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In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers

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IN PRAISE OF SEVENTH-GRADE CIVICS: A PLEA FOR STRICTER ADHERENCE TO SEPARATION OF POWERS

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Things were simpler in the seventh grade. We were taught that Congress decided what the laws should be; the President enforced them; and judges resolved disputes about their meaning and applicability.

Today, my seventh-grade civics lessons are in shambles. Instead of the seventh-grade civics model, we have article III judges appointing and supervising special prosecutors[1] and promulgating binding sentencing guidelines;[2] executive officials deciding the meaning and applicability of congressional statutes free from judicial review;[3] a Congress that makes law through silence[4] or delegates law-making authority to executive officials without meaningful policy guidelines;[5]

* Professor of Law, New York University. This is an edited and embellished version of the 1990 Winston Howard Lecture, delivered at the University of Wyoming College of Law on April 20, 1990. I express my thanks to Mr. Howard and to the Law School community for the warmth of my welcome.

1. Morrison v. Olson, 487 U.S. 654 (1988).
2. Mistretta v. United States, 488 U.S. 361 (1989).
3. CFTC v. Schor, 478 U.S. 833 (1986); United States v. Erika, Inc., 456 U.S. 201 (1982). *See also* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
4. Dames & Moore v. Regan, 453 U.S. 654 (1981); Haig v. Agee, 453 U.S. 280 (1981).
5. Mistretta v. United States, 488 U.S. 361 (1989).

and a President who is above the law itself,[6] when he isn't being deprived of the day-to-day ability to direct important members of the executive branch.[7]

The economic trauma of the Depression; the military challenge of the Second World War and the cold war that followed; the post-World War II moral imperatives of combatting racism, sexism and poverty at home; the care and feeding of the world's largest economy; and forty-five years of global super-power status have necessitated massive government initiatives that have by-passed Congress and enhanced the power of judges and administrators in ways that threaten the very survival of separation of powers as a coherent doctrine. Whatever we may have been taught in the seventh grade, much of the "law-making" that has really mattered in our time—the policy judgments that changed the way we live and paved the way to the future—have been made by judges and administrators, not by Congress.

For example, the post-World War II assault on race and sex discrimination was launched and largely propelled by judges armed with an ambiguous constitutional text, the power of judicial review and a long overdue sense of the utter unacceptability of historic patterns of discrimination. Similarly, the Nation's attempts to cope with the Depression; to manage the economy; and to wage both hot and cold war were largely the province of administrators, acting unilaterally or pursuant to congressional blank checks. Even when Congress acted, the real-world impact of the legislation was, more often than not, to shift greater power to judges and administrators in the guise of construing the maddeningly ambiguous language used by Congress.

One standard explanation for the dramatic rise of the judicial and the executive branches at the expense of Congress is the increased complexity of modern life. The sheer volume and technical difficulty of the problems that confront a post-industrial democracy are said to require a level of expertise and an on-going intensity of attention that a generalist body like Congress cannot supply. Administrative or judicial "experts" must be called in to keep the enterprise going.[8]

There is, of course, a good deal of power in the "expertise" explanation. Even under optimum conditions, a modern democratic state must rely upon a corps of "experts" to make decisions requiring a degree of technical competence that is beyond the range usually found in a legislature. Moreover, it is impossible for any large legislative body to focus its collective attention on more than a few issues at a time; to say nothing about problems of oversight and follow-up.

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6. Nixon v. Fitzgerald, 457 U.S. 731 (1982).
7. Morrison v. Olson, 487 U.S. 654 (1988).
8. For helpful overviews of the growth of the contemporary administrative process, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) and Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

In my opinion, however, the "expertise gap-attention span" explanation for the long-term decline of Congress does not paint a completely accurate picture of the phenomenon. After all, in most policy-making settings requiring technical expertise, generalists are able to make value-laden choices with the assistance of "experts." For example, in the FCC area, although technical expertise is undoubtedly needed to map the contours of a national communications policy, virtually all the value-laden decisions that undergird any such policy are well within the capacity of an informed, competent generalist.

I believe, rather, that Congress' decline has been largely self-inflicted, aided and abetted by an increasing judicial failure to take seventh-grade civics seriously. Congress, as an institution, has voluntarily ceded significant policy-making authority to the executive and judicial branches, in return for a relatively safe congressional incumbency—and the Supreme Court has let Congress get away with it.

By definition, making hard decisions about what government's response should be to a serious social problem is risky business for a politician. Paradoxically, but predictably, the evolution of a "tenured" Congress, characterized by incumbents with a strong presumptive re-election advantage, has led to a congressional tendency to avoid activity that might diminish that re-election advantage. When the existing ground rules strongly favor an incumbent's re-election, if a controversial political "hot potato" capable of altering the odds can be avoided, it makes excellent "careerist" sense to pass the "hot potato" to another branch. That, in a nutshell, is what Congress has done on difficult social problems for the past fifty years.

I do not intend such an observation as a criticism of judges or administrators for stepping into the policy-making void left by Congress' political careerism. Using a metaphor coined by Judge Posner in the context of statutory construction,[9] judges and administrators attempting to cope with a serious societal problem are much like platoon leaders in the midst of a battle. They are dutybound to respect orders from congressional headquarters; but, when those orders arrive in garbled form, or don't arrive at all, the platoon leaders can either surrender or carry on the best they can. Unfortunately, our executive and judicial platoon leaders have spent a good part of the last fifty years seeking to patch together a battle plan in the absence of decipherable congressional orders.

Some believe that the continuing shift in policy-making influence from Congress to the courts and executive is both inevitable and salutary. Parliamentary democracy, they argue, is structurally incapable of dealing effectively with many issues confronting us today[10]—issues

9. Posner, *Legal Formalism, Legal Realism and the Interpretation of the Constitution and Statutes*, 37 CASE W. RES. L. REV. 179 (1986-87).

10. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980); R. DWORKIN, LAW'S EMPIRE (1986); Strauss, *Formal and Functional Approaches to Separation of Powers - A Fool-*

like defining and protecting the rights of individuals and minorities, setting sound long-term fiscal and environmental policies, or rooting out wrongdoing or unfair advantage by the politically powerful.

A modern conception of separation of powers should, of course, reflect an understanding of majoritarian limits in dealing with certain sensitive issues, most notably preserving the rights of individuals and minorities. Acknowledging that the seventh-grade civics model should be bent in certain limited settings does not mean, however, that the model should be broken. In the absence of a powerful functional justification for deviation from the model, such as the justification sketched out in footnote four to *Carolene Products*,[11] fidelity to the text and structure of the Constitution requires that Congress be our principal law-maker, the executive be engaged primarily in carrying out Congress' policy choices, and an independent judiciary be the place where disputes about the meaning and applicability of law are finally resolved in the context of a case or controversy.

Unfortunately, the current state of separation of powers doctrine permits—indeed, encourages—Congress to avoid making difficult policy choices in at least three ways. First, the Supreme Court has encouraged Congress to remain passive in settings that cry out for an explicit policy decision by repeatedly giving legal effect to congressional silence.[12] Second, Congress has been permitted to carry out the legislative process in a procedurally indefensible manner that often shields legislative action from formal debate and scrutiny.[13] Finally, the Supreme Court has repeatedly upheld attempts by Congress to shift difficult policy choices to "experts" without being forced to take political responsibility for the result.[14]

At the same time, modern "flexible" separation of powers doc-

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ish Consistency, 72 CORNELL L. REV. 488 (1987); Schwartz, *Recent Administrative Law Issues and Trends*, 3 ADMIN. L.J. 543 (1989-90).

11. Carolene Products Co. v. United States, 304 U.S. 144 (1938).

12. For two recent examples of "legislating" through inaction, see Dames & Moore v. Regan, 453 U.S. 654 (1981); Haig v. Agee, 453 U.S. 280 (1981). *See also*, *In re* Debs, 158 U.S. 564 (1895); Holtzman v. Schlesinger, 414 U.S. 1304 (Marshall, Circuit Justice 1973) (J. Marshall refused to vacate stay); Holtzman v. Schlesinger, 414 U.S. 1316 (Douglas, Circuit Justice 1973) (on reapplication to vacate stay, J. Douglas vacated the stay); Holtzman v. Schlesinger, 414 U.S. 1321 (Marshall, Circuit Justice 1973) (J. Marshall reinstated the stay).

13. Congress' most recent legislative shortcut is to place policy restrictions on administrative action by the use of annual appropriations riders that are presented to the President as part of the omnibus appropriations bill. The practice often results in poorly debated, highly secretive proceedings that are virtually immune from the President's veto power. For a particularly unappetizing example of the process, see News America Corp. v. FCC, 844 F.2d 800 (D.C. Cir. 1987). For a provocative suggestion that the legislative process should be subject to a degree of review, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1975).

14. Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purpose of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

trine has so blurred the lines between the governmental branches that the integrity of an independent judiciary as the final arbiter of the law's meaning is threatened[15] and the coherency of the executive branch has been thrown into question.[16]

I propose to sketch the contours of classical separation of powers doctrine, describe what I believe to have been the collapse of the classical model and urge a return to a stricter adherence to separation of powers.

THE CLASSICAL MODEL OF SEPARATION OF POWERS

Montesquieu's model of separation of powers depends on three assumptions:

> *Assumption* #1: governmental power consists of the exercise of one or more of three functions—the making of new law; the enforcing of existing law; and the resolution of disputes about the applicability of law in specific settings;
>
> *Assumption* #2: no group of officials should be able to exercise more than one of the three governmental functions; and,
>
> *Assumption* #3: the performance of each function should be allocated to an institution structurally designed to perform it most effectively.[17]

The structure of the Constitution closely parallels classical separation of powers assumptions. The "power" of the United States is divided into "legislative,"[18] "executive"[19] and "judicial"[20] functions. Each function is carefully given to a separate branch that is structurally engineered to carry out its assigned task most effectively. The "legislative" function, requiring democratic compromise, is to be performed by a large, representative body with the only direct electoral contact with the people. The "executive" function, requiring efficient enforcement, is assigned to a single person, indirectly elected by the

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15. United States v. Erika, Inc., 456 U.S. 201 (1982); Thomas v. Union Carbide Co., 473 U.S. 568 (1985).

16. Morrison v. Olson, 487 U.S. 654 (1988).

17. Montesquieu is generally recognized to have been the first to posit a separate judicial function as a third function of government. Writers prior to Montesquieu divided government power into two zones—enunciation and enforcement, lumping judges and administrative officials into the enforcement zone. Compare, C. MONTESQUIEU, THE SPIRIT OF THE LAWS 8-13 (T. Nugent trans. 1949) with J. LOCKE, THE SECOND TREATISE OF GOVERNMENT, *reprinted in* TWO TREATISES OF GOVERNMENT 382-84 (P. Laslett 2d ed. 1967). For helpful general treatments of the development of separation of powers theory, see, VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967) and GWYNN, THE MEANING OF SEPARATION OF POWERS (1965). *See also* Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982).

18. U.S. CONST. art. I.

19. U.S. CONST. art. II.

20. U.S. CONST. art. III.

people. The "judicial" function, requiring neutrality and expertise, is vested in an insulated body of specialists, appointed through a combination of executive and legislative power; but, once appointed, free from any ongoing political influence.

From the beginning, there have been strains in the classical model. Most obviously, there is inherent tension in the Constitution itself in the area of foreign affairs. Unlike the domestic area, where Congress is given exclusive law-making authority, the foreign affairs provisions of the Constitution vest shadowy power to make policy in both the executive and the legislative branches.[21] Not surprisingly, conflicting assertions of congressional and presidential power in the area of foreign affairs have constituted an ongoing institutional counterpoint throughout the Nation's history. In effect, the very ambiguity of the text has forced each generation to forge a new relationship between the two political branches in the management of the Nation's external affairs.

Similarly, John Marshall's successful insistence in *Marbury* upon the judiciary's power "to say what the law is" in the context of disputes between individuals and both branches of government inevitably catapults the judiciary into the law-making business. While the precise extent of a judge's power to weigh conflicting values in an effort to give meaning to an ambiguous constitutional or statutory phrase remains a matter of fierce debate, the necessity of construing the ambiguous provisions of the statute, to say nothing of the open-textured provisions of the Constitution, have unavoidably propelled the judiciary into the realm of policy-making.[22]

Less obviously, the classical model itself harbors at least three conceptual weaknesses. First, the dividing line between the making of a new rule and the enforcement of an existing rule may be impossible to map with precision. By moving to a different level of abstraction, virtually any government action may be characterized as the making of a new rule or the enforcement of an old one. If the division between legislative and executive power turns on distinguishing between the making of a new rule or the enforcement of an old one, and that distinction is often arbitrary, the model may do a poor job of allocating power between the Congress and the executive, especially in close

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21. Executive power in the foreign affairs area is textually founded on article II, section 2 ("[t]he President shall be commander in chief of the Army and Navy. . ."); ("[h]e shall have Power, by and with the advice and consent of the Senate, to make treaties, providing two-thirds of the Senators present concur"); (the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers and consuls. . .") and article II, section 3 (the President "shall receive Ambassadors and other public ministers"). The classic work in the field is L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

22. For a discussion of the inevitable policy choices that must be made in construing ambiguous language, see, e.g., Sunstein, *Intrepreting Statutes in the Regulatory State*, 103 HARV. L. REV. 408 (1989).

cases. As the appalling state of the delegation doctrine attests,[23] that is precisely what has happened in the modern era.

Second, the attempt to vest an independent and exclusive "adjudicative" function in the judiciary, while possibly the most enduring and widely copied aspect of the Founders' experiment in political theory, is extremely difficult to carry out in its literal form.[24] Even a cursory study of governmental decision-making reveals that administrators, and even legislators, are often compelled to resolve contested questions of law and fact in order to perform their functions. The issue, therefore, is not whether the executive branch may ever engage in preliminary adjudicative behavior, but whether, when and over what the article III judiciary must have the final say. Unfortunately, modern separation of powers doctrine confuses the perception that preliminary adjudication may properly take place in non-judicial fora with a license to oust article III judges completely from the review process.[25]

Finally, a collision may exist between the two allocative principles that animate the classical model. As we have seen, *Assumption* #2 of the model posits a "negative" separation principle that argues against vesting any group of officials with more than one of the three governmental functions, while *Assumption* #3 posits a "functional" separation principle that argues for the allocation of each function to the institution structurally engineered to perform it best. In most settings, the two allocative principles operate in harmony, since allocating functions structurally also operates to allocate them negatively. Occasionally, though, the allocative principles collide. For example, "negative" separation argues strongly that the prosecutorial function never be exercised by the judiciary, since it would enable a single body of officials to engage in two functions. "Functional" separation may argue, though, that in certain settings, only the judiciary can be expected to perform sensitive prosecutorial tasks fairly.[26] Similarly, "negative" separation argues strongly that the executive not be given unilateral power to commence military hostilities abroad, while "functional" separation argues strongly that a collegial institution like Congress is not structurally suited to the task of rapid response to a foreign crisis. Since we have never attempted to rank the relative importance of the two allocation principles, many of the most difficult issues of separation of powers are resolved through intuitive, *ad hoc* choices between "negative" and "functional" allocation.

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23. *See infra* pp. 394-408.

24. Chief Justice Marshall abandoned any effort to posit an "exclusive" adjudication function in the article III judiciary when he upheld the creation of Article I federal courts for the territories. American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

25. For a helpful attempt to distinguish the judiciary's review functions from preliminary stages of adjudication, see, Fallon, *Of Legislative Courts, Administrative Agencies, and Article III Courts*, 101 HARV. L. REV. 916 (1988).

26. Presumably, that is why Congress vested the article III judiciary with the power to appoint and supervise the Special Prosecutor.

Despite the strains in the model, however, until relatively recently, we attempted to be faithful to it. The article I legislative power to "make" new "law" was jealously guarded as a congressional prerogative. For example, in *United States v. Hudson & Goodwin*[27] and *United States v. Coolidge*,[28] the Supreme Court denied the article III judiciary the power to create federal common law crimes, explicitly deferring to the law-making primacy of Congress. Similarly, in *Erie R.R. Co. v. Tompkins*,[29] the Court declined to recognize the power of a federal judge to "make" federal common law, even in a civil context.

Attempts by the executive branch to assert a unilateral power to make law fared equally poorly, at least in a domestic context. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*,[30] the Court rejected an attempt by the President to assert the unilateral power to use troops to seize and run the Nation's steel mills in order to avoid a labor stoppage during the Korean War.[31] Moreover, even when Congress sought to grant legislative power to the executive, the Supreme Court rebuffed the effort to avoid the model. Thus, in *Panama Refining Co. v. Ryan*[32] and *A.L.A. Schechter Poultry Corp. v. United States*,[33] the Court struck down attempts to delegate standardless law-making power to executive officials.

Conversely, the power to enforce existing law was carefully confined to the executive branch. For example, in *Springer v. Philippine Islands*[34] and *Buckley v. Valeo*,[35] the Court struck down attempts by Congress to retain the power to appoint officials charged with enforcement functions. Similarly, in *INS v. Chadha*,[36] the Court invalidated Congress' attempt to impose a one-house veto over implementing regulations issued by the executive branch. Finally, in *Bowsher v. Synar*,[37] the Court refused to permit an official theoretically removable by Congress to exercise enforcement functions. Similar attempts to vest the courts with enforcement powers were also rebuffed. Thus, in *Hayburn's Case*,[38] article III trial courts declined to exercise administrative duties conferred upon article III judges by Congress and in *United States v. Ferreira*,[39] Chief Justice Taney questioned

27. 11 U.S. (7 Cranch) 32 (1812).
28. 14 U.S. (1 Wheat.) 415 (1816).
29. 304 U.S. 64 (1938).
30. 343 U.S. 579 (1952).
31. For a helpful description of the Nixon Administration's unsuccessful attempt to develop a theory of "inherent" executive authority to make law in the domestic area, see, Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1. *See also* United States v. United States District Court, 407 U.S. 297 (1972).
32. 293 U.S. 388 (1935).
33. 295 U.S. 495 (1935).
34. 277 U.S. 189 (1928).
35. 424 U.S. 1, 118-43 (1976).
36. 462 U.S. 919 (1983).
37. 478 U.S. 714 (1986).
38. 2 U.S. (2 Dall.) 408 (1792).
39. 54 U.S. (13 How.) 40 (1852).

whether Congress was empowered to delegate administrative tasks to federal judges.

Finally, the power to resolve disputes about the meaning and applicability of law as applied to specific individuals was jealously guarded by the judiciary. *Marbury v. Madison*[40] is a fierce defense of the article III judiciary's "province and duty. . .to say what the law is."[41] *United States v. Nixon*,[42] re-asserts the primacy of the judiciary's power to resolve questions about the meaning of law in the context of specific cases.[43] The Supreme Court's initial response to the administrative state in *Crowell v. Benson*[44] and *St. Joseph Stock Yards Co. v. United States*,[45] at least in the context of "private" rights, was to stress the constitutional necessity of effective article III review of administrative findings of both fact and law. Finally, the Supreme Court plurality in *Northern Pipeline Construction Corp. v. Marathon Pipe Line Co.*[46] sought to posit an "inherently" judicial function—the resolution of private law disputes between private par-

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40. 5 U.S. (1 Cranch) 137 (1803).

41. The *Marbury* principle is not inconsistent with early cases such as American Insurance Co. v. Canter, *supra* note 24, upholding the use of article I judges in the territories, since ultimate appellate review of territorial courts was vested in article III tribunals. *See also* Palmore v. United States, 411 U.S. 389 (1973). Nor do early cases recognizing the validity of article I military courts violate the original model, since the authority to raise and maintain armies flows from articles I and II, rather than from article III. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); Toth v. Quarles, 350 U.S. 11 (1955).

It was the rise of the "public rights" doctrine that introduced confusion about the exclusive role of the article III judiciary. *See* Martin v. Hunter's Lessee, 14 U.S. 304 (1816); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929); Williams v. United States, 289 U.S. 553 (1933); Glidden v. Zdanok, 370 U.S. 530 (1962). Briefly stated, the "public rights" doctrine distinguishes between "private" rights created by common law rules (which must be adjudicated by article III judges) and "public" rights, created by statute, which may be adjudicated, in whole or part, by article I tribunals. Since the legislature is the source of a "public" right, the doctrine argues that the legislature can impose conditions on its enjoyment, including limitations on the adjudicatory fora.

The most obvious flaw in the doctrine is its assumption that common law rules are less the result of affirmative government action than are legislative rules. There is, however, no "pre-legal" state that can be viewed as a natural baseline from which legislative action has displaced us. All law, including judge-made law, is a social construct. Moreover, the assumption that government benefits may be conditioned on a waiver of article III protections is a dubious exercise of the "right-privilege" dichotomy. *See, e.g.*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 5 (1988); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Wald, *Government Benfits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. REV. 247 (1990).

As Justice Brennan noted in *Northern Pipeline*, the public rights doctrine has the pernicious functional result of encouraging Congress to seek to insulate disputes involving the government from article III resolution, despite the fact that such cases are the most likely to benefit from adjudication by an insulated arbiter.

42. 418 U.S. 683 (1974).

43. For a particularly broad statement of the principle, see, Cooper v. Aaron, 358 U.S. 1 (1958). *See also* United States v. Klein, 80 U.S. 128 (1871).

44. 285 U.S. 22 (1932).

45. 298 U.S. 38 (1936).

46. 458 U.S. 50 (1982).

ties—that could not be assigned to a non-article III official, even preliminarily.[47]

Thus, while rough edges were evident, especially in the foreign affairs,[48] presidential removal[49] and judicial power[50] areas, until recently, the picture that emerges from the cases is that of a conscientious commitment to separation of powers.

THE COLLAPSE OF THE CLASSICAL MODEL

Executive Exercise of Legislative Power

It all began to come apart during the 1943 Term of the Supreme Court.

After boldly asserting in *Schechter Poultry* the principle that congressional grants of regulatory power to the executive must be guided by an intelligible set of standards in order to preserve the division of responsibility between Congress and the executive, the Court upheld absurdly broad grants of authority to the Federal Communications Commission to enunciate a national communications policy "as public interest, convenience and necessity requires;"[51] and to the Office of Price Administration to set prices during wartime at "fair and equitable" levels.[52] With *NBC* and *Yakus* as its benchmarks, the rule against delegating legislative authority disintegrated. In the fifty-five years since *Schechter Poultry*, not a single congressional enactment has been deemed to vest too much discretion in the executive. The Supreme Court's toleration of Congress' flight from legislative responsibility culminated in *Mistretta v. United States*,[53] when the Court upheld the delegation of the power to establish presumptive sentences for all federal crimes to a body of presidentially appointed "experts" made up of article III judges, prison administrators and academics.

There can be no more significant "legislative" task than a congressional delineation of the punishment that should presumptively flow from a violation of federal criminal law. Indeed, only a narrow

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47. Congressional attempts to exercise the adjudicative function were reviewed under the rubric of the Bill of Attainder clause. *E.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); United States v. Lovett, 328 U.S. 303, 317-18 (1946); United States v. Brown, 381 U.S. 437 (1965). *See also* INS v. Chadha, 462 U.S. 919 (1983) (Powell, J., concurring).

48. *E.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Chicago & Southern Airlines, Inc. v. Waterman S.S. Co., 333 U.S. 103 (1948).

49. *Compare*, Myers v. United States, 272 U.S. 52 (1926) (upholding presidential removal of postmaster) *with* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding congressionally mandated term of years for FTC commissioner).

50. *Compare, Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) [*and*] Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) *with* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). *See also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

51. NBC v. United States, 319 U.S. 190 (1943).

52. Yakus v. United States, 321 U.S. 414 (1944).

53. 488 U.S. 361 (1989).

vote of the Sentencing Commission itself prevented the "experts" from resurrecting the federal death penalty. Of course, using "experts" to assist Congress in carrying out its legislative duties would have been unexceptionable. Thus, if Congress had voted up or down on the Sentencing Commission's recommendations, no problem of congressional delegation would have been present. But Congress would not even accept the political responsibility for voting on whether to accept the "experts' " determinations. Liberals were afraid of appearing soft on crime; conservatives were more than willing to leave the matter to Reagan Administration appointees. The net result was a cozy abdication of legislative responsibility that allowed Congress to pass the political buck yet again, this time with Supreme Court blessing.

The Court's half-hearted attempt in *Mistretta* to demonstrate that Congress' delegation was lawful because it was accompanied by adequate standards reflects the bankruptcy of existing delegation doctrine. For the Court, it was enough that Congress had spelled out a laundry list of factors that the "experts" should consider in reaching their decisions. That the factors often pointed in different directions and that Congress made absolutely no effort to accord relative rankings to divergent factors appeared not to trouble the Justices.[54] But legislating isn't merely toting up the considerations that must be weighed. The essence of the democratic process is the making of choices between and among conflicting considerations—the reaching of compromise positions that form a political *stasis*. Congress lacked the political courage to perform that task in the area of criminal sentencing. It is a breach of our most fundamental constitutional tenets for the Court to have validated the mutant legal rules that emerged from Congress' exercise in evasion.

Executive Exercise of Judicial Power

Yakus also marks the beginning of the erosion of the article III judiciary's role as exclusive final arbiter of the meaning and applicability of law. In *Yakus*, Congress provided for criminal sanctions for violating wartime price regulations and forbade article III judges in criminal cases from reviewing their validity if the defendant had failed to challenge them administratively within sixty days of their promulgation. Standing alone, *Yakus* might be read as nothing more than a particularly harsh application of the doctrine of exhaustion of administrative remedies. But once the process of article III erosion began, it accelerated to the point where the Court has now upheld the ousting of article III courts from any role in reviewing the lawfulness

54. Chief Justice Rehnquist's willingness to tolerate executive law-making in *Mistretta* is at variance with his refusal to tolerate executive law-making in Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 658-59 (1980) (Rehnquist, J., concurring).

of administrative action.[55]

The erosion of the conception of an independent judiciary performing a unique "judicial" function unfolded in three stages. First, as in *Yakus*, executive officials were given increasing responsibility for making the initial factual and legal assessments needed to determine the impact of a congressional statute in a specific setting. In *Atlas Roofing Co., Inc. v. OSHA*,[56] for example, the Court recognized the power of Congress to route virtually all fact-finding and law declaration functions involving government programs through the administrative process, at least as an initial matter, despite the impact on trial by jury.

Second, reviewing article III courts were directed to grant extensive deference to the initial administrative findings. At first, the rule of deference centered on the presumed functional fact-finding superiority of the administrative process. While the Court made a stab at preserving a right to *de novo* judicial review of certain categories of "jurisdictional"[57] or "constitutional"[58] facts, the administrative process rapidly supplanted the judiciary as primary fact-finder in area after area. Finally, in *Chevron v. NRDC*,[59] the rule of deference was expanded to statutory construction as well. Thus, under existing rules of deference, the article III judiciary is permitted to maintain a loose "rationality" check on administrative adjudicators on questions of fact and law; but, within the loose parameters of that "rationality" review, effective primacy has been shifted to article I adjudicators.

Third, Congress has begun to experiment with administrative schemes that completely exclude article III participation, even the pale reviewing function permitted under the rules of deference.[60] While the Court continues to apply a presumption that Congress intends to permit judicial review of administrative action,[61] and while serious doubt exists over the power of Congress to abolish judicial review of constitutional issues, the fact is that Congress appears quite comfortable with eliminating the independent judiciary from significant aspects of contemporary governance, especially when the government is a party to the dispute.

The degree to which the conception of an independent judiciary performing unique functions has fallen on hard times is reflected in the increasing tendency of Congress to draft article III judges for service as administrative or legislative officials. Thus, for example, in *Mistretta*, article III judges were given the responsibility of perform-

55. United States v. Erika, Inc., 456 U.S. 201 (1982); Thomas v. Union Carbide Co., 473 U.S. 568 (1985). *See also* CFTC v. Schor, 478 U.S. 833 (1986).
56. 430 U.S. 442 (1977).
57. Crowell v. Benson, 285 U.S. 22 (1932).
58. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936).
59. 467 U.S. 837 (1984).
60. United States v. Erika, Inc., 456 U.S. 201 (1982).
61. Johnson v. Robison, 415 U.S. 361 (1974).

ing the legislative task of establishing generally applicable sentencing guidelines for all federal crimes. In *Morrison v. Olson*, article III judges were given the responsibility of performing the executive task of appointing and supervising prosecutors. If Congress were committed to respecting the adjudicatory primacy of the independent judiciary, an occasional request to article III judges to perform non-article III tasks would not pose serious problems. But it is precisely because Congress and the Supreme Court appear willing to erode that adjudicatory primacy by permitting critical adjudicatory functions to be shifted to non-article III tribunals that the almost casual manner in which Congress treats article III judges as just another group of fungible bureaucrats is so ominous.

In *Northern Pipeline Construction Corp. v. Marathon Pipe Line Co.*,[62] Justice Brennan tried to rally his forces for a last-ditch defense of an autonomous and independent judicial branch. In *Northern Pipeline*, Congress sought to expand the jurisdiction of article I bankruptcy judges to include private law claims having an effect on the bankrupt's estate. Writing for a plurality of four,[63] Justice Brennan argued that the resolution of disputes between private persons that arise under state law is at the core of the judicial function, which may be performed, under the Constitution, only by article III officials exercising the "judicial" power of the United States. Justice Brennan's plurality recognized the existence of three historical exceptions to the rule that the "judicial" function must be performed by an article III official: (1) the operation of article I territorial courts;[64] (2) the adjudication of military courts martial;[65] and, (3) the adjudication by article I judges of so-called "public rights" disputes.[66] Since the private law dispute in *Northern Pipeline* did not fall within any of the historic exceptions, Justice Brennan argued that unless it fell within an exclusive sphere belonging to the article III judiciary, Congress would be free to assign all adjudicative tasks to non-article III adjudicators, thus totally bypassing the article III judiciary.

As Justice Brennan noted,[67] attempting to slam the barn door at the level of the private law case may well have come too late for many controversies that functionally cry out for an independent judiciary, but which fall under the "public rights" exception to article III. For those cases, involving most claims against the government, the Brennan opinion could only hold out the hope of constitutionally man-

62. 458 U.S. 50 (1982).

63. Justices Rehnquist and O'Connor concurred on narrower, but fundamentally similar, grounds.

64. American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828); Palmore v. United States, 411 U.S. 389 (1973).

65. *E.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

66. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855); *Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929); Crowell v. Benson, 285 U.S. 22, 50 (1932); *see supra* note 41.

67. *Northern Pipeline*, 458 U.S. at 68 n.20.

dated review of administrative adjudication by an independent judiciary.[68] However, as we have seen, when that review operates under rules of deference, it is a pale shadow of the genuine article.[69]

Unfortunately, Justice Brennan couldn't even keep the barn door locked at the level of the purely private case. In *Thomas v. Union Carbide*,[70] and *CFTC v. Schor*,[71] Justices O'Connor and Rehnquist joined the *Northern Pipeline* dissenters to uphold congressional schemes delegating the adjudication of disputes between private parties to non-article III officials. While the dispute in *CFTC v. Schor* was subject to *de novo* judicial review, the *Union Carbide* dispute was wholly excluded from judicial participation.

The uncertainty surrounding the *ad hoc* balancing test that currently appears to command a majority of the Court makes it impossible to predict how future article III cases will be decided. One thing, however, is certain: the Founders' guaranty of an independent judicial branch performing the third function of government is in tatters.

The Demise of the Unitary Executive

The erosion of the President's power to direct the executive branch flows from a misreading of two Supreme Court cases: *Myers v. United States*[72] and *Humphrey's Executor v. United States*.[73]

In *Myers*, the Court upheld the unilateral power of the President to remove a Postmaster who had been appointed with the advice and consent of the Senate, despite a statute requiring the consent of the Senate prior to removal. *Myers*, therefore, is consistent with the view of a unitary executive branch directed by the President engaged in the performance of the second function of government—the execution of the laws. In *Humphrey's Executor*, however, the Court ruled that the President lacked the unilateral power to dismiss a member of the Federal Trade Commission before the expiration of his statutory term.[74] Attempts to harmonize the two cases have centered on the difference in function between a Postmaster, who is a "purely" executive official, and a Federal Trade Commissioner, who exercises both adjudicative

68. *Id.* at 69 n.22.

69. The Brennan plurality suggests that the existence of nominal review by an article III judge will not be sufficient if the reality of adjudicative power is vested in a non-article III official. *Northern Pipeline*, 458 U.S. at 69 n.21. *See also* United States v. Raddatz, 447 U.S. 667 (1980).

70. 473 U.S. 568 (1985).

71. 478 U.S. 833 (1986).

72. 272 U.S. 52 (1926).

73. 295 U.S. 602 (1935).

74. Strictly speaking, *Humphrey's Executor* dealt only with the ability of the estate of an unlawfully dismissed employee to sue for back-pay. It has been widely cited for the proposition that the President may not replace officials at "independent" agencies with persons who will carry out the administration's policies until the expiration of their statutory terms. In fact, it may stand for nothing more than a duty to pay the salaries of the dismissed officials.

and policy-making powers as part of his administrative responsibilities.[75] Unfortunately, the distinction does not withstand analysis, since it is precisely at the level of policy-making authority that the President should have the power to assure that officials who share his philosophy are in control of the policy-making centers of the executive branch. While a degree of independence may be appropriate for officials exercising article I adjudicatory authority, in order to permit their decisions to qualify for deferential review by the courts, no similar functional need exists to insulate policy-making executive officials from "interference" by the President. Instead of confronting the fact that so-called "independent" policy-making executive agencies are inconsistent with any recognizable theory of separation of powers, the Supreme Court has elected to ignore the problem. In *Bowsher v. Synar*,[76] the Court was confronted with a provision of the Graham-Rudman Act that designated the Comptroller General as the official to forecast budget deficits and impose program-by-program cuts needed to reduce the deficit. Since the Comptroller General is theoretically removable for cause prior to the expiration of his statutory term by joint resolution of Congress, the Court was able to invalidate the statute because it improperly involved Congress in the execution of a statute, much as the appointment power in *Buckley v. Valeo*, and the legislative veto in *Chadha* had done.

The real problem with the Graham-Rudman statute was not, however, the highly remote possibility that Congress would seek to exercise a for cause removal power that had not been invoked for sixty years. It was the fact that a critically important executive function—the implementation of the Graham-Rudman Act—was entrusted to a bureaucrat who is wholly outside the control of the President. Ironically, the Court's solution to this breakdown in democratic theory was to make the problem even worse by striking down the only democratic check on the Comptroller General's awesome power—the possibility of congressional removal. The net result is a governmental official exercising significant executive power with no democratic accountability.

The confusion was compounded in *Morrison v. Olson*.[77] In *Morrison*, the Court upheld the provisions of the Special Prosecutor Act that authorized the judicial appointment and supervision of Special Prosecutors, not subject to presidential removal, to investigate criminal wrongdoing at the highest levels of the executive branch. *Morrison* is a separation of powers nightmare. Judges should not be involved in appointing or supervising prosecutors. Presidents should not be ousted from control of the law enforcement function. The combined

75. In Weiner v. United States, 357 U.S. 349 (1958), the Court ruled that the adjudicative functions of a War Claims Commissioner precluded unilateral removal prior to the expiration of a statutory term.

76. 478 U.S. 714 (1986).

77. 487 U.S. 654 (1988).

impact of *Bowsher* and *Morrison* is to make clear that the executive branch, designed to be headed by a single elected leader, may be riddled with independent beachheads immune from both presidential and congressional control.

A MODEST PROPOSAL

I harbor no illusions about the prospects of restoring strict separation of powers doctrine. As the Court's caution in approaching the issue of denying the President the power to remove policy-making officials in so-called "independent" agencies attests, the consequences of such a return might well be too dislocating to contemplate seriously.[78] But, as with any complex doctrine, it is possible to recognize exceptions to separation of powers' strict application without abandoning commitment to its core values. It would be possible for all three branches to take concrete steps to respect the core of separation of powers without dismantling the administrative state.

First, and most obviously, the delegation doctrine could be rescued from its current state of oblivion. It is not asking too much for the judiciary to require Congress to articulate intelligible standards to guide administrative officials. Platitudinous generalities, or the mere listing of factors without guidance as to their relative weight, hardly qualify as serious attempts at legislation. The delegation doctrine's rhetoric purports to require such standards, but the reality of the doctrine's application makes a mockery of the requirement.

Second, the notion that Congress may act by inaction should be rejected. Silence is not legislative activity and the more the courts treat it as if it were, the more Congress is encouraged to retreat into it.

Third, the primacy of article III tribunals as the final arbiter of law and fact in all cases, whether or not the government is a party, should be reinforced. Initial adjudication by non-article III officials should be subject to a meaningful review process that assures the integrity of a third function of government.

Fourth, the power of the President to direct all policy-making officials in the executive branch should be reinforced. While a few executive officials exercising adjudicative or sensitive investigative functions may be shielded against at will Presidential removal, no functional justification for insulating executive policy-makers exists.

Fifth, and perhaps most importantly, rules about separation of powers should be made in a principled way. In the current political climate in which the executive is often viewed as a surrogate for the Republican Party, while Congress is treated as a Democratic Party

78. For one suggested approach to the problem, see, Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

power base (and the judiciary is viewed as the enemy of both), rules about the allocation of power are inevitably skewed by partisan considerations. In the long run, though, it is in the best interests of all to work toward a doctrine of separation of powers that respects and reinforces the wisdom of the Framers and the political genius of Montesquieu.

CONCLUSION

I have described a contemporary doctrine of separation of powers that respects neither "powers" nor "separation." The Supreme Court's failure to defend the contours of the classical model has resulted in a political implosion that threatens to alter the fundamental structure of our government. Without a commitment to taking separation of powers theory seriously, the Court's *ad hoc* decisions have: (1) reinforced the dangerous growth of an unmanageable executive branch; (2) contributed to the decline of Congress as a policy-making body; and, (3) imperilled the role of the independent judiciary.

I began this piece by recalling that civics was simpler in the seventh grade. On balance, I think it was wiser, too.