these definitions did not command universal assent. Most often, discussions of governmental structure assumed rather than explicated such definitions. And beyond this imprecise core, the rest remained up for grabs—including those issues, such as removal authority, that generate modern controversies. Moreover, despite superficial similarities, separation of powers was distinct from the idea of mixed government and long subordinate to it. In separation of powers, institutions were differentiated by function, whereas in mixed government, government bodies reflected different orders of society.

American constitutionalists nonetheless employed separation of powers early on, though mainly rhetorically. Four of the early state constitutions even included separation of powers clauses. Virginia’s clause was typical, providing that "[t]he legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other." Perhaps the most concrete manifestation of the doctrine is one taken for granted today. In general, the early republican constitutions expressly prohibited members of the legislature from holding any remunerative position elsewhere in government. They did this, as the New Jersey Constitution declared, so that “the legislative department of this government may, as much as possible, be preserved from all suspicion of corruption,” especially corruption by the executive. Given their commitment to legislative supremacy, however, the states at best honored their commitment to these declarations in the breach. As Gordon Wood states:

[W]hat more than anything else makes the use of Montesquieu’s maxim in 1776 perplexing is the great discrepancy between the affirmations of the need to separate the several governmental departments and the actual political practice the state governments followed. It seems, as historians have noted, that Americans in 1776 gave only a verbal recognition to the concept of separation of powers

207. Id.
208. Id.
209. See WOOD, supra note 133, at 150–61. Wood argues that it is difficult to glean what eighteenth-century Americans meant by their repeated calls for distinct and separate departments. This is so, he explains, because the doctrine of separation of powers was vague and ill-defined. Id. at 151–53.
210. VA. CONST. of 1776, para. 3.
211. N.J. CONST. of 1776, art. XX; WOOD, supra note 133, at 157–59. This principle was carried forward by the Incompatibility and Ineligibility Clauses, which provide that no Congressperson may serve in another office under the authority of the United States. U.S. CONST. art I, § 6, cl. 2.
in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions.212

Taking separation of powers more seriously suggested ways of explaining where the states had gone wrong, which in turn sharpened many Americans’ apparently hazy conception of the doctrine. From this process a number of leading critics realized that they had placed too little faith in balance, had devoted too much attention to simple accountability, and had given insufficient concern to efficiency.

The most insistent theme was balance. Time and again, critics of the state constitutions decried their asymmetry and proposed separation of powers as a means to restore balance and preserve liberty. Among the first, Benjamin Rush, a vociferous supporter of the concept of separation of powers, complained that in the Pennsylvania Constitution “the supreme, absolute, and uncontrolled power of the State is lodged in the hands of one body of men.”213 Jefferson sounded the theme most forcefully and famously when criticizing his state’s constitution in Notes on the State of Virginia:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one... [Government] should not only be founded on free principles, ... the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.214

Despite occasional rhetorical excesses—arguably Jefferson’s final sentence is such an example—the advocates of separation of powers rarely argued for keeping the three government departments absolutely distinct. Even when they did, it is doubtful whether they meant it with much more clarity than did the men who drafted Virginia’s original—and effectively ignored—separation of powers clause. As Willi Paul Adams notes, “Montesquieu, the authority used by the critics, had not advocated a separation of powers pure and simple.”215 Likewise, Montesquieu’s “much praised model, the British constitution, permitted several functions to be exercised jointly or in a partially overlapping

212. WOOD, supra note 133, at 153–54.
213. Id. at 441 (quoting Benjamin Rush).
214. THOMAS JEFFERSON, Notes on the State of Virginia, in WRITINGS 123, 245 (Merrill D. Peterson ed., 1984); see also BANNING, supra note 168, at 88 (discussing desire of both Jefferson and Madison to reform Virginia Constitution of 1776).
215. ADAMS, supra note 176, at 275.
manner by the several branches." The more sophisticated commentators understood that governmental power needed to be separated sufficiently to ensure that no one branch would ever again become as powerful as the state legislatures had. Separation of powers, in other words, served balance rather than balance serving a rigid, formalistic view of separation of powers.

As it promised balance, separation of powers also reflected a reconceptualization of accountability. Simple accountability had proven to be too dangerous. As the Critical Period progressed, many thinkers could agree with Aedanus Burke when he observed that "[a] popular assembly," framed to respond to unmediated popular will and "not governed by fundamental laws, but under the bias [sic] of anger, malice, or a thirst for revenge, will commit more excess [sic] than an arbitrary monarch." This followed, others concluded, because simple accountability had also resulted in government that was paradoxically unaccountable. Recent experience demonstrated that radically representative legislatures fell easy prey to demagogues, to localism, and—perhaps most important—to factions. Each of these evils perverted consideration of the public good and thus blocked expression of the public interest. It was for these reasons, in part, that the state legislatures could pass too many laws too quickly in ways that threatened liberty. As Madison wrote in a privately circulated memorandum entitled Vices of the Political System of the United States, "The short period of independency has filled as many pages as the century which proceeded it" with ill-considered, unjust, and unrepresentative laws.

Separation of powers helped address these unhappy discoveries not by abandoning accountability, but by recasting it in such a way as to render it less dangerous and more truly representative, or at least representative of the people's better, more deliberative selves. Proponents of the doctrine therefore tended to worry less about attempting to replicate the populace as nearly as possible within the halls of the legislature. Instead they turned their concern to according the various departments of government a more representative basis. Doing this, it was declared, would ensure that "[all] power residing originally in the people and being derived from them, the several magistrates and officers of government vested with authority, whether legislature, executive, or judicial, are the substitutes and agents, and are at all times accountable to them." This more complex view of accountability

216. Id.
218. AEDANUS BURKE, AN ADDRESS TO THE FREEMEN OF THE STATE OF SOUTH-CAROLINA 23 (Philadelphia, Robert Bell 1783).
219. WOOD, supra note 133, at 406. As Wood puts it, "In the eyes of those who favored [new state constitutions], the old government had lost whatever representativeness of the people it had presumably possessed." Id. at 447.
220. See supra text accompanying notes 182-89.
221. MASS CONST. of 1780, pt. I, art. V.
meant shifting attention from such republican strategies as annual elections, local instructions, and requirements such as that “all bills of a public nature, shall . . . be printed for the consideration of the people.” 222 In their stead, it yielded such devices as direct election of the governor and upper houses of the assemblies.

For all that separation of powers promised as a safeguard of liberty, it also held out ways for making government power more effective, republican government’s more traditional if less pressing problem. Mostly those ways pointed toward rehabilitating those offices that executed the laws. Here, however, the concern was not so much for achieving balance or spreading representation, but for ensuring that government could promote order. Many Americans viewed the vices of the Critical Period as the inevitable degeneration of republics into anarchy. Some events, however, were best seen as just that, most spectacularly, Shays’s Rebellion, during which farmers in western Massachusetts rioted against state authority in 1786. The famous revolt, as Wood notes, “was received with excited consternation mingled with relief by many Americans precisely because it was an anticipated and understandable abuse of republican liberty. Liberty had been carried into anarchy and the throwing off of all government—a more comprehensible phenomenon to most American political thinkers than legislative tyranny.” 223 Seen this way, as anarchy, the outcome of Shays’s Rebellion suggested the solution. Happily, the state government had been able to restore order to western Massachusetts thanks in part to that state’s reformed and more vigorous governor. As Charles Thach neatly put it seventy years ago, concern about authority “meant a corresponding change of emphasis from the legislature to the executive.” 224 At the very least, this change of emphasis confirmed the wisdom that—contrary to the Pennsylvania approach—“the one-[person] executive is best.” 225 It also suggested “the necessity of executive appointments, civil and military; the futility of legislative military control . . . [and the] value of a fixed executive salary which the legislature could not reduce.” 226

A new spate of state constitutions put developing separation of powers principles into practice, most notably, the Massachusetts Constitution of 1780. So too, however, did New York’s earlier Constitution of 1777, a document that was ahead of its time, anticipated or even exceeded the approach later taken in other states, and, with the Massachusetts framework, is often cited as a

222. VT. CONST. of 1777, ch. II., § XIV.
223. WOOD, supra note 133, at 412.
225. Id. at 53.
226. Id.
precursor of the Federal Constitution. Both state documents, among others, displayed a profound commitment to a functional balance that was nonetheless short of a rigid, formal division.

The Massachusetts instrument, the work of such notable reformers as John Adams, stated—or to be accurate, overstated—this new commitment in the most ostensibly formalist separation of powers clause yet written:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative 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. This prescription meant strengthening the governor and courts at the expense of the assembly, the lower house in particular. Unlike fellow Chief Magistrates, the governor of Massachusetts—to be styled “His Excellency”—was therefore accorded an array of protections against despotic legislative power, including express salary protection, the ability to prorogue and adjourn the legislature, and a provisional veto that could only be overridden by two thirds of each house. Along similar lines, the New York governor had the authority to convene (on extraordinary occasions) and prorogue the assembly, along with a complex power to “revise” bills in conjunction with the state chancellor and judges of the supreme court to prevent laws that are “hastily and unadvisedly passed.” In both states the judiciary also benefited, at times in tandem with the executive. Massachusetts vested the power to appoint judges in the governor (with the advice and consent of the upper house of an executive council) and granted judges life tenure. New York, though more modest in its protections, also accorded the governor a qualified power to appoint judges and guaranteed that judges would serve during good behavior until the age of sixty.

227. For a discussion of the New York Constitution’s place in state and national constitutional development, see id. at 34–41. In particular the New York Constitution is often taken as a model for the federal executive. Id. at 53–54; Wood, supra note 133, at 463.
228. For example, the New Hampshire Constitution of 1784. See Wood, supra note 133, at 463.
230. Id. pt. II, ch. II, § 1, art. I.
231. Id. pt. II, ch. II, § 1, art. V.
232. Id. pt. II, ch. I, § 1, art. II.
233. N.Y. Const. of 1777, art. XVII.
234. Id. art. III.
236. Id. pt. II, ch. III, art. I.
237. N.Y. Const. of 1777, arts. XXIII, XXIV.
238. Id. art. XXIV.
Despite these measures, Massachusetts and New York fell short of the former state's near absolute separation of powers clause in much the same way that Virginia dramatically fell short of its own earlier, more cryptic version. New York, while empowering the governor to appoint most "officers" with the advice and consent of a "council of appointment," placed the appointment of the state treasurer directly in the hands of the assembly. Massachusetts provided for a "council, for advising the governor in the executive part of the government," which would further assume the governor's authority. It was chosen by the assembly. More striking, the assembly alone could choose what, on a modern formalist reading, would be a fair portion of the executive branch, including: "the secretary, treasurer, . . . receiver-general, . . . commissary-general, notaries public, and naval officers." In its own "reform" constitution of 1784, which also boasted a separation of powers clause, New Hampshire likewise vested appointment of the state's secretary, treasurer, and commissary-general in the assembly.

Beyond balance, separation of powers meant adopting devices that reflected the more complex conception of accountability. New York and Massachusetts did this most dramatically by rejecting legislative selection of the governor in favor of direct election by the people. The constitutions also diffused accountability within the assemblies themselves. Where a number of earlier constitutions had gone so far as either to empower the lower houses to elect the upper houses, or to get rid of the upper houses completely, New York and Massachusetts confirmed the majority view by specifying that this body too would be elected directly by the people. Conversely, neither instrument extended the principle to election of judges, a strategy with which state constitutions generally would not experiment for at least a generation and that the Federal Constitution would reject outright.

Finally, both the Massachusetts and New York frameworks also reflected a comparative concern for efficient administration of state affairs. Given the Pennsylvania option, it is significant that these and other systems chose to retain a single person as "supreme executive magistrate" or governor. As noted, Massachusetts in particular greatly circumscribed the governor's

239. Id. art. XXIII.
240. Id. art. XXII.
242. Id. pt. II, ch. II, § 3, art. II.
243. Id. pt. II, ch. II, § 4, art. I. In this, Massachusetts retained a feature evident in earlier state constitutions. See, e.g., DEL. CONST. of 1776, art. 16.
244. N.H. CONST. of 1784, pt. I, art. XXXVII.
245. Id. pt. II.
246. N.Y. CONST. of 1777, art. XVII; MASS. CONST. of 1780, pt. II, ch. II, § 1, art. III.
247. See, e.g., N.H. CONST. of 1776, para. 4.; S.C. CONST. of 1776, art. II; see also WOOD, supra note 133, at 214 (discussing early state constitutions in which lower house selected upper house).
248. GA. CONST. of 1777, art. II; PA. CONST. of 1776, § 2; VT. CONST. of 1777, ch. II, § I.
250. N.Y. CONST. of 1777, art. XVII; MASS. CONST. of 1780, pt. II, ch. II, § 1, art I.
executive supremacy, especially with regard to appointments. Nonetheless, the state’s retention of a “unitary” governor reflected a fresh appreciation throughout the Republic that a single Chief Executive promoted energetic enforcement of the laws in a way that a plural executive could not. Likewise, Massachusetts, as well as New York, also provided that the governor would be “the commander in chief of the army and navy . . . and shall have full power . . . to train, instruct, exercise, and govern the militia and navy” to defend the commonwealth. If anything, New York enunciated its commitment to energy even more plainly in stating that it was the duty of the governor “to transact all necessary business with the officers of government, civil and military; to take care that the laws are faithfully executed, to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature.”

**d. Separation of Powers and the Articles of Confederation**

Meanwhile, developments on the national level also pointed toward separation of powers, pragmatically understood. Compared to the state constitutions, the Articles of Confederation were not a source to which contemporaries often turned to draw lessons about government. That said, as in the states, experience under the Articles provided little support for a much more thoroughgoing conception of separation of powers than a general functional commitment to balance, joint accountability, and comparatively greater energy.

The Articles of Confederation established something more than a mere “gathering of ambassadors” but far less than a true national government. Under the Articles, the United States lacked many basic governmental powers. Of greater relevance, it also lacked anything approaching the governmental structure that had been developing in the states. Instead, the Articles concentrated what national authority that existed in the Continental Congress, a unicameral assembly composed of delegates from each state, each delegation possessing one vote. As the sole repository of national power, Congress performed legislative, executive, and judicial functions—imprecise as those terms remained—as well as duties that were less easily categorized. The Articles gave Congress what were considered core legislative powers, such as

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252. N.Y. Const. of 1777, art. XVIII.
254. N.Y. Const. of 1777, art. XIX.
255. The leading historical accounts of American constitutional thought during the Critical Period, echoing the sources, pay little attention to the Articles in comparison to the state constitutions. See, e.g., Wood, supra note 133, passim; McDonald, supra note 135, passim.
regulating financial matters, establishing post offices, and fixing weights and measures. But they also gave Congress the power to make war and appoint and commission all military officers serving the nation—authority usually thought to be executive in nature. In addition, Congress possessed significant authority for, in the words of the Articles, “managing the general affairs of the united states.” This phrase referred specifically to a “Committee of the States,” that would do the “managing” when Congress was in recess. In effect, the phrase also applied to other ways Congress attempted to oversee national affairs. Initially Congress tried to perform this task either through the whole body or through special committees that came to be comprised of both delegates and nondelegates. When this system proved clumsy, Congress in 1781 established departments under single heads who were not members of Congress. As if this combination of functions were not enough, Congress also acted as an appellate court for interstate admiralty disputes.

Few observers, and fewer participants, championed this framework. Most came to criticize the Articles for their failure to grant sufficient authority to the national government. Yet many also voiced criticisms of the national government’s structure, and these complaints often echoed developments in the states. Most obviously, the Articles failed the test of balance. Alexander Hanson of Maryland, for example, viewed the concentration of power in the single body of Congress as a grave deficiency. Conversely—and in contrast to the states—others complained that Congress was not accountable enough. So unresponsive was Congress that, after the Revolution ended, the

257. ARTICLES OF CONFEDERATION art. IX.
258. Id.
259. Id.
260. The Committee of the States, which was to be comprised of one delegate from each state, see id. art. X, met only once and was a near complete failure. MORRIS, supra note 256, at 97–99.
261. These committees included the Naval Committee, the Secret Committee, and the Committee of Secret Correspondence, among others. MORRIS, supra note 256, at 95.
262. The original appointees included Robert Morris as Superintendent of Finance and Agent of Marine, Benjamin Lincoln as Secretary at War, and Robert R. Livingston as Secretary for Foreign Affairs. Id.

Morris, perhaps his generation’s leading historian of the Founding, significantly labels the congressional experience with standing committees and single-head departments as “The Executive and Administrative Functions of Congress.” Id. For a general account, see JENNINGS B. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774–1789 (1935).


body had great difficulty maintaining a quorum, much to the consternation of Jefferson, among others.266 (This concern does nothing to belie the growing fear of simple accountability on the state level since Congress could not claim a direct electoral mandate, and was unlikely to abuse it even if it had had one.) Finally, others criticized the national government not just for its lack of authority, but also for its lack of energy in using the powers it did possess.267

As in the states, these criticisms reflected a growing appreciation of separation of powers. Yet, as in the states, they not only fail to demonstrate that a formalist conception of that doctrine was just around the corner, but instead point the other way. In particular, the Articles underscore how much conceptual work would have to be done to give practical definition to legislative, executive, and judicial (not to mention, “managerial”) authority, much less to assign these powers exclusively to one branch or another, much less to do all this in the space of a few years. Without doubt the failures of government, both state and national, illustrated the need for a greater division of powers to the extent those powers could be clearly defined. They did not, however, preordain a rigid formalist structure in which all governmental authority was clearly defined and neatly packaged.

Perhaps the most significant congressional enactment during this period, the Northwest Ordinance,268 points in the opposite direction, albeit in a paradoxical fashion. Enacted the same summer that the Philadelphia Convention drafted the Constitution, this often overlooked legislation merits consideration as a foundational constitutional document, or at least as a document that reflected American constitutional thinking at the time.269 Among other things, it established the basic interim governmental framework for territory now occupied by six states270. It also enumerated “fundamental principles of civil and religious liberty” that would “forever remain unalterable.”271

Not surprisingly, the framework set forth evinced yet another take on separation of powers, one which, like those apparent in the states, was keyed to recent developments. In this case, these factors pointed to a need for greater congressional involvement in the territories. Accordingly, the Ordinance greatly enhanced the authority of the congressionally appointed territorial governor. To an extent, this resulted in a division of powers that at first glance appeared to approach a modern formalist conception. The governor, for example, acted as

266. MORRIS, supra note 256, at 92–93.
267. Id. at 194–219, 245–66.
271. Id. §§ 13, 14, arts. I–VI.
Commander in Chief of the militia, appointed all military officers (except generals, who were appointed by Congress), and even appointed all "magistrates, and other civil officers." Yet the Ordinance went further, according the governor an absolute veto over legislation as well as the "power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient." This was arguably "executive" authority; British monarchs and royal colonial governors possessed these powers into the eighteenth century. Yet this was not necessarily so, as the Federal Convention itself would soon demonstrate.

2. The Myth of Formalist Separation

The account to this point refutes the formalist view. Calabresi and Prakash, however, claim that the story can be told with far greater precision. For them, separation of powers meant more than a central commitment to balance, joint authority, and a comparative concern for efficiency. Rather, the doctrine reflected these goals not in the abstract fashion just recounted, but through a precise and near-absolute division of powers. The foregoing account undermines this view in a number of ways. First, the sweep of events belies the assumption that the formalist conception was a constant and renders improbable the notion that it became the consensus. Second, it directly belies the notion that the term "separation of powers" primarily, still less necessarily, referred to the doctrine in its formalist guise.

a. The Pace of Change

Calabresi and Prakash embrace the idea that an "ancient text" should be construed "in its historical context." Toward that end, they briefly examine the thought of Locke, Blackstone, and Montesquieu to argue that "the founding generation firmly believed that, like Julius Caesar’s Gaul, all of government came divided into three parts." In doing this they assume that Locke, Blackstone, and Montesquieu advanced a formalist conception, that this conception was the eighteenth-century norm, and that the American constitutionalists, being the learned individuals they were, assimilated and applied this view.

272. Id. §§ 6, 7.
273. Id. § 11.
274. Calabresi & Prakash, supra note 86, at 599 n.219.
275. Id. at 606.
276. See id. at 604–65. For a discussion of the political philosophers who influenced the Founders with regard to executive power in particular, see FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 38–66 (1994).
None of this was the case. As noted, even a minimally adequate sense of context reveals that for much of the eighteenth century, constitutional thought was dominated by the tripartite but radically different model of mixed government. This conception, in turn, largely gave way to the republican commitment to legislative authority at the expense of executive or judicial power. Only after this approach proved problematic did separation of powers emerge in anything like its present form. Through all but the latter part of these developments, separation of powers was at best a peripheral doctrine that had barely been worked out, even by those American constitutionalists who gave it rhetorical support. All this would be true even if Locke, Blackstone, and Montesquieu advanced the type of formalist understanding of government that Calabresi and Prakash say they did. Yet the foregoing account challenges this claim as well. As an initial matter, only a careful, considered analysis of the work of these three thinkers could settle this point adequately. Absent such a study, the long reign of mixed government theory should at least give one pause before relying on any of these complex thinkers in any straightforward way, still less before invoking them to support formalism.

But perhaps the larger formalist contention can still be saved. Calabresi and Prakash could safely concede that separation of powers thinking may not have dominated eighteenth-century political thought yet still contend that it came into its own exactly at the point when the early republican constitutions demonstrated their inherent flaws.

At the very least, the complex evolution of constitutional thought during this period makes this reformulated claim appear counterintuitive and highly improbable. The dizzying theoretical changes that occurred prior to the Federal Convention cut against the type of global precision that formalists project. What strikes anyone who examines the era in any depth, especially those historians who have devoted years to the exercise, is its complexity, contradictions, and, at times, confusion. To note one well-known example, so distinguished a constitutionalist as John Adams in part grasped various tenets underlying the early republican constitutions and the subsequent reaction to them, yet never fully abandoned many of the central tenets of Whig mixed government. More to the point, modern formalists such as Calabresi and Prakash in effect need to argue that despite an initial commitment to mixed government, despite republican experiments in which the executive was all but abandoned, and despite the limited functional rather than formal realization of separation of powers in subsequent state constitutions, American constitutionalists by 1787 suddenly embraced a thoroughgoing formalist view that provided crisp, neat answers to intractable separation of powers problems that plague us still.
b. *Rhetoric Versus Reality*

Not only is this unlikely, it is plainly incorrect. Aside from invoking great eighteenth-century thinkers, Calabresi and Prakash seek to establish context by demonstrating how frequently American constitutionalists employed the language of separation. Simply observe, they say, how often key pamphlets, documents, and speeches speak of three and only three governmental powers: legislative, executive, and judicial. Note further how these sources time and again contend that only the legislature can make laws, only the executive can execute them, and only the judiciary can adjudicate them. What more compelling proof could there be for the formalist case?

This strategy is not only ahistorical, but tautological as well. When considering a general term like separation of powers, what matters is not just that people said it, but what they meant when they said it. In demonstrating certain general commitments, the account to this point also shows that early American constitutionalists did not in fact advance a comprehensive conception of separation of powers when they employed the general language of separation. Instead, they commonly used that rhetoric even as they established mechanisms that would violate the formalist conception of the doctrine. As Massachusetts illustrates, even the most extreme expression of the idea did not prevent those invoking it from according the power to appoint (and presumably remove) a substantial portion of the executive branch to the legislature. And American constitutionalists did not merely employ separation of powers rhetoric to later, “reform” constitutions such as that of Massachusetts, nor use it to critique the earlier, first-generation frameworks. As Calabresi and Prakash themselves note, they also spoke the language of separation in those earlier frameworks, as witness Virginia’s. Yet these were precisely the experiments notable for their nearly all-powerful legislatures. In this light, to assert that the mere utterance of separation of powers terms illustrates a particular (and improbable) conception of that concept is akin to arguing that the mere invocation of the words “natural law” reflects a clear commitment to John Finnis instead of Thomas Aquinas.

As a final matter, even differing accounts of the period just considered undermine the formalist case no less strongly. In this regard, consider the classic treatment of separation of powers by M.J.C. Vile, which Calabresi and Prakash overlook. In partial contrast to Wood, McDonald, and Adams, Vile argues that the early state constitutions actually embraced a “pure” separation of powers only to give way to later frameworks that turned to what he terms “checks and balances.” Vile quickly notes, however, that contemporaries

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278. *Vile, supra* note 20, at 120–21, 133–54.
employed the language of separation to defend each approach.\textsuperscript{279} He further asserts that what he views as "pure" separation of powers by definition meant a weak, minuscule executive—since the mere execution of laws was seen as purely mechanical—and that the appointment and removal powers of executive officers (including the Chief Executive) were not clearly seen as either legislative or executive matters—which is why these "pure" versions of the doctrine could vest the appointment of the executive in the legislature.\textsuperscript{280}

Two conclusions follow. First, Vile's treatment underscores the notion that "separation of powers" and related terminology were malleable, since on his view such terminology stood for both an earlier, formalist version of the doctrine (his "pure" separation of powers) and for a later, functionalist version (his "checks and balances"). Second, his version shows that, even at its apex, the formal version of the doctrine never vested anything like absolute control of the executive in the head of the executive.\textsuperscript{281}

B. Convention and Constitution

The constitutional experience of the previous twenty years culminated, at the Philadelphia Convention, in the Constitution of the United States. With these landmarks, Americans for the first time employed at the national level the still newly utilized, roughly defined doctrine of separation of powers as a means to serve the newly appreciated goals of balance, joint accountability, and comparative energy. They did not commit to a great deal more. This Founding commitment to a functional rather than formal separation of powers first became apparent at the Convention. The summer-long gathering displayed a general consistency about the goals that the doctrine was to further, yet revealed confusion, disagreement, and compromise in attempting to define the doctrine more specifically. More importantly, the commitment to a functional separation of powers also became apparent in the document that the Convention framed. At best, the framework offered a sketch of separation of

\textsuperscript{279} Id. at 146–47.
\textsuperscript{280} Id. at 138–45.
\textsuperscript{281} I have in general followed the account advanced by Wood rather than that put forward by Vile, for several reasons. First, Wood's version reflects the majority view among historians. Second, Vile's definition of "pure" separation of powers, while logical, nonetheless fails to account for the problem of executive appointments and removal, which are central to the modern formalist conception. Employing his definition would therefore cause needless confusion, especially to a legal audience. Finally, Vile's approach unnecessarily cedes the term "separation of powers," which is the phrase in dispute in current legal discourse, even though Vile himself relies on thinkers, such as Jefferson, see JEFFERSON, supra note 214, who spoke in terms of separation of powers when discussing what Vile labels "checks and balances." VILE, supra note 20, at 149–53.

Nonetheless, I should stress that I believe the two accounts are fundamentally in accord and mostly differ in the use of terminology. Each version supports my contention that the Massachusetts Constitution, for example, embodied a functional model, whether it is said to reflect "separation of powers," as does Wood, or "checks and balances," as does Vile.
powers, inked in only at the top of each branch, and even there falling well short of an absolute division of government functions.

By the same token, both the Convention and the Constitution belie the formalist contention that separation of powers was an end in itself. In particular, everything mentioned so far—previous constitutional experience, the Convention, and the Constitution—demonstrates that specific clauses that leading formalists commonly trot out for support are better understood when read the opposite way. Against this backdrop, the Vesting Clause should not be read to grant the executive branch a prepackaged set of powers. The Take Care Clause should not be taken to commit the President to execute only those laws that the President thinks are constitutional. The Opinions Clause is not surplusage. The Necessary and Proper Clause is only implausibly read as granting Congress the power to do no more than pass laws that further the authority of each branch within its sphere.

1. Separation of Powers Realized

a. The Convention

Contrary to the usual originalist assumption, the records of the Federal Convention more often than not reveal how little the Framers settled rather than how much. Instead, the Convention in many ways replicated, in a single summer, the confusion, disagreement, yet nascent consensus, that had characterized American constitutional thinking in the previous two decades. This point applies with special force to separation of powers. Here, not only did the fifty-five individuals who came to Philadelphia wildly disagree on particulars, but many initially questioned the doctrine itself. Numerous differences were put aside as the summer wore on, but not so many that anything other than a basic sketch was put forward. Certainly no one put forward any plan that assumed the rigid, global division of powers advocated by modern formalists.

A gathering any less contentious would have been surprising. As previously described, the background of the Convention at most furnished separation of powers as a mechanism yet to be worked out with precision. Moreover, a number of other factors cut against even the degree of consensus that had been achieved in a state like Massachusetts. For one thing, the ideals of mixed government and radical republicanism still commanded adherents, several of whom attended or influenced the Convention. For another, the Framers came from different states, which had handled the problem in different ways and whose experiences offered different lessons. Perhaps most important, the novel problem of how to apportion power between the national and state

282. See McDonald, supra note 135, at 240–42.
governments would profoundly affect how the delegates thought about apportioning power among the branches of the national government itself.²⁸³ These factors exacerbated certain divisive tendencies among the delegates throughout the Convention. An array of issues split the convention along a number of axes: small state vs. large state, North vs. South, commercial interests vs. agrarian interests.²⁸⁴ These splits often eclipsed disagreements over how best to divide government power. That said, loose groupings did emerge that bore upon separation of powers. At one extreme were the delegates “who had come of age politically before 1776,”²⁸⁵ who did not consider the early state constitutions to be fundamentally flawed, who valued state power, and who believed in legislative dominance (but not hegemony). This group included Roger Sherman, Edmund Randolph, George Mason, Benjamin Franklin, and John Dickinson.²⁸⁶ While often unsuccessful, these delegates insured that the Convention would have to take their relatively backward views into account. At the other end of the spectrum were younger delegates who had already become harsh critics of the republican state constitutions, who advocated national power, and who urged a substantial enhancement of the executive and the judiciary. Leaders here included James Madison, James Wilson, Alexander Hamilton, and Gouverneur Morris. Even these delegates, however, frequently disagreed on major points. In between fell those whom Luther Martin termed “the moderates.” Often, though not uniformly, this group sided with the nationalists rather than the republicans.²⁸⁷

The give and take among these groups did not lend itself to ready consensus except at the most general level. As McDonald notes, “Almost all the delegates agreed that there must be an executive branch, independent of the legislative and judicial branches.”²⁸⁸ Yet, despite this basic accord, for much of the summer the Convention left a shocking number of core separation of powers issues—presidential selection, the veto, legislative involvement in executive appointments, and assignment of the war power, to name a few—either up for grabs, or tentatively settled in ways contrary to their ultimate resolution. When it did settle such matters, the resolution often came in a last-minute flurry that reflected compromise within the framework of general shared purposes rather than the culmination of any specific vision.

²⁸³. See Thach, supra note 224, at 78–104.
²⁸⁴. Banning, supra note 168, at 111; Morris, supra note 256, at 269–70; Thach, supra note 224, at 78–79.
²⁸⁵. McDonald, supra note 135, at 240.
²⁸⁶. Id.
²⁸⁸. McDonald, supra note 135, at 240.
Rarely do the Convention's deliberations appear less tidy than in the emergence of the executive at each of the gatherings' well-known mileposts. The Virginia Plan, through which the nationalists seized the early initiative, set out an executive that was weak and ill-defined. This first blueprint, essentially Madison's work, proposed that the chief magistracy be selected by the national legislature, be responsible for executing national law, serve for a single, unspecified term, exercise veto power only in conjunction with the judiciary, and consist of an undetermined number of individuals.\textsuperscript{289} This outline changed only modestly as the Virginia Plan was considered in the Committee of the Whole during June and July. There, thanks largely to James Wilson, the delegates voted that the chief magistracy should be vested in a single individual and armed with a true but qualified veto, yet retained selection of the Chief Magistrate by the legislature.\textsuperscript{290} It was not until the Committee of Detail reported on August 6 that the executive began to assume a more familiar shape, with early versions of the Vesting Clause, the Take Care Clause and the Commander in Chief Clause. To this package the Committee added the bold proposal, earlier advanced by Wilson and rejected, that the Chief Executive be chosen not by the legislature but directly by the people, an idea that the Convention nonetheless at first rejected.\textsuperscript{291}

As late as August 31, less than three weeks before the Convention concluded, "the method of election of the chief magistrate, the question of eligibility to re-election, the degree of participation by Senate and President respectively in control of foreign affairs and the naming of judges, the method of impeachment, [and] succession in case of vacancies . . . were all yet unsettled."\textsuperscript{292} The Convention referred these and other unresolved or provisionally settled matters to a Committee of Eleven—really a committee on unfinished business.\textsuperscript{293} Completing its work on September 8,\textsuperscript{294} this committee at last resolved the matter of presidential selections, proposing the electoral college yet granting the Senate its advice and consent authority with regard to treaties, ambassadors, and judges.\textsuperscript{295} Yet even after this, matters were not complete. In the Committee on Style, Gouverneur Morris—in a last-minute move that passed without debate and almost certainly without a great

\textsuperscript{289} See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 21–22 (May 29); MCDONALD, supra note 135, at 207, 226; THACH, supra note 224, at 81–85.

\textsuperscript{290} See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 79–81 (June 2), 96–97 (June 4), 104 (June 4); MCDONALD, supra note 135, at 242, 248–52; THACH, supra note 224, at 85–89.

\textsuperscript{291} See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 177–89 (Aug. 6), 402–03 (Aug. 24); MCDONALD, supra note 135, at 244; THACH, supra note 224, at 117, 133. For the text of the report notes from the Committee of Detail, see 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 129–75.

\textsuperscript{292} THACH, supra note 224, at 131.

\textsuperscript{293} See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 471 (Aug. 31); MCDONALD, supra note 276, at 176–78.

\textsuperscript{294} 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 544–47 (Sept. 8).

\textsuperscript{295} 2 id. at 493–95 (Sept. 4).
deal more general consideration—placed ostensible limits on the clauses vesting legislative and judicial power but left the executive Vesting Clause ostensibly open-ended. Finally, in two last-minute changes, the Convention lowered the percentage of votes necessary to override an executive veto from three-fourths back to two-thirds and modified the Appointments Clause to give Congress the power to vest the selection of inferior officers in the President, heads of departments, or the courts.

Other aspects of the Convention show even more directly how the delegates agreed about the purposes underlying separation of powers but sharply disagreed over what the doctrine meant. Over the course of the summer, a number of proposals came to the fore, remained under serious consideration, and, but for chance, compromise, and tangential conflicts, nearly made it into the final document. These proposals generally shared a concern for restored balance, joint accountability, and renewed efficiency. They shared little else, least of all a fully-worked-through formalist conception of what separation of powers entailed.

Consider, for example, the Council of Revision, a pet project of Madison’s that also received support from Wilson. Originally part of Madison’s Virginia Plan, the Council combined the executive and judiciary for a provisional veto of national legislation. Madison, who was later joined by Wilson, kept pressing for the scheme throughout the Convention. Their reasoning, which convinced a number of state delegations, had to do with balance: Only the executive and judiciary combined, they asserted, could resist the excesses of the legislature. As many delegates noted, the Council would have violated an absolute division of power among the branches in a number of ways, first in combining the executive and judiciary, next in granting the judiciary the power to alter laws prospectively. Yet this mixing of powers did not bother either Madison, Wilson, or the delegates who supported the measure. In the end, it did not necessarily lead to the measure’s defeat either. In the final debate on the subject, Gouverneur Morris objected to the Council on the grounds that the Supreme Court ought to have no role

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296. 2 id. at 590–603 (Sept. 12); THACH, supra note 224, at 138–39.
297. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 585–87 (Sept. 12).
298. See 2 id. at 497–500 (Sept. 4).
299. See 2 id. at 585–87 (Sept. 12), 627–28 (Sept 15). McDonald notes that the delegates at the Convention “took with them conceptions of executive power derived from a commonly shared general corpus . . . but they did not by any means view the subject in identical ways.” McDONALD, supra note 276, at 160; see also id. at 160–81 (discussing delegates’ views on executive authority). Thach likewise states that the basic principle of separation of powers was in many ways the reflection of different experiences within the states. These experiences did not, however, prevent a commitment to separation of powers as a “sine qua non of governmental efficiency.” THACH, supra note 224, at 74.
300. McDONALD, supra note 276, at 168.
301. See THACH, supra note 224, at 85.
302. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 70–97 (June 1–4), 110 (June 4).
303. 2 id. at 537–42 (Sept. 7).
in prospectively declaring laws void because the judiciary was part of the executive.\footnote{304}

The Convention also struggled with the problem of how to select the “Chief Magistrate,” a conflict that further undermines the formalist account while illustrating the delegates’ concern for joint accountability in addition to balance. The standard formalist position holds that the election of the President by the people is inherent in any sound conception of executive authority. Yet, for much of the summer, the Convention repeatedly voted in favor of “electing the Executive by the national legislature.”\footnote{305} Harkening back to the early state constitutions, Roger Sherman “was for the appointment by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed.”\footnote{306} Against this option James Wilson championed “election by the people,” either directly or through an electoral college, only to see his proposal repeatedly defeated when the Convention considered it. Wilson, along with Madison and Morris, opposed legislative election in part for balance, arguing that the executive should be as independent as possible from the two houses of the legislature.\footnote{307} But supporters of popular election of the executive also saw it as a way to spread accountability, with Morris in particular asserting that the mechanism would help render the executive “the great protector of the Mass of the people.”\footnote{308} Unlike the Council of Revision, this idea succeeded at the eleventh hour, with little discussion. In context, this victory hardly shows the triumph of a formalist conception. Rather, it reflects a pragmatic and flexible view of separation of powers as a means to further more general constitutional values, including joint accountability.

The Convention’s efforts to define executive power ring yet another change on the same theme. Once again the delegates turned not to any widely shared formalist answer, but to a solution based on more general values, in this case efficiency above all. The Convention did not address the nature of executive authority squarely until early August, in the Committee of Detail.\footnote{309} It did not have much to go on. As McDonald explains, “[E]xcept for an occasional hint that ‘the executive power’ would be limited, no one made any extensive comments as to just what it would include. Experience was not an adequate guide . . . . Hume was silent on the subject, Montesquieu muddled, Locke too general.”\footnote{310} Blackstone’s Commentaries did provide a thorough account of royal prerogative power, but this helped only if one

\begin{footnotes}
\item[304] 2 id. at 298–99 (Aug. 15).
\item[305] 1 id. at 81 (June 2).
\item[306] 1 id. at 68 (June 1).
\item[307] 1 id. at 69 (June 1).
\item[308] 2 id. at 52 (July 19).
\item[309] Compare 1 id. at 64–69 (June 1) (general introductory proposal for executive) with 2 id. at 129–75 (Committee of Detail), 185 (Aug. 6) (initial detailed definition of executive powers).
\item[310] MCDONALD, supra note 135, at 247.
\end{footnotes}
equated the Crown's power with executive power. The Committee did not. Guided instead by a general desire to insure that the executive possessed sufficient energy and vigor, the Committee divided what Blackstone would have viewed as executive authority in a "curious manner." Such authority as the naturalization power, the power to establish courts, make war, and subdue rebellions went to Congress. The Senate, as the repository of residual state sovereignty, was awarded the exclusive power to make treaties, appoint ambassadors, and appoint judges of the Supreme Court. As McDonald dryly states, or perhaps overstates, "[S]o much for the doctrine of the separation of powers."

Within this broad division of powers, the Committee further grappled with the problem of how much authority to accord the executive expressly. Edmund Randolph, who was sympathetic to the early, republican state constitutions, offered a limited list that included the authority to carry into execution the national laws, enjoy executive authority vested by Congress, and receive salary protection. By contrast, Wilson, relying on the Pinckney plan (which in turn drew from the New York Constitution) proposed vesting the executive power in a single person, making the President the Commander in Chief of the army and navy as well as of the state militias, and granting the President the power to grant reprieves and pardons, among other powers. But it too fell far short of Blackstone's list, which Wilson expressly rejected as a guide. Wilson instead thought about executive power, and the executive in general, with an eye to what would produce sufficient energy and vigor. With minor verbal changes, Wilson’s enumeration became the enumeration of executive powers in the Constitution; with somewhat greater changes, so too did the Committee of Detail’s division of prerogative powers.

b. The Text in Context

The themes evident in the Convention, the thrust of the previous two decades of constitutional trial and error, culminated in the document that the delegates finally offered to the nation. Their text sustained the trend toward a more rigorous separation of powers, but at best only sketched what that doctrine was to mean in practice. In general, the proposed Constitution only attempted to define the powers and relationships of each branch mainly at their respective pinnacles. Even there, the document mixed certain core powers that on most formal theories, then or now, were best kept distinct. Perhaps for this
reason, the Constitution tellingly lacked the type of separation of powers clause employed in many of its state antecedents. McDonald even goes so far as to observe that "[t]he doctrine of the separation of powers," defined in a formalist manner, "had clearly been abandoned in the framing of the Constitution." Instead, the Constitution again demonstrated that both the basic division of powers, as well as their frequent mixture, merely served the more fundamental goals of ensuring that the branches of government would remain balanced, extending accountability throughout government, and making government more efficient than it had been in recent memory.

Of these values, balance once again remained paramount. The Constitution, following its New York and Massachusetts predecessors, achieved this goal first by making the executive and judiciary worthy counterparts of the legislature. The Constitution accomplished this strategy by assigning to the top of each branch a range of specific, core powers. One result was a "supreme magistrate [that] was truly awesome." The President's specific powers included the authority to grant reprieves and pardons, to make treaties and appoint ambassadors and judges of the Supreme Court (with the advice and consent of the Senate), to fill vacancies during the recess of the Senate, to recommend measures for congressional consideration, to convene Congress upon extraordinary occasions, to receive ambassadors, to take care that the laws be faithfully executed, and to commission officers. Likewise, the Constitution provided for the Supreme Court and authorized Congress to create a federal judiciary where none had existed before. It also specified broad potential jurisdiction for the federal courts. Finally, it assumed judicial review.

The Constitution pursued balance even more directly when it provided the top of each branch with specific means of self-defense. Often, this came at the expense of accomplishing a clean division of powers. Most dramatically, the President could exercise a qualified veto over legislation. While delegates supported the veto on a number of grounds, James Wilson articulated the dominant rationale when he stated, "[w]ithout such a Self-defence the Legislature can at any moment sink [the Executive] into non-existence."

316. McDonald, supra note 135, at 258.
318. U.S. Const. art. II, § 2, cls. 1–3; id. art. II, § 3.
319. Id. art. III, § 1.
320. Id. art. III, § 2.
321. For an excellent, recent study of late-eighteenth-century attitudes concerning judicial review, see Treanor, supra note 199, at 557–69; cf. Wood, supra note 133, at 453–63 (describing rise of judicial review in states).
322. U.S. Const. art I, § 7, cl. 2.
323. 1 Records of the Federal Convention, supra note 287, at 98 (June 4). When he made this statement, Wilson did not think a qualified executive veto went nearly far enough. He instead advocated at least an absolute executive veto, or even better, a combined executive and judicial veto in the form of a Council of Revision. 1 id.
Another defensive mechanism that is now taken for granted, but was not at the
time, is the Constitution's express protection of the President's salary from
congressional diminution or increase "during the Period for which he shall
have been elected," along with the allied prohibition that a sitting President
"shall not receive within that Period any other Emolument from the United
States, or any of them."\(^{324}\) Along similar lines, the Convention settled upon
express salary protection for the judiciary, providing as well that federal judges
"shall hold their Offices during good Behaviour."\(^{325}\) The Constitution
specified still further protection for the President and judiciary alike in
providing for impeachment as the only method of removal.

No less important, the Constitution continued the recent constitutional
trend of harnessing separation of powers to joint accountability. As in the
states, this inversion of the republican approach to accountability reflected a
suspicion of simple electoral mandates as demagogic as well as the associated
goal of insuring greater public deliberation.\(^{326}\) With the executive and,
indirectly, the judiciary, able to stake their own representative claims, the
legislature would no longer be able to rush through ill-considered laws on the
strength of a self-serving and distorted reliance on popular will. Gouverneur
Morris summed up this goal in a long address extolling a popularly elected
Chief Magistrate as a check on a tyrannical legislature. "If he is to be the
Guardian of the people," Morris declared, "let him be appointed by the
people."\(^{327}\)

The Constitution sought to insure joint accountability once more by
concentrating on the apex of each branch, the executive in particular. As in
Massachusetts, the most telling innovation was taking the selection of the
Chief Magistrate from the legislature. By contrast, the Constitution declined
the option of direct popular election in favor of the elaborate electoral
college.\(^{328}\) The Convention opted for this indirect method partly to placate
the advocates of vestigial state sovereignty and partly to insure that only the
most virtuous, disinterested individuals—in Wilson's phrase "Continental

Wilson sounded the theme of self-defense throughout the Convention. During the debate on the
Committee of Detail report he declared:

[T]he prejudices agst the Executive resulted from a misapplication of the adage that the
parliament was the palladium of liberty. Where the Executive was really formidable, King and
Tyrant, were naturally associated in the minds of people; not legislature and tyranny. But where
the Executive was not formidable, the two last were most properly associated. After the
destruction of the King in Great Britain, a more pure and unmixed tyranny sprang up in the
parliament than had been exercised by the monarch. [Wilson] insisted that [the delegates] had
not guarded agst. the danger on this side by a sufficient self-defensive power either to the
Executive or Judiciary department ....

2 id. at 300-01 (Aug. 15).
324. U.S. CONST. art. II, § 1, cl. 7.
325. Id. art. III, § 1.
326. See Greene, supra note 77, at 177.
327. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 53 (July 19); see THACH, supra
note 224, at 100-01.
328. U.S. CONST. art. II, § 1, cls. 2-3, amended by U.S. CONST. amend. XII.
Characters—would gain the office. As a direct function of the President’s newly enhanced accountability, the delegates also decided to give the President a hand in several “executive” powers that the Committee of Detail had originally slated for the Senate alone, including the power to make treaties and appoint ambassadors and judges of the Supreme Court. The Presidency’s popular basis also served to bolster the rationale for the veto. What George Mason said early in the Convention applied now with even greater force:

Notwithstanding the precautions taken in the Constitution of the Legislature, it would so much resemble that of the individual States, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It [a veto] would have the effect not only of hindering the final passage of such laws; but would discourage demagogues from attempting to get them passed.

A final goal that the Constitution’s brand of separation of powers furthered was governmental energy. Yet as with the values of balance and accountability, the nature of this efficiency is comparative and can only be understood against the previous baseline of republican legislative supremacy. Once again, the document did not attempt to address this goal by advancing or assuming global solutions. Rather, it specified answers mainly at the top of the branches, and even here mixed powers among the branches to a considerable extent. Perhaps the most important decision in this regard was the establishment of a unitary presidency. The advocates of unity prevailed over noisy opposition—primarily with the argument that a single magistrate would give the most “energy,” “vigor,” and “dispatch” to the executive. For similar reasons, the proposed Constitution went beyond even the Massachusetts framework in granting the executive further—but by no means

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329. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 501 (Sept. 4).
330. McDONALD, supra note 135, at 250–53; see also THACH, supra note 224, at 130–34 (describing creation of electoral college).
331. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 498–99 (Sept. 4); see McDONALD, supra note 135, at 250–51.
332. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 78 (July 21).
333. 1 id. at 65 (James Wilson) (June 1).
334. 1 id. at 64 (Charles Pinkney) (June 1).
335. 1 id. at 65 (James Wilson) (June 1).
336. These were not the only reasons. Wilson also advanced “responsibility,” 1 id. at 65 (June 1), as well as “tranquility,” 1 id. at 96 (June 4).
337. Speaking to both a unitary Chief Executive and control of the military, Elbridge Gerry declared that he was at a loss to discover the policy of three members for the Executive [which had earlier been proposed by Edmund Randolph]. It [would] be extremely inconvenient in many instances, particularly in military matters, whether relating to the militia, an army, or a navy. It would be a general with three heads.
1 id. at 97 (June 4).
complete—control of the military. Toward this end, the document made the
President commander in chief, provided that he “shall Commission all the
Officers of the United States,” yet kept an array of powers concerning
military finance and regulation vested in Congress.

The proposed Constitution did not journey backward to embrace either
Whig mixed government or republican legislative supremacy, but instead
continued to develop a commitment to separation of powers that was both
functional and general. Yet this strategy left open almost as many matters as
it resolved. How were Americans to answer the many unanswered questions
that this constitutional sketch left unanswered? Who would control the removal
of executive officials? Who would make war in an emergency? Who would
control the administration of laws? The document itself, especially when
viewed in the context of the constitutional evolution that preceded it, suggests
one basic conclusion. Specific answers would come mainly through the
enumerated political processes as informed by the fundamental constitutional
values that gave rise to them. That meant that it would ordinarily fall to
Congress, acting under its express or implied powers, to fill in the rest of the
Constitution’s blueprint, so long as the President did not block the attempt
through the veto. This model did not preclude judicial review when a measure
appeared to violate the functional values underlying separation of powers. It
did not assume, however, judicial intervention based upon a formalist baseline
that was indeed “just myth.”

2. The “Contested Clauses” Reclaimed

Yet formalists claim to know better. Of these, Calabresi and Prakash offer
the most extended, important, and in many ways powerful recent argument that
the “Constitution allocates the power of law execution and administration to
the President alone,” and that “the historical evidence taken as a whole
demonstrates that the case for a hierarchical executive branch under the control

338. U.S. Const. art. II, § 3.
339. These include the powers:
   To declare War, grant Letters of Marque and Reprisal, and make rules concerning
   Captures on Land and Water;
   To raise and support Armies, but no Appropriation of Money to that Use shall be for a
   longer Term than two Years;
   To provide and maintain a Navy;
   To make Rules for the Government and Regulation of the land and naval Forces;
   To provide for calling forth the Militia to execute the Laws of the Union, suppress
   Insurrections and repel Invasions;
   To provide for organizing, arming, and disciplining, the Militia, and for governing such
   Part of them as may be employed in the Service of the United States, reserving to the States
   respectively, the Appointment of the Officers, and the Authority of training the Militia
   according to the discipline prescribed by Congress . . . .
U.S. Const. art I, § 8, cls. 11-16.
341. Calabresi & Prakash, supra note 86, at 549 (emphasis added).
of the President is overwhelming and fully supports all of our textual claims.\textsuperscript{342} Absent a "separation of powers" clause,\textsuperscript{343} they seek to make their case with an especially able version of a classic formalist strategy that places the interpretive premium upon a number of more cryptic bits of text, including the Executive Power Clause, the Take Care Clause, the Opinions Clause, and the Necessary and Proper Clause.\textsuperscript{344} To the extent that they engage in simple textualism, Calabresi and Prakash merely exercise their prerogative as constitutional theorists. Yet to the extent that they also seek to bolster their readings with historical claims, their account ignores too much essential scholarship, offers too little context, and assumes too many of the conclusions it needs to demonstrate. Against the more comprehensive backdrop presented so far, each of these contested clauses instead comports with a more modest, functionalist interpretation.

a. The Executive Power Clause

Curiously, formalists rely on history least with regard to the text that for them matters most. Like other advocates of a unitary executive, Calabresi and Prakash place great weight on the introductory clause of Article II, which states that "[t]he executive Power shall be vested in a President of the United States of America."\textsuperscript{345} This clause, they say, plainly grants the President exclusive power to execute all federal laws. In contrast to their treatment of ostensibly less important clauses, however, Calabresi and Prakash make relatively few historical claims to support this reading. Instead, they rely mainly on close textual exegesis and on inferences drawn from structures and relationships set out elsewhere in the document. These tried and true interpretive methods may be especially effective when reading the Uniform Commercial Code, and may even be adequate for a terse document like the Constitution when a given text is clear, which the Executive Power Clause clearly is not.\textsuperscript{346} These techniques alone, however, do not amount to an originalist argument, which Calabresi, Prakash, and a number of other unitarian formalists seek.\textsuperscript{347} If the question is historical reconstruction, reliance on text

\textsuperscript{342} Id.
\textsuperscript{343} Which, as noted, would hardly demonstrate the formalist case. See supra text accompanying notes 218–29.
\textsuperscript{345} U.S. CONST. art. II, § 1, cl. 1.
\textsuperscript{346} Compare, for example, Calabresi & Prakash, supra note 86, at 570–81 (arguing that Article II Vesting Clause is exclusive) with Lessig & Sunstein, supra note 17, at 47–48 (arguing that Article II Vesting Clause is not as general as Calabresi and Prakash argue).
\textsuperscript{347} Calabresi & Prakash, supra note 86, at 556–59; see also BORK, supra note 104, at 143–60; Scalia, supra note 104, at 862–65.
and structure is perilous. Too often those who make the attempt wind up resembling a naturalist who declares that a fossilized duckbill belonged to a platypus, where a little more work would have revealed it had in fact been part of a duck. Something like this is going on here.

For Calabresi and Prakash, the platypus has two elements: First, they argue that the Executive Power Clause is a grant of executive power; second, they contend that this grant of power is exclusive. They come to this conclusion for a number of reasons. First, they reason that the Vesting Clause of Article II is similar to its counterpart in Article III, which is a general grant of power, and thus unlike the Vesting Clause of Article I, which speaks only of legislative power "herein granted" by subsequent, specific allocations. Next, they point to the plain meaning of the verbs "vest" and "extend." Finally, they contend that a comparison of the Constitution's specific lists of powers in Article I, Section 8; Article II, Section 2; and Article III, Section 2, clearly shows that the Article II enumeration is exemplary rather than exhaustive. "To vest" means "[t]o place in possession of" an individual or entity," while "to extend" means merely "to stretch [rendere] out [ex] an already existing thing or power." It follows that the Vesting Clauses of Articles II and III must be grants of power, while Article III's jurisdictional grant—which states merely that the judicial Power of the United States shall "extend" to various cases and controversies—merely allocates power already granted by the Vesting Clause.

The argument made for exclusivity is conclusory and rests mainly on an implicit negative inference. Here Calabresi and Prakash note that Article II does not say that the executive power shall be vested in one President "and in such inferior entities as Congress may from time to time establish and ordain." By contrast, Article III contains just such language empowering Congress to vest judicial power in lower federal courts. By a variant of expressio unis est exclusio alterius, Congress may create inferior entities that exercise the judicial power without the assent of the Supreme Court, but it may not create inferior executive entities without the assent of the President. Once created, however, these entities must be subject to presidential approval and superintendence.

The history of the era suggests not. Either of the readings that Calabresi and Prakash advance places more weight on the Executive Power Clause than it will bear because they place too little on the context in which the Clause

349. Id. at 572–74.
350. Id. at 576–79.
351. Id. at 572 (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2102 (Libraire du Liban ed. 1978) (4th ed. 1973)).
352. Id. (quoting 1 JOHNSON, supra note 351, at 696).
353. Id. at 563, 571–74.
354. Id. at 581.
first appeared. The difficulties begin with the claim that the Clause grants power. Their version not only assumes that there was a generally understood bundle of authority known as executive power, but that it necessarily included such specific prerogatives as the ability to appoint and remove executive officers as well as to superintend the enforcement of all laws. On this assumption, they further contend that the rest of Article II simply limits and clarifies the initial, well-defined grant. If the history of the period indicates anything, however, it is that no such generally understood bundle existed. To the contrary, the specific division of power struck by Articles I and II was in many ways unprecedented. By contrast, such comparative confusion did not reign when it came to “the judicial power.” 355 With the possible exception of judicial review, the particular powers associated with judicial authority were generally understood with greater precision than those associated with either legislative or executive authority. 356

Details confirm the general account. The Committee of Detail originally proposed that “the legislative Power shall be vested in a Congress,” then specified particular legislative powers;357 that “[t]he Executive Power of the United States shall be vested in a single Person . . . [to be styled] ‘The President,’” then specified particular executive powers; and finally, that “[t]he Judicial Power shall be vested in one Supreme (National) Court” and any inferior courts Congress would create, then specified the scope of permissible jurisdiction.358 This approach suggests that the authors—primarily the staunchly proexecutive James Wilson359—viewed the terms, both “legislative power” and “executive power,” as too vague to be anything more than precatory and to require further definition. Conversely, this language also suggests that the term judicial power referred to a more precisely understood set of prerogatives.

But wait, formalists urge. What counts is not the draft of the Committee of Detail, but the text of the Constitution itself. As Calabresi and Prakash acknowledge,360 the current language came about without debate, in the waning days of the Convention, when the Committee of Style—primarily the staunchly proexecutive Gouverneur Morris—changed what is now the Article I Vesting Clause to read, “All legislative power herein granted shall be vested in a Congress.”361 Calabresi and Prakash attempt to turn the absence of

356. See McDonald, supra note 135, at 253–58.
358. 2 id. at 171–72.
359. See McDonald, supra note 135, at 249; Thach, supra note 224, at 85–89.
361. What is likely, but unprovable, is that Morris made the change to forestall any inference that Article II’s list of powers was exhaustive and perhaps to enable an argument that Article II’s Vesting Clause could serve as authority for unenumerated executive power. See Thach, supra note 224, at 138–39 (suggesting that Vesting Clause “admit[s] an interpretation of executive power which would give to the President a field of action much wider than that outlined by the enumerated powers”).
debate on its head, arguing that it goes to show how general the agreement was for the change. Anyway, they add, it was the Morris language that went to We the People, and it is We the People's understanding that matters.\(^\text{362}\)

A better-informed reading cuts in just the opposite direction. As with most of the changes made by the Committee of Style, the absence of debate does not signal a deliberative consensus so much as the exhaustion and impatience of delegates trying to wrap up their business.\(^\text{363}\) More importantly, Calabresi and Prakash offer no evidence from the ratification debates to show that anyone understood the final differences among the three Vesting Clauses to signal an independent grant of a well and broadly defined set of executive powers, much less that such an understanding was general. Given the amorphous nature of executive authority during this era, it is implausible that the popular understanding of Morris's Executive Power Clause was in any way different from the Convention's understanding of Wilson's earlier version.

Calabresi and Prakash skate on even thinner historical ice with their claim that the executive power granted by the Article II Vesting Clause is exclusive. If the Constitution's origins undercut the notion that executive power possessed some precise meaning, they also negate any contention that such power was exclusive. As has been seen, even the later generation of "reform" state constitutions not only permitted, but actually mandated legislative involvement in both personnel and superintendence. Nothing in the records of the Convention demonstrates that exclusivity suddenly became the norm in 1787. True, Article II itself does not expressly grant Congress the power to create "inferior executive entities" without presidential approval in the same way that Article III explicitly empowers Congress to create inferior federal courts.\(^\text{364}\) But this does not mean Congress lacks this power any more than the absence of presidential removal power, where the appointment power is set forth, necessarily means that the President lacks removal authority. More likely, the lack of parallelism between the two clauses illustrates that the delegates had a better idea of what a court was than what an "executive entity" was. More generally, the negative inference that Calabresi and Prakash make presumes a tightness of composition that the Convention's many compromises and last-minute changes do not support. Against this backdrop, relying solely on negative inferences from the text serves more as a debating technique than as a means to recover contemporary understanding.

So what can be said about the Executive Power Clause? Once set back in its original context, perhaps all that can be asserted with assurance is that the provision furthers at least two of the general purposes that underpinned separation of powers thinking at the time. The Clause clearly furthers the ideal

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\(^\text{363}\) McDonald, supra note 135, at 228, 272.
\(^\text{364}\) Compare U.S. Const. art. II, § 1 with id. art. III, § 1.
of balance through an enhanced executive, whether it merely signals the location of executive powers or grants them. Likewise, the provision advances the goal of governmental energy by declaring that the apex of the executive department shall be a single individual. Anything much beyond these general points quickly becomes guesswork. Consequently, Lessig and Sunstein advance a plausible claim when they say that neither the text nor contemporary understandings preclude congressional oversight.\textsuperscript{365} Perhaps closer to the mark, on general grounds of balance, is Henry Monaghan's suggestion that the Clause at least includes a grant of self-protective power\textsuperscript{366} that augments the veto. Despite their important differences, either conception comports with the general picture suggesting that the Constitution was a sketch that left the future resolution of separation of powers matters mainly to the processes inked in at the highest levels of the three branches. What that picture does not allow, however, is an assertion that the cryptic phrase "executive power" refers to a clear, eighteenth-century baseline that just happens to dovetail with the modern formalist conception of that same term.

\textbf{b. The Take Care Clause}

With the Take Care Clause, which provides that the President "shall take Care that the Laws be faithfully executed,"\textsuperscript{367} Calabresi and Prakash attempt to bolster their formalist claims with more overtly historical ones. They make two basic assertions. As an affirmative matter, they argue that the Take Care Clause reflects the Founding generation's universal understanding that the President would be empowered to execute federal law independent of congressional interference. They trot out numerous official and unofficial statements from the ratification debates to support their case. Typical in this regard is their reliance on statements from Edmund Randolph at the Virginia ratifying convention, who declared: "'All the enlightened part of mankind agree that the superior dispatch, secrecy, and energy with which one man can act, renders it more politic to vest the power of executing the laws in one man.'"\textsuperscript{368} Lest there be any doubt, Randolph pressed on to assert that the President's powers surely included the authority to "'see the laws executed. Every Executive in America has that power.'"\textsuperscript{369}

\begin{footnotes}
\item[365] See Lessig & Sunstein, supra note 17, at 12–84.
\item[367] U.S. Const. art. II., § 3.
\item[368] Calabresi & Prakash, supra note 86, at 617 (quoting Edmund Randolph, Convention Debates (June 10, 1788), in 9 The Documentary History of the Ratification of the Constitution (Va.) 1097–98 (John F. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter Documentary History]).
\item[369] Id. at 617 (quoting Edmund Randolph, in 9 Documentary History, supra note 368, at 1098) (emphasis added by Calabresi & Prakash).
\end{footnotes}
But the Take Care Clause did more than just bolster the Executive Power Clause. Calabresi and Prakash realize that their first claim makes the Take Care Clause seem redundant. They are aware, too, that a number of contemporaries understood the clause to impose some duty or limit on the President. To address these difficulties, they suggest that the clause may have reflected "a desire to prevent the President from declaring that his executive power granted him the ability not only to enforce federal law, but also to suspend federal law or suspend the execution of it." Following Judge Easterbrook, however, they quickly add that the Founders could not have meant for this limitation to apply to presidential refusals to suspend the execution of laws that he felt violated his executive authority.

Once again, the two scholars overread text because they oversimplify history. Their initial claim—that the Take Care Clause reflected a consensus that the President (and only the President) execute the laws—may be dispensed with quickly. As with their treatment of the Executive Power Clause, the assertion assumes that any time an eighteenth-century American uttered the words "execute the laws," the individual not only had a clear categorical idea of what "execute" meant, but that this idea necessarily precluded any legislative involvement absent some express indication to the contrary. But this is precisely what any but the most superficial account of the period refutes. On this point, recall the purportedly conclusive statements of Edmund Randolph. By themselves, Randolph's assertions that the execution of the laws falls to the President say nothing about what he conceived that power to be or whether it was to be exercised exclusively. Moreover—and this is a critical point—Randolph's elaboration that "Every Executive in America has the power to execute the laws" directly undercuts a formalist understanding. As anyone with a more general knowledge of the period would realize, few if any of the state constitutions at the time prevented legislative involvement in the execution of laws in the way formalists contend. No amount of repetition can enable this kind of evidence to do any greater conceptual work.

The second Take Care Clause argument fares no better. Apart from a lone quotation from the proexecutive Wilson, Calabresi and Prakash offer no

370. Id. at 620.
372. As an initial matter, Calabresi and Prakash misconstrue Randolph's argument about a unitary presidency to be an argument about a unitary executive branch. By their logic, the phrase "to execute the laws" would mean that the President alone could do it. Cf. Calabresi & Prakash, supra note 86, at 617.
373. See supra notes 174–81 and accompanying text.
374. For a useful discussion of the Take Care Clause's background, see Greene, supra note 77, at 145 n.75.
375. Wilson's statement appears in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 304–05 (John B. McMaster & Frederick D. Stone eds., Lancaster, Historical Soc'y of Pa. 1888). This is not to say, of course, that no similar statements were made.
direct evidence that anyone understood the Take Care Clause to include an implicit exception allowing the President to refuse to execute laws that encroached upon executive authority. They merely assert that it would make little sense to frame a Constitution with a President as Chief Executive and then for that Chief Executive to give up powers in the face of unconstitutional statutes. Why it would make any more sense to frame a Constitution with a Congress to make laws and a Supreme Court to review them, and then to make the President effectively the sole judge of which laws to enforce when he believed them to encroach upon his authority is left unclear. Similarly unclear is why the President’s express veto power does not accord the office sufficient protection. This last point appears doubly puzzling considering that when the Founders pointed to the President’s powers of self-defense, they cited the veto almost always, and mentioned an implied power to suspend the execution of laws rarely.

Returned to its original context, the Take Care Clause better accords with a functional reading. Consider first the text’s affirmative reference to the President’s authority to execute the laws. Viewed in light of preceding constitutional evolution, this aspect of the Clause logically advances the Founders’ goals of balance and energy by further demarcating a critical general power that the Chief Magistrate would exercise. To say that the Founders understood the provision to do anything more—to say specifically that they viewed it as an absolute ban on any legislative involvement in a particular, broad conception of executing laws—reads into the measure a precision that the historical sources belie.

A similar point applies to the aspect of the Take Care Clause that limits the President. In context, this facet of the provision addresses the Founding concern for efficiency by enjoining the Chief Executive to execute the laws with care and further advances the Founding goal of balance in mandating that the executive remain faithful to something other than his whim—presumably federal laws and the Constitution. As before, to say anything more than this—particularly that the provision assumes that the President possesses a power to suspend the execution of laws that violate some clear conception of executive power—projects into the text what its general background simply does not support.

377. Calabresi and Prakash themselves concede that one original purpose of the veto was presidential self-defense. Id. at 622 n.352.
378. Calabresi and Prakash also include a problematic argument to bolster their Executive Power Clause contention. This argument reasons that the Committee of Detail, which drafted the Take Care Clause, at the same time drafted the Executive Power Clause, and thus realized the need for limits. As historical support, they note that the Committee of Detail added the requirements that the President “take care” that the laws be “faithfully” executed to the Committee of the Whole’s formulation that the Chief Magistrate “carry into execution the national laws.” Since, they reason, the Committee of Detail at the same time drafted the Executive Power Clause, which gave all executive authority to the President, it not only must have added a duty, but also a duty to disobey. Id. at 620–21.
c. The Opinions Clause

Calabresi and Prakash also invoke history to narrow certain clauses seemingly uncongenial to their cause. Among these is the Opinions Clause, which states that the President “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.” This language, they suggest, merely makes explicit what was already implicit in the creation of a Chief Executive. They also suggest that the Clause limits presidential authority by implicitly forbidding the President from demanding opinions on subjects unrelated to the statutory duties of the executive officer. In taking this position, Calabresi and Prakash reject two functional readings considered by Lessig and Sunstein. The first, more radical, interpretation holds that the Clause clearly permits the President to demand opinions from officers in “executive Departments,” but does not extend that authority to cover “Heads of [nonexecutive or administrative] Departments” of the type referred to in the Appointments Clause. The second, more limited position, suggests that without the Opinions Clause, Congress could have prevented department heads from providing opinions to the President. In supplanting these readings with their own, Calabresi and Prakash contend that the Opinions Clause, as originally understood, is just one more indication that the Founders sought to create a unitary executive.

At least as a historical matter, this proposition would be difficult to sustain. To support their reading, Calabresi and Prakash assume that the Founders thought that department heads would be constitutionally subordinate to the President by virtue of operating within the executive branch. They even offer several quotations, all from the most proexecutive of the delegates, to demonstrate the Founding view. Notwithstanding these particular utterances, the larger picture indicates that Calabresi and Prakash again push their assumptions too far. As the account to this point should have made clear, precisely what was not settled in this era was the exact relationship of executive underlings to the Chief Executive. Even less clear was the extent to which a Chief Executive would oversee underlings free from legislative interference. Against this backdrop, an articulation of presidential authority to require advice from subordinates is hardly redundant, but instead settles one aspect of executive authority that was by no means clear. Paradoxically, the

381. Id. at 634.
382. Lessig & Sunstein, supra note 17, at 34–35.
383. Id. at 33–34.
385. See supra Section III.A, Subsection III.B.1.
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chief interpretation that Calabresi and Prakash advance acknowledges as much. To argue that the delegates retained the Opinions Clause either out of caution; to prevent distortion, or to forestall assertions that the President lacked this authority suggests at a minimum that there existed a nontrivial body of opinion that was prepared to argue that, without this clause, the Chief Magistrate did lack such authority.

That said, the same background suggests that this argument would go too far in the other direction. If the constitutional history of the time refutes the notion of a formalist consensus regarding executive power, it would for the same reasons make unlikely the existence of any sharp distinction between department heads and heads of departments. As Calabresi and Prakash ably point out, contemporary usage indicates that no such distinction existed. Likewise, the general background of the period suggests that it would go too far to argue that, absent the Opinions Clause, the President would have no more authority to demand opinions from heads of departments than he would from the Chief Justice, the Speaker of the House, or the President of the Senate—all options that the Convention considered but abandoned. But that is far different from arguing that, without the Clause, Congress could prevent or regulate the channel of information from department heads to the President. Nothing about the general background prevents this reading.

Once again, the specific background of the Clause accords with the general background of the period. The Opinions Clause is the lone surviving part of a plan put forward by Gouverneur Morris and Charles Pinckney on August 20 to create a Council of the State. The original proposal called for the Council to consist of the Chief Justice of the Supreme Court and Secretaries for Domestic Affairs, Commerce and Finance, Foreign Affairs, War, Marine, and State. Each of the Secretaries was to be appointed by the President alone and to hold his office “during pleasure.” The plan further provided that the President “may require the written opinions of any one or more of the members: But he shall in all cases exercise his own judgment.” Two days later the Committee of Detail returned the proposal with several changes. First, it expanded the roster of what it now called the President’s “Privy Council” to include the President of the Senate and the Speaker of the House. In addition, it dropped the provisions specifying the President’s appointment and removal authority of the Secretaries and instead provided that the Council would simply consist of “the principal Officer in the respective departments of foreign affairs, domestic affairs, War, Marine, and Finance, as such departments of office shall from time to time be established . . . .” Finally, the new version retained a slightly modified provision regarding

387. See supra Subsection III.A.1.
389. 2 id. at 367 (Aug. 22).
opinions, stating that it would be the members' duty "to advise [the President] in matters respecting the execution of his Office, which he shall think proper to lay before them: But their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." Despite this promising start, the Privy Council did not survive the Committee of Eleven, which scrapped the idea for the sole stated (but not necessarily only) reason that "it was judged that the Presidt. by persuading his Council—to concur in his wrong measures, would acquire their protection for them." All that remained was the Opinions Clause.

The rise and fall of the presidential council yields complex lessons, none of which demonstrates a unitary executive. Thanks to their formalist assumptions, however, Calabresi and Prakash see only those implications that point in a unitary direction. In truth the story has elements that cut various ways. On one hand, councils of this type had earlier been seen as checks on executive power. Those who framed the early, republican state constitutions employed such councils as separate sources of power and expertise, the better to control the whims of the Chief Magistrate. On the other hand, this model began to give way in later constitutions, such as the Massachusetts framework, which made the councils more purely advisory. Morris and Pinckney appear to have viewed their proposal as continuing down this proexecutive path, first, by making clear that executive officers would have to report to the President, and even more dramatically, by expressly granting the President exclusive appointment and removal power. Yet for others at the Convention, the older conception of councils as sources of advice to check executive caprice (even when it was up to the Chief Magistrate to ask for the advice) did not disappear. Benjamin Franklin captured the two facets of a council neatly when he stated that "a Council would not only be a check on a bad President but be a relief to a good one."

The ultimate fate of the Council suggests that the Convention was not prepared to move as far as Morris and Pinckney. Even before the Convention referred the idea to the Committee of Eleven, the delegates eliminated the most "unitarian" aspect of the proposal in dropping the President's exclusive authority to appoint and remove the five executive "Secretaries." The Committee of Eleven further curtailed the President's potential power insofar as it eliminated his authority to demand written opinions from the Chief Justice, the House Speaker, and the Senate President. At the same time, the

390. 2 id.
391. 2 id. at 542 (Sept. 7).
392. 2 id. at 542-43 (Sept. 7).
393. See Wood, supra note 133, at 138-39.
394. Id. at 435.
395. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 342-44 (Aug. 20); see Thach, supra note 224, at 118-25.
396. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 287, at 542 (Sept. 7).
removal of these offices as expected sources of advice also reduced the plan’s vestigial checking function. The combined changes, in short, got rid of both the President’s substantial appointment and removal powers as well as the proexecutive aspects of the advising mechanism, while merely dispensing with that mechanism’s more old-fashioned checking aspect.

The Opinions Clause, as a remnant of the original advising mechanism, also cut both ways within its reduced sphere. As a vestigial check, it echoed the expectation that the Chief Executive would consult expert advisors. More forcefully, it made clear that those in charge of various ministries could not defy the Chief Magistrate, as had occurred in the early state constitutions, as well as in Britain, but would have to report to him. What it did not do was simply express what was already implied in a unitary conception of executive authority that the history of the Clause undercuts, first through the elimination of the appointment and removal powers and next through the ambiguous nature of the advisory function. Nor, conversely, did the Clause reflect a considered distinction between executive and nonexecutive departments. Between these extremes, however, nothing indicates that the delegates understood it to preclude Congress from requiring that executive officers also furnish reports to it, or from regulating the executive branch generally.

In this way, the Opinions Clause comports with each of the main functional values that separation of powers was meant to serve. But it does no more than that. It most clearly promotes efficiency by making principal officers responsible to the President. It also furthers presidential accountability to the extent that it reflects an understanding that the opinions offered would not be binding and that the President should not be able to “acquire the protection” of that advice for wrong measures. Finally, it advances balance insofar as it marks the checking function of a specified source of counsel. To posit any more precise understanding is to mistake the blueprint for the building.

d. The Necessary and Proper Clause

Calabresi and Prakash also make a number of historical claims to narrow the ostensible meaning of the Necessary and Proper Clause. First, they declare that the Founders considered the Clause to address the means of effectuating federal law, rather than who may do so. Second, they contend that the Clause precludes legislative direction in the execution of laws because the Founding generation viewed such involvement as improper. Next, they argue that legislation limiting the President’s authority to superintend the laws under the Necessary and Proper Clause was just the type of improper enactment that made contemporaries uneasy about the provision. Finally, they assert that reading the Clause to permit congressional limits on the President’s ability to execute the laws would be to return the national government to the Articles of
Neither the history of the period, nor the particular sources that Calabresi and Prakash cite, sustain any of these assertions.

When Calabresi and Prakash say that the Necessary and Proper Clause spoke to the means—the "how"—of effectuating federal powers rather than which branch—the "who"—of doing so, they first of all mean that the provision gave Congress no power to enact statutes that excluded the President entirely from the execution of any federal laws. To support this contention, they note several instances in which Founders discussed what means the Clause would permit Congress to effect, while assuming that the power to oversee those means would remain with the President. None of these examples, however, shows anyone limiting the scope of the Clause to means, nor are there enough of them to infer such a limit from the failure of speakers to go beyond a discussion of means. Calabresi and Prakash simply fail to make the historical case that a background understanding of the Clause prevented Congress even from taking certain law enforcement matters out of the President's hands completely. If history does suggest that such a law would be problematic, it is because the act would arguably violate some Founding commitment that is demonstrable—such as the maintenance of balance among the branches—rather than a more specific and questionable understanding.

Calabresi and Prakash use the same evidence to support another facet of their argument with even less success. In contending that the Necessary and Proper Clause spoke only to means, they suggest that no one could have mistaken the Clause to permit Congress to limit the President's authority to enforce the laws, for example, by restricting presidential discretion to remove executive officers. To so restrict the President, they contend, would be in effect to remove him from the execution of laws. On this point the historical case is not only weak but untenable. Once more, the passages Calabresi and Prakash employ do not limit the Clause to means and provide only marginal support for such an inference. More importantly, the history of the period yet again undercuts any contention that the Founders generally understood the assignment of executive authority to the President to preclude congressional limitations on that authority of the type just mentioned. As previously discussed, that history demonstrates that any widely held notion of what the power to execute the laws required was far thinner than modern formalists assume. In the most telling example, recall that the Massachusetts Constitution, despite a separation of powers clause that could scarcely be more exclusive, not only permitted but required the legislature to select a host of executive

398. Id. at 623. For example, they quote John McClurg asking whether the President is to have his own military force or command of the militia as a means of carrying the law into effect. See id. For more on McClurg, see Clinton Rossiter, 1787 THE GRAND CONVENTION 123-24 (1966).
399. See supra Subsection III.A.2.
400. Calabresi & Prakash, supra note 86, at 589-90.
officers. Even assuming some (unproven) bright-line distinction between how laws are executed and who executes them, the Massachusetts framework—and the general functional understanding it reflects—in effect treated measures that Calabresi and Prakash assume relate to “who” as instead going to “how.”

Beyond this, the most basic Necessary and Proper Clause claim that Calabresi and Prakash advance—asserting that a broad reading of the Clause disregards the central lessons of the Articles period—itself disregards lessons of the period that are even more central. As previously recounted, a more complete account of the era reveals that American constitutional thinking clearly responded to the Articles’ lack of a separate executive, which Calabresi and Prakash note, and to a far greater extent responded to the legislative excesses of the early, republican state constitutions, which they do not. The latter factor in particular generated a desire to enhance both the executive and judicial branches as the 1770s ended and the 1780s progressed. There is, however, a wide gap between this general desire and a wish “to get Congress out of the business of executive details.” The historical evidence simply does not indicate that American constitutional thought had settled on anything beyond the general desire at the time the Constitution was framed.

In this more complete light, the Necessary and Proper Clause appears to mean just what it says. By granting Congress the power “to make all laws for carrying into execution” the enumerated powers assigned to any of the branches, the text on its own terms contemplates that Congress will determine how these powers are best exercised. The Clause does not say that Congress can regulate the execution of federal power only so long as the President undertakes the execution. Still less does it say that Congress can merely

401. Related claims suffer from this same flaw of assuming a historical baseline that did not exist. The Necessary and Proper Clause could not, they contend, authorize legislative restrictions of the President’s authority to execute the laws because Congress lacks any predicate power to do so and because any congressional attempt to alter the separation of powers would be improper. Id. at 586-93, 622-26. Congress might well need such independent authority on the assumption that this power is clearly defined and in all relevant senses exclusive. Restrictions on presidential authority that in fact altered separation of powers would indeed be improper. But it is exactly these assumptions that anyone familiar with the period would doubt. As Calabresi and Prakash suggest, few Founders would have objected to Congress authorizing the President to call forth the posse comitatus to help him execute federal law. Id. at 623. What they would have a daunting time showing is that many more would have objected to the same law telling the President when the posse could be called out, how it could be deployed, what types of individuals it could comprise, when its members could be discharged, or any number of other restrictions.

The same problems plague the contention that “[l]egislation stripping the President of his authority to superintend execution of law, enacted under the guise of the Necessary and Proper Clause, is exactly the type of usurpation that worried Madison,” and so the Founders generally. Id. at 624. Yet this is exactly the type of measure over which neither Madison, nor anyone else whom Calabresi and Prakash cite, expresses concern when analyzing the Clause. Nor is there much reason to assume that they would have. Once more, the constitutional history of the era indicates that the Founding generation simply had not settled on a conception of executive power that precluded legislative regulation. Worries about how the Necessary and Proper Clause would be abused have little bearing on measures that were not at the time seen as abuses. See supra Section III.A, Subsection III.B.1.

402. Calabresi & Prakash, supra note 86, at 625.
facilitate the President's own determinations of how best to execute the
government's authority.

Read in this straightforward fashion, the Necessary and Proper Clause is
fully consistent with the nation's evolution toward separation of powers,
functionally conceived. In granting Congress regulatory authority over the
implementation of federal power, the provision does nothing more than permit
what even the most separationist state constitutions compelled. It certainly does
not violate any preexisting consensus about the exclusivity of presidential
authority, because there was none. Nor does it render separation of powers
chimerical. Unlike the governors of Virginia or Pennsylvania, the President can
fight off perceived encroachments with the substantial procedural safeguard of
the veto. Moreover, at some point a congressional action might become so
intrusive that it would plainly violate the clear values that the doctrine was
meant to serve. To pick an outrageous hypothetical, a statute declaring that
only the Comptroller General could oversee the execution of Commerce Clause
enactments would in one fell swoop upset the balance among the branches,
frustrate even a joint conception of accountability, possibly undermine
governmental efficiency—and so violate separation of powers as the Founding
generation understood it. It would not, however, violate the doctrine on the
unfounded assumption that the individuals who struggled with the Constitution
generally believed that only the President could determine most if not all
aspects of executing the laws.

C. The Ratification Debates

Final confirmation for a functional understanding comes from the national
debate over whether to ratify the Constitution, arguably the most important
source of all. That debate, which includes the official proceedings of the state
conventions, pamphlets, and private correspondence, has obvious historical
importance. Its importance to modern theorists, however, is if anything greater.
Nowhere is the significance of ratification greater than among those theorists
who assume that the intent of the lawgiver is dispositive. On this assumption,
what should count is not "framer intent" but "ratifier intent." As Chief
Justice Marshall explained long ago, the work of the Convention "was a mere
proposal [which] ... the people were at perfect liberty to accept or
reject ... ." "From [the ratifying] Conventions the constitution derives its
whole authority." But "ratifiers' intent"—or at least "ratifiers' understanding"—also matters for those who simply seek to gain a better
understanding of the Constitution's often delphic prose. It stands to reason that

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the great public discussion over the document, which involved hundreds of writers for more than a year, can clarify meanings that the private drafting of the instrument, which involved fifty-five speakers during a single summer, cannot.\footnote{405}

Despite all of this theoretical appreciation, actual reliance on the ratification debates itself remains theoretical. With the exception of the totemic \textit{The Federalist}, neither judges, lawyers, nor academics turn to them with anything like the frequency with which they consult the handy \textit{Records of the Federal Convention}. Use of \textit{The Federalist}, moreover, tends to be notoriously acontextual.\footnote{406} Chronic neglect and misuse of certain sources do not mean that they cannot be consulted. Rather, those transgressions simply make it that much more important that they be consulted properly.

1. \textit{The Federalist “Case” for Functionalism}\footnote{407}

More than any other argument, the Federalists defended the Constitution’s at times quirky division of powers as the surest way to achieve the elusive goal of balance. In doing this, they assumed an object that by now nearly every American valued, however much they disagreed about the scope of the powers being divided or the extent of the division. Federalists and Anti-Federalists, both famous and obscure, proclaimed over and over that separation of powers would prevent the concentration of too much authority in any one branch of government and thus prevent tyranny. Hamilton put the point concisely at the New York Convention, declaring: “The true principle of government is this—make the system complete in its structure, give a perfect proportion and balance to its parts, and the powers you give it will never affect your security.”\footnote{408} “Brutus,” an Anti-Federalist, concurred:

\begin{quote}
The judgment of the learned Montesquieu will be found analogous to these [separation of powers clauses] of Virginia and Massachusetts. This able writer says, “whenever the legislative and executive powers are united in the same person or in the same body of magistracy,
\end{quote}

\footnote{405. Then again, maybe not. As James H. Hutson has shown, the records of many of the ratifying conventions are extremely unreliable. To take the most notorious example, Thomas Lloyd, who served as the official reporter for the Pennsylvania and Maryland ratifying conventions, was often too drunk to take anything down, much less take anything down accurately. James H. Hutson, \textit{The Creation of the Constitution: The Integrity of the Documentary Record}, 65 \textit{Tex. L. Rev.} 1, 22–23 (1986). Moreover, the records of the Federal Convention are problematic in their own way. Hutson estimates that Madison, whose notes make up most of what we know about the proceedings, managed to take down only about 10% of what was said. \textit{Id.} at 34. The point here is not that these sources should not be consulted, but that any claims based upon them should be modest and qualified.}

\footnote{406. See Bernstein, \textit{supra} note 134, at 1585; Flaherty, \textit{supra} note 16, at 553 n.137.}

\footnote{407. I use quotation marks to make clear that my claim is not that the Federalists consciously argued in favor of what is a twentieth-century construct. Rather, my point is that Federalist arguments for the Constitution better comport with modern functionalism than formalism.}

\footnote{408. Alexander Hamilton, in 2 \textit{The Debates in the Several State Conventions on the Adoption of the Federal Constitution} 350 (Jonathan Elliot ed., 1941) [hereinafter \textit{Elliott’s Debates}].}
there can be then no liberty; because apprehensions may arise that the
same monarch or senate 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
powers.\footnote{409}

“A gentleman in New-York,” another Anti-Federalist, put the matter more
tersely, stating, “To vest judicial, legislative, and executive powers in the same
body, is admitted by all constitutional writers as parental of aristocratic
tyranny, or single despotism.”\footnote{410} James Wilson did not disagree, declaring
in almost identical terms that, “[t]o have placed in the [Confederation Congress], the legislative, the executive, and judicial authority, all of which are
essential to the general government, would indubitably have produced the
severest despotism.”\footnote{411}

Where the Federalists and Anti-Federalists parted company was on the
question of whether the Constitution’s approach to the doctrine struck the
proper balance. The Federalists had no doubt, at least in public. Much of the
time they preached to their own choir, praising the Constitution’s enhancement
of the executive and judiciary as a response to the legislative excesses that had
prompted the Federal Convention in the first place. Madison sounded this
theme in classic fashion in \textit{The Federalist}. Noting that “[t]he legislative
department is everywhere extending the sphere of its activity and drawing all
power into its impetuous vortex,”\footnote{412} he lamented the comparative
disadvantages of both the executive and judiciary.\footnote{413} The remedy for this was
not absolute separation of governmental power. Instead, it was “to divide the
legislature into different branches; . . . [a]s the weight of the legislative
authority requires that it should be thus divided, the weakness of the executive
may require, on the other hand, that it should be fortified,” in particular, by the
President’s qualified veto.\footnote{414} To this prescription, Hamilton would add his
famous defense of the Constitution’s enhancement of judicial power in \textit{The Federalist} No. 78.\footnote{415}

\footnote{409. “Brutus,” VA.\textsc{ independent chron.}, May 14, 1788, \textit{in 9 documentary history}, \textit{supra} note 368, at 799 (citation omitted).
410. \textit{Extract of a letter from a gentleman in New-York to his friend on the present Assembly [Virginia Ratifying Convention], dated October 26, 1787, VA.\textsc{ independent chron.} (Nov. 14, 1787), \textit{in 8 documentary history}, \textit{supra} note 368, at 157.
411. James Wilson, Convention Debates (Dec. 11, 1787), \textit{in 2 documentary history} (Pa.), \textit{supra} note 368, at 556.
413. \textit{Id.} at 309–10.
Bowdoin emphasized the continuity between the Constitution’s fortification of the executive and previous
efforts at reform, noting that, “[t]he legislative [i.e., veto] powers of the President are precisely those of
the governors of this state [Massachusetts] and those of New York.” \textit{2 Elliott’s debates} (Mass.), \textit{supra}
note 408, at 128.
At the same time, the Federalists also argued that the Constitution's remedies did not make the legislature too weak. Many Anti-Federalists, unconvinced that the state legislatures had gotten out of hand to begin with, raised fears that the proposed framework tipped the balance toward the newly fortified branches, especially the executive. Against this charge, Federalists typically contrasted the President's limited powers with those of their former monarch. Tench Coxe, for example, argued that "[t]he king of England has legislative power, while our President can only use it when the other servants of the people are divided," and later concluded that "[f]rom such a servant with powers so limited and transitory, there can be no danger, especially when we consider the solid foundations on which our national liberties are immovably fixed by other provisions of this excellent Constitution."416 Here, as before, the Federalist defense did not assume that a complete division of powers, precisely delineated, was an end in itself. Rather, the Federalist argument turned on whether the division actually made advanced the functional goal of balance.

Balance was just the beginning. Federalists contended that their new Constitution also promoted accountability—not the simple, legislative accountability of the first state constitutions but the more complex, joint accountability advocated by the reformers who sought to change those early frameworks. In part for this reason, Federalists like Tench Coxe wasted no time in pointing out that under their approach to separation of powers, "[t]he people will remain . . . the fountain of power and public honour."417 "The president, the Senate, and the House of Representatives," Coxe continued, "will be the channels through which the stream will flow—but it will flow from the people, and from them only."418 Moreover, Wilson noted,

The executive, and judicial power are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are so much the servants, and therefore as much the friends of the people, as those who make them.419

As Wood observes, the consequences of this system not only contributed to balance but to a new type of shared, interbranch, governmental responsiveness: "Because the Federalists regarded the people as 'the only legitimate fountain

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416. TENCH COXE, AN AMERICAN CITIZEN I (Sept. 26, 1787), reprinted in 2 DOCUMENTARY HISTORY (Pa.), supra note 368, at 141, 142.
418. Id.
419. WOOD, supra note 133, at 598 (quoting James Wilson).
of power,' . . . no department was theoretically more popular and hence more authorative than any other." More specifically, no longer could any department claim an exclusive popular mandate to justify ill-considered or oppressive measures, as legislative departments had done in the preceding decade.

Other aspects of the plan provided still further guards against the excesses associated with simple accountability. One part made presidential selection "mediate." The electoral college, in what became a common Federalist theme, would ensure "that the immediate election [of the President] . . . be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation . . . . [as well as] afford as little opportunity as possible to tumult and disorder." Just as the electoral process would forestall demagoguery, so too would the nature of the election. "[B]eing elected by different parts of the United States," argued James Wilson, the President "will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection." In similar fashion, the Federalists also praised the judicial selection process as a way to produce judges who were neither independent of the people nor slaves to demagogic whim. Even congressional elections, Federalists pointed out, should not be thought of as "immediate" on the model of the Pennsylvania Constitution. The Senators, for example, would be accountable to the people only indirectly, through the state legislatures. In all these ways, the diffusion of accountability represented by the Federalist separation of powers meant that only a sustained and widespread popular desire could serve as the legitimate basis for government action.

But the Federalists sought more than gridlock. For all that it promoted balance and expanded accountability, separation of powers was also intended to ensure that government had enough energy to do what it had to do once it did decide to act. As Hamilton told the New York Convention, "[T]o secure ourselves from despotism. . . . certainly was a valuable [object]." He continued, "but, sir, there is another object, equally important . . . . I mean a principle of strength and stability in the organization of our government, and vigor in its operations." Though Hamilton was perhaps the best exponent of vigorous government, Federalists generally agreed with his diagnosis.

420. Id. at 550 (citation omitted).
422. Pennsylvania Convention (Dec. 1, 1787), in 2 Documentary History, supra note 368, at 452.
424. Just after the Convention, Madison wrote Jefferson that one great object of the Convention was "to unite a proper energy in the Executive and a proper stability in the Legislative departments, with the essential characters of Republican Government." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 The Republic of Letters, supra note 263, at 495, 496; see Wood, supra note 133, at 350–52.
Separation of powers, at least the Constitution’s version, advanced governmental efficiency mainly through the executive. Toward this end, Wood notes, “[n]ot only was the president to be made independent of the legislature, but he was to be granted an extraordinary amount of power.” It did not follow, however, that the Federalists believed that the only way to insure sufficient governmental energy was to render all executive functionaries subordinate to the President alone. Instead, when Federalists did seek to demonstrate the Constitution’s functional commitment to energy, they typically pointed to the more modest device of a unitary Chief Executive. Edmund Randolph sounded a view shared even by many Anti-Federalists when he told the Virginia Convention that “[a]ll the enlightened part of mankind agree that the superior dispatch, secrecy, and energy with which one man can act, renders it more politic to vest the power of executing the laws in one man, than in any number of men.” The placing [of] the executive power in the hands of one person,” agreed James Monroe, “appears to be perfectly right.”

Perhaps the most thorough expression of the Federalist position came from Hamilton in *The Federalist* No. 70: “The ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers” (as opposed to some fixed notion of “executive power”). Echoing Randolph, Hamilton praised the Constitution for creating a single President, because “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number.” He also praised the document for dispensing with an executive council. Nowhere, however, did he argue that the need for energy requires absolute unity below the unitary Chief Executive. In fact, later in *The Federalist* he assumed that the approval of the Senate is required before the President can remove executive appointees, even though the document is silent on the matter.

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425. Wood, supra note 133, at 551.
426. Edmund Randolph, 9 DOCUMENTARY HISTORY (Va.), supra note 368, at 1097–98.
429. Id.
430. Hamilton criticizes the ideal of an executive council not only on the ground that it would undercut the value of a unitary Chief Magistrate, but also because it would “destroy” presidential responsibility (a point he says also applies to a plural Chief Executive). Id. at 427–31. In other words, Hamilton argues that a council would diffuse accountability too much.
enhanced powers sufficed. Too many people retained too many Whiggish fears for widespread agreement on anything more.\textsuperscript{432}

2. \textit{The Federalist “Case” Against Formalism}\textsuperscript{433}

Little in the ratification debates supports the view that either the Federalists or the Anti-Federalists presupposed that the Constitution reflected a more thoroughgoing, formalist approach to separation of powers. Much refutes it. As with the Convention, the records yield nothing approaching a consensus either as to what separation of powers entailed or what the powers themselves included beyond the basic values the doctrine was to serve. Perhaps more than the Convention, the evidence suggests that the goal of dividing powers no longer commanded the support it once did, even assuming that it was possible to define those powers with precision. Challenged by their opponents, many leading Federalists not only acknowledged but celebrated the ways in which the Constitution mixed powers, the better to serve such more fundamental ends as balance, accountability, and energy.

Especially striking is the lack of direct evidence for the formalist position. As had been true for over a decade, the Americans who debated the Constitution freely tossed about such terms as “legislative power,” “executive power,” “judicial power,” “executive unity,” and “separation” or “division” of powers. As had also been true, rarely did anyone define what these terms meant with any precision. Still less frequently did they address issues that today are at the center of separation of powers disputes. It could be, of course, that silence on these matters simply means that there existed such a deep-seated consensus on these terms that no one thought elaboration was necessary. Or it could be that these general terms signalled only the most basic agreement while masking profound disputes and uncertainties. Given the historical context, the formalist possibility is untenable.

But the point hardly needs to rest on negative inference. Madison, for one, recognized precisely the true state of affairs when he remarked to Jefferson that, “[e]ven the boundaries between the Executive, Legislative and Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference.”\textsuperscript{434} Time and time again, Federalists and Anti-Federalists alike pointed to the numerous ways that the Constitution violated a strict separation of powers even on the assumption that the powers to be divided could be clearly defined. As both Vile and McDonald argue, if

\textsuperscript{432}. Hamilton alluded to these fears when he stated that, “[t]here is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government.” \textit{The Federalist} No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{433}. \textit{See supra} note 407.

\textsuperscript{434}. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), \textit{in} \textit{1 The Republic of Letters}, \textit{supra} note 263, at 495, 500.
one defines the doctrine as a fairly complete division of well-defined types of authority, then “separation of powers had clearly been abandoned in the framing of the Constitution.”\textsuperscript{435} The Anti-Federalists keenly understood this and cried foul.\textsuperscript{436} Typical were the remarks of an “Officer of the Late Continental Army,” who criticized the Constitution on the ground that “the LEGISLATIVE and EXECUTIVE powers are not kept separate as every one of the American constitutions declares they ought to be; but they are mixed in a manner entirely novel and unknown, even to the constitution of Great Britain.”\textsuperscript{437}

Acknowledging the mixture, the Federalists responded defensively, then defiantly. Writing early in the debates, Tench Coxe took what would become the common tactic of pointing out that the Constitution’s blending of powers was still not as extensive as that in Britain. “The king of England,” he wrote, “has legislative power, while our president can only use it when the other servants of the people are divided.”\textsuperscript{438} But soon the Federalists extolled mixture as a means that at points better served the purposes attributed to separation of powers. “Is there any one branch,” Hamilton asked the New York Convention, “in which the whole legislative and executive powers are lodged?” The answer:

No. The legislative authority is lodged in three distinct branches, properly balanced; the executive is divided between two branches; and the judicial is still reserved for an independent body, who hold their office during good behavior. This organization is so complex, so

\begin{itemize}
\item \textsuperscript{435} McDoNALD, supra note 135, at 258; see VILE, supra note 20, at 160–75.
\item \textsuperscript{436} See HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 60–63 (1981). Storing, who remains perhaps the leading authority on the Anti-Federalists, brilliantly demonstrates that while the Federalists moved beyond viewing separation of powers in terms of a formal separation of government powers, their opponents continued to doubt “the theoretical soundness, the practical feasibility, and even the good intentions of this new kind of balanced government.” Id. at 62.
\item \textsuperscript{437} To the Citizens of Philadelphia, INDEPENDENT GAZETTEER (Phila.), Nov. 6, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 91, 93 (Herbert J. Storing ed., 1981). A minority of the Pennsylvania Convention developed the point at greater length:
\begin{quote}
The president general is dangerously connected with the senate; his coincidence with the views of the ruling junto in that body is made essential to his weight and importance in the government, which will destroy all independency and purity in the executive department, and having the power of pardoning without the concurrence of a council, he may screen from punishment the most treasonable attempts that may be made on the liberties of the people, when instigated by his coadjutors in the senate. Instead of this dangerous and improper mixture of the executive with the legislative and judicial, the supreme executive powers ought to have been placed in the president, with a small independent council made personally responsible for every appointment to office or other act, by having their opinions recorded; and that without the concurrence of the majority of the quorum of this council, the president should not be capable of taking any step.
\end{quote}
\item The Dissent of the Minority of the Convention (Dec. 18, 1787), in 2 DOCUMENTARY HISTORY (Pa.), supra note 368, at 617, 635 (emphasis added).
\item \textsuperscript{438} [Tench Coxe], An American Citizen I, INDEPENDENT GAZETTEER (Phila.), Sept. 26, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 20, 23 (Bernard Bailyn ed., 1993).
\end{itemize}
skilfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success.\textsuperscript{439}

Not all Federalists viewed the blend in the exact way that Hamilton did. "Americanus," for example, observed that "[i]n the organization of the senate, we may observe three \textit{distinctions of characters}, into which it is divided, the one \textit{legislative}, the other \textit{executive}, the third \textit{judicial}."\textsuperscript{440} But Hamilton, Americanus, and numerous other Federalists did agree that the Constitution's mixture of power helped insure balanced, accountable, and energetic government.

It would fall to "Publius," in this case Madison, to develop the point most powerfully. A rigid formalist separation of powers, he explained, misconstrued Montesquieu, the British Constitution on which he drew, and the early state constitutions:

[Montesquieu's] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the \textit{whole} power of one department is exercised by the same hands which possess the \textit{whole} power of another department, the fundamental principles of a free constitution are subverted. . . .

If we look into the constitutions of the several States we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.\textsuperscript{441}

The trick of government was not to assign three clearly conceived types of governmental authority to three discrete branches, but to seek the most sensible degree of division and linkage. As Madison put it, "[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."\textsuperscript{442} But it was impossible to achieve the proper blend through setting it out extensively in advance (and still less, it follows, by presuming it implicitly). The Critical Period showed that "a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of

\textsuperscript{439} 2 Elliot's Debates, \textit{supra} note 408, at 348 (Alexander Hamilton).
\textsuperscript{440} "Americanus II," \textit{Va. Independent Chron.}, Dec. 19, 1787, \textit{reprinted in 8 Documentary History} (Va.), \textit{supra} note 368, at 244, 246.
\textsuperscript{441} \textit{The Federalist} No. 47, at 302–04 (James Madison) (Clinton Rossiter ed., 1961).
\textsuperscript{442} \textit{The Federalist} No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).
government in the same hands." Ultimately, the solution lay not in any particular division, express or presumed, but sounded mainly in process. "[T]he defect must be supplied," Madison concluded, "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." In this way separation of powers would ensure that the government "will be controlled by itself." So long as the system did this, it was doing its job.

IV. FOUNDING VALUES TWO HUNDRED YEARS LATER

The Founders developed separation of powers as a means to further certain purposes, including balance, accountability, and energy. They sketched a basic tripartite division of governmental authority, specified certain relationships mainly at the top of the three branches, and trusted that the processes the framework established would advance the purposes it was designed to achieve. They did not presuppose, and in fact rejected, the idea that separation of powers "is a prophylactic device, establishing high walls and clear distinctions." But then again, so what? Assuming still that it should

443. Id. at 313.
445. Id. at 323.
446. Adhering to a standard of temporal breadth, see supra text accompanying note 129, would ordinarily counsel taking the story past the Constitution's ratification to early practice under it and, perhaps, beyond. This Article will not do so for a number of reasons. One set is theoretical. Many, though by no means most, interpretive theories that look to the past place greater emphasis on the legislative history leading up to a text than on a subsequent practice under it. See supra text accompanying notes 102–05. Another set of reasons is practical. Early practice, a sufficiently complex topic in its own right, would take at least as much space as the present treatment covering the period leading to ratification. Moreover, in contrast to the background of the doctrine, considerable work in the legal literature addresses early separation of powers practice. See, e.g., Casper, supra note 99, at 224–60; Corwin, Tenure of Office, supra note 54, at 360–87; Lessig & Sunstein, supra note 17, at 438–83.

Furthermore, much of the scholarship with regard to early practice is consistent with the account presented here in any case. Consider, for example, the "decision of 1789." Myers v. United States, 272 U.S. 52, 142 (1926). During its first session, the House of Representatives specifically considered whether to vest the President with the authority to remove heads of certain executive departments. Corwin's classic, and ably researched, article demonstrated that "a mere fraction of a fraction, a minority of a minority, of the House, can be shown to have attributed the removal power to the President on the grounds of executive prerogative." Corwin, Tenure of Office, supra note 54, at 362, 362–69. Recent work confirms the point. Lance Banning, for example, notes that Madison proposed that the heads of three executive departments be removable by the President, arguing that the Constitution left Congress no choice but to grant removal authority to the President. See Banning, supra note 168, at 276–77. But Banning also notes that Madison entered the congressional debates on this point asserting that Congress did have the power to decide whether to grant or withhold such authority. See id. at 277. Madison, himself, in other words, had no consistent conception of formal boundaries between the branches even in his own mind. His initial position, moreover, indicates that Madison came to the issue, after having led the ratification struggle, believing that the authority rested with Congress.

matter, does the Founding yield any lessons for modern separation of powers controversies? This part sketches an answer, arguing that the changed circumstances since the Founding make even more compelling the type of functional view of separation of powers evident at its inception. A fuller version of this argument must appear elsewhere. But at least the general contours seem plain.

The argument has three parts. First, it holds that the most appropriate way to maintain fidelity to the Founding is not through literal "originalism," such as that advanced by Justice Scalia and Judge Bork, but through models that serve the Founders' more general purposes in light of changed circumstances, as suggested by Lawrence Lessig and Bruce Ackerman. While these purposive approaches are sensible in general, nowhere do they make more sense than where the Founders themselves failed to agree on much more than general purposes—the case with separation of powers. Next, and here contrary to Lessig and Sunstein, the argument maintains that those circumstances that have changed since the Founding reveal that the modern formalist approach undercuts the principal functional values that the Founders hoped their approach to separation of powers would promote. Finally, the argument concludes that functional solutions should govern. Accordingly, the Court should mainly leave separation of powers controversies to the processes that the Founders specified, unless those particular processes or the general values that they were designed to promote are clearly under attack. This means that older devices such as the legislative veto and administrative oversight by "congressional agents" should have been left in place. Yet it also means that newer mechanisms such as the current version of the "line item veto" should not be.449

A. Fidelity over Time

Given that some degree of faithfulness to the Founding is a good thing, the question remains how best to be faithful two centuries later. So many bytes have been processed justifying the need for fidelity to begin with that comparatively little attention has been devoted to methods for achieving it. At least three candidates have nonetheless emerged as contenders: "narrow

449. Nor need the applications end here. While this Article concentrates on conflicts between Congress and the President, Larry Kramer has suggested that a similar type of analysis applies to disputes between Congress and the judiciary. Specifically, Kramer argues that nothing in the history of separation of powers prevents federal courts from making federal common law, notwithstanding the formalist objection that unaccountable judges should not be involved in lawmaking. To the contrary, he contends, "common lawmaking arguably furthers some purposes of separation of powers." Larry Kramer, The Lawmaking Power of the Federal Courts, 12 PACE L. REV. 263, 286 (1992); see also Larry Kramer, The Constitution as Architecture: A Charette, 65 IND. L.J. 283, 285–88 (1980) (arguing that Founders' understanding of separation of powers may have been to allow sufficient flexibility in governmental framework to allow institutional responses based on future events).
originalism," as set forth by Justice Scalia and Judge Bork; \textsuperscript{450} "translation," as is currently being developed by Lawrence Lessig; \textsuperscript{451} and "synthesis" of different constitutional moments, as advanced by Bruce Ackerman. \textsuperscript{452} However they relate to other aspects of the Founding, their relation to separation of powers is clear. The models of translation and synthesis advance the project of fidelity. Originalism, narrowly understood, undercuts it.

If ever a term muddied as much as it clarified, "originalism" is it. It has most commonly referred to the contention that judges should apply the meaning of a rule "understood at the time of the law's enactment." \textsuperscript{454} On this view, original understanding is not merely probative but dispositive. Often, this brand of originalism does not merely dictate the extent to which history should apply, but how to apply it. One might, after all, derive a rule at a sufficient level of generality that it could be readily applied to new circumstances without enacting a new law. Or one might view the original understanding of some text as sufficiently precise that only a new text can accommodate a change in context. Judge Bork advanced the ostensible originalist answer, contending that "a judge should state the principle at the level of generality that the text and historical evidence warrant." \textsuperscript{455} Judge Bork and other avowed originalists nearly always find that the historical evidence equates the intended meaning of a rule with either precise understandings or contemporaneous applications. \textsuperscript{456} Under this narrow originalist approach, the Eighth Amendment cannot prohibit disproportionate sentences, \textsuperscript{457} nor the Fourteenth Amendment prevent the criminalization of (homosexual) sodomy, \textsuperscript{458} nor the Commerce Clause permit regulation of manufacturing or agriculture \textsuperscript{459}—all because the (purported) original understanding of each provision is too narrow to account for changed circumstances.

This type of narrow originalist approach is ill-suited for separation of powers analysis. One set of problems pertains to narrow originalism generally.

\textsuperscript{450} See Fleming, \textit{supra} note 83.
\textsuperscript{451} See infra text accompanying notes 454–59.
\textsuperscript{452} See infra text accompanying notes 465–67.
\textsuperscript{453} See infra text accompanying notes 468–72.
\textsuperscript{454} BORK, \textit{supra} note 104, at 144.
\textsuperscript{455} Id. at 149.
\textsuperscript{456} For example, Judge Bork argues that the Supreme Court in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), properly gave a narrow reading to the Fourteenth Amendment's Privileges or Immunities Clause on the ground that its original meaning "remains largely unknown." BORK, \textit{supra} note 104, at 36–39. Along similar lines, Judge Bork asserts that the Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), violates the original understanding of the Equal Protection Clause by ignoring the contemporaneous practice of segregation in public education. BORK, \textit{supra} note 104, at 75–80. My argument at this point is not that the judge is correct or incorrect in his history, but that his history usually points him toward a narrow level of generality, at least when considering constitutional provisions protecting rights.
In the first place, the historical evidence indicates that the Founders consistently aimed for a fairly high degree of generality. As William Michael Treanor observes, the Founders "were not traditional originalists. They created a terse, open-ended constitution whose meaning would change in response to changed circumstances." Much in our legal culture confirms this view, not least of which is Chief Justice Marshall’s famous dictum in *McCulloch v. Maryland*: "[W]e must never forget, that it is a constitution we are expounding." Common sense supports this view as well. It seems absurd to maintain that someone who speaks with an expectation that her words will apply in unforeseen circumstances would not also intend that her meaning carry over. None of this is to say that we may blithely ignore the textual requirement that the President "have attained to the Age of thirty five Years" just because we may now believe that only those over forty are as worthy. It is to say that for the Constitution’s "majestic generalities," to say nothing of its nontextual doctrines, narrow originalism fails the test of fidelity on its own terms.

The second problem facing narrow originalism is more serious still. Even if the Founders did not usually aim for a high level of generality, they did when it came to separation of powers. As this Article has taken pains to show, the Founders generally agreed on the basic purposes that the doctrine was meant to achieve. Beyond this, agreement quickly broke down. The Founders never reached a consensus about the specifics of the three powers they were separating outside their respective cores. Still less did they agree about the specifics that generate modern controversies. Furthermore, the Federalists themselves defended the blending of powers, as they variously understood them, where necessary to achieve the ends previously associated with dividing them. There was no specific, which is to say, formalist, baseline. And since the Founders’ own blend and division of powers was unprecedented, there was no uniform set of applications to yield specific answers either. In this situation, even the most narrow originalist has no choice but to apply general Founding values or to give up the attempt to maintain fidelity to the Founding.

That leaves translation and synthesis. Each of these methods is also "originalist" in the sense that it aims to preserve privileged meanings from earlier eras of constitutional lawmaking. But unlike narrow originalist method, both translation and synthesis presuppose that an intended meaning or purpose is sufficiently general to carry over into changed circumstances. So profound

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463. U.S. CONST. art. II, § 1, cl. 5.
is the disagreement on this point that the advocates of these approaches avoid the "originalist" label altogether.

Translation applies when there are changes in context. In such cases, "particular applications of a constitutional text [or norm] may change over time as the context of application changes—all consistent with the command of fidelity." Consider, for example, the New Deal. Lessig, a leading proponent of this approach, argues that the radical changes ushered in by the New Deal, though radical, remain faithful to the Founders' original design. On this view, the original "Constitution embraced competing goals: one to empower the federal government over a range [but not a limitless range] of national economic activity; the other to reserve . . . to the states a domain over some kinds of economic activity." By the time of the Great Depression, the context for applying these purposes had fundamentally changed. It had become clear that the national economy was more extensive, integrated, and constructed than anything the Founders could have imagined. In addition, it had also become clear that laissez-faire economic assumptions no longer tracked economic reality, which in turn suggested that previously uncontested views about the courts' power to check economic regulation enacted by the legislature were as much political as legal. In light of these changed contexts, the Supreme Court could curtail substantive economic due process, and legitimately permit the expansion of federal commerce power while remaining faithful to the Founding design. In similar fashion, Lessig notes, the Court translates old norms to new contexts all the time.

By contrast, synthesis applies when there are changes in constitutional norms. Bruce Ackerman poses the challenge this way: "At Time One, the Founding generation announced X as higher law; at Time Two, [a later generation announced] Y—where Y is partly, but not entirely, inconsistent with X. How then to put X and Y together into a meaningful whole?" The answer, he suggests, is "[b]y self-consciously confronting the tensions between [the] Founding and [later amendments], and elaborating doctrinal principles which harmonize the conflict in a way that does justice to the deepest aspirations of each." For Ackerman, the New Deal cannot simply be explained by changes in context. Rather, he posits that "We the People" affirmatively repudiated economic liberty under the Takings, Due Process, and Commerce Clauses and approved vastly increased federal powers, through what amounted to Article V amendments ratified during the 1930s. These changes did not eclipse all prior constitutional norms. *Griswold v.*

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467. See *id.* at 438–39.
468. *1 ACKERMAN, supra* note 105, at 90.
469. *1 id.* at 94.
470. *1 id.* at 105–08.
Connecticut, for example, represents the Court's attempt to synthesize the New Deal's expansion of power with the Founding's surviving commitment to noneconomic rights.

Each of these models assumes that certain norms can be held constant and applied in new circumstances. Yet some question this assumption. Mark Tushnet, for example, notes that a critical difficulty in applying old norms to changed circumstances is the need to identify functional equivalents of earlier practices, beliefs, or institutions in novel settings. However difficult this task may be in other constitutional settings, it is not a significant obstacle in separation of powers. Today, Congress, the President, and the Supreme Court still function, thereby suggesting plausible functional equivalents for yesterday's Congress, President, and Supreme Court. These institutions may have grown more powerful in absolute terms; their relative authority may have shifted; they may have been joined by an additional branch of government. None of this, however, forecloses attempting to apply a norm that, for example, counsels against concentrating too much power in a single governing institution. This conclusion may have been different had the Republic adopted the type of system that the young Woodrow Wilson might have applauded and adopted a parliamentary system that in effect collapsed existing divisions of authority into a unicameral national legislature. But it did not.

The same point applies when considering the nature of the norm rather than the character of the circumstances. Common sense suggests that the more general the norm, the more likely it will be to discover functional equivalents of the original applications. A rule mandating a jury trial in civil suits "where the value in controversy shall exceed twenty dollars," will find fewer equivalent applications than a more general standard prescribing fairness in dispute resolution. As has been argued, the Founding did not yield a dominant approach to separation of powers that, at least below the apex of government structure, went beyond general goals. Norms such as that are sufficiently broad to be applied in all but the most radical of changed circumstances even at the expense of previous readings or applications of those norms.

For the purposes of this Article, moreover, there is no reason to choose between either the translation or synthesis approach. No one doubts that the federal government of the 1990s is a vastly different entity from its counterpart

471. 381 U.S. 479 (1965).
472. See 1 ACKERMAN, supra note 105, at 150-58.
473. See TUSHNET, supra note 115, at 41-44.
474. Tushnet does not "deny that we can ever understand the past, because the world of the past is not the world within which we have developed ways of understanding how others act." Id. at 44. To the contrary, he asserts that the interpretative task should be "to think through the implications of our continued dedication to the large abstractions when the particulars of the world have changed so drastically." Id.
475. See WILSON, supra note 7.
476. U.S. CONST. amend. VII.
of the 1790s. As will be seen, the balance of power among the branches has shifted; the nature of electoral accountability has changed; and novel means of insuring governmental energy have multiplied. Like the New Deal, it may be that these changed circumstances arose from changes in social and economic contexts. But also like the New Deal, it may also be that they are better seen as stemming from intervening amendments. Either way, the task of fidelity demands figuring out what current applications best serve the Founding's surviving purposes in this new world.

Doing that, however, requires a better understanding of what these new circumstances are.

B. Changed Circumstances

As a general matter, developments in American government over the past two centuries undercut the modern formalist case still further. For starters, "more than 200 years of practice under the Constitution suggest that the inherent fluidity and the system of checks and balances render a strict separation impossible," a point that scholars as diverse as McDonald, Corwin, Lessig and Sunstein, and Susan Low Bloch have suggested. That phenomenon would be dispositive assuming that evolving custom should count as a source for constitutional norms. For present purposes, however, more important are the ways “more than 200 years of practice” affect the application of norms derived from the Founding itself. Those two centuries of change have profoundly reshaped the context in which each of the principal Founding values so far considered are to be implemented today if they are to be implemented at all.

1. Balance in an Executive Vortex

a. General Powers

By far the greatest changes concern the goal of balance, the Founding’s most important separation of powers value. As Forrest McDonald recently observed, “[i]t is a commonplace among students of the presidency that the two-plus centuries of American experience under the Constitution have been characterized by a general if irregular drift of authority and responsibility

477. McDonald, supra note 276, at 180 n.35.
478. See Corwin, The President, supra note 54, at 76–84; McDonald, supra note 135, at 180 n.35; Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L.J. 561, 618–51; Lessig & Sunstein, supra note 17, at 14–22.
479. For a classic discussion and application of this approach, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593–614 (1952) (Frankfurter, J., concurring).
toward the executive branch."\textsuperscript{480} This is not to say that Congress cannot, on occasion, still seize the initiative when, as now, it benefits from an effective leadership and a rudderless Chief Executive. But from a larger perspective the overall drift has been inexorable and shows few signs of any long-term shift.\textsuperscript{481} It often surprises students to discover Madison's statement, previously noted, that "[t]he legislative department is . . . drawing all power into its impetuous vortex."\textsuperscript{482} Were Madison to consider the same problem in light of subsequent developments, he would have little choice but to conclude that if there were any one branch against which "the people ought to indulge all their jealousy and exhaust all their precautions,"\textsuperscript{483} it would be the executive.

This evolution has occurred across the board, starting with activities that formalists consider to be at the core of executive authority. Consider law enforcement, which Justice Scalia has called "a quintessentially executive function."\textsuperscript{484} In fact, presidential dominance in this area was slow in coming. As Lessig and Sunstein, among others, have noted, in the beginning Congress relied mainly on state and local officials to enforce federal legislation, while federal district attorneys, who acted under instructions of an auditor in the Treasury Department, remained all but completely independent up to the Civil War.\textsuperscript{485} Key changes occurred in 1855, when the Attorney General was made a full-time job;\textsuperscript{486} in 1861, when federal district attorneys were placed under the Attorney General's direction;\textsuperscript{487} in 1870, with the establishment of the Justice Department;\textsuperscript{488} and in 1909, with the creation of the Justice Department's first "Bureau of Investigation."\textsuperscript{489} The President likewise expanded enforcement powers through increasing use of executive orders,

\textsuperscript{480} MCDONALD, supra note 276, at 277. While noting this orthodoxy, McDonald himself in part challenges it, contending that "[i]n truth, the preponderance of power has flowed in long-term trends from one branch to another, and now and again a balance has been reached." Id. McDonald nonetheless concludes that the twentieth-century trend has been largely toward executive power, notwithstanding congressional reassertions in the wake of Vietnam and Watergate. Id. He further contends that with regard to popular expectations, the "inflation of the presidency has been virtually uninterrupted." Id. at 277–78.

\textsuperscript{481} Perhaps tellingly, many of the major challengers to the current incumbent seek to exchange powerful positions in Congress for the presidency, including Senate majority leader. For a recent assessment of the major challengers as they entered this year, see Steven V. Roberts et al., Looking for Mr. Un-Dole, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 30. It remains to be seen to what extent the present initiative will remain with Congress should a Republican capture the White House in the next election.

\textsuperscript{482} THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961); see BANNING, supra note 168, at 400.

\textsuperscript{483} Id.

\textsuperscript{484} Morrison v. Olson, 487 U.S. 654, 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").


\textsuperscript{486} Id.

\textsuperscript{487} Id.

\textsuperscript{488} Id.

\textsuperscript{489} Id. at 366–83; LEWIS L. GOULD, THE PRESIDENCY OF THEODORE ROOSEVELT 293 (1991); MAX LOWENTHAL, THE FEDERAL BUREAU OF INVESTIGATION 83–92 (1950).
which according to some estimates now number 50,000 since 1907. At times, especially in this century, Presidents have engaged in direct action as if to preserve the "king's peace," without specific legal authorization. Nowhere has this been more evident than in labor disputes, where in the first half of this century Presidents intervened in no fewer than twenty-five major industrial disputes. Meanwhile, Presidents from Jefferson and Jackson onward had discovered liberal use of patronage as a way to gain further control over executive personnel, a means of control only partly undermined by the emergence of a civil service system in the late nineteenth century.

Presidents have further garnered the lion's share of expanded federal authority in areas that are harder even for formalists to characterize. In foreign affairs, presidents as early as Jefferson pushed beyond original expectations by deploying American forces abroad without congressional approval. Over time the practice became more frequent and involved higher stakes as the United States assumed its place as a world power. In similar fashion, Presidents have also proven themselves to be naturals at commanding progressively more powerful media attention to the relative exclusion of the multivoiced Congress and secretive Supreme Court. As a function of these and other developments, the public long ago focused its expectations on the executive branch, both state and national, to address the nation's needs—a focus that serves further to confirm the shift.

The shift toward presidential government has also taken place in areas that formalists would consider "quintessentially legislative"—or at least those legislative activities that the Constitution arguably confers upon the President. Take, for example, initiating the legislative process. Under Article II, Section 3, the President has the duty not just to report to Congress on the State of the Union, but to "recommend to their Consideration such Measures as he shall judge necessary and expedient." With the exception of Lincoln, nineteenth-century presidents used this authority sparingly, and then generally in abstract, almost ritualistic ways. It was not until Theodore Roosevelt that a President indicated a desire to seize the legislative initiative, an initiative actually grasped by Woodrow Wilson. Wilson's proactive approach, if not always a

490. MCDONALD, supra note 276, at 297.
491. Id. at 294–95.
493. For one of the most recent and penetrating assessments, see ELY, supra note 11 (considering constitutionality of wars in Korea, Vietnam, Laos, and Cambodia, and of later covert wars, and suggesting reforms of combat authorization).
494. MCDONALD, supra note 276, at 425–58 (providing history of shaping presidential images from John Quincy Adams to Bill Clinton).
496. U.S. CONST. art. II, § 3.
success, has since become the norm, so much so that the President has aptly been termed the "legislator-in-chief."497 One committee chairperson gave a flavor of the twentieth-century norm when he told an administration witness, "[D]on't expect us to start from scratch on what you people want. That's not the way we do things here—you draft the bills and we work them over."498

As Bruce Ackerman emphasizes, Franklin Roosevelt's tenure accelerated the expansion of federal power, and with it the rise of the presidency, by a quantum leap.499 F.D.R. set new standards with regard to law enforcement, broadly defined, first in his efforts to micromanage the economy under the National Recovery Act and then through such initiatives as his unprecedented campaign of antitrust prosecutions.500 F.D.R.'s success in pushing through major legislation likewise established new boundaries for presidential leadership in that area.501 So too did his mastery in foreign affairs, with radio and the press generally, and in forging popular expectations of what an active President could accomplish.502 For present purposes, it does not matter whether Ackerman is correct that these changes in degree amounted to a change in constitutional kind,503 or whether Lessig is closer to the mark in arguing that the New Deal represented the translation of extant constitutional norms to a new context.504 What matters here is that each of these changes compounded a historic shift from the congressional government anticipated by the Founders to the presidential government familiar to us.

b. Delegation and the Administrative State

For all these developments, the most clearcut shift toward presidential power has yet to be mentioned. This is, of course, the grand-scale emergence of executive and independent agencies, the "fourth branch of government" also known as the "administrative state." As the nation's problems grew, Progressives and New Dealers believed that so too should the federal response. Congress therefore "not only passed more laws, requiring more execution; it also passed more laws requiring broad-scale policy making before execution."505 Once more the net beneficiary would be the President, the nominal head of the agencies that would both execute and make policy. But

497. MCDONALD, supra note 276, at 348, 359-64.
500. See MCDONALD, supra note 135, at 289-91.
501. See id. at 365-66.
502. See id. at 405-07, 441-47.
503. 1 ACKERMAN, supra note 105, at 105-08.
504. Lessig, supra note 462, at 461-72.
505. Greene, supra note 77, at 154.
unlike many of the transfers considered so far, this one crossed bright doctrinal lines. Previously, a formalist-minded Supreme Court had held that, while Congress could enact laws that required execution, it could not franchise away its legislative power by passing laws that required broad-scale policymaking. Twice the Court invoked this "nondelegation doctrine" to strike down congressional giveaways. These were, however, the last times the Court tried to keep the floodgates shut.

Here, then, was a threat to separation of powers that functionalists and even formalists could (or should) agree on, though for different reasons. For formalists, the rise of the administrative state could not count as a simple expansion of laws to be executed. Nor was it like the President's expanded role in proposing legislation, since at least that had some basis in constitutional text. Still less was it analogous to the increased focus on the President by the media and the public, developments not directly implicating constitutional concerns. Instead, for formalists the problem with the death of the nondelegation doctrine lay precisely in the Court's refusal to police previously established boundaries. For functionalists, by contrast, this aspect of the Court's turnabout was a virtue. As the Court elsewhere indicated, its new stance acknowledged that the administrative state typically wielded "quasi" executive, legislative, and judicial power that could not be easily shoved into any of the three traditional categories. The Federal Trade Commission, for example, was not only "to carry into effect" certain policies, but was "to perform other specified duties as a legislative or as a judicial aid." Broad delegation of authority to what, on the formalist view, is the executive was not therefore necessarily troubling, least of all because it crossed borders that had formally been policed, so long as Congress did not delegate in such a way that threatened such foundational values as balance.

Yet this is just what Congress continued to do. With the New Deal, and the attendant death of the nondelegation doctrine, the giveaway of what had been seen as legislative authority (or something close) became massive. Between 1934 and 1936 alone, Congress established the Securities and Exchange Commission, the National Labor Relations Board, the Bituminous Coal Commission, and the United States Maritime Commission, to name a few. This trend, moreover, has generally accelerated during the five decades since F.D.R.'s death. At least as important as the scope of modern delegation, however, is to whom the power has been delegated. If there has

507. Humphrey's Ex'r v. United States, 295 U.S. 602, 628–29. Later, in Morrison v. Olson, the Court would go further, repudiating the "quasi" subcategories and (at least in that case) adopting an out-and-out functionalist analysis that turned on whether restrictions on the removal of the officials at issue impedes the President's ability to perform his constitutional duty. 487 U.S. 654, 690–91 (1988).
508. Humphrey's Ex'r, 295 U.S. at 628.
509. See McDonald, supra note 276, at 327.
been any net beneficiary of Congress's abdication of authority, it has been the President. In formal terms, Presidents ultimately exercise the appointments and removal powers over the heads of both executive and independent agencies (a distinction that is becoming increasingly difficult to maintain). Informally, Presidents influence agencies through *ex parte* and secret contacts and through executive agencies established to coordinate agency activities. This is not to say that Congress lacks methods of influencing agency conduct. It is to say, however, that a substantial measure of power that under the nondelegation doctrine would by definition have resided in Congress has since fallen to the President.

c. *Fidelity and Balance*

Any approach that ignores changes bearing upon ongoing constitutional commitments overlooks them not so much at its own peril, but at the peril of the commitments it purports to further. Where the commitment is balance, even the most glancing survey indicates that the executive branch long ago supplanted its legislative counterpart as the most powerful—and therefore most dangerous—in the sense that the Founders meant. This shift toward presidential government suggests that at a minimum we need an approach that would permit Congress to maintain some control over the authority the Court now permits it to delegate away to the administrative state. More broadly, this shift implies that invoking separation of powers to invalidate congressional attempts to keep pace with the presidency is not only wrong headed but, more important still, fundamentally unfaithful to our founding values.

Then again, any approach that hopes to maintain fidelity to those values must also be open to the possibility of further change. It may be that the current activist Congress signals the beginning of a long shift back toward the legislative department or, more dramatically, the first act of a "constitutional moment." So far, either conclusion seems premature. Yet should either situation occur, securing balance would compel the Supreme Court to be as accommodating of presidential efforts to keep pace as it has only occasionally been of congressional efforts to do the same in the current context. Put another way, the concern with balance was neither inherently proexecutive, nor prolegislative, nor prejudicial, but can only be given meaning by taking it for an end in itself.

2. *Accountability and the Populist Presidency*

Two hundred years of practice have also affected the Founding commitment to accountability, properly recaptured. On this view,
accountability should no longer be the province of one branch of government but instead should rest with both houses of the legislature, the executive, and, less directly, even the judiciary. In this way, separation of powers tamed accountability by ensuring that government, or any part of it, could threaten liberty in the name of last year’s election results. It also refined accountability by ensuring that government action could not proceed legitimately only if it rested on sustained, widespread, and deliberative support as reflected in the agreement of several components of the government, in turn reflecting several soundings of popular will through staggered congressional and presidential elections.  

a. From Merit to Mandate

If any branch at first seemed the most likely to claim electoral mandates for tyrannical or precipitous actions, it was the legislature. By contrast, the Founders generally conceived of the presidency not first and foremost as a representative post, but as a relatively apolitical award for men who had demonstrated extraordinary virtue and character through selfless public service. No longer. As unitarians are quick to point out, at present no elected official plausibly claims to be more representative or accountable than the President. He, or one day she, can do this on the strength of elections that, far from filtered affairs envisioned by the electoral college process, long ago evolved into tournaments that are in part plebiscite, in larger part popularity contests.

The best way to appreciate the distance travelled is to go back to the starting point. Ralph Ketcham captures the conventional wisdom among both Federalists and historians, stating that “elevation to the presidency” was initially seen as recognition for “seniority and previous service to the nation, a service [that] could continue . . . only if [the president] could insulate his office from partisanship . . . [and] scorn electioneering.”  

No Chief Executive embodied this “idea of a patriot king” more thoroughly than Washington, who sought to rule based upon his incomparable reputation rather than any mere victory at the polls. One means to insure that the Republic would have a fighting chance of selecting successors in Washington’s image was the electoral college. As Hamilton noted, this last-minute contraption would screen the people’s choice for President through men of “discernment” who would be “capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.” Accordingly, the main claimant of direct accountability to

511. See supra text accompanying notes 316–32; see also supra text accompanying notes 219–21.
the people would remain the legislature, the only branch that would in large part be elected directly.\textsuperscript{314}

This early conception began to break down almost from the outset. Even so, "the passage from a traditional, notable-oriented and deferential politics on the one hand to a party, electorate-oriented and egalitarian style of politics on the other, did not come about abruptly."\textsuperscript{315} The Jeffersonians took an important step along this path when they successfully transformed the election of 1800 into a plebiscite of sorts, pitting their policies against those of the Federalists. Jefferson, while himself continuing to "scorn electioneering," not surprisingly ran the first administration to take a consistent lead in proposing legislation rather than simply waiting for Congress to act. The Jacksonians took even greater strides. Not only did they embrace the idea of presidential elections as popular referenda, and do it with gusto, they pioneered the modern political party as the best way to mobilize grassroots support for their candidate. Despite inevitable detours, others continued in the same direction. So tireless was Theodore Roosevelt in bringing his message to the people, for example, that Congress voted him a fund for railroad travel in 1906, thus "putting his [bully] pulpit on wheels."\textsuperscript{316}

Once again, however, it was the other Roosevelt who increased executive pretensions by another order of magnitude. Symbolically, F.D.R. once and for all ended the fiction that individuals did not seek the White House by bucking precedent and accepting the Democratic nomination in person in 1932. In more substantive terms, F.D.R. identified his subsequent electoral victories with the popular will to such an extent that he treated the decision in \textit{Humphrey's Executor} as almost a personal affront, which in turn prompted him to overplay his hand with his ill-fated "court packing" scheme. As Rexford Tugwell recalled:

\begin{quote}
If Franklin, who not only had a vivid sense of presidential prerogatives \textbf{but who by election and reelection was the chosen leader of the American people}, felt that the obstructions of the Court constituted an impertinent denial of his right to act as leader, there was certainly justification. It has been suggested that the Humphries [sic] case constituted an affront to the presidency. It very well may have been that case, even more than the other decisions of 1935,
\end{quote}

\textsuperscript{314} Among other things, this early conception of the presidency undermines the notion that the Founders viewed responsiveness as the special province of a unitary executive branch. But of more immediate concern, it also suggests that the Founders did not view the presidency as the type of institution that could abuse claims to "speak in the name of the people" in the same way that the early state legislatures had. None of this is to ignore how recent an innovation that the popular election of a Chief Magistrate was, filters or no. However avant-garde he may have been on the point, James Wilson could state that in some sense the President truly would be a "MAN OF THE PEOPLE." James Wilson, Convention Debates (Dec. 1, 1787), in DOCUMENTARY HISTORY (Pa.), supra note 368, at 452.


\textsuperscript{316} McDonald, supra note 276, at 436.
which provided the motive for the post-election attempt to humiliate the Court in turn..."517

And so it has gone until today's near all-consuming carnival. Any but the most general assessment about modern presidential politics would be problematic. It appears safe to say, however, that the "electorate-oriented and egalitarian style" has rarely been so strongly pronounced nor further from its original, "notable-oriented" precursor. What is more, parties, which served as the critical device for popularizing the presidency, no longer act as a check. Instead, presidential candidates now largely bypass party machinery and go even more directly to the public through advertising, press manipulation, and the media generally. Some of these candidates advance salient agendas, thus emphasizing the plebiscitarian component of the process. Others are simply more interested in projecting a winning image, content to defer the problem of what actually to do once in office until that bridge needs to be crossed. Either way, successful presidential candidates not only exercise awesome power, but power greatly enhanced by their success in convincing the electorate to sanction their general policy orientation or, perhaps more dangerously, to issue them a blank check based on the strength of how well they project an appealing image.518 For good or ill, the presidency in the late twentieth century asserts the most plausible entitlement to "speak for the people" in much the same way that the Pennsylvania legislature did in the late eighteenth century. At a minimum, the presidency's current purchase on that title has grown far more plausible than it was when the office was initially conceived.

b. Fidelity and Accountability

In this light, accountability appears as nearly the opposite of the trump card that proponents, and even many opponents, of the unitary executive take it to be. As with balance, the changes in government practice since the Founding cut against, not for, executive power. In each case the trick is to avoid confusing original applications of a constitutional norm with the norm itself, properly reconstructed. Contrary to the usual assumption, here was not the rudimentary accountability that modern unitarians extol. Instead, the Founders reconceptualized the idea to render it more safe and more reflective of considered popular choice. Initially, Congress put the greatest pressure on this more sophisticated commitment by virtue of its superior representativeness. As unitarians are the first to argue, this is exactly the area in which the President now advances a comparable, if not more compelling, claim. Any


518. See, e.g., LOWI, supra note 495, at 7–21, 97–133 (discussing "plebiscitary presidency").
response faithful to the Founding, therefore, should greet this development not as a cause for celebration but concern.

A simplified example should make this concern more plain. Assume that President Clinton manages to win reelection in 1996 on a traditional "liberal" Democratic platform. Assume further that the Republicans retain majority control less than two-thirds of the Senate and House. Inevitably taking his victory as a mandate, the President directs the Secretary of the Interior to stop all private development of public lands in its tracks. Accordingly, the Secretary issues several phonebooks-worth of regulations that would have been the envy of the New Deal, Square Deal, New Frontier, and Great Society. Unitarians would argue that all this is appropriate. The people spoke in the last presidential election, and a responsive Chief Executive is merely carrying out their will.

But is he? Recall that a deregulation-minded G.O.P. retained comfortable majorities in each house. Permitting the President absolute control in this instance does violence to the Founding conception of accountability in at least two regards. First, it would not appear to reflect a considered national determination to go back to the heyday of regulation (which a Democratic sweep in both houses might have indicated). Second, it accords the President immense power (the stakes would be irrevocably higher by inverting the example to assume a presidential directive to sell off the national forests). Nor is it enough to say that Congress could always change the laws under which the Secretary acts, since they would not necessarily survive a veto on these facts. Exclusive reliance on the override solution precludes several less drastic means of enabling the considerable portion of the country opposed to the executive's actions, perhaps even the majority, as reflected in dozens of congressional elections. Current doctrine aside, one such device would be the legislative veto. Another, assuming recalcitrant underlings, would be limitations on the President's removal power.

Lately, some scholars have explored the deeper implications of accountability from a modern perspective. In particular, Peter Shane has suggested, "[o]nce we plumb the complexities of both defining and operationalizing accountability, a strong case appears that tight unitary control of the executive is a problematic model." Yet even Shane, among others, remains tentative on the extent to which "original intent" supports the application of a more complex notion of the concept to the modern presidency. They need not.

3. Energy and Governmental Activity

Modern government at its most lethargic is energetic beyond the Founders' most reckless speculations. To take one not entirely symbolic measure, from 1789 to 1861 Congress on average enacted 60 public bills and 6.4 public joint resolutions per year—and each of these averaged less than a single page.\(^2\) By 1992 the number had climbed to 609 bills\(^2\) and 50 resolutions, with one act alone running over 1000 pages.\(^2\) As Richard Epstein aptly notes, the specter of modern government is so great that it suggests at least a prima facie "conflict between the original constitutional design and the expansion of state power."\(^3\) It is, moreover, a conflict dominated by the federal government. Just as it is a truism that modern government engages in pervasive regulation, it is likewise a cliché that the bulk of this power has flowed to the White House, Congress, and the Supreme Court.\(^4\) Contrary to Professor Epstein, these changes need not be considered illegitimate simply because they are epic. Any number of approaches—a broad reading of the Reconstruction Amendments, treating the New Deal as higher lawmakers, translating Founding norms into evolving social and economic context, even custom and \textit{stare decisis}—insure that we are unlikely to return to a Colonial Williamsburg version of Washington, D.C. anytime soon.\(^5\) Nonetheless, the Founding commitment to energy cannot be discussed in a relative vacuum, apart from these changes.

Nonetheless, many observers discount these changes on other grounds, arguing that activity does not necessarily mean action. Washington, they say, will spin its wheels in hearings and studies rather than take needed action, and even when it does act, the measures that result are often at cross purposes. Consider federal regulation of tobacco. During July 1995 the Food and Drug Administration proposed the fairly self-evident measure of treating nicotine as a drug; three months later the measure is still pending.\(^6\) Then again, successive Surgeons General have actively discouraged tobacco consumption,

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\(^{2}\) McDonald, supra note 276, at 347 n.2.
\(^{4}\) For example, the House bill that became the "Housing and Community Development Act of 1992" came in at 539 pages. H.R. 5334, 102d Cong., 2d Sess. (1992) (enacted).
\(^{5}\) Richard A. Epstein, \textit{Takings: Private Property and the Power of Eminent Domain} at x (1985). Elsewhere I have criticized Professor Epstein's historical methods and conclusions. See Flaherty, supra note 16, at 556-67. On this point, however, I believe that the sources support this assessment. See \textit{id.} at 575-79.
\(^{6}\) See, e.g., Miller, supra note 67, at 56.
\(^{7}\) On Reconstruction and the Reconstruction Amendments, see Foner, supra note 127; Nelson, supra note 127; Kaczorowksi, supra note 127. On the New Deal as higher lawmakers, see I Ackerman, supra note 105, at 34-57; Ackerman, supra note 117, at 508, 510-15. On \textit{stare decisis}, see Henry Paul Monaghan, \textit{Stare Decisis and Constitutional Adjudication}, 88 COLUM. L. REV. 723, 748 (1988).
as has Congress through its ban of broadcast cigarette advertising. Conversely, Congress has also perennially subsidized tobacco growers, while the Commerce Department has done its best to open overseas markets.\footnote{Peter Schmeisser, \textit{Pushing Cigarettes Overseas}, N.Y. TIMES, July 10, 1988, § 6 ( Magazine), at 16.} All of this is arguably but one example of "gridlock.\footnote{See Symposium, \textit{The Constitutional Structure of National Government in the United States: Is It in a State of Crisis?}, 9 ADMIN. L.J. 1 (1995); see also Nathaniel L. Nathanson, \textit{Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and "Independent" Agencies}, 75 NW. U. L. REV. 1064, 1090-91 (1981) (speaking of governmental "deadlock").} Considering all the actions that the government does take regarding tobacco, such gridlock hardly demonstrates insufficient energy. Rather, the phenomenon at least in part reflects the price of the Founding strategy of joint accountability. A majority of the American people may well desire a smoke-free nation. But given tobacco farmers, employees, smokers, and libertarians, not enough of the nation appears to desire a consistent policy against smoking to sustain one. Until enough of the nation does, different branches of the government, and different components of those branches, will—and should—continue to reflect patchwork national attitudes with patchwork national policies.\footnote{Cf. Eskridge & Ferejohn, supra note 71 (using game theoretic model to analyze Framers’ understanding of balance).} The point is that there are a plethora of policies, however contradictory, to begin with.

An incalculable number of these policies could not exist without one segment of government yet to be directly considered in this regard—the administrative state. Here the not-entirely-symbolic measure is the \textit{Code of Federal Regulations} (CFR). In its first year of publication, significantly 1939, the CFR consisted of sixteen volumes; last year it had expanded to 200 volumes, exceeding 60,000 pages combined.\footnote{See J. MYRON JACOBSTEIN ET AL., \textit{Fundamentals of Legal Research}, 272 (6th ed. 1994); see also Note, \textit{The Federal Register and the Code of Federal Regulations—A Reappraisal}, 80 HARV. L. REV. 439 (1965) (describing history and purpose of Federal Register Act).} As these numbers suggest, delegation may have come about because the world became too complicated for Congress to handle alone, but it also enabled Congress to address more than it ever otherwise would have on its own. In this regard, the Progressives and New Dealers who advocated agencies for their expertise, efficiency, and, in turn, energy were right all along. This is not to ignore that in several other regards they were not. An enormous literature chronicles the ways in which agencies have not lived up to their original billing. They can be "captured" by the industries they purport to regulate. They are subject to "triangulation," by which the agency, Congress, and the President produce stalemate. They are, more simply, often overstaffed, wasteful, and inert.\footnote{On the inefficiencies of the administrative state, see Calabresi, supra note 69, at 50-55, 58-67, 78-81, 83-86; Shane, supra note 519, at 202-06.} All of this may well be accurate, but it begs the relevant question. If the issue is fidelity to Founding concerns about energy, agencies—warts and all—provide one more
reason for constitutional scholars to look elsewhere for problems to lose sleep over.

C. Separation of Powers Doctrine Restored

Only at this point can our experience with separation of powers be brought to bear on doctrine intelligently. As Part III demonstrated, the Founders did not assume a global tripartite division of government but struggled to a rough consensus on certain more abstract values. As this part has suggested, evolving circumstances since the Founding have yielded threats to these more abstract purposes from quarters that the Founders themselves would have thought surprising and counterintuitive. Assuming, as this part also does, that this legacy should matter, how should the judiciary respond? The answer is twofold. First, in light of the abstract Founding principles, courts should greet separation of powers challenges with skepticism, and dust off in spirit, if not in specifics, Alexander Bickel's concept of "passive virtues." Yet second, also in light of the Founding's general principles, the judiciary should nonetheless intervene in certain instances. Those instances, however, should be confined either to violations of clear textual provisions relating to the apex of the three branches or to clear breaches of underlying separation of powers principles themselves. In light of changed circumstances, it should be clear that nearly every time that at least the Supreme Court has stepped in, those interventions not only have ignored the passive virtues, they have frustrated the values underlying the doctrine they purport to apply.

1. Separation of Powers and the Passive Virtues

The passive virtues, at least in the separation of powers context, are briefly stated. The Supreme Court should rarely intervene in separation of powers conflicts. When it does, it should do so principally when faced with a compelling violation of one of the basic values of balance, joint accountability, or sufficient energy. Otherwise, it should abide by the solutions worked out through the political processes by the other branches. This approach follows first because the formalist baseline is unhelpful for the types of conflicts that commonly arise. It also follows because the functionalist baseline is inherently difficult—though not necessarily impossible—for the judiciary to police.

Ironically, perhaps the closest formulation of this prescription to appear in recent case law comes from Chief Justice Rehnquist, usually a formalist fellow

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532. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111 (1962). Here I use the term only in the abstract, to refer to a general stance of judicial deference, rather than to the specific doctrinal devices Bickel had in mind. Such devices mainly comprised a strict and vigorous application of doctrines related to standing, ripeness, and political questions, among others. See id. at 111–98.
traveler of Justice Scalia. Despite upholding the independent counsel, the
Chief Justice attempted to remain true to the formalist spirit as best he could
for most of the opinion. He relied on the text of the Appointments Clause to
defend the manner in which the independent counsel was selected. Likewise,
his drew upon Article III to uphold the judiciary’s minimal oversight of the
post. In each instance, the text plausibly carved out certain exceptions to
presidential control of prosecutors.533 No such tack was available, however,
to deal with the limitations Congress imposed on the President’s authority to
remove the independent counsel. At this point the Chief Justice simply
abandoned formalist categories altogether534 and embraced a rough
functionalist formulation keyed to balance. As he put it, the question ultimately
became

whether the Act, taken as a whole, violates the principle of separation
of powers by unduly interfering with the role of the Executive
Branch. . . . 

[That is, does] the Act “impermissibly undermine[ ]” the powers of
the Executive Branch, or “disrupt[ ] the proper balance between the
coordinate branches [by] prevent[ing] the Executive Branch from
accomplishing its constitutionally assigned functions[?]”535

The vagueness of this test has not been well received. Not surprisingly,
Justice Scalia could not believe that the Court could abandon the crisp tripartite
division of government power for the Chief Justice’s inquiry. “The Court,” he
declared, “replaced the clear constitutional prescription that the executive
power belongs to the President with a ‘balancing test.’ What are the standards
to determine how the balance is to be struck, that is, how much removal of
Presidential power is too much?”536 Commentators unsympathetic to
formalist categories have sounded a similar theme. Abner Greene, for example,
argues that “the Court’s language is based on no theory of checks and
balances, but merely on an ad hoc judgment that the deprivation of presidential
power here is not too great.”537

534. Not only did he abandon the familiar three categories of legislative, executive, and judicial, but
he also abandoned the subcategories of “quasi-legislative” and “quasi-judicial” on which the Court relied
in Humphrey’s Executor. He had to take this extra step since he, like Justice Scalia, assumed that a
prosecutor exercised core executive power. Id. at 687–88.
535. Id. at 693, 695 (fifth and sixth alterations in original) (quoting Nixon v. Administrator of Gen.
Servs., 433 U.S. 425, 433 (1977)).
536. Id. at 711 (Scalia, J., dissenting).
537. Greene, supra note 77, at 175. In place of formalist categories, Greene suggests that the Court
should invalidate legislative measures primarily when Congress is engaged in the aggrandizement of its
power, that is, when it retains power to overseen the implementation of the law through the legislative veto,
as in Chadha, or through its removal powers, as in Bowsher. See id. at 158–77, 184–96.
While a provocative idea, Professor Greene’s proposal does not ultimately provide a solution that
comports with fidelity. The aggrandizement model does provide a way for imposing a degree of coherence
Yet the ad hoc nature of the *Morrison* approach is precisely what renders it faithful to the Founding conception. Adhering to an abstract, purposive, inquiry merely acknowledges that the Founders themselves were no more precise. They can be fairly said to have reached broad agreement on certain general purposes; they cannot be fairly said to have achieved a consensus on any precise baseline capable of determining who can remove government officials. The main exception to this, a profound one, comes at the top of the government's structure, where constitutional text addresses the relationship among the Congress, the President, and the Supreme Court in comparative detail. Consequently, the Court rightfully should step in if Congress were to appoint its own Commander in Chief of the armed forces, or eliminate the Supreme Court, or direct the enforcement of a bill notwithstanding a successful presidential veto. However epic, these scenarios are ultimately trivial to the extent that they are far-fetched.

All of this suggests an approach along the following lines. First, the absence of precise guidelines means that the Court will, and should, generally leave to the political processes the question of how to divide government authority. On this version of the passive virtues, the judiciary should defer to mechanisms worked out by Congress and the President unless one or the other side can establish a palpable violation. The lack of an exact baseline, in short, should mean a high threshold for judicial intervention.

This approach follows, moreover, not just because the Founding offers no precise baseline. It is also faithful to the general nature of those separation of powers values of which we can be relatively certain. As Justice Scalia and Professor Greene point out, rendering a judgment on the comparative power of the various branches is at best controversial and at worst difficult. The same insight applies with perhaps even greater force to the goals of joint accountability and adequate energy. To acknowledge this, however, is merely to recognize an additional reason for the Court generally to leave the resolution of separation of powers disputes to the other branches and respect the compromises that they hammer out. In this regard, the Court should adopt a

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on the Court's otherwise irreconcilable case law. The aggrandizement inquiry nonetheless fails the test of fidelity for at least two reasons. First, it does not fully liberate itself from formalism. In a broad sense, Congress assumes—or aggrandizes—power every day, whether by statute, restrictions it places on presidential removal power, or (formerly) legislative vetoes. For this reason, one needs some baseline to figure out when impermissible aggrandizement takes place. Yet such a foreordained baseline is just another type of formalism. Perhaps for this reason, Greene himself tends to slip into formalist jargon when defining aggrandizement. See, e.g., *id.* at 161 ("[Under] the 'no congressional aggrandizement' theory: Congress may not give itself a role in the removal of officers exercising executive power.").

Second, and more important, aggrandizement, in Professor Greene's sense, is not necessarily a bad thing from the Founding perspective. To the contrary, preventing it can yield results that violate Founding separation of powers values as surely as does formalism of the more orthodox variety. To invalidate the legislative veto on the grounds of aggrandizement, for example, ignores the role that this device played in maintaining a balance between Congress, which has been permitted to delegate its policymaking authority, and the executive, which has been the main beneficiary of that delegation. See *supra* text accompanying notes 354–78.
stance not unlike its current (albeit shaky) approach to federalism in *Garcia v. San Antonio Metropolitan Transit Authority*.

Given that the President and even a post-New Deal Congress are more evenly matched than the federal government and the states, the argument for such a generally passive approach is more compelling here.

Second, "generally" does not mean "always." Fidelity in no way requires either treating separation of powers disputes as nonjusticiable or as justiciable but requiring judicial deference in every instance. Contrary to Justice Scalia's position, an approach such as the Court employed in *Morrison* need hardly be "standardless." One set of standards comprises those certain clear textual commands directed to the respective summits of the three branches. However unlikely, should Congress attempt to appoint Cabinet members or other "Officers of the United States," the Court would have a clear textual basis for intervention. The other set of standards consists of the general purposes that the Founders sought to implement through their rough sketch. Apart from specific textual commands, the values the Founders sought to implement through their rough sketch do provide a substantive basis for judicial intervention. Take, as did the Chief Justice, the preeminent goal of balance. The presidency's current ascendancy notwithstanding, an act transferring all authority to remove federal officials currently exercised by the President to Congress would, at a stroke, so weaken the executive that the Court's deference would be hard to justify. Conversely, balance—to say nothing of joint accountability—may provide a nonformalist basis for reinvigorating nondelegation on the grounds that Congress routinely gives away so much of its policymaking authority as to result in the presidency's current ascendancy. In these ways, the approach offered here parts company with *Garcia*, or at least with Jesse Choper's proposal that conflicts over the division of power between the federal government and the states should be treated as nonjusticiable, a suggestion on which the *Garcia* Court drew. For the same reason, this approach even more directly parts company with Professor Choper's related proposal—which the Court has never adopted—that separation

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539. For an incisive critique of *Garcia*’s assumptions regarding the states’ abilities to defend themselves using constitutional mechanisms, see Kramer, *supra* note 143.
541. U.S. CONST. art. II, § 2, cl. 2.
543. *Garcia*, 469 U.S. at 551 n.11. At least one eminent commentator, perhaps in light of the Court’s explicit reliance on Choper’s work, read the opinion to hold exactly this. See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1720–25 (1985). What *Garcia* actually says on this point is another issue. As an initial matter, the Court’s opinion does not purport to say that federalism disputes are not justiciable but instead that, on the merits, they should usually be left to the political process. Moreover, the Court’s reasoning keeps open at least two possibilities for intervention. One would be a breakdown in the political processes. See *Garcia*, 469 U.S. at 556. Another, substantive one would be federal intrusion on matters central to state self-government. *Id.*
of powers disputes "should be held to be nonjusticiable."544 Unlike these strategies, here there are substantive bases for intervention. While they may be imprecise, and so only rarely enforceable, they better address the concerns of the Founding generation than standards that, however definite, cannot make this same claim.

2. Applications

From this perspective—the Founding emphasis on purpose and process—the Court's historically novel forays into separation of powers have been bad enough. From the perspective of changed circumstances—outlined earlier—the outcome of those sallies has been even worse. Now should it be clear how much worse. Too often the Court has managed to get matters exactly wrong, going out of its way to exacerbate the very evils that separation of powers was designed to curb. Most often these missteps have come about when the Court has invalidated mechanisms that the political branches had developed as responses to presidential government, including the legislative veto as well as limits on executive removal and appointment authority. The added irony is that in each of these instances, the Court has generally justified its wrong turns by relying on history. That said, in none of these areas are the precedents so well settled as to preclude a reevaluation, particularly given the inconsistent rationales that support them and the Court's less-than-ironclad stance on stare decisis.545 Such a reevaluation should in turn prevent further missteps as the Court likely faces new separation of powers controversies such as the line item veto. Regardless, should the Court continue down the path of formalist activism, it should at least do so forthrightly, without fleeing to questionable historical assumptions even more questionably applied.

a. The Legislative Veto

Many who defended the legislative veto suggested that the mechanism comported with "original intent," but few if any among them realized how strong their case was—strong enough, in fact, to merit the device's resurrection. As Justice White made clear in Chadha, the legislative veto was a classic response to the administrative state.546 In scores of instances,

544. CHOPER, supra note 542, at 263. See generally id. at 260–415 (elaborating proposal that separation of powers be treated as nonjusticiable).

545. See Planned Parenthood v. Casey, 505 U.S. 788, 854–55 (1992) (joint opinion); Payne v. Tennessee, 501 U.S. 808, 827–28 (1991) (arguing that while stare decisis is "preferred course," it is not an "inexorable command"); Garcia, 469 U.S. at 546–47 (rejecting rule that turns on judicial appraisal of whether government function is "integral" or "traditional"). For a careful consideration of the Court's recent encounters with stare decisis, see Monaghan, supra note 525.

546. INS v. Chadha, 462 U.S. 919, 967–74 (White, J., dissenting) (tracing historical use of legislative veto to resolve major constitutional and policy differences).
Congress realistically had to, and constitutionally could, relinquish substantial policymaking authority that could variously be termed legislative, executive, adjudicative, administrative, or "quasi" variants of all of the above. Yet fearful of ceding too much power, particularly to the executive branch, Congress reserved vestigial authority to reverse policy determinations made by whatever entity now exercised the power delegated away. In practical terms, this type of reservation meant that Congress—or more problematically, either House—no longer needed a two-thirds vote to rescind certain decisions but could instead do so with a mere majority. The question remains: Is what was once a classic response a constitutional one from the viewpoint of fidelity?

There is no reason why it should not be, least of all a formalist one. Then again, this dispute, unlike others, does implicate fairly precise requirements. Article I, Section 7 provides that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." The strictures of bicameralism and presentment, however, do not apply just because they exist. To the contrary, fidelity points the other way on at least two counts—one contingent, the other, unconditional. As many have argued before and after Chadha, it is difficult to find an analytic difference between the power Congress may permissibly give away in general and the portion of that same power it opts to reserve in certain instances. Absent some other reason, either power should qualify as "legislative," and thus trigger bicameralism and presentment, or neither should. Since the Supreme Court long ago gave up subjecting delegated policymaking to Article I, Section 7, so too should it abandon doing the same to reservations of this same authority.

In addition, and perhaps overlooked, the Bicameralism and Presentment Clauses cut against application here precisely because they are express. Recall that the developments leading to the Constitution's text indicate that its drafters at most offered a sketch of separation of powers, inked in only at the top of each branch, and even then not fully filled in. This context in turn suggests that the two clauses at issue are best read as speaking not to every governmental action that changes the legal relations between parties, which even in the eighteenth century would have been incalculable. Rather, it suggests that the clauses address departures in policy—including a system of joint oversight for the implementation of those departures—which by virtue of their novelty would be important enough to require the attention of both

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550. See supra Part III.
political branches. Put another way, neither the text nor its history specifies the exact relationship among the branches apart from certain requirements at the framework’s apex. It follows that those requirements should not be extended below that apex to such matters as implementation, which the document in most other areas leaves to the political branches to work out among themselves.

Conversely, there is every functionalist reason to look favorably upon the legislative veto, at least with regard to those functions championed at the Founding. First, consider balance, the centerpiece of the system. Given that balance was a primary purpose for dividing government authority, and given further that the executive has supplanted the legislature as the branch posing the greatest threat to this balance, it follows that any jurist faithful to the past should applaud, not deride, legislative attempts to maintain that balance, especially when those attempts appear in part of a package delegating still more power to the executive.\footnote{Cf. Chadha, 462 U.S. at 980–84 (White, J., dissenting) (arguing that Framers did not contemplate broad restraint on congressional authority).}

Now turn to accountability, ostensibly the unitarian strong suit. Yet here, contrary to unitarians left and right, the given from history is not unmediated responsiveness to a single electorate by a single branch, but coordinate responsibility to the people as reflected in several elections. On this score, the last thing on a judge’s mind should be preventing Congress from exercising some vestigial control over policymaking decisions rendered by executive and administrative officials who are otherwise answerable to the President, the officer who today makes the most plausible yet problematic claim to an electoral mandate. To recall the environmental hypothetical, a legislative veto of a determination to sell off the national forests makes good sense both because it checks the most powerful branch and because the existence of a congressional majority, though not “veto proof,” demonstrates a lack of popular commitment to the policy at issue.

Nor, finally, does a concern for energy preclude the device. For all of their worries about “democratic despotism,” the Constitution’s supporters to be sure prized a government that would possess sufficient vigor to act. As an initial matter, it is far from clear that a legislative veto necessarily frustrates this goal. It may just as easily block executive attempts to suspend an action as impede decision to take them, as Chadha itself demonstrates. But suppose that the legislative veto did spell gridlock. In light of the governmental activity made possible by the administrative state, the inefficiency wrought by the legislative veto would have to be crippling before it raised a concern of constitutional proportion. Fifty years of practice under the device suggests that this was hardly the case.
b. Removal

The analysis is much the same when applied to removal authority, only stronger. Congress early on considered placing statutory limitations on the executive’s presumed authority to dismiss government officials,552 at first balking, but then reversing itself with the Tenure of Office Act of 1820.553 Only in this century have limitations on presidential removal authority, mainly restricting the exercise of that authority “for cause,” become a staple of the Court’s separation of powers jurisprudence. These have included restrictions upon the discharge of “executive” officials in Myers, of officials in “independent agencies” in Humphrey’s Executor, of Congress’s own officials who ostensibly executed the law in Bowsher, and, coming full circle, of “executive” officials in Morrison. Each of these variations raises its own particular considerations, especially Bowsher. Nonetheless, they all share the common thread of remaining faithful to the Founding conception as applied to contemporary practice.

The removal issue, in fact, exposes formalist analysis at its least grounded. Unlike the legislative veto, arguably no specific text serves as a candidate to determine matters. Absent a “Removals Clause,” or something reasonably close, opponents of legislative involvement must retreat to an originalist baseline that assumes that the removal of government officials is categorically an executive task. In this way, unitarians can claim that the removal authority is inherently executive, bootstrap the power to the all-purpose Executive Vesting Clause, or both. Yet such an originalist baseline is precisely what the original understanding does not support. While some of the Founders may have believed that removal was necessarily an executive act, many, including the proexecutive Hamilton, did not—too many to assume sufficient agreement on the matter. Rather, the Constitution’s silence left the issue, as it did so many others, to the political processes that it explicitly set forth.

By contrast, limitations on executive removal authority comport with those values that did initially command widespread support—or at least they comport with modern values. Start again by considering balance. As the Humphrey’s Court recognized, preventing Congress from imposing neutral restrictions on the dismissal of “independent” agency officials would accord the President a powerful weapon for controlling administrative policymaking, even as Congress was ceding even more policymaking control to such officials.554 As Brandeis earlier recognized555—and as the Court came to appreciate in Morrison—a similar threat to balance may arise from unrestricted presidential

552. See Corwin, Tenure of Office, supra note 54, at 355–57 (discussing legislative efforts to limit power of removal).
553. Tenure of Office Act of 1820, ch. 102, 3 Stat. 582 (1820).
control over "purely executive" officials as well. In the abstract, policymaking by officials subject to congressional approval may well present a closer case. In the real world of presidential dominance, however, such arrangements should not necessarily trigger constitutional concern. They may even function to maintain interbranch balance, especially when Congress limits its own removal authority to neutral, "for cause" reasons.

As with the legislative veto, a proper reconstruction of accountability turns this value against its usual champions. When the goal is diffusing accountability rather than concentrating it, and when the presidency lays the most plausible claim to the concentrated version, congressional involvement in the critical area of removal should meet with approval instead of invalidation. Moreover, the case is even more compelling than that of the legislative veto. Here, Congress would have no other way of checking officials who, to follow the example, promulgated massive environmental legislation at the President's behest, in a manner consistent with a general statutory delegation but not reflective of an electorate that has yet to back the President's approach fully by returning a compliant House and Senate. Admittedly, the value of joint accountability provides less support for arrangements in which, as in Bowsher, Congress itself wields removal authority absent presidential involvement. In this situation, even a "for cause" limitation on removals would not expand the input of the elected branches. That said, the restriction to neutral criteria would at least lessen concern about the concentration of unlimited authority.

As a final matter, efficiency concerns again may not support the device in question, but they do not undermine it either. Once more, it is not clear that removal limitations will always work to produce less government rather than more. Insulated officials may just as easily resist presidential attempts to reduce governmental activity as expand it, a discovery made by President Reagan much to his chagrin. But even if they did produce stasis, removal limitations would not rise to the level of constitutional concern. As with the legislative veto, post-New Deal experience suggests that the mechanism has not exactly impeded the government's ability to act with sufficient energy. Short of that, the extent to which it hampers the President's efficient "chain of command" is simply the price of balance and joint accountability.

c. The Line Item Veto

The general approach outlined here need not be backward looking. Take, for example, the "line item veto," an idea whose time may have arrived, but

which itself has yet to arrive in the Supreme Court. Several variations of this idea are currently under consideration, but probably the strongest medicine proposes that Congress grant the President power to "punch out" certain discrete items in an omnibus bill that would otherwise survive. On this model, if a bill promoting both guns and butter came to the White House, a veto could send the provision dealing with butter back to Capitol Hill for a potential override, yet allow the guns provision to become law. Should the Court interfere with such a mechanism? If so, how?

To answer the first question, this medicine would be strong enough to rebut the ordinary presumption against judicial intervention. For starters, a direct delegation to a coequal branch—in contrast to the legislative veto and removal authority—does not involve an area ordinarily left to the political processes. Instead, it directly implicates those processes, those parts of the separation of powers framework most extensively "inked in at the top." In this instance, Article I, Section 7 sets out in extended detail the procedures by which "Every Bill" not approved by the President shall be returned, reconsidered, and restored (or not). Put another way, the text speaks to the relationship between coordinate branches themselves, rather than to how any of the branches deals with "third party" subordinates. In this fashion, the subject matter implies a more compelling case for judicial intervention. Yet even if it did not, there would be a separate and sufficient reason for the Court to act. In its strong form, the line item veto fundamentally undermines the purposes underlying separation of powers given current government practice. Not coincidentally, this failing goes a long way toward answering the second question of how the Court should act.

The same cannot be said of formalist analysis. Though the text generally sets out the relationship between the branches themselves, in this instance it provides no clear answer. The type of "bill" to be presented to the President is arguably indivisible, but also arguable is the position that a measure pertaining to dozens of disparate topics is not a "bill" within the meaning of the term. Unfortunately, formalism, which ordinarily promises precise answers in the absence of text altogether, provides no clear answers either. On one hand, determining the scope of a bill would seem to be "quintessentially..."
legislative,” as deciding whether to prosecute is “quintessentially executive.” Congress, therefore, should not be able to cede this responsibility through the line item veto. On the other hand, the concept of a bill or law arguably presupposes a measure in which the elements are sufficiently germane to meaningful discussion and deliberation. Accordingly, Congress should be able to allow the President to reject certain provisions and accept others so long as they are unrelated.

By contrast, attention to the Founding values that gave rise to separation of powers clearly cuts against the strong form of the line item veto. The device dramatically fails the test of balance and might even have done so back when Congress was viewed as the most threatening branch. Suffice it to say that in present circumstances, balance is ill served by a device through which Congress not only gives away significant power, but gives it away directly to the President rather than to subordinate departments or agencies.

Likewise, the line item veto impedes joint accountability. Here the problem is that the mechanism—again in its strong form—permits the enactment of laws without the approval of the different branches, which themselves represent different manifestations of the people. Suppose the President uses a line item veto to reject the butter portion of a legislative package but allows the gun provision to become a statute. There are two problems inherent in such a course of action. The first difficulty occurs because of the effect of such a veto on the issue of whether guns and butter should be joined at all. However appropriate it may be for the President to disagree with Congress on this score, the President’s action denies Congress the opportunity to override this determination and relink the measures by a two-thirds majority. Instead, the two items are severed by virtue of one becoming law, even though the popular will, as reflected through congressional elections, strongly favors the linkage. The more dramatic problem is that the gun measure will become a binding norm even though it might never have commanded a majority standing alone, absent legislative bargaining.

Finally, while the line item veto would probably not violate the goal of sufficient government energy, it does not draw strength from this value either. To the contrary, the device would most likely reduce the level of government regulation and expenditure, or so both its advocates and opponents assume. This expected reduction would have to be epic to be of constitutional concern given the enormous degree of governmental activity that prompts calls for the

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560. A formalist so inclined might, moreover, point to prima facie historical support in 1 WILLIAM BLACKSTONE, COMMENTARIES *176–77, to say nothing of the Constitution’s text, U.S. CONsT. art. I, § 5, cl. 2 & § 7, cl. 2.

561. To what extent such a relatively strong conception of germaneness constituted eighteenth-century practice is another matter. See Michael B. Rappaport, The President’s Veto and the Constitution, 87 NW. U. L. REV. 735, 762–66 (1993) (rejecting assumption that restricted sense of bill was one historical meaning of term).
line item veto. The Republic may well be entering an era in which it is rethinking the outer limits of appropriate governmental action. Until it does, or at least until it does so on the constitutional plane, there will be at least a latent tension between the line item veto as a way to reduce government and the Founding goal of a government blessed with sufficient vigor.

V. CONCLUSION

The specific recommendations advanced in this Article must for the present remain provisional, but the general approach from which they come should be conclusive. It should be conclusive, at any rate, so long as our constitutional past has a place in present constitutional discourse. Further consideration will no doubt lead to further refinement of particular applications, especially prospective controversies such as the line item veto. But at least it should now be clear that there is a powerful case for an approach that considers separation of powers questions in light of the purposes generally agreed upon to justify the doctrine when one novel variant of it was adopted in the Constitution. And at the very least, it should be plain that the history of this development does not support the formalist assumptions too often taken for granted in present case law and commentary. There may well be compelling reasons for the unitary executive in particular, and formalist analysis in general. History is not one of them.