The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar

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*Bowsher v. Synar*

Daniel J. Gifford*

*Bowsher v. Synar*¹ is the latest in a series of recent cases in which the Supreme Court has elaborated upon and applied the separation of powers doctrine.² The Court has cast many of these decisions in wooden, overly conceptual terms, exposing the Court to criticism that it has imposed an elaborately refined organizational framework upon the federal government going vastly beyond the pragmatic intention of the Framers. Despite the inadequacy of the Court's reasoning, however, this Article contends that, overall, the Court's recent decisions possess an underlying merit: They contain the foundation upon which a new and coherent understanding of the separation of powers principle can be built. As with other juridical principles,³ the separation princi-

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³ A classic discussion of the problems connected with the operationality of juridical principles is contained in Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 816-28 (1967). Professor Friedman noted that a judicial doctrine must avoid being subjected to “constant, ceaseless testing of the boundaries of doctrine through litigation.” Id. at 826. It can do this either by according with a consensus of those affected or by being sufficiently developed so that its application can be carried out in a predictable way. See also Gifford, *Communication of Legal
ple must be made workable if it is to remain vital. The Court's decisions constitute significant steps in the right direction without imposing unwarranted rigidity upon governmental processes.

The Court has been stumbling toward this goal, proceeding by instinct rather than by design. For reasons spelled out below, the separation principle has been crying out for clarification; the caselaw is inconsistent and largely unpredictable. Yet judicial clarification itself risks imposing a constitutional straitjacket upon government, unless carried out with attention to both the concerns of the Framers and the needs of modern administration. Thus far, the Court has avoided this risk, and, unlike the decisions of the Court in the New Deal Era, recent separation of powers decisions have not substantially interfered with the process of democratic government or with the implementation of congressional policy.

This Article advocates a flexible approach to the separation of powers doctrine — an approach consistent with the intent of the Framers, the caselaw tradition, and governmental practice. It also supports extensive presidential supervisory power over all administration and enforcement.

Three years ago, Professor Peter Strauss also proposed that the separation of powers principle be reconceptualized. Strauss argued, consistent with the approach advocated here, that the doctrine be interpreted flexibly and in a way that acknowledges the President's responsibility over administration and enforcement. Strauss, however, warned against what he termed the "siren call" of a "bright-line simplicity." He advocated a so-called checks-and-balances approach, which is demonstrably complex and therefore subject to varying and unpredictable applications. The Court is already developing bright-line approaches to defining the roles of the three constitutional branches and there is merit to this method. These developing bright-line approaches can assist the Court in giving effect to the Framers' underlying concerns, so long

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Standards, Policy Development, and Effective Conduct Regulation, 56 CORNELL L. REV. 409 (1971) (pointing out the interrelationships between doctrinal development and enforceability). In Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Tests, 76 HARV. L. REV. 755 (1963), the present Solicitor General argued in effect that the courts had to formulate doctrines that were sufficiently developed to control the resolution of other cases in order to preserve the legitimacy of the judicial role. On the concept of operationality in the social sciences, see, e.g., J. March & H. Simon, ORGANIZATIONS 155-56 (1958).


6. Id. at 596-97, 639-42.

7. Id. at 625-26.

8. Id. at 640-59.
as the bright lines are recognized as protective devices, subservient to more complex underlying considerations. So employed, the Court may be able to attain a higher degree of coherence and consistency in its approach to the separation of powers principle than it has in the past without falling into the trap of formalistic rigidity.

Much of the confusion that has afflicted both courts and commentators in this area is due to the confusing vocabulary in which the separation of powers doctrine has been discussed. After clarifying that vocabulary, this Article sets forth a needed doctrinal restatement and reinterprets existing caselaw to support that restatement.

I. Bowsher v. Synar and the Limits of Judicial Vocabulary

In Bowsher v. Synar, the Supreme Court held that the Comptroller General of the United States could not exercise the functions delegated to him under the Gramm-Rudman-Hollings Act because those were “executive” functions, which the Court viewed as incompatible with the power residing in Congress to remove the Comptroller from office by joint resolution. Chief Justice Burger’s opinion for the Court makes plain that the significance of congressional removal power lies in a presumption that an officer is subservient to the authority possessing power to remove him. Congressional removal power over an officer performing executive functions would, therefore, constitute an impermissible inroad upon the separation of powers doctrine incorporated into the Constitution.

9. These underlying considerations involve using institutions to channel aggression and ambition to check tendencies toward tyranny. See The Federalist No. 51, at 349-50 (J. Madison) (J. Cooke ed. 1961); Strauss, supra note 5, at 602-04; cf. 1 K. Davis, Administrative Law Treatise § 2:6, at 81 (2d ed. 1978) (suggesting that tyranny and arbitrariness are more likely to stem from “unchecked” power rather than from “blended” power).
12. See 106 S. Ct. at 3192. See generally 31 U.S.C. § 703(e)(1)(B) (1982) (giving Congress the power to remove the Comptroller General by joint resolution). The “executive” functions upon which the Court focused included the preparation of a report by the Comptroller General containing detailed estimates of projected federal revenues and expenditures. The Comptroller was also required to specify the reductions, if any, necessary to reduce the deficit to the target amount set in the Act for the appropriate fiscal year. Gramm-Rudman-Hollings Act § 251, 2 U.S.C. § 901 (Supp. III 1985). Under the Act, the President is required to order the reductions set forth in the Comptroller General’s report. Id. § 252, 2 U.S.C. § 902 (Supp. III 1985).
13. 106 S. Ct. at 3193.
14. Id.
Apart from its particular impact upon the administration of the Gramm-Rudman-Hollings Act, *Bowsher* has significant ramifications for regulatory structure generally. In his brief to the Court, the Solicitor General, while disclaiming any need for the Court to decide this issue in the case before it,\(^{15}\) suggested that the so-called "independent" regulatory agencies cannot constitutionally be insulated from presidential control.\(^{16}\) Although the Chief Justice asserted that the Court's decision did not cast "doubt upon the status of 'independent' agencies because no issues involving such agencies [were] presented,"\(^{17}\) the Court implicitly accepted most of the contentions upon which the Solicitor General's suggestions rested.\(^{18}\) Indeed, *Bowsher* raises a number of issues about the structure of the federal government, including the President's role in the regulatory structure and the basic approach of the courts to issues of power allocation.

**A. The Inflexibility of the Court's Opinion**

The Court's opinion carries overtones of a rigid conceptualism, groping for formal definitions of the functions of each of the federal government's three branches, while implying that the functions of one branch cannot be constitutionally mingled with the functions of another.\(^{19}\) Unlike dicta in the lower court opinion, Chief Justice Burger's opinion failed to recognize that the tasks performed by the various branches are often mingled in practice and that courts have been inconsistent in their approaches to the separation of powers doctrine.\(^{20}\)

Various scholars caution against a rigid approach to the separation of powers doctrine.\(^{21}\) Professor Strauss argues that the doctrine was meant to provide an overall structure of government at the highest levels, not to straitjacket administrators who must occasionally perform tasks that resemble combinations of two or even all three of the basic governmental functions.\(^{22}\) Professor Kenneth Culp Davis also warns against a strict separation of powers approach to government. Instead of providing a rationale for a comprehensive, flexible theory, Davis argues that the theory of separation of powers should be de-emphasized and replaced with theories that limit the discretionary powers of governmental officials.\(^{23}\) In *Bowsher*, the Court largely ignored such critics in its search for a proper understanding of an "executive" function.\(^{24}\)

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16. Id.
17. 106 S. Ct. at 3188 n.4.
18. See id. at 3188-92.
19. Id. at 3186-88.
22. See *id.* at 574-83.
The Court concluded that the Comptroller General's budgetary determinations involved the performance of executive duties.\textsuperscript{25} According to the Court, an official exercising such executive functions could not be subject to congressional control,\textsuperscript{26} and the Court equated power of removal with control.\textsuperscript{27} Because the Comptroller General is removable by a joint resolution of Congress,\textsuperscript{28} he is, in the Court's view, constitutionally prohibited from exercising executive powers.\textsuperscript{29}

Although the Court followed an almost syllogistic reasoning to reach this result, it tried to avoid approving in advance the ramifications of its logic. Indeed, the Court explicitly denied that its opinion cast doubt upon the legitimacy of independent agencies.\textsuperscript{30} Although ruling that an official over whom Congress possesses removal power cannot perform executive functions, the Court avoided ruling that Congress cannot circumscribe the President's removal power over officials exercising administrative and enforcement tasks.\textsuperscript{31}

B. The Issues Raised by Bowsher

\textit{Bowsher} raised several issues concerning the independence of various officers and agencies. The narrow issue was whether a removal mechanism in which Congress participates is inconsistent with that official's performance of executive functions — an issue that the Court decided in the affirmative.\textsuperscript{32} The Court's resolution of that issue has little significance outside of the Gramm-Rudman-Hollings context, however, because Congress has not tried to retain removal power over most government officials.\textsuperscript{33} The broader issue raised by \textit{Bowsher} is the extent to which Congress can restrict the presidential removal power, and its corollary: Whether

\begin{enumerate}
\item See id. at 3192.
\item Id.
\item Id.; see infra text accompanying notes 91 & 128-39.
\item 106 S. Ct. at 3192.
\item Id. at 3188 n.4.
\item Indeed, the Court cited Humphrey's Executor v. United States, 295 U.S. 602 (1935), as authority upholding a congressional limitation upon the President's removal power. 106 S. Ct. at 3188. This, however, is the weakest part of the Court's opinion. As discussed in detail below, \textit{Humphrey's Executor} is in acute need of reinterpretation that \textit{Bowsher} fails to supply. The Court's reasoning in \textit{Bowsher} is patently inconsistent with the reasoning of \textit{Humphrey's Executor}; the Chief Justice fails to bring these two strands of reasoning together into a consistent whole. For a further discussion of \textit{Humphrey's Executor} see infra notes 108-34 and accompanying text.
\item See 106 S. Ct. at 3192.
\item See id. at 3188 n.4 (stating that "[a]ppellants have referred us to no independent agency whose members are removable by Congress for certain causes short of impeachable offenses, as is the case with the Comptroller General").
\end{enumerate}
persons not subject to presidential removal power can be entrusted with executive functions. To the extent that Bowsher and other related cases\(^\text{34}\) have broadened presidential power over officials exercising executive functions, it raises a third issue of the meaning and scope of those functions deemed "executive" in a constitutional sense. The Solicitor General argued that the President's power to remove executive officials could not be constitutionally restricted,\(^\text{35}\) and he also contended that the independent regulatory agencies perform functions indistinguishable from so-called executive agencies.\(^\text{36}\) Bowsher also raises broad issues about the federal government's structure and the role and responsibilities of its several branches. Finally, the Bowsher opinion requires a reevaluation of the position of administrative regulation within the federal governmental scheme.

C. The Misleading Nature of the Judicial Vocabulary

Because Bowsher — like other cases that have treated the separation of powers doctrine — uses broad, open-textured terms such as "executive" and "legislative" both to define functions performed by officials and agencies and to describe the constitutional allocation of powers among the branches of the federal government, the significance of the Court's opinion is obscured. Using these imprecise terms to justify its ruling forces the Court's critics to employ them as well, although critics must use them cautiously, aware of the potential for mischief and misunderstanding inherent in suggestive and unclear language. In older cases, the modifier "quasi" was often prefixed to the terms "legislative," "executive," and "judicial." That usage, although archaic,\(^\text{37}\) has the merit of distinguishing a description of a function performed by a government official from a reference to a constitutionally designated power allocated to one of the three branches.

Over time, the basic concerns underlying the separation of powers doctrine have become confused and intermingled with issues that relate primarily to regulatory tasks.\(^\text{38}\) Even when separation


\(^{36}\) Id. at 46 n.32.


\(^{38}\) The preeminent administrative law scholar of the day, Professor Kenneth Culp Davis, has repeatedly confused questions of the constitutional allocation of powers to the several branches with descriptive questions concerning various ways in which officials and agencies exercise decisionmaking authority granted to them by statute. In the current edition of his treatise, Davis argues that "[t]he very identifying badge of the modern administrative agency is the combination in the same hands of the judicial power to adjudicate cases and the legislative power of rulemaking, along with the executive powers to enforce, to investigate, to initiate, and to prosecute." 1 K. DAVIS, supra note 9, § 2:4, at 71. Because Davis fails to distinguish between the constitutional and descriptive uses of terms such as "executive," "legislative," and "ju-
of powers issues have directly affected regulatory agencies, courts have contributed to the confusion by failing to distinguish the constitutional use of these terms from their use in describing administrative action analogous to the constitutional power.39

Only when courts face up to the ramifications of the radically open language with which they discuss separation of powers questions will they bring those discussions up to the level of rational discourse. The "legislative," "executive," and "judicial" adjectives — as applied to constitutional allocations of power — are so open to interpretation that their use is conclusory. Not only courts, but scholars as well, frequently fall into the trap of using those terms as if they carry meaning and hence can be used analytically. The positive aspect of some recent cases, including Bowsher, is the Court's increasing recognition of the uselessness of those terms in evaluating the constitutional roles of the governmental branches.

II. The Tension Between Flexibility and Doctrinal Coherence

The separation of powers principle poses twin dangers — that it will be construed so flexibly as to lose its meaning or that it will be applied in an overly formal and rigid way. Some theorists, for example, believe that whenever the President and Congress reach a
political accommodation embodied in a statute (the use, for example, of the legislative veto, ex officio administering officials, or other devices designed to insulate officials from presidential control), courts should respect that compromise. Doing so would free the executive and legislative branches to work out any power-sharing allocation; according to these theorists the result would, almost necessarily, meet the constitutional requirements. The rationale for that position is that the constitutional checks and balances were brought into play during the legislative process — power-sharing arrangements incorporated in regulatory legislation were necessarily hammered out between the two branches in the legislative process, during which each presumably fought for and obtained the protections that it needed. The flaw in this position is that it ignores the danger that one of the branches will use the bargaining power of the moment to impose a system of power allocation permanently skewed to its advantage. Indeed, Congress has increasingly allocated to itself roles in the administration of regulatory statutes while weakening the role of the executive branch, a danger against which Madison warned in The Federalist Papers.

The second danger arises partially from the confusing separation of powers vocabulary described above, as well as from a related source of confusion: A formalistic (and naïve) belief that the work of each of the constitutional branches is so unique that it cannot include work resembling that of the others. As explained below, the language of some of the Supreme Court caselaw contains the root of this error. In Myers v. United States, for example, the Court suggested that the President’s responsibility for law enforcement conferred plenary power over officials in the executive branch, regardless of their particular tasks. Humphrey’s Executor v. United States, accepting Myers’ premise, ruled that a Federal Trade Commissioner had to be separated from the executive branch in order to achieve the independence that, in the Court’s view, his work required. This logic suggests that officials who perform adjudicatory or legislative functions cannot belong to the executive branch, thus implying that the executive branch must be composed of officials acting in a unidimensional way. Such an approach would entail splitting much administration and

40. See, e.g., 1 K. DAVIS, supra note 9, § 2:6, at 79 (“Political process is usually better on such issues than judicial process. Legislative bodies should be encouraged to allocate powers through legislation, and courts should give great deference to statutory allocation of powers.”).
41. See id.
44. 272 U.S. 52 (1926).
45. See id. at 134-35.
46. 295 U.S. 602 (1935).
47. See id. at 627-28.
enforcement work from the executive branch; indeed, the ramifications of such an approach are so sweeping as to render its realization patently impracticable.\textsuperscript{48}

A. Early Approaches

The earliest understanding of the Constitution's separation of powers principle did not contemplate an absolute prohibition on one branch performing any work resembling that of another. Instead, the principle was meant, according to Madison, to prevent any one of the constitutional branches from possessing "directly or indirectly, an overruling influence over the others in the administration of their respective powers."\textsuperscript{49} Because none of the Founders wrote a treatise on administration, they did not treat the implementation of the principle on day-to-day administration. Madison, however, explicitly recognized that some mingling of the powers of the branches was necessary, and he pointed to various places where the several branches were given similar tasks.\textsuperscript{50} Hamilton advocated a unitary executive, locating responsibility for administration in a single person who would be politically accountable.\textsuperscript{51} Both Madison and Hamilton, as active participants in government during the Republic's early years, must have recognized that administering officials in the executive branch would have to formulate the policies necessary to that task of administration, even when the formulation of those policies would resemble

\textsuperscript{48} The issuance of so-called legislative and interpretative rules is common practice among those charged with administration and enforcement; and those rules are widely recognized as efficient administrative devices. \textit{See}, \textit{e.g.}, National Petroleum Refiners Ass'n \textit{v. FTC}, 482 F.2d 672, 681-84 (D.C. Cir. 1973), \textit{cert. denied}, 415 U.S. 951 (1974) (setting forth the advantages of rulemaking). Indeed, experience has shown that without the ability to issue these rules, the administrators of some statutes might be overwhelmed by their caseloads, thus rendering those statutes effectively inadministerable. \textit{See}, \textit{e.g.}, J. \textsc{Landis}, \textsc{Report on Regulatory Agencies to the President Elect} 54-58 (1960) (reporting on the regulatory problems of the Federal Power Commission and its need to act via rule); \textit{see also} Gifford, \textit{Communication of Legal Standards, Policy Development, and Effective Conduct Regulation}, 56 \textsc{Cornell L. Rev.} 409 (1971) (describing relationships between precision of rules, costs of enforcement, and compliance). Similarly, adjudications are common tools of administration because they provide convenient means for applying existing or newly formulated policies to disputed facts or for formulating policies to be applied to individualized facts. They also provide a means for bringing institutionally developed specialization to these matters.

If administrators were deprived of these tools, vast segments of administration would be effectively transferred to the federal courts, and uncertainties and disputes would be forced to be resolved by litigation. Such a result would impose an impossible burden upon the federal courts, and would dramatically increase the cost of enforcement. Many statutes would thus become unenforceable.

\textsuperscript{49} \textsc{The Federalist} No. 48, at 332 (J. Madison) (J. Cooke ed. 1961).

\textsuperscript{50} \textit{See} \textsc{The Federalist} No. 47, at 329-31 (J. Madison) (J. Cooke ed. 1961).

\textsuperscript{51} \textsc{The Federalist} No. 70 (A. Hamilton).
the work of the other branches. Indeed, Chief Justice John Marshall expressly adverted to this matter in 1825, when he ruled that Congress could either legislate in detail itself or, at least in some cases, delegate "powers which [it] may rightfully exercise itself" by enacting "general provisions" and authorizing "those who are to act under such general provisions, to fill up the details." His discussion contemplated that executive officials would perform decisionmaking tasks that Congress could have performed had it legislated more precisely. In 1840, Chief Justice Roger Taney, with a pension statute before him, explicitly recognized that executive branch officials had to formulate policies necessary to administer such a statute, policies that Congress could have formulated. Moreover, Taney observed that the construction of a statute taken by executive branch officials in the course of their administration raised issues which might, when a proper challenge brought these issues before a court, be addressed by the judiciary. Although recognizing that the same or similar issues might properly be addressed by all three branches, Taney sought to prevent the judiciary from interfering with the administrative resolution of those issues in the first instance. In short, in the Republic's beginning the separation of powers principle was understood to be flexible enough to accommodate the needs of the executive branch to perform tasks that resembled those performed by the other branches.

B. The Needed Doctrinal Clarification

The practicalities of administration would have forced a flexible approach to the separation of powers doctrine, even if the Founders had intended otherwise. This flexibility is most apparent in the executive department, where it is beyond question that both legislative-like and judicial-like actions have been performed as a matter of course. Despite this necessary flexibility, however, courts have at times applied the doctrine to invalidate official actions on the ground that they contravened separation of powers principles. Although courts have applied the doctrine flexibly,

52. See 1 K. DAVIS, supra note 9, § 3:4, at 157-59 (discussing early congressional practice in delegating various tasks incident to administration).
54. See id. at 44-46 (upholding judicially issued rules governing court procedure that Congress could have promulgated itself through legislation).
56. Id. at 515-17.
57. Id. at 516.
58. See supra note 48; infra text accompanying notes 82-85; see also Strauss, supra note 5, at 579. For a discussion of a constitutional branch's exercise of powers resembling those of the other branches, see 1 K. DAVIS, supra note 9, § 2:2, at 63-65.
59. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (invalidating the Bituminous Coal Act on grounds that Congress had delegated lawmaker powers to private businessmen); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (holding the National Industrial Recovery Act invalid on the ground that Congress is not permitted by the Constitution to delegate its legislative power); Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (holding § 9(c) of the National Industrial
not until recently have they applied it in a coherent or predictable way, and, furthermore, they have generated few standards to guide the doctrine's evolution. As a result, most of the separation decisions reflect ad hoc judicial evaluations with unpredictable results.

This lack of doctrinal coherence jeopardizes the principle's vitality for several reasons. Without standards guiding its growth and application, the doctrine cannot retain its legitimacy when applied to invalidate official action that is momentarily popular. Without standards, the doctrine is — and will be seen to be — a basis for the exercise of unwarranted power by the judiciary. Finally, without standards, inconsistent applications of the doctrine are likely to increase, and no doctrine can remain vital in the face of increasingly inconsistent applications.

What is needed, therefore, is a new understanding of the separation of powers principle that will retain the historic flexibility with which the doctrine has been applied and that will also guide future applications. This new understanding must be true both to the understanding of the Framers, who sought in a separation of governmental powers a defense against tyranny, as well as to the principal judicial decisions embodying the separation principle. Only by being true both to the original intent and to the embodied traditions can the new understanding of the separation principle attain the legitimacy necessary to perform its role effectively.

Recovery Act unconstitutional due to its improper delegation of legislative power); see also, e.g., American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting) (arguing that § 6(b)(5) of the OSHA Act of 1970 "unconstitutional-ly delegated to the Executive Branch the authority to make the 'hard policy choices' properly the task of the legislature"); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) (stating that Congress may not delegate "quintessential" issues of legislative policy to the executive because "legislatures are to make laws, not legislators"); Gifford, supra note 4, at 299, 307-09 (discussing judicial alteration and invalidation of New Deal regulatory mechanisms held to have violated separation of powers principles). In Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court held that the Bankruptcy Act of 1978 unconstitutionally conferred Article III power upon judges who lacked life tenure and protection against salary diminution. But see Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (upholding a congressional delegation of authority to arbitrators as a constitutional mechanism for the resolution of disputes). On the latter cases, see Sherry, Issue Manipulation by the Burger Court: Saving the Community from Itself, 70 MINN. L. REV. 611, 654-59 (1986).

60. See THE FEDERALIST NO. 47 (J. Madison); Strauss, supra note 5, at 602, 667.

C. The Developing Paradigm

The ambiguity of the separation of powers vocabulary impedes, but does not block, analysis of the Court's recent work. The recent series of decisions lay the framework for a new understanding of the separation principle. These decisions operate at two levels. First, on a broad level, they are inductively creating a coherent organizational design from various constitutional provisions such as the appointments and other clauses. Second, on a different level of analysis, the Justices' actions manifest their awareness of the traditional vocabulary's treachery. Although the Court is reluctant to admit it, it is increasingly delineating the constitutional functions of the several branches in almost bright-line terms without relying upon that traditional vocabulary. Thus, for example, the Court has twice asserted that Congress exhausts its constitutional function with the passage of legislation, and has suggested that the core Article III function is the determination of non-congressionally created rights. In the former group of cases, the Court has drawn bright lines, rather than employ an ad hoc balancing approach, to allocate constitutional decisionmaking. In the latter cases, the Court has denied that it is drawing bright lines, but it has nonetheless attributed substantial weight to one factor that, although perhaps not

62. See supra note 2.
64. U.S. Const. Art. II, § 1, cl. 1 (vesting of executive power in the President); Art. II, § 2, cl. 1 (power to require opinion of principal executive officers); Art. II, § 3 (responsibility that laws "be faithfully executed").
65. See supra notes 37-39 and accompanying text.
66. In the cases construing the requirements of Article III, the Court has attributed significant importance to the degree to which a non-Article III tribunal is called upon to adjudicate "private" (as opposed to "public") rights, although it has backed away from using that distinction as a "bright-line" guide to constitutionality. See Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3259 (1986); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 586-89 (1986); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70, 83-84 (1982).

In Northern Pipeline Justice Brennan appeared to view the extension of (non-Article III) bankruptcy court jurisdiction to the adjudication of rights under state law as constitutionally fatal. Writing for the Court in Thomas, however, Justice O'Connor denied that "the public rights/private rights dichotomy ... provides a bright-line test for determining the requirements of Article III." 473 U.S. at 586. Refusing to apply that dichotomy as determinative in Schor, Justice O'Connor stated broadly that "our Article III precedents... counsel that bright line rules cannot effectively be employed to yield broad principles applicable to all Article III inquiries." 106 S. Ct. at 3261.

As this Article shows, the Court seems to be employing a bright-line (or almost bright-line) test to determine the limits of congressional powers. Although it has experienced greater difficulties in applying such tests under Article III, it may be that, despite Justice O'Connor's turns of phrase, the public rights/private rights dichotomy may yet provide the basis for a useful presumption concerning the constitutionality of non-Article III tribunals, or that the narrower factor of compulsory adjudication of state-created rights that underlay Northern Pipeline will provide such a differentiating tool.

68. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83-84 (1982) (holding that Congress's power to define the parameters of rights that it has created does not extend to constitutionally recognized rights, the definition of which is the sole province of Article III courts).
69. In its recent Article III cases, the Court has attributed substantial importance
always determinative, carries the potential of assisting the Court in developing standards for construing Article III. By employing partial definitions of the constitutional roles of the branches, the Court has avoided the ambiguity inherent in the traditional separation of powers vocabulary. This bright-line approach is neither a manifestation of naïveté nor a simplistic surrender to the attraction of labels. Rather, it is because the Court is sensitive to the open-textured nature of the traditional separation of powers vocabulary that it finds it necessary to define at least some constitutional functions in this bright-line manner. This approach helps to differentiate the constitutionally assigned legislative role in Article I from the legislative functions that are carried out in the executive branch. A bright-line guide to constitutional limits also ensures that the Framer's basic allocation will be maintained. In concepts as open-ended as those underlying the separation doctrine, fuzziness at the edges will ultimately erode the core.

There is, of course, no necessarily correct answer as to the division of authority between the constitutional branches. Issues of power allocation are essentially political and must evolve over time. Nevertheless, courts are asked to pass upon these issues without regard to the pace at which experience provides new insights or at which political theory develops. In performing this exceedingly difficult task, courts must avoid imposing undue rigidity upon government and yet they must also provide a decisional framework sufficient to bring coherence into the separation principle's application. By having chosen the legislative process' completion as the boundary for congressional action, the Court has formulated a bright-line guide narrow enough to permit vast governmental flexibility, and yet recognizable enough to provide the basis both for coherent decisionmaking by courts and from which public debate on various applications of the separation principle

to the so-called "public rights/private rights" dichotomy, and in Northern Pipeline the Court used one manifestation of that dichotomy as the basis for invalidating the bankruptcy courts. In Northern Pipeline, the Court held the non-Article III bankruptcy courts unconstitutional on the ground that they possessed compulsory jurisdiction over the adjudication of state-created rights. Id. at 88. For other cases discussing the private rights/public rights dichotomy, see Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3259 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 586-89 (1985). Although Justice O'Connor refused to apply a bright-line test to determine the constitutionality of non-Article III tribunals in Schor and Thomas, her refusal involved the public rights/private rights dichotomy. In neither of those cases was the compulsory adjudication of state-created rights in issue. In Thomas, the adjudication concerned federally created rights, and in Schor the plaintiff who chose to adjudicate in the non-Article III tribunal was obviously not compelled to do so.

70. See, e.g., 1 K. Davis, supra note 9, § 2:6, at 81.

71. Indeed, Judge Stephen Breyer has argued that this boundary is flexible enough to permit a close substitute for the legislative veto condemned in Chadha. See Breyer, The Legislative Veto After Chadha, 72 Geo. L.J. 785, 792-96 (1984).
can proceed. Such a visible guide will protect the principle from erosion by neglect. The guide that the Court chose reflects the Founder’s concern that, in a democracy, it is the legislative branch that is likely to overstep its bounds at the expense of the other branches,72 and is, therefore, most in need of limits.

III. Clarifying the Scope of Congressional Power

A. The Limited Scope of Congressional Power

In recent cases, the Court has attempted to circumscribe the scope of congressional power. In both Bowsher and Chadha, the Court ruled that Congress exhausts its own power by enacting a statute.73 Neither of these decisions denies that Congress can delegate power to officials to administer statutes that it enacts, but both decisions hold that once Congress makes such a delegation, there is no method — short of enacting new legislation — through which Congress can control the delegatee officials’ exercise of that power. Indeed, the Court’s decision in Buckley v. Valeo74 anticipated this restriction on congressional power. Congress had sought to control the enforcement of the new election law by creating a congressional agency, staffed largely by its own appointees, to administer that law. The Court, relying upon the Appointments Clause of the Constitution,75 ruled that Congress has no such power — and that the President’s constitutional responsibilities for administration and enforcement of the laws precludes such arrangements.76

B. Congress and the Delegation Doctrine

The Court’s rulings on the contours of congressional power in Bowsher, Chadha, and Buckley suggest that the delegation doctrine, as traditionally described, should be reconceptualized to bring it into harmony with the newly developing separation of powers paradigm. Since the 1930s, the delegation doctrine has been described as restricting Congress’s power to delegate “legislative” functions77 to an agency or official, unless the delegated power is sufficiently confined by standards or principles guiding its exercise.

Congress’s freedom to delegate power to government officials — including power widely referred to as “legislative” — raises a conundrum. When Congress delegates such power to governmental agencies or officials, the agencies or officials appear to be given

72. See The Federalist No. 48 (J. Madison); see also Bowsher, 106 S. Ct. at 3189; Buckley v. Valeo, 424 U.S. 1, 129 (1976).
73. See Bowsher, 106 S. Ct. at 3192; Chadha, 462 U.S. at 954-55.
74. 424 U.S. 1 (1976) (per curiam).
76. 424 U.S. at 138-39.
77. Professor Davis, for example, describes the delegation doctrine in terms of Congress’s delegation of “legislative power” to administrative agencies. See 1 K. Davis, supra note 9, § 3:1, at 149-50.
power that, in the absence of delegation, Congress itself would exercise.78 Yet, Boughner and Chadha make clear that once Congress delegates such power, it may not control that delegated power's exercise.79 How can it be that the legislative branch is constitutionally prohibited from exercising control over the exercise of "legislative" power? Boughner highlights the generally recognized fact that power which is apparently "legislative" can be exercised outside of the legislative branch.80 But it has added a new wrinkle to the old understanding: The legislative branch itself cannot formally participate in the exercise of the "legislative" power that it delegates to officials outside the legislative branch.81

If, after enactment, Congress can no longer control the substantive policies to be incorporated in a regulatory statute, then those policies must be formulated by the officials who administer that statute. Those officials formulate the policies necessary to administration and enforcement through a variety of methods, of which the issuance of so-called legislative rules — no less than the issuance of interpretative rules or the development of standards through case-by-case adjudication — is merely one.82 Since, as this Article suggests,83 it is the executive branch that exclusively administers and enforces, the executive branch necessarily performs legislative rulemaking incident to those tasks.84 The anomaly of

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78. That is why many such delegations have been described as delegations of "legislative" power. The strongest examples of such delegations lie in the many delegations to regulatory agencies of the power to issue "legislative" rules. See id. § 3:3, at 152-57.

79. Boughner, 106 S. Ct. at 3192; Chadha, 462 U.S. at 954-55.

80. See 106 S. Ct. at 3203 (Stevens, J., concurring) (quoting Chadha, 462 U.S. at 985-86 (White, J., dissenting)).

81. See id. at 3187-88.

82. The practical equivalence of rulemaking and adjudicatory decisionmaking is widely recognized. That recognition underlies litigation in which parties challenge adjudicatory precedents as procedurally deficient rulemaking. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); cf. SEC v. Chenery Corp., 318 U.S. 80 (1943) (Chenery I) (refusing to uphold an SEC order denying conversion of directors' stock because the agency had based its decision upon judicially established principles of equity insufficient to support the order). But cf. SEC v. Chenery Corp., 332 U.S. 194 (1947) (Chenery II) (upholding an SEC order that officers' and directors' stock not be converted into stock of a newly reorganized corporation because the SEC had based its decision on administrative experience). Among the regulatory agencies, the FTC was a leader in seeking to replace adjudicatory policymaking with rulemaking. See FTC, TRADE REGULATION RULE FOR THE PREVENTION OF UNFAIR OR DECEPTIVE ADVERTISING AND LABELING OF CIGARETTES IN RELATION TO THE HEALTH HAZARDS OF SMOKING AND ACCOMPANYING STATEMENT OF BASIS AND PURPOSE OF RULE 130-31 (1964).

83. See infra notes 163-89 and accompanying text.

84. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45, 864-66 (1984) (noting that administrative agencies, experts in their fields and indirectly politically accountable through the President, are properly given authority by Congress to implement statutes through regulations); see also Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469, 506-
the executive branch issuing so-called legislative rules disappears when the confusing usage of those terms is clarified. That one means of formulating policy can be characterized as "legislative" has no constitutional significance.\textsuperscript{85}

C. The Allocation of Policymaking Between Congress and Administering and Enforcing Officials

Despite the rulings of Buckley, Chahda, and Bowsher, limiting Congress's role to enacting legislation, the Constitution permits a wide range for the actual allocation of responsibility over national policy. Congress itself depends upon presidential approval of its legislation, except in unusual cases in which a two-thirds vote can be mustered in each House,\textsuperscript{86} an arrangement that fosters active bargaining between the executive and legislative branches on the terms of pending bills. Moreover, because legislation must be administered and enforced, administering and enforcing officials bear the responsibility for developing the necessary operative meanings for imprecisely written statutory provisions. Indeed, because all statutory language (like other language) must be significantly open-textured, at least as applied to some situations,\textsuperscript{87} administering and enforcing officials can never be completely freed from that task, however much Congress strives to speak precisely.

The interesting point, for present purposes, is that the degree to which Congress chooses to speak imprecisely describes the allocation of policy formulation between Congress on the one hand and administering and enforcing officials on the other.\textsuperscript{88} To be sure, the so-called delegation doctrine limits the extent to which Congress may allocate policy formulation to those officials,\textsuperscript{89} but within the broad parameters it does permit, Congress may allocate policy formulation between itself and the officials who will administer and enforce its legislation.

\begin{footnotesize}
\footnote{\textsuperscript{85} This analysis is suggested by passages in some current judicial opinions. See, e.g., Synar v. United States, 626 F. Supp. 1374, 1399 n.28, 1402 (D.D.C.), aff'd sub nom. Bowsher v. Synar, 106 S. Ct. 3181 (1986); INS v. Chadha, 462 U.S. 919, 953-54 n.16 (1983).}
\footnote{\textsuperscript{86} U.S. CONsT. Art. I, \S 7.}
\footnote{\textsuperscript{87} See Gifford, supra note 3, at 418-19 (suggesting that "all laws possess, in varying degrees, marginal or penumbral areas" because factual and equitable circumstances may impel "solutions that would not be predictable in advance").}
\footnote{\textsuperscript{88} See Jaffe, The Illusion of the Ideal Administration, 86 HARV. L. REV. 1183, 1188-89 (1973).}
\footnote{\textsuperscript{89} See generally 1 K. DAVIS, supra note 9, \S\S 3:1-3:3, at 149-57.}
\end{footnotesize}
IV. Clarifying the Scope of Presidential Power

A. The Scope of Presidential Power Under the Caselaw

The separation of powers decisions have not provided a clear understanding of the President's role in relation to other officers exercising functions outside of the legislative and judicial branches. The few cases considering the scope of the President's removal power assume that power to remove an official also confers power to control that official's behavior.

In *Myers v. United States*, the Court set out broad parameters governing the President's removal power while holding that Congress could not restrict the President's power to remove from office a Postmaster previously appointed by the President and confirmed by the Senate. A statute had provided that Postmasters such as Myers, who had been appointed with the advice and consent of the Senate, were removable by the President only with the Senate's consent. Following the so-called "Decision of 1789," the Court held that provision unconstitutional. Although the Court was called upon to consider only the validity of requiring Senate consent to the removal of such officers, the Court broadly ruled that the President possesses plenary removal power over executive officers appointed by him with Senate confirmation. The President is also presumed to possess plenary removal power over other executive officers unless Congress specifically provides otherwise. Because Congress may by statute confer the power of appointment of inferior officers upon cabinet officers, it may also restrict the removal of those appointees. Congress, for example, has imposed such restrictions upon the removal of workers in the federal civil service. Congress itself, however, may not partici-
pate in these removal decisions.\textsuperscript{97}

Nine years later, the Court muddied the waters by its decision in \textit{Humphrey’s Executor v. United States},\textsuperscript{98} holding that the President acted unlawfully in removing from office a Commissioner of the Federal Trade Commission (FTC). Under the Federal Trade Commission Act,\textsuperscript{99} the President appoints Commissioners to a seven-year term with the consent of the Senate; Commissioners are not removable except for specified causes.\textsuperscript{100} In rejecting the government’s contention that the statutory restriction upon the President’s removal power unconstitutionally interfered with presidential control over the executive department, the Court distinguished \textit{Myers} as limited to “purely executive officers”:

\begin{quote}
[T]he necessary reach of the [\textit{Myers}] decision goes far enough to include all purely executive officers. It goes no farther; — much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.\textsuperscript{101}
\end{quote}

The Court then described the FTC as an institution that “cannot in any proper sense be characterized as an arm or an eye of the executive”\textsuperscript{,102}

\begin{quote}
[I]n the contemplation of the statute, [the FTC] must be free from executive control. In administering the provisions of the statute in respect of “unfair methods of competition” — that is to say in filling in and administering the details embodied by that general standard — the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary.\textsuperscript{103}
\end{quote}

In 1958, the Court, in \textit{Wiener v. United States},\textsuperscript{104} held that the War Claims Act of 1948\textsuperscript{105} restricted the President’s power to remove a member of the War Claims Commission, a body that, like a court, determined rights on the basis of record evidence.\textsuperscript{106} Under the statute, the Commissioners held office for the duration of the Commission’s existence.\textsuperscript{107} The decision in \textit{Wiener}, like the decision in \textit{Humphrey’s Executor}, was grounded on the rationale that the removal restriction helped to ensure the President’s inability

\textsuperscript{97. See Myers, 272 U.S. at 161.}
\textsuperscript{98. 295 U.S. 602 (1935).}
\textsuperscript{100. Id. § 41.}
\textsuperscript{101. 295 U.S. at 627-28 (emphasis added).}
\textsuperscript{102. Id. at 628.}
\textsuperscript{103. Id.}
\textsuperscript{104. 357 U.S. 349 (1958).}
\textsuperscript{106. See 357 U.S. at 355-56; 50 U.S.C. app. § 2001 (1982).}
\textsuperscript{107. 50 U.S.C. app. § 2001 (1982).}
to influence the Commission's decision in particular cases.\textsuperscript{108}

1. \textit{A Short Critique of Humphrey's Executor}

\textit{Humphrey's Executor} placed the FTC (and by implication other agencies modeled upon it) outside the executive branch. In doing so, the Court employed the separation of powers vocabulary in ways that were carefully contrived to create an aura of justification for its decision while engendering widespread confusion about the separation of powers doctrine.\textsuperscript{109} The Court's tactic served its purpose well: For several decades, its decision has provided the main authoritative support for the independence of the several regulatory agencies from presidential control.\textsuperscript{110} As will be demonstrated below, the Court's ruling is untenable.

In \textit{Humphrey's Executor}, the Court characterized the Commission as a "legislative" agency.\textsuperscript{111} Yet the "legislative" character of the FTC had nothing to do with its development of enforcement policy under section 5 of the Federal Trade Commission Act.\textsuperscript{112} Indeed, the opinion justified the characterization on the ground that the Commission performed investigations and wrote reports in aid of legislation. The Court also referred to the FTC as an "agency of the judiciary"\textsuperscript{113} — again, that characterization had nothing to do with the FTC's role in adjudicating cases under section 5. Rather, the basis for that characterization was a little-used provision of the Federal Trade Commission Act under which a court, in an antitrust case brought by the Attorney General, may refer the question of relief to the FTC for a recommendation.\textsuperscript{114} By identifying areas in which the FTC was authorized to perform work in aid of the legislative and judicial branches, the Court was able to describe the Commission as in part a "legislative" and in part a "judicial" agency, using those terms to refer to the constitutional branches.\textsuperscript{115}

The Court also described the FTC as acting "quasi-legislatively" and "quasi-judicially" when it administers the Federal Trade Commission Act by amplifying and applying the statutory term

\begin{itemize}
\item \textsuperscript{108} See Wiener, 357 U.S. at 356; Humphrey's Executor, 295 U.S. at 624-26.
\item \textsuperscript{109} The care taken by the Court to construct this superficially misleading opinion upon a literally accurate propositional base in the manner described suggests that it was done intentionally. See infra text accompanying notes 111-16.
\item \textsuperscript{110} See Synar v. United States, 626 F. Supp. 1374, 1396-1402 (D.D.C.), aff'd sub nom. Bowsher v. Synar, 106 S. Ct. 3181 (1986); Pierce, supra note 84, at 510-12; Strauss, supra note 5, at 609-16.
\item \textsuperscript{111} The Court referred to the Commission as "an agency of the legislative and judicial departments." 295 U.S. at 630; see also id. at 628.
\item \textsuperscript{112} See 15 U.S.C. § 45 (1982).
\item \textsuperscript{113} 295 U.S. at 628.
\item \textsuperscript{114} See id.; 15 U.S.C. § 47 (1982).
\item \textsuperscript{115} 295 U.S. at 628.
\end{itemize}
unfair methods of competition." In employing these terms, the Court was apparently describing the FTC's functions but without attributing to it any role in aid of the Article I or III constitutional branches. The Court's apparent care in using the "legislative" and "judicial" appellations — with and without a prefix — suggests that when it applied the prefix "quasi," the Court was consciously describing functions that were merely analogous to the functions of the constitutional branches. The Court, however, took no pains to emphasize this different usage in its opinion. Had it done so, it would have been apparent that when the FTC performs its primary task of enforcing section 5 of the Federal Trade Commission Act, it is not acting in aid of the legislative or judicial branches. As an administrator and enforcer, the agency is carrying out a constitutional task assigned to the executive branch.

Whether or not the Court was intentionally striving to mislead, the opinion provides no acceptable rationale for excluding the FTC from the executive branch or from presidential control. The FTC's quasi-judicial tasks do not in themselves provide a basis for excluding the FTC from the executive branch; many so-called executive agencies also perform quasi-judicial tasks. Neither do the FTC's quasi-legislative tasks, in amplifying the meaning of section 5 of the Federal Trade Commission Act, provide a basis for excluding the FTC from the executive branch, as many agencies within the executive branch perform analogous functions under other statutes.

In addition to dissembling in its decision, the Court in Humphrey's Executor took an unsatisfactory approach on the merits. Restrictions upon the President's removal power were upheld in Humphrey's Executor on the ground that the FTC was not part of the executive branch and therefore not subject to presidential supervision. This approach is flawed for several reasons. The opinion implicitly suggests that the President's removal power cannot be restrained within the executive branch. The Court also took the FTC out of the executive branch without locating it elsewhere, an approach that conflicts with that opinion's own presuppositions. The rationale for removing the FTC from the executive branch was not only misleading (as demonstrated above), but rife with the potential for unsettling the roles of concededly executive agencies. Finally, the opinion tacitly

116. See id.
117. See id. at 628-30.
118. For example, the Secretary of Labor issues occupational safety and health standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b) (1982), and the Secretary of Transportation issues motor vehicle safety standards under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392 (1982).
119. 295 U.S. at 628.
120. See id. at 631.
121. See id. at 628.
122. If Humphrey's Executor is read as excluding independent agencies from the executive branch because they engage in quasi-legislative and quasi-judicial activities, then the executive branch agencies should also be excluded from the executive branch.
supported the view that the FTC is a "legislative" agency through which the laws are enforced independently of the executive branch.123

These various flaws in the *Humphrey's Executor* opinion flow from the premise underlying that opinion: that the only way presidential power can be restricted is by removing agencies from the executive branch. Such a premise overemphasizes the President's power within the executive branch, and it generates a distorted remedy — that restrictions upon presidential power require the dissection of the executive branch. Indeed, the whole perspective of *Humphrey's Executor* is wrong; by implicitly conceding unlimited presidential power within the executive branch, and by grounding restrictions upon presidential power in dissections of that branch, *Humphrey's Executor* conflicts with the flexible approach to separation embraced in the Republic's early days, which the Court's removal decisions, as distinct from their rationales, have historically upheld.124

B. The Issue of Presidential Control

1. The Rationale of the Removal Cases

The formal question in *Myers, Humphrey's Executor*, and *Wiener* involved the President's removal power, but the underlying issue was the extent of presidential control. Although each of these cases employed unsatisfactory reasoning in reaching its result, each was grounded upon a need for, or the undesirability of, presidential control over the officers in question.125 *Bowsher*, however, was different.

In *Bowsher*, the Court refused to recognize the issue of presidential control as decisive.126 Instead, in a shift from the focus of the other removal cases, the decisive issue in *Bowsher* was said to be congressional control over an officer performing functions that the Court identified as executive.127 As in the earlier cases, the Court reasoned that power to remove gave rise to a power to con-

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123. See 295 U.S. at 629-30; see also supra note 111 and accompanying text.
124. See supra notes 49-57 and accompanying text; infra text accompanying note 175.
125. See *Wiener*, 357 U.S. at 355-56; *Humphrey's Executor*, 295 U.S. at 631-32; *Myers*, 272 U.S. at 163-64.
126. 106 S. Ct. at 3193.
127. Id. at 3192.
trol. Because Congress possessed power to remove through joint resolution,\textsuperscript{128} the Court concluded that Congress possessed power to control the officer over whom it held the removal power.\textsuperscript{129}

Chief Justice Warren Burger’s reasoning supporting the position in \textit{Bowsher} was strained. Because Congress is a body composed of many members divided into two Houses, it is much more difficult for Congress, as an institution, to supervise or control the work of an officer through actual or threatened use of removal power than it is for the President. Moreover, Congress’s removal power is exercisable through joint resolution, a technique requiring passage by both Houses and approval by the President. It is essentially equivalent to the enactment of legislation.\textsuperscript{130} Because the President could effectively block most foreseeable congressional attempts to remove the Comptroller General,\textsuperscript{131} Burger was unconvincing when he derived congressional control over the Comptroller General from the subjection of that officer to removal by joint resolution.

Despite some conflicting strands in his opinion,\textsuperscript{132} Burger’s real objection to subjecting an officer exercising the delegated Gramm-Rudman-Hollings functions to removal by joint resolution appears not so much to be congressional power over that officer,\textsuperscript{133} but congressional participation in any removal decision — participation that effectively blocks unilateral action by the President.

2. The Relation of Removal to Control

The President controls the operations of the executive branch directly or through his subordinates in two ways: (1) by issuing orders or directives to lower-ranking officials to carry out identified policies and revising or reversing the decisions of officials who misapply administration policies, and (2) by dismissing officials

\begin{itemize}
  \item \textsuperscript{128} \textit{Id.} at 3189; see infra notes 130-31 and accompanying text.
  \item \textsuperscript{129} See 106 S. Ct. at 3188-90.
  \item \textsuperscript{131} It is possible that Congress could override the President’s disapproval, but that would require a two-thirds vote in each House, ordinarily a difficult requirement to meet. The Solicitor General conceded that the President has veto power over an attempted congressional removal of the Comptroller General, but contended that Congress’s power to override a veto gave it the necessary removal authority. \textit{See Brief for the United States at 32-33 n.18, Bowsher v. Synar, 106 S. Ct. 3181 (1986)} (No. 85-1377).
  \item \textsuperscript{132} Some passages in Burger’s opinion suggest that limiting the President’s removal power without involving congressional participation in removal decisions might pass constitutional tests. A statutory provision vesting the officer exercising Gramm-Rudman-Hollings functions with a fixed term, for example, and making him removable by the President only for cause, might pass constitutional muster. Such a provision would restrict the President’s removal power without subjecting the officer to any form of congressional supervision. \textit{See 106 S. Ct. at 3188 n.4.}
  \item \textsuperscript{133} Unless it could muster a two-thirds majority, Congress could not remove the Comptroller General without presidential consent. Such congressional involvement translates into a constraint upon the President’s power rather than as a basis for the exertion of congressional supervisory power over the officer.
\end{itemize}
who have failed to pursue administration policies. In many set-
tings neither the President nor his subordinates can reverse deci-
sions made by lower-ranking executive officials.\footnote{This is the case when the official or officials in question have authority to decide an adjudicatory proceeding or to decide to issue an irrevocable legal interest, such as the granting of a patent. \textit{See infra} text accompanying notes 150-58.} It is the President's formal power to dismiss officials, therefore, that underlies much of his ability to implement policy. This power lends ultimate credibility to his directives and those of his subordinates. Moreover, by replacing uncooperative officials, the President can ensure that aberrational decisions, even if irreversible, will not be repeated.

Finally, the President's constitutional responsibilities are necessarily directed to overall policy, not to particular applications. Control over a complicated bureaucracy cannot rest upon superior officers' power to correct the mistakes of subordinates. Substantial diffusion of decisionmaking responsibility is essential, but control must accompany that diffusion. Such control can be exercised effectively only through control over the identities of the personnel entrusted with responsibility and the concomitant power to replace personnel whose overall approaches conflict with administration policies. In context, therefore, the power to reverse a particular decision pales into insignificance beside the power to replace officials.

V. Constraints Upon Presidential Power: A Reconciliation of the Removal Cases

A. Frankfurter's Rationale in \textit{Wiener}

Justice Frankfurter's short opinion in \textit{Wiener v. United States} contains the germ of a reconciliation of the removal cases. In \textit{Wiener}, the Court ruled that the President lacked authority to remove a member of the War Claims Commission who had been appointed under a statute containing no provision for his removal.\footnote{357 U.S. 349 (1958). An approach to the \textit{Wiener} case resembling the one set forth in this Article can be found in Note, \textit{Incorporation of Independent Agencies into the Executive Branch}, 94 \textit{Yale L.J.} 1766, 1771 n.40 (1985).} The Court's opinion was largely based upon the adjudicatory nature of the Commission's work, which made freedom from outside interference, including that of the President, imperative:

If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, \textit{a fortiori} must it be inferred that Congress did not wish to have hang over the Commission the Damocles'...
sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.\textsuperscript{137}

Thus in \textit{Wiener}, as in \textit{Humphrey's Executor}, the issue of whether Congress may limit the President's removal power was cast in terms of the appropriateness of freeing that official from presidential control; that issue was, in turn, resolved in light of the kind of work that the official was called upon to perform. But in \textit{Wiener}, as distinguished from \textit{Humphrey's Executor}, the official lacked a major policymaking role. He was to make decisions based on an evidentiary record, under preexisting standards of evaluation\textsuperscript{138} — a circumstance in which presidential interventions would have appeared improper. In context, therefore, the restriction upon the President's power over the official appeared inherently more justified because it did not raise the troublesome question about the President's supervisory role over policy. Although the opinion purports to follow \textit{Humphrey's Executor}, and does partially rely upon Congress's express decision not to employ an executive agency to adjudicate war claims, the opinion focuses upon the official's work in deciding disputes "on the merits of each claim, supported by evidence and governing legal considerations,"\textsuperscript{139} and upon the appropriateness of protecting on-the-record decision-making pursuant to preexisting standards from presidential interference. This focus provides the insight necessary to a coherent separation of powers analysis.

The key factor in a proper analysis is the relation of the President's control of overall administration and enforcement policy to the character of the work of the official whose removal is restricted. It is not necessary to remove an official completely from the executive branch in order to restrict the President's control over that official's performance of his assigned tasks. Nor should it be necessary to remove an official completely from the executive branch in order to restrict the President's removal power as \textit{Humphrey's Executor} suggested.\textsuperscript{140} These were red herrings inappropriately used in \textit{Humphrey's Executor}.

\textbf{B. The Standard for Insulating an Official from Executive Control}

Because the President is charged by Article II with ultimate responsibility for the administration and enforcement of the laws,\textsuperscript{141} statutory limitations upon the President's control over officials must be consistent with that constitutional responsibility.\textsuperscript{142}

\textsuperscript{137} \textit{Id.} at 356.


\textsuperscript{139} 357 U.S. at 355.

\textsuperscript{140} See 295 U.S. at 627-32; see also supra text accompanying note 122.

\textsuperscript{141} \textit{See U.S. Const. Art. II, § 3.}

\textsuperscript{142} \textit{See Nixon v. Administrator of Gen. Servs.}, 433 U.S. 425, 443 (1977) (stating

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Under this approach, restrictions on presidential power over an official—including restrictions on the removal power—are justified only when those restrictions do not interfere with the President's overall control over administration. Although such an approach can be easily stated, its application requires a sophisticated understanding of the President's constitutionally assigned responsibilities.

Thus, although the Constitution makes the President ultimately responsible for enforcing and administering the laws, the Constitution contemplates that the President will be assisted in these tasks by governmental departments under the supervision of cabinet officials. Moreover, numerous statutes assign responsibility for administration and enforcement to particular officials of cabinet and noncabinet rank. To determine whether a given restriction upon presidential control conflicts with the President's constitutional responsibilities, it is necessary to inquire how his responsibilities for administration and enforcement are to be understood in light of these laws assigning administrative and enforcement responsibilities to particular officials.

1. Delegations to Particular Individuals and Agencies: The Relation Between the Responsibilities of Administering Officials and Those of the President

Regulatory statutes typically assign the task of administration and enforcement to particular officials or agencies. Two examples will suffice. The Secretary of Agriculture has been assigned the task of administering the Packers and Stockyards Act, and the Secretary of Labor has administrative and enforcement tasks under the Occupational Safety and Health Act of 1970. But in fixing that administrative responsibility, Congress is neither denying the President's ultimate responsibility for administration and law enforcement, nor interfering with it. It is not the President's role to be involved with day-to-day administration.

Rather, the President's role is overseeing administration and enforcement by subordinates. The President is substantially responsible for the efficiency with which existing laws are enforced, that "in determining whether the [Presidential Recordings and Materials Preservation] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions").

143. See U.S. Const. Art. II, § 2 (authorizing the President to "require the Opinion in writing, of the principal officer in each of the executive Departments" and permitting Congress to vest the appointment of inferior officers "in the Heads of Departments").


the coordination of the policies pursued by different parts of the executive branch, and the substantive policies pursued by officials who actively administer the laws. Almost all laws provide a degree of flexibility in the way they are interpreted, administered, and enforced. The responsibility for formulating administrative and enforcement policies applicable to the various regulatory laws lies primarily with the officials who administer and enforce those laws. But the policy determinations of those officials are ultimately subject to presidential oversight, and the likelihood that the President will actively exert such oversight authority grows as those policies become increasingly important to overall governance.

As the policies pursued by regulators increase in importance, they take on an increasing political nature, which increases the likelihood of active presidential involvement in their final formulation. This, of course, is as it should be — the President's active involvement brings an elected official into the regulatory process and helps subject important policy decisions to the review of the electorate.

Conversely, as the substance of an official's decisionmaking is restricted, there is less need for presidential control. In the case of an official using preexisting and fully elaborated standards to decide issues upon record evidence, there is no place for presidential control. An attempt by the President or other superior official to influence such decisionmaking would be improper, because all relevant factors have been specified; presidential influence could only divert the decisionmaker from those factors.

Finally, it is necessary to take account of the various laws structuring regulatory decisionmaking. Many regulatory statutes provide for the issuance of rules or regulations and the Administrative Procedure Act, in sections 553, 556, and 557, establishes formal and informal rulemaking procedures. Once a rule is adopted by a regulating authority, that authority must apply it in accordance with its terms until it is repealed. Rules reify regulatory policies and bind both the immediate regulating authority and the President until they are repealed.

2. The Appropriate Standards

The foregoing discussion indicates that Congress may properly insulate certain decisionmaking from presidential influence and control and that the paradigmatic independent decision is one made on a record pursuant to preexisting standards. In such a de-

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146. See Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 461-63 (1979); Strauss, supra note 5, at 663.
147. The relationship between the President and the officials with statutory responsibility for administering specific laws is discussed, e.g., in Myers v. United States, 272 U.S. 52, 135 (1926); Strauss, supra note 5, at 600, 649.
cision, there is little room for developing and applying policy, either in the pursuit of decisionmaking efficiency or in the realm of substantive standards. As room for policy formulation increases, congressional limitations upon presidential influence become problematic. The nineteenth century case of *Butterworth v. Hoe* is illustrative. The Court held that the Secretary of the Interior could not reverse the Commissioner of Patents' decision to issue a patent, even though the Secretary was the Commissioner's superior. The statute finalized the Commissioner's decision to approve a patent application. The Secretary, and his superior, the President, were powerless to reverse the Commissioner's decision once rendered. But *Butterworth* did not hold that they must accept an administration of the patent system with which they were displeased. The Commissioner may, in the eyes of the President, have issued patents too liberally. The President could remove the Commissioner and thus prevent repetitions of the prior liberal patent-issuance decisions. Congress could appropriately vest sole decisionmaking power in the Commissioner to ensure that patent-issuance decisions be made on the application record. But it is not so clear that Congress ought to insulate the overall policy pursued in the patent office from presidential control by restricting the President's removal power. This example also reveals another aspect of the tools of supervisory control: While useful in controlling overall policy implementation, removal is too drastic a tool to be of much use in the many cases in which a superior will disagree with a subordinate's resolution of a particular case of no wide consequence for overall administration.

These illustrations show that some decisionmaking, like those of the War Claims Commission, should be based solely upon the record; in such cases the propriety of insulating decisionmakers from presidential influence is clear. They also show that some decisionmaking based solely upon record facts also involves significant policy application. When policy decisions determine the out-

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150. 112 U.S. 50 (1884).
151. *Id.* at 55-56, 69-68.
152. *Id.* at 66-67.
153. *See id.* at 66-68.
154. In commenting upon Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), Professor Strauss observed that if the Administrator of the Environmental Protection Agency chose to disregard presidential advice and to promulgate a rule of his own design, the White House's sole recourse would be to punish the Administrator. *See Strauss, supra* note 5, at 666. If that were so, then the Administrator could bind the President on a wide-ranging policy matter as effectively as the nineteenth century Commissioner of Patents could bind the President by his patent-issuance decisions. That is not quite true, however, for — considerations of political feasibility aside — the President could remove the Administrator from office and (after appropriate procedures) a new Administrator could issue a replacement rule.
come of many cases, or otherwise significantly affect administration, it may be inappropriate for Congress to insulate those policies from presidential influence — even when factual determinations are required to be made on the record. In *Sierra Club v. Costle*, the District of Columbia Court of Appeals underscored the important role of the President in agency policymaking. The court recognized that for factual contributions to the rulemaking process, even presidential input must follow on-the-record procedures. On matters of policy, however, the President is necessarily part of the decisionmaking structure and can therefore appropriately communicate privately with the official who bears primary responsibility for administering a regulatory statute.

Thus, decisionmaking functions fall along a continuum. At one end are decisions made on the record pursuant to preexisting standards; these decisions normally affect only an identified party. At the other end of this continuum, decisions — like those concerning institution of enforcement actions, for example — are made on the basis of prediction and judgment upon a wide and unlimited range of factors, and tend to exert a broad impact upon administration. Decisionmaking at the former end is appropriately insulated from presidential control; at the latter end ultimate presidential control is imperative. In the middle ranges of this continuum, decisionmaking is imbued with characteristics from each of the polar paradigms. A regulatory statute, for example, may require that decisions be made on record evidence, but those decisions may also involve the formulation of new policies that will significantly affect the future administration of that statute.

Recognition of this decisionmaking continuum allows the issues

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152. Id. at 404-08.
153. Id. at 407-08.
154. Id. at 405-06; see also Pierce, *supra* note 84, at 509 (discussing *Sierra Club v. Costle* as a case that recognizes the President's need to communicate his policy preferences to executive branch agencies); Strauss, *supra* note 5, at 665 (emphasizing the need for presidential coordination and review of agency policy); cf. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 981 (1980) (suggesting that Article II may allow the President to intervene in agency affairs both publicly and privately, but may limit White House staff intervention to exclusively public action).
155. The Court, in *Heckler v. Chaney*, 470 U.S. 821 (1985), set forth the various factors that an agency would consider in deciding whether to bring an enforcement action:

  First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

  Id. at 831-32.
raised by *Humphrey's Executor* to be evaluated in a new light. Although the President could appropriately be restrained from influencing the FTC's basic factfinding, he has a legitimate concern over the policies with which the FTC imbues section 5 of the Federal Trade Commission Act. A proper approach to the issues raised by *Humphrey's Executor* would recognize that the President should not interfere with the FTC's basic factfinding in adjudicatory proceedings while it would acknowledge that the President may appropriately be interested in the FTC's policies. Accordingly, the Court should have recognized the President's power to remove a Commissioner.\(^{160}\) It could have relied upon the exclusiveness-of-the-record principle (today embodied in the Administrative Procedure Act\(^{161}\)) to protect the FTC's basic factfinding functions from outside influence. Because these removal functions are performed in the first instance by an administrative law judge, this approach would have upheld both the integrity of the factfinding and the President's ultimate responsibility over administration and enforcement.

VI. The Emerging Understanding of the Executive Branch's Constitutional Functions

A. Bowsher's Approach to the Constitutional Functions of the Executive

In *Bowsher*, the Court premised its ruling — that the Comptroller General was constitutionally disabled from performing his assigned duties under the Gramm-Rudman-Hollings Act because of the congressional power to remove him from office — on the ground that those duties were "executive" in the constitutional sense.\(^{162}\) But in justifying its conclusion that the duties in question were executive, the Court's opinion was deficient because it came close to using the term "executive" as if its meaning were self-explanatory.

In characterizing the Comptroller General's duties as executive, the Court substantially relied upon the fact that he must interpret the provisions of Gramm-Rudman-Hollings and apply them to rec-

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162. 106 S. Ct. at 3192.
oncile different budgetary estimates for presentation to the President. But statutory interpretation is patently not limited to executive officials. Most of the functions of the appellate courts consist of statutory interpretation. That the assigned duties of the Comptroller General involved interpretation indicates absolutely nothing about whether those duties belong to the executive branch. In emphasizing the Comptroller General's interpretative role as grounds for categorizing it as an executive function in the constitutional sense, therefore, the Court failed to provide an adequate explanation of its decision — instead, it shrouded its decision in obscurity.

The Court's focus on the need for the Comptroller General to interpret the law and exercise judgment about its application was a response to the contention that the Comptroller General's duties were merely "ministerial and mechanical," and thus did not involve the performance of responsible executive functions. Interpretation that is incidental to administration has historically been associated with responsible executive functions — the kind with which courts cannot properly interfere by writs of mandamus or injunction; this is probably what made the Comptroller General's functions executive ones in the eyes of the Court. But this was only a conclusion that, if the Comptroller General's tasks belonged constitutionally to the executive branch, he should then be free from interference by other branches in performing those tasks. Despite the assignment of responsible decisionmaking authority to the Comptroller, that assignment does not, in itself, establish that the assigned tasks constitutionally belong to the executive branch.

The Court made the necessary connection between the Comptroller General's duties under Gramm-Rudman-Hollings and the executive branch in the following passage which attempts to explain how the Comptroller General implements the Act. Here, the Court pointed out how the Comptroller could bind the President, and thus control the policy taken by the President in implementing the Act:

The executive nature of the Comptroller General's functions under the Act is revealed in § 252(a)(3) which gives the Com-

163. The Court stated:
Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of "execution" of the law. Under § 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.

Id.

164. Id.

165. See, e.g., Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840) (refusing to issue a writ of mandamus when the challenged act performed by the Secretary of the Navy required the exercise of judgment and discretion and was not merely ministerial). For a general discussion of Paulding and writs of mandamus, see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 179 (1965).
troller General the ultimate authority to determine the budget cuts to be made. Indeed, the Comptroller General commands the President himself to carry out, without the slightest variation . . . the directive of the Comptroller General as to the budget reductions . . . .

The Comptroller General’s assigned duties were thus perceived as executive branch duties because of their binding effect on the President. Of course, the mere fact that the President is bound by the Comptroller General’s action does not in itself locate those acts in the executive branch, because the President — like other executive branch officials — can be bound by the acts of any of the constitutional branches. Congress binds the President by legislation, the courts by their judgments, and executive agencies by their regulations. But it was apparent that the Comptroller General’s assigned functions were not in the service of the judiciary, and the Court had already committed itself on the boundaries of congressional action in Chadha: Congress exhausts its constitutional function when it enacts legislation. Action implementing legislation cannot be congressional action. It would have been awkward to conclude that the President could be bound by a governmental act outside any of the three constitutional branches. Thus, the Comptroller General’s act necessarily had to be an act of the executive branch.

Besides reaffirming the boundaries of congressional activities set forth in Chadha, Bowsher also effectively uses the mirror image of those boundaries as a guide to the constitutional domain of the executive branch. Although not going so far as to hold that all official action must be assigned to one of the three branches, Bowsher suggests a broad definition of executive branch functions. It suggests — but does not quite hold — that all official action taken to implement a statute properly belongs to the executive branch, a proposition whose general acceptance would ease the President’s difficulties in extending his supervisory authority over the independent agencies. It holds — explicitly or by necessary impli-

166. 106 S. Ct. at 3192.

In the past, commentators have decried the lack of policy coordination among the federal agencies. See Bruff, supra note 146, at 455; Hector, Problems of the CAB and
cation — that all such action that binds executive branch officials is attributable to that branch. 169

B. Toward a New Understanding of Executive Autonomy

Bowsher is a step toward recognizing that administration and enforcement properly belong to the executive branch. This recognition is needed to facilitate the President's coordination of the policies of the independent agencies with those of the executive agencies. Although the President exerts extensive de facto supervision over the independent agencies, 170 the legitimacy of his supervisory role must be clarified in order to strengthen that role. Chief Justice Burger's hesitation in accepting the Solicitor General's muted suggestion to that effect was grounded in his reluctance to undo past precedent 171 and in his correct intuition that some limitations upon the President's power to control are often necessary or appropriate to effective government. 172

Once it is recognized that Myers v. United States 173 overstated the sweep of the presidential control that the Constitution demands and that Humphrey's Executor falsely conceptualized the means for restricting presidential control, the difficulties that afflicted Burger in Bowsher vanish. All of the cases — even

the Independent Regulatory Commissions, 69 YALE L.J. 931, 949 (1960). These Executive Orders embody a growing attempt by presidents to remedy that problem. They have, however, engendered some controversy. See, e.g., DeMuth & Ginsberg, White House Review of Agency Rulemaking, 99 HARV. L. REV. 1075 (1986) (arguing that the regulatory review program furthered by President Reagan through OMB involvement is a beneficial and necessary management tool for effective presidential administration); Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 HARV. L. REV. 1059 (1986) (contending that the OMB's power to decide whether and in what form a regulation will be issued should be eliminated and that the OMB should not be involved in the rulemaking process); Strauss & Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 ADMIN. L. REV. 181 (1986) (suggesting that statutes governing the independent agencies should not be interpreted to foreclose presidential supervisory power of the sort reflected in Executive Orders 12,591 and 12,498); Note, Presidential Policy Management of Agency Rules Under Reagan Order 12,498, 38 ADMIN. L. REV. 63 (1986) (suggesting that the authority asserted by President Reagan under Executive Order 12,498 cannot be sustained under the President's Article II powers).

Clarifying the President's supervisory role over the independent agencies would facilitate the extension of such Executive Orders to them. On the willingness of the independent agencies to comply with the provisions of such Orders, compare Strauss, supra note 5, at 663 (suggesting that the independent agencies have generally acted as if their actions were subject to the Orders) with Strauss and Sunstein, supra, at 203 (stating that the President requested voluntary compliance from the so-called "independent" agencies, but that his request was generally rejected).

169. See 106 S. Ct. at 3192.

170. See Strauss, supra note 5, at 588-91. But see Strauss & Sunstein, supra note 165, at 202-03.


172. See supra text accompanying notes 150-161. Chief Justice Burger's discussion of Humphrey's Executor suggests a potential receptivity to a contention that some tasks are appropriately insulated from presidential control. He avoided definitive statements about that matter, however, because he saw the issue in Bowsher as involving the legitimacy of congressional control over an officer performing a task belonging to the executive branch rather than the legitimacy of insulating certain executive branch officers from presidential control. See Bowsher, 106 S. Ct. at 3188 & n.4.

173. 272 U.S. 52 (1926).
Humphrey's Executor — are consistent with the revised rationale just elaborated. That rationale recognizes the President's overall control over policy pursued by officials and agencies engaged in administration and enforcement, subject to constraints upon presidential power to issue orders or directives or to remove officials when doing so would interfere with work that is properly confined to a record and does not raise significant policy issues.

1. A Revisionist Interpretation of the Cases

Under a revisionist interpretation of the removal cases, Myers correctly set forth the constitutional responsibility of the President over policy.\textsuperscript{174} Myers erred only by failing to note the need in some circumstances for that power to be restricted in order to facilitate an official's performance of assigned tasks.\textsuperscript{175} Generally, such a restriction would be proper when the official is required to decide matters based on a limited record. Because the Postmaster in Myers was not engaged in on-the-record decisionmaking, there was no apparent basis for limiting presidential control over him; hence the restrictions on his removal were properly held invalid.\textsuperscript{176} The restrictions upon the removal of the War Claims Commissioners in Wiener v. United States\textsuperscript{177} were justified because the Commissioners were required to decide matters on a factual record under preexisting standards. Accordingly, the removal restrictions helped to ensure that decisions were made solely on that record. Humphrey's Executor involved an official who was obligated to decide factual matters on the record, but who exercised significant policymaking functions. The President's responsibility properly extended to supervising the Commissioner's policy-developing functions.\textsuperscript{178} Despite the confused reasoning in Humphrey's Executor, the Court's decision, as in Myers and Wiener, merely decided the government's liability for salary due after removal.\textsuperscript{179} It should be possible for the government to contract for salary payments to an official for a specified period without

\textsuperscript{174} \textit{See id.} at 134-35. The Myers opinion properly focused on the President's need to control the actions of his subordinates. A revisionist interpretation of Myers would incorporate certain qualifications upon the President's removal powers. As argued above, the President's removal power could properly be restricted in the case of officials deciding matters on the record pursuant to preexisting standards. \textit{See supra} text accompanying notes 150-61.

\textsuperscript{175} Even the Myers opinion conceded that the President could be prevented from interfering with the performance of adjudicatory duties by executive branch officials. 272 U.S. at 135.

\textsuperscript{176} \textit{See id.} at 135; \textit{see also supra} text accompanying notes 150-161.

\textsuperscript{177} 357 U.S. 349, 355-56 (1958).

\textsuperscript{178} \textit{See supra} notes 150-161 and accompanying text.

\textsuperscript{179} \textit{See Wiener}, 357 U.S. at 349; Humphrey's Executor, 295 U.S. at 618-19; Myers, 272 U.S. at 106-08.
limiting the President's power to remove that official from exercising the powers of his office. Understood solely as a case involving a back pay award, *Humphrey's Executor* need not be read as a precedent limiting the President's power to direct or influence the so-called independent agencies or remove their heads. For reasons already stated, *Bowsher* effectively recognized the President's overall supervisory power.\(^{180}\)

2. **The Analogy to the Cases Protecting Executive Autonomy from Judicial Interference**

*Bowsher* and *Chadha*, together with other recent cases,\(^ {181}\) can be understood as extending the protection that the courts have historically accorded the executive against judicial inroads to protection against legislative interference as well. But, as with all analogies, there is a twist. When courts protect executive autonomy against judicial interference, they are generally called upon only to respect the decisionmaking processes of the executive branch without examining the power relationships within that branch. When courts protect executive autonomy against legislative interference, however, they protect not only individual executive decisions, but also enforce the plenary power of the President over those subordinates exercising significant policymaking roles.

*Bowsher*’s reference to the responsible judgment that the Comptroller General had to exercise in performing his Gramm-Rudman-Hollings duties\(^ {182}\) thus has a double reference: It incorporates the standards courts have employed to avoid judicial interference with the executive as a useful analogy by which to protect the executive from legislative interference, and it identifies the parts of the executive branch that must be subject to presidential control.

C. **The New Paradigm**

The Court is proceeding toward a new approach to separation of powers that employs bright-line techniques but also incorporates the flexibility necessary to avoid straitjacketing governmental administration. By defining the boundaries of congressional action, the Court has provided intelligible standards for itself, the lower courts, and Congress. Under those standards, various formal devices Congress uses to control administration of its legislation are no longer permitted.\(^ {183}\) In large measure, the newly visible bound-

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180. See *supra* notes 163-169 and accompanying text.  
181. E.g., *Buckley v. Valeo*, 424 U.S. 1, 140-43 (1976) (per curiam) (holding that Congress may not appoint Federal Election Commissioners authorized to conduct "rulemaking and enforcement" activities). *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977), is also helpful inasmuch as it directs attention to the need to protect the Executive Branch in "accomplishing its constitutionally assigned functions," *id.* at 443, a focus conducive to recognizing both a need for executive autonomy and the President's controlling role within the executive branch. See *id.* at 442-45.  
182. See 106 S. Ct. at 3192.  
183. Congress retains, of course, a vast array of informal devices for influencing
aries of congressional action also define the proper scope of the executive branch. Yet this new approach does not fall into the formalism of trying to push each government activity, agency, or official into one of the three constitutional branches. Rather, it is content merely with identifying some boundaries or limits on the functions of the constitutional branches as a means of stabilizing the points of reference.

If the congressional role ends with the passage of legislation, then the tasks of administering and enforcing regulatory legislation is performed by officials who owe no allegiance to the legislative branch. Although many statutes designate particular officials to administer and enforce them, these officials should be subject to the President's supervisory role imposed by the Constitution. It is not particularly important whether these officials are deemed to be "in" the executive branch, but it is important that they be subject to presidential supervision. It seems eminently sensible, however, to take the view that officials charged with administering and enforcing statutes belong to the executive branch, a view that merely recognizes the legitimacy of the President's supervisory role.

The new approach, however, does not judge the propriety of statutory limitations upon presidential control over any particular act, or even over all acts, of an official by locating that official within the executive department. That was the error of both Myers and Humphrey's Executor. The Court in both cases assumed that, if an official belonged to the executive branch, he was then subject to extensive presidential control; if the official was appointed by the President and belonged to the executive branch, then presidential control through exercise of the removal power could not be constitutionally limited. Under the new approach, Congress's ability to limit presidential control over an executive branch official depends upon the function that the official is performing. To the extent that the official is charged with deciding matters upon evidence in a record or upon the basis of other limited information, and evaluating that evidence or other information under preexisting standards, Congress may appropriately insulate that official from presidential control. To the extent that an official is charged with significant policymaking functions, however, the President's supervisory role must be respected.

administrative behavior, the most important of which are threatened repeal or amendment of the legislation being administered and threatened reductions in the budgets of the offending agency.

184. See supra notes 144-145 and accompanying text.
185. See Pierce, supra note 84, at 513; Strauss, supra note 5, at 611-14, 665-66; Strauss & Sunstein, supra note 169, at 294.
This new approach reflects the constitutional distinction between presidential appointments of superior officers and nonpresidential appointments of inferior officers, which was recognized both in *Myers* and in *Buckley v. Valeo*. The highest levels of administration are intensively involved with policy development and implementation. It is over such officials that the President's supervisory role requires that his power should be at a maximum. At lower levels of government, where policy shades into routine administration under the direction of superiors, the President does not need the plenary removal power that he needs over higher level officials.

Many officials who perform on-the-record factfinding tasks and who may belong to the executive branch are not presidentially appointed. Administrative law judges are the most conspicuous examples. For these officials, tenure in office can be provided with no difficulty. Even in the case of presidential appointees, who perform on-the-record factfinding tasks and evaluate those facts under preexisting standards, there would be no difficulty, under the new approach, in recognizing Congress's ability to restrict presidential control over these officials, including restricting the President's removal power. Significant constitutional problems would arise only from congressional restrictions over the President's power to remove policymaking officials. Finally, the constitutionality of the statutory tenure granted to persons holding the office of independent counsel can be seen to rest not only on the technical manner of the appointment, i.e., through non-presidential appointment, but also on the absence of potential conflict between the activities of such counsel and legitimate executive branch policies.

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186. 272 U.S. at 162.
187. 424 U.S. at 126, 132, 140-41.
188. Indeed, the government's routine administration is conducted by "employees" (rather than "officers"), see Buckley v. Valeo, 424 U.S. at 126 n.162, typically possessing indefinite tenure in office. At such levels, however, significant policymaking is absent. On the reduced need for an executive to possess plenary power to remove nonpolicymaking officials, see *Elrod v. Burns*, 427 U.S. 347, 367 (1976).
190. Chapter 39 of Title 28 of the U.S. Code provides for an office of independent counsel that is concerned with the prosecution of high government officials or officers of national political campaigns and whose office is structured to be independent from presidential control. 28 U.S.C. §§ 591-598 (1982). Independent counsel is appointed by a division of the United States Court of Appeals for the District of Columbia Circuit upon application of the Attorney General and holds office until the matters he is required to investigate are substantially completed. 28 U.S.C. §§ 592, 593, 596(b) (1982); see also 28 U.S.C. § 49 (1982) (defining procedures for assignment of judges to appoint independent counsel). He is removable only by the Attorney General and only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1) (1982).

Independent counsel's appointment by the court satisfies the requirements of the Appointments Clause for the appointment of inferior officers. As an inferior officer, Congress is free, under the reasoning of *Myers*, to place restrictions on his removal. 272 U.S. at 160-61.

These restrictions and other provisions designed to ensure the independence of this officer nonetheless raise the question of whether that officer's independence is com-
VII. Alternative Analyses

A. The Checks-and-Balances Approach

In a comprehensive study of its origins and development, Professor Strauss recommends a "checks-and-balances" approach to applying the separation of powers principle. That approach was drawn from the Court's discussion of the separation principle in its opinions in United States v. Nixon, Nixon v. Administrator of General Services, and Buckley v. Valeo. Under Strauss's approach, decisionmaking arrangements would be evaluated "in terms of their contribution to or detraction from the maintenance of tensions among the named branches" in the performance of their "essential functions."
Strauss himself has adequately stated the objections to the "checks-and-balances" approach as a guide for the courts. He acknowledges that "an analysis framed in terms of interference with the capacity to maintain one's core function is more effective as a means of organizing debate than as a rule for deciding cases" and that his recommended test "is both diffuse and subject to conscious or unconscious manipulation." He concludes, however, that despite the difficulties inherent in applying the checks-and-balances approach, it is desirable because it best reflects the Framers' intention both that the American government be effective and that it embody a "continuing struggle among its parts."

Strauss' application of the checks-and-balances approach to the Civil Rights Commission confirms these admitted difficulties in applying it. Strauss describes the events leading to the reconstitution of the Commission as a factfinding body without any law-administering function as a political compromise between the President and Congress. Under the new arrangement, the President appoints four members and the leadership of each House of Congress appoints two. The result is a potential struggle within the Commission between appointees of different ideological persuasions, but no struggle in the appointment process. The prior arrangement encouraged struggle over the appointment process by requiring the appointment of Commissioners upon whom both the President and the Senate could agree. Strauss asserts that "it immediately became evident that the unchecked authority to appoint conferred by the new scheme offered far less opportunity for political struggle than had the prior arrangements." He does not inform his readers how this conclusion became clear, nor does he describe how the political struggle has lessened. That struggle has eased in the appointments process, but not necessarily among the Commissioners. Further, is it correct to conclude that the struggle has lessened in the appointments process when the structure of that process is itself the culmination of an intensive political struggle? Strauss's conclusions may be correct, but they are not self-evident. His test does not offer courts adequate guidance. Surely Strauss does not mean that any regulatory mechanism is suspect if an alternative promises greater potential for political struggle. Moreover, Strauss endorses various arrangements limiting presidential authority when congressional authority is likewise limited. Such limitations may be constitutionally valid in some circumstances, but they do not connote political

197. Id. at 625.
198. Id. at 617.
199. Id. at 626.
200. See id. at 644-45.
203. Strauss, supra note 5, at 579.
204. See id. at 641, 650-53.
struggle. Indeed, Strauss's test is a shield behind which courts could rationalize their decisions to restructure governmental arrangements, but it does not provide them with useful criteria as to when and in what circumstances that restructuring is needed.205

None of this criticism is directed against Strauss's comprehensive examination of the history of the separation principle or his checks-and-balances approach as a useful analytical tool, along with others, for organizing discussion about how the principle is working. My contention is merely that the checks-and-balances approach does not furnish a sufficiently precise guide to the courts in a field marked by judicial confusion and inadequate analysis.

B. The "Blending of Powers" Approach

Professor Davis accurately observes that the separation principle is largely undefined and is, therefore, "an empty receptacle for answers that have to be invented."206 But Davis has only the most general recommendations for providing those answers.207

First, he strongly warns against a "strict" interpretation of the principle.208 By a strict interpretation, Davis seems to mean an interpretation of the principle under which each of the three branches would perform all governmental functions resembling its core function. He supports the "blending" of these functions in various, but unspecified, ways.209 The strict separation against which Davis warns us would be impossible to implement;210 indeed, because of the imprecise and overlapping meanings of the

205. Cf. Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C.) ("Nor are we disposed to resolve this matter on the basis of whether there is an 'adequate' admixture of nonexecutive powers, or whether nonexecutive powers 'predominate'; those are neither judicially manageable nor congressionally knowable standard."); aff'd sub nom. Bowsher v. Synar, 106 S. Ct. 2181 (1986).

206. 1 K. DAVIS, supra note 9, § 2:6, at 77.

207. Davis contends that a sound future for separation of powers theory can be constructed consistent with the following advice that he offers to the courts: (1) Montesquieu was wrong in his assumptions about separation of powers being a necessary safeguard against tyranny; (2) a mere blending of the three basic powers should not be the basis for a ruling of unconstitutionality; (3) there is no objection to conferring all three types of powers upon agencies; (4) subject to few limits, agencies can be given judicial powers; (5) the grant of nonjudicial powers to courts should be evaluated in light of the comparative competence of the courts and alternative government institutions; (6) allocations of power should be resolved by negotiation between the branches; (7) checks on the exercise of power should be strengthened; (8) the relative powers of the several branches vary over time without the help of the courts; (9) an important question is how far courts should legislate; and (10) the theory of separation of powers should be deemphasized and replaced with theories about how discretionary powers should be confined, structured, and checked. See id. § 2:6, at 78-82.

208. See id. § 2:5, at 74.

209. See id. § 2:5.

210. Because rulemaking and adjudication are indispensible elements of administration, a "strict" theory of separation of powers would make government inadministrable. See supra text accompanying notes 48 and 118-19.
traditional separation of powers vocabulary,\textsuperscript{211} the "strict" interpretation to which he refers is difficult even to describe in intelligible terms. Davis' warnings are appropriate, but his fears are unfounded.

Davis also expresses substantial skepticism about the principle itself. Because he notes elsewhere that the principle is largely undefined,\textsuperscript{212} his skepticism seems directed against the kind of extreme interpretation of the principle described earlier. He argues that experience has shown that Montesquieu was wrong in his assumptions about the need for the principle.\textsuperscript{213} Moreover, he suggests that the principle might be deemphasized and replaced with theories about how discretionary powers should be confined, structured, and checked.\textsuperscript{214} Finally, Davis believes that issues about allocations of power are political questions that should be resolved by negotiation between the branches, and he believes that courts should respect the results of those negotiations.\textsuperscript{215}

I have no major quarrel with most of Davis's view that the content of the separation principle needs to be worked out over time, nor do I disagree with his view that a flexible approach to the principle is imperative. Courts, however, should play a limited role in working out the boundaries of the tasks allocated to the three branches. Courts must perform that role with sensitivity to the often complex governing tasks involved, while developing coherent standards with which to evaluate separation of powers issues.

Davis's approach to the separation of powers principle, however, offers very little guidance to the courts. Like Strauss, Davis offers a number of perspectives from which the effects of various interpretations of the principle on the operations of government can be

\textsuperscript{211} See supra text accompanying notes 37-40.

\textsuperscript{212} See K. Davis, supra note 9, \S 2:6.

\textsuperscript{213} See id. \S 2:6, at 78. In Book XI of THE SPIRIT OF LAWS, Montesquieu argued that a separation of the executive, legislative, and judicial powers was necessary to ensure political liberty. In so arguing, Montesquieu was drawing upon the English experience as he understood it. 1 C. Montesquieu, The Spirit of Laws, bk. 11, at 151-62 (Paris 1748) (T. Nugent trans. 1949). In THE FEDERALIST NO. 47, Madison explained that Montesquieu's reliance upon the English experience demonstrated that Montesquieu's advocacy of a separation of the three basic powers of government was not inconsistent with each of the departments exerting some control over the others: [H]e did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted. THE FEDERALIST NO. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961) (emphasis in original). Davis, rather than explaining Montesquieu, has challenged him directly. Using the parliamentary experience, Davis argues that "[e]ven mixing up the main executive, legislative and judicial powers does not mean tyranny, as anyone can see by examining the British government and the results." 1 K. Davis, supra note 9, \S 2:6, at 78 (emphasis in original).

\textsuperscript{214} See K. Davis, supra note 9, \S 2:6, at 82.

\textsuperscript{215} See id. \S 2:6, at 79-80.
evaluated in political discourse. But he does not provide an alternative to the stance taken in this Article that promises both coherence and needed flexibility.

VIII. Conclusion

In several recent decisions culminating in *Bowsher v. Synar*, the Supreme Court has been laying the groundwork for a revised understanding of the separation of powers principle. The Court's incorporation of bright-line standards into its developing paradigm is a means by which future decisions can proceed from similar reference points. Bright-line standards, however, ought not to be used as substitutes for critical process analysis. But if used wisely, they can be an aid to consistency without hindering needed flexibility or blocking the new approaches that must develop over time.

Experience and scholarship over substantial periods will necessarily produce new insights into the separation principle; and the principle itself must be sufficiently flexible to accommodate this growth. Although courts must decide cases when they arise, they are not the ultimate repositories of political wisdom. Especially in dealing with matters as difficult and complex as the separation principle, courts must look beyond the judicial system to find guidance. Courts cannot, of course, delay decisions in cases coming before them because an underlying theory that would assist them is not yet fully developed. It is in these circumstances that bright-line standards can be useful. If used wisely, they can introduce coherence and consistency into a field that is wide open to development and that, until very recently, has been victim to a confusing and imprecise vocabulary. Used with care and with an understanding of their limitations, such standard need not block judicial openings to new developments nor inject undue inflexibility into governmental arrangements.