From *Sick Chicken* to *Synar*:
The Evolution and Subsequent De-Evolution of the Separation of Powers*

*Stephen L. Carter**

I. INTRODUCTION

I shall discuss two competing strands in the loosely woven jurisprudence that the Supreme Court has created to resolve controversies regarding the separation of powers in the federal government. One of these I called the "evolutionary tradition." The evolutionary tradition emphasizes the need to adapt the powers of the federal government to the perceived demands of a changing society. This tradition is highlighted by a deference to the congressional judgment on the most effective means for deploying its authority. The judicial approval of the creation of quasi-executive, quasi-legislative agencies, beyond the immediate control of either of the political branches, provides perhaps the best example of this evolutionary tradition.

The countervailing strand is the "de-evolutionary tradition." I call it "de-evolutionary" rather than "non-evolutionary"

---


** Professor of Law, Yale University. This paper formed the basis of a presentation at the Federalist Society Symposium on the Separation of Powers in Chicago, Illinois, on November 16-17, 1986. A revised version was presented at a faculty workshop at the Yale Law School on January 26, 1987. Although many people on both occasions provided important criticism and advice, I would especially like to thank Enola Aird, Akhil Amar, Lea Brilmayer, Guido Calabresi, Drew Days, Geoffrey Hazard, Jerry Mashaw, Michael McConnell, Jeff Powell, George Priest, Peter Strauss, Cass Sunstein, Ruth Wedgwood, and Harry Wellington for asking the hard questions about the earlier drafts.

1. I borrow the term "evolutionary tradition" from my colleague E. Donald Elliott. See Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 *Columbia L. Rev.* 38 (1985). As will become clear, however, the uses to which he and I put the term are quite different.

because it is not preservative. Rather, the de-evolutionary tradition actively seeks return to a system of balanced and separated powers modeled closely on the governmental design that the Framers had in mind when they established a constitutional government. This tradition rejects the view that evolution in the larger society requires a concomitant evolution in the manner in which the federal government organizes itself for the exercise of power. In an earlier era, the de-evolutionary tradition was represented by the Supreme Court’s effort to use the non-delegation doctrine to halt the New Deal.⁴ More recently, this de-evolutionary tradition has led to the Court’s decisions to strike down the legislative veto in *Immigration and Naturalization Service v. Chadha*⁴ and the Gramm-Rudman-Hollings delegation of significant budget-cutting authority to the Comptroller General in *Bowsher v. Synar.*⁵ The important distinction between the traditions is one of emphasis. Neither tradition denies the central facet of the other. The evolutionary tradition is not blind to the need for constitutionalism in the working of the American system, and the de-evolutionary tradition does not seek to refute the claim that the nature of society and the shape of the government are constantly changing. Evolutionary judges still demand some limits on how the government deploys its powers, and de-evolutionary judges often permit the other branches a substantial degree of freedom in construing their own powers. But to the de-evolutionary judge, the crucial concern in adjudication under the separation of powers is legitimacy and the need for constitutional authority. The evolutionary judge is more concerned with the efficiency—perhaps a better term is effectiveness—of government operation. Thus, although they overlap in places, the two traditions push quite powerfully in opposite directions.

The evolutionary tradition emphasizes deference and the de-evolutionary tradition is relatively intrusive into the affairs of the other branches; but it would be a mistake to assume that the de-evolutionary tradition is simply a feature of conservative activist jurisprudence, rising to prominence whenever the Supreme Court is dominated by those who oppose an expansive role for the federal government in American society. Similarly, the evo-

---

5. 106 S.Ct. 3181 (1986).
volutionary tradition is not merely a liberal effort at re-ordering the economy and the culture to fit some redistributive model. The Burger Court handed down such important evolutionary decisions as *Nixon v. Administrator of General Services* and, with some exceptions, was quite sympathetic to the role of independent regulatory agencies. The Warren Court, on the other hand, was responsible for *Powell v. McCormack*, surely one of the most perplexing de-evolutionary decisions since the New Deal. In straining to protect a “right to travel” in *Kent v. Dulles*, the Warren Court indulged an essentially de-evolutionary gloss on the non-delegation doctrine to limit the flow of authority from the legislative branch to the executive.

Neither the evolutionary nor the de-evolutionary tradition in the separation of powers represents a pure tradition in judicial reasoning. The Court has rarely been consistent, even over the short term, in choosing one tradition rather than the other to govern its constitutional analysis. Consequently, neither tradition is easily identified with the direction in which the Court wants the society to move. Indeed, because the same Justices are capable of equally forceful arguments in both traditions, the opinions embodying the arguments generally seem justifications for results reached, rather than explanations of the analytical pathways that led the Justices to their conclusions. In short, the Supreme Court’s jurisprudence on the separation of powers is as lacking in analytical coherence and clear direction as any other line of its decisions.

Nevertheless, the distinction between the traditions is quite useful in developing a theory of the role that the Court should be playing in resolving challenges to the manner in which the federal government has decided to distribute its authority. Neither tradition is wholly satisfactory in melding the needs of the modern activist state with the limitations inherent in the notion of a written constitution, and the choice of either one will lead to difficulties and disappointments. I shall argue, however,

that liberal democratic theory demands clear sources of authority to guide adjudication under the structural clauses of the Constitution, and that the only way in which the courts can discover those clear sources is to use interpretive tools that render those clauses relatively determinate. If the structural clauses are essentially indeterminate—if no narrowing rules limit judicial interpretive freedom—then the source of authority is more difficult to discern. As a consequence, the case for the de-evolutionary tradition, because of its emphasis on the need for authority, is stronger than the case for the evolutionary tradition. The de-evolutionary tradition, moreover, provides a link between the process of constitutional interpretation on the one hand and, on the other, a facet of political experience too often ignored or trivialized by legal theorists: a shared sense of continuity in nationhood. When adjudicating cases arising under the constitutional provisions that establish the system of balanced and separated powers, constitutional courts that see a link between the authoritativeness of their pronouncements and the legitimacy of their function ought to prefer a slightly softened version of de-evolutionary tradition.

It may be that extreme societal need would justify setting the de-evolutionary tradition aside in particular cases, but because establishing clear rules to determine those cases is so difficult, the courts should hesitate to try. This does not mean, however, that the federal government will be strictly limited in its power and scope to the narrow conception shared among the Framers in 1787. The de-evolutionary tradition suggests guideposts, but will not yield in every case a determinate answer. Where the answers are unclear, the de-evolutionary judge should resort to a device that does not always fit comfortably into the de-evolutionary tradition: The political question doctrine. This doctrine is a vital tool in adjudicating separation of powers cases, and needs a revival if the jurisprudence is to be made coherent.

II. THE TRADITIONS OF SEPARATED POWERS

A. The Evolutionary Tradition

“No single idea,” writes Robert Nisbet, “has been more important than, perhaps as important as, the idea of progress in
Western civilization for nearly three thousand years."\textsuperscript{11} Human-
ity, in this vision, has been striving since the first to improve
itself and its condition, and this striving has been successful in
the past and will succeed in the future. The work of the major
figures in the development of liberal democratic theory sparkles
with this vision of human progress.\textsuperscript{12} The American Revolution
might have been driven in part by the same notion: "The great-
est of the Founding Fathers," Professor Nisbet tells us, and with
reason, "were emphatic in their conviction of past progress over
vast lengths of time for humanity, and of progress, with America
in the vanguard, through a long future."\textsuperscript{13}

There has always been a degree of tension between the de-
sire of citizens to move forward and the concept of law. Law, in
most of human experience, has been a device that sets in place
some particular understanding of the way things ought to work,
and while the law is always mutable, it is rarely mutable with
ease.\textsuperscript{14} Yet America is in a sense a nation of positivists, one in
which political dialogue is concerned far less frequently with the
demands of morality than it is with the commands of law.\textsuperscript{15} Be-
cause we as a nation rest so much of our public morality on a
supposed rule of law, those who would change the way we live
must first get the law on their side. Since Tocqueville's famous
dictum,\textsuperscript{16} it has become something of a commonplace that in

\textsuperscript{11} R. NISBET, HISTORY OF THE IDEA OF PROGRESS 4 (1980).
\textsuperscript{12} The early liberal theorists "were attached to other specific ends, to which liberty
was a means—essentially peace, prosperity through economic growth, and intellectual
\textsuperscript{13} R. NISBET, supra note 11, at 194.
\textsuperscript{14} Samuel Huntington has suggested that the central tension in American public
life stems from frustration with political institutions, which are seen as resistant to the
changes that the public demands as society grows towards its ideal vision of itself. See S.
side of the story is that without the concerted action by others, it is quite difficult to
make immutable rules, even rules to govern one's own conduct, and certain rules to gov-
ern the conduct of others. Cf. Schelling, Enforcing Rules on Oneself, 1 J.L. ECON. & ORG.
357 (1985) (rules for self); Kronman, Contract Law and the State of Nature, 1 J.L. ECON.
\textsuperscript{15} This often misunderstood facet of American life, combined with the near failure
of public moral dialogue in resolving any issue, has the ironic effect that those deter-
mined to change society through the route that American ideology suggests is most legiti-
mate—through the legal process—are consistently (and irrelevantly) charged with seeking
to impose their moral judgments on others.
\textsuperscript{16} Wrote Tocqueville: "There is hardly a political question on the United States
which does not sooner or later turn into a judicial one." A. De Tocqueville, DEMOCRACY
IN AMERICA 270 (G. Lawrence trans. 1969). It is sometimes forgotten that Tocqueville
made this comment in the course of expressing his admiration for the role of American
America, the courts are the forum of first resort for individuals or groups who would prefer that the government not treat them as it has.\(^{17}\) Given the evidently open-ended nature of the constitutional clauses most directly concerned with matters of fundamental right, and the magnificent triumphs of the traditional civil rights movement using those clauses as their weapons,\(^{18}\) this trend is what an observer would expect. What may be less apparent is that the clauses concerning the structure of the federal government are also increasingly pressed into the service of this vision of societal progress. It is this same sense that humanity must and will change and move forward that motivates the evolutionary tradition.

The evolutionary tradition in separation of powers jurisprudence is faithful to the credo that Chief Justice Marshall laid down by way of explaining, in *McCulloch v. Maryland*,\(^ {19}\) why the Congress possessed adequate authority to create a Bank of the United States:

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as

---

\(^{17}\) Thus Tocqueville noted that because of the degree of respect enjoyed by law on the United States, "those who would like to attach the laws are forced to adopt ostensibly one of two courses: they must either change the nation's opinion or trample its wishes under foot." *Id.* at 240. For a passionately polemical, if also witty and sometimes forceful, critique of the explosion of constitutional claims, see R. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME (1984). But even if transformation of moral into legal argument is a depressingly ubiquitous feature of American political and moral dialogue, it may not be an avoidable one:

> Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere. In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.

M. Shapiro, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981). This potential inevitability says nothing, of course, about the ability of a society to exclude issues from judicial decision. The interesting question is whether those societies that have not permitted courts to rule on constitutional questions are moving in our direction—or whether we are moving in theirs.


far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. . . . To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. 20

The problems of the nation change, the Chief Justice seemed to be saying. The Congress must be free to adapt its authority to meet these fresh problems, "to accommodate its legislation to circumstance." And when the Congress has made its choice, has adapted its authority to meet the fresh crisis—so the language implies—a reviewing court should defer to the congressional judgment. Thus the evolutionary tradition rests on a principle of judicial restraint. It is not the Court that brings about evolution in the separation of powers, but the historical forces to which the Congress responds. The Court, recognizing this reality and accepting the need for effective government, permits the Congress to meet the fresh challenges through creation of the institutions and mechanisms it prefers.

Although McCulloch was the most explicit early statement of the rationale for the evolutionary tradition, it is by no means the earliest case that might be set in the tradition. That distinction might belong to the Court’s tantalizing 1798 decision in Hollingsworth v. Virginia. 21 In Hollingsworth the Court rejected a claim that the eleventh amendment, because it was never presented to the President for signature after passing both Houses of the Congress, was illegally sent on to the states for ratification, and should therefore be considered void. The Court dismissed this contention, despite an apparently unambiguous constitutional requirement for presentment. 22 Hollingsworth is

20. Id. at 415-16.
21. 3 U.S. (3 Dall.) 378 (1798).
22. See U.S. Const. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the
not much like *McCulloch* because the Court's opinion did not contain any language concerning a deference to congressional judgments—its rejection of the claim occupied but a single sentence in a footnote—and in fact, the Justices showed no sign of appreciating their evolutionary feat. Yet the feat, though subtle, is there: By sustaining this circumvention of the President, the Justices effectively permitted the Congress to transform a check on the legislative branch (the need to present proposed amendments to the President before they went to the states) into a check on the President (the ability of the Congress and the states to bypass him in the amendment process). Even though perhaps unintended, the mutability that the law demonstrated in *Hollingsworth* is possessed of an evolutionary flavor.

The influence of this evolutionary tradition is evident in the nineteenth century expansion of the powers of the Congress. Again and again, the Supreme Court ratified congressional judgments on what instrumentalities were required for the effective deployment of federal authority. The decision in *McCulloch* is in a sense the parent of them all, but the tradition, once it started moving, rapidly gathered steam. Examples abound. *McCulloch* ruled that the Congress could establish a bank if it thought one needed. In 1858, the Justices ruled that the Congress could, in an exercise of its war-making power, establish courts martial independent of the judicial branch. If railways were needed, the Congress could establish corporations to lay track and build bridges, while rendering those corporations immune from state taxation. If the national debt was too costly to repay, the Congress could cause inflation to reduce the value of its obligations. And, in probably the only decision in this line that is troubling to modern proponents of broad congressional authority, if the Congress concluded that the decisions of the Supreme

Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . . ."

23. 3 U.S. (3 Dall.) at 381.

24. "The Court did not suggest that the question of the President's role in the amendment process was one for the political departments rather than the Court." Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 Harv. L. Rev. 386, 403 (1983). I am indebted to Charles Black for first pointing out to me the paradoxical aspect of the Court's conclusion in *Hollingsworth*.


Court threatened declared legislative policy, it could curtail the Court's jurisdiction.28

There were notable exceptions to this trend—Hylton v. United States is one,29 Paul v. Virginia another,30 and Pollock v. Farmer's Loan & Trust a third31—but these exceptions tended to involve objections to the subjects the Congress chose for regulation, not the agencies the Congress established in order to regulate. United States v. Klein32 was the closest to a genuinely de-evolutionary decision on congressional authority. In Klein, the Justices refused to permit the Congress to alter the significance that the Court had already determined presidential pardons to possess. Klein cannot easily be explained on evolutionary grounds, but it was at most a small deviation from a plainly evolutionary trend.

The modern American state would be quite different had the evolutionary tradition not dominated the separation of powers jurisprudence well into the twentieth century. Without a doctrine of this kind, there would be no independent regulatory agencies in the federal government. Absent an evolutionary tradition of deference, the Justices would never have been able to decide in Humphrey's Executor v. United States33 that the Congress can create an independent agency, part court, part legislature—in that particular case, the Federal Trade Commission—that "cannot in any proper sense be characterized as an arm or an eye of the executive."34 Because the Congress had established the agency outside of the executive branch, the Jus-

29. 3 U.S. (3 Dall.) 171 (1796).
30. 75 U.S. (8 Wall.) 168 (1869).
32. 80 U.S. (13 Wall.) 128 (1872).
34. Id. at 628.
tices explained, the Commissioners did not serve at the pleasure of the President. 35 And what was the constitutional warrant for the establishment of an agency that acts, in the Court's words, "in part quasi-legislatively and in part quasi-judicially"? 38 Simply this: The Congress determined that the agency was needed, and the congressional authority to establish agencies independent of presidential control "cannot be well doubted." 37

This is deference with a vengeance, but a deference that is not difficult to understand. Already in 1935 when Humphrey's Executor was decided, the Congress had established perhaps half a dozen independent regulatory commissions that were not quite part of the legislature and not quite part of the executive. 38 Before the start of the New Deal, a fledgling administrative government was in place, and the decisions and rules of the administrative agencies had become a part of the national economic culture. 39 The Court had in the past reviewed cases involving these agencies without ever questioning their legitimacy. 40 Only an enormously confident Supreme Court would readily challenge what had become a common part of the government.

But that is not quite a sufficient explanation for the outcome, given that the same Supreme Court was at the time engaged in a decidedly de-evolutionary assault on the New Deal. Constitutional law professors are fond of teasing their students by reminding them that the Court's decision in Schechter Poultry Corp. v. United States 41 was in fact handed down on the same day as Humphrey's Executor. This does present a challenging conundrum: How can the de-evolutionary doctrine against delegation of legislative powers, which the Justices applied in Schechter Poultry, be reconciled with the evolutionary tradition of deference at work in Humphrey's Executor? The

35. Id. at 629.
36. Id. at 628.
37. Id. at 629.
39. See Rabin, supra note 2, at 1197-1242.
40. See id. at 1229-36 (arguing that the Supreme Court generally played the role of facilitator, not opponent, of Progressive Era regulation).
41. 295 U.S. 495 (1935).
best answer is the obvious one, that the Justices were not guided in either case by the legal philosophy reflected in their opinions. Instead, they seized both cases as chances to strike at the New Deal.\textsuperscript{42} \textit{Schechter} rejected the National Industrial Recovery Act of 1933, which, in its early life, had been a popular cornerstone of the New Deal program. The commissioner, whose challenged ouster led to \textit{Humphrey's Executor}, was being removed by President Roosevelt because he was considered unsympathetic to the aims of the New Deal.\textsuperscript{43} The cases are linked, in other words, not by the styles of their reasoning, but by the perceived virtues of their results: The New Deal had to be stopped.

The New Deal was not stopped, of course, and in retrospect the New Deal cases represent no more than a minor tremor on the constitutional landscape. After the “switch in time” that may or may not have “saved nine,”\textsuperscript{44} a majority of the Justices retreated once more into the evolutionary tradition that permitted administrative government to continue to grow.\textsuperscript{45} Nine years after \textit{Schechter}, the Court in \textit{Yakus v. United States}\textsuperscript{46} essentially eviscerated the non-delegation doctrine that had once threatened bureaucratic government, and since that time, a ma-

\begin{enumerate}
\item This traditional explanation—that the Justices were engaged in no more than standardless Roosevelt-bashing—has been forcefully challenged by my colleague Jerry Mashaw, who has suggested that the decisions are readily harmonized through a sophisticated vision of courts protecting a federalist republic from the co-opting of its regulatory institutions by powerful private interests. While I am unsure which explanation, in the absence of psychological evidence, is dictated by application of Occam's razor, the theory Professor Mashaw suggests is an eminently plausible one.

\item See C. Pritchett, \textit{The American Constitution} 247 (3d ed. 1977); E. Corwin, \textit{supra} note 38, at 91.

\item This phrase is a reference to the Supreme Court's apparent retreat from its anti-regulatory stance in the face of President Roosevelt's “Court-Packing” plan. \textit{See generally} R. Jackson, \textit{The Struggle for Judicial Supremacy} (1941). For a suggestion that Justice Roberts, the swing vote in the repudiation of the judicial assault on the New Deal, was not in fact intimidated by the Roosevelt proposal, see Frankfurter, \textit{Mr. Justice Roberts}, 104 \textit{U. Pa. L. Rev.} 311 (1955). Naturally, the fact (if it is a fact) that Justice Roberts altered his position prior to the proposal to alter the size of the Supreme Court does not lead ineluctably to the conclusion that the public outrage occasioned by the Court's anti-New Deal jurisprudence was irrelevant to his decision.

\item The immediate result of the “switch” was the Court's decision in \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 \textit{U.S.} 1 (1937), which dramatically broadened the discretion of the Congress to use its interstate commerce power to regulate activities formerly considered too local or too indirectly connected to commerce among the states. This, too, was an evolutionary development. \textit{See also} Wickard \textit{v. Filburn}, 317 \textit{U.S.} 111 (1942); \textit{United States v. Darby}, 312 \textit{U.S.} 100 (1941).

\item 321 \textit{U.S.} 414 (1944).
\end{enumerate}
The majority has never again embraced that theory as a basis for declaring an act of the Congress unconstitutional.47

The evolutionary tradition has also been at work in the development of the relationship between the Congress and the Court itself. Although it is no easy matter to find an argument from the constitutional text or its history to support the congressional grant of jurisdiction to federal courts in cases seeking nothing but a declaratory judgment, the Justices sustained that grant.48 In the 1960s, nothing but an evolutionary approach to constitutional analysis could adequately explain the decision in *Katzenbach v. Morgan*,49 which sustained congressional legislation outlawing as a violation of the fourteenth amendment a form of literacy test for voting that the Court had ruled just six years earlier did not violate the amendment's strictures.50 The *Morgan* opinion in particular emphasized what *McCulloch* had, the need to defer to the congressional judgment on necessity, even though *Morgan* involved what appeared to be a direct challenge to the finality of the Court's constitutional interpretation.51

Even though recent years have seen a revival of the rhetoric of the de-evolutionary tradition, both in what the Court has actually done52 and in what dissenters, notably Justice (now Chief Justice) William Rehnquist, thought it should have done,53 it is the evolutionary tradition which is responsible for the growth in the power and authority of the federal government. And it is

---

47. In National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), the Justices used the non-delegation doctrine as a tool for statutory construction, reading the statute to avoid finding a broad delegation. Although the Court has not recently invalidated legislation on non-delegation grounds, some commentators have recommended a revival. See J. Ely, Democracy and Distrust 131-34 (1980); T. Lowi, The End of Liberalism 297-98 (1969). So have some Justices. See infra note 55 and accompanying text. For an important contrasting view, see Mashaw, Pro-Delegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81 (1985).


that tradition, now apparently threatened, that many contemporary students of the separation of powers are rushing to preserve. On the evolutionary view, for example, the Supreme Court was wrong to decide in *Immigration and Naturalization Service v. Chadha*\(^\text{54}\) that the legislative veto, because it violates the article I requirement that legislation be presented to the President for signature or veto,\(^\text{55}\) is generally an unconstitutional usurpation of executive authority. My colleague, E. Donald Elliott (from whose work I borrow the term “evolutionary tradition,” although I use the term somewhat differently than he does\(^\text{56}\)), has criticized the Court’s failure in *Chadha* to come to grips with the reality of the administrative state.\(^\text{57}\) The “threat to the essence of the constitutional principle of separation of powers” with which the Court should have been concerned, he argues, is not the possibility that the Congress has stepped into the wrong legal category in the form of its acts, but rather

the reality that most of the federal law affecting most of the people most of the time is not made through the bicameral legislative process that the Court’s opinion enshrines, but by administrative decisionmakers, who are not elected and who are not, by and large, subject to either effective presidential or judicial control.\(^\text{58}\)

This point is not, as it may appear to be, a de-evolutionary argument against the rise of the administrative state. It is instead firmly in the evolutionary tradition of separation of powers analysis: *Because* of the rise of the administrative state—a development which, Professor Elliott insists, has so far confounded the Court\(^\text{59}\)—the Justices should show greater deference to congressional strategies to provide some form of continuing political guidance to the bureaucrats who make so many of our laws.\(^\text{60}\)

No doubt the forthcoming academic criticisms of *Bowsher v.*

---

55. In an earlier era, the Court disregarded the Clause, perhaps in evolutionary zeal. See *supra* notes 21-24 and accompanying text.
56. See Elliott, *supra* note 1. We use the term in subtly different ways, because Professor Elliott has in mind a jurisprudential tradition, a faith in the ability of law to evolve on the model of an organism, whereas I am referring to a conscious judicial decision to permit the law to evolve in order to enable the creation of institutions not contemplated when the law was laid down.
57. Elliott, *supra* note 52, at 164.
58. Id. at 146.
59. See id. at 166-68.
60. See id. at 162-76.
Synar, in which the Justices ruled that the Congress may not vest ultimate budget-cutting authority in the Comptroller General, because he is removable by congressional vote, will be couched in similar terms. In the meanwhile, Justice White, in his rigorously evolutionary dissent, has shown the way:

The majority’s . . . conclusion rests on the rigid dogma that, outside of the impeachment process, any “direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with the separation of powers.” Reliance on such an unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role. The wisdom of vesting “executive” powers in an officer removable by joint resolution may indeed be debatable—as may be the wisdom of the entire scheme of permitting an unelected official to revise the budget enacted by Congress—but such matters are for the most part to be worked out between the Congress and the President through the legislative process, which affords each branch ample opportunity to defend its interests. . . . [T]he role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law. . . . I see no such threat . . . .

The important constitutional question, in Justice White’s view, was not whether as a formal matter the powers involved were “executive” and the officer exercising them was “legislative,” and his argument had little to do with constitutional history; his concern was whether in practical effect the statutory scheme altered “the balance of authority” between the President and the Congress. If, as he concluded, it did not, then the only remaining question was the wisdom or unwisdom of the Gramm-Rudman-Hollings arrangement, a policy matter which the political branches had already resolved.

Professor Elliott’s critique of the Court’s reasoning in Chadha and Justice White’s of the decision in Synar have in common the general notion that the Congress must be permitted to act creatively to adapt to a changing reality. This approach lays the foundation for the evolutionary tradition. The reasoning

---

62. Id. at 3214-15 (White, J., dissenting).
for the deference that the evolutionary tradition requires is bottomed on the perception that the needs of the nation and the requisites of the government do change, and no matter what a Framer might intend or a Court might rule, in the nature of politics, the government will change too. This, surely, is what Justice Jackson had in mind when, even as he concurred in the Court’s essentially de-evolutionary decision in *Youngstown Sheet-Tube Co. v. Sawyer*\(^6\) (popularly known as *The Steel Seizure Case*), he warned of impending tragedy if the Congress did not take note of the ways in which the necessities of government were evolving around it. Justice Jackson explicitly accepted the majority’s de-evolutionary premises, but he also set forth his doubts:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.\(^6\)

So the Court might order the President not to act because its reading of the Constitution holds that only the Congress can do what the President is trying to do, but if popular demands on the government reach such a pitch that somebody has to act, then sooner or later, somebody will, and given time, so Justice Jackson seems to suggest, even the Court will accommodate itself to the fresh reality. Justice Jackson’s opinion is in this sense like Galileo’s recantation: Forced to declare that the separation of powers stands still, he ends by muttering audibly, “Nevertheless, it moves.”\(^6\)

---

63. 343 U.S. 579 (1952).
64. *Id.* at 654-55 (Jackson, J., concurring).
65. That Galileo muttered these words at the end of his trial is a part of popular mythology, although it is unclear whether the myth possesses a basis in fact. *See G.*
The pure evolutionary judge would not of course have recanted in the first place. The separation of powers moves because the nation moves, and the Court has to let them both go when the moment arrives. Thus, the evolutionary judge might argue that *Steel Seizure* was wrongly decided because the President was responding to the clear need (if there was a clear need) to get steel production going again. Popular impatience with the pace of the legislative process, so the evolutionary judge could reason, had led to an accretion of authority in the presidency when rapid action, as against the establishment of long-range policy, was necessary. The President’s exercise of that power in a particular case would thus be no usurpation, but rather the only responsible course. This was what Chief Justice Vinson intended to convey when he wrote in a stinging dissent: “Executive inaction in [this] situation, courting national disaster, is foreign to the concept of energy and initiative in the Executive as created by the Founding Fathers.” The President must be able to invoke his “broad executive power granted by article II to an officer on duty 365 days a year” when the Congress cannot act quickly and the action is necessary “to avert disaster.”

In fact, an evolutionary judge could join the *Steel Seizure* majority only in one circumstance: If the judge were convinced that the Congress had already accommodated its statutory design to meet the emergency that the President insisted demanded his immediate action. This was precisely the point pressed by Justice Frankfurter, who argued in his concurring opinion that through the provisions of the Taft-Hartley Act, which provided for the means through which a labor dispute might be controlled, the “Congress has expressed its will to withhold this power from the President as though it had said so in so many words.” He added to this one of the clearest evolutionary statements ever written by a Supreme Court Justice—albeit one which, he concluded, did not apply to the case before the Court:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly es-
establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on the "executive Power" vested in the President . . . 70

In other words, it moves. Nevertheless, it moves.

B. The De-Evolutionary Tradition

Rapidly increasing complexity in most fields of human endeavor is met sooner or later by a neo-romantic yearning for a lost Golden Age, a time when matters were both simpler and better.71 This is particularly true in the United States, where, as J.G.A. Pocock has pointed out, to a "curious extent . . . the most post-modern and post-industrial of societies continues to venerate pre-modern and anti-industrial values, symbols, and constitutional forms . . . ."72 Our cultural mythology, Professor Pocock suggests, arises "out of the attempt to escape history and then regenerate it."73 Thus, it was perhaps inevitable that the social and economic revolution sparked by the federal government's phenomenal growth in size, power, and intrusiveness during the first century and a half of rule under the Constitution would in its turn spawn a counter-revolution, seeking to slow the clock or even to turn it back, in order to return not so much to the way things used to be as to the way we would like to believe they used to be. The de-evolutionary rhetoric which marked the immediate judicial reaction to the New Deal was in a sense the

70. Id. at 610-11.

71. This yearning for a simpler age is particularly common as people react to a rapidly changing technological world. For discussions of this yearning, see, e.g., S. Florman, Blaming Technology: The Irrational Search for Scarecrows (1981); Marx, Reflections on the Neo-Romantic Critique of Science, in Limits of Scientific Inquiry 61 (G. Holton & R. Morrison eds. 1979).


73. Id. at 545.
legal arm of this counter-revolution; the de-evolutionary trend in recent Supreme Court decisions and in contemporary political polemic is quite likely the reflection of something similar.

The underlying principle of this de-evolutionary tradition is captured in the much-ridiculed (and perhaps misunderstood) statement by Oliver Wendell Holmes in *New York Trust Co. v. Eisner* that "a page of history is worth a volume of logic." Justice Holmes was writing about taxes, not about constitutional interpretation as such, but his statement was rigorously de-evolutionary nevertheless. When adopted as a credo by the de-evolutionist, the statement has nothing to do with judicial unwillingness or inability to follow logical argument; rather, it has to do with the sources of authority in resolving cases arising under the system of balanced and separated powers. "A volume of logic" is not sufficient evidence of meaning because reasoning alone is not, in de-evolutionary theory, an adequately authoritative basis for decision. The text might be enough, but only insofar as it suggests the governmental form envisioned by its authors. The views of the authors themselves are ideal: "Tell me what the Framers said," the de-evolutionary judge demands, "and then I'll tell you what the text means."

A good example of the de-evolutionary judge's dismissal of arguments over public policy when, in the judge's view, the vision of the Framers is easily discerned, arose in the Court's opinion in *Buckley v. Valeo*. There the Justices rejected efforts by the Congress to bypass the President in appointing members of the Federal Elections Commission. The policy considerations in defense of the appointment provisions were plain enough: The entire lesson of Watergate (a scandal the breadth and depth of which is too often forgotten) was surely that no President can

---

74. 256 U.S. 345 (1921).
75. *Id.* at 349.
76. *Eisner* involved a challenge to a particular tax levy as an impermissible "direct" tax. In concluding that the tax was instead an "excise" tax, the Justices explained that what mattered was whether the tax had been levied as an excise tax over the years—not whether, as a matter of simple logic, it was the functional equivalent of a direct tax. It was on this point that Justice Holmes concluded that history was more important than logic. Obviously, an opinion of this nature is de-evolutionary in spirit.
77. 424 U.S. 1 (1976).
78. Those needing a reminder, those too young to recall, or those who persist in thinking that the liberal news media, which hated him so, hounded President Nixon from office for no good reason, might profitably peruse *New York Times, The End of a Presidency* (1974), the excellent chronology and catalogue of Nixon Administration misdeeds produced by the Times' editorial staff shortly after President Nixon's resignation.
be trusted to monitor himself. Were the President to appoint the members of the Commission that would be charged with investigating his own campaign, then there would be no particular reason to trust the investigators. In other words, the entire scheme of federal regulation of campaign contributions and expenditures—a response to an obvious necessity—might fail if the constitutional guidelines on appointment were read too literally.79

The Court's per curiam opinion gave little sympathy. "[S]uch fears," the Court replied, "however rational, do not by themselves warrant a distortion of the Framers' work."80 The constitutional system of checks and balances, on this view, is a finished product, almost a work of art, and worth preserving not because of its quality—the goodness or badness of "the Framers' work" is decidedly not the issue—but simply because of its antiquity. For the de-evolutionary judge, that antiquity, by providing a link to the Golden Age, reinforces the legitimacy of the interpretation that it generates. The same reasoning, only set forth in greater detail, led to the rejection in Chadha of the claim that effective government operation required that the Congress be allowed to retain a veto over the exercise of powers that it has delegated to the executive branch:

[I]t is crystal clear . . . that the Framers ranked other values higher than efficiency. . . . [They] unmistakably express[ed] . . . a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process. The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumber-someness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President.81

The theme is the same: This precious work of the Framers must

79. This potential failure is tempered, of course, by the congressional ability to make presidential appointments depend on the approval of the Senate.
80. 424 U.S. at 134.
be preserved in the form they wanted it to have. The reasoning has a private law analogue in the concept of moral right, foreign to American copyright law but quite common elsewhere, under which artists, even after selling their work, retain some control over what is done with it later, and, in particular, can act to prevent its distortion or its destruction. The de-evolutionary judge is acting as proxy for the artists—those who wrote and ratified the Constitution—to prevent any distortion of their valuable work.

The rhetoric of the de-evolutionary tradition sometimes seems almost religious in the fervor of its veneration of the Framers. The de-evolutionary judge, as protector and perhaps oracle of the dead Framers, must guard against dangers much like those that pass through the mind of Okonkwo, the troubled protagonist of one of Chinua Achebe's most powerful novels. Okonkwo, when he sits down to work out the awful consequences for his world of his son's decision to abandon the Ibo tradition of ancestor worship and become a Christian, concludes that "[t]o abandon the gods of one's father . . . [is] the very depth of abomination." And there is more:

Suppose when he died all his male children decided to follow Nwoye's steps and abandon their ancestors? Okonkwo felt a cold shudder run through him at the terrible prospect, like the prospect of annihilation. He saw himself and his fathers crowding round their ancestral shrine waiting in vain for worship and sacrifice and finding nothing but ashes of bygone days, and his children the while praying to the white man's god.

One can almost see the worried faces of the dead ancestors—or the dead Framers—wondering who will worship them now that the world has changed. It is because of this sense of disintegra-

---


84. C. Achebe, Things Fall Apart 158 (1959).

85. Id. A more anthropologically apt analogy might be to the Melanesian "cargo cults," adherents of which believe that the spirits of their ancestors will return by sea, bringing treasures—"cargo"—that will suffice to undo what the white man's invasion has done. The cargo cults, too, in effect yearn for the return of a lost Golden Age, and count on their ancestors to bring it back. See generally P. Worsley, The Trumpet Shall Sound: A Study of "Cargo" Cults in Melanesia (2d ed. 1968).
tion of society in the face of the rejection of traditional authority—a sense plainly shared by de-evolutionary judges—that Achebe chose to call his fine novel *Things Fall Apart*.

The de-evolutionist, of course, prefers to hold things together, and the link between legitimacy and antiquity is a crucial tool. Thus, what matters most in the cases construing the system of balanced and separated powers is the way that those who set up the system of balanced and separated powers actually envisioned its operation. In *Chadha*, for example, the majority cited the records of the Constitutional Convention in support of its conclusion that the Congress may retain a legislative veto over executive action only if that veto complies with the article II requirements of bicameralism and presentment. These constitutional provisions, the Court insisted, represent “the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.” This faith that the system of balanced and separated powers was “exhaustively considered” is a cornerstone of the de-evolutionary tradition. If there was no such exhaustive planning, there is nothing to hark back to.

Similarly, in such decisions as *Powell v. McCormack*, *Nixon v. Fitzgerald*, and, most recently, *Bowsher v. Synar*, the Justices have relied in part on contemporaneous debates over ratification in determining that the Constitution prohibits, respectively, congressional refusal to seat a member who meets the qualifications explicitly set forth in article I, judicial implication of a right to sue a President for damages based on his official conduct, and delegation to a congressional employee of authority that is executive in nature. Chief Justice Burger’s majority opinion in *Synar* in particular pursues the same theme of a cautiously worked out system of checks and balances:

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide

---

87. Id. at 951.
89. 457 U.S. 731 (1982).
90. 106 S. Ct. 3181 (1986).
avenues for the operation of checks on the exercise of governmental power.\textsuperscript{91}

The neo-romanticism of this tradition, the sense of wise Framers living and working in a lost Golden Age,\textsuperscript{92} is plain on the face of this argument. The need to return to that Golden Age, to give heed to the wisdom of the Framers, is considered almost so obvious as to require no analytical support. After all, these wise Framers must have meant \textit{something} by the words they chose.\textsuperscript{93} Thus, for the de-evolutionary judge seeking to resolve a dispute arising under the separation of powers, nothing is more important than gaining an understanding of the way that those who wrote and ratified the Constitution hoped that the government structure would operate.

The need to consider the history is, for the de-evolutionary judge, inextricably bound up with the legitimacy of the judicial role. In the constitutional system of balanced and separated powers, the de-evolutionary judge finds the central justification not only for the work of the courts, but for the very existence of the government of the United States. The authors of the Constitution, in this vision, battled and compromised throughout the two months of the Philadelphia Convention in their efforts to design a system which, as Madison put it in \textit{The Federalist} No. 51, comprised several “constituent parts” which would, in their interaction, “be the means of keeping each other in their proper places,” and which was aimed at “divid[ing] and arrang[ing] the several offices in such a manner as that each may be a check on the other.”\textsuperscript{94} To permit one branch of the government to check another in a manner inconsistent with this original design, the de-evolutionary judge holds, is to risk upsetting this carefully worked out balance. From there, the de-evolutionary argument

\textsuperscript{91} \textit{Id.} at 3187.

\textsuperscript{92} C. Vann Woodward has characterized as the “Golden Age Fallacy” the view that the Framers of the Constitution were wiser and nobler than people of later generations, and the invariable consequence of that view, that their public words and actions at the time of ratification and in the early years of the Republic constitute some catalogue of what the document must have meant to them. \textit{See The Responses of the Presidents to Charges of Misconduct} at xiv (C. Woodward ed. 1974). The point of the criticism is that the wise Framers of the “Golden Age,” like politicians of every other age, had specific policy concerns which were sometimes best addressed by making politically inspired claims about constitutional requirements or prohibitions.

\textsuperscript{93} It is possible, of course, to concede that the Framers must have meant something while denying the possibility of discovering that meaning. \textit{See Brest, The Misconceived Quest for the Original Understanding}, 60 B.U.L. Rev. 204 (1980).

\textsuperscript{94} \textit{The Federalist} No. 51, at 355-56 (J. Madison) (B. Wright ed. 1961).
proceeds almost syllogistically: The government is legitimate only as long as it operates pursuant to the Constitution's system of balanced and separated powers. If the balance is disturbed, then the nation is no longer governed under that Constitution, and if there is no longer constitutional government, then there is no longer legitimate government. That is why the history is so important. And it is this central notion of the link between history and legitimacy that leads the de-evolutionary judge to the essentially activist stance of preventing the branches of the federal government from straying too far beyond the metes and bounds marked out in the historical record.

The de-evolutionary judge will not always insist on searching through dusty historical tomes (even if word-processed) in order to gain the necessary understanding. The judge might rely instead on an apparent "plain meaning" of the text, but will generally treat the words as a sort of "best evidence" of the intentions of those who wrote them. In the Steel Seizure Case, Justice Black's majority opinion rejected President Truman's argument that an amalgam of several of his executive powers provided adequate authority to seize and operate the steel mills. Ignoring the amalgam argument, the majority considered the executive powers seriatim, concluding that none was sufficient to justify the President's action. According to Justice Black, the President was trying to exercise legislative authority. The constitutional "framework"—the structure of the text—was cited as prohibiting what he was trying to do:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice.

This passage echoes, and not faintly, with Montesquieu's rather

96. Id. at 585-89.
97. Id. at 582-89.
98. Id. at 587-89.
dogmatic understanding of the separation of powers. His rule, expressed in *The Spirit of the Laws*, was simple and firm: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."\(^9^9\) The executive, according to Montesquieu, would "have a share in the legislature by the power of refusing," that is, through the exercise of a veto.\(^1^0^0\) But "[i]f the prince were to have a share in the legislature by the power of enacting, liberty would be lost."\(^1^0^1\)

To label Montesquieu the patron saint of the de-evolutionary tradition would be unfair, but de-evolutionary judges and scholars do have a habit of quoting him more frequently than, say, John Locke, who, despite views on the separation of powers quite similar to Montesquieu's, might better be cast as an apostle of evolution.\(^1^0^2\) The de-evolutionary judge, like Montesquieu and unlike the Supreme Court in the peculiarly evolutionary rhetoric it selected in justifying its de-evolutionary decision in *Buckley v. Valeo*,\(^1^0^3\) often treats the powers of the federal government as though there really is a "hermetic seal" separating the branches from one another.\(^1^0^4\) The most important New Deal separation of powers cases, *Panama Refining Co. v. Ryan*\(^1^0^5\) (often remembered as *Hot Oil*) and *Schechter Poultry Corp. v. United States*\(^1^0^6\) (popularly ridiculed as *Sick Chicken*), construed the interaction of article I and article II to prohibit a delegation by the legislative branch to the executive of an authority sufficiently broad "as essentially to commit to the President the functions of a legislature. . . ."\(^1^0^7\) Obviously, the Court might have been right or wrong in reading the delegations in those cases as running afoul of its test.\(^1^0^8\) What matters more for pre-

---

100. Id. para. 52.
101. Id. para. 53.
102. Locke, for example, apparently considered it appropriate for the executive to defy the legislature when the executive's judgment of the public good so required. See infra note 195. This is far more dynamic than Montesquieu's notion of a static, almost mechanistic system of checks and balances that are clear and determinate.
103. 424 U.S. 1 (1976) (*per curiam*).
104. See id. at 121.
105. 293 U.S. 388 (1935).
107. 293 U.S. at 418.
108. In *Schechter*, even Justices Cardozo and Stone, previously and subsequently staunch New Deal supporters, felt bound to conclude that delegation was "running riot."
sent purposes is the almost offhand way in which the Court con­cluded in both cases that a standardless delegation is not per­missible. Legislation is the thing that the Congress does, and so ipso facto (as the Justices seemed to think) it cannot be done by anyone else.109

Although the de-evolutionary tradition never vanished en­tirely from the separation of powers jurisprudence,110 it dropped into a half-century quiescence following the New Deal cases. True, it briefly opened one eye to assist Justice Black in the Steel Seizure Case, although even there the concurring opinions of Justices Frankfurter and Jackson were more in the evolution­ary spirit.111 But mostly it slumbered. The last few years, however, have been marked by an almost extraordinary renaissance in de-evolutionary analysis of separation of powers problems. It is as though a majority of the Justices has suddenly decided to cry “Hold, enough!”112 Or to move from Shakespearean metaphor back to Galileo, the mutterings of “Nevertheless, it moves,” have apparently been heard, and the Court has decided to issue a fresh condemnation of this heresy.

III. THE WEAKNESSES OF THE TRADITIONS

Although the evolutionary and de-evolutionary traditions seem ascendant almost in neat cycles, both continue to thrive and to provide intellectual challenge. The twin traditions over­lap, but at the same time, they pull in opposite directions. Each has its adherents, among scholars and judges alike, and the ar-

295 U.S. at 553 (Cardozo, J., concurring).
109. See id. at 529-42.
110. In particular, the language of de-evolution never vanished from the case law. For example, when in United States v. Darby, 312 U.S. 100 (1941), the Justices overruled Hammer v. Dagenhart, 247 U.S. 251 (1918), which had found unconstitutional a congres­sional enactment preventing products of child labor from entering interstate commerce, the Justices cited nothing about the changing needs of society or a fresh construction of the Constitution. Hammer v. Dagenhart was wrong, the Court concluded, because it mis­understood the rule that had been in the Constitution all along:

The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.

. . . . Hammer v. Dagenhart was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision . . . .”

United States v. Darby, 312 U.S. at 115-17 (emphasis added).
111. See supra text accompanying notes 64-70.
112. Shakespeare, Tragedy of Macbeth, act 5, scene 8, line 20.
Arguments raised in support of each deserve to be taken seriously. Yet the two traditions that have governed the separation of powers jurisprudence both raise analytical questions sufficiently grave as to cast doubt on whether either one, in its pure form, can supply the courts a relatively coherent analytical approach for cases involving this system of balanced and separated powers. I will discuss the problems with each tradition in turn.

A. The Dangers of Evolution

1. The policy problems

In form, the evolutionary tradition avoids considerations of proper policy, deferring to the judgment of the Congress on how the needs of the nation ought to be met. In substance, however, the evolutionary tradition itself reflects three judicial policy judgments, each one reasonably attractive on the surface (which helps explain the appeal of the tradition itself) but somewhat more troubling underneath.

   a. Congressional expertise. The first policy judgment should be clear, stating as it does the central principle on which the tradition is grounded: The Congress has a better sense than the courts possibly can have about what institutional forms are needed in order to meet the challenges of a changing nation. This judgment must be present; if it isn't, then the case for deference to the congressional judgment on the necessity of these new institutional forms becomes startlingly weak. In fact, absent this principle, John Marshall’s analysis in *McCulloch v. Maryland*\(^{113}\) was exactly backward, for the proper role of the Court would have been to make an independent determination on whether the Bank of the United States was necessary or not. The result might have been the same, but the evolutionary tradition would have missed this vital constitutional launching.

   This policy judgment ought to be controversial. After all, as many political scientists have pointed out, a rule requiring judicial deference to legislative decisions is fraught with paradox. Rules of this kind entail significant costs, both to the ideal of representative democracy they are said to preserve and to the hope for rational decisionmaking they are said to promote.\(^{114}\) Public choice theory has cast significant doubt on the efficacy of

---

legislative bodies in aggregating private preferences,\textsuperscript{115} and at
the very least, our modern understanding of the weaknesses of
representation has forced a redefinition of the terms of the de­
bate.\textsuperscript{116} If legislatures in fact possess the weaknesses that theory
suggests, one may fairly ask why their members should be pre­
sumed to have a better sense than judges do of the needs of the
nation and the institutional forms required to meet those needs.

The question is not unanswerable. Many of the answers,
however, might come down to a desire to preserve the traditional
understandings of the roles and abilities of the branches almost
for their own sake, which sounds suspiciously de-evolutionary.
Another approach might be to join with John Ely, who has ri­
posted: "[W]e may grant until we're blue in the face that legisla­
tures aren't wholly democratic, but that isn't going to make
courts more democratic than legislatures."\textsuperscript{117} This response
might be beside the point, which is not to join the debate over
whether courts or legislatures are the more democratic (in this
sense, representative and responsive) institutions, but only to

\begin{quote}
\end{quote}

\begin{quote}
\textsuperscript{116} Legal theorists defending sophisticated versions of democratic theory now feel obliged to address the concern about the weaknesses of representation, if only to dismiss it. See, \textit{e.g.}, R. Dworkin, \textit{Taking Rights Seriously} 141 (1977) ("it does not so much undermine the argument from democracy as call for more democracy"); J. Ely, supra note 47, at 67 ("the appropriate answer is to make [the legislatures] more democratic").

The dominance of interest groups in the legislative process has sparked debate, sometimes seemingly whimsical, sometimes somewhat bizarre, about the proper role of the courts in reviewing "interest-group" legislation. See, \textit{e.g.}, Easterbrook, \textit{The Supreme Court 1983 Term—Foreword: The Court and the Economic System}, 88 Harv. L. Rev. 4 (1984) (courts as enforcers of the bargain between the legislature and the interest group); Landes & Posner, \textit{The Independent Judiciary in an Interest-Group Perspective}, 18 J.L. & Econ. 875, 883-92 (1975) (courts as agencies that increase the value of the legislation sold by the legislature to the interest group); Macey, \textit{Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model}, 86 Colum. L. Rev. 223 (1986) (courts as agencies to increase the cost of interest group legislation, making its purchase less attractive).
\end{quote}

\begin{quote}
\textsuperscript{117} J. Ely, supra note 47, at 67.
\end{quote}
ask whether, if legislatures in fact do not represent people well and if the rule of deference really does have the costs suggested, this underlying principle is a sensible one on which to lay the foundation of separation of powers analysis. I do not insist that it is not; I only want to remind the reader that the issue is present.

b. Fresh checks. More important is a second policy judgment that pulls in tandem with the first one. This second principle, a *sine qua non* of any evolutionary theory, holds that when the Congress has determined that a new institutional arrangement is necessary, the fresh congressional judgment in effect supersedes the original framework of checks and balances. I say "supersedes" instead of "overrides" because the sense of the evolutionary tradition is one of successive institutional forms: A gives way to B gives way to C gives way to D as each earlier arrangement is found wanting. In particular, new arrangements for controlling the President in the continuing battle for supremacy may supersedes older institutional forms.

I have elsewhere referred to these new institutional arrangements for controlling the President as "fresh checks." The notion that congressionally established fresh checks should supersedes the original system of balanced and separated powers, as a legislative scheme is put into place over the constitutional one, raises two difficult policy questions. First, can only the Congress establish these fresh checks, or can the President or the courts do so as well? Perhaps the courts could be blocked by the claim that they lack the factfinding expertise of the legislature, but even if this dubious claim is valid, the same argument would fail against the President, for in the "real world" in which the evolutionary judge prefers to operate, the investigative resources of the Executive Branch dwarf those of the Congress.


120. Courts routinely act to resolve questions presenting special technical or other fact-finding difficulties, sometimes with the aid of special masters, sometimes without. Moreover, the courts in theory are more dispassionate factfinders than the more politically sensitive legislature.

121. A variant of this notion holds that an executive functionary potentially can exercise investigative and regulatory power in a less overtly political—more profes-
The second difficult policy question is this one: If the Congress can judge that necessity requires the establishment of fresh checks as against the President, could it not also decide that the time had come for fresh checks as against the courts? An authority to alter jurisdiction, or even to override specific constitutional decisions, might be deemed by the Congress as absolutely imperative in order to restore the proper balance of powers long lost in this era of judicial search for fundamental rights. One might try to mix in the bizarre policy judgment that an independent judiciary (that is, a judiciary protected by a de-evolutionary constitutional understanding) is more important than an independent executive. But the case for this question-begging principle is difficult to imagine, and in its absence it is not easy to see how the evolutionary judge can avoid deference to the Congress even when the issue is control of the courts.

c. Boundaries of discretion. The most fundamental of the policy judgments that underlie the evolutionary tradition grows from the role the courts play in society. Whether they defer to legislative judgments or not, they are still constitutional courts expected to engage in judicial review, and those who oppose particular governmental initiatives will continue to come before the judges in the hope of winning in litigation what was lost in legislation. In general, advocates of the evolutionary tradition do not want to abandon this role; rather, they want to deal with separation of powers problems at a different level of abstraction. No matter whether the Constitution itself or relevant historical materials disclose an understanding contrary to what the Congress now seeks to do. The question the evolutionary judge asks herself, much as Justice White did in his stinging dissent in Synar, is whether the system of checks and balances is "really" threatened. If there are adequate checks still available, if the powers remain "really" separated, then the inquiry is ended.

---

122. Some theorists who support a judicial review relatively unconnected to the Constitution's text or history have argued that a congressional authority to alter the jurisdiction of the federal courts is an essential majoritarian check on the broad-ranging protection of rights in which both contend the courts should be engaged. See supra note 28.

But this approach assumes that even in the absence of a reliance on the history and text that provide the grist for the de-evolutionary mill, the evolutionary judge has a means for discovering when the powers are “really” separated and when they are not. Evolutionary judges and scholars are not always clear on how they will identify the cases in which the congressional redeployment of authority has gone too far, or even what “too far” means in such a context as this. Vague references to an effective ability in the President to check the congressional exercise of its newly minted power\(^\text{124}\) cannot possibly be an adequate answer, because the President would challenge the new institutional form only if he believed that at least a part of the power in question was rightly his. In other words, to refer to the problem as one of “real” checks is to suggest that only checks and balances—not the separation of powers itself—are of constitutional significance. More sophisticated explanations may be offered, but one may concede that a general theory might exist and still ponder the wisdom of a policy that leaves so vague the boundaries of congressional authority.

2. The authority problem

The less tractable difficulty with the evolutionary tradition is the one that leads de-evolutionary judges to suspicion of it. The problem is this: It is unclear what constitutional warrant the courts have for permitting the Congress free aggrandizement of its own authority in the guise of exercising its judgment on what institutional arrangements new problems require. The distinction between a government that operates under a written Constitution and a government that does not is supposed to be that the written Constitution provides real limits in real cases on what the government can do, and that mere popularity of a particular initiative, mere contemporary consensus on some new order, is not sufficient to overcome that rule.

This criticism is more often leveled, many times with much less reason, against courts involved in tilting at the windmills of fundamental right.\(^\text{125}\) In a sense this tendency to treat judicial decisions as the whole of constitutional law has always been a curious phenomenon, because if Alexander Bickel was right to

\(^{124}\) Some of the references are more sophisticated. See, e.g., Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 488-508 (1979).

\(^{125}\) For a sharp reminder, see Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985).
identify the federal courts as the least dangerous branch of the national government, the framers surely were equally right in their fear that the most dangerous was the legislature. Unfortunately, consideration of the structural limits on the constitutional authority of the Congress no longer inspires a significant part of constitutional scholarship.

Unless we are all evolutionists, as once we were all supposed to be Keynesians, the question of congressional authority should be central for any serious student of the legitimacy of the American system of government. The evolutionary theorist has an obligation to explain precisely what facet of constitutional or democratic theory legitimates a congressional project of rearranging institutional forms to meet that same Congress's essentially unreviewable vision of societal needs; and further, what portion of theory justifies consistent judicial deference to these institutional rearrangements.

A judge who is resisting the lure of de-evolution cannot simply retreat into the history of drafting and ratification. Instead, she must look to other, vaguer guides in deciding whether a proper balance of powers exists or whether the latest congressional initiative must be struck down. Obviously, the judge could simply trust her own instincts, her own "sight of the board," as the chessplayers call it, to tell her how well the system of checks and balances will work if the congressional action is sustained. She might consider the views of experts who have stud-


128. "By 1969, a conservative President could announce his conversion to Keynesian principles with little rebuke." T. GALBRAITH, THE AFFLUENT SOCIETY xix (3d ed. 1976). When President Nixon announced his "conversion," one television commentator—I believe it was Howard K. Smith—turned to the camera and said something like, "That's a bit like a Crusader saying Mohammed was right all along."

129. I do not mean to suggest that no theorists have done so. See, e.g., Elliott, supra note 52.

130. Some judges have a very quick sight of the board, and I assume that like chess players, the quicker, the better. But chess players act on their sight of the board alone only when they are in time trouble. The better chess players indulge in rigorous analysis when time allows—a point that judges should keep in mind.
ied the problem, but then she will risk becoming a prisoner of
the same instrumental rationality, the testing of means only
against their efficacy in achieving stated ends, that has come to
drive so much of the American governmental and intellectual
enterprise.

There is significant tension between the idea of considering
policies only as means for achieving stated ends and the ideals of
constitutionalism. Instrumental rationality generally takes the
ends, the policy goals, as given, for it accepts the premise of lib­
eral democratic theory and of neoclassical economics that it is
generally inappropriate—and impossible—to analyze the moti­
vations lying behind individual preferences. But the means
chosen to implement the goals can be broken up into smaller
components, and by using the tools of modern policy science, the
analyst can subject them to relentless dissection, analysis, and
criticism, before finally proposing paths toward reform. The
evolutionary tradition fits this model, for what matters to the
evolutionist is whether a particular arrangement for the exercise
of federal power is the most efficacious one, given the end in
sight. The evolutionary judge's subsidiary inquiry, whether this
efficacious arrangement maintains a "real" balance of powers,
also reduces to a question of the same kind.

The problem with this use of our burgeoning public policy
science, an inevitable one in an area of theory driven by instru­
mental rationality, is that the law itself is stripped of the aura of
uniqueness which is assigned to it in liberal theory. The law be­
comes all too mutable, and is left as no more than one of the
means that must be tested against its efficacy in achieving the

---

131. Spiro Agnew, while serving as Vice President of the United States, supposedly
said, "You don't learn about poverty from people who are poor, but from experts who
have studied the problem." The analogy to constitutional theory should go without being
stated.

132. Critical treatments of instrumental rationality as a driving force in society in­
clude M. HORKHEIMER, ECLIPSE OF REASON (1947), and R. UNGER, KNOWLEDGE AND POLI­
TICS (1975).

133. Some theorists might argue, however, that the reasons that preferences are
formed are crucial for democratic government. See generally M. YUDOF, WHEN GOVER­
NMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983) (cautioning
against government indoctrination); Sunstein, supra note 115 (arguing that only
truly endogenous preferences should be the basis for government decisions). Cf. H. MAR­
cuse, ONE-DIMENSIONAL MAN 208 (1964) ("the repression of society in the formation of
concepts is tantamount to an academic confinement of experience, a restriction of
meaning").

134. See, e.g., Tribe, Technology Assessment and the Fourth Discontinuity: The
desired end.\textsuperscript{135} The Constitution, which is after all a species of law,\textsuperscript{136} is thus quite naturally viewed as a potential impediment to policy, a barrier that must be adjusted, through interpretation or amendment, more often than preservation of government under that Constitution is viewed as a desirable policy in itself.\textsuperscript{137} In this the modern student of policy is like the modern moral philosopher—and like a good number of constitutional theorists as well—in denigrating the value of preserving any particular process and exalting the desirable result.\textsuperscript{138} But constitutionalism assigns enormous importance to process, and consequently assigns costs, albeit perhaps intangible ones, to violating the constitutional process. For the constitutionalist, as for classical liberal democratic theory, the autonomy of the people themselves, not the achievement of some well-intentioned government policy, is the ultimate end for which the government exists. As a consequence, no violation of the means the people have approved for pursuit of policy—here, the means embodied in the structural provisions of the Constitution—can be justified through reference to the policy itself as the end.\textsuperscript{139}

Somewhere between the totalitarian horror of a society

\begin{quote}
\textsuperscript{135} “[P]olicy-oriented legal discourse forces one to make explicit choices among values, and the pursuit of procedural or substantive justice requires that rules be interpreted in terms of ideals that define the conception of justice.” R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 195 (1976).

\textsuperscript{136} In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the understanding that the Constitution is a kind of law was crucial to Chief Justice Marshall’s analysis, which justified judicial review essentially by treating it as a choice of law problem. Should the two laws conflict, Chief Justice Marshall explained, the judicial task is to decide which one governs. \textit{Id.} at 176-77. Under the Supremacy Clause the answer must be that the Constitution as law must be preferred over the legislation in question.

\textsuperscript{137} I do not mean this point to be as self-referencing as it may sound. Obviously, I am sensitive to the difficulty that one cannot say what government “under” the Constitution is until one first takes a position in the evolution v. de-evolution debate. All I mean to imply by the text is that the policy scientist may reject proposed constitutional interpretations simply because they do not accord with her judgment on desirable policy. In this the policy scientist makes essentially the same move as the moralist. \textit{See infra} note 139.

\textsuperscript{138} For a particularly sharp example, see Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063 (1980).

\textsuperscript{139} One may say of the policy scientist what Alexander Bickel wrote of the moralist: “[T]he moralist will find it difficult to sacrifice his aims in favor of structure and process, to sacrifice substance for form.” A. BICKEL, THE MORALITY OF CONSENT 30 (1975). One may also repeat Professor Bickel’s reply: “Yet process and form, which is the embodiment of process, are the essence of the theory and practice of constitutionalism.” \textit{Id.} But for good measure, one ought also to bear in mind the riposte of both the moralist and the policy scientist to all of this, to wit, that the separation of substance and process is illusory.
\end{quote}
driven entirely by its zeal to achieve stated ends,\(^{140}\) and Grant Gilmore’s Kafkaesque evocation of a society so bound up in the forms of law that it becomes a living hell,\(^{141}\) drifts the moderately progressive American constitutional ideal. I am not at all sure that we best pursue it by freeing our legislature entirely from the bonds of constitutionalism,\(^{142}\) trusting to nothing but the independent and largely unguided judgment of the courts to decide when the legislature goes too far.

**B. The Dangers of De-Evolution**

1. **The policy problem**

When the National Security Act of 1947 created the Air Force as a separate branch of the armed services,\(^{143}\) some members of the Congress worried that a constitutional amendment might be necessary.\(^{144}\) After all, the Constitution grants to the Congress only the authority “[t]o raise and support Armies,”\(^{145}\) “[t]o provide and maintain a Navy,”\(^{146}\) and “[t]o make Rules for the Government and Regulation of the land and naval Forces.”\(^{147}\) There is not a word about air forces or an Air Force or even air, nor is there reference to a discretion to establish armed forces generally. Nothing anywhere suggests that the Framers had in mind the adaptation of the war power to a changing technology that would permit soldiers to fly. There is only an army, which is the “land Force” and which is not to be a standing army\(^ {148}\) (the Framers’ conception of what an army


141. “The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.” G. Gilmore, The Ages of American Law 111 (1977).

142. I mean of course the constitutionalism of process. As far as I know, no one advocates an institutional evolution that would lead to the trampling of individual rights, but that conclusion depends, of course, on a prior conclusion about what rights the individual possesses.


146. U.S. Const. art. I, § 8, cl. 13 (emphasis added).


148. See U.S. Const. art. I § 8, cl. 12: “[N]o Appropriation of Money to that Use
would be was quite a narrow one\textsuperscript{149}]; and a navy, the "naval Force," apparently intended to move on the sea.

What should a de-evolutionary judge do if faced with a contention that the Congress exceeded the scope of its authority in establishing an Air Force? The original understanding certainly did not provide for an Air Force, and the Framers, who spent enormous time and effort working out precisely what armed forces they thought the united nation would need, took pains to specify, both in the text and in their debates, how sharp the limits were on what troops the government would have at its command.\textsuperscript{150} A judge who uses history in the almost slavish way that the Court did in \textit{Chadha} and \textit{Synar}, as revealing a world view that must be preserved intact, could easily rationalize a decision to sustain the establishment of armed forces that fly. To say that the original understanding must be re-interpreted in light of technological advance—a plausible-sounding answer—is in fact to step firmly into the evolutionary world, because there is no apparent reason to say that fresh knowledge about the science of aeronautics matters, whereas fresh knowledge about the science of politics or economics does not. There is no escape through some lurking hypothetical judgment on the part of the Framers that the Congress would adapt the military might of the United States to meet each fresh crisis because there was no such judgment. The original understanding seems unambiguous: So much of an armed force and no more.\textsuperscript{151}

\textsuperscript{149} Those who wrote and ratified the Constitution, many of them terrified of a large standing army that might become a power center, apparently envisioned a small national armed force that would, if necessary, supplement the state militias in putting down domestic rebellion or repulsing foreign invasion. See W. Reveley, \textit{War Powers of the President and Congress} 59-65 (1981).

\textsuperscript{150} In particular, as Alexander Hamilton emphasized in \textit{The Federalist}, supporters of ratification pointed out that the only forces that would exist were those that the Congress authorized. He drew a contrast on this point between the United States and Britain, where the monarch could raise the troops as well as lead them. See \textit{The Federalist} No. 69 (A. Hamilton).

\textsuperscript{151} I do not mean to suggest that the original understanding is unambiguous in the sense that it was unanimous or that it is certain or even that it is knowable; I am fully cognizant of the hermeneutical problems. See infra notes 244-46. The method illustrated by this paragraph is the method that the courts actually use, as best I am able to understand it. Having used the tools of the kind on which the courts usually rely in finding the original understanding, I conclude that \textit{a court} would find the original understanding unambiguous.
Similarly, as Erwin Chemerinsky has pointed out, the men who wrote and ratified the Constitution probably neither ex­pected nor intended that anyone but a male would ever serve as President of the United States.152 This original understanding is as good as written into the document: The President is always referred to as “He,” and there is nothing to suggest that the masculine pronoun was meant to include the feminine.153 It may even be the case (and here, I am less familiar with the evidence) that the Framers adopted the system that they did in part to perpetuate a patriarchal vision of how the world ought to work.154 Or perhaps (and my caveat is the same) they considered the attributes of “maleness,” as they understood them, vital to the success of their carefully worked out scheme of balanced and separated powers. In either of these circumstances, the Framers would have shared an understanding (albeit perhaps an unarticulated one) that the election of a woman—that any important role for a woman in governance of their new nation—would disrupt their system of government. What, then, ought a de-evolutionary judge to do if faced with the election of a woman as President?

The kind of rigid formalism that is said by critics to charac­terize the reasoning in such decisions as Chadha and Synar might well, on this evidence, lead to the conclusion that the Air Force is unconstitutional and that a woman cannot serve as Chief Executive. One who is convinced by more contemporary hermeneutic approaches to historical reasoning might argue that both the Air Force and the first female President could be saved by using the evidence to try to reconstruct, in our own imagina­tions, the entire world of the Framers, then in effect to step into their world (in our minds) and tell them about ours, letting the answers generated by that imaginary conversation give meaning to the textual provisions at issue.155 So far, however, the de-evo-
volutionary opinions handed down by the Supreme Court have evidenced little sensitivity toward the potential shortcomings of the preferred historical method, and consequently there has been no reason for the Justices to argue at this level of sophistication. They prefer to use the historical materials for the arguably ahistorical task of discovering concrete answers to the questions before them, worshiping, in the metaphor used earlier, at the shrine of the ancestors who lived and fought and designed a nation in the Golden Age.

Nevertheless, the de-evolutionary tradition might have answers to the potentially absurd results in these hypothetical cases. The de-evolutionary judge might respond that she reads the historical evidence differently, or even finds it unclear, but unless we want to pretend that the Constitution and its history are perfect, that they grant license for everything that we like and forbid only what we do not,156 then it is useful to assume that the evidence is as plain as one could ask. After all, the argument that evidence is unclear is presumably available to save any congressional initiative that the judge wants to save, and indulging so malleable an argument defeats the legitimating function of the de-evolutionary tradition. Advocates of the de-evolutionary tradition are assuming a particular standard of historical proof, and it is surely a standard short of certainty.

Yet unless the rigid rules reflected in de-evolutionary opinions are ignored (one might also say "softened") in particular cases, the de-evolutionary judge really does risk reaching results so absurd that they might make mockery of the judicial function. The de-evolutionary judge would probably sacrifice the disciplining rules of the tradition in cases of this nature. Doing so,

---

156. For a stylish critique of this notion, see Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981). A less generous version of the argument is Reynolds, Securing Equal Liberty in an Egalitarian Age, The Earl W. Nelson Memorial Lecture, University of Missouri School of Law, Columbia, Missouri (Sept. 12, 1986) (unpublished speech). The liberal insistence that the courts can protect a substantial subset of the rights defined by the liberal political program, and that in so doing the courts are acting as a legitimate brake on the will of the majority, bespeaks a potential contradiction so great that it might reasonably be described as the principal failure of liberal constitutional theory. Cf. Leeds, The Supreme Court Mess, 57 Tex. L. Rev. 1361 (1979) (making the point from the right); Tushnet, The Dilemmas of Liberal Constitutionalism, 42 Ohio St. L.J. 411 (1981) (making the point from the left).
however, requires resort to some extra-constitutional set of values that will tell the judge which cases are appropriate for what will be, in substance if not in form, an evolutionary rather than a de-evolutionary approach. Once the judge turns to an extra-constitutional source for the answer, she is doing nothing different than what her evolutionary colleague proposes to do with deference to congressional judgment on necessity.

It may be that the de-evolutionary judge will permit the new institutional arrangement—the fresh check—in a smaller number of cases than will the evolutionary judge, and this quantitative distinction might well have qualitative significance on the issue of legitimacy. Yet this essentially empirical assertion is also beside the point, because in order to decide which cases are appropriate ones for the import of extra-constitutional values, the de-evolutionary judge must test against her standard every case. The judge may reply that she is testing only the difficult cases against her standard, but that answer does no more than move the problem to a different level of abstraction. The judge is still invoking an extra-constitutional source, this time to tell her which cases are the difficult ones. From this paradox there is no apparent escape.

2. The logical problems

But even if these policy problems did not exist, the fundamental weakness of the de-evolutionary tradition should be plain: Even assuming away, for the sake of the argument, all the important hermeneutical questions involved with trying to piece together meaning of a text from historical fragments written by and about those who created it, the advocate of the de-evolutionary tradition relies on either a logical fallacy or an interpretive tautology. Because appeal to history has become such an important part of both jurisprudence and scholarship, and not merely when the subject is the separation of powers, it is worth considering both points in some detail.

a. The logical fallacy. The logical fallacy of the de-evolu-

---

157. As Owen Fiss has pointed out, the fact that judges may err does not make their decisions illegitimate. See Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 748 (1982) ("Not every mistake in adjudication is an example of lawlessness."). By implication, lawlessness turns in part on the frequency of error.
tionary use of history may best be understood by restating the de-evolutionary argument syllogistically:

(a) If the Framers did not want the separation of powers to evolve, they would have omitted any explicit provision for that evolution.
(b) The Framers omitted any explicit provision for that evolution.
(c) Therefore, the Framers did not want the separation of powers to evolve.

To logicians, this deceptive syllogistic structure exemplifies the logical fallacy of confirming the consequent. In this structure, irrefutably correct premises may be stated in support of conclusions that they do not prove. All that is really proved is that the conclusion is one possible explanation for the observed minor premise—which is known from the outset. The strong form of deductive reasoning, which is irrefutable as long as the major and minor premises are accurate, runs like this:

(a) All lawyers are thieves.
(b) Holmes is a lawyer.
(c) Therefore, Holmes is a thief.

The fallacy of confirming the consequent would structure the argument in this fashion:

(a) All lawyers are thieves.
(b) Holmes is a thief.
(c) Therefore, Holmes is a lawyer.

The point of the fallacy is that Holmes may be a thief for any number of reasons, even if he is not a lawyer. Similarly, the Framers may have omitted any mention of evolution of the separation of powers for any number of reasons, even if they had no concrete intention to forbid it. They may have thought the right of the Congress to reorganize the forms of government too obvious to need discussion; they may have preferred to leave the institutional arrangements to be resolved by future generations; or they may have left historical fragments yet undiscovered in which they pursue the matter in detail. Thus, the mere absence of available historical evidence is not proof that the Framers intended to forbid anything. The fact that there is “nothing in the history” to show that the Framers intended to approve legislative vetoes or civil damages awards against the President is not, by itself, proof that they would not have permitted either one, had the question ever arisen or had different records survived.
Even if one believes, moreover, that the historical records are adequate, there remains the difficulty of where we ought to search. The Supreme Court, for example, seems most frequently to cite the records of the Constitutional Convention of 1787, and constitutional scholars regularly follow the Court's example. But those records were sealed, unavailable to the ratifiers except in the form of carefully orchestrated polemics on either side.\textsuperscript{169} Whatever the recorded views of those who wrote the Constitution, the Constitution draws its authority from its ratification, not its drafting, and it was ratified in the state conventions that voted for it. The debates in those conventions and the public argument that preceded them and continued long after they ended should thus be considered the document's true legislative history.\textsuperscript{160} Until well into the twentieth century, when Professor Farrand compiled and published his edition of Madison's notes on the Philadelphia Convention, judges called upon to construe the provisions of the Constitution managed quite well without detailed discussions of what the Framers actually said to one another in their private debates.\textsuperscript{161} It is a bit peculiar to say now, two hundred years after ratification, that the history that really matters is that secret history that played no role in the nation's decision to adopt the new Constitution.

This is by no means an argument against any use of history in adjudicating separation of powers cases. But the almost mechanical way in which the history is generally examined is logically incorrect, given what its advocates are seeking to demonstrate.

\textit{b. The interpretive tautology.} The interpretive methodology of the de-evolutionary tradition proceeds from the central insight that the Framers spent considerable time working out the ways in which the various branches of the government they were designing should deploy their powers and check and balance one another. That this is what happened seems, as a matter


\textsuperscript{160} For discussions on whose intent should matter to true originalists, \textit{see}, \textit{e.g.}, Brest, supra note 93, at 214-15; Dworkin, \textit{The Forum of Principle}, 56 N.Y.U. L. Rev. 469, 482-88 (1981).

\textsuperscript{161} The first edition of Farrand's compilation was published in 1911. \textit{See generally Records of the Federal Convention} (M. Farrand ed. 1911). On the tools used by judges to interpret the Constitution in the years following ratification (when the notes of the Convention were unavailable), see Powell, \textit{The Original Understanding of Original Intent}, 98 Harv. L. Rev. 585, 913-24 (1985).
of history, essentially indisputable. Whether its interpretive consequences are as clear as the de-evolutionary judge believes is, however, a different question. Once again, it is useful to state the argument syllogistically:

(a) Constitutions should be interpreted according to the views of those who wrote them.
(b) The Framers wrote the Constitution.
(c) Therefore, the Constitution should be interpreted according to the views of the Framers.

The weakness of this syllogism is obvious: The major premise (a) essentially states what the de-evolutionary judge sets out to prove in the first place. Any effort at independent verification of premise (a) will end up looking an awful lot like the syllogism under examination.

But this particular statement of the interpretive argument leading the de-evolutionary judge back into the Golden Age is too simplistic. The de-evolutionary judge need not demonstrate that the history is the preferred source of authority in every case. The judge might even concede that in some cases—cases regarding the protection of individual rights, for example—the importation of other materials in an effort to breathe life into the text is sometimes appropriate. With respect to the structural clauses, however, the de-evolutionary judge is likely to remain adamant: The text is to be read through the glass of history, and arguments over morality and public policy are better addressed to another forum. The judge, in fact, has no choice but to insist, because the de-evolutionary tradition links history and legitimacy so closely. Thus, the restated syllogism might run like this:

(a) When the authors of a Constitution have spent considerable effort at working out a precise scheme for the operation of government, their views are binding on later interpreters.

162. The hermeneutical difficulties that might prevent a present-day reader from fully appreciating the Framers' concerns do not prevent the reader from knowing that the concerns were there. See infra text accompanying notes 292-99.

163. I have argued elsewhere that as long as the interpretive rules tightly discipline adjudication under the Constitution's structural clauses, some degree of freedom for judicial maneuver might be appropriate when adjudication proceeds under the more broadly written clauses protecting individual rights. See Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 YALE L.J. 821 (1985).
(b) The Framers spent considerable effort at working out a precise scheme for the operation of government.

(c) Therefore, the views of the Framers are binding on later interpreters.

But the tautology has not been eliminated; it has only been camouflaged. Premise (a) still states the argument, and an independent proof of that premise is still required.

I will not belabor the point with repeated examples; the formula should by now be sufficiently clear that the interested reader can perform the necessary iterations. I would suggest, however, that at the end there lies an ultimate syllogism marking the de-evolutionary tradition, a syllogism that might run something like this:

(a) We should follow the intentions of a Constitution's authors when the authors so intended.

(b) The Framers intended that we follow their intentions.

(c) Therefore, we should follow the intentions of the Constitution's authors.

The tautology is still present, only now it is even worse. Now the major premise is itself tautological in its self-referencing: "Follow intentions when the intentions are that they be followed." At this level, the argument for following the history has been reduced to gibberish, the more so because of the paucity of evidence for the second part of the tautology, the premise that the Framers wanted later generations bound to their intentions. In fact, the need for historical guidance is rendered coherent only when approached in a fashion quite different from that usually chosen by the courts and commentators in their efforts to justify the de-evolutionary tradition.

C. Things Fall Apart: The Problem With Muddling Through

If neither tradition seems wholly satisfactory, then perhaps we should continue as we have been—muddling through, waiting

164. The realization that this premise is tautological is hardly original. See, e.g., Chemerinsky, supra note 152, at 59; Kay, Preconstitutional Rules, 42 Ohio St. L.J. 187, 193 n.22 (1981).

for the courts to rule on the institutions and procedures established by the Congress, rarely able from one year to the next to predict how the Justices will view the next problem to arise. Muddling may not be so bad as it sounds, for no matter what the level of doctrinal incoherence, it can hardly be said that the separation of powers jurisprudence has led to the sort of disastrous oppression, tyranny of the legislature, or tyranny of the judges, that some predict should the Court not come up with a clearer and more coherent jurisprudence (and also a correct one) of fundamental rights.¹⁶⁶ So maybe nothing is broken, and nothing need be fixed.

Actually, that conclusion has matters exactly backward. We may be able to afford to muddle—to let the Court meander—when the issue is the construction of the provisions of the first, fifth, or fourteenth amendments. For reasons set out elsewhere, judicial muddling on issues of fundamental rights does not necessarily represent a threat to the legitimacy of American constitutional democracy.¹⁶⁷ It may instead promote a healthy dialogue on the proper contours of those rights.¹⁶⁸ The structural constitutional provisions, however, present quite a different interpretive problem, because in our Constitution they serve quite a different constitutive purpose. All of the Constitution’s clauses serve in some sense to restrain the power of the state that they constitute, but the structural clauses, unlike the clauses protecting individual rights, are concerned with authority as well as power. The individual right clauses may be used to establish a catalogue of ends that the state may not pursue, but in a nation whose theory of government rests on a written Constitution, merely concluding that an end is not prohibited cannot possibly demonstrate the state’s authority to act as it wishes. There remains the question of how the constitutional state is permitted to pursue its ends, and the structural clauses are the place, if there is one, where the answer must be found when the citizen demands of her government: “By what right do you do this?”

“In reality,” Garry Wills has written, “nations get away with

¹⁶⁷. See, e.g., Carter, supra note 118; Schauer, supra note 125; Wellington, The Nature of Judicial Review, 91 Yale L.J. 486 (1982). Recent dialogic conceptions of constitutional adjudication owe much to the work of the late Alexander Bickel, especially The Morality of Consent which described an “endlessly renewed educational conversation” between the Supreme Court and its constituency. A. Bickel, supra note 139, at 111.
¹⁶⁸. See Carter, supra note 51, at 851-63.
whatever they feel they can, principle or no." Although Professor Wills wrote these words in the course of a discussion of international relations, the central claim still points to the fundamental problem which liberal political theory was developed to resolve—the tyranny inherent in the notion of the state. Liberal theorists have approached the problem by creating ever-more-sophisticated visions of "authority" without which the state cannot act lawfully. The raw power of the state may still lead to oppression, but in the absence of authority, the oppression is a lawless one, and its appearance dissolves the claim of the state on the allegiance of its citizens. A state without authority, in short, is a state that cannot lawfully repress popular revolution.

Institutional design is crucial to an appreciation of the nature of a state's authority. One may believe, with the mainstream liberal theorists and with many of the Framers, that the great danger to any community is the tendency of citizens toward self-aggrandizement; that the state exists primarily to prevent citizens from oppressing their neighbors for the sake of this tendency toward "possessive individualism", and that the institutions of the state must be designed in a way that also restricts the natural tendency of those citizens who serve the state to do the same thing. Or one may begin, as others among the Framers did, from republican premises, considering the state as a means for the promotion of virtue and a sense of civic responsibility, and concluding that the institutions of the state must be designed to alleviate the likelihood or at least the effects of corruption, that is, in Bruce Ackerman's fine phrase, to "economize


170. Cf. J. Rawls, A Theory of Justice 112 (1971) ("By the principle of fairness it is not possible to be bound to unjust institutions, or at least to institutions which exceed the limits of tolerable injustice . . . . In particular, it is not possible to have an obligation to autocratic and arbitrary forms of government."). Joseph Raz has suggested determining the "legitimacy" of authority in part by the role of that authority in people's practical decisions about what they ought to do. Raz, Authority and Justification, Phil. & Pub. Aff., Winter, 1985, at 3. But of course the problem for today's moral theorists is what it was for Locke: One person's legitimate authority might be another's illegitimate oppression. Cf. I. Shapiro, The Evolution of Rights in Liberal Theory 113-18 (1986) (discussing lack of standards in Lockean right to resist).


170. Cf. J. Rawls, A Theory of Justice 112 (1971) ("By the principle of fairness it is not possible to be bound to unjust institutions, or at least to institutions which exceed the limits of tolerable injustice . . . . In particular, it is not possible to have an obligation to autocratic and arbitrary forms of government."). Joseph Raz has suggested determining the "legitimacy" of authority in part by the role of that authority in people's practical decisions about what they ought to do. Raz, Authority and Justification, Phil. & Pub. Aff., Winter, 1985, at 3. But of course the problem for today's moral theorists is what it was for Locke: One person's legitimate authority might be another's illegitimate oppression. Cf. I. Shapiro, The Evolution of Rights in Liberal Theory 113-18 (1986) (discussing lack of standards in Lockean right to resist).

on virtue." But under either set of premises—and it seems clear that those who wrote and ratified the Constitution proceeded under one or the other or some admixture of the two—authority and institutional design are inextricably linked. The state acts legitimately only when the institutions of the state are established in a way that limits the possibility of self-aggrandizement by state officials, minimizes the effect of the corruption of those officials, or both. Because institutional design is precisely what the Constitution's structural clauses are about, those clauses are the place to search for the legitimacy, and hence the authority, of the national government the document establishes.

The problem of authority is also central to that subset of liberal political theory that we call constitutional theory. Mainstream constitutional theorists take as a fundamental precept the authority of the Constitution itself. The main task of constitutional theory was for many years what might be called the "justification project," and for many theorists it still is. The justification project propounds and tests principles that the theorists hope will show why the pronouncements of the Supreme Court should be considered as authoritative as the provisions of the document those pronouncements interpret. As a result of that testing, some principles become for a time a part of the paradigm within the limits of which constitutional theorists work, but as the principles are subjected to greater scrutiny, most are discarded. That search continues, and it is an important search, although in its most controversial form—the hunt for the Grand Theory to "prove" the rightness or wrongness of decisions on which rights are fundamental and which are not—it is somewhat beside the present point.

Yet the fundamental rights cases deserve a brief mention. The explosion in the Court's fundamental rights jurisprudence and the rise of the administrative state—two developments that virtually coincide as historical moments—have provided the impetus that drives another, more explicitly normative group of
constitutional theorists. For this second group, authority is less important than efficacy, and finding a theory that ties particular results to the Constitution is less important than demonstrating that those results are good. These are troubled times for the notion of authority, nearly unbearable ones for proponents of liberal democratic theory, and those constitutional theorists who have never been much concerned with authority, are now in much the same position as a group of farmers in Chinua Achebe's novel *Things Fall Apart* to which I earlier made reference. These were the farmers who watched the labor of their neighbors while rarely planting any crops of their own, then laughed at the long drought and torrential rains that destroyed their neighbors' crops:

Some farmers had not planted their yams yet. They were the lazy easy-going ones who always put off clearing their farms as long as they could. This year they were the wise ones. They sympathized with their neighbors with much shaking of the head, but inwardly they were happy for what they took to be their own foresight.  

The theorists who disbelieve in the notion of authority, like the farmers who dawdled and procrastinated and planted no crops, might well feel like saying, "We told you so," and those who have struggled to demonstrate the possibility of legitimacy may have no ready rejoinder.

But it is precisely at such times as this, when the notion that legal authority can really be demonstrated is most in doubt, that it is especially crucial to try. The rule of law in general, and of constitutional law in particular, will not be possible unless some connection can be shown between what the government does and what the Constitution permits. Because constitutional authority will flow from the clauses establishing the structure of the government (if indeed it flows from anywhere), the analysis of those structural clauses, and of the system of balanced and separated powers that they establish, seems the sensible place to begin. Thus, unless the jurisprudence regarding the structure of the government, including the system of balanced and separated powers, relies for its force on disciplining interpretive rules capable of generating answers that are in most cases relatively determinate, the legitimacy of the entire project of constitutionalism, and of judicial review in particular, is set seriously at risk.

174. C. Achebe, supra note 84, at 25.
IV. THE HARD CHOICE, AND ITS RATIONALE

Neither choice is entirely attractive, but a judge who must decide a case requiring interpretation of the political Constitution—the Constitution of government structure—must choose nevertheless. If, as I have argued, merely continuing to muddle—relying on instinctive guesses and a rough common sense—will do little to promote the legitimacy of the constitutional system, then the judge requires a set of rules to discipline what would otherwise be complete creative freedom. Interpretive rules that serve to render the constitutional provisions establishing the separation of powers relatively determinate, that help give them content independent of judicial bias, will serve the purpose of restraint better than rules that do not. Any interpretive rule defined with sufficient rigor can serve this purpose, but if the matter in issue is the justification for judicial action under the structural clauses, not all rules are equally valid.

For reasons that I will explain, the aims of liberal democratic theory and of constitutionalism generally will best be served if interpretation of the structural provisions of the political Constitution begins, and frequently ends, with consideration of the text and its historical background. And while as currently practiced, the de-evolutionary tradition relies on a historical methodology that contemporary hermeneutical theory (as well as simple logic) reveals as bankrupt, de-evolutionary judges nevertheless are steering closer to the winds of legitimacy than are their evolutionary colleagues. Thus, I will propose a modified version of the de-evolutionary approach to adjudication under the structural clauses, an approach which will supply a better set of interpretive rules, and thus a more legitimate and legitimating set of results, than will its evolutionary cousin. I will further argue that even the de-evolutionary tradition, properly understood, leaves substantial room for development of new institutions for the exercise of governmental power, because, when the history and text fail to supply answers that are sufficiently clear, the deference that characterizes the evolutionary tradition is ap-

---

175. I define the "political Constitution" with a smidgen more precision in Carter, supra note 118, at 72-81. See also Carter, supra note 163, at 853-70.

176. I mean this to be a partial rejection—although not a refutation—of the deconstructionist claim that "there are no texts, but only interpretations." See H. Bloom, The Breaking of Form, in H. Bloom, P. de Man, J. Derrida, G. Hartman, & J. Miller, Deconstruction and Criticism 1, 7 (1979) [hereinafter Deconstruction and Criticism].
propriate, and the means for exercising that deference is the much-maligned political question doctrine.

To understand why the de-evolutionary approach, although in need of modification, is the more sensible one, it is necessary first to sketch very briefly the reasons that the major figures in the development of liberal political theory in general, and the authors of the American Constitution in particular, thought that the legitimacy of government required that the powers of government be distributed among its agencies in a way that permitted them to check and balance one another. With that understanding, it will be possible to investigate the relationship between the reasons that moved the Framers and the nature and legitimacy of constitutional adjudication as we have come to understand it. From this investigation will flow the reasons to reject the evolutionary tradition and to establish the modified de-evolutionary tradition as the proper guide for separation of powers jurisprudence.

A. Historical Currents

The notion that the powers of the government should be balanced and separated in order to avoid tyranny is much older than the American Constitution. The notion is older than the writings of Montesquieu, whose views on the relationship between citizen and state powerfully influenced those who designed the American system of federal government. It is older, too, than the work of Locke, whose Second Treatise was

---

177. Some notion of checks and balances, whether formal or not, might be implied in the very idea of government. Certainly it is implied in the idea of constitutional government. This is by no means a recent discovery. For example, in 1901, James Bryce of Oxford published a study of governance in various societies through the ages, illustrating different ways in which checks and balances operate in each. See generally J. Bryce, Studies in History and Jurisprudence (1901).

178. Although, as Rogers Smith has pointed out, it is a mistake to ignore the effect of the principles set down by the natural law liberal John Locke, see R. Smith, supra note 12, at 15-16, it was the republican Montesquieu (along with James Harrington) whose political theory was far more influential in developing the original American constitutional structure.

The role of political theory in the deliberations of the Framers is entitled to more detailed and graceful treatment than I am capable of in this paper, and fortunately has received it. See, e.g., B. Bailyn, The Ideological Origins of the American Revolution (1967); F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (1985); J. Pocock, supra note 72; G. Wills, supra note 127; G. Wood, supra note 127.
read and either refined or misunderstood by Montesquieu. In fact, some vague notion of checks and balances has existed as long as there have been theories of government, although, as M.J.C. Vile has pointed out, there is a historical limit beyond which one cannot sensibly go in seeking the origin of the theory: “The idea of an autonomous ‘legislative power’ is dependent upon the emergence of the idea that law could be made by human agency, that there was real power to make law, to legislate.”

If laws are handed down by God, then there is no role for humanity but enforcement. Of course this, too, is a kind of separation of powers, the divine and the mortal, but it is a weak model at best.

In seeking the early articulation of ideas that sound like our modern notion of the separation of powers, one might look, for example, at Plato's *Republic*, where Socrates is quoted as saying:

I suppose that if the rulers are to be worthy of the name, and their auxiliaries likewise, the latter will be willing to do what they are commanded and the former to command. In some of their commands the rulers will in turn be obeying the laws; in others—all those we leave to their discretion—they will imitate the laws.

Or one might seek the origins in the political theories of Aristotle and Cicero, who argued for a vigorous separation of the lawgiving and administrative functions of rule. But these are false leads; it is unlikely that the theorists of classical antiquity had in mind anything remotely resembling what we now think of as the separation of powers, largely because they shared nothing approaching the modern conception of liberal democracy.

179. The eighteenth-century British political theory so influential on early American thought “owed more to Machiavelli and Montesquieu than it did to Locke.” G. Wood, supra note 127, at 29. See generally J. Pocock, supra note 72. The colonial pamphleteers of popular mythology may not even have been terribly conversant with Locke's work, see B. Bailyn, supra note 178, at 29 (“The citations are plentiful, but the knowledge they reflect . . . is at times superficial. Locke is cited often with precision on points of political theory, but at other times he is referred to in the most offhand way, as if he could be relied on to support anything the writers happened to be arguing.”), or, for that matter, with much else, see G. Wood, supra note 127, at 14 (“They cited and borrowed promiscuously from almost every conceivable English writer.”). But even if the influential thinkers of the time did not read Locke's *Two Treatises* with care (or perhaps at all), there is evidence of a relatively widespread familiarity with some of his other work. See J. Fliegelman, supra note 154, at 38.


182. See M. Vile, supra note 180, at 21-27.
Rather, the political theory of ancient Rome and Greece, one that was to dominate political thought through much of the Middle Ages, was the theory of mixed government. 183

“Mixed government” theories are found, albeit in somewhat different forms, in the works of Aristotle, Plato, and Polybius, and were later echoed by both theologians and secular political theorists throughout Europe until the outbreak of the English Civil War. The theory of mixed government held that in order to succeed, a government must divide its authority among the powerful interest groups in society, so that no one of them can dominate the others. 184 As Polybius put it in his Histories, the government should be arranged so that no group, “exceeding its own norm, might veer toward its own perversion.” 185 Each one, he wrote, by “pulling the other back, might keep the balance from sinking much to either side.” 186 Mixed government theory is in one sense a theory about democracy, concluding as it does with some requirement of representation. In another sense, it is a theory about structure, because of its emphasis on balancing as a means for preventing oppression. Ultimately, however, it is a pragmatic theory about what government must do to survive, because as the ancients were clearly aware, a government that ignored or oppressed powerful constituents was simply providing a focus for the discontent that could ruin the experiment with national government. 187

Mixed government theory is different from separation of powers theory because it emphasizes a distribution of govern-

183. See G. WILLS, supra note 127, at 97-107 (intellectual history of the theory). For a particularly evocative analysis of mixed government in Aristotelian thought, see J. POCOCK, supra note 72, at 66-77.

184. The theory was not justified in precisely these terms. Rather, mixed government theorists saw themselves as borrowing the most attractive features of monarchy (rule of the one), aristocracy (rule of the few), and democracy (rule of the many), while avoiding the “perversions” of each: the tendencies respectively of monarchy to degenerate into despotism, of aristocracy to collapse into factionalism, and of democracy to disintegrate into anarchy. See G. WOOD, supra note 127, at 197-98.

185. POLYBIUS, HISTORIES, bk. 6, § 10, l. 7, quoted in G. WILLS, supra note 127, at 99.

186. Id.

187. Described this way, mixed government theory has much in common with the political theory of pluralism, whose intellectual precursor it obviously is. Cf. R. DAHL, supra note 115 (arguing that interest groups will interact within a democracy without regard to governmental structure).
ment functions among interest groups, rather than a distribution among agencies without regard to who may run them. But the theories are similar, too, because each sees the necessity of avoiding the concentration of power within a small circle within the government, and each seeks to avoid this concentration and its concomitant oppression through diffusing the powers of government in ways that permit someone—a coalition of interest groups or a combination of autonomous agencies—to check and balance any potential concentration.

In medieval Europe, the theory of mixed government was pressed in support of the argument that recognition of the power of feudal lords and a degree of respect for popular will were appropriate restraints on what would otherwise be the unbridled authority of the king. Thus, the barons whose arms kept the king from falling and the people at large, on whose peace he equally relied, should have some formal role in checking his authority. He could not govern without them, and he therefore should not be permitted to try. By the seventeenth century the theory dominated among political philosophers in England, too, and seemed an acceptable theory of politics until the English Civil War revealed its weakness and arguably ended its ascendancy. A theory of government that could not resolve such a conflict short of bloodshed was inadequate on its face; by the time Charles I was finally executed, the theory of mixed government, although retaining its name, had evolved into something quite different, although not quite as different as it would become in the wake of the American Revolution.

Quoting Professor Vile once more: “The execution of the King, and the abolition of the House of Lords, destroyed the institutional basis of the theory of mixed government, and any justification of the new constitution which was to be framed for England would have to rest upon a different theoretical basis.” Mixed government could not explain the way a nation was to be ruled when two of the great power centers that had served as balances under the theory, the monarchy and the aristocracy, had been overthrown. Cromwell’s solution, although he gave it no name, was a theory of separation of powers. The new

188. No matter what view one takes of the nature of feudal society—and several are available—it is plain that the feudal system of governance rested in part on an appreciation of the interdependence among those holding practical power in society. See N. Cantor, Medieval History: The Life and Death of a Civilization 214-23 (2d ed. 1969).
189. M. Vile, supra note 180, at 47.
Constitution provided for a Lord Protector and a Parliament who would, through a distribution of administrative and legislative functions between them, be able to check any tendency in the other toward tyrannical rule. Although the Protectorate did not long endure, by the time of the Restoration the twin notions of a rule of law that would bind even the monarch and of checks and balances to prevent the tyranny of at least the legislature were firmly established in English politics.

John Locke, although clearly not writing on a blank slate, took upon himself the task of harmonizing these twin notions. If the legislature was supreme, what sense did it make to say that there were checks on its activities? And if checks were to be placed on legislative activity, how could one describe the legislature as supreme? Locke resolved the tension through a careful definition of the meaning of legislative supremacy. The king was bound by laws that were properly enacted by the Parliament, and in that sense, the Parliament was supreme, because "what can give laws to another, must needs be superior to him." The laws, however, were to be enacted only in accordance with the legislature's own rules and should be general in nature, "not to be varied in particular cases." The laws proposed by the legislature would, moreover, be subject to executive veto and the legislature could not restrict the executive's "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it." So while the legislature was formally supreme, the executive—the monarch—retained a freedom of action sufficiently broad and sufficiently vague to prevent the Parliament from reducing him to its agent.

It remained for Montesquieu to take these tangled strands of mixed government theory, legislative supremacy, and balanced government, and transform them into what is generally described as the first articulation of a true separation of powers.

193. Id. ch. XI, § 136.
194. Id. ch. XI, § 142.
195. See id. ch. XIV, §§ 159-60.
196. Id. ch. XIV, § 160.
For Montesquieu, as for Locke, only through separating its powers could a government make a legitimate claim to be governing its citizens under the rule of law. If the legislature also executed the law, then those who did any deed under the guise of government authority would adjust the law to their liking. Although the traditional notion held that the courts of justice derived their function from the king—from the executive authority—these, too, had to be rigorously independent of direct executive or legislative influence. Even though Montesquieu's conception of the nature of executive, legislative, and judicial functions might be in some ways startlingly different from the American model, he was quite clear in his view that some measure of separation of powers, some system of checks and balances, was an indispensable prerequisite for the legitimacy of any government structure that would hold coercive power over the autonomy of individuals.

In other words, a government in which the powers were not separated, with all the friction, competition, and inefficiency that the separation entails, was not a legitimate government and consequently could make no fair claim to the allegiance of the governed.

Yet, as a number of students of constitutional history have recently pointed out, the notion that the powers should be separated may be—and, at the time of the Framing, apparently

---

197. M. Montesquieu, supra note 99, at bk. XI, ch. 6, paras. 4-5.
198. Id. at bk. XI, ch. 6, para. 5 ("[T]here is no liberty, if the judiciary power be not separated from the legislative and executive.").
199. In particular, Montesquieu viewed the judiciary power as an aspect of the executive power—as "the executive in regard to things that depend on the civil laws," by which he meant both criminal punishment and private disputes. See id. bk. XI, ch. 6, paras. 1-2. Montesquieu, writing against a mixed government background, envisioned different constituencies in his different branches, and therefore "[h]e did not have to face Madison's problem of three powers all expressing a single interest (the people's) . . . "). G. Wills, supra note 127, at 121.
200. See, e.g., M. Montesquieu, supra note 99, at bk. XI, ch. 6, para. 42 ("Were the executive power not to have a right of restraining the incroachments of the legislative body, the latter would become despotic" because "it might arrogate to itself what authority it pleased"); id. bk. XI, ch. 6, para. 55 ("The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative."); id. bk. XI, ch. 6, para. 59 ("Were the executive power to determine the raising of public money . . . liberty would be at an end because it would become legislative in the most important point of legislation."). W.B. Gwyn has argued that Montesquieu's central concern was with efficiency of the separation of powers, not with the checking function. W. Gwyn, supra note 191, at 104. As the text suggests, I read Montesquieu to suggest the critical importance of separation and checks primarily in order to reduce the risk of despotism.
was—understood in several different ways. Locke and Montesquieu argued that the powers of government should be separated primarily as a prerequisite to legitimacy. Their main concern was not with how checks and balances might work out in practice. In its practical aspect, a system of separated powers may be viewed, for example, as promoting efficiency by creating a division of labor, reflecting what Garry Wills has called a judgment on how “the functions of government [should] be divided up by ministers in order to get things done.” There is little to suggest, however, that the Framers and ratifiers of the American Constitution had efficiency (as against energy) at the front of their minds, and Professor Wills’ conclusion that considerations of efficiency primarily moved Hamilton and Madison is probably a bit exaggerated. To be sure, as contemporary theorists have pointed out, there is some tension between the concept of a system of checks and balances and the idea that the powers of government should be separated. If the branches of government must interact in order to check one another, then the separation of their powers is not a pure one. But in the debates over the ratification of the American Constitution, these concepts were quite closely linked to one another and to the general notion of governmental legitimacy.

When James Madison commented in The Federalist No. 47 that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many

201. For a concise review of some of the differing understandings on separation of powers during the pre-constitutional era, see M. Vile, supra note 180, at 119-75. See also F. McDonald, supra note 178, at 80-87 (differing understandings on Montesquieu).

202. See G. Wills, supra note 127, at 113 (Locke and Montesquieu “were primarily concerned with this question of the right to rule rather than the practical problem of maintaining the separation on which this right is based.”).

203. Id. at 109.

204. [T]he Framers of the Constitution were not trying to create a government that would discern national goals and serve them efficiently and with dispatch; they were trying to create a limited government that would serve only those goals that could survive a process of consultation and bargaining designed to prevent the mischief of factions and the tyranny of passionate majorities or ambitious politicians.


205. See G. Wills, supra note 127, at 109-10.

206. See, e.g., M. Vile, supra note 180, at 33 (“The two doctrines are not merely logically distinct, but to a considerable extent they conflict with each other.”); G. Wills, supra note 127, at 119 (“Checks and balances do not arise from separation theory, but are at odds with it.”).
... may justly be pronounced the very definition of tyranny," he gave voice to a sentiment widely held among those who supported ratification. "[T]he separation of the executive from the legislative," William Davie, who had been at Philadelphia, told the North Carolina ratification convention, is "a principle which pervades all free governments." William Davie, who had been at Philadelphia, told the North Carolina ratification convention, is "a principle which pervades all free governments." "[B]lending the legislative, executive, and judicial powers," John Julius Pringle warned in South Carolina's convention, "would violate the soundest principles of policy and government." This is all legitimacy language of the sort used by Locke and Montesquieu. From the available evidence, it does not appear that any opponents of ratification contended that a system of separated powers was a bad thing. Rather, the opposition focused on what was considered the vital concomitant of that separation: the ability of the branches to check and balance one another.

The system of checks and balances embodied in the American Constitution occupied far more time at the Philadelphia Convention than anything else, for a reason that should be obvious: the 1787 Constitution was primarily a constitution of structure, a constitution that defined and constituted a government. Even two hundred years later, when most people probably think of the document as primarily a device for the protection of individual rights, the most cursory examination reveals the comparative wealth of detail with which those who wrote the Constitution sketched out their vision of how the government would function. A system of carefully balanced and separated powers was, along with an experiment with new notions of representation, the cornerstone of this act of constitutional creation.

To be sure, modern political scientists have amply demonstrated how impoverished a theory the Framers possessed of the nature and needs of representative government. The Framers understood less than they thought they did about the potential power of factions and interest groups, the advantages enjoyed

---

208. 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 103 (J. Elliot ed. 1836) [hereinafter Debates].
209. Id. at 269.
210. I emphasize that the wealth of detail is comparative. Thus, I do not suggest "that the structural clauses are always more concrete than individual rights provisions or . . . that they are always clear at all." Carter, supra note 118, at 73.
211. See supra note 115.
212. The inability of the Framers' political science to prevent small, well-organized groups from developing disproportionate influence in the legislative process is virtually
by incumbents when they stand for re-election, the way in which a legislature aggregates or fails to aggregate preferences, and so forth. But even though the representative character of the new government was sometimes cited as one check on abuse, the Framers' understanding of the nature of representation bears at best a tangential relationship to their more general concept of a system of balanced and separated powers. In their consideration of the ways in which the branches would check each other, as in the considerations of Locke and Montesquieu, it mattered only a little how those who would exercise the various powers were selected, still less precisely who was represented, as long as the authority that each branch ultimately would exercise was effectively checked by the others; as long, that is, as the powers of the government really were balanced and really were separated.

In the ratification debates, most of the arguments over checks and balances dwelt on the question whether the President had too much power. This was predictable. Under the Articles of Confederation, there had been no executive authority worth mentioning, and an important Federalist goal had been reining in something they considered far more dangerous than a strong executive: a legislature with too much power. So great was the fear of the legislature that many delegates to the Philadelphia Convention argued strongly against impeachment and


214. See supra note 315.

215. See, e.g., *THE FEDERALIST* No. 39 (J. Madison) (representation in republican government); *THE FEDERALIST* No. 45 (J. Madison) (election as check on President); *THE FEDERALIST* No. 52 (J. Madison) (election as check on members of House of Representatives).

against permitting the Congress to override the President’s veto.217

But the Anti-federalists were convinced that the proposed Constitution had matters exactly backward. Dismayed by the product of the Philadelphia Convention, the Anti-federalists listed among their most important complaints the assertion that the constitutional structure provided too few checks on presidential authority.218 “We are not indeed constituting a British Government,” a disgusted George Mason warned at the Philadelphia Convention, “but a more dangerous monarchy, an elective one.”219 “Can you search the President’s closet?” Patrick Henry demanded of Virginia delegates. “Is this a real check?”220 James Monroe—who would later serve as Chief Executive—gloomily agreed: “I can see no real checks [on the President] in it.”221 Sometimes they were quite explicit in their invocation of Montesquieu’s ideal. The dissenters from the Pennsylvania convention’s ratification vote complained of a “dangerous and improper mixture of the executive with the legislative and judicial,”222 while a critic wrote to James Iredell, a supporter of ratification, speculating on the need for a fresh convention to write a new Constitution, which, unlike the one resulting from Philadelphia, would “secure our political liberty by separating the executive, legislative, and judicial powers.”223

The Federalists were well armed for these arguments. Ham-

217. See, e.g., 1 Records of the Federal Convention 98 (M. Farrand ed. 1911) (J. Wilson) [hereinafter Records] (if the Congress can override the veto, it “can at any moment sink [the executive] into non-existence”); 2 id. at 64-65 (G. Morris) (warning against rendering the President “dependent on those who are to impeach”). See also 4 Debates, supra note 208, at 117 (S. Spencer) (impeachment and veto combine to render Chief Executive helpless).

218. See generally H. Storing, What The Anti-Federalists Were For 53-63 (1981); Kenyon, Men of Little Faith: The Anti-Federalists on the Nature of Representative Government, in The Confederation and the Constitution: The Critical Issues 56, 69-80 (G. Wood ed. 1973). The Anti-federalists would have been more comfortable, of course, arguing the more central issue—whether the United States should have a strong national government or whether it (they) should comprise a union of strong, independent states. The product of the Convention and the sentiment of the time foreclosed that possibility, so they were forced to concede the idea of national government and argue over whether checks and balances were adequate. See G. Wood, supra note 127, at 519-24, 547-49.

219. 1 Records, supra note 217, at 101.

220. 3 Debates, supra note 208, at 165-66.

221. Id. at 219.

222. 2 Documentary History of the Ratification of the Constitution 635 (M. Jensen ed. 1976) [hereinafter Documentary History].

223. 15 id. at 364.
ilton, in The Federalist No. 69, took pains to set forth the differences between the President of the United States and the King of England. The President, he pointed out, would serve in office only for four years, not for a lifetime; he could be removed from office on impeachment by the House of Representatives and conviction by the Senate; and, unlike the situation in England, a two-thirds majority of both Houses of the Congress could override the executive's veto. 224 Tench Coxe, writing pseudonymously as "An American" in an essay that would be widely reprinted, responded to the Anti-federalist attack with a point-by-point rebuttal of the claim that the legislative and executive powers were intermixed. 225 William Davie assured delegates to North Carolina's convention that it was "impossible for human ingenuity to devise any mode of election better calculated to exclude undue influence." 226 Charles Pinckney confidently informed South Carolina's ratifying convention that "corruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed." 227 Delegate after delegate, with a confidence and a fervor that would astonish modern politicians, insisted in the ratifying conventions that the availability of the remedy of impeachment would sufficiently rein in presidential abuses of power. 228

Again and again, the Federalists pointed to the role of checks and balances in the operation of government under their new Constitution. The adequacy of the checks, as the crucial issue on which the ratification debates turned, was consequently the key (in the public mind, at least) to the legitimacy of their system. I have already mentioned Hamilton's exhaustive listing of the checks on the President in The Federalist No. 69. Madison, in The Federalist No. 47, agreed with the Anti-federalists that "the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct" was an "essential precaution in favor of liberty." 229 In the next

224. See The Federalist No. 69 (A. Hamilton).
225. 2 Documentary History, supra note 222, at 140-41.
226. 4 Debates, supra note 208, at 22.
227. Id. at 302.
228. See, e.g., 3 Debates, supra note 208, at 486 (E. Randolph) ("If he be not impeached, he may be displaced at the end of the four years."); 4 id. at 32 (J. Iredell) (impeachment means President is "amenable for his conduct"); 4 id. at 281 (C. Pinckney) ("No man, however great, is exempt from impeachment and trial.").
paragraph, he repeated the point.\textsuperscript{230} Yet all of this was only prologue to his argument that absolute separation was not required and had never been practiced among the several states.\textsuperscript{231} He warned in \textit{The Federalist} No. 48 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 government in the same hands.”\textsuperscript{232} And, as he explained in \textit{The Federalist} No. 51, some degree of connection was inevitable, even desirable, because although “[a] dependence on the people is, no doubt, the primary control on the government,” nevertheless, “experience has taught mankind the necessity of auxiliary precautions.”\textsuperscript{233}

The precautions he had in mind involved building into the constitutional system a set of checks through which each agency of government would be able to balance and resist any arrogation of power by another. This system of checks and balances, far expanded from anything in the political theory of Locke and Montesquieu, would be the principal means through which the new government would avoid the tyranny conceded to exist when the powers were not separated. The system, moreover, could operate within a branch of government as well as in relationships among the branches. For example, Madison conceded, in tones reminiscent of Locke, that the legislature probably would be dominant in the new government because “it is not possible to give to each department an equal power of self-defense,”\textsuperscript{234} but concluded that this risk had a structural separation remedy: Bicameralism, he explained, would limit the opportunity for “dangerous encroachments,” by the legislature.\textsuperscript{235}

\textit{The Federalist} No. 51 reflects the classical republican fear of corruption and establishes a liberal individualist kind of solution: “Ambition must be made to counteract ambition.”\textsuperscript{236} Thus, under the government proposed in the Constitution, “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the pri-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 336-37.
\item Id. at 337-42.
\item \textit{The Federalist} No. 48, at 347 (J. Madison) (B. Wright ed. 1961).
\item \textit{The Federalist} No. 51, at 356 (J. Madison) (B. Wright ed. 1961).
\item Id.
\item Id. at 357.
\item Id. at 356.
\end{enumerate}
\end{footnotesize}
vate interest of every individual may be a sentinel over the public rights." This was for the Federalists the ultimate and, they no doubt thought, the unanswerable rejoinder to the Anti-federalist criticism that the powers were not separated. They are separated in a sense, the Federalists responded; and to the extent that they are not, their mixture, because it involves checks and balances, will further the purpose for which the powers are separated—the prevention of tyranny.

What matters about all of this debate is not who was right and who was wrong, but rather the spin that it placed on the notion of legitimacy. The ideal the critics clearly had in mind, the model, too, that the Federalists sought to defend, was one in which a system of balanced and separated powers operated both to prevent any single branch from arrogating too large a share of authority and, a different and equally important point, to prevent each branch from abusing the powers it did hold. For the Framers, then, legitimacy—rule in accordance with law—was not a function of separation alone, as it arguably had been for both Montesquieu and Locke; it was a function as well of the degree to which the branches were able to check one another in the exercise of power. Suffice it here to conclude that for the writers and ratifiers of the Constitution, the separation of powers and the system of checks on the exercise of power were intended foremost as a means for preventing tyranny, and, as such, were viewed as vital to the legitimacy of the American constitutional experiment.

B. The Importance of Constitutional Structure

Although modern moral philosophy has added other criteria for judging the legitimacy of a government, the notion that a

237. Id.

238. Checks and balances are, as a matter of intellectual history, an aspect of mixed government theory, not of separation of powers, and the consensus among modern theorists is that checks and balances are in some tension with separation of powers. See M. Vile, supra note 180, at 32-34, 53-75; G. Wills, supra note 127, at 119. However, as Professor Vile has noted, "[t]hough the theory of mixed government is not logically connected with the theory of separation of powers, the former theory provided suggestive ideas which formed the basis of the new doctrine." M. Vile, supra note 180, at 34. The American constitutional achievement involved blending the two in the structure of a single government—a democratic republic. "This revolution marked an end of the classical conception of politics and the beginning of what might be called a romantic view of politics." G. Wood, supra note 127, at 606. How depressed the Framers might be to learn what contemporary political science thinks of their romanticism!

239. I do not mean this statement to be taken as a suggestion that moral philosophy
government cannot be legitimate unless its most fundamental powers are separated in a way that checks and balances their exercise has a continuing intuitive appeal. To imagine a government in which all or most authority resides in a single branch or individual or faction or, as we now must add, party organization, is to imagine what we today would call a totalitarian state.240 Thus, even today’s evolutionary judges and scholars want to preserve some version of balanced and separated powers. It may be true that the rise of administrative government has drastically altered the system of checks and balances that the Framers expected.241 Yet the most ardent advocates of organizing our government institutions so as to maximize deference to (for example) scientific expertise ultimately rest their contentions on some notion of separating and balancing the powers of government.242

So we seem to be a very long way from abandoning the notions that the powers of government should be separated and that the branches should check and balance the others in the exercise of their authority. The question, of course, is what particular system of checks and balances we ought to have. This is a normative inquiry, and it can be understood in either of two ways: (a) What is an ideal system of balanced and separated powers? (b) What system of balanced and separated powers ought the courts to enforce? Obviously, if one happens to believe, as I do not, that constitutional courts in every case should enforce whatever seems to them ideal,243 the two questions merge into one, for the answer to (b) is then the answer to (a). I propose to address only question (b), although in the course of

is determinate or that moral philosophers have reached any consensus. But I also do not endorse the skeptical position that no moral determinacy can ever exist. See Leff, Law and Technology: On Shoring Up a Void, 8 OTTAWA L. REV. 536 (1976).

240. Perhaps I should not use the term “we”; even on this point, there is no moral consensus. Cf. Leff, Unspeakable Ethics, Unnatural Law, 1979 DUKE L.J. 1229 (denying the existence of moral consensus on, inter alia, napalming babies and buying and selling others).

241. For a particularly clear statement of how the assumptions have necessarily changed, see Strauss, supra note 52.

242. Thus, even Arthur Kantrowitz, when he offered his controversial proposal for a “science court,” rested his argument on the understanding that a separate institution to decide scientific questions would improve democratic decisionmaking. See Kantrowitz, Controlling Technology Democratically, 63 Am. Scientist 505 (1975); Kantrowitz, Proposal for an Institution for Scientific Judgment, 156 Sci. 763 (1967).

243. I have in mind the theories holding that judges should promote the moral evolution of the society. See, e.g., C. BLACK, supra note 28; M. PERRY, supra note 28. Obviously, my choice of textual language is meant as something of a lampoon on theories that are actually quite sophisticated.
so doing, I hope to demonstrate the analytical irrelevance of question (a). In interpreting structural clauses, more than in any other aspect of constitutional adjudication, courts ought to be guided by sources more concrete than moral philosophy or their own intuitions about right and wrong.

1. The need for interpretive rules

To ask what system of separated and balanced powers the courts ought to enforce is really to ask what text it is that establishes that system and what interpretive rules the courts should apply when adjudicating controversies arising under the system. In all circumstances, interpretive rules are selected with an eye toward disciplining the act of interpretation. An act of interpretation is always a creative act, because it requires a reader's choice on how to bound a text, and it calls upon a reader to exercise her faculties of judgment and imagination. The text invites the reader to imagine possible worlds; without imagination, the interpretation is not possible.

No text provides its own interpretation. The interpretation, because the process is a creative one, will vary with the purpose for which it is undertaken, which is to say, with the rules that govern the interpretive act. I do not mean to endorse the claim that interpretation is impossible, but rather to reject the formalist's argument that there is only a single way of defining a text, that only a single form of interaction between the reader and the text deserves to be described as "interpretation," and that this form of interaction leads inexorably to a predetermined result. I also do not mean to contend that rules, in some demonstrably neutral way, entail specific, rigorously defined results. I do insist, however, that the interpretive rules make a

244. I take this to be common ground among theorists holding a variety of views on other aspects of the problem of interpretation. See generally The Politics of Interpretation, supra note 169 (a collection of essays on interpretation).

245. Stanley Fish, who contends that the relevant interpretive choice is among "different interpretive assumptions" (not the same as rules), is of the view that meaning is determined neither by text nor by rules, but rather by the assumptions and context of an interpretive community. See S. Fish, Is There A Text In This Class 281-84 (1980); Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325, 1330 (1984).


247. See infra text accompanying notes 278-83, 297-309.
difference. The rules—if they are followed—limit the possible worlds from which the reader can choose.248

For example, if the morning newspaper’s account of the previous day’s baseball game contains Stanton Delaplane’s example of poor sports reporting—the sentence “Snively hit a home run”249—different readers will add to the text more than the sentence itself, and will as a result see different images. For one reader there is a dejected pitcher, head down, spikes scuffing the dirt; for another a pale spheroid soaring over the center field fence into a sky of purest eggshell blue; for a third a crowd of thousands on its feet, cheering, chanting, demanding that the hero of the moment take a curtain call; and for a fourth a canny business manager determined to have his client’s contract renegotiated while Snively is still larger than life. But if the reader has been instructed to count the number of home runs that each member of the team has hit so far this season, there is a disciplining interpretive rule which may lead the reader to see nothing on the page except “+1” in the column under Snively’s name. The creative imagination has been reined in. Yet all of these images are interpretations, and there is no non-tautological sense in which any one of them is more correct than any other. The image varies with the purpose, which is the same as saying that the interpretation varies with the rule. Consequently, to speak of a “best interpretation” is really to speak of a “best interpretive rule,” for the correctness of an interpretation cannot be evaluated until the observer knows what the interpretation is for.250

A judge is also a reader possessed of a similar creative imagination, and the judge enjoys a similar relationship to the texts she is asked to apply. A critic cannot evaluate the judge’s performance unless the critic has in mind the interpretive rule that

248. Part of the difficulty with the entire argument is that no matter what an ideal judge might do, no one seriously supposes that, for example, the Justices of the Supreme Court of the United States really are striving to follow a consistent set of interpretive rules. Yet it is necessary to have an ideal before proceeding to criticize someone’s failure to live up to it, as well as to decide whether to pursue policies that might lead toward (or away from) the ideal.

249. See Delaplane, The Sporting Way, reprinted in The Third Fireside Book of Baseball 119 (C. Einstein ed. 1968) (“The sports editor was aghast. He said, ‘He wafted the spheroid over the pickets! Can’t you write English?’ ”).

the judge ought to be applying. The constitutional text may read, "No State shall . . . deny to any person within its jurisdic-
tion the equal protection of the laws." The judge asked to de-
cide how the text applies in a particular case is commonly de-
scribed as explaining what the text "means"; as a practical
matter, the judge's task is to select a rule to discipline the inter-
pretive act. Many different rules may serve a disciplining func-
tion. A judge who believes in enforcing the picture the authors
had of the effect of the clause they were drafting will assign a
different meaning than will a judge who seeks to enforce her own
vision of society's moral evolution. But a value not typically
thought of as controlling constitutional adjudication can also be
an interpretive rule. A judge whose overriding concern is maxi-
mizing the wealth of the society will develop quite a different
image, and thus will assign quite a different meaning, than will a
judge whose motive is to equalize the distribution of that
wealth. All of these are interpretive rules, all of them serve the
function of disciplining judicial behavior and all of them seem
capable of a relatively neutral application to a given set of facts.
So if the test of a rule were only whether it constrains inter-
pretation—whether, that is, it does what it is designed to do—they
would all be equally good rules.

I am not at all certain what standards we should use in test-
ing proposed interpretive rules for disciplining adjudication
under the Constitution's open-ended clauses protecting funda-
mental rights. That is a matter of quite passionate scholarly
and judicial debate, and is one which, fortunately, I need not
now join. I am quite convinced, however, that the rules that
guide interpretation of the document's structural clauses—clauses, for example, like those establishing the system
of balanced and separated powers—should be rules that are ef-

252. See R. Berger, Government by Judiciary: The Transformation of the Four-
teenth Amendment 363-72 (1977).
253. See M. Perry, supra note 28, at 99-125.
256. The text implies no judgment on the relative moral worth of these competing
interpretive rules.
257. I have elsewhere extended tentative endorsement to dialogic theories proposing
that the interpretive rules for the relatively indeterminate rights-protecting clauses are
less important than the rules to discipline interpretation of the more determinate struc-
tural clauses. See Carter, supra note 163, at 849-52; Carter, supra note 51, at 845-62.
ffective both in narrowing judicial discretion and in preserving the contours of the governmental system the Framers designed.

The case for the de-evolutionary tradition strikes me as irrefutable in its supposition that there is a link between the legitimacy of the judicial function and the nature of the interpretation of the structural clauses.258 A judge who is called upon to decide a case arising under this political Constitution, this constitution of government structure, takes her very authority to decide the case from the structural provisions of article III.259 If the case before her also turns on interpretation of a structural clause, she is in effect construing a clause that is of the same nature—although it may not be the same clause—as the one that establishes her function. As a consequence, she ought to be quite cautious in asserting too broad an authority to use that clause creatively in the service of some policy goal she may have; otherwise she is in the same position as the legislature possessing executive powers which, in the political theory of the Framers' time, and, perhaps, of ours as well, would not govern according to law because of its ability to change the rules to provide post hoc or even simultaneous justification for any arbitrary enforcement decision it might reach.260

I suggest only an analogy, not an identity, because the case the judge is asked to decide may involve, for example, a dispute between the executive and the legislative branches and will consequently be resolved through interpretation of a different clause than the one that, in an implicitly de-evolutionary move, the judge construes as granting her the authority to decide constitutional cases at all.261 But the clause she must interpret to decide the case at all and the one she has already interpreted as granting her the power to decide are of a similar nature. Each clause addresses the distribution of authority among the branches of the federal government, and, as a consequence, each reflects the understanding that resulted from the extended


259. See U.S. Const. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . .”).

260. See M. Montesquieu, supra note 99, at bk. XI, ch. 6, para. 5; J. Locke, supra note 192, at ch. XII, § 143.

261. For an example of a de-evolutionary defense of judicial review based on the language of article III and its history, see Amar, supra note 28.
wrangling over needed or appropriate balances and checks that led to the 1787 Constitution. The judicial interpretive act is similar, because in both cases the judge is called upon to set forth the structural limits on the authority in question even though she is construing the authority of different branches of the government. The analogy must be admitted to be a very close one, however, unless the critic is prepared to contend that a judge should indulge one style of reasoning—one set of interpretive rules—when her own authority is in issue, and another style when the power in question belongs to someone else.

As far as I am aware, no one has pressed this contention in any detail. Jesse Choper, in his controversial “Separation Proposal,” has argued for judicial abstention, through the political question doctrine, when the case requires the Court to decide whether a particular power is allocated to the President or to the Congress. At the same time, he has argued for an active judicial defense of the courts' own prerogatives against executive or legislative encroachment. This is not, however, an argument that the courts ought to follow different interpretive rules for different structural clauses. It is, rather, a claim that with respect to certain structural clauses—those involving the relative authority of the President and the Congress—the courts ought to stop after making the initial interpretive move, the move that tells the court that no threat to its own authority is involved. I will have more to say about Dean Choper's proposals presently. For the moment, let it suffice to conclude that even granting his theory, a call for the courts to interpret different provisions of the political Constitution in different degrees is not the same as a call for the courts to interpret those different provisions according to different sets of disciplining rules.

Indeed, it is in a sense counter-intuitive to suggest that different interpretive rules ought to apply to different structural provisions, for it is difficult to imagine what the relevant differences might be. By definition, the clauses of the political Constitution are all clauses about the way the government is designed to operate in practice, and all form part of the system of checks and balances that was considered by its drafters as a prerequi-

263. Id. at 380-415.
264. See infra notes 327-28 and accompanying text.
site to legitimacy. It is not obvious how one might work out the meta-rule to determine which structural clauses will be interpreted in accordance with which subsidiary interpretive rules. Even if one could find a meta-rule, it would only in its turn be another interpretive rule, for one would still have to apply the rule to the clauses in order to sort them.

Still, the heaviest service this argument can perform is to demonstrate that the same interpretive rules ought to be applied to all structural provisions of the Constitution. An argument that the rules must be consistent does not by itself say what those rules ought to be.

2. The better interpretive rules

The evolutionary tradition posits an interpretive rule under which the judge in effect tests the initiative in question to see whether it leaves in place a "real" separation of powers in which "real" checks and balances exist. This, however, is a peculiar fealty to pay to the tradition of separated powers. The phrase "separation of powers" does not occur in the Constitution; in fact, nothing approximating it occurs in the Constitution. That our constitutional culture has nevertheless enshrined it in jurisprudence can be attributed in part to an instinct about the nature of tyranny, but in larger measure to constitutional history, to our knowledge of the debates over drafting and ratification, to the Federalist Papers and similar documents, and to what we know about the political theory of the time—in short, to a deeply rooted cultural mythology about the nature of our government. Viewed against this background, the evolutionary

265. See supra text accompanying notes 202-38.
266. See supra text accompanying notes 123-24.
267. A fortiori, the Constitution does not "spell out the particular form of that theory being endorsed." G. Wills, supra note 127, at 110.
268. By "mythology" I do not mean to connote "legend," which is to say, I do not insist that these aspects of our cultural iconography never existed. On the contrary, I insist on their importance. But a mythology is anything at the heart of a belief system, whether verifiable or not. Cf. A GREELEY, THE JESUS MYTH 11 (1971).

One intriguing empirical challenge to the line of argument I suggest in text has been raised by Christopher Collier, a historian who has authored DECISION IN PHILADELPHIA (1986), a popular history of the Constitutional Convention. He was recently quoted in an interview to depressing effect: "The public is actually so ignorant about the Constitution that I don't even think they have any myths about it." Thomas Jefferson Wasn't Even Near Philadelphia in 1787, The Stamford Advocate, May 3, 1987, at A13. One must be careful, however, to avoid the quick assumption that a public lack of knowledge about specifics necessarily bespeaks a public opposition to the values that the specifics might
judge's determination to preserve a system of government in which the powers are separated and balanced surely stems at least in part from de-evolutionary roots: A system must be preserved because the history demands it.

But if a system of balanced and separated powers is to be preserved because the history demands it, then why not preserve the particular system that the history demands? The evolutionary judge argues with some force that this approach could stifle society’s creative energies, making it impossible for the government to accommodate its organization to the needs of a changing world. And this, the evolutionary judge frequently adds in yet another de-evolutionary move, cannot possibly be what the Framers envisioned. But even evolutionists probably realize that this argument may prove too much. After all, any system of checks and balances might have these same pernicious effects. I do not insist that every system does stifle these energies and make accommodation impossible; only that every one might. To be sure, the evolutionary judge would respond that any system that proved to have these effects could be superseded by a new one, but that answer in turn proves too little. If the potential for the defect will always be present, then why insist on reviewing the new institutional arrangement to ensure that “real” separation and “real” checks survive? Why not ask instead only whether the Congress has made a reasonable judgment on efficacy of its new institutional forms, or even, as in Dean Choper’s proposal, dismiss as political questions all separation of powers controversies not directly affecting the judicial branch?269

A part of the answer might lie in the same political theory that motivated the original establishment of the system and that continues to make intuitive sense today; perhaps the evolutionary judge still fears that a concentration of unchecked authority weakens the claim that the government rules in accordance with law.270 Thus, some degree of “real” separation or balancing is

---


269. See J. Choper, supra note 262, at 260-379 (the Separation Proposal), discussed supra text accompanying notes 262-64.

270. As one evolutionist put the matter:

[T]he main line of tradition, dominant at least since McCulloch v. Maryland, is that practical effects, not abstract formulas alone, should guide the Court in separation of powers cases. This is not to say, of course, that “syllogism” counts for naught; to go that far would be to repudiate the core of constitutionalism.
needed if the government is to be a legitimate one. This answer is thoughtful, but also incomplete and troubling, for the evolutionary judge still lacks a theory to guide adjudication under the structural clauses. The evolutionary tradition cannot by its very nature provide a definitive construction of a structural clause; the interpretation must be open to change as more is learned about the needs of society and the practical operation of the apparatus of government. Thus, the judge is left instead to work out in every case whether the power that one branch has appropriated is too great, or whether the checks now available over another are too small. But that approach is a slender reed indeed to support a jurisprudence of separation of powers. If a theory grounded on something concrete guides adjudication, other political actors can at least make reasonable predictions about what a court will think of their work. By contrast, the implicit theory of evolution—"Everything is okay unless I think it goes too far"—carries legal realism to a frighteningly nihilistic extreme: No one knows what the law is until the courts announce it.

It seems vital that adjudication under the structural clauses of the Constitution proceed according to interpretive rules tending to generate relatively determinate meanings when applied to those clauses. Not only the judicial branch, but the entire government takes its authority from those clauses. The Framers and the political theorists who influenced them were correct to perceive the dangers in a system in which the powers of government are not separated and balanced. At the risk of sounding too unfashionably ontological, it seems apparent that the powers are separated and balanced better when an observer can see the separation and see the balances as something actually extant and comprehensible than they are when the observer cannot. The less determinate the results yielded by the rules chosen to discipline the interpretive process, the less apparent the contours of the system will be. If those clauses constituting the government are not interpreted according to rules that yield determinate and predictable results, it is not easy to meet the radical argument that challenges the legitimacy of American constitutional government by holding even constitutional law to be empty at its core.271

---

271. See Carter, supra note 163.
An evolutionary judge might answer part of this as the Federalists did during the ratification debates, by asserting that many of the contours of the system of balanced and separated powers are obvious, as indeed many of them are: the President may veto legislation, but the veto may be overridden by a sufficiently large majority; the President may nominate the judges and officers of the United States, but the Senate must confirm them before they can take office; the President may be impeached by the House and tried in the Senate, but the Chief Justice presides at the impeachment trial; and on and on in this manner. These clauses, the evolutionary judge could explain, will be enforced without regard to any de-evolutionary nonsense, because their enforcement is neither evolutionary nor de-evolutionary; it simply involves a judgment on clarity as against lack of clarity. The outline of the system of checks and balances is plain and clear, the judge could argue; only the less clear clauses will be interpreted.

Note, however, the premise that all of these examples have in common. The checks exist because we can read about them right there in the constitutional text. In form—although, as will be seen, not in effect—the evolutionist is saying that these clauses possess meanings so apparent that no interpretation is necessary. There is something to this claim, because after all, the government does continue to operate, in accordance with a broadly shared understanding on constitutional meaning, without the need for constant resort to the courts for interpretation of the structural clauses. It is not easy, however, to defend the claim that any clause speaks to the reader in a way that renders interpretation completely unnecessary. That the government continues to operate may suggest only that, placed in the current social and political context, many clauses have been authoritatively interpreted. That does not make the interpretations "right"; it means only that the broadly shared interpretations are supported by a power considerably in excess of the power possessed by those who consider them wrong.

275. See Schauer, supra note 125, at 414-20.
277. The role of power in establishing authoritative interpretation—and of interpretation in perpetuating repression—is a regular subject of debate in other fields of criti-
Obviously, the evolutionary judge (like any judge) wants to buttress her decisions with something more than "We have the guns," and in effect, the evolutionary judge's response that some structural provisions are "clear" does reflect a choice of a correct (to her) interpretive rule. The argument that some clauses have clear and obvious meanings does not proceed—as evolutionary analysis typically does—from any assessment of present-day societal necessities. Rather, it proceeds from a kind of "plain meaning" rule applied to the structural provisions of the constitutional text, perhaps—indeed, probably—buttressed by a historical understanding. In other words, the argument refers to the vision that the Framers held of the way in which the powers would be balanced and checked. For that reason, the "plain meaning" argument should be considered a de-evolutionary one. It may be, then, that even evolutionary intuition accords with a de-evolutionary approach. Certainly the evolutionary tradition by itself cannot supply the disciplining rules necessary if interpretation of the structural clauses is to yield concrete results.

But there is more to the case for a de-evolutionary interpretive rule than this. Any rule, if clearly announced and neutrally applied, might serve to constrain creative freedom and thus to generate relatively determinate interpretations of the structural clauses. I do not mean to reject Wittgenstein's insight (gleefully embraced by some radical critics of method) that no one can prove to anyone else, outside a context of shared assumptions, that any rule applied to a new situation entails a particular result. That conclusion, however, is increasingly powerful in increasingly higher levels of abstraction. At the level of ordinary conversation within a culture that, like ours, shares assumptions about constitutionalism and the rule of law, it is useful chiefly as

cism where the stakes are arguably lower than they are when the text at issue is a legal one. See generally D. Held, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS (1980) (criticism in sociology, psychoanalysis and other fields); THE POLITICS OF INTERPRETATION, supra note 169 (articles on theories of interpretation and criticism in various areas). That power plays a role in establishing the authority of legal interpretations should be obvious. That is why the stakes are higher. See Fiss, supra note 250, at 196-97.


Wittgenstein might have intended it all along: as a kind of caution flag warning us of the dangers of rationalist arrogance. At the same time, Wittgenstein’s insight reminds us that when assumptions are shared, communication is possible. A quibble about the assumptions is no challenge to the central insight.

Thus, within the context of a culture that shares conversational assumptions, it is possible to talk sensibly about the disciplining force of rules. There is a sense in which using shared assumptions in this way reduces questions of interpretation to questions of power, but this use of the word “power” is an awkward one. Rather, interpretation in this vision becomes linked to interpretive consensus, not so much a consensus about meaning, but a consensus about how meaning is to be found. The interpretive rule does not create the consensus, and it also does not arise from the consensus in any coherent fashion. The matter is quite the other way around: The existence of the consensus, of a shared context of conversational assumptions, is what gives the rule its disciplining force.

Evolutionary theory, I have argued, cannot provide rules that will discipline in any important way. But even if evolution-

280. See id. at 79-113. For particular applications of this understanding in a discussion of legal rules, see Brainerd, The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory, 34 Am. U.L. Rev. 1231 (1985); Fiss, supra note 250. For precisely this reason—that Wittgenstein’s insight might legitimate rather than destroy legal reasoning—not every critical scholar is a fan. See, e.g., R. Ungar, Passion: An Essay on Personality 12 (1984) (“the doctrine easily lapses into complacency because it teaches us that we must take communities of sense and value more or less as we find them”).


282. The perception that rules, although also interpreted, might nevertheless discipline the next interpretive act, and the notion that an interpretive community might develop a consensus on authoritative disciplining rules combine to form the basis of the answer offered by Owen Fiss (one of the two most persistent defenders, along with Ronald Dworkin, of the model of adjudication as interpretation) to the critics who deny the possibility of a constrained interpretation. See Fiss, The Death of the Law?, 72 Cornell L. Rev. 1 (1986); Fiss, supra notes 157 & 250. I have elsewhere expressed my doubts about his suggestion that the legal profession, which he singles out as the relevant interpretive community, either deserves the role of authoritative generator of rules or is capable of playing it. See Carter, supra note 163, at 835-37. As will become clear, my point in the present article is that the interpretive understanding of the broader community—of “We, the People”—is necessarily entitled to consideration in the development of disciplining rules; otherwise, continuity in nationhood becomes a sham.
ary theory does not provide a useful rule, other theoretical approaches than de-evolution might supply rules readily.\(^{283}\) Thus, one may concede the case for determinate interpretations and deny the need for resort to the historical materials so important to the de-evolutionary judge. A de-evolutionary approach, however, offers something that no other theoretical construct is likely to. It supplies a common link among the notions of constitutionalism, government under law, and something that is omitted from too many constitutional theories even though vital to national survival: a shared sense of continuing nationhood.

The link between the ideals of constitutionalism and government under law is well known. A nation is governed according to law when the law is something recognizable and is also something that binds sovereign as well as citizen.\(^{284}\) Separating the powers of government was viewed in the political theory of the Framers' time as promoting this ideal by preventing those who enforced the law from altering it to suit their arbitrary desires. A constitution, in this vision, is a particular species of law, but is law nevertheless. It is fundamental law, constituting the government as the name implies, but is subject to the same test: To be law it must be recognizable and must effectively bind. In our understanding of constitutionalism, this relatively immutable fundamental law is largely about the process by which evolving preferences are turned into more mutable law. Thus, the rule of law is doubly ensured: Not only must the laws be clear and binding, but they must also be enacted according to the forms of the Constitution.

The link to our sense of continuing nationhood merits some further explication. Our Constitution is a species of law, but it is also something more. It is at its heart a story we tell about ourselves, a statement of the ideals of our nationhood and of the

\(^{283}\) Thus, there is no reason in principle that one could not discipline interpretation by requiring the answer that would further some chosen social goal. See supra text accompanying notes 244-56.

\(^{284}\) As Professor Vile has noted:

There is an essential connection between the notion of government according to law and the concept of the functions of government. This connection forms the basis of the concern with function down through the ages, and is the explanation of the persistence of this concept in spite of the many attacks made upon it.

M.J.C. VILE, supra note 180, at 21. Law, in this view, must be recognizable and must restrict government function, and Professor Vile is correct to remind us of its persistence. This vision is common, for example, to liberal positivist theories of law. See H.L.A. HART, THE CONCEPT OF LAW 49-76, 97-107 (1961).
way in which we want our nation to work. I do not insist, although it is possible, that our almost religious enshrinement of a Constitution few Americans have read, and, to some extent, of the courts as its prophets, represents a yearning for a lost Golden Age—the same yearning that characterizes much of the rhetoric of the de-evolutionary tradition as well as a significant part of the political polemicism of our day.

Michael Kammen has suggested that the genius and the irony of the American constitutional system are reflected in the curious circumstance that the American people are enormously proud of their Constitution without really knowing very much about it.285 Certainly the image of wise and good Framers, who fought off a monarchy and established the most successful revolutionary government in history, continues to occupy a central place in American political iconography. The America that celebrates the bicentennial of its Constitution also celebrates the bicentennial of its Golden Age. That was when the Great Ones lived, that was when they wrote. The link between their government and ours provides us with continuity in nationhood. They were the Founders who laid down the rules; we are the inheritors, who follow the rules that the Founders laid down. Tocqueville might have been right in observing that the government of the United States “depends entirely on legal fictions,”286 but those fictions are our constitutional inheritance: In the constitutional story that we tell about ourselves, the government that we have is the one that the Framers designed.

The judge who believes in evolution of the separation of powers is not immune to the charm of this image. Think back on the “obvious” contours of the system of balanced and separated powers and the rigorously de-evolutionary way in which the evolutionary judge tends to construe them. Perhaps even the evolutionary judge who insists that all the government needs to be legitimate is a “real” separation of powers and a set of “real” checks actually hopes to discover that the Framers have already put them in place. Even to this evolutionary judge, while some parts of the system may change, other parts stay the same. Thus, the distinction between the traditions may be reduced to a matter of degree.

The concept of continuity is a sensible one to introduce for another reason as well. If our cultural mythology insists that "our" government—the Republic to which school children pledge their daily allegiance—is the one that the Framers designed, then at least in its fundamentals it is the government that the people of the United States consider themselves bound to obey. The people of the United States are the inheritors of the "We, the People," in whose name the Constitution speaks. The people may not know the Constitution, but they know of the Constitution, and the knowledge and belief that the public shares is the best measure of what they understand their government to be.\(^{287}\) If the Congress allocates its authority according to some intricate contemporary theory, and if that theory runs sharply contrary to the model operation envisioned when the powers of the Congress were first set out, then the government's claim on the loyalty of its citizens is arguably weakened. The claim is weakened not in some literal sense—I do not suggest the possibility of popular revolution over the issue of the legislative veto—but only figuratively: The people think that the wise Framers designed the government we have, and the Congress and the courts solemnly pretend that this is so, but know otherwise.

The problem of "fresh checks" is more readily resolved on an understanding that seeks to forge links among concepts of legitimacy, determinacy, and continuity. The term "fresh check" refers generically to any new institution for controlling the authority of another branch of the government if that new institution was plainly outside the contemplation of those who designed the system.\(^{288}\) If the Supreme Court's decisions are borrowed as yardsticks, the legislative veto must be dismissed as a fresh check;\(^{289}\) so must the judicial implication of a right to sue the President for compensation for harm he has inflicted in his

---

\(^{287}\) Thus Frederick Schauer has noted: "The structural provisions of the Constitution, including and perhaps especially those that never see the judicial system, represent a critical source of the public's attitude towards this Constitution and towards constitutionalism in general." Schauer, supra note 125, at 403. While I plainly agree with Professor Schauer's observation, I would not make so strong a claim for popular understanding about the constitutional clauses protecting individual rights because my intuition—and I recognize this reason as a weak one—is that the people of the United States do not cherish the images of the Reconstruction Congress and the Constitutional Convention in quite the same degree.

\(^{288}\) See supra note 118.

official capacity.290 The problem with fresh checks is only partially the dubious constitutional warrant for their creation, for until one decides which interpretive rule to apply to the structural clauses, this criticism begs the question. The larger problem is their potential for mischief in a system of balanced and separated powers. Whether one views the system developed by the Framers as sacrosanct or prefers to let the system evolve, the danger is the same: deference to the ability of one branch to create fresh checks on the others leads almost by definition to a gradual accretion of power in that branch. The constitutional scheme of separate powers and the equally important system of checks and balances were designed to prevent just this occurrence. There may be an argument for superseding these systems if they can be shown to have failed; but if real separation and real balances do in fact matter, it is much harder to see the argument for setting these systems aside simply because someone has a better idea and is able to write a statute, or an executive order, that reflects the idea.

Not all fresh checks need be deemed unconstitutional on this approach, and the interpretive rules need not have the effect of yanking a startled nation back into the eighteenth century. The interpretive rule tells the judge what the text means; but applying that text to the case at hand remains a matter for prudence and judgment. The preservation of government structure that I have proposed suggests the need for a difficult judgment on whether a particular initiative violates a fundamental part of the original understanding on how the nation was to be governed; it does not suggest a form of originalism that would, in Erwin Chemerinsky’s example that I have already mentioned, bar women from the presidency.291

Contemporary students of hermeneutics realize that it is in any case not possible to share the Framers’ understanding on the meaning of the text.292 Those who wrote and ratified the Constitution communicated in their world, and we communicate in ours, and the discontinuities between the two are so vast that

291. See Chemerinsky, supra note 152, at 56.
292. Hermeneuticists would also agree with deconstructionists that meaning does not exist “within” a text. See Hartman, DECONSTRUCTION AND CRITICISM, supra note 176, at vii (“Deconstruction . . . refuses to identify the force of literature with any concept of embodied meaning . . . .”). They might differ, of course, on the consequence of this observation.
we cannot safely assume that they used words to refer to the things that we imagine when we read the same words. No matter how thoroughly we research what they said and what they wrote, we can never by fully sure that we understand all of what they meant. 293

None of this means that originalism is impossible. It does suggest that originalism cannot perform the feats that some of its adherents require of it. It cannot bring back the Golden Age because it cannot provide unambiguous pictures of what that Golden Age was like. It cannot generate in some mechanical way a concrete and shared original intention because it cannot provide unambiguous versions of what the Framers and Ratifiers must have believed. But the history, to be useful, need not answer all questions unambiguously. And if the proper search is for those aspects of the history that will provide the continuity that links our nation with the one the Framers envisioned, the judge need not pause over every detail. The judge should strive instead to identify those aspects of the system the Framers designed that were in their view most fundamental to the success of their enterprise. One need not capture the full flavor of what those who designed the presidency expected it to be in order to deduce that they really did mean for there to be only one President.

Faced with a relatively subtle question involving presidential authority—the question, for example, whether the President's official conduct ought to subject him to a judicially created cause of action for damages by those who are harmed—the judge naturally has a more difficult time. To argue that there can be no civil liability because the Framers did not mention it involves a logical fallacy. 294 To argue that there must be civil damages liability because the Framers did not forbid it involves the flip side of the same fallacy. But these are rather gross and grotesque conclusions to draw from something so elusive as in-

293. See Brest, supra note 93, at 218-22. Moreover, even if we have greater faith in our understanding of the history than contemporary hermeneutics suggests that we should, it is quite unclear how much faith we should have in the accuracy of the sources. See Hutson, supra note 159, at 6-35. And if we have faith in the sources, the modern understanding of the mechanisms of voting might nevertheless call into question the extent to which the activity of the Framers actually reveals their true preferences on institutional design. Cf. Riker, The Heresethics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice, 78 Am. Pol. Sci. Rev. 1 (1984) (tracing voting "cycles" in decision on how President would be selected).

294. See supra text accompanying notes 159-61.
intellectual history. The de-evolutionary judge must perform a more sensitive analysis.

Obviously, the judge will begin with the text, and although she ought to be aware of who benefits and who is hurt through the nation’s continuing reliance on a “plain” meaning, if she believes that the meaning is plain, then there is little additional determinacy to be gained through a more thorough study. If she is dissatisfied with the result, especially if in the case before her the outcome seems to be morally repugnant, she had best look to other constitutional provisions to test her dissatisfaction. Indeed, those who wrote and ratified the Constitution may well have expected that in the usual case, the text itself, along with the canons of statutory construction in wide use in their day, would provide all the “meaning” that might be necessary. But of course, in most of the difficult modern cases, including Nixon v. Fitzgerald, the case raising the question about civil damages actions against the President, there is no plain meaning, whether created by practice or power, to enforce.

The de-evolutionary judge goes to the history; the judge who is sensitive to hermeneutical problems does so with some care. The judge should of course read and study the debates and the history of drafting and ratification and should also try to be at least a little bit conversant with the larger history of the era. Through so doing, the judge should endeavor to picture the broad policy conclusions underlying the system of checks and balances and to review the delicate balancing, if indeed it existed, that led to the drafting of the clauses in issue. In the presidential immunity case, the judge performing this research would discover a long and bitter struggle over the authority of the President, its limits, and the means for checking his abuse of authority. She would find the difficult compromise between those who believed that any independent executive authority threatened legislative supremacy and ultimately majoritarian democracy, and those who worried that the legislature might sink the President into non-existence. She would learn of the general perception, after the economic and political failures of the Confederation, that the executive must possess considerable

297. See E. CORWIN, supra note 38, at 5-16; G. WOOD, supra note 127, at 430-38; Carter, supra note 119, at 1357-63.
freedom and energy, as she would learn of the simultaneous hatred and awe of the British monarch. From this and similar evidence, the judge would try to build up a picture of the Framers' world, and in the picture she built, she would conclude that the provisions regarding the punishment of the President had been worked out with considerable care. The Framers, she might conclude, had quite a definite model in mind, and it was fundamental to their vision of the operation of their system.

This done, she would try to tell them about our world. Obviously, the imagination works hard in this case, but that can hardly be avoided. She must try to project herself into the debates, to imagine herself outlining our present-day problems, and to ask whether, armed with foreknowledge, the Framers mean to enable or forbid our proposed solution. This leaves the judge considerable freedom—I happen to believe that she would have to conclude that civil damages liability would not fit snugly into the system the Framers designed, although others might disagree—but the discipline comes in the search, not in the resolution. The rules have still limited her choice of possible worlds, and as long as she undertakes the search conscientiously, as long as she sets out the analysis she has pursued and the reasons for her conclusions as honestly as she is able, she is doing all that we can ask of a judge. At all events, and whatever her methodology, her search finally is for evidence of the fundamental policies of separation and balance on which the concrete clauses rest; and it is these fundamental policies that she ought to hold inviolable if fresh checks are to be avoided and if determinacy and continuity are to be preserved.

An example of this interpretive process is provided by the Court's decision in *Bowsher v. Synar.* The majority concluded that the delegation of budget-cutting authority to the Comptroller General was effectively a delegation of executive responsibilities to a legislative officer. Possibly this description was accu-

298. See, e.g., G. WILLS, supra note 127, at 87-93 (Hamilton's ambivalence); G. Wood, supra note 127, at 132-43 (popular debate).
300. 106 S.Ct. 3181 (1986).
301. *Id.* at 3191-92.
rate, but in jumping from that discovery to a conclusion of unconstitutionality, the majority escaped far too easily from the need for judgment. Justice White's dissent, on the other hand, went too far in the other direction, for reasons already discussed, and Justice Blackmun's separate dissent was to much the same effect. Justice Stevens, however, whose opinion concurring in the judgment was joined by Justice Marshall, got the matter exactly right. In Justice Stevens's view, the Gramm-Rudman-Hollings delegation was unconstitutional for precisely the same reason that the legislative veto was unconstitutional:

>[T]he powers assigned to [the Comptroller General] under the Gramm-Rudman-Hollings Act require him to make policy that will bind the Nation; . . . when Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution—through passage by both Houses and presentment to the President. In short, Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress such as the Speaker of the House of Representatives, the Sergeant at Arms of the Senate, or the Director of the Congressional Budget Office.  

What emerges from Justice Stevens's opinion is a picture of the way in which the Congress is to make policy, a picture derived from his reading of the constitutional history. To him it did not matter whether the power delegated to the Comptroller General could be called "executive" or not; what mattered was only that the Congress had effectively delegated to the Comptroller General an authority which, in the vision of the Framers, was to be exercised in a particular way. The bicameralism and presentment requirements are not, on this view, mere clumsy historical artifacts to be circumvented as the need arises. They are instead the fundamental checks that the Framers provided against the possibility of legislative tyranny. On the theory that I have presented, the more fundamental the check, the less

302. See supra text accompanying notes 54-65.
303. 106 S.Ct. at 3215-20.
304. Id. at 3194.
305. Id. at 3203-05.
306. Id. at 3205.
307. Id. at 3203.
freedom a de-evolutionary Congress or a de-evolutionary judge should have to ignore it.

The effort to supply determinate answers in separation of powers cases does not require that the history be sufficiently clear and compelling that only one result is conceivable. Were this the requirement, there would be no need to screen judges for anything other than their ability to understand historical materials and to read and write the English language. But we require of our judges much more than this, and while they are not, perhaps, the dedicated philosopher-scholars of Alexander Bickel's attractive vision, they are nevertheless expected to do more than simply calculate and regurgitate—they are expected to judge. This means that they must exercise their own reasoning ability and, in particular, the faculty of creative imagination. This facility of the mind enables the judge, through a choice among possible worlds, to translate the symbols of the text into a meaning and to apply that meaning to resolve a legal dispute. There is a balance that must be struck: How clear is the history? How did the Framers envision the working of the system? How fundamental was their vision? How different from this vision is the proposed fresh check? How close to the line does the challenged initiative fall? In short, even when the interpretation of the text is determinate or nearly so, the judge still has a good deal of work to do. What matters throughout is that the judge be guided by the basic de-evolutionary principles that I have mentioned, that the judge try to develop an image of the way in which the Framers hoped the government would function, and that the judge make that image the beginning—although perhaps not the end—of the analysis.

There are costs to applying interpretive rules designed to limit the ability of each branch to enclose fresh checks on the others, and the costs are not trifling. There is a certain loss in government efficiency; there is a weakening of the ability of the nation to respond to every crisis with the institutional form that

308. See A. Bickel, supra note 126, at 25-26 ("Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.").

309. The judge's experience over the years and the professional requirements of craft will naturally tend to channel the judge's creative freedom. Cf. Deutsch, Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science, 20 STAN. L. REV. 169, 233 (1968) ("To substitute 'logic' for 'experience' in constitutional adjudication . . . would be to dispense altogether with the judicial process, at least the judicial process as known in the United States and in England.").
experts who have studied the problem think best. But these costs are outweighed by the benefits of rendering the structure of government, including its checks and balances, relatively determinate and, in consequence, more legitimate, as well as of paying homage to some uniquely American aspects of our constitutionalism by keeping the government of the United States reasonably close to the one envisioned by those whose choices most Americans believe still rule.

Still, Americans, like the scholars who occasionally purport to speak for them, are a restive bunch, impatient with a government that does not solve the problems of society with the requisite degree of alacrity. The demand for a balanced budget, if the demand in fact exists, may typify this restiveness; the Gramm-Rudman-Hollings statute, a thinly-veiled effort at heading off the potentially disastrous call for a constitutional convention to balance the budget, may typify the tendency of politicians to lurch from one crisis to the next, responding to public demands as best they can on the spur of the moment, often seeming to dare the courts to do anything about it. The courts cannot, of course, force the Congress to legislate right. But in the de-evolutionary tradition, they may play a vital and active role in keeping it from legislating wrong.

V. THE NECESSARY VITALITY OF THE POLITICAL QUESTION

DOCTRINE

And yet this theory plainly is not sufficient. There may be cases, for example Synar or Chadha, in which the de-evolutionary judge can tell, if not easily then at least with a fair degree of certainty, that the congressional initiative violates one of the fundamental tenets on which the Framers organized their system of balanced and separated powers. There may be other cases, such as Dames & Moore v. Regan or United States v. Curtiss-Wright Export Corp., wherein the de-evolutionary judge can judge that the challenged institutional arrangement meshes well with the model the Framers envisioned. But surely

310. The call for a convention is most troubling to those who do not believe that the Congress possesses the constitutional authority to limit the subjects that the convention might consider. Compare Dellinger, The Recurring Question of the "Limited" Constitutional Convention, 88 YALE L.J. 1623 (1979) with Van Alstyne, The Limited Constitutional Convention—The Recurring Answer, 1979 DUKE L.J. 985.


312. 299 U.S. 304 (1936).
there will be many other cases arising under structural clauses, perhaps even a majority of the cases in which the rules I have recommended will not lead to any relatively determinate interpretation of the constitutional clause in question, or in which, having reached one, the Justices will have trouble applying it to the case at hand. In cases of this nature, the deference called for by the evolutionary tradition is due, for there is no clear image of the world the Framers envisioned, and there is consequently nothing to hark back to.\textsuperscript{313} The judge faced with a new institutional form and no answer to the question whether it fits snugly into the model the Framers designed ought not consider herself free to disturb what the political branches have achieved. She need not give it judicial blessing, but she cannot pronounce it anathema. Fortunately, a means for holding this middle ground already exists: the political question doctrine.

The political question doctrine, whether viewed as a constitutional imperative\textsuperscript{314} or as one of Alexander Bickel's semi-discretionary passive virtues,\textsuperscript{315} has been, at least since \textit{Coleman v. Miller}\textsuperscript{316} in 1939, an important arrow in the judicial quiver. Contemporary judicial discussions of the doctrine typically begin by quoting this language from Justice Brennan's majority opinion in \textit{Baker v. Carr}:\textsuperscript{317}

\begin{quote}
It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from
\end{quote}

\begin{footnotes}
\item[313] See \textit{supra} text accompanying notes 87-88.
\item[314] Cf. \textit{Baker v. Carr}, 369 U.S. 186, 217 (1962) (political question doctrine is "essentially a function of the separation of powers").
\item[315] See A. BICKEL, \textit{supra} note 126, at 111-98.
\item[316] 307 U.S. 433 (1939).
\item[317] 369 U.S. 186 (1962).
\end{footnotes}
multifarious pronouncements by various departments on one question.\textsuperscript{318}

Louis Henkin, among other critics, has pointed out that much of this taxonomy—even the venerable “textually demonstrable constitutional commitment” category—involves issues of judgment rather than deference.\textsuperscript{319} A court that rules that another branch has the authority to decide an issue is nevertheless considering the limits of the authority of the second branch and is implicitly determining that with respect to the activity at issue, the second branch has not exceeded those limits.

In recent years, moreover, the courts have shown no fondness for the political question doctrine. \textit{Baker v. Carr} itself was certainly a case in which no standard could be found in the Constitution, and therefore, as Justice Frankfurter suggested, the challenge to Tennessee’s legislative apportionment should perhaps have been dismissed as nonjusticiable.\textsuperscript{320} But in \textit{Reynolds v. Sims},\textsuperscript{321} the Court did “discover” a standard, a “right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens,”\textsuperscript{322} or, as we tend now to think of it, one-person, one-vote. To say that this standard was derived from the fourteenth amendment, as the Court insisted that it was, is at least a little bit disingenuous. Yet, as John Ely has pointed out, this principle is perhaps the most splendid example of successful constitutional creation. It has become an accepted and valued part of the political and even the moral landscape.\textsuperscript{323}

So perhaps, judged against its popular acceptance, the Court’s refusal to find a political question in \textit{Baker v. Carr} has been a success. But after \textit{Baker} and the equally intriguing creativity in \textit{Powell v. McCormack},\textsuperscript{324} it is difficult to imagine any important case being dismissed as a political question, and indeed, the Justices have reserved that treatment for relatively unimportant cases. For example, the Supreme Court has ruled

\textsuperscript{318} \textit{Id.} at 217.
\textsuperscript{320} 369 U.S. at 277-325 (Frankfurter, J., dissenting).
\textsuperscript{321} 377 U.S. 533 (1964).
\textsuperscript{322} \textit{Id.} at 576.
\textsuperscript{323} “Anyhow, the critics were wrong on this one: the equal weighting of everyone’s vote turned out to be a notion with which most people could sympathize.” J. \textit{Ely}, supra note 47, at 121.
\textsuperscript{324} 395 U.S. 486 (1969).
that the Senate has the final say on who has "received more lawful votes" in an election for a Senate seat. But the outrage that would follow a gross effort on the part of the Senators to rig the election is probably sufficient security against a Senate action that might lead to serious litigation. In an age of massive leaks to the mass media, counting the votes is little more than a ministerial act. Other cases wherein the Court has found questions to be political are not significantly more substantial than this. There is in fact little left of the political question doctrine, if indeed it ever was a real doctrine, but for reasons that will be explained, judges committed to the ideal of a relatively determinate political Constitution, marked by the continuity of which I have written earlier, ought to be trying to resurrect the doctrine, or at least to breathe fresh life into it.

The political question doctrine is, in fact, not quite dead, and in separation of powers controversies it may be close to a revival. Jesse Choper's "Separation Proposal," under which virtually all separation of powers cases would be considered political questions, is an important step in that potential revitalization. Dean Choper, although he may have carried his point a bit far, is surely on to something when he contends that no matter how plainly the history demonstrates the Framers' intentions with respect to the separation of powers, "[i]t by no means follows . . . that the framers intended the Court to enforce the separation of powers or that judicial review is necessary to resolve constitutional clashes between Congress and the President." Even if, as I have proposed, the Court ought to intervene when the government has deployed its authority in sharp violation of the rules the Framers thought they were establishing, it hardly follows that the Court must have something to say about the merits of every case in which the separation of powers argument is raised. Although the process of judicial review, as Charles Black has pointed out, serves to legitimate the day-to-day functioning of the government even as it singles out some government actions for prohibition, clear judicial approval or disapproval of a government decision is not required in every case.

326. See, e.g., Gilligan v. Morgan, 413 U.S. 1 (1973) (Congressional authority to organize and regulate the militia).
328. Id. at 265.
Sometimes even the de-evolutionary tradition is better served if the courts defer.

The political question doctrine represents the modern Court’s most important tool for deference, and the tool is potentially quite a useful one. But political question cases come in more than one variety. The more common sort analyzed by Louis Henkin in his critique of the Court’s political question jurisprudence, is the case in which the Justices purport to be deferring to the legislative judgment on a “political” question, whereas what they are really doing amounts in practical terms to determining whether the legislative action falls within some sphere of reasonableness—which is not really deference at all, but review.

But political question cases come in another variety as well. In this second set of what might be called “pure” political question cases, the deference is real, because the Justices make no determination whatever about the allowable scope of legislative or presidential authority. The best recent example of a political question case of this sort is Goldwater v. Carter. Faced there with a challenge by a handful of Senators and Representatives to President Carter’s decision to abrogate the mutual defense assistance pact between the United States and the Republic of China, four Justices pronounced the question a political one, not because the President had acted reasonably, but because in this “dispute between coequal branches of our Government,” there was no basis in constitutional language or history for the Court to determine whether the Senate in fact should play a role in deciding whether to terminate a treaty.

Justice Powell, who would have dismissed the suit on other grounds, criticized this reasoning, arguing that the plurality opinion in effect was dismissing the action because deciding the case would be difficult. The application to text and history of

---

331. See Henkin, supra note 319.
332. Id. at 600-01.
334. Id. at 1004 (Rehnquist, J., joined by Burger, C.J., Stewart, J., and Stevens, J., concurring).
335. Id. at 1003.
336. Id. at 997 (Powell, J., concurring).
337. Id. at 999.
"normal principles of interpretation," he wrote, would adequately resolve the case. This response, however, is not quite to the point, and it misses the de-evolutionary force of the course the plurality preferred. The plurality's point was not that resolution was difficult but that under the standards of interpretation that the four Justices preferred to apply resolution was impossible. A de-evolutionary approach, seeking to discover the model on which the Framers hoped the treaty-making and treaty-ending powers would function, did not yield any determinate result. In that circumstance, a judge who accepts the de-evolutionary tradition cannot possibly feel free to disturb the status quo. The political question doctrine—the real one, the pure one—serves as a moderating gloss on the de-evolutionary tradition and will still permit a degree of institutional evolution if the de-evolutionary judge turns to it whenever her preferred interpretive methodology leaves matters indeterminate. Without the doctrine—with an obligation to decide every case—the de-evolutionary judge would in effect be forced to abandon the de-evolutionary tradition.

Dean Choper's conclusion that all disputes between the President and the Congress should be left for resolution by these overtly political branches, cuts strongly against the grain of the entire theory on which the de-evolutionary judge premises her jurisprudence. His view necessarily considers the separation of powers as a historical artifact of a previous generation's misunderstanding of effective division of government powers. It ignores the possibility that separation in and of itself might be attractive as a bulwark against tyranny. It lends neither determinacy nor continuity to the constitutional system of balanced and separated powers, and therefore does little to enhance legitimacy.

338. Id.
339. Id.
340. I am here making certain obvious—and possibly unwarranted—assumptions about the meaning of the plurality opinion.
341. Dean Choper anticipates this criticism in his book, arguing in response that although the Framers plainly intended separation of powers as one bulwark against tyranny, there is no evidence that they expected the courts to enforce it. J. Choper, supra note 262, at 266-70. But there is precious little evidence that they anticipated any significant part of what we now imagine when we think of judicial review, a point that he acknowledges. See id. at 266. Dean Choper willingly accepts judicial review in other contexts. See id. at 60-128 (judicial review is indispensable for protecting individual rights); id. at 380-415 (judicial review is appropriate when courts are protecting themselves).
Under the Separation Proposal, for example, *Immigration and Naturalization Service v. Chadha*[^342] should have been dismissed as a political question, because the only issue was whether the power at issue resided in the executive or the legislative branch—not whether the power could be exercised by the government at all[^343]. Yet the presentment clause difficulty presented by the legislative veto was perfectly plain, and because presentment was a fundamental part of the Framers' restrictions on the ability of the Congress to work its will, that difficulty would be decisive under the de-evolutionary theory defended in this article. The fact that the dispute was in a sense between the political branches[^344] would not cause the de-evolutionary judge to hesitate over whether to decide the case because the key to the judge's "pure" political question doctrine is not the identity of the parties or even of the issues, but rather the nature of the result yielded when the judge applies the proper interpretive rules to the text.

Still, the line between determinate and indeterminate results is not a bright one, and the de-evolutionary judge should not rush to dismiss a suit as a political question merely because the answer is at first unclear. As already mentioned, the role of the judge involves creativity and imagination, and those faculties, cabined though they are by the interpretive rules that I have proposed, must be applied with a will when the interpretation proves a difficult one. In the end, perhaps the judge still will be unable, even through an act of guided imagination, to conjure a picture of the vision the Framers held of the operation of the check or balance in question. This, I presume, is what happened as the Justices in the plurality tried to analyze the issue in *Goldwater v. Carter*[^345]. And at that point, it seems entirely appropriate for the Court to indulge the judicial equivalent of throwing up one's hands in despair, that is, to declare the question a political one to be resolved by the political branches between one another.

This conclusion highlights an aspect of the political ques-

[^343]: See J. Choper, *supra* note 262, at 357-60 (arguing that constitutionality of legislative veto should be nonjusticiable).
[^344]: I say "in a sense" because Chadha was a private party claiming harm. The Separation Proposal necessarily rejects the notion (outside of the due process clause) that Chadha might have a right to have the government proceed against him only through the forms set forth in the Constitution.
tion doctrine, as well as of the operation of our political system, that is sometimes overlooked or misunderstood. The resolution of an issue between the Congress on the one hand and the President on the other may be effected by means bearing only the most tenuous relation—or no relation at all—to the issue at hand. If the Senate is annoyed at the President for terminating a treaty without its consent, the constitutional structure does not leave the matter for decision only through a statute directing the President to desist, a statute the President might then defy, bringing about fresh litigation. The Senate (and the argument can be expanded, mutatis mutandis, to the House of Representatives or the Congress as a whole) possesses a host of weapons that it might bring to bear in political confrontation. If the President refuses to back down, he might find his cronies facing a more difficult time achieving confirmation for judgeships and ambassadorships. He might not receive funds for the programs he cherishes and might be forced to accept dramatic increases in funds for programs he abhors. As I noted on an earlier occasion, “One need only consider the vast range of positions for which Senate confirmation is required to realize the potential for congressional limitation of the executive inherent in the confirmation power.”

There is some reason to believe that those who designed the system of checks and balances assumed that the Congress would act in this fashion, indeed, that they expected and counted on a politically charged relationship between the electorally accountable branches as vital to the success of their scheme. If indeed this is so, then judicial deference, through the political question doctrine, in cases of an indeterminate text should promote adherence to the Framers’ original vision. If litigation is not always (or perhaps not often) an available strategy, those who are dissatisfied with the action of one of the electorally accountable branches might be forced to run for redress to the other, and perhaps in that way the political battle might be joined.

In the same sense, it is possible to imagine judicial intrusion when the text is unclear as itself constituting a kind of fresh check. If the Framers planned on an overtly political resolution of a category of problems, then judicial interference would upset

346. See Carter, supra note 119, at 1390.
347. On this point, Dean Choper and I entirely agree. See J. Choper, supra note 262, at 263-70; Carter, supra note 119, at 1384-94.
the balance. Thus, the political question doctrine, more than providing a means for deference when the interpretive rules that have been advocated yield no clear result, may well be an inescapable concomitant of de-evolutionary theory. Put otherwise, the historical investigation that the de-evolutionist demands can reveal much more than the concrete design and the fundamental policies underlying it; the investigation might reveal as well a broadly shared understanding that some questions are by their nature political and the expectation that the political branches would resolve these disputes between themselves. That, too, would be a historical discovery that the de-evolutionary judge is bound to respect.

VI. A PRECAUTIONARY AFTERWORD: THE COSTS OF CONSTITUTIONALISM

None of this means that the application of these rules to the decision of particular cases will be easy, and none of it means that in hard cases judges should not continue to be guided by practical wisdom no less than by abstract theory. It is not my intention, moreover, to provide a theoretical underpinning for a sudden dismantling of the administrative state or for a sudden reversal of the flow of authority from the Congress to the President.

A pure de-evolutionist might have difficulty justifying the rise of administrative government, and there is a disquieting aspect to the establishment of rule-making and rule-enforcing agencies that are independent of direct legislative or executive supervision. The Framers had a view on who would make policy and who would carry it out, and that view did not include a role for these somewhat bizarre governmental institutions. Yet perhaps even for the de-evolutionist (at least on the softened version that I have proposed) there comes a point when evolution really does matter, when, as Justice Frankfurter suggested...
in the *Steel Seizure Case*, the government has operated in a particular way for so long a time that it no longer makes sense to speak of a Constitution that requires something else.\textsuperscript{350} And perhaps, although it is impossible to draw a bright line to divide the cases in which the evolution has passed that point from the cases in which it has not, we can nevertheless state with confidence that the role of independent administrative agencies falls on one side of that line, the Gramm-Rudman-Hollings formula on the other.

Perhaps. But the other side of the argument, although frightening in its implications, may be the stronger. Perhaps we can find no warrant, in constitutional tradition or in liberal political theory, for the establishment of independent agencies.\textsuperscript{351} Perhaps a government that operates through these independent boards and commissions is really a lawless one, in the classical sense, wherein the same people, the regulators, make the rules, enforce them, and interpret them. Perhaps these agencies are acting according to a delegation of legislative power forbidden in classical liberal theory. Perhaps there is no argument from constitutional history that can possibly render these independent agencies legitimate. And so perhaps, in our de-evolutionary zeal, we ought to put an end to them.

Bruce Ackerman, in his Storrs Lectures, has sought to sail to the rescue of the administrative state with the suggestion that, in effect, the people themselves ratified the role of independent agencies in the 1936 elections because the nation’s politics, for a brief period of intensive debate, moved to the higher level that they had occupied at the time of the ratification of the original document.\textsuperscript{352} This argument in effect seeks to justify evolutionary developments in a de-evolutionary, although also discontinuous, way. Judicial approval of the administrative agencies does violence to nothing that is in the Constitution, the argument runs, because it harks back to the original understanding shared by those who in practical terms adopted a constitutional amendment to permit those agencies to function.\textsuperscript{353} The

\textsuperscript{350} See supra text accompanying notes 66-70.

\textsuperscript{351} I make more of this possibility (without taking a position in the rich evolutionary v. de-evolutionary debate on the subject) in Carter, *The Beast that Might Not Exist: Some Speculations on the Constitution and the Independent Regulatory Agencies in Workable Government*, supra note 258 at 76.

\textsuperscript{352} See Ackerman, supra note 172, at 1049-57.

\textsuperscript{353} Id. at 1051-57, 1070-72.
argument respects the virtue of determinacy, but more important, it rests on a vision of the continuity necessary to nationhood: This administrative Golden Age may be more recent, many of the Framers may still be alive, but they are due the same homage as those who have been dead for nearly two centuries.

Professor Ackerman’s rescue mission, however, may founder on the same shoals that have broken up many other proposals for interpretive rules: There may be no adequate rule of recognition to let the observer know which elections involve constitutional politics, and, in consequence, the implicit ratification of some otherwise contra-constitutional development, and which elections are mere normal landslides, in which the policies in issue have no constitutional dimension. In short, the theory may eventually provide a means of rescue, but it does not do so yet.

So despite Professor Ackerman’s effort and some others, the argument for demolition of the administrative state has not yet met with a convincing de-evolutionary refutation. Nor is the difficulty limited to the administrative agencies. What about the President, who almost since the original ratification of the Constitution, has been siphoning power from the Congress primarily because of the need to respond rapidly to crises that do not admit of quick legislative solutions? Is he, too, to be reined in, his powers circumscribed, those of the Congress drastically augmented?

Here the de-evolutionary judge stands on much firmer ground in permitting the status quo to continue. The strands of power that the President has gathered around him, particularly in the foreign affairs realm, are not necessarily with him forever. The Court has repeatedly approved presidential exercises of authority that some might have thought belonged to the Congress (the Steel Seizure Case was a departure from this trend), but only in cases where the Congress has raised no legislative objection. The Congress may have acquiesced in presidential decisions that augment his authority, but the acquiescence need not

354. See, e.g., Strauss, supra note 52.
355. See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981) (President may construe statute as granting him authority to suspend private claims against a foreign power unless the Congress objects); Madsen v. Kinsella, 343 U.S. 341, 349-55 (1952) (President as Commander-in-Chief may establish military tribunals unless the Congress limits his authority to do so); Santiago v. Nogueras, 214 U.S. 260 (1909) (President as Commander-in-Chief may administer captured territories by fiat until the Congress acts).
continue; at any time, the Congress might change its collective mind.\textsuperscript{356} As I put the point in an earlier essay:

All these cases stand quite plainly for the proposition that the President can exercise a purportedly inherent power if Congress has historically acquiesced and \textit{if Congress does not try to stop him}. If Congress \textit{does} try to stop him, then by definition it is no longer acquiescing. In a fluid and dynamic system of checks and balances, this is the only conclusion that makes sense. It is surely not the case that all that is, is constitutional, so absent some constitutional equivalent of adverse possession, what Congress has given, Congress can also take back.\textsuperscript{357}

In short, one need not be an evolutionist to defer, perhaps through the political question doctrine, when the claim is raised that the President is exercising as "inherent" a power that is actually the legislature’s to control. I do not refer to a case in which the argument is pressed that the President \textit{is actually legislating}; I refer only to the case in which the claim is made that he requires congressional permission for what he is doing. \textit{Goldwater v. Carter} and \textit{Dames & Moore v. Regan} are cases of this nature.

The de-evolutionary judge can call the questions raised in such cases as these political, but they remain so only until legislation is in place challenging the President’s authority to do what he seeks to do. At that point, the de-evolutionary judge has to decide whether the power at issue is one that the Framers thought that the Congress should be able to control. As Charles Black has pointed out, in nearly every case the answer should be "Yes."\textsuperscript{358} The Framers had reason to be wary of the Congress as potentially the most dangerous branch. It is.

\textbf{VII. Conclusion}

All of this leaves most substantive constitutional doctrine pretty much where it is. The Supreme Court’s reasoning in cases arising under the system of balanced and separated powers is often shaky, but its results are generally where they should be.

\textsuperscript{356} "The one fundamental error is that of supposing that the modern expansion of presidential power is based on the Constitution by itself, and is hence inaccessible as a matter of law to congressional correction." Black, \textit{The Working Balance of the American Political Departments}, 1 Hastings Const. L.Q. 13, 20 (1974).


\textsuperscript{358} See Black, supra note 356, at 15.
That is a problem for supporters of legislative vetoes and other innovative means through which the Congress may try to participate in day-to-day policy-making; and, conceivably, it is a problem as well for supporters of strong and independent administrative agencies. But decrying the recent line of de-evolutionary decisions as a return to "formalism" is, in the end, an irrelevant sidestep. If the American constitutional democracy is to be government under the rule of law, the degree of doctrinal coherence matters. A determinate governmental structure is more legitimate than an indeterminate one. The weakness of the evolutionary tradition is, in the end, its inability to render government structure determinate.

Determinacy, separation of powers, and a system of checks and balances do not tell the whole story of legitimacy. The separate parts of a government with an unambiguous constitutional foundation might unite to repress a minority, or even a majority, of the governed. Or a government might find itself so steeped in checks and balances that private forces involved in exploitation of others are able to block any initiative to end the exploitation. In short, a government wholly concerned with the governing process, a government with no conception of or interest in rights, is not likely to prove itself a legitimate one. On the other hand, a government with little concern for the democratic process—even a totalitarian government, a dictatorship—might still protect the rights of its citizens, apart from the right to participate in their own governance. This course would not render the government more legitimate; it would remain an outlaw, albeit, perhaps, a relatively humane one.359

The obsession of contemporary constitutional dialogue, perhaps for good reason, has been seeing to it that the government, whether outlaw or not, remains humane.360 The instrument

359. Allusions to literature are supposed to go unexplained; that is why they are called allusions rather than citations. This allusion, however, might require a citation: Oh, Watson, he was a sort of Robin Hood type—robbing the rich and giv-ing to the poor. Of all the buccaneers in history, I really find him one of the most sympathetic. Now, I certainly do not wish to condone his obvious dis-repect for the law. Nevertheless, in all justice to him, it must be added that for an outlaw, he was a remarkably humane one! R. SMULLYAN, THE CHESS MYSTERIES OF SHERLOCK HOLMES 84 (1979) (quoting Holmes).

360. A judicial review based on moral vision might be described in these terms. This I take to be the point of Michael Perry's suggestion, see M. PERRY, supra note 28, that the best test for legitimacy is whether, over time, the Court produces a moral vision with which most Americans generally agree. The Court may in a sense be operating outside the bounds of the Constitution—it might be an "outlaw"—but in time the people come
charged by liberal constitutional scholars with preserving that humaneness is the judicial system. Setting forth the rules that the courts ought to follow in preserving the humaneness constitutes an important mission for scholarship aimed at improving our system of government, but not a sufficient one. If the government is to be legitimate, then it must not be an outlaw, no matter how well intentioned; and constitutional theorists who want to keep the government law-abiding have an obligation to consider matters of structure as well as questions of right. A lack of attention to the substantive results of governance is only one kind of oppression. A lack of attention to its forms and processes is another. My defense of an essentially de-evolutionary approach to separation of powers questions is an effort to take those processes seriously, by supplying to interpretation of the constitutional structure the qualities of determinacy and continuity that serve in turn as keys to legitimacy. My goal, in other words, is to see to it that whether humane or not, the government does not become an outlaw.

No doubt there are other approaches that can serve the same purpose, and some of them may be better than the one here proposed. But the one that I suggest possesses the sometimes forgotten practical virtue of meshing well with the work that the Supreme Court is already doing. So many constitutional theories would require for their implementation a radical re-statement of prevailing doctrine. Radical discontinuity is not always a bad thing—American slavery, for example, might not have ended without it—but it is both unrealistic and profoundly threatening to the notion of government under law to suppose that the courts can or should readily implement whatever theory has most recently caught academic fancy. Sometimes theory might demand too much change: in the constitutional story that we tell about ourselves, it is important to hold things together.

to see it as humane. There is an echo of the same theme, albeit carefully camouflaged, in the work of John Ely. In his monograph on judicial review, he proposes that judges, in the cause of justice, might sometimes be driven by desperation to decisions without regard to law, which he labels “civil disobedience.” J. Ely, supra note 47, at 183. He might as well have said that the courts might sometimes be forced to be outlaws—but remarkably humane ones.