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GOVERNMENTAL FUNCTIONS AND CONSTITUTIONAL DOCTRINE: THE HISTORICAL CONSTITUTION

Russell K. Osgood†

Most lawyers and commentators assume that judges can and should consistently ascertain and apply constitutional law doctrine.¹ Thus, the primary epithet aimed at a purportedly erroneous judicial decision or commentary is that it is “unprincipled.”² What this means is that the decision or commentary represents doctrinal inconstancy or incoherence or, at a minimum, diverges from the position supported by the critic hurling the epithet.

The assumption that a stable datum of “doctrine” exists which courts can apply to constitutional problems conflicts with most individuals’ perception of the current state of United States constitutional law.³ It also conflicts, to some extent, with older notions of the judicial function. For example, Felix Frankfurter and others⁴ have argued that in many situations courts should refuse to rule, withhold a ruling, or avoid a ruling by using a prudential tactic like abstention or the political question doctrine.⁵ Despite the failure of doctrinal coherence or “principledness”⁶ to eventuate and its inconsistency with Frankfurterian prudential notions, only a few have ques-

† Professor of Law, Cornell University. The author thanks students and faculty of law and history at the University of Glasgow, the University of Edinburgh, and Cornell University for reading (or listening to) and commenting upon earlier versions of this article, including Gregory Alexander, William Gordon, James Henderson, Chris Himsworth, Dennis Hutchinson, Sheri Johnson, Robert Kent, and Dale Oesterle.

¹ One notable exception is Phillip Bobbitt’s view expressed in his book, *CONSTITUTIONAL FATE* (1982).

² See Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *COLUM. L. REV.* 982 (1978); Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959). When confronted with a difficult array of precedent Judge Bork has softened his position to some extent. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388, 1395-98 (D.C. Cir. 1984) (upholding a U.S. Navy regulation requiring that homosexual sailors be discharged on ground that Court cannot create a constitutional right to engage in homosexual activity despite line of cases purporting to recognize privacy rights.).

³ See, e.g., Nagel, *The Formulaic Constitution*, 84 *MICH. L. REV.* 165 (1985).

⁴ A. BICKEL, *THE LEAST DANGEROUS BRANCH* 127-43 (2d ed. 1986).

⁵ See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (Brennan, J.) (curtailing political question doctrine); *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941) (Frankfurter, J.) (classic abstention case).

⁶ This essay also uses the term “doctrinality” to refer to principledness.

tioned this underlying assumption.⁷

Surely the most famous argument for principledness is Herbert Wechsler's 1959 forward to the *Harvard Law Review*.⁸ It is an elegant, deeply thoughtful, and erudite lecture. Like many lectures, it glosses over major problems, but scholars continue to debate its claims with respect. Wechsler defined a principled decision as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."⁹ He then used this theory of principledness to criticize the holdings in *Shelley v. Kraemer*¹⁰ and *Brown v. Board of Education*¹¹ and its progeny. Wechsler began his lecture with an attack on Learned Hand and Felix Frankfurter for endorsing prudential notions in judicial decision making.¹² Wechsler believed that the courts must decide each case presented unless the Constitution unequivocally commits the question to another branch.¹³ He argued that courts should decide cases on the basis of neutral¹⁴ or general principles—principles not generated in political debate for political ends. At one point in the lecture Wechsler conceded, "When no sufficient . . . [principled reasons] can be assigned for overturning value choices of the other branches of the Government, or of a state, those choices must, of course, survive."¹⁵ Although Wechsler neither emphasized this nor illustrated it with examples, he wrote later that articulating the amount of burden a state may impose on interstate commerce may be "beyond the possibility of principled decision."¹⁶

⁷ But see *infra* text accompanying notes 28-31.

⁸ Wechsler, *supra* note 2. For criticism and some support of Wechsler, see Greenawalt, *supra* note 2; Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1981).

⁹ Wechsler, *supra* note 2, at 19.

¹⁰ 334 U.S. 1 (1948).

¹¹ 347 U.S. 483 (1954).

¹² Wechsler, *supra* note 2, at 1-10.

¹³ *Id.* at 9-10. Impeachment is one example of such a commitment. *Id.* at 7; see U.S. CONST. art. I, § 3.

¹⁴ It is interesting to speculate why Wechsler chose the word "neutral." Many things which might be labelled constitutional principles, like racial equality, are not neutral in any sense of the term. That Wechsler meant to exclude current political considerations is clear. Perhaps he chose the word to avoid being trapped by a word like "textual." Kent Greenawalt has the best discussion of the meaning of Wechsler's "neutral," but after reading Greenawalt's discussion, it is still not clear to me that the word "neutral" adds much to the meaning of the word "general." See Greenawalt, *supra* note 2, at 985 ("A person gives a neutral reason, in Wechsler's sense, if he states a basis for a decision that he would be willing to follow in other situations to which it applies.").

¹⁵ Wechsler, *supra* note 2, at 19.

¹⁶ Wechsler, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY 290, 299 (S. Hook ed. 1964) (emphasizing difficulty of using neutral principles in nebulous legal areas such as scope of permissible state action under commerce clause); see also H. WECHSLER,

Two prominent constitutional law commentators, Robert Nagel and Jesse Choper, have offered modifications on the notion of principledness without deserting its central features. Nagel attacks the recent trend in constitutional decisions to spawn and present doctrine in formulaic terms, such as tests with "prongs," "standards," or "hurdles."¹⁷ Nagel argues that such formulations inevitably distance judges from the text of the Constitution, and even worse, they fail to communicate effectively with the public, the wider audience for Supreme Court decisions.¹⁸

Nagel does not, however, attack the notion that doctrine can be elaborated. At most his article implies that courts have difficulty articulating constitutional doctrine apart from constitutional text, and that many efforts to do so fail. Nagel suggests that lean, law-applying judicial decisions should be the norm,¹⁹ but he does not indicate how judges can fashion such decisions from broad constitutional language without some doctrinal elaboration.

Ironically, Nagel's distrust of complex doctrinal tests allies him with liberal commentators who have decried the dilution of certain constitutional guarantees through the mechanism of balancing calculi. In the most remarkable of these developments, the Court, it is said,²⁰ has balanced away the right not to have one's home or person searched without a warrant procured upon a showing of probable cause in the context of grand jury proceedings²¹ and, more recently, when a police officer acts in good faith in procuring a warrant which is later found defective in some respect.²²

Jesse Choper also proposes a modified version of principledness. In two articles²³ which compose the core of his book *Judicial Review and the National Political Process*²⁴ Choper argues that the fed-

LER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 35-36 (1961) (using Holmes' clear and present danger test as example of a neutral principle).

¹⁷ Nagel, *supra* note 3, at 165.

¹⁸ In a short "speculation" at the end of his article, Nagel attributes the formulaic trend to a vision of constitutional jurisprudence in which the Supreme Court sees itself as locked in combat with popular culture. *Id.* at 211-12. Thus, the Court's formulae may represent judicial imperialism in the form of adoption of anti-democratic constraints and indicate that the Court no longer considers it necessary or desirable to communicate with the public.

¹⁹ *Id.*

²⁰ LaFave, "The Seductive Call of Expediency": *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895.

²¹ *United States v. Calandra*, 414 U.S. 338 (1974).

²² *United States v. Leon*, 468 U.S. 897 (1984).

²³ Choper, *The Scope of National Power 'is-à-'is the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) [hereinafter Choper, *Judicial Review*]; Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974) [hereinafter Choper, *Theory and Practice*].

²⁴ J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

eral courts should husband their limited, institutional capital, expending it for the most part on individual rights cases. Thus, "the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states."²⁵ Choper justifies avoiding federalism cases on the basis that the issues in such cases are qualitatively different than those considered in individual rights cases. The latter involve "principle,"²⁶ whereas the former concern only the question of which entity may do something, rather than whether that thing may be done at all. Choper ends the first of his two articles by stating the assumption underlying his argument, namely, that the "central function" of judicial review is to "[curb] majoritarian abuse of the constitutional liberties of the individual."²⁷

There have been two major, but isolated, attacks on the notion of principledness. In his book *Constitutional Fate*, Phillip Bobbitt suggests that some Supreme Court decisions are best viewed as the exercise of an "expressive function" in constitutional jurisprudence. These decisions, according to Bobbitt, tend not to have a clear doctrinal or textual basis and tend not to become significant precedent.²⁸ At a deeper level, the exercise of this expressive function represents the social order's continuing effort to create its own "fate."²⁹

Mark Tushnet has also attacked the notion of principledness from a quasi-Marxist, semiotic perspective.³⁰ Actually, most of Tushnet's attack is aimed at Wechsler's claim that doctrine can, and should, be elaborated in terms of "neutral" principles. Tushnet argues, "Interpretivism and neutral principles, as the two leading dogmas of modern constitutional theory, are thus designed to remedy a central problem of liberal theory by constraining the judiciary sufficiently to prevent judicial tyranny."³¹

Despite these criticisms, the assumption of principledness, or "doctrinality," remains so universal that it deserves careful reconsideration, especially in light of several recent Supreme Court decisions. This essay attempts such an analysis in the context of three such decisions. *Bowsher v. Synar*,³² the most recent case and the one

²⁵ Choper, *Judicial Review*, *supra* note 23, at 1557.

²⁶ *Id.* at 1555-56.

²⁷ *Id.* at 1579; *see also* Choper, *Theory and Practice*, *supra* note 23, at 858 (essential role of judicial review in our society is to guard against certain constitutional transgressions specifically sought to be imposed by popular majorities).

²⁸ P. BOBBITT, *supra* note 1, at 196-219.

²⁹ *Id.* at 233-40.

³⁰ Tushnet, *supra* note 8.

³¹ *Id.* at 784-85.

³² 106 S. Ct. 3181 (1986).

of primary importance in this essay, involved separation of powers within the federal system. The second case, *Pennhurst State School & Hospital v. Halderman*,³³ concerned the allocation of judicial responsibility within the federal system, and the third, *Garcia v. San Antonio Metropolitan Transit Authority*,³⁴ considered federalism in the commerce clause context.

An observer of the United States Supreme Court will immediately recognize that *Bowsher*, *Pennhurst*, and *Garcia* were very complex cases, each of which came to the Court with a long pedigree of prior, relevant decisions and commentary. As a result, it was difficult for the Court in each case to articulate a principled statement of doctrine. The factual and doctrinal complexity of these cases might suggest that they are not good examples on which to focus in considering the validity of the assumption of doctrinality. The proponents of principledness have, however, argued for its application in contexts of similar complexity and constitutional importance. For example, Robert Bork has purported to apply the doctrine in first amendment³⁵ and privacy³⁶ cases. More importantly, it is appropriate to scrutinize the assumption of doctrinality in the context of the more difficult and fundamental questions of constitutional law because it is in this context that doctrinality is allegedly the most helpful.

The notion that courts can and should articulate doctrine so that it produces discrete portions of truth which, when fitted together like a puzzle, display the constitutional law of the United States is difficult to test. On the one hand, if a particular decision, like *Bowsher*, is labelled incoherent, then the proponents of principledness argue that the problem is with the decision, the commentator evaluating the decision, or both. On the other hand, if one starts with a single statement of doctrinal principle, for instance Bork's theory of the core meaning of the first amendment,³⁷ and applies it to a particular case, the application rarely confronts the mass of available precedent or other data. The inherent difficulty in testing doctrinality may be the reason that it has lived such a long

³³ 465 U.S. 89 (1984).

³⁴ 469 U.S. 528 (1985).

³⁵ See, e.g., *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (striking down WMATA's rejection of a poster based on its political content); see also Bork, *supra* note 2 (discussing Wechsler's concept of "neutral principles" in the context of the first amendment).

³⁶ See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (upholding Navy regulation requiring discharge of homosexual sailors despite argument that it violated privacy interest).

³⁷ Bork, *supra* note 2, at 29. ("[T]he core of the first amendment [is] speech that is explicitly political.").

and unqualified life in the minds of many lawyers, but it is not a reason not to continue the intellectual testing.

This essay will analyze *Bowsher*, *Pennhurst*, and *Garcia* to test the validity of the claim that constitutional law can usually be articulated in terms of enduring doctrinal formulations. The case law on separation of powers and federalism, analyzed here, refutes this claim. Instead, the Constitution provides an historical framework³⁸ which throws the three branches of the federal government and the various components of the federal system into a perpetual state of possible competition and confrontation.³⁹ In this framework the underlying social order generates over time the answers as well as the constitutional questions.

My argument, that historical context⁴⁰ is a significant and changeable determinant in constitutional decision making, further justifies focusing on these three cases in a symposium about *Bowsher*: Other constitutional and structural developments in the federal system provide an important part of the historical context for *Bowsher*. Thus, both *Pennhurst* and *Garcia* are directly relevant to a deeper understanding of *Bowsher*.

This essay will discuss each case first in doctrinal terms and secondly in terms of some tentative historical perspectives. Next, the essay will develop the theory of an historical constitution. The essay will end with an analysis of the three cases in terms of that theory.

³⁸ I am not arguing that all legal decisions are existentialist acts or that law is radically indeterminate. Nor am I even saying that law is likely to be used as an instrument in a Marxist class struggle. I am saying that articulations of law are always and necessarily incomplete and tentative. Because of the nature of human society and behavior and other historical variables, for each final exposition of any constitutional provision there will always arise new questions and new needs that will require reformulations and re-creations of rules or propositions once perceived as final doctrinal expositions of dogmatic significance.

³⁹ As the frequently quiescent operation of the government demonstrates, competition and confrontation are not necessary conditions at all times and on all issues.

⁴⁰ Explaining these three cases under a theory of an historical constitution is obviously quite different from the approach of constitutional historians who normally describe in detail the context of a single decision or series of decisions. Examples of this mode of historical scholarship include Friedman, *A Search for Seizure: Pennsylvania Coal Co. v. Mahon in Context*, 4 LAW & HIST. REV. I (1986), and Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-58*, 68 GEO. L.J. I (1979). These discrete studies are valuable, but I think that the historical perspective need not always be focused narrowly—it can be applied across types of cases and over long periods of time. Needless to say, the risks of superficiality and distortion increase with the use of such an approach.

I

BOWSHER V. SYNAR

A. The Decisions

The three judge district court in *Synar v. United States*⁴¹ and the Supreme Court on an expedited appeal in *Bowsher v. Synar*⁴² found unconstitutional the mandatory appropriation reduction mechanisms of the Balanced Budget and Emergency Deficit Control Act of 1985 ("the Act").⁴³ However, the various opinions of the two courts and the Supreme Court's two dissenters⁴⁴ analyze and apply doctrine in this case quite differently.

1. *The District Court Opinion*

The per curiam district court opinion, commonly attributed to Judge (now Justice) Antonin Scalia, is divided into three parts. In the first part the district court concluded that Congressman Synar and the other plaintiffs had standing to sue.⁴⁵ In the second part the court rejected the challengers' claim that the Act constituted an impermissible delegation of legislative power by the legislative branch.⁴⁶ Although the court asserted that it need not decide the delegation issue,⁴⁷ it weighed the issue fully in order to present the Supreme Court with a full record of the case, thereby forestalling a remand should the high court reverse on the separation of powers issue.⁴⁸ In the third part of the opinion, the district court agreed with the challengers' claim that the appropriation reduction procedure violated the doctrine of the separation of powers.⁴⁹ The court held that although the Comptroller performed essentially *executive* functions under the Act, he was a creature of the legislative branch.

Giving such power over executive functions to Congress violates the fundamental principle expressed by Montesquieu upon which the theory of separated powers rests: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise lest the same monarch or senate should enact ty-

⁴¹ *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986).

⁴² 106 S. Ct. 3181 (1986).

⁴³ The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985) (popularly known as the Gramm-Rudman-Hollings Act).

⁴⁴ Justices White, *Bowsher*, 106 S. Ct. at 3205, and Blackmun, *id.* at 3215.

⁴⁵ *Synar*, 626 F. Supp. at 1379.

⁴⁶ *Id.* at 1382.

⁴⁷ *Id.* ("It is strictly unnecessary for us to reach this point, since we hold in Part IV of this opinion that the challenged provisions of the Act are unconstitutional on other grounds.").

⁴⁸ *Id.* at 1382-83.

⁴⁹ *Id.* at 1391.

rannical laws, to execute them in a tyrannical manner."⁵⁰

There were two necessary predicates to the district court's decision. First, it concluded that the Comptroller performed an essentially executive function.

Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered The first of these specifications requires the exercise of substantial judgment concerning present and future facts that affect the application of the law—the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an interpretation of the law enacted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he "take Care that the Laws be faithfully executed."⁵¹

The second predicate was the district court's holding that the Comptroller was a legislative branch official. The district court based this conclusion on the determination that the Comptroller was removable only as a result of a congressional initiative. In so ruling, the court implicitly minimized the importance of the President's veto power over any congressional initiative to remove the Comptroller.⁵²

2. *The Supreme Court Opinion*

a. *The Majority Opinion.* The Supreme Court affirmed the district court's result. In his opinion for six justices, Chief Justice Burger first concluded that no consideration of the question of Congressman Synar's standing was necessary because the Treasury employees' union and at least one named employee plaintiff clearly had standing.⁵³ At the end of the opinion, in a footnote, Chief Justice Burger summarily disposed of the delegation issue by stating that resolution of the delegation issue was unnecessary in view of the Court's decision on separation of powers.⁵⁴

The Chief Justice's opinion is, therefore, largely confined to a discussion of the "constitutionally imposed" separation-of-powers

⁵⁰ *Id.* at 1401-02 (quoting C. MONTESQUIEU, *THE SPIRIT OF LAWS*, vol. 1, bk. XI, ch. 6, at 152 (London 1823)).

⁵¹ *Id.* at 1400.

⁵² *Id.* at 1401. It is, therefore, puzzling and inaccurate for the district court to have written the following: "The statute governing removal of the Comptroller General, by contrast, eliminates *all* presidential power of removal, and—much beyond that—confers the power of removal upon Congress." *Id.*

⁵³ *Bowsher*, 106 S. Ct. at 3186.

⁵⁴ *Id.* at 3193 n.10.

issue. The majority⁵⁵ agreed with the district court that the Act violated the separation-of-powers doctrine because the Comptroller performed an essentially executive function⁵⁶ yet was removable only at the initiative of the legislative branch.⁵⁷

b. *Stevens' Concurrence.* Justice Stevens concurred in the judgment. In a separate opinion he found that the doctrine of separation of powers was violated because the Comptroller General, viewed *functionally*, is a member of the legislative branch "because of his longstanding statutory responsibilities."⁵⁸ Whereas Scalia and Burger relied on removal procedures in labeling the Comptroller a member of the legislative branch, Stevens found the Comptroller's traditional responsibilities and institutional identification with the legislative branch to be the crucial and fatal connections.⁵⁹ Stevens concluded,

[W]hen 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 Congress⁶⁰

c. *The Dissenting Opinions.* Justice White dissented from the judgment. He was not satisfied that the Comptroller should be viewed as a creature of the legislative branch.⁶¹ In addition, Justice White disagreed with the majority's conclusion that the Comptroller's function under the Act could confidently be labelled an executive function.⁶²

⁵⁵ In reaching this result, the majority quoted Madison's allusion to Montesquieu in *The Federalist No. 47*: "[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates . . ." 106 S. Ct. at 3186 (quoting *THE FEDERALIST* No. 47, at 325 (J. Madison) (J. Cooke ed. 1961)).

⁵⁶ *Id.* at 3188-92.

⁵⁷ *Id.* at 3192. In their appeal to the Supreme Court the defenders of Gramm-Rudman-Hollings challenged vigorously the remedy selected by the district court. The district court remedy invalidated part of Gramm-Rudman-Hollings rather than the fifty-year-old statute which fixed the Comptroller's tenure of office. Chief Justice Burger rejected this challenge, asserting that the Act's fallback procedure (which replaced sequestration with joint resolutions to reduce any excess appropriations) "settles the [remedy] issue." *Id.* at 3193. Although the district court did not address this issue, the Chief Justice's discussion of this issue was presaged to some extent in the district court's discussion of the ripeness aspect of the separation of powers question. *Synar*, 626 F. Supp. at 1392.

⁵⁸ *Bowsher*, 106 S. Ct. at 3194 (Stevens, J., concurring).

⁵⁹ *Id.* at 3196-98.

⁶⁰ *Id.* at 3194.

⁶¹ *Id.* at 3208 (White, J., dissenting).

⁶² *Id.* at 3206-08.

Justice Blackmun agreed with Justice White but further dissented with respect to the majority's remedy.⁶³ According to Blackmun, "the only sensible way to choose between two conjunctively unconstitutional statutory provisions is to determine which provision can be invalidated with the least disruption of congressional objectives."⁶⁴ Blackmun felt that the least disruptive route was to strike down the tenure act; alternatively, the Court should not enforce that provision when and if anyone tries to remove a comptroller.

B. Structure Issues

1. *Delegation*

While the standing and remedies issues in *Bowsher* are quite interesting, the central concerns of both courts were the plaintiffs' structural functions arguments. With respect to the delegation doctrine issues, the district court opinion stands alone. That court rejected the notion that the delegation doctrine is moribund, although it conceded, "Pragmatically . . . the Court's decisions display a much greater deference to Congress' power to delegate."⁶⁵ The district court further rejected a narrow formulation of the delegation doctrine that would only prohibit delegation of certain "core functions" of the legislative branch.⁶⁶ Rather, he adhered to the traditional notion that the doctrine requires that delegating legislation provide an adequately "intelligible principle"⁶⁷ to guide and confine administrative decision making. Under this analysis the court found that the provisions of the Gramm-Rudman-Hollings Act provided a sufficiently intelligible principle.⁶⁸

The district court also rejected a delegation challenge against section 274(h) of the Gramm-Rudman-Hollings Act, which precluded judicial review of "[t]he economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays."⁶⁹ The court sustained this provision because the Act's overall constitutionality remained subject to judicial review and "the exercise of many validly delegated authorities is statutorily insulated from judicial review."⁷⁰

Because the Supreme Court did not reach the delegation issue

⁶³ *Id.* at 3215 (Blackmun, J., dissenting).

⁶⁴ *Id.* at 3216.

⁶⁵ *Synar*, 626 F. Supp. at 1384.

⁶⁶ *Id.* at 1385.

⁶⁷ *Id.* at 1389.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1390.

in *Bowsher*, the delegation doctrine's current status remains in doubt. Unfortunately, many of the questions raised in *Bowsher* concerning the delegation doctrine are directly relevant to resolving what the Court isolated as "the separation-of-powers" issue. For example, the major post-*Schechter*⁷¹ delegation cases⁷² have not found any delegations excessive. Most of the statutes reviewed in those cases involved substantial delegations of discretionary law-formulating powers to the executive branch or independent agencies.⁷³ Therefore, it is unclear what would constitute an impermissible delegation. Similarly, it seems impossible in light of post-*Schechter* developments to maintain that the executive branch and independent agencies do not perform functions which are at least partially legislative in character. If this is the case, then *Bowsher's* assumption that each branch may only perform certain determinate, assigned functions is seriously undermined.

2. Separation of Powers

The district court and the Supreme Court agreed that the Gramm-Rudman-Hollings Act violated the separation-of-powers doctrine. The Constitution, of course, establishes no unitary doctrine of the separation of powers. Rather, the notion of separated powers is reflected in several constitutional provisions and the works of Montesquieu, which undeniably affected the design of the Constitution of 1787.⁷⁴

Reading the Constitution with regard to structure, articles I, II, and III respectively confer legislative, executive, and judicial power on the separate branches of the federal government: Congress, the President, and the federal courts. However, there is considerable overlap of these functions. The President plays a legislative role in

⁷¹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁷² *See, e.g., United States v. Mazuric*, 419 U.S. 544, 556-57 (1975); *Fahey v. Malloree*, 332 U.S. 245, 250 (1947); *Bowles v. Willingham*, 321 U.S. 503, 516 (1944).

⁷³ *See, e.g., United States v. Mazuric*, 419 U.S. 544 (1975) (upholding congressional delegation of power to regulate distribution of alcoholic beverages on Indian reservation to reservation's tribal council); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (upholding congressional delegation to Secretary of State and Attorney General of power to promulgate regulations under which aliens may be excluded); *Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding delegation of power to fix rents pursuant to Emergency Price Controls Act to Price Administrator); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding delegation of power to FCC to make regulations in public interest).

⁷⁴ The leading scholar on the history of the idea of separated powers has concluded, however, that the framers of the United States Constitution did not accept the extreme, French version of the idea. Rather, the Constitution adopts a conception of checks and balances which requires the branches to interact rather than be totally isolated from each other. *See* M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 119-75 (1967).

vetoing or approving proposed legislation.⁷⁵ Judicial review by the courts presupposes scrutiny of the validity of the executive and legislative branches' actions. Finally, Congress has the power to block certain appointments, reject treaties and other executive agreements, and control to some extent the jurisdiction and structure of the federal courts.⁷⁶

a. *Executive and Legislative Functions.* *Bowsher* assumes that the courts are able to label certain governmental functions as either legislative or executive. Both Burger for the Supreme Court⁷⁷ and the district court⁷⁸ based their invalidation of the Gramm-Rudman-Hollings budget reduction sequestration procedure on their conclusions that the Comptroller was to perform, at least in part, an executive function.

The Constitution provides no sure guide for determining what is an executive, legislative, or judicial function. As the district court opinion demonstrates,⁷⁹ cases abound in which the courts have permitted performance of judicial functions normally within the grant of article III by article I executive branch officials.⁸⁰ However, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁸¹ the Court declared provisions of the Bankruptcy Act of 1978⁸² unconstitutional because it conferred article III powers on article I judges.⁸³ And in *Buckley v. Vale*,⁸⁴ the Court held that a portion of the 1974 amendments to the Federal Election Campaign Act of 1971⁸⁵ was invalid because it conferred adjudicative and executive functions on commissioners of the Federal Election Commission not appointed pursuant to the appointments clause of the Constitution.⁸⁶ Both decisions strike down statutory schemes based on an impermissible assignment of functions, but neither opinion provides significant

⁷⁵ U.S. CONST. art. I, § 7, cl. 3.

⁷⁶ *Id.* art. II, § 2, cl. 2; *id.* art. III, §§ 1-2.

⁷⁷ *Bowsher*, 106 S. Ct. at 3192.

⁷⁸ *Synar*, 626 F. Supp. at 1400. Congress attempted to make the Comptroller appear to act ministerially rather than to exercise discretion in making policy judgments because of the threat of a separation of powers challenge. Both courts, however, rejected this effort. *Bowsher*, 106 S. Ct. at 3192; *Synar*, 626 F. Supp. at 1399-1400.

⁷⁹ *Synar*, 626 F. Supp. at 1399-1403.

⁸⁰ See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (holding findings of fact by deputy commissioner of United States Compensation Commission in suit for compensation by injured maritime employee final).

⁸¹ 458 U.S. 50 (1982).

⁸² Pub. L. No. 95-598, § 201(a), 92 Stat. 2549, 2657 (1978).

⁸³ Article I judges are not life tenured. U.S. CONST. art. I, § 8.

⁸⁴ 424 U.S. 1 (1976).

⁸⁵ Federal Election Campaign Act of 1974, Pub. L. No. 93-443, §§ 310-315, 88 Stat. 1263, 1280-87 (1974) (amending Federal Elections Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971)).

⁸⁶ *Buckley*, 424 U.S. at 140. Some commissioners were appointed by the Speaker of the House, some by the President, and some by the Senate leadership.

discussion of or guidance about how one identifies these three purportedly discrete functions.

Thus, a central feature of *Bowsher*, the ability to identify executive functions and to proscribe nonexecutive officials from exercising them, is tremendously indefinite. As the district court recognized (but the Supreme Court did not), past decisions permitting congressional limits on the President's removal power, approving the existence of federal agencies substantially independent of the President, or approving legislative delegations have characterized such officials and agencies as "quasi-judicial," "legislative courts," or some other branch amalgam.⁸⁷ Therefore, to hold that the Comptroller is an executive branch official because he "execute[s] the laws"⁸⁸ or because he has considerable discretion⁸⁹ only begins the analysis.⁹⁰ Nevertheless, the two courts reached their respective conclusions based on these generalities.

b. *Executive v. Legislative Officials*. A second crucial premise in both the district court and Burger opinions is that courts can identify an individual as a member of the executive or legislative branch on the basis of his tenure of office and that the Comptroller was, based on applying this method, a legislative branch official or agent. As the district court recognized, however, the line of cases concerning the President's removal power is difficult to reconcile and sheds only indirect light on the question of whether the Comptroller is more appropriately a legislative or an executive official.⁹¹

Both Burger and the district court concluded that the power to remove the Comptroller rested with Congress alone and therefore characterized him as a legislative branch official. The Chief Justice wrote:

Although the President could veto such a joint resolution, the veto could be overridden by a two-thirds vote of both Houses of Congress. Thus, the Comptroller General could be removed in the face of Presidential opposition. Like the District Court, . . . we therefore read the removal provision as authorizing removal by Congress alone.⁹²

This startling conclusion is especially curious in light of the Court's

⁸⁷ *Synar*, 626 F. Supp. at 1396-97.

⁸⁸ *Bowsher*, 106 S. Ct. at 3189.

⁸⁹ *Synar*, 626 F. Supp. at 1403.

⁹⁰ Presumably all governmental officials and most citizens "execute" the laws in certain situations. And, as modern notions of jurisprudence or political theory tell us, judges and legislators both have considerable discretion in the performance of their jobs.

⁹¹ *Synar*, 626 F. Supp. at 1393.

⁹² *Bowsher*, 106 S. Ct. at 3189 n.7 (citing district court opinion, 626 F. Supp. at 1393 n.21).

reasoning in *INS v. Chadha*,⁹³ in which it held legislative vetoes unconstitutional because the President had *no* role in the process. At the least, Chief Justice Burger's view that the Gramm-Rudman-Hollings Act authorized removal by Congress alone overstates what the Act, in fact, provided.

c. *The Removal Cases.* The cases involving the President's removal power play two roles in *Bowsher*, although neither court explicitly recognized this dual role. First, they provide indirect evidence about the branch to which the Comptroller properly belongs. Second, they involve the issue, also embedded in *Bowsher*, whether the congressional power to remove the Comptroller encroached upon the President's constitutional appointments power.⁹⁴ Both opinions blended indistinguishably consideration of this second issue into the first.

The five major removal cases⁹⁵ decided by the Supreme Court have involved questions different from those in *Bowsher*; specifically, those cases considered whether and in what ways Congress may limit the executive branch's power to remove an official. The first two cases involved interpretations of statutory removal provisions. *United States v. Perkins*⁹⁶ concerned a naval cadet dismissed by the Secretary of the Navy for a reason not specified in the statute setting the terms of his office. The cadet sued for and won an award of back pay. The Court held that Congress may "restrict the [executive branch's] power of removal as it deems best for the public interest" and that, therefore, the cadet could not be dismissed except pursuant to the statute.⁹⁷ In *Shurtleff v. United States*⁹⁸ the Court construed a tenure statute to provide that President McKinley had residual power to dismiss a government appraiser appointed with Senate confirmation. The tenure statute enumerated certain reasons which could lead to a dismissal⁹⁹ but the court held, in effect, that the enumeration was non-exclusive.¹⁰⁰

⁹³ 462 U.S. 919 (1983).

⁹⁴ U.S. CONST. art. II, § 2, cl. 2.

⁹⁵ *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); *Shurtleff v. United States*, 189 U.S. 311 (1903); *United States v. Perkins*, 116 U.S. 483 (1886). A sixth case, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839), concerned whether a district court judge had an implied power to remove a clerk he had appointed. The Court held that one could properly infer under the Constitution that the power to appoint carried with it the power to remove "[i]n the absence of all constitutional provision, or statutory regulation." *Id.* at 259.

⁹⁶ 116 U.S. 483 (1886).

⁹⁷ *Id.* at 485.

⁹⁸ 189 U.S. 311 (1903).

⁹⁹ The enumerated reasons for dismissal included "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 313.

¹⁰⁰ *Shurtleff* and *Perkins* are reconcilable only as exercises in statutory interpretation.

The remaining three cases do not involve fairly pure questions of statutory interpretation but consider whether the statute, as clearly drafted, violated the Constitution. *Myers v. United States*¹⁰¹ is the most significant of these removal cases. The Supreme Court in *Myers* invalidated a statute which required that the Senate advise and consent to the removal, as well as the appointment, of a postmaster. In a long opinion, Chief Justice Taft held that Congress could not so limit the President's power over certain employees performing executive functions.¹⁰² Justice Holmes¹⁰³ and Justice McReynolds¹⁰⁴ dissented in part because they saw no way to determine what was an executive, as opposed to a legislative, function. Holmes also felt that the President's duty to execute the laws included executing laws which required the advice and consent of Congress or the Senate in a removal.¹⁰⁵

Taft's opinion in *Myers* reaches three interrelated conclusions. First, the Constitution generally separates and isolates the exercise of the three functions of government.¹⁰⁶ Second, appointment and removal of officers of the United States pursuant to article II, section 2, clause 2 is an executive function; thus the President should have free removal power.¹⁰⁷ Third, the inference of a free presidential removal power over officers of the United States is supported

In *Perkins* the Court interpreted the statute's removal provisions to be exclusive and upheld them; in *Shurtleff* the Court interpreted the removal provisions to be nonexclusive and therefore never reached the constitutional question.

¹⁰¹ 272 U.S. 52 (1926).

¹⁰² Taft's opinion presaged the opinion of Justice Sutherland the next term in *Springer v. Philippine Islands*, 277 U.S. 189 (1928), in which the Court, in a *quo warranto* proceeding, denied the validity of colonial legislative branch appointments of directors of the National Coal Company and the Philippine National Bank. Justice Sutherland wrote, "[T]he legislature cannot engraft executive duties upon a legislative office . . ." *Id.* at 202. Justice Holmes, in dissent, responded,

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

Id. at 211.

Springer is one of a group of United States Supreme Court decisions rejecting various facets of the legal structure of the American colonial administration in the Philippines. See *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Carino v. Philippine Islands*, 212 U.S. 449 (1909); *Kepler v. United States*, 195 U.S. 100 (1904). While it is hard to generalize, these decisions seem to impose most aspects of the American legal order on the colonial government. Chief Justice Taft, who was on the Court at the time of *Springer*, had previously served as a colonial administrator in the Philippines.

¹⁰³ *Myers*, 272 U.S. at 177 (Holmes, J., dissenting).

¹⁰⁴ *Id.* at 178 (McReynolds, J., dissenting).

¹⁰⁵ *Id.* at 177 (Holmes, J., dissenting).

¹⁰⁶ *Id.* at 108-09 (majority opinion).

¹⁰⁷ *Id.* at 176.

both by historical practice¹⁰⁸ and by the requirement that the President alone must "take Care that the Laws be faithfully executed."¹⁰⁹ Taft concluded that "the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid."¹¹⁰

The Court's opinion in *Myers* goes beyond prohibiting congressional participation in removals to bar any limitation on the President's removal power over officers of the United States. At the same time, Taft reaffirmed the conclusion reached in *Perkins* that Congress could by statute restrict or limit a department head's removal power over officials who were not officers of the United States appointed with the advice and consent of the Senate:

The *Perkins* case is limited to the vesting by Congress of the appointment of an inferior officer in the head of a department. . . . If [Congress] does not choose to entrust the appointment of such inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal.¹¹¹

Thus, Taft's decision relied more on the statute's interference with the President's power than on congressional involvement in the removal process.

The next removal case, *Humphrey's Executor v. United States*,¹¹² was decided in the midst of a major battle between the Court and the President but not one between the President and Congress. President Franklin Roosevelt purported to dismiss a commissioner of the Federal Trade Commission but did not claim to be exercising

¹⁰⁸ First, Taft relied particularly on the Decision of 1789, in which Congress determined not to enact a proviso that the head of an executive branch department could be dismissed by the President without Senate consent even though the Senate had confirmed his appointment. *Id.* at 114-15.

Second, Taft carefully minimized the significance of the statement in *Federalist Paper No. 77* that the Senate would have to advise and consent to the removal as well as the appointment of executive branch officials on the basis that its author, Alexander Hamilton, later changed his mind. *Id.* at 136-37.

Third, Taft mentioned Andrew Jackson's message of February 10, 1835 in which Jackson claimed that the president had exclusive and plenary removal power over executive branch officials. *Id.* at 158-61.

Finally, Taft discussed the major controversy that ensued when the post-Civil War congresses, opposed to President Andrew Johnson, passed the Tenure-of-Office Act, ch. 154, 14 Stat. 430 (1867), which provided that certain executive department officials were to serve until their successors had been confirmed. *Myers*, 272 U.S. at 165-68. This act was repealed in 1887. Ch. 353, 24 Stat. 500 (1887). Taft rejected the argument that the tenure acts were solid precedent for the 1876 statute requiring advice and consent for the removal of a postmaster. *Myers*, 272 U.S. at 175-76.

¹⁰⁹ U.S. CONST. art. II, § 3.

¹¹⁰ *Myers*, 272 U.S. at 176.

¹¹¹ *Id.* at 162.

¹¹² 295 U.S. 602 (1935).

a statutory removal power. The underlying act provided for removal only in certain circumstances. Roosevelt argued that *Myers* recognized a residual power in the President to dismiss any executive branch employee without cause.¹¹³

Justice Sutherland, one of Roosevelt's protagonists in the larger struggle, wrote the majority opinion in *Humphrey's Executor*. He rejected Roosevelt's argument and held that *Myers* was confined to "purely executive" officers.¹¹⁴ By contrast, a Federal Trade Commissioner's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."¹¹⁵ Sutherland concluded that the Commission was not part of the executive branch¹¹⁶ and, therefore, that the case was not controlled by *Myers*.¹¹⁷

The final removal case, *Wiener v. United States*,¹¹⁸ concerned the validity of President Eisenhower's dismissal without cause of a commissioner of the War Claims Commission appointed with Senate confirmation.¹¹⁹ The Court awarded back pay to Wiener; it relied on the framework of *Humphrey's Executor* and concluded that Wiener was exercising quasi-judicial functions. The Court reached this result even though the statute in question was quite similar to the one in *Shurtleff* which the Court had interpreted the other way.

The five removal cases establish several guidelines about removability. First, Congress may not limit the President's power to remove a member of the executive branch who is an officer of the United States by requiring Congress to advise and consent in a removal. Second, Congress may limit the reasons for which a department head may remove other executive branch employees who are not officers of the United States. Third, Congress may limit the power of the President to remove certain officers of the United States who are performing nonexecutive branch functions. Fourth, the Court has never approved explicit statutory limitations on the President's power to remove an officer of the United States even without congressional participation; indeed, the *Shurtleff* Court construed a fairly clear statute to avoid such a limitation.

The removal cases do not support either court's conclusions in

113 *Id.* at 626.

114 *Id.* at 632.

115 *Id.* at 624.

116 *Id.* at 628.

117 Although the district court suggested in *Synar* that the underlying logic of the result in *Humphrey's Executor* was no longer valid, 626 F. Supp. at 1397, it treated the result in that case (and the four others) as still binding. Chief Justice Burger relied on *Humphrey's Executor* in *Bowsher* as general support for the notion that separation-of-powers considerations affect appointments and removal cases. *Bowsher*, 106 S. Ct. at 3188.

118 357 U.S. 349 (1958).

119 *Id.* at 350.

Bowsher regarding the branch to which the Comptroller belonged and the extent of the President's powers under the appointments clause. First, the removal cases provide no direct authority as to what constitutes an executive function; in fact, they declare that certain law-executing activities are quasi-judicial. Second, while the result in *Myers* supports the conclusion reached in *Bowsher* on the appointments clause issue, the *Myers* logic, applied consistently, would go far beyond *Bowsher* and the Act. The Court in *Myers* reasoned that Congress may impose no limitation on a President's right to remove officers of the United States. This conclusion could invalidate the current tenure of many important governmental officials or lead to the demise of independent regulatory agencies within the executive branch. Taft's *Myers* decision, if accepted fully, would also allow Congress to limit significantly the grounds for removing only those executive branch officials who are not officers of the United States.

3. *INS v. Chadha*

Bowsher came shortly after the Court's decisions in *INS v. Chadha*¹²⁰ and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹²¹ In both decisions the Court struck down significant legislation based on interpretations of the general notion of separated powers. *Chadha* was still on the minds of all members of the Supreme Court as they decided *Bowsher*: the Court's majority opinion, like the district court's before it, struggled to squeeze *Bowsher* into the *Chadha* mold. In *Chadha* the legislative veto was held unconstitutional because less than the entire constitutional legislative branch could alter the design or the implementation of the law.¹²² Thus, in *Bowsher*, both Chief Justice Burger¹²³ and the district court¹²⁴ concluded that despite the President's role in the removal process, Congress, by virtue of its power to override a presidential veto, has ultimate control over that process. Justice White correctly pointed out the Court's quick elision of this point.¹²⁵

Chadha sheds little direct light on the separation-of-powers question raised in *Bowsher*. Although the majority opinion in *Chadha*

¹²⁰ 462 U.S. 919 (1983).

¹²¹ 458 U.S. 50 (1982).

¹²² The Court stressed the constitutional requirements of presidential presentment and bicameralism. *Chadha*, 462 U.S. at 946-51.

¹²³ *Bowsher*, 106 S. Ct. at 3189 n.7.

¹²⁴ *Synar*, 626 F. Supp. at 1401.

¹²⁵ *Bowsher*, 106 S. Ct. at 3209-10 (White, J., dissenting). Justice White noted that the majority ignored the difference between the legislative veto in *Chadha* and the congressional removal provision in *Bowsher*. Under the latter, Congress can remove the Comptroller only by joint resolution which must pass both houses and be signed by the president or repass with two-thirds majorities after a presidential rejection. *Id.* at 3210.

concludes that the veto was an impermissible exercise of legislative power¹²⁶ and thus rests, like *Bowsher*, on a delineation of legislative and executive functions, the opinion fails to explain why the determination of whether to deport could be delegated to the Attorney General.¹²⁷ Furthermore, most observers would probably agree that the particular governmental action taken in *Chadha* constituted the exercise of either an executive or judicial, rather than legislative, function.

C. The Expressive Function?

One explanation for the doctrinal sponginess and confusion in *Bowsher* and the other separation-of-powers cases is that these cases represent an exercise of an expressive function of constitutional law. Phillip Bobbitt has offered this explanation in other contexts.¹²⁸ Thus, according to Bobbitt, *National League of Cities v. Usery*¹²⁹ was essentially a nondoctrinally quantifiable assertion of the continued importance of the federal system. Similarly, *Bowsher* and *Chadha* may be imprecise reminders to the participants in the national political arena of the continued importance of separated powers and functions.

D. An Historical Approach

Bobbitt's expressive function theory may partially explain cases like *Bowsher*, but one can say more. In areas of general constitutional prescription, a dynamic underlying social and political order, even one committed to a continuing reverence for the text of the Constitution, has the maximum ability to create, change, and recreate the very core of those general constitutional understandings. In this context, the naturally competitive forces of a society and the segments of its governmental structure conflict. The tension created by this structural conflict shapes the content of the Court's expression in cases like *Bowsher*.

Both the Supreme Court and the district court in *Bowsher* are inclined to desert the rationale of *Humphrey's Executor* while keeping its holding. At the same time, although both courts rely heavily on *Myers*, they ignore its basic premise that Congress's power to control the tenure of executive branch officials should be severely limited.

¹²⁶ *Chadha*, 462 U.S. at 951-59.

¹²⁷ In a footnote the Court responds to this argument by stating that "[this] kind of Executive action is always subject to check by the terms of the legislation that authorized it." *Id.* at 953 n.16. Presumably, the President had approved the legislative veto on numerous occasions.

¹²⁸ P. BOBBITT, *supra* note 1, at 196-219.

¹²⁹ 426 U.S. 833 (1976).

In neither *Bowsher* opinion is there a precise delineation of what Congress did that caused it to cross the forbidden line. Conversely, there is no limitation on, or even recognition of, the existence of considerable cross-branch functioning.

Although doctrine provides no sure explanation of *Bowsher*, history may. Both *Bowsher* and *Chadha* seem to reflect the continuing fear that the presidency had been attacked or weakened in the post-Watergate, post-Vietnam era. Chief Justice Burger asserted in *Bowsher*, "The dangers of Congressional usurpation of Executive Branch functions have long been recognized."¹³⁰ Similarly, *Myers* was handed down during the relatively weak presidency of Calvin Coolidge. By contrast, *Humphrey's Executor* was decided at a time when fear of presidential domination was significant.

History is complex and legal decisions do not follow in direct response to the crises and headlines of the moment. But it would not be odd to find that judges, particularly conservative judges, interpreting very general and imprecise notions of separated powers would tilt against what they perceive as an era's aggressive force in order to sustain competition and balance at the heart of the government. As Chief Justice Burger stated, "[T]his system of division and separation of powers produces conflicts, confusion, and discordance at times,"¹³¹ but its goal is the avoidance of tyranny.

Bowsher also reflects a theme in American constitutional history broader than one could make out from a minute contextualization of the separation-of-powers cases. *Bowsher* represents a fear of concentrations of power. Two major episodes in constitutional history illustrating this theme are the Supreme Court's acceptance of federal and, to a lesser extent, state railroad rate regulation¹³² and the federal antitrust laws.¹³³ The Court upheld these statutory schemes in the face of the enormous power of the interests arrayed against such regulation and the comparative weakness of the public sector. More recently, the Court's decisions in *Chadha*, *Buckley*, and now

¹³⁰ 106 S. Ct. at 3189.

¹³¹ *Id.* at 3187.

¹³² See *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914) (Shreveport Rate Case); *Chicago, Burlington & Quincy R.R., v. Chicago*, 166 U.S. 226 (1897) (condemnation of railroad property upheld in face of due process challenge); see also *Munn v. Illinois*, 94 U.S. 113 (1877) (upholding state regulation of prices of grain warehouses).

¹³³ See *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (dissolving combination scheme between Great Northern and Northern Pacific railways); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (breaking up interstate (e.g., commerce) aspects of combination of iron-pipe manufacturers); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (implicitly approving antitrust law but holding that sugar refining was part of manufacturing and, therefore, not part of commerce). It is, of course, true that in some of the early cases like *E.C. Knight*, particular monopolies were declared not covered by the antitrust laws because manufacturing was not considered a part of interstate commerce and was therefore not subject to federal regulation.

Bowsher have revived this theme and transported it to justify careful consideration of power relationships in the national government.

In sum, *Bowsher* is not the natural outcome of a process of ever-perfecting doctrinal development. Nor is it the product of irrational or random events or of an inexorable class struggle. Rather, it seems to reflect a continuing judicial and societal adherence to a fear of concentrations of power. The cases discussed can thus be explained as continuing adjustments countering perceived concentrations of power. That Congress might become the object of this fear in the era of the modern presidency could not have been predicted twenty-five years ago. After the shocks¹³⁴ of those twenty-five years, though, the Court seems to be attempting to maintain a balance in the national government. This process has involved striking down innovations in the interaction between the legislative and executive branches and protecting the judiciary's exclusive territory more vigorously than past precedents would have suggested.

II

PENNHURST

*Pennhurst State School & Hospital v. Halderman*¹³⁵ was a procedurally complex pendent jurisdiction case. Residents of a Pennsylvania facility for the mentally retarded had challenged the conditions of their care. The plaintiffs brought their claim in federal court based on the fourteenth amendment due process clause and federal and state statutes establishing rehabilitation programs for retarded people.¹³⁶ The Court of Appeals, in a ruling which directly preceded Supreme Court consideration, found that a state statute had been violated, awarded damages, and ordered state officials to upgrade the facility in various ways.¹³⁷ The Court of Appeals did not reach the federal issues in part because of the judicial doctrine that cases should be disposed of on a non-constitutional basis whenever possible.¹³⁸ The Court of Appeals rejected the state's argument that the court order violated the eleventh amendment by being based solely on state law.¹³⁹ Based on considerations of comity, the court also

¹³⁴ I would include in this category Nixon's fall, Johnson's end of the Vietnam War paralysis, and Ford's and Carter's failures to be reelected.

¹³⁵ 465 U.S. 89 (1984).

¹³⁶ *Id.* at 92.

¹³⁷ *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647, 661 (3d Cir. 1982).

¹³⁸ *Id.* at 658; see *Pennhurst*, 465 U.S. at 95-96; see also *Siler v. Louisville & Nashville R. R.*, 213 U.S. 175, 193 (1909) ("Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons.").

¹³⁹ *Pennhurst*, 673 F.2d at 659.

declined to abstain from acting.¹⁴⁰ Pennsylvania appealed the Court of Appeals order as to the eleventh amendment and comity issues. The Supreme Court found that the eleventh amendment had been violated and reversed the Court of Appeals.

A. The Eleventh Amendment Issue

The history of the eleventh amendment in the federal courts is long and intricate. Congress passed the amendment to prevent prospectively the result reached in *Chisolm v. Georgia*.¹⁴¹ In that case out-of-state plaintiffs were allowed to sue Georgia in federal court even though the doctrine of sovereign immunity apparently barred the same action in state court.¹⁴² The curiously indirect wording of the eleventh amendment¹⁴³ has been held in a long line of cases to "exemplify" the notion that the jurisdictional grant in article III was not intended to eliminate the defense of state sovereign immunity in federal court proceedings.¹⁴⁴ Thus, in *Hans v. Louisiana*¹⁴⁵ the Court held that a federal court action by a citizen against his own state might also be abated on the ground of the sovereign's immunity.¹⁴⁶

The operation of a state's sovereign immunity in a federal proceeding involving federal claims has been an issue in numerous cases. The Supreme Court has held that sovereign immunity is no bar to an action by the United States against a state.¹⁴⁷ Very little else is clear.

In *Ex parte Young*¹⁴⁸ the Court decided that sovereign immunity did not bar a federal court from prospectively enjoining a state official from enforcing an unconstitutional state statute. The Court barred Minnesota's attorney general from enforcing a state railroad rate regulation which unconstitutionally took the plaintiff's property by imposing unfair rates. Minnesota's doctrine of sovereign immunity barred any state court challenge of these rates. Justice Peckham wrote:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitu-

¹⁴⁰ *Id.* at 659-60.

¹⁴¹ 2 U.S. (2 Dall.) 419 (1793); see *Pennhurst*, 465 U.S. at 97-98.

¹⁴² 2 U.S. (2 Dall.) at 479-80.

¹⁴³ "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

¹⁴⁴ *E.g.*, *Pennhurst*, 465 U.S. at 98-99.

¹⁴⁵ 134 U.S. 1 (1890).

¹⁴⁶ *Id.* at 20-21.

¹⁴⁷ See *United States v. Texas*, 143 U.S. 621, 646 (1892) (state consents to suit by United States upon entry into Union).

¹⁴⁸ 209 U.S. 123 (1908).

tional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official. . . . [H]e is in that case stripped of his official or representative character¹⁴⁹

Ex parte Young must be interpreted cautiously in light of the circumstances under which it arose. It is one of a series of decisions in which the federal courts imposed limits on aggressive state regulation of large business enterprises, especially railroads.¹⁵⁰ Thus, the Court's willingness to disregard federalism should be discounted to some extent. At the same time, if sovereign immunity could bar federal and, of course, state litigation of federal claims, then the Constitution's supremacy principle would be rendered meaningless. Thus, a more theoretically sound decision in *Ex parte Young* would have held that a state is not sovereignly immune to federal constitutional claims *even in its own courts*.

Ex parte Young's fiction—that an erring state officer was stripped of his or her official character—eliminated the problem of sovereign immunity in cases involving federal constitutional claims when only prospective, injunctive relief is sought. Post-*Ex parte Young* decisions have replaced this fiction to some extent with a test balancing the justification for sovereign immunity against the importance of the particular federal right asserted. In *Edelman v. Jordan*,¹⁵¹ the leading recent case, Justice Rehnquist held that sovereign immunity barred a suit seeking retroactive payments of welfare benefits which went unpaid in violation of federal law. Because a retroactive award would necessarily come from the state's general coffers, a significant state interest existed.¹⁵² Justice Rehnquist concluded, "As in most areas of the law, the difference between the type of relief barred by

¹⁴⁹ *Id.* at 159-60. Justice Peckham also wrote the majority opinion in *Lochner v. New York*, 198 U.S. 45 (1905) (state statute limiting hours of labor held unconstitutional). Both cases struck down state attempts to regulate commerce as unconstitutional.

¹⁵⁰ See *Smyth v. Ames*, 169 U.S. 466 (1898) (Nebraska statute fixing reasonable maximum railway rates deprived companies of just compensation); *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890) (Minnesota statute establishing commission to regulate railroad rates held unconstitutional because it deprived railroads of property without due process of law and of equal protection of the laws). The Supreme Court approved and enforced, however, similar federal regulatory programs. See text accompanying *supra* note 132; see also Cook, *History of Rate-Determination Under the Due Process Clauses*, 11 U. CHI. L. REV. 297 (1944).

¹⁵¹ 415 U.S. 651 (1974). Rehnquist, writing again for the majority after *Edelman*, concluded that the eleventh amendment does not bar suits in federal court premised on causes of action created by Congress pursuant to § 5 of the fourteenth amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); see also Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

¹⁵² Retroactive payment in this case "resembles far more closely [a] monetary award

the Eleventh Amendment and that permitted under *Ex parte Young* will not, in many instances, be that between day and night."¹⁵³

B. The *Pennhurst* Decisions

With the post-eleventh amendment cases as their primary reference point, the *Pennhurst* justices considered the *Pennhurst* residents' claims. Justice Stevens, in a biting dissent,¹⁵⁴ bitterly disagreed with Justice Powell's majority opinion about the correct characterization of the cases that followed *Ex parte Young*. Even Justice Stevens, however, did not argue that the Supreme Court had fully and forthrightly decided the issue of whether a state official's violation of state law also strips away sovereign immunity.¹⁵⁵ However, Justice Stevens did claim that this stripping had in fact occurred in some cases.¹⁵⁶

Thus, *Pennhurst* presented a somewhat novel question. Justice Powell argued that to deprive a state of sovereign immunity when it violated its own law would be to "emasculate the Eleventh Amendment."¹⁵⁷ Justice Stevens seemed to suggest that this emasculation had already occurred.¹⁵⁸ Perhaps behind Justice Stevens's venom lay his apprehensions about potential problem cases arising from the majority's decision.

The majority concluded that sovereign immunity barred the *Pennhurst* school remedial order and remanded the case to the Court of Appeals for a reconsideration of the federal issues.¹⁵⁹ This disposition may cause administrative problems in pendent jurisdictional proceedings in which some, but not all, claims are subject to a defense of sovereign immunity. Justice Powell noted in response to this possibility that pendent jurisdiction is a judge-made conven-

against the state itself than it does prospective injunctive relief." *Edelman*, 415 U.S. at 665 (citation omitted).

¹⁵³ *Id.* at 667.

¹⁵⁴ *Pennhurst*, 465 U.S. at 126 (Stevens, J., dissenting).

¹⁵⁵ Although part II of Justice Stevens' opinion is quite emphatic, a careful reading of his description of case holdings suggests that I am correct. *Id.* at 130-39.

¹⁵⁶ *Id.* at 132-35 (Stevens, J., dissenting).

¹⁵⁷ *Id.* at 106 (majority opinion).

¹⁵⁸ *Id.* at 130-39 (Stevens, J., dissenting).

¹⁵⁹ *Id.* at 124-25 (majority opinion). This decision came at the end of a long series of decisions, including prior review by the Supreme Court itself. In its first consideration of the case the Court held that section 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1982), did not create any substantive rights. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 31-32 (1981). The Court then remanded the case to the Court of Appeals for consideration of remaining state law, and federal constitutional and statutory issues. *Id.* at 31. The Court did not in its first decision consider whether a decision premised solely on state law would violate the eleventh amendment.

ience without an explicit basis in article III¹⁶⁰ and that in many cases parallel proceedings in state and federal courts already take place.¹⁶¹

Pennhurst will affect only those cases in which a sovereign immunity defense is available, including cases in which a plaintiff seeks non-prospective injunctive relief or damages. Thus, if the state has consented, waived, or abolished its immunity, no eleventh amendment problem will arise with a decree like the one the Court of Appeals entered. Nevertheless, the decision will impose costs in future litigation because a state's sovereign immunity status must be ascertained at an early point in such pendent proceedings or multiple proceedings may be required in some situations.¹⁶²

C. Sovereign Immunity Doctrine

Reasonable and intelligent justices obviously disagreed about the meaning of the doctrine and precedent confronting them in *Pennhurst*. Justice Stevens stated that the fiction of stripping extended to violations of state law.¹⁶³ Justice Brennan in a separate dissent argued that the eleventh amendment does not apply to a case between a state and its own citizens and called for the overruling of *Hans v. Louisiana*.¹⁶⁴ Justice Powell implies that assuming that federal jurisdiction exists, the eleventh amendment precludes action in a federal court if state law is in question and there has been no waiver.¹⁶⁵ If federal rights are violated, then *Edelman's* balancing seems to be in order.

One could argue that the federal courts in *Pennhurst* should have abstained from passing on the state law issue: the Court of Appeals decided a significant question of Pennsylvania law on which the federal courts needed additional state law guidance.¹⁶⁶ The

¹⁶⁰ *Pennhurst*, 465 U.S. at 120.

¹⁶¹ *Id.* at 122.

¹⁶² In addition, there remains the difficult question of whether the remedy sought is for "past" as opposed to "continuing" violations of federal law. *See, e.g.*, *Papasan v. Allain*, 106 S. Ct. 2932, 2942 (1986) ("We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners.").

¹⁶³ *Pennhurst*, 465 U.S. at 158.

¹⁶⁴ *Id.* at 125 (Brennan, J., dissenting). Justice Stevens, in a later decision, embraced the substance of Justice Brennan's dissent. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) ("Additional study has made it abundantly clear that not only *Edelman*, but *Hans v. Louisiana* as well, can properly be characterized as 'egregiously incorrect.'") (citation omitted) (quoting *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 153 (1981) (Stevens, J., concurring)).

¹⁶⁵ *Pennhurst*, 465 U.S. at 100, 121.

¹⁶⁶ The Pennsylvania Supreme Court had decided in *In re Schmidt*, 494 Pa. 86, 96, 429 A.2d 631, 636 (1981) that the state statute required the state to adopt the "least restrictive environment" approach to the care of retarded persons.

Court of Appeals might have avoided a decision premised on state law or declined to rule for reasons of comity. On the other hand, given the current judicial distaste for abstention, the Pennsylvania courts provided sufficient guidance to render use of that device unjustified.¹⁶⁷

Because of the unlikelihood of abstention, *Pennhurst* should be evaluated in terms of eleventh amendment doctrine. *Pennhurst* is a case with more basis for doctrinal certitude than *Bowsher* or *Chadha* because, as Justice Powell argued, it presents starkly the question of whether the eleventh amendment has any content. Even though the long line of precedent suggests that the eleventh amendment's content can be balanced away, nothing in the amendment's text or background justifies the adoption of the stripping fiction.

Stripping was generated by a result-oriented jurisprudence which assumes that controversies must be resolvable, yet the framers may have contemplated that certain controversies in which a state is a party would not be resolvable by judicial process.¹⁶⁸ In any event, it is impossible to derive from article III's general grant of federal jurisdiction a specific direction to enforce federal rights against the states.¹⁶⁹ Even the Court, in *Edelman* and elsewhere, has

¹⁶⁷ The classic case of discretionary abstention is *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500 (1941) (remanding case to state court for definitive construction of state statute alleged to discriminate against black porters by requiring white conductors to attend sleeping cars in to avoid "needless friction" with state policies). But in *Baggett v. Bullitt*, 377 U.S. 360 (1964), where an anti-communist state oath law was challenged under the first amendment, the Supreme Court held that abstention is not proper where a statute is unconstitutional on its face. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Court laid out the various bases for abstention. *Id.* at 813-17. It found that none of them applied in that case but dismissed the action on the "separate" ground that to do so comported with "wise judicial administration" in view of contemporaneous state court proceedings. *Id.* at 817.

Strident anti-abstention commentary can be found in Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) and Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978). For a more balanced view, see Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

The abstention doctrine may be reviving. In the most recent Term a unanimous Supreme Court reversed a Sixth Circuit decision which halted a pending state administrative civil rights proceeding on the ground that it infringed religious freedom. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986). The Court reinstated a district court order abstaining under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), from intervening in that proceeding. *Dayton Christian Schools*, 106 S. Ct. at 2720.

¹⁶⁸ It is certainly clear that the Framers did not give the scope of judicial power and authority systematic attention. See M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 154 (1913).

¹⁶⁹ Herbert Wechsler finds such a direction implicit in the supremacy clause. Wechsler, *supra* note 2, at 3. But that clause omits any mention of federal judges and, at the least, implies that state court judges will normally be the first line of defense in ensuring that the supremacy principle is observed. U.S. CONST. art. IV, cl. 2. Wechsler

found its earlier decision in *Ex parte Young* hard to explain if one believes that the eleventh amendment has content.

D. The Expressive and Historical Element

Pennhurst has, to employ Bobbitt's formulation, an expressive element: it reminds the courts of the existence of the federal system and highlights the states' continuing power to assert or to waive their historical immunity.¹⁷⁰ But *Pennhurst* cannot be formulated into neatly expressed principles of lasting linguistic value.

One can say more about *Pennhurst*. Like the themes in *Bowsher* and other cases involving structural constitutional issues which cannot successfully be enshrined by language, the issues and results in *Pennhurst* are particularly susceptible to historical rearrangement by and in response to the changing demands of the social order. While our political system formally remains federal in structure, there has been a sustained augmentation of the power and responsibility of the national government. Frequently national power has been enhanced with the specific goal of overwhelming state resistance, even in areas of traditional state responsibility such as crime, health, and safety. It would be curious to find that the doctrine of sovereign immunity could long resist that trend. And once that doctrine was breached by a judicial fiction, as it was in *Ex parte Young* and its progeny, it is hard to stop the process of contraction.

Yet *Pennhurst* represents some degree of hedging on the trend of federal domination of the states. As discussed in the next section, *Garcia* seems inconsistently to indicate that the courts will never limit the direct exercise of a federal power, in that case the commerce power, by reference to state sovereignty. This result is in line with historical developments in American society and government since 1860. These two tendencies may be reconciled if one understands that while *Pennhurst* suggests that although the federal courts will, as a result of historical developments, decline to limit a direct exercise of an enumerated federal power, they may recognize (and perhaps even enhance) state sovereignty in other situations. Thus, one might predict a revival of abstention.¹⁷¹ One other possible explanation is that *Pennhurst* merely reflects the docket-clearing priorities of the recently retired Chief Justice.

To the extent that *Pennhurst* reflects either residual deference to the states or fear of the alleged problem of overloaded federal court

suggests that state court judges are mentioned primarily to remind them of the principle. Wechsler, *supra* note 2, at 3.

¹⁷⁰ Justice Powell discusses the fact that a state may consent to be sued only in a particular forum, which is not necessarily a federal court. *Pennhurst*, 465 U.S. at 99 n.9.

¹⁷¹ See *supra* note 167 and accompanying text.

dockets, it closely resembles *Stone v. Powell*,¹⁷² decided in 1976. In *Stone* the Court limited federal habeas corpus consideration of search and seizure claims originating in state proceedings. The Court held that federal habeas corpus review of such claims is appropriate only if a petitioner was denied "full and fair litigation" of such claims by the state.¹⁷³

To say that *Pennhurst* resembles *Stone* is, of course, only a partial explanation, particularly when *Pennhurst* is compared with *Garcia*. An historical explanation for developments in constitutional law presupposes that the explanation for a particular result can be found only in continuing or changing social perceptions of the questions involved. *Pennhurst*, like *Bowsher*, reflects a continuing social fear of concentrations of power.

III

GARCIA

*Garcia v. San Antonio Metropolitan Transit Authority*¹⁷⁴ apparently halts for the present the Supreme Court's search for affirmative limits on Congress's commerce power arising from state sovereignty. The search began in *National League of Cities v. Usery*,¹⁷⁵ when the Court invalidated some amendments to the federal Fair Labor Standards Act¹⁷⁶ which applied federal wage and hour rules to municipal fire and police workers. In the nine years that followed the Court considered five major commerce clause cases. According to the majority in *Garcia*, the Court in those cases was unable to articulate a workable standard for determining tangible limits under the commerce power on federal action affecting state governmental powers.

A. Federalism and the Commerce Clause

Garcia represents the most visible, recent example of collective doctrinal uncertainty within the Court.¹⁷⁷ In *Hodel v. Virginia Surface Mining & Reclamation Association*¹⁷⁸ the Court attempted mid-way through the post-*Usery* cases to promulgate a four-pronged test. To

¹⁷² 428 U.S. 465 (1976).

¹⁷³ *Id.* at 482. Although Justice Powell's opinion for the majority is largely confined to a discussion of the role of and justification for the exclusionary rule, Justice Brennan in dissent wrote that these cases "involve the question of the availability of a *federal forum* for vindicating those federally guaranteed rights." *Id.* at 503.

¹⁷⁴ 469 U.S. 528 (1985).

¹⁷⁵ 426 U.S. 833 (1976).

¹⁷⁶ Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974).

¹⁷⁷ The fourth amendment is less of an example of collective uncertainty because some of the justices have fairly precise doctrinal views on the issue. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984).

¹⁷⁸ 452 U.S. 264 (1981).

offend state sovereignty, a challenged federal regulation first had to regnlate the state as a state.¹⁷⁹ Second, the regulation had to “address” matters that were indispensable attributes of state sovereignty.¹⁸⁰ Third, state compliance with the regulation had to impair directly the state’s ability “to structure integral operations in areas of traditional governmental functions.”¹⁸¹ Fourth, in relation to the state interest, “the nature of the federal interest advanced . . . [could not] justifi[y] state submission.”¹⁸²

In *Garcia* Justice Blackmun for the majority referred to the *Hodel* test and the Court’s unsuccessful efforts to apply it: he wrote, “What has proved problematic is not the perception that the Constitution’s federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations.”¹⁸³ Blackmun went on to hold that the primary limitation on the exercise of the commerce power is the structure of the legislative branch. Thus, states will have to trust Congress to protect their interests in the formulation of legislation.¹⁸⁴ Although Blackmun did not completely abandon the idea of affirmative limitations on the commerce power, he did hold that the application of the federal wage and hour legislation to a mass transit system did not violate whatever limitation might exist. Thus, he concluded by quoting the late Justice Felix Frankfurter’s statement that there may well be some “horribles” which would produce a decision along the lines of the factually overruled *Usery*.¹⁸⁵

Usery itself had overruled a fairly recent decision.¹⁸⁶ In the course of *Usery*’s short but active life, the Court substantially diluted its impact. For example, it sustained in *Hodel* an aggressive federal program which overrode historically entrenched state power over land use in the interest of controlling coal strip-mining.¹⁸⁷ In *Federal Energy Regulatory Commission v. Mississippi*,¹⁸⁸ the Court upheld a federal program designed to channel state licensing of power plants. And in the term before *Garcia*, the Court sustained the application of federal age discrimination rules to game wardens employed by the state of Wyoming.¹⁸⁹

179 *Id.* at 287.

180 *Id.* at 287-88.

181 *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 852).

182 *Id.* at 288 n.29.

183 *Garcia*, 469 U.S. at 547.

184 *Id.* at 552.

185 *Id.* at 556.

186 *Maryland v. Wirtz*, 392 U.S. 183 (1968).

187 452 U.S. at 288 (district court decision that federal program violated tenth amendment “rests on an unwarranted extension of . . . *National League of Cities*”).

188 456 U.S. 742 (1982).

189 *EEOC v. Wyoming*, 460 U.S. 226 (1983).

Like *Pennhurst*, *Garcia* produced several well-argued dissents. Justice O'Connor suggested that while no "bright line"¹⁹⁰ rule is possible in a case like *Usery*, "state autonomy" should still count as a "factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States."¹⁹¹ Justice Powell's dissent favored a balancing approach like the fourth prong of the *Hodel* test, in which the relative strengths of the federal and state interests are compared.¹⁹²

B. The *Garcia* Decision

There are several possible ways to view Justice Blackmun's opinion in *Garcia*. He may have meant that although state sovereignty imposes affirmative limitations on the exercise of the commerce power, the Court is unable to articulate them. Another view, no doubt supported by some of those who joined in the majority, is that there is no limitation on the exercise of the commerce power other than the federal political process.¹⁹³

Most commentators, especially doctrinalists, would reject the possibility of an inarticulable standard. Such a possibility calls to mind the late Justice Potter Stewart's claim that he could not define obscenity, but he could identify it.¹⁹⁴ Yet, it may not be absurd to state that the commerce power has limits for which it is difficult, perhaps impossible, to articulate an enduring standard. The nature of what is integral to a government has changed drastically since 1789 and will continue to change. Just as the Court had difficulty distinguishing between an "integral" transit system and a "nonintegral" intercity railway system,¹⁹⁵ so it will have difficulty specifying what functions are so central or integral to a state government that they define its sovereignty. And once the Court has made such a categorization, time will ultimately strain some of its specifications.

The positions of Justices Powell, O'Connor, and Blackmun may be presented in a form recognizable as "doctrine," but in each case the doctrine's core is so spongy as to make the doctrinal formulation worth very little. For example, Justice O'Connor's state autonomy factor's weight would vary tremendously depending on a court's estimation of the federal interest's importance. Such a factor would regularly lose out with a court dominated by people like Justice Mar-

¹⁹⁰ *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting).

¹⁹¹ *Id.*

¹⁹² *Id.* at 578 (Powell, J., dissenting).

¹⁹³ Justice Rehnquist, in a short dissent, promised a revival of *Usery*, presumably to occur once the balance of power on the Court shifts again. *Id.* at 579-80.

¹⁹⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring.)

¹⁹⁵ *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982).

shall, but would win often if the court were dominated by people like Justice O'Connor. Justice Powell's balancing test leads in exactly the same direction. By contrast, Justice Blackmun's majority opinion promises somewhat greater repose than would the O'Connor or Powell resolution.

C. The Expressive Element

Like *Usery*, *Garcia* has an expressive aspect. *Usery* stood for the proposition that there are some limits to the commerce power inherent in the federal system; more generally, it emphasized that the states and their instrumentalities count. *Garcia*'s message is, at its least coherent level, that courts should not bother with federalism questions if Congress has designed an intricate regulatory statute for some reason apart from federalism. Despite these expressive elements, neither *Usery* nor *Garcia* lends itself to an enduring doctrinal formulation. Revealingly, even the more conservative dissenters in *Garcia* were unable to formulate with any precision a standard for the future.

D. An Historical Approach

The significance of *Garcia*, like that of *Bowsher* and *Pennhurst*, is primarily historical. As American society has grown and centralized, the national government has faced increasing demands for solutions to problems. In response, the Court has gradually demolished most possible limits on the commerce power. The Court defined the word "regulate" broadly.¹⁹⁶ It dropped the nineteenth-century distinctions between navigation, commerce, manufacturing, mining, and production—of which the last three were originally perceived as not commerce.¹⁹⁷ The Court further broadened the commerce power by holding that Congress could undertake commerce regulation for any end not contradicted by an affirmative textual constitutional provision other than the ninth and tenth amendments.¹⁹⁸

¹⁹⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824) (upholding federal coastal licenses to operate in New York waters and striking down New York laws which created steamboat monopoly).

¹⁹⁷ Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.") with *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) ("[N]one of [the] essential antecedents of production constitutes a transaction in or forms any part of interstate commerce" and is therefore not subject to federal regulation.).

¹⁹⁸ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (confirming Congress's power to regulate against racial discrimination where Congress found such discrimination has "a direct and adverse effect on the free flow of interstate commerce").

Thus, Congress could ban lottery tickets because they were morally reprehensible, not because they damaged or impeded some economic interest.¹⁹⁹ Finally, the Court held that federal regulation of commerce could extend to things or actions not themselves in commerce, but which might, when aggregated with the things or actions of others similarly situated, "affect" commerce.²⁰⁰ As social pressure has mounted, the Court has poured into the commerce clause a jurisprudence which reflects a fundamental alteration in the Constitution's allocation of governmental powers.

However, the holding of *Pennhurst* indicates that *Garcia* does not amount to the complete interment of states' authority. Courts still might, and in the former case the Supreme Court did, recognize the substantiality of the states' interest in handling nonfederal legal questions not involving direct exercises of an enumerated federal power. This possibility might seem insignificant when compared with both the frequency and significance of Congress's use of the commerce power, but developments in other areas of federalism indicate that it is not.

In recent cases the Court has reaffirmed its desire to avoid invalidating state law under the supremacy clause, even when a state and the federal government both exercise their respective powers to regulate essentially the same thing. For instance, in a tortured opinion Justice White upheld a California moratorium on building nuclear power plants²⁰¹ in the face of elaborate federal statutory and administrative regulation of that industry. The Court has also declined to strike down state laws which burden interstate commerce so long as they serve a "legitimate" local purpose.²⁰² At the same

¹⁹⁹ *Champion v. Ames*, 188 U.S. 321 (1903).

²⁰⁰ *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) ("[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the states of origin and destination, which might have a substantial and harmful effect upon that commerce . . . Congress may . . . prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear."); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

²⁰¹ *Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190 (1983); *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (Washington law regulating oil tankers partially validated, partially invalidated). *But see Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 106 S. Ct. 709 (1986) (Mississippi State Oil and Gas Board's authority pre-empted by federal regulation.).

²⁰² *See, e.g., Maine v. Taylor*, 106 S. Ct. 2440 (1986) (upholding state restriction on imports of bait fish). The Court described the applicable standard as whether a state "needlessly obstruct[s] interstate trade or attempt[s] to 'place itself in a position of economic isolation.'" *Id.* at 2455 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

time that the Court has avoided finding federal-state collisions, it has invalidated state laws discriminating against nonresidents.²⁰³ Such decisions are not inconsistent with a limited recognition of federalism, for they involve a question of the power of the states among themselves and entail no exertion of national governmental power.

Thus, *Garcia* more clearly than *Bowsher* or *Pennhurst* shows the social order imposing its will on the legal system. I have suggested that a generalized, historical, and strongly ingrained fear of concentrations of power supported questionable interpretations of the general notion of separation of powers in *Bowsher* and of the eleventh amendment in *Pennhurst*, yet the *Garcia* Court subordinated that fear in sustaining an exercise of the most powerful legal tool, a federal enumerated power.

IV

DEVELOPMENT AND APPLICATION OF THE THEORY OF AN HISTORICAL CONSTITUTION

A. The Meaning of an Historical Constitution

The Supreme Court failed to articulate meaningful doctrinal formulations of enduring significance in *Bowsher*, *Pennhurst*, and *Garcia*. This failure is not the result of judicial inadequacy or some other temporary circumstance, nor does it lend support to claims that law is radically or even significantly indeterminate at all times. Rather, these cases demonstrate that the development of case law arising under the United States Constitution can only be understood in its historical context.

To conclude that the United States Constitution and the legal rules it creates are an historical constitution is not novel²⁰⁴ and may not appear to have much content. The idea certainly does not, in the abstract, offer much specific guidance about what the future holds. And it suggests that past results will frequently be explained in terms of their non-legal contexts, which are subject to perpetual revisions, rearrangements, and changes in historical fashion.

There are, of course, various forms or types of historical analy-

²⁰³ See, e.g., *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (state statute taxing out-of-state insurance companies at higher rate held invalid); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984) (municipal ordinance limiting employment subject to the privileges and immunities clause). The Court has continued to apply vigorously explicit federal statutory preemptions of state law, as in the case of the federal pension law. See, e.g., *Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983), *aff'g mem.*, *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F. 2d 323, 329 (2d Cir. 1982) (state statute relating to employee benefit plan as defined by ERISA preempted by federal statute).

²⁰⁴ See generally C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1937).

sis.²⁰⁵ Some definition of the phrase "historical constitution" is therefore necessary. By the term "historical constitution" I do not mean that the original intention or understanding of a particular provision in the Constitution ought necessarily (or even usually) to control in constitutional law: indeed, I mean something almost the opposite.²⁰⁶

The historical theory of the Constitution places the evolution of the Constitution in the context of the development of American society²⁰⁷ and in a larger framework of social theory. The Constitution of 1787 established the fundamental, governmental structures of a group of societies that wished to form a nation. It established a national governmental structure and specified certain rights, powers, and obligations of the states and of the federal government and its components and citizens.

The Constitution of 1787 is now a small element of what has become a very large national community with a number of significant regional subcommunities. This national community functions primarily in response to the will of its constituency and certain external stimuli,²⁰⁸ and not in response to abstract constitutional or other legal commands.

Our society continues to be dynamic, but this dynamism is neither new nor materially more frenetic than it was, for example, from 1830-1870. Some periods may experience greater change or stability than others, but close historical study of even the most serene epochs reveals change and tension as well as continuity and consensus.²⁰⁹

²⁰⁵ Examples are Marxist history, intellectual history, and history which focuses on great men.

²⁰⁶ See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers did not intend "the original understanding at Philadelphia" to be dispositive of constitutional inquiries.).

²⁰⁷ I would even go so far as to endorse an expanded version of the thesis offered here to the effect that in the United States the interpretation and operation of most indigenous legal subsystems replicates a substance-oriented, common-law system even if the core of the subsystem is a statute or a constitution. (I think this observation is less likely to be true of highly volatile statutes like the Internal Revenue Code than, for example, the U.C.C.) In such common law systems I believe that the crucial historical fact has been the freedom, rather than the constraint, imposed by the operation of precedential "doctrine." Precedent may actually liberate judges by focusing not on issues of legal formality but rather on the limits and continuing vitality of a non-canonical rule. See Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). For an interesting comparative treatment of aspects of this question, see P. ATIYAH & R. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* (1987).

²⁰⁸ Much has been written about the accuracy of various ideological and philosophic perspectives in both the interpretation and use of history. In this essay I have attempted to avoid this debate, although my views on this issue are fairly obvious.

²⁰⁹ See, e.g., Dyer, *Changes in the Link Between Families and Land in the West Midlands in the*

The relative insignificance of the Constitution and the fact of perpetual change in the underlying social order constantly generates new questions, new aspirations, new conflicts, and new interpretations of old institutions and old language. Many of these developments arise directly or obliquely from consideration of constitutional issues.

The fact that change is pervasive both in society and in the substance of its law does not necessarily mean that the constitutional text will be completely or substantially disregarded in the course of history. One value which a society may embrace is a reverence for the constitutional text. But even with such a commitment, constitutions frequently employ language, phrases like "cruel and unusual" punishment²¹⁰ and "due process of law,"²¹¹ which not only do not inhibit but invite constant societal reevaluation. More significantly, language frequently lacks the precision to hold off over time insistent social demands, even assuming a commitment to the constitutional canon.

In the end, however, constitutions and law cannot long constrain societies. Rather, each society has considerable freedom in its internal, dynamic, historical evolution to redefine basic parts of its constitution. This is particularly true if, as just suggested, the text uses open-ended phrases or concepts, omits specification of implied provisions, or employs very general and grandiose formulations. Thus, instability and change have been noteworthy elements in the legal development of the unspecified powers of the states²¹² and now the general rubrics enjoining separation of governmental functions.

Some²¹³ will decry this uncertainty or instability in the core

Fourteenth and Fifteenth Centuries, in LAND, KINSHIP, AND LIFE-CYCLE 305 (R. Smith ed. 1984).

²¹⁰ U.S. CONST. amend. VIII.

²¹¹ Compare *Roe v. Wade*, 410 U.S. 113 (1973) (right to terminate pregnancy within right to privacy) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (broadly defining due process liberty interests to include right to exercise discretion about one's children's education, thus constraining states' regulation of such family matters) and *Lochner v. New York*, 198 U.S. 45 (1905) (bringing right to contract freely within scope of liberty interest, thus constraining states' passage of labor legislation) with *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (homosexuals' right to engage in sodomy not fundamental) and *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (optician's right to do business does not prevent broadly restrictive regulation of opticians).

²¹² Compare *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Nebraska's regulation of interstate ground water use violative of commerce clause) with *Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190 (1983) (California's regulation of nuclear power plants not pre-empted by Atomic Energy Act and thus not a violation of due process clause).

²¹³ Herbert Wechsler, for example, obviously disapproves of this kind of approach. Other commentators have endorsed a theory of constitutional interpretation which I would call a common-law type theory that is not markedly different from the theory of an

meanings of basic provisions of the Constitution. They misconstrue the availability of alternatives: any constitution or interpretation of a constitution which attempts to confine the greater part of such a document or set of ideas about the structure of government will fail as soon as the underlying social order moves, in its own ways, to reject its confines.

B. Judicial Decisions Under an Historical Constitution Theory

While acknowledging that the Constitution ought to be viewed primarily as an historical document, many will wonder what significance that conclusion should have for judges and for others concerned with particular cases. It is easier to state what judges should not do than to specify exactly how they should proceed. Generally, judges who understand the historical character of the Constitution should not attempt to confine their study of particular provisions to ascertaining what was originally intended or how it operated at a particular time.

More specifically, the notion of an historical constitution suggests the following guidelines. First, judges who accept the Constitution as primarily an historically contingent source of law should recognize the legitimacy and inevitability of alterations in former constitutional certainties. Thus, precedent,²¹⁴ especially when it involves general constitutional prescriptions, should not be understood as firm doctrine, but as an expression of law in one context.²¹⁵ While precedent should not lightly be tossed away, its continuing persuasiveness hinges on its larger, historical context. Thus, in *Bowsher* both courts properly minimized the underpinnings of the *Humphrey's Executor* decision.²¹⁶ Conversely, the very stringent framework erected in *Korematsu v. United States*²¹⁷ to evaluate suspect racial classifications seems particularly reliable. *Korematsu* confronted a powerful social demand for a decision that would minimize the importance of the claims of American citizens of Japanese ancestry.

Second, the American judicial system's unique contribution to jurisprudence has been to encourage judges to decide cases having a substantial "political" component or presenting difficult fundamental questions. While judges should occasionally employ pru-

historical constitution. See, e.g., Wellington, Book Review, 97 HARV. L. REV. 326 (1983) (reviewing M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982)).

²¹⁴ See *supra* note 207.

²¹⁵ The district court recognized this to some extent in *Synar*. See 626 F. Supp. at 1384 (discussing decline of the delegation doctrine which accompanied rise of administrative law).

²¹⁶ *Id.* at 1399; *Bowsher*, 106 S. Ct. at 3188.

²¹⁷ 323 U.S. 214 (1944).

dential devices to avoid a decision,²¹⁸ the American judicial system should continue to decide a broad range of political and “fundamental” cases. In deciding such cases judges should focus on the democratic nature of American government and law and on the societal values at issue. In general, judicial resolution of questions should foster further societal development with respect to the concerns in dispute. Decisions like *Lochner v. New York*²¹⁹ and *Roe v. Wade*²²⁰ (discussed below) are, in the absence of a social consensus,²²¹ mistaken, whereas decisions imposing or specifying procedural mechanisms to ensure fair legislative or judicial consideration of issues are valid.²²²

Third, judges may decide cases which involve consideration of deeply ingrained social attitudes or prejudices. We accept the result in *Brown v. Board of Education*²²³ not because there was a social consensus in favor of integration, but because there was a consensus, and long judicial preparation,²²⁴ supporting the conclusion that sep-

²¹⁸ For example, Indiana’s pro-Republican party legislative gerrymandering which did not disable any identifiable group needing protection under the equal protection clause presents a political question in two senses. See *Davis v. Bandemer*, 106 S. Ct. 2797 (1986).

²¹⁹ 198 U.S. 45 (1905).

²²⁰ 410 U.S. 113 (1973); see *infra* text accompanying notes 250-53.

²²¹ When one suggests that legal rules are determined at least to some extent by a nonformal process of social consensus, people immediately think that one is arguing that law is or should be determined by a Gallup poll or some other simple-minded and evanescent indication of majoritarian sentiment. This critical and pejorative picture is based on several incorrect assumptions. First, a society’s polity need not be majoritarian at all. Second, the results of some instant measurement of sentiment are, even if accurate, rarely transferable and should be resisted by judges considering appropriate legal rules. Third, the legislative process is designed to handle most social demands and an historically sensitive judge will look to it to resolve most social questions.

²²² See *Miranda v. Arizona*, 384 U.S. 436 (1966) (mandating procedure to ensure defendant is not deprived of fifth amendment right against self-incrimination). I am aware that many, including perhaps some current justices of the Supreme Court (*e.g.*, *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (Rehnquist, J.) (recognizing narrow “public” safety exception to *Miranda*); *Moran v. Burbine*, 106 S. Ct. 1135, 1142 (1986) (O’Connor, J.) (individual held in custody and given *Miranda* warning need not be informed of an outside telephone call relating that attorney had been hired)) and some who have read versions of this article, find it difficult to distinguish *Miranda*’s elaborate, quasi-legislative specification of procedures to be applied to individuals held in custody from the similarly elaborate and quasi-legislative specifications of privacy rights in *Roe*’s pregnancy situation. It is argued that the Constitution provides little or no basis for either.

I would agree that no consensus supports the particular format of procedures established by *Miranda*, but I believe that that decision is much more easily sustained by most theories of the role of the text and also by a wide-ranging social consensus supporting the desirability of protecting individuals in police custody but not yet charged with a crime.

²²³ 347 U.S. 483 (1954).

²²⁴ See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (requirement of segregated seats in a mixed race law school held to violate equal protection clause); *Sweatt v. Painter*, 339 U.S. 629 (1950) (separate law school for blacks in Texas held not

arate schools were unfair. There is still no consensus, however, about how to remedy the multiple problems of deprivations which blacks have experienced: the deeply divergent economic and, in certain cases, cultural situations of blacks and others hinders such a consensus.²²⁵ Not surprisingly, there is also no social consensus supporting aggressive affirmative action programs. The courts have, in effect, recognized this vacuum: the mere occurrence of unequal results in employment or other facets of life does not automatically trigger the requirement of remedial action,²²⁶ but the development and implementation of an affirmative action program in such a case pursuant to civil rights legislation²²⁷ or private agreement²²⁸ is not prohibited.

Fourth, courts generally should avoid hasty decision of important cases. The expedited appeal procedure in cases in which a federal statute has been held unconstitutional²²⁹ has considerable

to be equal to white law school; black student ordered admitted under equal protection clause); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state court enforcement of racially restrictive covenants constitutes state action which violates equal protection clause); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (black woman cannot be deprived of legal education available to equally qualified whites); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (failure to provide any in-state legal education for blacks violates equal protection clause when it is available to whites); *Buchanan v. Warley*, 245 U.S. 60 (1917) (city ordinance prohibiting mixed-race blocks violative of due process); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (exclusion of nonwhites from grand jury venire panels violates equal protection clause).

²²⁵ Thus, I think that the federal courts should avoid elaborate remedial specifications in decrees in cases of racial discrimination. Rather, they should employ simple, but drastic, remedies like ordering the schools closed until the parties can reach a settlement about a remedial order. This might mean that residential segregation would not be immediately remedied by busing orders because black litigants might accept resource reallocations to predominantly black neighborhood schools. In hindsight, this remedy might have been more efficacious than busing orders. In such cases it is also possible that no settlement can ever be devised among the parties.

The reliance on busing and other strategies designed to produce a quick balance of the available races in all schools may have led to *Milliken v. Bradley*, 418 U.S. 717 (1974), which essentially leaves blacks remediless if the segregated schools exist across municipal boundaries not drawn in a racially discriminatory manner. If local agreement had created the primary remedies, then the *Milliken* plaintiffs might have won their case with the State of Michigan and have negotiated special state remedial assistance for the Detroit school system.

²²⁶ See *Washington v. Davis*, 426 U.S. 229 (1976) (police test with disproportionate racial impact not unconstitutional because test is directly related to job requirements).

²²⁷ See *Local 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986) (consent decree may be entered to benefit minority firefighters who were not actual victims of employer's discrimination); *Local 28, Sheet Metal Workers' International Association v. EEOC*, 106 S. Ct. 3019 (1986) (fund order and membership goal designed to benefit minority sheet metal workers constitutional although it would benefit some minorities not directly harmed).

²²⁸ See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (master collective bargaining agreement with affirmative action plan allowing preferential treatment of minority trainees not prohibited by Civil Rights Act).

²²⁹ 28 U.S.C. § 1252 (1982).

appeal. It promises a speedy resolution of an important matter which, if delayed, might create serious problems in operating or in disentangling the operation of the government. But speed should be sacrificed when it imposes significant costs through poor results. While the district court produced a solid opinion in *Synar*, the members of the Supreme Court should have taken more time to observe the reaction to that decision and to review its reasoning carefully before rushing to a conclusion. Chief Justice Burger's opinion in *Bowsher*, like his opinion in the expedited case of *United States v. Nixon*,²³⁰ reflects hasty, superficial thinking and composition.

Fifth, a prerequisite to judicial behavior consistent with an historical conception of the Constitution is careful rehearsal of the background of each case and of its most relevant precedents. Neither the district court nor the Supreme Court decision reflects an appreciation of the implications of their attempts to draw a line based on separation of powers in the sand of governmental practice. If Congress cannot participate in the removal of a purportedly executive official, then it is hard to explain why Congress may legislate sweeping limitations on the President's power to remove such an official. Similarly, if independent agencies perform legislative or quasi-legislative functions and executive branch officials perform functions within the scope of the judicial power of the United States, then one looks in vain to find a textual basis—or even a basis in some partial separations-of-powers theory—to explain why a presumably legislative official may not perform certain executive branch functions.

A judge who recognizes the historical nature of the Constitution will confront two major difficulties. First, general aspirational values recognized in the Constitution (for instance, that people should be treated equally) may in some cases conflict with an overwhelming social consensus favoring a specific social practice or rule (for example, one which does not reflect equal treatment). Second, the viewpoint of an enlightened or elite segment of the population (for instance, that the death penalty is cruel) may diverge from a broad social consensus (for example, that the death penalty may be an appropriate sanction for heinous crimes).²³¹ Although these two situations cannot be completely separated, I would argue that the judge is not free in a democratic society to act solely on some view of what an elite segment wishes, but he may and should act if, in considering the general aspirational goal against the enduring social practice, he thinks that the court's decision might move society to

²³⁰ 418 U.S. 683 (1974).

²³¹ See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating death penalties in this case without a majority opinion).

accept an expanded conception of equality or due process. Thus, judges may lead society in some limited situations.²³²

C. An Historical Constitution and the Protection of Rights

An historical theory of the Constitution may be thought of as a threat to the Constitution's role in erecting "rights" or other barriers to government action which protect the weak or the oppressed. Some will no doubt fear that judges who accept such a theory of the Constitution will be particularly prone to defer to the legislative will or some other demand²³³ of the social order that might hurt a minority group or a particular individual. It is not enough to respond that a theory of "rights", even when held by judges who are doctrinalists, has not always protected unpopular minorities²³⁴ or individuals.²³⁵

There are several responses to criticisms of the historical approach based on fears of discrimination against minorities or individuals. First, the social evolution which produces new substance in constitutional relations also may produce new demands for protections, like the demands allegedly protected by static conceptions of

²³² See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (different standards for conferral of dependant status upon spouses of military women than spouses of military men in minority violates due process); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (making right to vote in any manner contingent on wealth violates equal protection clause).

Some who have read this article have identified the assertion that judges may occasionally lead society as both fatal and contrary to the main thesis. I could hide behind a claim that leading is frequently inadvertent. For instance, in many situations judges face considerable uncertainty and very mixed demands from a society. In other situations, judges confront very vocal demands from a small segment of society and have little evidence of a social consensus one way or another.

But I am admitting to more than the difficulty of ascertaining and following a consensus: I am suggesting that judges can occasionally push an ambivalent or reluctant social order. I will have to save for another article a fuller articulation of this possibility, but because the explanation offered is based on observation and is primarily descriptive, it would be inaccurate for me not to admit that leading can take place and can be successful.

²³³ The classic popular example of this is, of course, acute public pressure to indict, convict, and execute people allegedly responsible for heinous crimes. But part of the historical constitution is that judges should be aware of and resistant to sudden, emotional demands for a particular judicial or legal result. Although a theory of an historical Constitution accepts the notion that a Constitution is ultimately an instrument of social, popular will, there is frequently a major difference between what societies seem to demand in panicked circumstances and what they demand over time.

²³⁴ See *Korematsu v. United States*, 323 U.S. 214 (1944) (World War II internment of Japanese-Americans held constitutional).

²³⁵ See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919) (upholding convictions for sedition on grounds that circulars which advocated supporting Russian Revolution by refusing to work in munitions factories necessarily interfered with war effort against Germany); Polenberg, *Progressivism and Anarchism: Judge Henry D. Clayton and the Abrams Trial*, 3 *LAW & HIST. REV.* 397 (1985).

“rights.” Therefore, doctrinalists should recognize that theories which encourage legal rigidity may often discourage a widening of constitutional protections.²³⁶ Just as “rights” doctrinalists point to *Brown v. Board of Education*,²³⁷ they ignore *Plessy v. Ferguson*,²³⁸ *Lochner v. New York*,²³⁹ and *Bowers v. Hardwick*.²⁴⁰ Doctrine, if articulable, cannot be both rigidly protective and flexibly inclusive at the same time.

Second, an historical view of the Constitution frequently does result in the protection of “rights” claims asserted by minorities or individuals. Read Robert Jackson’s dissent in *Korematsu v. United States*,²⁴¹ the first Justice Harlan’s dissent in *Plessy v. Ferguson*,²⁴² and Felix Frankfurter’s opinion in *Rochin v. California*.²⁴³ Each judge and his opinion reflected a belief in the historical evolution of the protection of the individual from the exercise of government authority.

Ultimately, however, one must concede that an historical approach does defer in a democratic polity considerably to popular will, particularly to a formal legislative expression of such will. The conviction that a wide spectrum of people in a society should have laws and rules that reflect their beliefs and actions forms the core of an historical theory of constitutionalism if the particular society’s polity is democratic.²⁴⁴

Jesse Choper has expressed a preference for judicial consideration of “rights” claims: Choper’s work relies on the notion that “rights” claims involve “principles” whereas governmental powers cases involve only “allocations” of permissible powers.²⁴⁵ But powers impinge on claims for freedom or protection, and allocation de-

²³⁶ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (Black, J., dissenting) (arguing against expansion of due process property interests to include statutory entitlements); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 515 (1969) (Black, J., dissenting) (arguing against extension of right to free speech to cover wearing of political symbols at school); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (Black, J., dissenting) (arguing against striking down Virginia poll tax); *Mapp v. Ohio*, 367 U.S. 643, 661 (1961) (Black, J., concurring) (arguing that fourth amendment alone does not bar admission of illegally seized evidence).

²³⁷ 347 U.S. 483 (1954).

²³⁸ 163 U.S. 537 (1896) (upholding Louisiana statute providing for racial separation in railway cars).

²³⁹ 198 U.S. 45 (1905) (holding New York statute limiting total number of employee working hours unconstitutional).

²⁴⁰ 106 S. Ct. 2841 (1986) (refusing to strike down Georgia criminal law against sodomy on privacy grounds).

²⁴¹ 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

²⁴² 163 U.S. 537, 552 (1905) (Harlan, J., dissenting).

²⁴³ 342 U.S. 165 (1952).

²⁴⁴ To admit that this is inevitable and proper is also a canon of doctrinalism. The degree of openness with which new questions are faced or old ones reconsidered as a result of social change is all that separates the two positions.

²⁴⁵ See sources cited *supra* note 23.

cisions can significantly curtail or recognize such claims. For example, on the surface, *Dred Scott v. Sandford*²⁴⁶ involved a jurisdictional question: whether a slave, or an alleged former slave, was a citizen entitled to sue in federal court under article III. At a deeper level, it involved a freedom claim: Dred Scott claimed that he was free or that, in any event, he could sue to establish his freedom.²⁴⁷ Finally, it involved a pure allocation of powers question: whether Congress could prohibit or limit slavery in territories not yet organized as states.²⁴⁸

An historical view of the Constitution does not distinguish *a priori* between individual claims for freedom and protection on the one hand and allocations of power questions on the other. Indeed, the history of constitutional development suggests that the two types of questions are rarely distinct. Even when a case appears superficially to be purely of one type, the future ramifications of a decision cannot be confined to one or the other realm. For instance, in the late nineteenth century the Supreme Court decided a line of cases in which the "rights" claims of resident Chinese aliens generally disappeared in resolving cases in favor of Congress's authority in exercising the naturalization power to abrogate treaties with the Chinese Empire.²⁴⁹

D. An Historical Constitution and the Privacy Cases

Some might take the foregoing description of an historical approach to constitutional law to mean that a decision which reflects the popular consensus is in and of itself valid. For example, some might think I would say that *Roe v. Wade*²⁵⁰ is valid because the majority of Americans clearly support privacy in abortion matters; for this reason *Roe* may never be completely overruled.

The *Roe* decision is not consistent with the theory of an historical constitution. The notion of an historical constitution rests upon the theory that the social order continually defines the most fundamental aspects of the Constitution and of all law. One very important ingredient of that definition is society's power to condemn certain actions based on moral values, even if those values are not universally shared. I suspect that while the great majority of the American people do not find abortion always immoral, many find it immoral in some instances and believe that only individuals elected by, and accountable to, the people should decide what is con-

²⁴⁶ 60 U.S. (19 How.) 393 (1857).

²⁴⁷ *Id.* at 403.

²⁴⁸ *Id.* at 432.

²⁴⁹ *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

²⁵⁰ 410 U.S. 113 (1973).

demned. Thus, if Massachusetts wishes to ban abortion it should be able to do so, except in the case of a clear threat to maternal life. Conversely, if California wishes to allow abortion permissively it should. An historical Constitution in a democratic society cannot allow judges to make basic moral judgments on fundamental issues absent a clear consensus and some basis in the text supporting the decision. Not surprisingly, then, dismay and doctrinal confusion abound when the Supreme Court attempts to decide questions like whether a state can impose a twenty-four hour waiting period before an abortion may take place.²⁵¹

The theory of an historical constitution sees abortion as a question of deep social attitudes which, at least until an overwhelming social consensus emerges, should be decided by state legislatures rather than by a judicial interpretation of the fourteenth amendment that awards all rights to the fetus or to the prospective mother during the first trimester.

Roe or the dissent's position in *Bowers v. Hardwick*²⁵² could be consistent with a theory of historical constitutionalism if they had been decided on a basis other than the protection of abstract privacy notions. If the Court had premised either *Roe* or *Bowers* on the fact that enforcement of the abortion or sodomy prohibitions was either nonexistent or so selective as to be freakish,²⁵³ then state legislators could have prevailed either by ensuring enforcement or by refraining from enacting them. Such a resolution of these cases would have had the salutary effect of putting the pressure for a resolution of such claims on the legislatures, where it appropriately resides.

E. *Bowsher*, *Pennhurst*, and *Garcia* Under an Historical Constitution Theory

None of the three cases discussed here present fundamental questions of social morality as clearly as does *Roe*. On the surface, *Bowsher*, *Pennhurst*, and *Garcia* each involved a seemingly minute question about the propriety of certain rules of intra- or inter-governmental behavior in a federal system with a tripartite national government.

Garcia is probably the easiest case to reconcile with an historical

²⁵¹ See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). It is interesting, of course, to turn the abortion cases on their doctrinal heads and ask whether a fetus should be considered a person and, if so, whether its rights are protected. If a fetus is a person, then the logic of "rights" doctrinalism leaves the pregnant woman powerless.

²⁵² 106 S. Ct. 2841 (1986).

²⁵³ Although freakish enforcement has never led the Supreme Court to strike down a criminal statute, Justice Potter Stewart suggested that it should. See *Furman v. Georgia*, 408 U.S. 238, 388 (1972) (Stewart, J., concurring).

constitution theory. Given the tremendous expansion of the realm of interstate commerce and the generality of the word "regulate" in the commerce clause, state sovereignty cannot limit the exercise of the commerce power, even assuming continued adherence to a federal system. Twentieth-century conditions have led increasingly to national efforts to solve problems and confirm the impossibility of finding in the abstraction of the states' sovereignty any substantial limitation on a direct exercise of the federal commerce power.

Pennhurst is the hardest to reconcile of the three cases. The scope of pendent jurisdiction and its existence in the shadowy world of state sovereignty under the eleventh amendment are the most arcane of the issues raised. *Pennhurst* shows that although state sovereignty must yield to direct exercises of a federal enumerated power, the sovereignty of the states and their role in the federal union will be recognized and preserved in other situations.²⁵⁴

Bowsher, like *Pennhurst*, presents initially an arcane question, but like *Garcia*, it involves the fundamental structural issue of the separation of powers. The most enduring and socially appealing feature of the separation-of-powers idea, at least in the American context, is that judges should be autonomous and that their power should be protected from political encroachment.²⁵⁵ *Northern Pipeline* should, therefore, prove durable.

In the administrative law context, where executive officials and legislative functions are mixed, the social commitment to the abstraction of separated powers is not discernible, except insofar as it reflects a general commitment to the idea of a diffusion of power. Thus, *Bowsher* and *Chadha* probably reflect judicial fear of the threat of Congressional domination, or at least aggression, within the federal government. This fear is certainly greater now than at the time of *Humphrey's Executor*.

Thus, historical developments and very general attitudes in society explain *Garcia* and *Bowsher*. To some extent, however, the two explanations conflict. It would seem more reasonable for conservative judges to fear (and, therefore, to attempt to contain) expansive federal power over state governments than Congress's few efforts to control more precisely governmental functioning.

Developments under an historical constitution reflect not primarily the predilections of conservative judges but the demands of the underlying social order. American society has demanded laws and programs from the federal government, ranging from farm sup-

²⁵⁴ Recall that *Pennhurst* may also be a disguised effort to further curtail the dockets of the federal courts. See *supra* notes 172-73 and accompanying text.

²⁵⁵ See Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to an Ongoing Debate*, 36 STAN. L. REV. 201 (1984).

ports to health care for the elderly, that would be struck down or limited if judges were to respond solely to a political abstraction like the fear of central governmental power. Indeed, the ultimate explanation for *Bowsher* may be the Court's realization of its inability over time to prevent federal government centralization. Given this result, a revival of the desire for federal separation of powers was as inevitable as efforts by Congress to assert itself more forcefully in the wonderland of federal benefits and programs.

If courts truly cannot resist the pressures for centralization, but at the same time continue to reflect a social commitment to diffusion of power, then *Bowsher* should have two contradictory consequences. On the one hand, future judicial decisions will not alter significantly the theoretically unclear role and power of independent commissions and agencies in the federal government; on the other hand, the Court will continue to look for ways to confine formally the executive and legislative branches' respective spheres of operation, particularly if one branch is perceived as seeking to change settled practice.

* * *

Some, as they finish this essay, will think that I have allowed my sense of the "is" in legal matters to defeat my sense, or Herbert Wechsler's sense, of the "ought to be." They will feel that I have not met Wechsler and others on the same plane, that is, I have not addressed what law is and how it ought to operate.

But in the case of law, the "ought to be" for which Wechsler and others have argued is so hopelessly inadequate, even in basic and fundamental areas, that it must be revised or treated as a myth. The only revision which can face the "is" of our legal system is one which accepts law as an organic feature of social organization and which encourages the courts to recognize frankly their role—both its possibilities and its limitations.