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# FORMAL AND FUNCTIONAL APPROACHES TO SEPARATION-OF-POWERS QUESTIONS—A FOOLISH INCONSISTENCY?

Peter L. Strauss†

Is it possible to give contemporary shape to the principles of constitutional structure we know as “separation of powers”? That question was sharply presented once again on the final day of the Supreme Court’s most recent Term, when it decided two cases raising separation-of-powers issues. In *Bowsher v. Synar*,<sup>1</sup> the subject of this symposium, the Court found constitutional fault in Congress’s asserted expansion of its own powers at the expense of the President’s article II authority. *Commodity Future Trading Commission v. Schor*,<sup>2</sup> far less widely noted, upheld against constitutional challenge Congress’s assignment to an administrative adjudicator of the power to resolve a counterclaim arising under state common law, that might have been thought to require disposition by an article III court. The basic problem facing the Court in each case was accommodating the enormously complex and varied structure of the federal government, as it has grown over the years, to the Constitution’s provisions for distributing the power of government among three named heads of authority, each of which in contemplation performs a unique function. In this sense at least, the cases ask the same constitutional question: how should the judiciary assess Congress’s exercise of its general authority to provide such structure for the affairs of government as it deems “necessary and proper” in light of the Constitution’s clear statement that “all legislative powers herein granted” are vested in “Congress,” “the executive power” is vested in the “President,” and “the judicial power” is vested in the “Supreme Court” and any lower courts Congress chooses to establish?<sup>3</sup>

*Bowsher* and *Schor* each reached defensible results, yet (wholly apart from the analytic difficulties each opinion may present on its

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† Betts Professor of Law, Columbia University School of Law. This article has benefited greatly from conversations with Bruce Ackerman, Harold Bruff, Steven Carter, Geoffrey Miller, Henry Monaghan, Andrzej Rapaczynski, Susan Rose-Ackerman, Roy Schotland, and Cass Sunstein. For most parenthetical characterizations of cases and other citations in these footnotes, the author thanks the editors of the *Cornell Law Review*.

<sup>1</sup> 106 S. Ct. 3181 (1986).

<sup>2</sup> 106 S. Ct. 3245 (1986).

<sup>3</sup> U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1.

own terms) they exemplified inconsistent reasoning styles. The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries),<sup>4</sup> and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.<sup>5</sup> In *Bowsher*, seven Justices relied on formalism in rejecting Congress's work, over the vigorous protests of two dissenting functionalists. In *Schor*, seven functionalists—the *Bowsher* dissenters plus five of the majority in that case—sustained Congress's choice over a formalist dissent. Five Justices, then, apparently wanted to have it both ways.

Although the Court has been unsettled how these knotty questions of structure should be resolved (a question that consumes the bulk of the remaining pages), in the past decade it has not been hesitant to act. On the eve of the Constitution's bicentennial the Court has unhinged major federal statutes on three separate occasions—apparently without provoking either alarm or a sense of constitutional crisis. In one case, the Court held that the Bankruptcy Reform Act's broad grant of jurisdiction to the nation's bankruptcy courts violated article III.<sup>6</sup> In another, the Court put in question almost 200 statutes for their inclusion of a "legislative veto."<sup>7</sup> Finally, in *Bowsher*, the Court rejected Congress's effort to discipline itself from adding to the burgeoning national debt. That judicial frustration of Congress's choices on so wide and important a range of national problems should be (as appears) so easily accepted is itself remarkable.<sup>8</sup>

The Court's apparent willingness to act has now given rise in

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<sup>4</sup> *E.g.*, *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944-51 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-66 (1982); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-30 (1935); *Myers v. United States*, 272 U.S. 52, 116-17 (1926).

<sup>5</sup> *E.g.*, *United States v. Nixon*, 418 U.S. 683, 713 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 442-43 (1977). On the general proposition, *see* Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491 (1987); Strauss, *The Place of Agencies in Government, Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

<sup>6</sup> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>7</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>8</sup> Not so many years ago it was well understood that the Supreme Court did not really exercise much control over Congress, at least outside the area of individual rights. The occasions on which the Court actually held federal statutes to be unconstitutional were few and often intellectually doubtful. When these decisions concerned matters of national importance, such as the scandal of child labor or the rescue of the national economy from a terrible depression, political and critical reaction was swift and coruscating, and history's verdict negative.

some quarters to even larger questions. All three cases reflect a revival of concern about constitutional issues touching the structure of government—that is, the problem of separation of powers—that appears driven by broadly shared fears that the national bureaucracy (or, more embracively, the national government) has moved beyond effective control, either by the people or by those whom the people directly select to head the government for them. Despite each opinion's insistence that its authors intended no such effect,<sup>9</sup> both government<sup>10</sup> and private attorneys<sup>11</sup> have attempted to use these cases to put independent regulatory commissions (bodies previously regarded as well-integrated if not in all respects well-understood arrangements of government) into constitutional shadow.

Any such effect of the recent cases would make the Court's adventurism on separation-of-powers issues even more remarkable. Both in an early footnote of the *Bowsher* opinion<sup>12</sup> and in *Schor*, the Court gave unmistakable notice that the independent regulatory commissions would in fact be protected, and that nothing it had said in other contexts about separation of powers should be understood as impairing Congress's frequent choice of such bodies to carry out the functions of government. Most of the literature thriving under the influence of these cases has assumed such an outcome, indeed struggled for a means of justifying it.<sup>13</sup> I assume here that, in fact, Congress's assignment of governmental functions to "independent" agencies will be sustained. The only possible questions, then, concern the Court's assessment of necessary and permitted controls by the President, Congress, or courts over the independent agencies' functioning. As the courts have in fact insisted, they simply will not assume so destructive a role respecting institutions that often have worked well in carrying out their assigned tasks,<sup>14</sup> and that occupy

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<sup>9</sup> *Bowsher*, 106 S. Ct. at 3193; *Chadha*, 462 U.S. at 931-35; *Northern Pipeline*, 458 U.S. at 80.

<sup>10</sup> As reflected in Justice White's dissent, the Solicitor General argued in *Bowsher* that executive authority could not be vested in any officer who is not removable at will by the President. *Bowsher*, 106 S. Ct. at 3206 (White, J., dissenting); see also Taylor, *A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B8, col. 3.

<sup>11</sup> See *Ticor Title Ins. Co. v. Federal Trade Comm'n*, 625 F. Supp. 747, 748 (D.D.C. 1986), *aff'd*, 814 F.2d 731 (D.C. Cir. 1987).

<sup>12</sup> 106 S. Ct. at 3188 n.4 (The holding denying congressional participation in removal should cast no doubt on proposition that Congress may "vest . . . governmental functions in officers who are free from the partisanship that may be expected of agents wholly dependent upon the President." (quoting *id.* at 3207 (White, J., dissenting))).

<sup>13</sup> See Bruff, *supra* note 5; Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 Ky. L.J. — (1987); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985); Strauss, *supra* note 5; Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986); Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

<sup>14</sup> Years of debate have not demonstrated that single-headed, politically "attached"

such a large place in government. This paper asks whether the courts can avoid this destructive role while sustaining the recent separation-of-powers results in an intellectually coherent fashion. The Court's opinions in *Bowsher* and *Schor* illustrate the difficulties that have long plagued the Court's efforts to give content to the Constitution's structural principles in general, and separation-of-powers precepts in particular.

The following pages address a series of questions suggested by these introductory characterizations: First, do *Bowsher* and *Schor* really present the same issues, decided in differing ways? The dissenters in each—that is, those who, on this hypothesis, voted consistently in both—vehemently insisted that the cases did indeed present the same issues. However, one need not inquire further if it is possible to discern distinctions supporting the differing approaches or rules for these approaches' invocation in varying circumstances. Second, if the issues are the same, can the Justices be excused their inconsistencies of approach? Lawyers close to the Supreme Court have long been aware that opinions issued in the last few days of a Term must be regarded with caution; these opinions often reflect the extraordinary pressures the Justices encounter in attempting to clear their docket of what are often the most difficult cases for decision. Does that consideration (or any other) render this just a law professor's point—an interesting insight from the Monday morning quarterback, but no occasion for criticism of the Justices' enterprise? And finally, can one construct a map, a set of precepts functional or formal, that can serve the ends and/or reflect the meanings embedded in the constitutional text and structure, and be administered with teeth and precision? Or is one forced to the judgment voiced by Professor Choper<sup>15</sup> and recently given effect by the Court on the equally structural issue of federalism,<sup>16</sup> that identifying manageable judicial standards is so difficult

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agencies are more effective across the range of governmental activities than multimember, "independent" commissions. Many agencies in each class have been less than fully successful—an outcome as easily attributed to deficiencies in mandate, delegation, or support as to governmental form. See generally Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973). That the Occupational Safety and Health Administration and the Environmental Protection Agency, attached agencies, have been more successful in carrying out their missions as instruments of government than the independent agencies such as the Federal Reserve Board, the Securities and Exchange Commission, and the National Labor Relations Board is a dubious proposition. More important, one readily perceives aspects in the performance of the functions of the latter group that may require greater remove from the world of politics than the former for ready public acceptance.

<sup>15</sup> J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

<sup>16</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). For a full

that the Court should forswear the enterprise and concentrate on the protection of individual rights?

Readers are entitled to know about their guide that he has already staked out a position in these debates, opting for the difficult middle ground of functionalism.<sup>17</sup> That analysis, which will not be repeated here, sought to show that our formal, three-branch theory of government—at least as traditionally expressed—cannot describe the government we long have had, is not required by the Constitution, and is not necessary to preserve the very real and desirable benefits of “separation of powers” that form so fundamental an element of our constitutional scheme. The Constitution does not define the administrative, as distinct from the political, organs of the federal government; it leaves that *entirely* to Congress.<sup>18</sup> What the Constitution describes instead are three generalist national institutions (Congress, President, and Supreme Court) which, together with the states, serve as the principal heads of political and legal authority. Each of these three generalist institutions serves as the ultimate authority for a distinctive governmental authority-type (legislative, executive, or judicial). Each may be thought of as having a paradigmatic relationship, characterized by that authority-type, with the working government that Congress creates.

Although these heads of government serve distinct functions, employing distinctive procedures, the analysis argued, the same cannot be said of the administrative level of government. Virtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange Commission—exercises *all three* of the governmental functions the Constitution so carefully allocates among Congress, President, and Court. These agencies adopt rules having the shape and impact of statutes, mold governmental policy through enforcement decisions and other initiatives, and decide cases in ways that determine the

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discussion of *Garcia* and its implications, see Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341.

<sup>17</sup> Strauss, *supra* note 5; see also Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 [hereinafter Strauss, *Legislative Veto*].

<sup>18</sup> The distinction between political and administrative government had its counterpart in early writings about administrative procedure that suggested a distinction between “executive power” and “administrative power.” “Executive power” was concerned with those issues Chief Justice Marshall had identified in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), as “[q]uestions . . . in their nature political.” “Administrative power” was seen as strictly statutory, and subject to presidential participation only to whatever extent might be provided by statute. See the elegant discussion of the writings of Freund, Wyman, Willoughby and Goodnow in Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285 (1950). One need not accept the proposition about complete congressional control of “administrative power” to find force in the distinction.

rights of private parties. If in 1787 such a merger of function was unthinkable, in 1987 it is unavoidable given Congress's need to delegate at some level the making of policy for a complex and interdependent economy, and the equal incapacity (and undesirability) of the courts to resolve all matters appropriately characterized as involving "adjudication." A formal theory of separation of powers that says these functions cannot be joined is unworkable; that being so, a theory that locates each agency "in" one or another of the three conventional "branches" of American government, according to its activities, fares no better. Respect for "framers' intent" is only workable in the context of the actual present, and may require some selectivity in just what it is we choose to respect—the open-ended text, the indeterminacy of governmental form, the vision of a changing future, and the general purpose to avoid tyrannical government, rather than a particular three-part model. The problem is finding a way of maintaining the connection between each of the generalist institutions and the paradigmatic function which it alone is empowered to serve, while retaining a grasp on government as a whole that respects our commitments to the control of law.

This object can be achieved conformably to the words of the Constitution, it was claimed, although at some cost to traditional understandings, by observing that the concept of a "branch," as such, is not required by the text. When the Constitution confers power, it confers power on the three generalist political heads of authority, *not on branches as such*.<sup>19</sup> The constitutional text addresses the powers *only* of the elected members of Congress, of the President as an individual, and of the Supreme Court and such inferior federal courts as Congress might choose to establish. Its silence about the shape of the inevitable, actual government was a product both of drafting compromises and of the explicit purpose to leave Congress free to make whatever arrangements it deemed "necessary and proper" for the detailed pursuit of government purposes. One can easily and properly infer some relationships that the three named governmental actors must observe as among themselves and, consequently, with whatever subordinate parts of government Congress chooses to create, without having to believe that those parts must be located "here" or "there" in the government structure, or that the governmental functions they may perform are restricted by the accident of that location.

Rather than describe agencies in terms of branches, in other words, the analysis suggested one could examine their relationships

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<sup>19</sup> Thus, the terms "actor," "constitutional actor," or "named head of government" are used in place of "branch" in the following, unless the conventional view is being described.

with each of the three named heads of government, to see whether those relationships undermine the intended distribution of authority among those three.<sup>20</sup> Just as contemporary property analysis tends to speak of the property relationship as a "bundle of rights," no one of which is essential to the characterization of a particular bundle as having the attributes of "property," this analysis of separation-of-powers issues proposes examining the quality of relationships between an agency and each of the three named heads of government. It is not necessary to insist that there be particular relationships between an agency and any of the named constitutional actors (beyond the few specified in the constitutional text) in order to require relationships of a certain overall character or quality.<sup>21</sup>

The reason for putting forward this possibly jarring view of our institutional arrangements was to avoid two competing models, each of which presents grave threats to two of the most fundamental values of our constitutional structure—first, that effectively carrying out governmental objectives requires a powerful, independent, politically accountable, and unitary executive; and second that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>22</sup> The first model, which may be described as that of the "strong executive," regards all discretion conferred on agencies as executive authority, subject to direct presidential control. This is discretion as Chief Justice Marshall understood it in *Marbury v. Madison* when he wrote that the Secretary of State, in his discretionary functions, "is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts

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<sup>20</sup> A related but different question would arise if one believed that a particular agency had been created in circumstances so free of control by any of the three named heads of government that it presented the risk of lawless, irresponsible, tyrannical government against which the Constitution guards respecting Congress, President, and Court. An aspect of this problem is discussed *infra* at text following note 144.

<sup>21</sup> Thus, it is suggested, presidential power to remove an official without cause from a position of leadership in an agency is not a *sine qua non* of the president's relationship with agencies responsible for carrying out the laws of the United States. Cf. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). But this is not because the Federal Trade Commission is not "in" "the executive branch," or performs no "executive" function—two misleading propositions the *Humphrey's Executor* Court thought it was required to affirm. The FTC plainly performs executive functions (in contemporary characterizations, it does little else), and the former assertion is almost meaningless. Rather, this judgment can be made in light of a complex of relationships that the President does enjoy with such an agency—the power to appoint, to remove for cause, to consult, and so on—and also in light of the relationships Congress has provided for itself in dealings with the agency. A regime such as the FTC's which is generally structured to foster objectivity and apoliticality—appropriate governmental ends—looks very different, in this light, from one that enhances congressional relationships at the evident expense of presidential ones.

<sup>22</sup> THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961).

of such an officer, as an officer, can never be examinable by the courts.”<sup>23</sup> We still imagine such discretion in the limited context of foreign affairs and a few like settings, but the years since the *Marbury* decision have seen the emergence of administrative discretion exercised by agencies in *all* the characteristic forms of governmental action—legislative, executive, and judicial. Reluctance to concede to the President himself the possibility of exercising all three functions is what led me to reject the “simple” solution of regarding all administrative government as “executive.” To permit the President fully to govern the exercise of administrative discretion in these forms is to accumulate all powers in his hands, in a sense that could not be said of an agency exercising these powers subject to the oversight of President, Congress, and Court.<sup>24</sup>

The second model, which could be called the “fourth branch” model, is our traditional compromise: it treats some agencies as if they were completely outside the President’s grasp, and others as within it. This approach fails to resolve the discretion-ordering function for those agencies characterized as “executive,” and represses recognition that they, too, exercise legislative *and* judicial *and* executive functions. It also places the remaining agencies beyond the constitutional text. Any notion of a unitary executive is destroyed if there are agencies responsible for carrying out public laws to which the President may not speak in his office-characteristic ways. The result is to enlarge Congress, rather than the President, or else to cast some agencies loose of public control—either, a deeply objectionable result. Any workable theory must not only avoid placing excessive power in the President’s hands, but also maintain his claim to a central and unifying governmental role—that is, to a relationship with *all* agencies that permits the exercise of his characteristic functions.

Further reflection has persuaded me that these ends could also be accomplished by viewing all agencies engaged in law-implemen-

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<sup>23</sup> 5 U.S. (1 Cranch) 137, 166 (1803).

<sup>24</sup> *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (article II does not grant President authority to issue executive order directing Secretary of Commerce to seize and operate steel mills). To be sure, in regulatory domains even the chief executive would remain subject to such other-branch constraints as statutory authorization and judicial review. Only if those constraints seemed impaired, one could argue, would separation-of-powers hazards mature. *Cf.* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (grant to President of authority so large as to swamp likely oversight capacity); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (text of presidentially adopted rules unpublished). Yet if I am right that contemporary administrative discretion assumes a form simply not envisioned by the drafters of the Constitution, this argument suggests taking a larger gamble than the Constitution requires. From the perspective of the ends of separation of powers, it is a gamble we would be wiser not to take.

tation as "executive," while permitting Congress substantial freedom in structuring the precise character of their relationships with the President. As distinct from the "strong executive" view of the exercise of discretion voiced by Chief Justice Marshall, agencies need not be the alter egos of the President. For some agencies, the President's relationship may be characterized as one of oversight rather than substitution of judgment. Under this modified approach the SEC is a part of the executive branch even though its discretion is exercised at greater remove from presidential supervision than, say, the Department of Justice. Even for the latter, as we have recognized, the fact that it exercises a characteristically executive function does not prevent Congress from enacting and enforcing principles of White House noninterference. Calling all agencies "executive" rather than simply "our government" would have the rhetorical advantage of fitting our history and the resulting preconceptions more easily. What is essential to the move, however, is recognition that the changing character of "discretion" warrants imposing limitations on the President's authority to command. Otherwise, the move is made at the cost of encouraging the President to believe he can deal with those who exercise administrative discretion as he does the Secretary of State.

## I

### ARE THE ISSUES THE SAME?

#### A. *Bowsher v. Synar*

*Bowsher v. Synar*<sup>25</sup> concerns the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985,<sup>26</sup> popularly known as the Gramm-Rudman-Hollings Act. As relevant to the litigation, that Act empowered the Comptroller General to resolve differences between the Director of the President's Office of Management and Budget and the Director of the Congressional Budget Office over the extent to which proposed budgetary legislation met the deficit-reducing standards of the Act.<sup>27</sup> The Comptroller General was also to make final<sup>28</sup> calculations of the revisions the Act required should these projections fail to meet the deficit-reducing standards. The Court characterized these powers as "executive," and held that Congress could not constitutionally place their exercise in the hands of an official subject to congressional removal

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<sup>25</sup> 106 S. Ct. 3181 (1986).

<sup>26</sup> Pub. L. No. 99-177, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1037 (codified in scattered sections of 2, 31 & 42 U.S.C. (Supp. III 1985)).

<sup>27</sup> 2 U.S.C. § 901 (Supp. III 1985).

<sup>28</sup> Judicial review of those calculations was precluded by § 274(h) of the Act. *Id.* § 922(h).

from office—that is, removal by a body outside the article II executive.<sup>29</sup>

*Bowsher* urgently required decision, for the first significant application of the draconian provisions of the deficit-control legislation seemed likely to occur in the summer of 1986.<sup>30</sup> The Chief Justice's opinion—his final word for the Court as Chief Justice following his rather surprising resignation—was formulaic and skeletal, emphasizing a formalistic analysis of the three separate and distinct branches of American government familiar to all from high school civics classes. The Gramm-Rudman-Hollings Act conferred authority on the Comptroller General to carry out its provisions with legal effect; a person or body authorized to execute the laws in this fashion employs the “executive power” conferred by the Constitution on the President.<sup>31</sup> Yet by statute the Comptroller General serves a fifteen-year term from which he may be removed only by impeachment or by a joint resolution of Congress enacted after a hearing to determine whether he has given “cause” for the removal.<sup>32</sup> In this way, Congress has asserted an unusual<sup>33</sup> measure of control over the Comptroller's tenure in office. Finding that this arrangement inevitably would make the Comptroller General subservient to Congress, the Court held invalid the grant of executive authority to him:<sup>34</sup> “The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts;”<sup>35</sup> “Congress cannot reserve for itself the power of removal of an officer charged with execution of the laws

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<sup>29</sup> 106 S. Ct. at 3192.

<sup>30</sup> Indeed, the very importance of getting this case decided during 1986 may have contributed to the Court's difficulties. The case came to the Court late in the Term, virtually undeveloped by lower court proceedings, and required an accelerated briefing schedule. In ordinary course it might have been a strong candidate for an order for reargument. Certainly, in the past, the Court has used this method to buy time for thoughtful decision. *See, e.g., Myers v. United States*, 272 U.S. 52 (1926). The Court's difficulties in deciding separation-of-powers questions have, however, often been compounded by the necessity of reaching a speedy decision. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>31</sup> 106 S. Ct. at 3188.

<sup>32</sup> 31 U.S.C. § 703(b),(e)(1) (1982).

<sup>33</sup> To my knowledge, no other officials exercising “executive” functions serve subject solely to congressionally initiated and controlled removal proceedings.

<sup>34</sup> It would also have been possible—as Justice Blackmun's dissent urged—to strike out the provisions giving Congress control over the Comptroller General's tenure while retaining his authority to act. 106 S. Ct. at 3215 (Blackmun, J., dissenting). The majority's judgment that Congress would not have delegated such authority to the Comptroller absent his complete independence from the President seems reasonable in light of the history of the statute, as well as its explicit provision for a fallback scheme, 2 U.S.C. § 922(f) (Supp. III 1985), in case the Comptroller General's authority should be held invalid.

<sup>35</sup> 106 S. Ct. at 3187. It seems unlikely that Chief Justice Burger meant to cast a constitutional shadow on oversight committees, the budget process, and the other polit-

except by impeachment;"<sup>36</sup> and "[t]o permit an officer controlled by Congress to execute the laws would be . . . to permit a congressional veto."<sup>37</sup>

The factual premise of these propositions—that the arrangements Congress made respecting the Comptroller General's removal create congressional control over his administration—is the most difficult element of the analysis, taken on its own terms. As Justices Stevens, Blackmun, and White asserted,<sup>38</sup> the Court had earlier relied upon a "for cause" removal provision as precisely the element creating the independence from the President that justified delegation of judicial and legislative functions to an "independent regulatory commission";<sup>39</sup> and the Court worked hard to maintain the validity of such delegations. The *Bowsher* removal provision actually required presidential participation, for Congress's joint resolution of removal was subject to presidential veto; and it presumably invited judicial review as to "cause."<sup>40</sup> Congress even denied itself the carrot of an insecure incumbent's wish for reappointment; by statute, the Comptroller General is limited to a single fifteen-year term.<sup>41</sup> Thus, the proposition of dependency-in-fact by virtue of the removal provision is extremely hard to maintain. "Barring resignation, death, physical or mental incapacity, or extremely bad behavior, the Comptroller General is assured his tenure if he wants it, and not a day more."<sup>42</sup>

To reach this conclusion is not to say that the *Bowsher* result is necessarily wrong, with nothing more to support it than arid formalism. The Court might have looked more globally at the relationships between Congress and the General Accounting Office, seeing

ical means by which Congress checks the President and the agencies. "[S]upervision" is meant in the technical sense—as order-giving rather than as oversight.

<sup>36</sup> *Id.* at 3188. This framing of the proposition was evidently an effort to defuse any suggestion that the majority was undercutting the result in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), upholding congressional limitations on the President's power to remove an FTC Commissioner. It recasts the conventional distinction between that case and *Myers v. United States*, 272 U.S. 52 (1926), by stressing the element of congressional participation in removal in the latter, and its absence in the former. See Strauss, *supra* note 5, at 614-15.

<sup>37</sup> 106 S. Ct. at 3189.

<sup>38</sup> *Id.* at 3194-95 (Stevens, J., concurring); *id.* at 3216 n.1 (Blackmun, J., dissenting); *id.* at 3209 (White, J., dissenting).

<sup>39</sup> *Id.* at 3195 (Stevens, J., concurring) (referring to *Humphrey's Executor*, 295 U.S. 602 (1935)).

<sup>40</sup> The majority said of reviewability only that the Solicitor General was unwilling to endorse it. *Id.* at 3190. The other opinions implicitly or explicitly assumed the availability of review. *Id.* at 3195 (Stevens, J., concurring); *id.* at 3211 (White, J., dissenting); *id.* at 3215 n.1 (Blackmun, J., dissenting).

<sup>41</sup> 31 U.S.C. § 703(b) (1982).

<sup>42</sup> F. MOSHER, *THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT* 242 (1979), quoted in *Bowsher*, 106 S. Ct. at 3213 (White, J., dissenting).

how the bundle of relationships, formal and informal, creates for the agency a distinctive atmosphere and self-image that does not characterize other agencies. These relationships also create, at the congressional end, a unique intermingling of executive and legislative functions. That intermingling, in turn, raises threats to the courts' capacity to enforce the constraints of law that ought to be a matter of deep concern. Such an inquiry might have looked, with equal attention, at the way in which the congressional arrangements would deny the President a role in the execution of the laws, and also exclude the courts from any participation in control. One provision, for example, restricts the President's exercise of his appointment power by forcing him to choose a Comptroller General from a slate of three candidates proposed jointly by the House and Senate leadership.<sup>43</sup> Another permits the Comptroller General to veto presidential reallocations of military appropriations.<sup>44</sup> A third makes the Comptroller General's decisions final, subject to no judicial review whatsoever.<sup>45</sup>

The Court's approach may well have been a function of the particular arguments made to it, and the hasty development of the case on the Court's docket may have prevented it from fully exploring the issues.<sup>46</sup> Or the Court may have believed that making an issue of the President's impoverished relationship with the agency would place the independent regulatory commissions in greater jeopardy by reopening issues concerning presidential removal power. Yet no such reopening need occur.

Rather than argue that particular relationships (such as the removal power) are necessary, the alternative inquiry I suggest would have focused upon the overall framework of relationships, a framework whose elements might vary. Viewed in this light, the lines of control and influence running from the office of the President to the independent regulatory commissions are much more numerous, thick, and strong than those connecting that office to the GAO. Even the "for cause" removal restrictions join President and independent agency: it is the President who determines whether cause exists in the first instance and, as the majority observed to other purposes in *Bowsher*, what may constitute "cause" is (perhaps fortu-

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<sup>43</sup> 31 U.S.C. § 703(e)(3) (1982). Imagine such a restriction on the appointment of the Secretary of State or even (if an important independent regulatory commission is desired) the Chairman of the Federal Reserve Board or of the Securities and Exchange Commission. If, taking the majority at its word, the Comptroller General is an executive officer of the United States in the constitutional sense, what is to restrain Congress from imposing similar restrictions on those appointments?

<sup>44</sup> 2 U.S.C. § 901(d) (Supp. III 1985).

<sup>45</sup> *Id.* § 922(h).

<sup>46</sup> See *supra* note 30.

nately) undefined.<sup>47</sup> The independence at issue in such agencies is merely relative, as one taking the broader view would quickly perceive. The majority's exclusive focus on a particular formal relationship with Congress required a factual premise that cannot be sustained. Of course the broader view is a more difficult enterprise, a point to which we will return; yet, it does not require false assumptions.

Justice Stevens concurred in an opinion joined by Justice Marshall, apparently driven by a realization of the weakness of the majority's premise of control-in-fact. He suggested a different, but in its way equally formal, tripartite analysis of the problem facing the Court. Justice Stevens first asked where the Comptroller General "was" rather than what he was doing. "[O]ne of the identifying characteristics of the Comptroller General is his statutorily required relationship to the Legislative Branch."<sup>48</sup> Was it unconstitutional that his "current statutory responsibilities also envision a role . . . with respect to the Executive Branch?"<sup>49</sup> No, for many examples of such a mixed relationship could be cited; "[o]bligations to two Branches are not . . . impermissible, and the presence of such dual obligations does not prevent the characterization of the official . . . as part of one branch"<sup>50</sup>—in this case, Congress. Nor need the particular function being performed by the Comptroller General be characterized as "executive." Each branch exercises functions that could be characterized as executive, legislative, and judicial. "[G]overnmental power cannot always be readily characterized with only one of those three labels. On the contrary, . . . a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."<sup>51</sup> The Comptroller General's decision could also be made by Congress (as the fallback provision suggests it now will be) and in that case clearly would embody a "legislative" action.

Indeed, that is the observation that drives Justice Stevens' judgment that the legislature's delegation was unconstitutional: when a congressional employee acts in a way that is unmistakably "executive" (Capitol police making an arrest; the Librarian of Congress implementing statutory directives), that may be inescapable; but "[i]f Congress were free to delegate its policymaking authority to one of its components . . . it would be able to evade" the constitutional restraints on the legislative process.<sup>52</sup> Delegation of rulemak-

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<sup>47</sup> See Strauss, *supra* note 5, at 615.

<sup>48</sup> 106 S. Ct. at 3196 (Stevens, J., concurring).

<sup>49</sup> *Id.* at 3198.

<sup>50</sup> *Id.* at 3198-99.

<sup>51</sup> *Id.* at 3200.

<sup>52</sup> *Id.* at 3203.

ing power to independent or executive agencies does not present this threat; that delegation disperses rather than concentrates and sequesters power. Thus, the issue is not how executive officials may act, but how Congress may act. Because Congress itself is authorized to act with legally binding effect only through the enactment of statutes, it cannot delegate the making of policy having equivalent force and effect to an agent of the legislative branch who will act without observing the formalities of statutory enactment.<sup>53</sup>

Justice White's dissent was the principal voice raised in opposition to the *Bowsher* majority's "distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives."<sup>54</sup> Accepting the majority's characterization of the Comptroller General's authority as "executive," Justice White found the tenure controls Congress had reserved indistinguishable in practice from those that assure the independence of the independent regulatory commissions, and hence unobjectionable. Such limits as there may be to Congress's control of presidential removal are a function of "the extent to which [they] prevent[] the Executive Branch from accomplishing its constitutionally assigned functions."<sup>55</sup> This is *not* a bright-line inquiry; Justice White preferred the uncertainty of functional inquiry to the difficulties of "formalistic and unbending rules." From a functional perspective, Justice White found no difficulty. Assigning the Comptroller General's functions under the Act to an officer not subject to presidential removal at will presents no problem, because those functions are not central to the presidency—in fact, they lie closer to Con-

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<sup>53</sup> Justice Stevens' approach has the decided advantage of avoiding future appointments clause problems, *see supra* note 43, but echoes the Court's opinion in *INS v. Chadha*, 462 U.S. 919 (1983), and thus suffers from *Chadha*'s defects. *See* Strauss, *Legislative Veto, supra* note 17. Indeed, one *can* understand the legislative veto as a device to avoid the President's participation in the legislative process. *See* Strauss, *supra* note 5, at 651-53. Putting the matter in this formal way, however, invites one to attempt the same analysis with the other "branches." The result, one supposes, is that lower level judicial officials would be free to act executively or legislatively, but not judicially, and lower level executive officials could act judicially; or legislatively, but not in an executive fashion. Thus, the formal reasoning is far from satisfactory. Justice Stevens' observation that essential controls have been defeated, however, is central.

<sup>54</sup> 106 S. Ct. at 3205 (White, J., dissenting). Justice Blackmun's dissent would have avoided deciding on the majority's separation-of-powers issue by finding that the plaintiffs in the case were not entitled to the relief they sought (a declaration that the 1985 statute was invalid) and that any questions that might be raised about Congress's removal power under the 1921 statute, while important and substantial, were premature. *Id.* at 3215 (Blackmun, J., dissenting). Justice Stevens' approach was no more persuasive for Justice Blackmun; the Comptroller General's protected tenure made him an independent actor indistinguishable from a regulatory commissioner as an appropriate recipient of what was in effect rulemaking authority. *Id.* at 3215 n.1.

<sup>55</sup> *Id.* at 3207 (White, J., dissenting) (quoting *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977)).

gress. The Comptroller General has little policy-making discretion, and Congress's decision to seek a nonpartisan actor who would "not . . . allow his calculations to be colored by political considerations" is sensible, and "deprives the President of no authority that is rightfully his."<sup>56</sup> As a matter of factual characterization, the President's veto power over removal "reduces to utter insignificance" any threat of subservience by the Comptroller General to Congress.<sup>57</sup> "The practical result . . . is . . . to render [the Comptroller] one of the most independent officers in the entire federal establishment."<sup>58</sup> Justice White characterized the Court's invalidation of congressional participation in removal as the product of "rigid dogma":<sup>59</sup>

[A]n unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role. . . . [T]he role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law.<sup>60</sup>

#### B. *Commodity Futures Trading Commission v. Schor*

*Schor*<sup>61</sup> neither presented such urgent issues nor made unusual demands on the ordinary timetable of the Justices (or of the attorneys who prepared the case for argument before them). It concerned the constitutionality of the Commodity Futures Trading Commission's rule permitting the Commission to entertain common law counterclaims, arising under state law, in agency proceedings a broker's client had initiated to recover reparations for alleged violations of the Commission's regulations. Ordinarily, such issues would be decided by state courts or in diversity actions. The argument—given color by the Court's decision four years earlier in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>62</sup>—was that article III precluded Congress from assigning the adjudication of these issues to an administrative agency such as the CFTC. This appearance was, in fact, the case's second on the Supreme Court's docket. In 1984, relying on *Northern Pipeline*, the D.C. Circuit had found against the CFTC's exercise of jurisdiction.<sup>63</sup> The Supreme

<sup>56</sup> *Id.* at 3208.

<sup>57</sup> *Id.* at 3212.

<sup>58</sup> *Id.* at 3213.

<sup>59</sup> *Id.* at 3214.

<sup>60</sup> *Id.* at 3214-15.

<sup>61</sup> 106 S. Ct. 3245 (1986).

<sup>62</sup> 458 U.S. 50 (1982).

<sup>63</sup> *Schor v. Commodity Futures Trading Comm'n*, 740 F.2d 1262 (D.C. Cir. 1984).

Court had vacated and remanded that decision<sup>64</sup> for reconsideration in light of its intervening decision in *Thomas v. Union Carbide Agricultural Products Co.*<sup>65</sup> The D.C. Circuit reiterated its conclusion after reargument;<sup>66</sup> the case then came before the Supreme Court in ordinary course.

Understanding the *Schor* case requires at least a brief excursion through the separation-of-powers doctrine in the judicial context, a context whose problematic character is reflected in the *Northern Pipeline* decision. *Northern Pipeline* concerned 1978 revisions of the Bankruptcy Act that permitted non-article III bankruptcy judges to perform virtually all judicial functions in bankruptcy cases—in particular, to resolve, without regard to any objections of the party opposing the bankrupt, a contractual matter that ordinarily would be decided upon by a state court under common law. Only limited provisions were made for judicial review of bankruptcy court judgments. While six members of the Court found the 1978 revisions to be an unconstitutional delegation of judicial authority, the Court failed to produce a majority opinion. A plurality of four, Justice Brennan writing, grounded its analysis in a formal separation-of-powers argument about article III judicial power.<sup>67</sup> Justices Rehnquist and O'Connor joined that judgment on narrow grounds that appeared to rest on the involvement of an issue arising under state common law.<sup>68</sup> Finally, Justice White dissented<sup>69</sup> in terms very like those of his dissent in *Bowsher*, arguing that the legislative arrangements Congress had made seemed sensible to him, and presented no discernible threat, in and of themselves, to the article III courts.<sup>70</sup>

Justice Brennan's formal argument drew on the analysis used in *Crowell v. Benson*,<sup>71</sup> a decision that, despite its own formalism, was ultimately credited with sustaining the assignment of some adjudicatory functions to administrative agencies.<sup>72</sup> Describing the functions of a deputy commissioner of the independent United States

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<sup>64</sup> 105 S. Ct. 3551 (1985).

<sup>65</sup> 473 U.S. 568 (1985). *Thomas*, a case restricting *Northern Pipeline*, is briefly discussed *infra* at text accompanying notes 73-77.

<sup>66</sup> 770 F.2d 211 (D.C. Cir. 1985).

<sup>67</sup> *Northern Pipeline*, 458 U.S. at 52 (plurality opinion in which Justices Marshall, Blackmun, and Stevens joined Justice Brennan).

<sup>68</sup> *Id.* at 89 (Rehnquist, J., concurring in judgment).

<sup>69</sup> *Id.* at 92 (White, J., dissenting). Chief Justice Burger and Justice Powell joined with Justice White. Chief Justice Burger also wrote a separate opinion. *Id.* at 92 (Burger, C.J., dissenting).

<sup>70</sup> *Northern Pipeline* is discussed in Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 18-20 (1983); Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197; and Strauss, *supra* note 5, at 629.

<sup>71</sup> 285 U.S. 22 (1932).

<sup>72</sup> See, e.g., Monaghan, *supra* note 70, at 18-20.

Employees' Compensation Commission in deciding workers' compensation cases, the *Crowell* Court saw itself as choosing between characterizing his routine function as involving "public rights" of no necessary concern to the courts, and finding him to be an "adjunct" of the article III courts. If the matter the adjudicator was empowered to decide had no necessarily judicial component—if it was "executive" or "legislative" and hence could properly be resolved even if the judiciary were totally excluded—the adjudicator need not be placed in an article III institution. But if the matter *did* require judicial participation, and claims arising under state common law were paradigms of such matters, then it had to be possible to regard the adjudicator as an "adjunct" of an article III court and in some sense "within" the judicial branch. Thus, a two-part analysis was to be undertaken: First, whether judicial involvement is required; and second, if so, whether the adjudicator can fairly be described as enjoying "adjunct" status. For Justice Brennan in *Northern Pipeline*, the disputes between private citizens at stake in bankruptcy proceedings could not be characterized as involving "public rights," and the powers granted the bankruptcy judges by the 1978 revisions made them at once too powerful and too remote from article III courts to be characterized as "adjuncts." As remarked, Justices Rehnquist and O'Connor, who filled out the *Northern Pipeline* majority, rested their judgment exclusively, it appeared, on the involvement of a state common law issue in the particular case.

*Thomas*,<sup>73</sup> the next case, involved a dispute arising under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). A provision of FIFRA authorized the federal Environmental Protection Agency to use one manufacturer's research data about the health, safety, and environmental effects of its pesticide in considering another manufacturer's later application to register a similar product. As a condition of that use, the "follow-on" registrant had to offer to compensate the first manufacturer, and to agree to binding arbitration should they disagree as to the amount, subject to, at best, limited judicial review. The Court was unanimous in upholding the statutory scheme, but the Justices' opinions varied in rationale. Justice Brennan and two Justices who had joined his opinion in *Northern Pipeline*<sup>74</sup> sought to show how the statute at issue in *Thomas* could be upheld under that opinion;<sup>75</sup> Justice O'Connor now wrote for a majority of the Court and stressed that functional, not formal, analysis was the appropriate means for resolving constitutional disputes about congressional assignment of judicial business to other-

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<sup>73</sup> 473 U.S. 568 (1985).

<sup>74</sup> Justices Marshall and Blackmun. Justice Stevens also wrote separately.

<sup>75</sup> 473 U.S. at 599-600 (Brennan, J., concurring).

than-article-III courts.<sup>76</sup> She gave three reasons why the “independent role of the judiciary in our constitutional scheme” was not threatened by the very limited provision for judicial involvement:

[1] the right [at issue] is not a purely “private” right, but bears many of the characteristics of a “public” right. Use of a registrant’s data to support a follow-on registration serves a public purpose as an integral part of a program safeguarding the public health. Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication.

. . . .

[2] . . . the FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement. The danger of Congress or the Executive encroaching on the Article III judicial powers is at a minimum when no unwilling defendant is subjected to judicial enforcement power as a result of the agency “adjudication.”

. . . [U]nder FIFRA, the only potential object of judicial enforcement power is the follow-on registrant who explicitly consents to have his rights determined by arbitration.

[3] . . . FIFRA at a minimum allows private parties to secure Article III review of the arbitrator’s “findings and determination” for fraud, misconduct, or misrepresentation. This provision protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law. Moreover, review of constitutional error is preserved, and FIFRA, therefore, does not obstruct whatever judicial review might be required by due process.<sup>77</sup>

This, then, is the context within which *Schor* arose: an established dispute between the use of formal and functional methods of analysis in which the latter apparently had prevailed; and also a special sensitivity about the assignment to federal tribunals other than article III courts of disputes between private citizens turning on questions of state common law.

Although the Court might have been troubled, in the abstract, even by the CFTC’s authority to entertain private actions to recover damages for violations,<sup>78</sup> the particular circumstances of *Schor* made

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<sup>76</sup> *Id.* at 582-94 (majority opinion). Justice O’Connor was joined by Chief Justice Burger and Justices White, Powell, and Rehnquist.

<sup>77</sup> *Id.* at 589-92 (citations omitted).

<sup>78</sup> In seeking certiorari, the Solicitor General had to discuss the significance of the D.C. Circuit’s decision. He cited no other setting in which federal agencies currently exercise such authority. See Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Schor* (Nos. 85-621, 85-642). *But see*

the case about as unattractive for upholding Schor's constitutional claim as the legislative background of *Bowsher* had invited judicial intervention. One obvious undercurrent in *Bowsher* was that Congress, directly focused on the separation-of-powers problems, had attempted to pull a fast one, undercutting the President. In *Schor* it was the plaintiff who appeared to hold that position. Schor had invoked the CFTC's jurisdiction for his claims that his broker had violated CFTC regulations, when he might have chosen to sue in district court. When Schor's broker sued him in federal district court, in diversity jurisdiction, Schor sought dismissal of that action on the ground that the matter could be brought before the CFTC under its counterclaim jurisdiction. Schor did not first raise his constitutional objections to that jurisdiction until a Commission administrative law judge had first ruled preliminarily against him on the merits. This factual background, of course, does not answer the question whether Congress may lawfully empower the CFTC to entertain such claims; yet to the extent that Schor's claim was to the personal benefit of an "independent and impartial" judiciary, he evidently had compromised its force. The briefs in the case understandably stressed the issue of consent.<sup>79</sup>

Six Justices joined Justice O'Connor's majority opinion upholding CFTC jurisdiction over the counterclaim.<sup>80</sup> Schor's earlier invocation of the CFTC's jurisdiction had taken out of the case any consideration of the "individual rights" aspects of citizens' claims to have disputes decided by article III courts. Although the majority agreed that the separation-of-powers issue had to be reached, that issue, Justice O'Connor asserted, was to be assessed by reference to the purposes underlying article III, with " 'practical attention to substance rather than doctrinaire reliance on formal categories.' "<sup>81</sup>

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Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499f-499g (1982). Rather, the threats he identified were to other arrangements for referring disputes that ordinarily would be decided by article III courts to other tribunals with party consent. *Id.* at 20-21. The Federal Arbitration Act, the Federal Magistrates Act, and the use of masters and referees are examples. Mention also was made, *id.* at 26-28, of proposals for federal judicial reform that might involve creation of alternative tribunals—for example, to consider Social Security Act matters—as one means of dealing with the burgeoning caseload of the federal courts. The effect was to focus the significance of the case on judicial more than administrative activity.

<sup>79</sup> Brief for the Commodity Futures Trading Commission at 28-41, *Schor* (Nos. 85-621, 85-642); Brief for Respondents at 38-42, *Schor* (Nos. 85-621, 85-642). Schor asserted that his "consent" had been purchased at too high a cost—in effect, that it would be an "unconstitutional condition" for Congress to make his ability to use the CFTC contingent on his willingness to have counterclaims decided there. That argument did not attract a single adherent.

<sup>80</sup> Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens joined with Justice O'Connor.

<sup>81</sup> 106 S. Ct. at 3256 (quoting *Thomas*, 473 U.S. at 587).

She relied heavily on the majority opinion in the *Thomas* case in defining as the relevant issue whether Congress's action would "emasculat[e] constitutional courts,"<sup>82</sup> leading to "the encroachment or aggrandizement of one branch at the expense of the other."<sup>83</sup> This appears to be just the inquiry that Justice White had called for in *Bowsher*.<sup>84</sup>

In deciding whether assigning business to a "non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch," Justice O'Connor wrote, "the Court has declined to adopt formalistic and unbending rules."<sup>85</sup> Congress must be free to take "needed and innovative action pursuant to its Article I powers."<sup>86</sup> Factors for the courts to consider, none in itself determinative, include the extent to which the "essential attributes of judicial power" remain in article III tribunals, the range and scope of delegation, and the concensus leading Congress to act.<sup>87</sup> Here the Court found no objectionable intrusion into judicial authority: the CFTC's exclusive jurisdiction was limited, clearly linked to its primary responsibilities, and understandable as promoting an appropriate congressional purpose—namely, fostering efficient resolution of disputes and thus promoting compliance with the statutory scheme.<sup>88</sup> Beyond this, the jurisdiction of the CFTC merely paralleled that of the courts and did not preclude it. CFTC jurisdiction required district court action for enforcement, and thus would be subject to reasonably tight review, including substantial evidence review of its findings of fact and de novo review of its legal conclusions.<sup>89</sup> In this context, the state common law character of the claim ought not be regarded as "talismanic"; although the claim's character magnifies the risks of improper encroachment, *this* case presents

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<sup>82</sup> *Id.* at 3257 (quoting *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

<sup>83</sup> *Id.* at 3257 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). *Buckley* is another of the Court's treatments of separation-of-powers problems, one that (in this respect at least) seems functional in its orientation.

<sup>84</sup> 106 S. Ct. at 3207 (White, J., dissenting).

<sup>85</sup> *Schor*, 106 S. Ct. at 3258.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 3258-59. The Court had no occasion to say what it meant by this observation. Review of CFTC decisions occurs under provisions, 7 U.S.C. §§ 9, 18(e) (1982), that essentially track the Administrative Procedure Act, and that have been held to invoke its provision on scope of review, 5 U.S.C. § 706 (1982). *Cardozo v. CFTC*, 768 F.2d 1542, 1552 (7th Cir. 1985). Under current interpretations, APA review often involves acceptance of an agency's reasonable legal conclusions. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The ordinary bases suggested for such acceptance of agency judgments would not easily extend, however, to agency judgments about the meaning of state common law rules. *Cf. Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir.), *cert. denied*, 459 U.S. 999 (1982).

no "substantial threat to the separation of powers."<sup>90</sup>

Justices Brennan and Marshall dissented, following a formal analysis like that in *Bowsher* and voicing passionate dismay at the Court's lack of consistency. Ours is a government of three distinct branches, they reasoned, each of which must be maintained "entirely free from the control or coercive influence, direct or indirect, of either of the others."<sup>91</sup> Repeating the analysis that had attracted four votes in *Northern Pipeline* and three votes in *Thomas*, and had now lost further support, they insisted that the judicial power must be vested in article III courts, subject only to narrow exceptions which could not include agency adjudication of state common law counterclaims in disputes between private parties. The "important functions of Article III are too central to our constitutional scheme to risk their incremental erosion,"<sup>92</sup> which "abdication to claims of legislative convenience"<sup>93</sup> threatens. The balance between concrete gains in efficiency and convenience promised by legislative assignments of matters to agency decision, and the more remote and theoretical benefits of separation of powers, will never appear to favor the latter in any particular case. It is not significant that the CFTC shares jurisdiction with the judiciary;<sup>94</sup> permitting Congress to make article I courts attractive, even if article III courts remain formally open, is tantamount to permitting Congress to destroy article III courts.<sup>95</sup> The reasoning of the majority would allow few stopping points, they feared, if Congress were to become more aggressive in permitting federal agency entertainment of counterclaims. "[D]ilution of judicial power operates to impair the protections of Article III regardless of whether Congress acted with the 'good intention' of providing a more efficient dispute resolution system or with the 'bad intention' of strengthening the Legislative Branch at the expense of the judiciary."<sup>96</sup> As in *Bowsher*, so here, the dissent argued, it is necessary to endure the inconvenience of separated

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<sup>90</sup> 106 S. Ct. at 3259-60.

<sup>91</sup> *Id.* at 3262 (Brennan, J., dissenting) (quoting *Bowsher*, 106 S. Ct. at 3188 which quotes *Humphrey's Executor*, 295 U.S. at 629).

<sup>92</sup> *Id.* at 3263.

<sup>93</sup> *Id.* at 3264.

<sup>94</sup> *See id.* at 3265 ("[A]ny 'sharing' of jurisdiction is more illusory than real.").

<sup>95</sup> *See id.* ("If the administrative reparations proceeding is so much more convenient and efficient than litigation in federal district court that abrogation of Article III's commands is warranted, it seems to me that complainants would rarely, if ever, choose to go to district court in the first instance.").

<sup>96</sup> *Id.* at 3266. One might not appreciate the contemporary importance of this argument simply from reading the opinions in the case. Turning to the briefs, however, one is immediately struck that what appears to the parties—particularly to the Department of Justice—to be at stake is the future of judicial reform rather than the future of administrative action. *See supra* note 78. Avoiding an opinion that would inhibit transfer of Social Security Act appeals to an article I court, rather than avoiding an outcome that

powers in order to secure liberty.<sup>97</sup>

The majority approach in *Schor* repudiates not only the formalist analysis of the *Northern Pipeline* plurality, but also the analytic structure underpinning *Crowell v. Benson*.<sup>98</sup> To the *Crowell* Court it had seemed to matter, at least as an issue of metaphor, "where" in government an administrative adjudication was regarded as having been placed.<sup>99</sup> As applied to adjudicators who were commission employees indistinguishable from the employees of other regulatory commissions then extant, the "adjunct" characterization was fictive even in 1932;<sup>100</sup> unlike a United States magistrate<sup>101</sup> or even a bankruptcy judge,<sup>102</sup> a deputy commissioner had no formal connection whatever with the judiciary, apart from the provision for review of his decisions once final. In this respect, the *Crowell* Court's approach may be regarded as functional; in the end it insisted that "regard must be had . . . not to mere matters of form but to the substance of what is required,"<sup>103</sup> and that from this perspective a suitable arrangement for judicial review "provides for the appropriate exercise of the judicial function."<sup>104</sup> Nonetheless, the fictive "adjunct" relationship in *Crowell* carried with it certain standards of review as a matter of constitutional necessity: independent judicial redetermination of certain "constitutional" or "jurisdictional" facts; relatively intense review of other factual determinations; and "full" judicial authority to deal with all matters of law.<sup>105</sup> *Schor* makes no mention of the "adjunct" aspect of *Crowell*; evidently, locating the branch in which the CFTC sits is no longer thought important.<sup>106</sup> The fundamental requirements of judicial involvement voiced in *Crowell* now appear as important, but nondeterminative, "factors." Thus, as welcome as abandonment of the "adjunct" fiction may be, it also raises certain risks. In substituting a general, functional anal-

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would cast doubt on other contemporary administrative adjudication, is the program that stalks the pages of the government's brief.

<sup>97</sup> 106 S. Ct. at 3265 (Brennan, J., dissenting).

<sup>98</sup> 285 U.S. 22 (1932).

<sup>99</sup> *Id.* at 56-58.

<sup>100</sup> *Id.* at 68, 70 & n.5 (Brandeis, J. dissenting).

<sup>101</sup> See *United States v. Raddatz*, 447 U.S. 667 (1980) (upholding constitutionality of U.S. magistrates).

<sup>102</sup> See *Northern Pipeline*, 458 U.S. 50 (1982).

<sup>103</sup> *Crowell*, 285 U.S. at 53.

<sup>104</sup> *Id.* at 54.

<sup>105</sup> *Id.* at 46, 54, 62.

<sup>106</sup> As a metaphysical exercise, it would also be rather problematic. Deputy commissioners appear only to have decided workers' compensation claims. The CFTC makes rules and reaches enforcement decisions as well as engages in adjudication. Even in adjudication it most often engages in activities for which the *Crowell* review constraints would now be thought inappropriate—as when it interprets its own rules or governing statute. See *supra* note 89.

ysis for *Crowell*'s relatively formal two-part analytic structure, the *Schor* Court threatens the basis for insisting on the *Crowell* standards of review even as it observes that these standards are in fact provided for in the case at hand.

It thus appears that a majority of the Court, on that first Monday in July, sought to have it both ways on the subject of separation of powers. For five of the Justices—Chief Justice Burger and Justices Rehnquist, Powell, O'Connor, and Stevens—the proper approach in *Bowsher* appeared to be quite formal: figure out which "branch" the actor is in (or which branch's function he is exercising) and then see whether the formal requirements that ensue from that inquiry are inconsistent with the provisions of the statute under challenge. However minor or understandable that inconsistency might be, it condemns the statutory scheme. If these five Justices had undertaken the same inquiry in *Schor* (as Justice Brennan did in his *Schor* dissent), they would have been forced to conclude that the CFTC was exercising a judicial function (by resolving a legal dispute arising between two private parties under state common law) outside the article III judiciary. But the only question these five Justices asked in *Schor* was whether this convenient and well-controlled arrangement unavoidably threatened one branch's (here the judiciary's) performance of its most central constitutional functions. Again, if *that* had been the inquiry these five undertook in *Bowsher* (as Justice White did in his *Bowsher* dissent), they might well have concluded that Congress's very limited reservation of control over the Comptroller General's tenure in office, and his marginal performance of executive function, generated no such threat to the presidency.

## II

### CAN THE CASES BE RECONCILED?

This remarkable juxtaposition might be taken as further evidence of the claims of latter-day legal realists about the indeterminacy of law and the basic power-orientation of the legal apparatus. Yet, for me, as an existential proposition, to embrace those claims is to repudiate the enterprise. That the judge's obligation is one of consistency in her own reasoning in like cases—the very obligation of coherent explanation that she enforces on agencies such as the CFTC when their work comes before her for review—is the very premise of her authority.<sup>107</sup> A judiciary that asserts the power to

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<sup>107</sup> See Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979) (criticizing Supreme Court's willingness to abandon *stare decisis*); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (court decision "must be genuinely principled, resting . . . on analysis and reason quite transcending the

impose legal obligation or sanction without recognizing the duty of coherence and explanation is one I would not choose, and one that we as a people have not chosen.

Justice O'Connor, of course, asserted no such power for the Court, but the explanation she essayed was a skeletal one:

Nor does our decision in *Bowsher v. Synar* require a contrary result. Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch. In any case, we have, consistent with *Bowsher*, looked to a number of factors in evaluating the extent to which the congressional scheme endangers separation of powers principles under the circumstances presented, but have found no genuine threat to those principles to be present in this case.

In so doing, we have also been faithful to our Article III precedents, which counsel that bright line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. See, e.g., *Thomas, supra*. Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.<sup>108</sup>

Is it that "aggrandizement" is the key to activate a formalist approach? That article III separation-of-powers cases are different in principle from those arising under articles I and II? Or, perhaps, is it more simply that the Court finds itself facing the dilemma once described by Justice Cardozo, that of the judge who is surer how she must decide than able to explain why?<sup>109</sup> The government we have built and now live with has attained a complexity and intermarriage of function that beggars the rationalistic tripartite schemes of the

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immediate result that is achieved"). *But cf.* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (one can demand consistent decisions from particular judge but not from Supreme Court as institution without forcing it to sacrifice its institutional nature).

<sup>108</sup> 106 S. Ct. at 3261 (citations omitted).

<sup>109</sup> "Often he fumbles about, feeling in a vague way that some such problem is involved, but missing the universal element which would have quickened his decision with the inspiration of a principle." B. CARDOZO, *THE GROWTH OF THE LAW* 102 (1924) (discussing *Hynes v. New York Cent. R.R.*, 231 N.Y. 229, 131 N.E. 898 (1921)). Driven to the realization that the law's analytic forms permitted alternative answers in the *Hynes* case, Judge Cardozo first understood it his obligation to demonstrate that state of affairs. Then and later he defended his choice of outcome on his "conception of the end of the law, the function of legal liability . . . . Some theory of liability, some philosophy of the end to be served by tightening or enlarging the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent." *Id.* at 101-02. He would not have asserted, and did not assert, that he was free either of explanation or of an obligation to consistency so far as he could attain it.

eighteenth century. Identifying a satisfactory principle for assessing the permissibility of distributions of governmental power, much less one that can be rooted in the "separation-of-powers" framework, may simply be too much to expect.<sup>110</sup>

The element perhaps most remarkable in Justice O'Connor's brief explanation of the Court's action lies in its opaqueness to the contrasting styles employed in the two opinions: the formal, tripartite scheme of neatly characterized and separated branches and functions in *Bowsher*, and the "core function" analysis inquiring, not into overlap, but into fundamental impairment of role in *Schor*. One could even say that the two opinions represent poles frequently encountered in legal analysis, between rigid rule and individualized judgment, between technical positivism and policy analysis.

The evidence of history is that resolution between these poles is not to be expected—that, inescapably, judges require both techniques. On the one hand, clear rules contribute to planning, stability, even assurance that conduct can and will be governed by law. Clarity and concreteness offer pronounced rhetorical advantages in justifying a negative verdict on the constitutionality of a statute or other activity undertaken by a powerful, coordinate branch of government. Yet such rules present the twin hazards of inflexibility in the face of changing and unpredictably varying circumstances, and of inviting evasion by their clarity. Much human wisdom is reflected in what is not our failure but our *unwillingness* to attempt a full definition of fraud; fraud inheres in the efforts to circumnavigate such definitions as there may be. And the drafters or interpreters of a Constitution, anticipating and even wishing continuing struggle and irresolution over the dispersion of political power, could easily foresee a corresponding difficulty arising out of the attempt to specify permitted allocations.

On the other hand, approaches grounded in holistic appreciation of the circumstances of particular disputes promise, in their flexibility, both the potential for accommodating needed change and a discriminating and direct response to the problem of evasion. Yet these approaches raise larger questions about the legitimacy of judicial action, both by enlarging the element of judicial personality in the exercise of judicial power and by appearing to deprive outside observers of a firm basis on which to appraise that exercise. And, from a practical perspective, experience suggests that a flexible or functional standard has only short-term advantages in dealing with the evasion theme. Starting with *McCulloch v. Maryland*,<sup>111</sup> judicial assurances that manipulative uses of doctrine could be identified

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<sup>110</sup> Cf. J. CHOPER, *supra* note 15, at 171-379.

<sup>111</sup> 17 U.S. (4 Wheat.) 316 (1819).

and defended against have proved false. The force of common law analytic methods in expanding from the base of the permitted has simply been too strong and the defenses against that expansion unadministrable.

In this respect, Justice Brennan will surely be vindicated as a prophet if—as seems not unlikely given the current press to control the explosive growth in litigation<sup>112</sup>—the future puts his fears to the test. It is his sense of the importance and vulnerability of the Court that may explain the strong interest in formalism by a Justice so often prone to insist on the Constitution's flexibility and adaptability. While "core function" may be the best that the most sophisticated of analysts can suggest,<sup>113</sup> it has no stable content. At best, "core function" analysis can guard against a sudden demarche, but not against the step-by-step accretion of "reasonable" judgments over time. The strength of flexibility is at the same time its weakness—as indeed Justice White's consistent inability to apply his analysis with bite may itself suggest.

Of course we want both the comfort of adaptation to changing circumstances *and* the assurance that no one of the three designated heads of our government will ever succeed in displacing either, let alone both, of the others, despite their unending contention for power. We can say, in that sense, that we know the ends to which judicial effort ought to be bent. That knowledge, however, only highlights the polarity inherent in these objectives and opens further questions about consistency or, barring that, the possibility of agreeing on the ordering of these objectives. A resolution to this problem can hardly be expected if the ends in view look resolutely and irreconcilably in differing directions. On the whole, the voice of adaptation is that of functionalism; the voice of assurance, that of the classic and formal three-part division. Do we know which we prefer? Is there a meta-rule that can establish which approach should be taken in the event of conflict? Can one tease out of the cases, or the circumstances in which they arise, any principles for choosing between functional and formalistic approaches?

For evidence of the high stakes in this inquiry, one need look no further than the recent brouhaha over the existence of limits on federal authority to regulate the affairs of state government. The history of judicial efforts to referee the apportionment of authority between state and federal governments is also one that has wit-

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<sup>112</sup> See *supra* notes 78 & 89.

<sup>113</sup> See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953). *But cf.* Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 201 (1984).

nessed struggles between formalists (insisting that only certain governmental functions belong to the federal government, and that others are reserved to the states) and functionalists (urging that the only appropriate judicial role in a changing society is to protect the "core functions" of state government). Here, too, those struggles occurred in the service of separating power amongst the possible instruments of government in the interest of protecting citizens' freedom.<sup>114</sup> Although separation-of-powers formalism appears to have survived the New Deal,<sup>115</sup> federalism formalists were routed during the New Deal's explosive endorsement of national authority to deal with economic issues. Increasing federal efforts to regulate the conduct of state government, and apparent appreciation of the political benefits to citizens of the federalist allocation,<sup>116</sup> marked the emergence in *National League of Cities v. Usery*,<sup>117</sup> of an analysis which (at least as subsequently interpreted<sup>118</sup>) stressed interference with "core" state functions more than a catalog of do's and don't's. In *Garcia v. San Antonio Metropolitan Transit Authority*<sup>119</sup> a majority of the Court overruled *Usery* on the evidence of less than a decade, pronounced this approach unworkable and abandoned to the federal political process any effort to define the proper interpenetration of federal and state authority.<sup>120</sup>

The argument made in support of that abandonment does not easily apply to the separation of powers among the three named heads of American national government. This argument is that the states are represented in the national political process and therefore the valid interests of state governments, and of their citizens, are likely to be protected in the making of federal policy.<sup>121</sup> Imperfect

<sup>114</sup> See Rapaczynski, *supra* note 16.

<sup>115</sup> See, in particular, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), decided the same day as *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—perhaps the New Deal's blackest day. *Humphrey's Executor* has never been questioned by the Court, and its formalist analysis remains influential today, as its frequent citation in *Bowsher* amply testifies.

<sup>116</sup> See Rapaczynski, *supra* note 16.

<sup>117</sup> 426 U.S. 833 (1976).

<sup>118</sup> See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-95 (1981).

<sup>119</sup> 469 U.S. 528 (1985).

<sup>120</sup> A different way of looking at the *Usery* cases is to remark that only one Justice—Justice Blackmun—changed his mind in *Garcia*, among ample threats by the new minority that when the occasion arose they would return the compliment. I will refrain from treating the correctness of these cases or alternative approaches. For that discussion I refer the reader to my colleague Andrzej Rapaczynski's interesting analysis, *supra* note 16. The point here is simply to illustrate the third approach possible, in addition to those of *Bowsher* and *Schor*.

<sup>121</sup> See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) ("[T]he existence of the states as governmental entities and as the sources of the standing law is

as this political mechanism may be in the context of federalism,<sup>122</sup> it is deeply problematic in assessing relations among President, Congress, and Court. First, equivalent "political process" reformulations are not possible; more important, the judiciary's participation in separation-of-powers controversies may be found precisely in its authority to assess the legality of actions respecting congressional, presidential, or judicial powers.<sup>123</sup> Judicial renunciation of that authority would, in itself, work a startling and deep shift in the distribution of authority within American government. Nonetheless, the "political process" argument has been made;<sup>124</sup> its success in *Garcia* suggests it might be heard; and the prospect of that result as a reaction to the undoubted difficulties of judicial management of a functional inquiry warrants attention.

Simply looking at the cases, an observer might conclude that the Court seems much more clearly committed to functionalism in examining its own place in the constitutional scheme than in dealing with issues concerning the other two heads of federal government. Only once since the decision in *Crowell v. Benson*,<sup>125</sup> in the plurality opinion of four Justices in *Northern Pipeline*, has the Court come close to voicing a formalistic view of separation-of-powers issues concerning the courts. Indeed, as we have seen, the number of Justices who remain faithful to that approach is now reduced from four to two. This shift could reflect an appreciation of the extraordinary complexity of the federal judicial system,<sup>126</sup> embracing not only those congressional creations that are unmistakably courts or adjuncts to them, but also the regulatory bodies, attached to or "independent" of the presidency, that have been congressionally endowed with dispute-resolving power. It may reflect an appropriate modesty in declaring constitutional principles that might appear to enshrine the Court's own place,<sup>127</sup> or it may reflect self-interested relief at being freed of the need to decide matters of routine in litigation-rich times.<sup>128</sup> Whichever explanation one believes, the Court has unmistakably chosen a functional approach over a formal approach in as-

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in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception.").

<sup>122</sup> Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Rapaczynski, *supra* note 16.

<sup>123</sup> Monaghan, *Book Review*, 94 HARV. L. REV. 296, 303, 307 (1980) (For example, "Congress is not institutionally 'represented' in the White House." (reviewing J. CHOPER, *supra* note 15)).

<sup>124</sup> J. CHOPER, *supra* note 15, at 260-379.

<sup>125</sup> 285 U.S. 22 (1932); see *supra* notes 71-73 and accompanying text.

<sup>126</sup> E.g., *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

<sup>127</sup> Cf. Hart, *supra* note 113.

<sup>128</sup> The government clearly drew on this attitude in its argument of *Schor*. See *supra* notes 78 & 89.

sessing questions of impact on its own functions. In matters affecting Congress and the President, on the other hand, the record is equivocal, and the recent trend to formalism appears to be gathering momentum.

That judges have greater personal experience both of the complexity of the "judicial" function and of the arguable advantages of recognizing the conveniences of administrative judging cannot form a principled basis on which to differentiate separation-of-powers disputes involving the courts from separation-of-powers disputes involving the President and Congress. Simply because judges recognize that separation-of-powers issues prove extraordinarily complex in the judicial settings with which they are familiar hardly establishes that the issues are simple in circumstances they can less readily understand. Similarly, just because judges can personally appreciate the convenience of delegating routine judicial functions to others fails to differentiate these matters from other settings where the judges tell us, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."<sup>129</sup> Certainly, nothing in *Crowell* or any of its progeny suggests that some special quality of the position of the courts renders functionalism unmistakably appropriate for them, while less relevant to the other named heads of government. The tenor of *Crowell*'s language is to just the opposite effect. "[R]egard must be had, *as in other cases where constitutional limits are invoked*, not to mere matters of form but to the substance of what is required."<sup>130</sup>

The possibility that the Court is acting out of "modesty," choosing a relatively permissive and flexible test vis-à-vis judicial functioning to avoid the appearance of self-serving statement, has at least two aspects. First, the choice between formalist and functionalist approaches might be seen as essentially tactical: formal approaches to presidential/congressional disputes will both simplify planning for those two politically potent bodies (albeit at some cost to government flexibility) and diminish their sense that the judges personally, as distinct from the law, are responsible for the outcome.<sup>131</sup> This approach thus encourages acceptance and discourages retaliation. Functional approaches to matters involving the

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<sup>129</sup> *Bowsher*, 106 S. Ct. at 3193-94 (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

<sup>130</sup> 285 U.S. at 53 (emphasis added).

<sup>131</sup> Formal rules give the appearance of being exogenous: "It isn't that I wanted to do this, but I had no choice."

judiciary acknowledge its position as "the least powerful branch"; their consistent tendency is to validate legislative choices, avoiding confrontation.<sup>132</sup>

Second, as Justice O'Connor's effort to distinguish *Bowsher* in *Schor* also suggests, the choice may be a function of the need for effective containment, an approach that would tend to treat a constitutional actor's "aggrandizement" of its own function and its "undermining" or restriction of another's function as separable issues. When the issue is whether one of the named heads of governmental authority can appropriate to itself some function it did not previously enjoy, the question of containing that head within its designated role is presented more sharply than when the issue involves taking from one of the actors or reducing the extent of some function previously enjoyed.<sup>133</sup> One could make a formalistic, tripartite division analysis of *additions* to an actor's functions, and a functional analysis of *subtractions* from an actor's authority or—perhaps especially—one actor's apparent relinquishment (as by delegation) of some piece of its own ordinary authority to another.

The tactical explanation is hard to connect with the constitutional scheme, as distinct from some critical sense of *realpolitik*. That is, such a judicial response may reflect the behavior political observers would expect from a relatively weak institution, as it struggles to maintain its position and influence relative to its competitors. But nothing in the Constitution or in the objective circumstances of judicial review suggests this outcome. One thinking about American government in the usual way, as consisting of three "branches" that encompass all of government's operating units, might also find the "aggrandizement" explanation problematic. On the three-branch hypothesis, one cannot subtract here without adding there. If the judicial function is diminished by assigning adjudicatory functions to "the executive branch," that also enlarges the presidency, suggesting presence there of the merged functions against which, on the formalist hypothesis, the Constitution guards—whatever the apparent gains in convenience.

Yet "addition" and "subtraction" need not be taken as the opposite sides of one coin. The formation of an ordinary administrative agency,<sup>134</sup> in particular, can be seen as "subtracting" from what

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<sup>132</sup> Cf. C. BLACK, *THE PEOPLE AND THE COURT* 52 (1960) ("[A] case can be made for believing that the prime and most necessary function of the Court has been that of *validation* . . .").

<sup>133</sup> The Court has characterized the containment problem as one "hydraulic pressure" threatening to break down the scheme of separated powers and merge them in one place. *Bowsher*, 106 S. Ct. at 3189 (quoting *Chadha*, 462 U.S. at 951).

<sup>134</sup> By "administrative agency" I do *not* mean "independent regulatory commission." *All* bodies responsible for regulation are included. The following analysis is as

would otherwise be the authority of *each* of the three constitutional actors: Congress's delegation loosens its controls over the formulation of legislative policy; the agency's law-enforcement functions detract to some degree from what would otherwise be the President's personal executive function; and the agency's decisional process can significantly displace that of the courts. To which actor's authority does all of this subtracting add? At this point, the analysis summarized above<sup>135</sup> acquires particular bite: there is no constitutional need to regard the functioning, day-to-day elements of government (that is, the agencies) as being "in" any particular "branch" (as distinct from having a relationship with the named constitutional actors). In such a case, the functional question would remain—namely, has so much been taken from the functioning of Actor *X* to impair its core function?—but the formal analysis would be irrelevant. The general question of control, of assuring the lawfulness and responsiveness of government, remains; yet so long as conventional lines of control running to each of the named heads of government are present—so long as Congress can revise the statute and must appropriate needed resources, the President may appoint and consult, the courts may review—the issue of aggrandizement simply disappears.

*Schor* is precisely such a case. The CFTC, an "independent" agency, wields some powers of each of the three named heads of government. Thus, in *Schor*, it had adopted a rule which, if valid, enjoyed the force of a statute: it authorized the exercise of a jurisdiction over counterclaims in Commission adjudication for which there would otherwise have been no basis. The CFTC daily takes and implements decisions about the enforcement of commodity futures regulatory law, seeking information, announcing policies, initiating proceedings, and ordering priorities. And as this case makes evident, the Commission also—to a degree greater than most<sup>136</sup>—entertains and decides disputes, resolving the legal claims of individuals that would otherwise be grist for the courts. Yet the Commission also enjoys a strong relationship with each of the constitutional actors it has thus, to some extent, displaced. It acts

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valid for the Department of Agriculture as it is for the Nuclear Regulatory Commission. Although one is conventionally described as being "in" "the executive branch" and the other not, it is obvious that both must be (and are) described as "executive" for some constitutional purposes. Each has legal authority to make judgments which the President is not entitled to displace or overrule—that is, which are beyond his lawful command. That distinctions exist between them—for example, in the degree of control the President enjoys over the tenure of the chief officers of each—may speak to the nature of necessary presidential controls but does not detract from the broad picture painted in the text. See *supra* notes 17-24 and accompanying text.

<sup>135</sup> *Id.*

<sup>136</sup> See *supra* note 78.

within the framework of congressional statutes, under the constraints of congressional appropriations, and subject to the ordinary routine of congressional oversight and political chaffering. The President appoints its members, who doubtless respond to his requests for advice or suggestions as to national policy, cooperate in his councils, depend upon him for logistic support, and suffer his discipline when they depart from their duty.<sup>137</sup>

Most important, given the particular dispute in *Schor*, the CFTC's decisions are subject to judicial controls in the usual fashion: factual judgments are upheld only if supported by "substantial evidence" on the administrative record viewed as a whole; legal judgments are upheld only if supported by the court's independent inquiry (although that inquiry may identify reasons why the court is to accept some reasonable agency judgments);<sup>138</sup> and matters left to agency discretion must still be explained and rationalized to a degree that prevents a court from concluding that its exercise was "arbitrary" or "capricious." Given these arrangements, one can easily conclude that courts have been assured all the essentials of judicial power, in circumstances that do not threaten "separation-of-powers" policy; one cannot see how either the President or Congress has been enlarged vis-à-vis the courts, or made more threatening in relation to them, or how the courts' capacity to maintain their relationship with the political heads of government has been diminished. Only formalism supports a negative judgment.

As has already been suggested, the problem underlying *Bowsher* cannot be understood in the same way. It is not simply that Congress chose a particular mechanism for protecting the "independence" and "objectivity" of the Comptroller General—a mechanism that, in the abstract, one might think would work effectively toward that end. The Comptroller General's relationships with the President, from the proposing of his appointment onward, are strikingly weaker than those that characterize other agencies; the President and the courts both are utterly divorced from participating in the control of the particular functions under review; and the relationship between Congress and the Comptroller General is far more embracive and proprietary than the relationships that characterize the rest of government. Here one could fairly describe Congress as

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<sup>137</sup> The data for some of these propositions as empirical statements about the CFTC in particular is not at hand; yet one cannot imagine a current and effective part of American government for which they would not be true. The reference to discipline is, simply, a reminder that the President is authorized to remove Commissioners "for cause"—an authority that looms even larger in the wake of the majority's potentially generous construction of that power in *Bowsher*.

<sup>138</sup> See Levin, *Scope of Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986); *supra* note 89.

having appropriated to itself the President's characteristic functions (and made nugatory those of the courts). Functionalist and formalist could be equally concerned with these outcomes; that the Court chose a formalist analysis speaks to possible rhetorical advantages, but not to outcome.

Viewing "aggrandizement" in terms of the full set of relationships among agency, Congress, President, and courts rather than in terms of a single "talismanic" feature of one of those relationships is, of course, precisely what the *Bowsher* Court failed to do. In this sense Justice White has the better of the argument; the factual assertions that the majority chose to make about congressional dominion over the Comptroller General were unsustainable. Yet in the end Justice White fares no better. While he insists on functionalism rather than formalism, he fails (as he had in the earlier cases) to carry through with an inquiry addressed to the whole range of circumstances informing functional analysis. In *Bowsher* he looks *only* at the discharge provisions and not, as a functional analysis should insist, at how they sit in the general framework of relationships among the GAO, Congress, President, and courts. If the right question is whether the arrangements under challenge threaten to aggrandize one of the three named constitutional actors at the expense of another, thus imperiling the balance of American government and the performance of core functions by the weakened actor, then that question requires a broader view.

Note that the question asks nothing directly about the agency empowered to act—the GAO or the CFTC—but rather asks about the impact of the challenged arrangements on the three named heads of constitutional government and the relationships among them. Although one can easily agree with the *Schor* majority that empowering the CFTC to entertain counterclaims under state common law entails no such consequences, the equation in *Bowsher* is not as clear. In *Bowsher*, aggrandizement *is* present: what the President loses in the way of ordinary controls over the tenure of government officials, Congress has asserted for itself. The "standard relationship of control," preserved between court and agency in *Schor*, is missing between President and agency in *Bowsher*. The legislative histories of both enactments in question, the tenure provision of the 1921 Act and the 1985 deficit reduction measure, reflect specific attention to the distribution of power between President and Congress, the intention to reduce it there and increase it here. The 1985 legislation excludes even the judiciary from participation in control over the important governmental functions being exercised. It is not that convenience or factual impact is never relevant to separation-of-powers inquiry, but that, *in these circumstances*, the

historical insignificance of the particular challenged control, over the years, could be judged insufficient to answer the institutional threat. Congress could be excused much in its own relationship with the GAO if it recognized conventional presidential and judicial relationships with that agency. Its insistence on an exclusive relationship, a device which if successful could indeed propel Congress into a general position of dominance over the national government, is the differentiating feature, and the one that renders Justice White's result (if not his general mode of analysis) suspect.<sup>139</sup>

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<sup>139</sup> In an interesting analysis, Charles Tiefer defended other GAO authority that could be characterized as "executive," along with the authority of special prosecutors appointed under the Ethics in Government Act, 28 U.S.C. §§ 591-598 (1982 & Supp. III 1985), and of inspectors general acting under the Inspector General Act of 1978, 5 U.S.C. §§ 1-II (Supp. III 1985), on what might be called a conflict of interest theory. Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59 (1983). He proposes that agencies independent of presidential direction are justified when their independence permits them to serve a checking function against presidential self-dealing. Examples might include a special prosecutor able to act against wrongdoing high in the administration (against which a President might be tempted to suppress investigation); an inspector general able to give Congress accounts of departmental waste and fraud unaffected by the Secretary's wishes to preserve the appearance of rectitude; a Comptroller General able to enlist the compulsion of a judicial order in inspecting the records of recalcitrant agencies, 31 U.S.C. § 716(c)(1) (1982), or to sue to block a wrongful executive impoundment, 2 U.S.C. §§ 686-687 (1982).

*Quis custodiet custodiet?* is indeed the central dilemma of separation-of-powers theory, and the suggested approach may prove a fruitful one. Interbranch checking of this character has less obvious consequences for citizen control of government, and a greater likelihood of contributing to flexibility in government arrangements, than the displacement of one or another "main actor" in matters having a direct impact outside government. See Strauss, *Legislative Veto*, *supra* note 17, at 805-17.

A sequel to *Bowsher*, decided by the Third Circuit as this essay went to press, appears on initial reading to be consistent with Professor Tiefer's approach. *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986). At issue in that case was the Competition in Contracting Act, 31 U.S.C. §§ 3551-3556 (Supp. III 1985), a congressional effort, again involving the use of the GAO, to find a means for checking departmental adherence to the norms of government contracting procedures without invoking time-consuming judicial procedures or having to leave the department to watch itself. Under the challenged provisions of this statute, the filing of a protest by a disappointed bidder stays the awarding of a challenged contract until the Comptroller General responds to the protest or the agency certifies that "urgent and compelling circumstances" require it to go forward. *Id.* § 3553. The Comptroller General's ultimate ruling, to be made within a brief time, is in the form of a recommendation to the agency, and the stay is then lifted; the agency may adopt the recommendation or not, as it chooses. Only the partial dependence of the stay on the Comptroller General's action was challenged as inconsistent with separation of powers.

The court accepted that the Comptroller General was to be regarded, under *Bowsher*, as a congressional agent, 809 F.2d at 982; it nonetheless sustained the statute. The administration of government contracts and the expenditure of government funds both involve activities in which Congress and the President share intense interests. Where the Comptroller General's decision in *Bowsher* binds the President (and, in a sense, the rest of us), in *Ameron* the filing of a protest generates an automatic, time-limited stay, albeit one whose duration depends in part on the time it takes for the Comptroller General to voice his recommendation. Since he is given no merits-determining power, the

The suggestion made here, that courts should view separation-of-powers cases in terms of the impact of challenged arrangements on the balance of power among the three named heads of American government, gives rise to at least three cautionary questions, none of which seems possible to resolve in this essay. First, is such analysis judicially manageable in the individual case? Second, is the analysis capable of keeping us within range of the constitutional text over time? And third, does the analysis sufficiently express the important judgments of that text?

The first question, reflected in Justice Brennan's assertion in his *Schor* dissent that such analysis would inevitably fail (because of the immediacy of convenience gains, and the distance and ineffability of core function losses),<sup>140</sup> is a variant of the general critique of judicial balancing. One needs to distinguish here between the proposition that some judges will balance poorly, as in my view Justice White did in *Bowsher*, and the proposition that balancing as such is either inherently unmanageable, or presents such endemic risks of poor performance that it is generally undesirable. The questions are serious ones; it is not hard to say what the central issues are, but determining when the institutional capacities necessary to maintain the required tension among Congress, President, and Court have been threatened will rarely be other than a difficult act of judgment.<sup>141</sup> Yet all Justices—including Justice Brennan—continue to find the use of such techniques appropriate and sustainable in settings where, as here, underlying policy is evoked more easily than textual specification.

There remains the chance, also identified by Justice Brennan's *Schor* dissent,<sup>142</sup> that the repetitive making of "reasonable" choices by Congress will, over time, erode the independence of the judiciary or of the President. The argument is that a series of small steps, each reasonable within its context, provides a means by which Congress may subordinate either or both of these actors. The changes litigation growth has been working in the judiciary's capacity to function, and the resulting spate of proposals to consign new areas

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court easily placed the scheme in the realm of oversight, rather than control. Any affect on outside parties is limited to delay (unless the agency itself is moved to reconsider on receiving the Comptroller General's advice—and no one claims a constitutional ill in that), and from an ex ante perspective the risk of delay is far less than if (as it plainly could) Congress put the same stay device and dispute-resolving authority in the courts. In the *Ameron* context, as not in *Bowsher*, it is possible to see the challenged device as an instrument of ongoing, self-informing discussion and adjustment between the President and Congress, rather than as one of command.

<sup>140</sup> See *supra* notes 93-94 and accompanying text.

<sup>141</sup> See Strauss, *supra* note 5, at 668-69.

<sup>142</sup> See *supra* note 92 and accompanying text.

to administrative rather than judicial provenance,<sup>143</sup> give point to Justice Brennan's fears for the judiciary. Yet American constitutional review has always been more effective in preventing large and sudden departures from contemporary understandings than in avoiding what Justice Brennan fears as slow erosion; its adaptability to slow change—the genius of the common law, it might be called—has been a strength, not a weakness, one that has permitted the Constitution to endure. A swamped judiciary, in which even the Supreme Court's capacity for oversight is impaired by enormous growth in the overseeable base, will be no more effective a protector of our liberties than a diminished judiciary. Assume such changes as Justice Brennan fears might occur over the decades (as administrative government has grown over the decades); still we do not know what other changes might occur during the same period, arguably neutralizing those effects.

Finally, maintaining an appropriate balance among the three named constitutional actors may not prove sufficient to preserve the values of the constitutional scheme. In addition to the problem of aggrandizement, of imbalance, there is also the problem of remoteness, of unaccountability. This problem could be viewed from the perspective either of politics or of law. That is, the authority of agencies such as the CFTC may be objected to on the ground that that they are too remote from electoral accountability, the chief control that we as citizens enjoy over Congress and President. A different objection is that agencies are insufficiently subject to the constraints of law, and to the limitation that the need for public acceptance imposes on the courts.

The problem of political accountability has loomed large in recent literature,<sup>144</sup> but does not yield readily to simple distinctions between "attached" and "independent" agencies. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,<sup>145</sup> a recent decision directly concerned with problems of scope of review, all of the Justices joined Justice Stevens' statement recognizing both the importance and the fact of political accountability through the President: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices."<sup>146</sup> The

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<sup>143</sup> See *supra* note 78.

<sup>144</sup> See, e.g., Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); cf. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. 1 (1986).

<sup>145</sup> 467 U.S. 837 (1984); see also *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

<sup>146</sup> 467 U.S. at 865.

agency subject of *Chevron*, the EPA, is one "attached" to—rather than "independent" of—the presidency in formal terms; yet once one gets past the simplistic belief that the existence of a "for cause" removal restriction fully determines an agency's accountability to the President, one can understand that Justice Stevens' statement concedes (as is indisputable) that even attached agencies are somewhat independent of the President. In the same way, independent agencies are often significantly attached, as, *inter alia*, the Court's stress in *Bowsher* on the undefined and broad character of "for cause" removal authority emphasizes. The issue is one of degree, and the thickness of the President's connections to most if not all current agencies, independent *or* attached, makes both Justice Stevens' observation and the questions currently being raised in the literature applicable to all.

The question of judicial accountability may be more pressing. Since Congress generally provides rather full review of administrative action—one imagines, wishing the resultant control rather than seeking to avoid possible constitutional difficulty as such—the question what would be a sufficient judicial relationship does not often arise, at least outside the framework of "adjunct" relationships as in *Crowell*. It did rear its head, however, in *Thomas v. Union Carbide Agricultural Products Co.*,<sup>147</sup> in which Justice O'Connor's opinion for the Court seems to suggest a narrow view. Recall her conclusion that review limited to determining whether an arbitrator had abused or exceeded his power, "willfully" misconstrued his mandate, or committed "constitutional error" would suffice to meet "whatever judicial review might be required by due process."<sup>148</sup> Although a party stipulation abandoning any due process claims removed any concern over the definition of this "due process review" from the case, it is apparent that the constitutional minimum in Justice O'Connor's sights describes a level of judicial involvement considerably reduced from the usual court-agency relationship.

If the issue is seen only from the perspective whether the subtraction from judicial authority threatens the courts' capacity to perform their function in the constitutional scheme or authorizes presidential or congressional encroachment on judicial function, then the *Thomas* Court's judgment that no such threat exists is readily accepted. Seen from the perspective of remoteness, however—the quality of the agency's connections to the constraints of law—the notion that it might suffice to provide review only for fraud, misrepresentation, or constitutional error is disturbing. Again, the posture of *Thomas*, including the largely consensual nature of the

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<sup>147</sup> 473 U.S. 568 (1985); *see supra* text following note 73.

<sup>148</sup> 473 U.S. at 592.

arbitral submission and the special characteristics ordinarily attached to arbitrators, suggests that these expressions are not a reliable indicator of the Court's future direction. The Court remanded, rather than decide, a delegation issue that might be thought particularly apt for consideration of the remoteness issue (since the absence of control is at the heart of the delegation problem), and Justice Brennan's concurrence for three members of the Court asserted that the review function that Justice O'Connor identifies "preserves the judicial authority over questions of law in the present context."<sup>149</sup> "So long as this delegation is constitutionally permissible—an issue left open on remand—and judicial review to ensure that the arbitrator's exercise of authority in any given case does not depart from the mandate of the delegation, the judiciary will exercise a restraining authority sufficient to meet whatever requirements Article III might impose in the present context."<sup>150</sup> Yet delegation arguments are desperation arguments in the current legal climate, and Justice Brennan's hopeful reading of what judicial review is required seems just that, particularly given the loss of support for his position in *Schor*.

If the facts in *Schor* were precisely as given, except that Congress had made the CFTC's judgment reviewable only for fraud, misrepresentation, similar misconduct, or constitutional error, should the majority have reached the same result? Review for constitutional error suffices to check Congress but, as the courts have readily affirmed in the context of statutory exclusion of review of decisions made by the Veteran's Administration,<sup>151</sup> this cannot be converted into a check on the legality of *agency* action without repudiating the congressional limitation of review. The Court also may constrain the President; indeed, the CFTC's independence underscores the absence of any threat of presidential aggrandizement through such a provision. But again, this observation suggests no measure of control over what the *agency* does; if anything, it suggests a need for greater judicial control than would be experienced for an agency more firmly attached to the President. These hypothesized arrangements present no threat to judicial function greater than that to congressional or executive function. One's sense that the arrangements nonetheless present a substantial threat to the premises of control and constraint on which our governmental arrange-

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<sup>149</sup> *Id.* at 601 (Brennan, J., concurring).

<sup>150</sup> *Id.* at 602.

<sup>151</sup> *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *Johnson v. Robison*, 415 U.S. 361 (1974). These were the two cases cited by the *Thomas* court for its proposition concerning constitutional review. See also Judge (now Justice) Scalia's opinion for the D.C. Circuit in *Gott v. Walters*, 756 F.2d 902, 906-16, *vacated on joint motion of the parties*, 791 F.2d 172 (D.C. Cir. 1985) (en banc).

ments rest suggests issues the future may have to address. What intensity of judicial review is necessary to maintain the connection between agency action and the premises of containment of government function underlying the separation-of-powers idea, is an issue quite separate from that of aggrandizement (since it need not be the President or Congress that gains power in this way), to which significant new attention must be addressed.

That worthy project is a larger one than seemed possible to undertake for this symposium. For the moment, it is sufficient to note that the Court appears to be at sixes and sevens about the appropriate analytic technology for resolving separation-of-powers issues. Although formalism has its advantages and functionalism its dangers, the former is simply incapable of describing the government we have. It is inconsistent with the framers' judgment—as embodied in the necessary and proper clause and in the decision to omit any description of government proper from the constitutional text—that the optimal level of specificity about the forms of government is low.<sup>152</sup> At best formalism serves as proxy for a functional approach for Justices perhaps unwilling to trust their inheritors—or even themselves—with the difficult and contextual analyses that functionalism requires.

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<sup>152</sup> See Bruff, *supra* note 5, at 492-95.