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Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts

Eric R. Claeys

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INTRODUCTION

The Rehnquist Court is widely believed to be the most conservative Court in recent memory. Especially in the legal academy, the Rehnquist Court has a reputation as being conservative in its politics,[1] originalist in its interpretive commitments,[2] and suspicious of the New Deal. Mark Tushnet wonders whether the Rehnquist Court has shaken the American constitutional order so profoundly that "the New Deal/Great Society political system is no longer in place."[3] Tushnet is no supporter of the Rehnquist Court,[4] but many of the Court's defenders and admirers share the same view. In the most ambitious defense of the Rehnquist Court to date, John McGinnis insists that the Court's "reflects a more skeptical view of centralized democracy in an era in which there is more elite skepticism about the prospects of nationally mandated social reform than existed in the eras of the New Deal and Great Society."[5]

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1. *See, e.g.*, Richard H. Fallon, Jr., *The Conservative "Paths" of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

2. *See, e.g.*, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

3. Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 30 (1999).

4. Otherwise he would not have written MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

5. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Ju-*

As widespread as this view is, there is at least one good reason to doubt it. It treats Supreme Court Justices too much as trend setters and too little as trend followers. Most Justices get their offices by dint of distinguished practice or public service, not extensive post-graduate academic training. Quite often, they assume the truth of normative opinions that either are conventional among legal elites when they serve on the Court, or were so when they went to law school. As John Maynard Keynes once explained, public officials often write into law political philosophy they learned "from academic scribblers of a few years back." They do so not "immediately, but after a certain interval; for in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age."[6]

Obviously, no single article could explore this doubt in any comprehensive way. Yet there is a surprisingly simple way to demonstrate that it deserves attention—to reexamine how the Rehnquist Court has treated separation of powers. Separation of powers law counts as one of the great puzzles of the Rehnquist Court. Knowing what constitutional scholars knew in 1987,[7] there was every reason to expect that the Rehnquist Court would put separation of powers front and center in its constitutional agenda. Word for word, separation of powers takes up more space in the Constitution than any other doctrine. Chief Justice Rehnquist and Justice Scalia were widely known to sympathize with "original intent" principles of interpretation.[8] More important, as this Article will show, the Burger Court had left the Rehnquist Court with several excellent originalist precedents. Later, the Rehnquist Court would change the law of constitutional federalism using the precedential equivalent of whole cloth.[9] By contrast, at the beginning of the Rehnquist Court, the Court had all the precedents it needed to launch a sweeping revolution in separation of powers.

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risprudence of Social Discovery, 90 CAL. L. REV. 485, 490 (2002).

6. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383-84 (1964).

7. *See, e.g.*, Symposium: *Bowsher v. Synar*, 72 CORNELL L. REV. 421 (1987).

8. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

9. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1955); New York v. United States, 505 U.S. 144 (1992).

Yet there was no revolution.[10] The Rehnquist Court has declined several invitations to breathe more life into originalism through separation of powers law. In the process, the Court has continued a trend that has frustrated constitutional scholars for years, veering erratically between originalist and non-originalist interpretive methodologies with barely any explanation.[11] Did the Justices on the Burger Court take originalism seriously from the beginning? If not, why have the Burger and Rehnquist Courts applied originalism at all? Many academics have criticized the Burger and Rehnquist Courts for their inconsistency,[12] but no one has yet explained these Courts' track records convincingly.

This Article explains that puzzle. The Burger and Rehnquist Courts have used originalism and non-originalism selectively. Both Courts have chosen one or the other depending on which better promotes a theory of government this Article calls "the Progressive theory of apolitical administration." In simple form, this theory holds that government operates best when the Constitution is construed to stop elected politicians from interfering with expert bureaucrats. Leading Progressive academics deduced this theory of government from a more comprehensive political theory of a living Constitution. During the New Deal, the theory of apolitical administration lost its overt associations with living Constitution theory and became widely accepted, in legal education and among leading public-law officials and practitioners.

A broad bloc on the Burger and Rehnquist Courts has continued to use the Progressive theory of apolitical administration to decide hard separation of powers cases. That bloc has used the theory to decide whether to apply an originalist methodology or a non-originalist one in separation of powers cases. Since methodology often decides results in constitutional cases, this

10. *See* M. Elizabeth Magill, *Separation of Powers: The Revolution that Wasn't*, 99 NW. U. L. REV. 47 (2004).

11. My favorite expression of frustration comes from Gary Lawson, who complained that the Court was "alternately raising and dashing the hopes . . . of formalists . . . who advocate strict adherence to the Constitution's particular tripartite structure." Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 854 (1990). He concludes that the functionalists won by TKO. *See id.*

12. *See, e.g.*, E. Donald Elliott, *Why Our Separation of Powers Juriprudence is so Abysmal*, 37 GEO. WASH. L. REV. 506, 507 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Law*, 60 S. CAL. L. REV. 1083 (1987).

bloc has really used the Progressive theory of apolitical administration to decide the merits of separation of powers cases. This controlling bloc has been quite broad. Justice White was a consistent non-originalist, while Justices Scalia and Thomas have been fairly consistent originalists. The other members of the Court, however, have mixed and matched the two approaches. This group has included Chief Justice Burger and Justices Stewart, Powell, Stevens, O'Connor, Kennedy, and Souter. More often than not, it included Chief Justice Rehnquist and Justices Brennan, Blackmun, and Marshall. It probably includes Justices Ginsburg and Breyer.

The Progressive theory of apolitical administration does not come into play in every case, but it strongly influences cases that test how administrative agencies relate to the three traditional departments of government. The clearest test cases began in 1976 and continued through 1992. While the Court has not heard enough separation of powers cases in the last twelve years to say with certainty whether the theory continues to control, the available evidence suggests it does. Most of the time, the law under review promotes Progressive ideals by transferring power from the traditional three departments to an administrative agency. In such a case, the controlling bloc of Justices applies a deferential, non-originalist methodology called "New Deal functionalism" to uphold the administrative scheme. By contrast, when the law under challenge seems to flout the ideal of apolitical administration, alarm bells go off and the controlling bloc worries that Congress is trying to inject politics into administration. The Justices in this bloc then use originalism to declare the law unconstitutional.

This episode teaches two important lessons. The first relates to separation of powers. The Supreme Court does not take originalism nearly as seriously as scholars do. Although scholars disagree whether originalism is a desirable or workable approach to separation of powers, they do agree that, if the Court were to apply originalism consistently in separation of powers, it would need to invalidate most of the administrative state.[13] In reality, however, the Burger and Rehnquist Courts have used originalism in a manner that dedicated originalists would find per-

13. *See, e.g.*, Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 11 (1994) ("There is, however, one overriding problem with formalism as a method for evaluating current structures. Under a pure formalist approach, most, if not all, of the administrative state is unconstitutional.").

verse—only when doing so bolsters the constitutional case for the administrative state. Not to put too fine a point on it, but the Burger and Rehnquist Courts have paid attention to James Madison's opinions about separation of powers only when his views happen to dovetail with Frank Goodnow, Woodrow Wilson, and James Landis's plans for an independent and centralized national bureaucracy.

The second lesson is relevant to retrospectives that have or will soon be written about the Rehnquist Court.[14] In one of the most important areas of constitutional law, a broad cross-section of Justices on the Burger and Rehnquist Court took their bearings not from conservative political beliefs, not from original-intent jurisprudential beliefs, but from Progressive-New Deal political theory. Somewhere in their education or practice, the Justices on these Courts learned to think that the best way to run a government was to establish centralized bureaucracies staffed by well-educated lawyers and public-policy specialists, and substantially free from meddling by politicians. If similar connections explain other areas of the Court's case law, that Court has been much less conservative and much more conventional than most academics assume.

Before proceeding, let me briefly explain this Article's methodology. The Article is primarily descriptive. It is normative only to the extent that it uses a theory of government to describe and predict how the Burger and Rehnquist Courts have approached separation of powers cases. This interpretation could be described as "attitudinalist," in that it presumes that Justices decide cases primarily on the basis of political preferences shaped by Progressive political theory.[15] At the same time, this Article concentrates far more than attitudinalist studies usually do on how Justices may have formed their political preferences and attitudes. In addition, the Justices studied here could maintain with sincerity that they kept their political attitudes largely separate from their constitutional interpretation. The Progressive and functionalist ideas discussed throughout the Article could have convinced Justices that sound constitutional interpretation can and should consider the substantive consequences of different interpretations under consideration—in

14. *See, e.g.*, McGinnis, *supra* note 5; Tushnet, *supra* note 3; Symposium, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 561 (2003).

15. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

which case they could appropriately have relied on the Progressive theory of apolitical administration while interpreting the separation of powers provisions of the Constitution. While John McGinnis has explored a similar approach in his explication of the Rehnquist Court,[16] legal scholars have not developed this genre of interpretation as systematically as have political scientists who study the Supreme Court. Ronald Kahn has called this approach "constitutive," by which he means that overarching normative ideas "constitute" in Justices' minds overarching but distinct understandings of law, government, and legal interpretation.[17] This genre of scholarship, however, now goes by the name "institutionalism."[18] As Howard Gillman explains, institutionalists aim to describe the Supreme Court and other public institutions by reconstructing "those bundles of ideas and motivations that are associated with particular institutions."[19] They do so "in the hope that [they] can induce with some confidence the reasons that led a particular course of conduct."[20] Stated in institutionalist terms, then, this Article's thesis is that the Progressive theory of apolitical administration is an especially big stick in the bundle of ideas and motivations that inform the current Court's decision making in separation of powers cases.

That said, the interpretation presented here may depart from institutionalist scholarship in one significant respect: By surveying the Burger and Rehnquist Courts' achievements in context of developments from the Progressive Era and the New Deal, this approach may paint with too broad a brush for many institutionalists. Institutionalists often prefer to describe motivations and intentions, in Gillman's words, "at a particular historical moment in a particular context."[21] There are sound reasons to focus on narrow historical context. This Article illustrates the

16. *See* McGinnis, *supra* note 5, at 498-99 (while it is "much too simple to say that the Supreme Court follows the election returns . . . Justices pick up the outlines of broad social theories as they are reflected in the media" or articulated by leading theorists).

17. RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953-1993, at 4 (1994).

18. *See* Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65 (Cornell W. Clayton & Howard W. Gillman, eds. 1999).

19. *Id.* at 78-79.

20. *Id.* at 78.

21. *Id.* at 79. *See also* Karen Orren & Stephen Skowronek, *Beyond the Iconograph of Order: Notes for a "New Institutionalism,"* *in* THE DYNAMICS OF AMERICAN POLITICS: APPROACHES & INTERPRETATIONS 311, 320 (Lawrence C. Dodd & Calvin Jillson eds., 1994) ("There is no escaping a description of 'the times' in the study of institutions.").

risk: One must be careful not to assume that Justices on the Court in the last 30 years have understood and applied the theory of apolitical administration as Woodrow Wilson and other Progressives did. Progressives tended to understand that theory as one of several necessary implications of an encompassing Hegelian, "living Constitution" theory of the state, while contemporary lawyers and legal academics prefer to ground the theory in more technical and policy-oriented consequentialist claims.

At the same time, there are also useful reasons to take a longer view than institutionalists typically prefer. The main reason is a concern about interpretation. Contemporary separation of powers doctrine is hard to understand on its own terms, in large part because it is reconciling deep tensions between Progressive intentions, a constitutional design arguably inconsistent with those intentions, and pre-Progressive case law demonstrably inconsistent with those intentions. To understand the intentions behind current doctrine, it helps to start with the intentions of leading Progressives, which were quite clear, and then to interpret current doctrine as an attempt to reconcile the Constitution and the case law with those intentions.[22] This interpretive approach may in turn produce other benefits for constitutional scholarship if it bears fruit in subsequent studies of other areas of the Supreme Court's case law. It may contribute to the study of Supreme Court history, for its long view may help put the Rehnquist Court in sensible historical perspective in relation to the most important constitutional developments of the early twentieth century. Separately, the long view may provide useful examples to engage important issues in contemporary normative constitutional theory. The Rehnquist Court has opened up wide-ranging debates about the merits of "original intent" and "living Constitution" approaches to constitutional interpretation.[23] To appreciate the stakes of such debates, it is helpful to go back and find points of contact in theory and the case law between originalist and living-Constitution approaches to interpretation. In separation of powers law, that point of contact lies in the Progressive Era.

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22. I have explored a similar theme in relation to the Commerce Clause in Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after* Lopez *and* Morrison, 11 WM. & MARY BILL RTS J. 483 (2002).

23. *Compare, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266-68 (1991) (proposing a historicist theory of constitutionalism in which the Constitution's meaning changes as a result of transformational "constitutional moments") *with* Scalia, *supra* note 8 (defending originalism).

I. THE PROGRESSIVE ERA, THE NEW DEAL, AND APOLITICAL ADMINISTRATION

A. THE PROGRESSIVE THEORY OF APOLITICAL ADMINISTRATION

Progressive political theory made a huge contribution to twentieth-century political practice by making popular and respected the theory of apolitical administration. This theory filled what leading Progressive academics perceived to be a gap both in American political practice and in the canon of political theory generally. For better or worse, both practice and theory had focused on questions about the ends of government to the exclusion of questions about the means of government. To fill that gap, the Progressives proposed that American governments teach a class of professional experts the tools of social and political control, insulate them from the ruckus of electoral and party politics, and then leave them rationally and efficiently to implement the legislative priorities that emerged from such politics.

The basic critique was sketched out in a seminal 1887 article by Woodrow Wilson—then a political scientist, and later a president of Princeton, Governor of New Jersey, early leader of the Progressive wing of the Democratic Party, and ultimately President of the United States.[24] Wilson ambitiously called "the science of administration . . . a birth of our own century, almost of our own generation"—and at the same time "the latest fruit of that study of the science of politics which was begun some twenty-two hundred years ago."[25] After asking rhetorically where the new science administration could be found, he answered, "Surely not on this side the sea," for "[t]he poisonous atmosphere of city government, the crooked secrets of state administration, the confusion, sinecurism, and corruption ever and again discovered in the bureaux at Washington forbid us to believe that any clear conceptions of what constitutes good administration are as yet very widely current in the United States."[26]

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24. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

This section focuses on the thought of Frank Goodnow, Charles Evans Hughes, and Woodrow Wilson because they were leading figures and they restated principles generally accepted by Progressive academics and statesmen. For a close study of similar themes covering other Progressive thinkers, see Nathan D. Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285 (1950).

25. *Id.* at 198.

26. *Id.* at 201.

Wilson turned away from American practice to the canon of political theory, and here too he noticed a gap. Most political theory to his day, he believed, had focused on questions of ends and regimes—what objects governments should undertake, and which forms of government were best-equipped to attain those objects. This canon had overlooked a different question, namely "how law should be administered with enlightenment, with equity, with speed, and without friction." This question of means, he complained, had been "put aside as 'practical detail' which clerks could arrange after doctors had agreed upon principles."[27]

To remedy this problem, Wilson proposed a science of politics that grafted the administrative successes of European monarchies onto the politics of American democracy. Notwithstanding their other defects, in monarchies, "administration has been organized to subserve the general weal with the simplicity and effectiveness vouchsafed only to the undertakings of a single will."[28] By contrast, notwithstanding their other advantages, in democracies, "which entered upon a season of constitution-making and popular reform before administration had received the impress of liberal principle, administrative improvement has been tardy and half-done."[29] Such a democracy "finds it exceedingly difficult to close out [the constitution-making] business and open for the public a bureau of skilled economical administration."[30] As of his time, democracies had been "more concerned to render government just and moderate than to make it facile, well-ordered, and effective."[31] Wilson acknowledged, tacitly comparing the United States to Prussia, that "[i]t is better to be untrained and free than to be servile and systematic. Still there is no denying that it would be better yet to be both free in spirit and proficient in practice."[32] As a result, Wilson concluded that "we have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments saddled with the habits of a long period of constitution-making."[33]

Wilson and others concluded that the basic solution was to create a science of administration. Administration would take

27. *Id.* at 198-99.
28. *Id.* at 204.
29. *Id.* at 205.
30. *Id.*
31. *Id.* at 206.
32. *Id.* at 207.
33. *Id.* at 206.

legislative priorities as a given, issued by the political, electoral, and legislative processes, and concentrate on achieving those priorities as rationally and efficiently as possible. The trick was to ensure that politics shape only the *ends* of administration—without tainting or interfering with the *means* of administration. As Wilson explained, "[t]he problem is to make public opinion efficient without suffering it to be meddlesome. Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is of course a clumsy nuisance, a rustic handling of delicate machinery. But as superintending the greater forces of formative policy alike in politics and administration, public criticism is altogether safe and beneficent, altogether indispensable."[34] In short, "administration "lies outside the proper sphere of *politics*. . . . Although politics sets the tasks for administration, it should not be suffered to manipulate its offices."[35]

The same themes came out later in the writings of Frank Goodnow, a professor of administrative law at Columbia and the first President of the American Political Science Association, the trade guild for the emerging discipline of political science.[36] Goodnow cited "American experience [as] conclusive" to prove that "in its extreme form [tripartite separation of powers] has been proven to be incapable of application to any concrete political organization."[37] Goodnow believed instead that "political functions group themselves naturally under two heads, which are equally applicable to the mental operations and the actions of self-conscious personalities."[38] In other words, "the action of the state as a political entity consists either in operations necessary to the expression of its will"—that is to say, politics—"or in operations necessary to the execution of its will"—that is to say, administration.[39]

As Goodnow's comments suggest, many leading Progressives deduced the theory of apolitical administration from a more comprehensive "living Constitution" theory of political

34. *Id.* at 215.

35. *Id.* at 210.

36. *See* Dennis J. Mahoney, *A Newer Science of Politics:* The Federalist *and American Political Science in the Progressive Era*, *in* SAVING THE REVOLUTION: *THE FEDERALIST PAPERS* AND THE AMERICAN FOUNDING 250, 252 (Charles R. Kesler ed., 1987).

37. FRANK J. GOODNOW, POLITICS AND ADMINISTRATION 13 (1900) (John A. Rohr intro., 2003).

38. *Id.* at 9.

39. *Id.* at 9.

philosophy. Goodnow distinguished between administration and politics because he likened the state, "abstractly considered," "to an organism," with "a social mind and a social will."[40] Politics provided the will, administration supplied the mind. Similarly, Woodrow Wilson frequently called the American Constitution a "vehicle of life."[41]

In any case, the Progressives drew several specific proposals from their understandings of the living Constitution and the theory of apolitical administration. They sought to reorder enabling statutes and structural constitutional law to recognize the fundamental Progressive distinction between politics and administration. The Progressives had four main proposals. First, to discharge Progressive theory's increased conception of social control, the country needed more administrators. Thus, Woodrow Wilson foresaw in 1887 "a corps of civil servants prepared by special schooled and drilled, after appointment, into a perfected organization."[42] Charles Evans Hughes, Governor of New York, Presidential candidate against Wilson, and Supreme Court Justice, observed: "The equipment of governmental departments or bureaus to aid in the enforcement of the laws has been a marked feature of recent legislation." "[I]n order that the bureau may accomplish the purpose of its creation," he explained, "the necessity of an enlarged force becomes apparent."[43]

Second, the Progressives demanded broader delegations. They expected bureaucratic agencies to assume the responsibility of generating substantive rules of conduct. Statutory law gets outdated quickly in the world of the living Constitution. As Elihu Root, a leading lawyer, U.S. Senator, and Cabinet Secretary to two Republican Presidents, explained, "As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority."[44] Before Progressive agencies like the Interstate Commerce Commission, the Federal Trade Commission, and state public utility agencies, Root noted, "the

40. *Id.* at 8.

41. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 167-68 (1911).

42. Wilson, *supra* note 24, at 216.

43. CHARLES EVANS HUGHES, THE CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT 35 (1910, Arno Press 1974 reprint).

44. ELIHU ROOT, ADDRESSES ON CITIZENSHIP AND GOVERNMENT 535 (1916).

old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."[45] Of course, the Progressives did recognize, as Charles Evans Hughes did, that "in the unchecked discretion of legislatures and administrative officers lie opportunities of tyranny."[46] But as most Progressives did, Hughes judged it better to err on the side of action than inaction. "[T]here is no greater mistake," he warned, "than to withhold the power to do well in the fear of ill."[47]

Third, the Progressives transferred adjudicative functions from courts and executive-branch departments to bureaucrats. The Progressives finessed possible constitutional objections by recognizing a new category of "quasi-judicial" administrative functions. As Frank Goodnow explained, judicial courts were not competent to apply law to facts in situations in which "such performance requires the possession of considerable technical knowledge."[48] Separately, Goodnow regarded many some clearly executive functions as "*quasi*-judicial in character" because they "must be as impartial and free from prejudice as possible,"[49] and require "wide information and varied knowledge," which "must in many instances be acquired by some governmental authority which is reasonably permanent in character."[50]

Last, and most important, the Progressives demanded that the bureaucrats be insulated from politics. For the Progressives, politics and administration were like oil and water. In Goodnow's diagnosis, while "[p]opular government requires that . . . [a]dministration must . . . be subjected to the control of politics,"[51] it threatens to "hinder[] instead of aid[] the spontaneous expression of the public will, and hampers its efficient execution."[52] Goodnow warned that "[p]olitical control over administrative functions is liable . . . to produce inefficient administration in that it makes administrative officers feel that what is demanded of them is not so much work that will improve their own department, as compliance with the behests of the political

45. *Id.* at 535 (1916).
46. HUGHES, *supra* note 43, at 44.
47. *Id.* at 44.
48. GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 37, at 75.
49. *Id.* at 76.
50. *Id.* at 76.
51. FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 7 (1905); *accord* GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 37, at 24.
52. GOODNOW, PRINCIPLES OF ADMINISTRATIVE LAW, *supra* note 51, at 8; *accord* GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 37, at 37, 72.

party."[53] Of course, one might question whether administrators are as independent of party politics as Goodnow seems to have assumed. Nevertheless, if Woodrow Wilson is representative, the Progressives did not think there was a problem. Wilson was positive that administrators could recognize and implement the will American people independent of parties or other parochial interests. He assumed it was possible to establish "a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with the popular thought, by means of elections and public counsel, as to find arbitrariness or class spirit out of the question."[54]

The Progressives assumed that two tools would insulate bureaucrats from the political branches. One consisted of legal protections. To protect administrators from the executive, Goodnow proposed to give agency officers a legal "position reasonably permanent in character and reasonable free from political influence," including "considerable permanence of tenure," similar to judicial tenure.[55] The Progressives also assumed that the bureaucracy would remain as free from Congress as they hoped to make it free from the President. Woodrow Wilson, for instance, scorned the possibility that "those who administer the law . . . shall be in leading strings and shall be reduced to be the mere ministerial agents of a representative assembly."[56]

The Progressives' other tool lay in public opinion. The Progressives hoped to educate public and elite opinion that administration was best kept separate from politics. Hughes proposed to attract the best and brightest to administrative service by "attach[ing] to the office the degree of honour, which is commensurate with the importance of the work to be performed."[57] Similarly, Goodnow hoped to foster a "sound public opinion" toward the bureaucracies. At the end of the day, Goodnow concluded, the security provided by public opinion "is the only protection which can be offered to either the judicial or administrative authorities against the exercise of political influences by bodies . . . in the extra-governmental—political—system."[58]

53. GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 37, at 82-83. *See also* HUGHES, *supra* note 43, at 34, 45-46.
54. Wilson, *supra* note 24, at 217.
55. GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 37, at 86-87.
56. WILSON, *supra* note 41, at 15.
57. HUGHES, *supra* note 43, at 51.
58. GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 37, at 45.

B. NEW DEAL FUNCTIONALISM

Law and public opinion worked together to convert the Progressives' blueprint for apolitical administration into reality. By the late New Deal, the opinions of legal elites and legal academics tracked the Progressives' agenda for administrative government. While this article cannot survey this New Deal transformation in any comprehensive way, the highlights are reasonably clear and have been described by leading historians.[59] To begin with, opinions changed in the law schools. For instance, as recalled by Louis Oberdorfer, one of Byron White's colleagues at Yale Law School, by 1939 the students were learning a Legal Realist catechism that held, among other things:

> 4. Congressmen and legislators are crooks, fools, or both.
>
> 5. The only proper way to allocate resources is to create an administrative agency – staffed by experts – such as former Professor Douglas or former Professor Fortas.[60]

While Oberdorfer (later a federal judge) was almost certainly poking fun at his professors for their zealousness, it is just as clear that he learned the underlying Progressive message.

Separation of powers law also changed in this period. Indeed, most lawyers do not appreciate the extent to which the pre-1900 conception of separation of powers law had receded *before* the famous showdown between President Roosevelt and the Court from 1935 to 1937.[61] The Court had loosened the nondelegation doctrine from 1900 through the early New Deal.[62] In the

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59. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 169-246 (1992).

60. DENNIS J. HUTCHINSON,THE MAN WHO ONCE WAS WHIZZER WHITE : A PORTRAIT OF JUSTICE BYRON R. WHITE 153 (1998) (quoting Judge Louis F. Oberdorfer, "Remarks at the 25th Anniversary of Byron White's Appointment to the Supreme Court, April 25, 1987).

61. This is one of the valuable insights made by G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 94-127 (2002).

62. *See, e.g.*, Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) (rejecting a nondelegation challenge to a radio statute requiring the Federal Radio Commission to "make a fair and equitable allocation of licenses," "as public convenience, interest or necessity requires"); Avent v. United States, 266 U.S. 127 (1924) (upholding a transportation statute to prescribe rules to break emergency rules for railroads when "reasonable" and "in the interest of the public and of commerce"); Buttfield v. Stranahan, 192 U.S. 470 (1904) (rejecting a nondelegation challenge to a law making it illegal "to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness" in relation to standards for the same promulgated by the Secretary of the Treasury).

1932 case *Crowell v. Benson*,[63] the Court legitimized the practice of allowing administrative agencies to conduct arguably Article III adjudications when it upheld against constitutional challenge large portions of a maritime workers'-compensation scheme. In the 1936 case, *Humphrey's Executor v. United States*,[64] the Court upheld against an Article II challenge the constitutionality of FTC commissioners. The Court's decision handed President Roosevelt a significant political defeat, but to do so the Court wrote Frank Goodnow's constitutional theory of separation of powers into the U.S. Reports. The Court upheld the FTC's enabling act on the ground that the FTC's commissioners exercised not "executive power in the constitutional sense," but "quasi-legislative or quasi-judicial powers."[65]

Of course, the New Deal Court also seemed to break with the Progressive blueprint when it endorsed the non-delegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*[66] and then again in *Panama Oil Co. v. Ryan*.[67] *Schechter Poultry* and *Panama Ryan* were the first two cases in which the Supreme Court used the non-delegation doctrine to strike down acts of Congress.[68] But in the context of *Crowell*, *Humphrey's Executor*, and especially the trend in nondelegation law, these two decisions were extreme cases. Both considered challenges to the National Industrial Recovery Act, in which Congress had given the President broad latitude to certify codes of fair competition for a wide range of American industries. Shortly after *Panama Ryan* and *Schechter Poultry*, the Court upheld other New Deal laws as against non-delegation challenges.[69] In light of the deferential cases before and after, *Schechter Poultry* and *Panama Ryan* quickly came to be understood as standing for the proposition that Congress violates the non-delegation doctrine only when it gives the President a blank check over most of the economy in a single legislative act.[70]

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63. 285 U.S. 22 (1932).
64. 295 U.S. 602 (1936).
65. *Id.* at 628-29.
66. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
67. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).
68. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 370 (2002).
69. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944) (upholding a delegation authorizing "fair and equitable" price controls); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding a delegation to issue broadcast licenses when doing so promotes the "public interest, convenience, or necessity").
70. *Accord* GARY LAWSON, TEACHER'S MANUAL TO ACCOMPANY FEDERAL ADMINISTRATIVE LAW 101-02 (3d ed. 2004).

These New Deal cases laid the basis for a new, non-originalist narrative in separation of powers law. This narrative now goes by the name of "functionalism." To avoid confusing this specific narrative with the general category of functionalist interpretive theory, this article will refer to the narrative as "New Deal functionalism."[71] New Deal functionalism differed from the Progressive theory of apolitical administration in at least two respects. It did not appeal to overarching ideas about a "living Constitution" as the central idea from which specific separation of powers prescriptions emanated. In addition, it did not attack head-on pre-1900 understandings of separation of powers, as Frank Goodnow had when he concluded that tripartite separation of powers "has been proven to be incapable of application to any concrete political organization,"[72] or as Woodrow Wilson had when he complained that the Framers had had "no clear analysis of the matter in their own thoughts" when they wrote the Constitution to implement Montequieu's ideas about separation of powers.[73] Rather, New Deal functionalism respected tripartite separation of powers in broad form and then made the law significantly more deferential and pro-administration in the details. It converted separation of powers law from a fairly rulebound exercise into a process of balancing competing interests. The balance weighed interests depending on how well they accorded with the Progressive theory of apolitical administration.

The transition is apparent in James Landis's 1938 book, *The Administrative Process*, an influential attempt by a leading academic to articulate the constitutional case for administrative agencies. Like the Progressives, Landis assumed that the object of constitutional interpretation was "to adapt governmental technique . . . to modern needs."[74] Like the Progressives, Landis also attributed the adaptation in the early twentieth century to such factors as "the growing interdependence of individuals," "[t]he rise of industrialism and the rise of democracy."[75] Like the Progressives, Landis insisted that courts ought to defer to this

71. For one useful restatement of general functionalist tenets, see Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 229-35. For a more comprehensive defense of functionalism in separation of powers, see Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

72. GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 37, at 13.

73. WILSON, *supra* note 41, at 55.

74. JAMES LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938).

75. *Id.* at 7.

transformation out of a recognition of the "inadequacy of the judicial . . . process[]."[76] Unlike the Progressives, however, Landis did not deduce any of these prescriptions from a living Constitution or an organic national will.[77] Each prescription was a practical, technical, and superficially apolitical response to the exigencies of regulating a national economy in an encompassing national democracy.

II. POLITICS AND ADMINISTRATION ON THE BURGER AND REHNQUIST COURTS

A. *BUCKLEY*: COOPTING ORIGINAL-INTENT FORMALISM

By the 1970s, this combination of Progressive ends and New Deal methodological means became widely accepted among most Justices, academics, and other leading public lawyers. New Deal functionalist methodology kept the Supreme Court's separation of powers law in accord with Progressive ends after the New Deal. For instance, in the 1958 case *Wiener v. United States*, the Court restated *Humphrey's Executor* to allow the President to fire "core" executive officers at will, but also to allow Congress to shield "administrative" or "quasi-judicial" executive officers from removal.[78] The Supreme Court bucked the functionalist trend on occasion. In the 1952 decision *Youngstown v. Sawyer*, for example, the Court declared illegal an attempt by President Truman to seize U.S. steel mills under his powers as commander in chief without any specific statutory authorization.[79] Like *Panama Oil* and *Schechter Poultry*, however, *Youngstown v. Sawyer* could be read narrowly, for the proposition that the Court would invoke originalist separation of powers ideas only when necessary to stop the President from governing the entire U.S. economy without congressional supervision.

However, in the 1970s, two important conditions changed: Activist conservative courts no longer represented a major threat to the Progressive blueprint for apolitical administration, and Congress became a threat in its own right. To appreciate

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76. *Id.* at 46.

77. *See* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Legal Fundamentalism*, 107 HARV. L. REV. 32, 56 (1993) (expressing surprise that "the progressive elaboration of a theory of a changing constitution . . . ground to a halt after 1937").

78. 357 U.S. 349 (1958).

79. 343 U.S. 579 (1952). I thank Joel Goldstein for convincing me to consider *Youngstown v. Sawyer*.

that new threat, consider the law challenged in the 1976 decision *Buckley v. Valeo*.[80] *Buckley* challenged the composition of the Federal Election Commission. Four of the eight officers were appointed by the leaders of the House and Senate, and the Secretary of the Senate and the Clerk of the House held two more seats *ex officio*.[81] Politically, the FEC scheme represented an important precedent against the separation of politics and administration. The FEC enjoyed the full panoply of powers traditionally enjoyed by administrative agencies—the powers to make legislative rules, prosecute violations of its organic statute and rules, and adjudicate those prosecutions, subject to limited judicial review.[82] If Congress could appoint the FEC's officers, there was no principled reason why Congress could not assume the power to appoint every other agency's officers.

The FEC Act forced the Court to make a choice between political ends and interpretive means. One easy way to invalidate the Act was to revive originalist principles of interpretation in separation of powers law. But the Court could not do so without reopening the many questions about judicial activism and judicial review that the New Deal had settled. On the other hand, if the Court applied New Deal functionalism, it would have been extremely difficult for the Court to invalidate a law in which Congress was asserting its political will over an administrative agency.

The Court sided with Progressive government theory. In *Buckley*, the Court invalidated the FEC Act by resuscitating originalism—or, as the rest of this Article will describe it, "original intent formalism." This approach is "formalistic" because, as Thomas Merrill explains, it "insists that the structural provisions of the Constitution establish a set of rules—an 'instruction manual'—that must be followed whatever the consequences."[83] This formalism is an "original-intent" formalism because the original meaning of the Constitution supplies the instructions in that so-called manual. In *Buckley*, the Court appealed to original meaning by insisting that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Phila-

80. 424 U.S. 1 (1976).
81. *See Buckley*, 424 U.S. at 113.
82. *See Buckley*, 424 U.S. at 111-112.
83. Merrill, *supra* note 71, at 230 (quoting Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON L. REV. 21, 22 (1988)).

delphia in the summer of 1787."[84] Read formalistically, since the appointments clause specifically authorizes only the President, the heads of departments, and the courts of law to appoint officers, it implicitly withholds that power from Congress.[85] The Court acknowledged that Congress might have "had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the act," but it formalistically insisted that any such reasons "do not by themselves warrant a distortion of the Framers' work."[86]

As these quotations suggest, at a superficial level *Buckley*'s holding seems not to rely on policy at all. Below the surface, however, the decision relies heavily on Progressive norms about apolitical expertise. *Buckley*'s holding created tensions with such separation of powers precedents as *Crowell* and *Humphrey's Executor*. Again, the FEC's commissioners exercised standard agency rulemaking, enforcement, and adjudicative powers. Since the Court expressed keen interest in what the Framers had said about the appointments clause issue, perhaps the Court might also have considered what the Framers had said about modern administrators. Publius, after all, had assumed in passing that the notion of independent, non-partisan administration was a "political heresy."[87] He declared emphatically that the combination of government functions in one officer is "the very definition of tyranny."[88] The Court did not appeal to Publius's authority on these points, however. The Court held that the FEC's rulemaking, prosecutorial, and adjudicative powers were innocuous, "of kinds usually performed by independent regulatory agencies."[89] Such powers, the Court suggested, were best "exercised free from day-to-day supervision of either Congress or the Executive Branch," and "essential to effective and impartial administration of the entire substantive framework of the Act."[90]

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84. *Buckley*, 424 U.S. at 124.
85. *See* U.S. CONST. art. II, § 2; *Buckley*, 424 U.S. at 125-26.
86. *Buckley*, 424 U.S. at 134.
87. *See* THE FEDERALIST NO. 68, at 379, 382 (Madison) (Clinton Rossiter ed. & Charles R. Kesler intro., 1999); *see also* Charles R. Kesler, *Separation of Powers and the Administrative State*, *in* THE IMPERIAL CONGRESS 20, 23-31 (Gordon Jones & John Marini eds., 1989).
88. THE FEDERALIST NO. 47, *supra* note 87, at 268, 269 (Madison).
89. *Buckley*, 424 U.S. at 140-41.
90. *Buckley*, 424 U.S. at 140-41.

B. PROGRESSIVE THEORY AND ARTICLE III

Buckley's distinction gradually hardened throughout the rest of the Burger Court and the early years of the Rehnquist Court. It surfaced next in a series of cases about the relationship between Article III courts and administrative agencies. A Court plurality embraced original-intent formalism in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[91] In *Northern Pipeline*, the Court invalidated provisions of the Bankruptcy Act of 1978 that vested the power to hear bankruptcy cases and related state lawsuits in bankruptcy courts staffed by judges who lacked Article III tenure or salary guarantees.[92] *Northern Pipeline* did not directly threaten the Progressive blueprint of apolitical administration. The bankruptcy provisions at issue threatened the Article III judiciary's integrity, because they transferred arguably Article III business to non-Article III judges.[93] Even so, *Northern Pipeline* threatened to upset that Progressive blueprint indirectly. If the Court had applied the plurality's rule of decision to any scheme providing for administrative adjudication, it would have needed to discredit *Crowell* and declare the scheme unconstitutional.

The Court thus hastened to limit *Northern Pipeline* in subsequent cases involving agency adjudication. In *Thomas v. Union Carbide*,[94] the Court considered a challenge to a law authorizing the EPA to order binding arbitration in proceedings meant to compensate pesticide makers for compelled disclosure of their trade secrets.[95] Writing for the Court, Justice O'Connor declined to strike the scheme down. If the Court invalidated the arbitration scheme, she worried, "the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt."[96]

Justice O'Connor reaffirmed New Deal functionalism in *CFTC v. Schor*.[97] In *Schor*, the Court upheld a scheme authorizing Commodities Futures Trading Corporation administrative

91. 458 U.S. 50 (1982) (plurality opinion of Brennan, J.).
92. *See Northern Pipeline*, 458 U.S. at 53-54 (plurality opinion of Brennan, J.)
93. *Northern Pipeline*, 458 U.S. at 60 (plurality opinion of Brennan, J.).
94. 473 U.S. 568 (1985).
95. *Thomas*, 473 U.S. at 573.
96. *Thomas*, 473 U.S. at 587. Chief Justice Burger and Justices White, Rehnquist, and Powell joined O'Connor in *Thomas*. Justice Stevens concurred separately to decide the case on a waiver issue; Justices Brennan, Blackmun, and Marshall concurred separately to distinguish the case more narrowly from *Northern Pipeline*.
97. 478 U.S. 833 (1986).

law judges ("ALJs") to adjudicate suits and state-law counterclaims arising from the violation of Commodities Exchange Act regulations. Writing for the Court, Justice O'Connor framed Schor's Article III challenge as a balance of competing policy interests. O'Connor then gave the competing interests the weights specified in Progressive political theory. She deferred heavily to the purpose of the law, "to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA."[98] She placed great weight on avoiding the possibility that the Court might "unduly constrict Congress' ability to take needed and innovative action."[99] On the other side, O'Connor did not worry that the Commission's ALJs might be more political than juries and state and Article III courts. She took at face value a claim in a congressional report that "the CFTC was relatively immune from political pressure and [had] obvious expertise."[100]

C. PROGRESSIVE THEORY IN ARTICLE I

The formalist revival erupted next in Article I. The 1983 case of *INS v. Chadha*[101] challenged a "legislative veto" provision. The Immigration and Naturalization Act gave the Attorney General power to suspend the deportations of aliens not lawfully in the United States if the aliens satisfied certain criteria, but it also reserved to each house of Congress the power to reverse such suspensions and thereby to reinstate the deportations.[102] Like the appointments scheme challenged in *Buckley*, the legislative veto directly threatened the ideal of apolitical administration. Policymaking was apolitical as long as Congress delegated regulatory powers to agencies and then left the agency to make the final decision. Policymaking became political, however, if Congress kept a veto hanging over the agency's decision.

Nevertheless, the Court declared the legislative veto unconstitutional because it threatened the ideal of apolitical administration. A solid majority of the Court embraced an original-intent formalist analysis.[103] Writing for the Court, Chief Justice

98. *Id.* at 855.
99. *Schor*, 478 U.S. at 851.
100. *Id.* at 855-56 (citing H.R. Rep. No. 93-975, pp. 44, 70 (1974)).
101. 462 U.S. 919 (1983).
102. *Chadha*, 462 U.S. at 924-25.
103. Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor joined Chief Justice Burger's opinion for the Court. Justice Powell concurred separately to decide the case on Article III grounds. *See id.* at 959 (Powell, J., concurring). Justice White dis-

Burger reasoned that the veto of an agency action counted as an exercise of "legislative Power" under Article I. This legislative act, however, was not endorsed by the President or both Houses of Congress, as required by the presentment and bicameralism clauses.[104] Chief Justice Burger brushed aside functionalist policy arguments for the veto: "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[105] As had the *per curiam* Court opinion in *Buckley*, Burger's majority opinion in *Chadha* stressed what one Framer had called the "'danger of a Legislative despotism.'"[106] Burger cited *The Federalist* for the principle that bicameralism and presentment "establish[] a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good."[107] *Chadha* was especially telling because the legislative veto was not a constitutional novelty. As the Court noted, as of 1983 Congress had inserted nearly 300 legislative-veto provisions into administrative statutes, many during the New Deal.[108] If the Court's separation of powers law had been motivated by the intention not to disturb administrative institutions with a solid pedigree in history and practice, the Court should have upheld the legislative veto.

Chadha could plausibly have been read to signal that the Court would embrace formalism and broadly throughout separation of powers law. The simplest way to test this view was to ask whether the Court would start applying the interpretive approach of *Chadha*, a formalist Article I case, to the main Article I doctrine, the nondelegation doctrine. Tellingly, *Chadha* itself

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sented on New Deal functionalist grounds, arguing that the legislative veto represented a sound response to the problems created by broad administrative delegations. *See id.* at 967 (White, J., dissenting). Justice Rehnquist (joined by Justice White) agreed with the Court's analysis of the legislative veto but concluded it required the Court to declare not only the veto but the entire deportation scheme unconstitutional. *See id.* at 1013 (Rehnquist, J., dissenting).

104. *See* U.S. CONST. art. I, § 7; *Chadha*, 462 U.S. at 951-59.

105. *Chadha*, 462 U.S. at 944.

106. *Id.* at 949 (quoting 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254 (quoting James Wilson)); *see also id.* at 949-50 (quoting Alexander Hamilton in THE FEDERALIST NO. 22 and Joseph Story in COMMENTARIES ON THE CONSTITUTION).

107. *Id.* at 948 (quoting THE FEDERALIST NO. 73, at 458 (Hamilton)).

108. *See Chadha*, 462 U.S. at 944-45 (quoting James Abouresk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977), and citing Justice White's list of the acts implicated in *Chadha*, 462 U.S. at 1003-13 (White, J., dissenting)).

discouraged this approach—on the authority of the Progressive theory of apolitical administration. In *Chadha*, Congress had made a plausible nondelegation argument in its brief. By the Court's own formalistic definition of "legislative power," Congress argued, the power to suspend deportations was just as "legislative" as the power to veto the suspension. If the Court were set on formalism, it would need to explain why the Attorney General, an executive officer, could exercise legislative power without raising nondelegation problems. Not so, held the Court. *That* question raised "only a question of delegation doctrine," and "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto."[109]

As the evidence rolled in after *Chadha*, it became clear that the Court still subscribed to the New Deal's functionalist rendition of nondelegation doctrine. The clearest sign of the trend came in the 1989 decision *Mistretta v. United States*,[110] which upheld the U.S. Sentencing Commission's powers to promulgate legislative formulas for federal district courts to follow in criminal sentencings. Unlike the legislative veto, the Sentencing Commission was a constitutional novelty in an important respect. The standard-issue administrative agency makes legislative rules on behalf of or in place of the President; the Sentencing Commission promulgates such rules for Article III courts. That difference made the Commission enough of a constitutional sport for the Court to attack the Commission if it so desired. Nevertheless, in the Court's mind, Congress's delegation to the Commission raised essentially the same policy issues as any other delegation to any other agency.[111] Thus, in a majority opinion joined by everyone except Justice Scalia, Justice Blackmun restated nondelegation doctrine in classic New Deal functionalist terms. Blackmun distinguished *Chadha* on legislative-usurpation grounds, recognizing that Congress may not "exercise the responsibilities of other Branches or . . . reassign powers vested by the Constitution."[112] In all other cases, however, *Mistretta* signaled that courts should uphold delegations as long as "Congress

109. *Chadha*, 462 U.S. at 953-54 n.16.

110. 488 U.S. 361 (1989).

111. *See id.* at 371 (calling the Commission "an independent Sentencing Commission"). I am grateful to John Duffy for insisting that I highlight the contrast between the legislative veto in *Chadha* and the Sentencing Commssion in *Mistretta*.

112. *Mistretta*, 488 U.S. at 382.

clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[113]

As Justice O'Connor had in *Thomas* and *Schor*, Justice Blackmun balanced the competing policy interests in *Mistretta* with Progressive eyes and thumbs. Since *Chadha* had cited *The Federalist Papers* as controlling authority, perhaps *Mistretta* could have taken judicial notice that Publius had defined "law" as "a rule of action" and asked rhetorically, "how can that be a rule, which is little known, and less fixed?"[114] In *Mistretta*, however, Justice Blackmun cited Progressive policy arguments as authoritative. The nondelegation doctrine, he explained, "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[115] Since the Commission gave the judiciary power over both rulemaking and rule application in sentencing, perhaps Justice Blackmun could have considered Publius's and Montesquieu's warning that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[116] Justice Blackmun declined, stating that the Court has often "upheld statutory provisions that to some extent commingle the functions of the Branches."[117]

D. PROGRESSIVE THEORY AND ARTICLE II

The Burger and early Rehnquist Courts also applied New Deal functionalism and original-intent formalism selectively in Article II removal cases. Removal law had settled in a function-

113. *Id.* at 372-73. Justice Scalia dissented on the formalist ground that the Sentencing Guidelines scheme unconstitutionally authorized judicial officials to make legislative rules outside of the course of exercising their Article III "judicial power" to decide cases. *See id.* at 416-26 (Scalia, J., dissenting). However, Scalia did reject Mistretta's nondelegation challenge. Scalia disagreed with the majority because he thought there does exist a non-delegation doctrine, but he thought it a doctrine "not readily enforceable by the courts." *Id.* at 415 (Scalia, J., dissenting). Scalia's opinion is revealing because it shows that he is sometimes more attached to a functionalist theory of judicial minimalism than he is to original-intent interpretation. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). These tensions go beyond the scope of this article; I have explored them in relation to Scalia's takings jurisprudence in Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 220-29 (2004).

114. THE FEDERALIST No. 62, *supra* note 87, at 344, 349 (Madison).

115. *Id.* at 372.

116. THE FEDERALIST NO. 47, *supra* note 87, at 270 (Madison) (internal quotations omitted).

117. *Id.*

alist pattern after *Humphrey's Executor* in 1935 and *Wiener* in 1958, but the Burger Court unsettled it in *Bowsher v. Synar*.[118] The Balanced Budget and Emergency Deficit Control Act assigned the removal power to Congress, not the President. The relevant provisions required the Comptroller General to determine whether the federal budget deficit exceeded statutory targets and what budget cuts would reduce the deficit beneath the target. The Comptroller General's determinations triggered automatic sequestrations unless Congress made equivalent spending cuts.[119] Unlike the agency officers at issue in *Humphrey's Executor* and *Wiener*, the Comptroller is removable by a joint resolution of Congress.[120] Although the Comptroller does have "good cause" protections similar to those protecting agency commissioners and administrators,[121] the Court pointedly noted that Congress was not willing to concede during the *Bowsher* litigation that these good-cause provisions were enforceable in an Article III court.[122] The most important feature of the Act was that *Congress*, and not the President, was exercising the removal power.

The Balanced Budget Act created a threatening precedent for apolitical administration. While the Comptroller General is not an ordinary administrator, the Comptroller's responsibility to prepare binding budget estimates was executive, like the prosecutorial and adjudicative functions of many agencies.[123] If Congress could constitutionally arrogate the power to fire the Comptroller, it could cite the Balanced Budget Act as precedent for rewriting many agency enabling statutes to assume for itself the power to fire agency officers.

The Court thus switched to original-intent formalism. (*Bowsher* was particularly ironic because it was handed down on the same day as the very functionalist *Schor* decision, discussed above in part II.C.[124]) Writing for the Court, Chief Justice Burger invalidated the challenged provisions of the Balanced Budget Act on formalist grounds. "Congressional control over

118. 478 U.S. 714 (1986).
119. *Bowsher*, 478 U.S. at 718.
120. *See id.* 478 U.S. at 728.
121. *See id.* (citing 31 U.S.C. § 703(e)(1)(B)).
122. *Id.*
123. *Bowsher*, 478 U.S. at 732-34.
124. July 7, 1986. *Compare id.* at 714 *with* CFTC v. Schor, 478 U.S. 833 (1986). Chief Justice Burger and Justices Powell, O'Connor, and Rehnquist joined both majority opinions, and Justice Stevens joined the Court's functionalist opinion in *Schor* and wrote a separate formalist concurrence in *Bowsher*.

the execution of the laws," the Burger insisted, "is constitutionally impermissible."[125] The Court also appealed to original intent. It quoted the warning from Publius and Montesquieu that it would disregard a few years later in *Mistretta*, that "'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'"[126] Because this overriding threat to liberty was coming from Congress rather than from an agency, the Court applied the standard formalist syllogism: Congress's control over the tenure of the Comptroller General made the Comptroller a legislative official; the Comptroller's balanced-budget responsibilities were executive; and therefore, because the official was not performing the functions of his branch, the relevant portions of the Act violated the separation of powers.[127]

The Court reversed course and limited *Bowsher*'s reach a few years later in *Morrison v. Olson*.[128] *Morrison* rejected a challenge to the provisions of the Ethics in Government Act establishing the Office of Independent Counsel, which protected independent counsels from removal except for good cause.[129] *Morrison*, however, was not a test case of the Progressive theory of apolitical administration. The Independent Counsel's prosecutorial powers were clearly "core executive" powers, not administrative, "quasi-judicial" powers. Perhaps the Court was motivated by concerns similar to the concerns that motivated *Panama Oil*, *Schechter Poultry*, and *Youngstown v. Sawyer*: here, a desire that no future President hold himself above the law as President Nixon had when he fired the special counsel investigating Watergate.[130] Perhaps, as Michael Rappaport speculates, *Morrison* was decided as it was "because elite liberal opinion and some of the general public regarded the independent counsel as essential to good government."[131] Even so, *Morrison* con-

125. *Bowsher*, 478 U.S. at 726-27.

126. *Bowsher*, 478 U.S. at 722.

127. *See Bowsher*, 478 U.S. at 727-34. Chief Justice Burger wrote the Court opinion for himself and Justices Brennan, Powell, Rehnquist, and O'Connor. Justices Stevens and Marshall concurred separately to decide the case on a different formalist ground, that the Comptroller General could not rescind funds without Congress's following the bicameralism and presentment clauses. *See id.* at 736 (Stevens, J., concurring). Justices White, *see id.* at 759 (White, J., dissenting), and Blackmun, *see id.* at 776 (Blackmun, J., dissenting) dissented separately to uphold the balanced-budget act on New Deal functionalist grounds.

128. 487 U.S. 654 (1988).

129. *See id.* at 663-64 (citing 28 U.S.C. 596).

130. *Cf.* United States v. Nixon, 418 U.S. 683 (1974).

131. Michael B. Rappaport, *It's the O'Connor Court: A Brief Discussion of Some Critiques of the Rehnquist Court and Their Implications for Administrative Law*, 99 NW.

firmed what *Bowsher* had already made apparent, that a broad bloc on the Court was alternating between formalist and functionalist methodologies for substantive reasons.

E. PROGRESSIVE THEORY ON THE REHNQUIST COURT

By 1989, after *Morrison* and *Mistretta*, it was clear that a substantial majority on the Court had channeled the formalist revival to apply mainly when Congress threatened to exert political control over administrative agencies. The Rehnquist Court's separation of powers cases have followed this pattern since *Morrison* and *Mistretta*, especially in the few cases that touch on the Progressive norm of apolitical administration. Most of these cases are nondelegation opinions, all of which follow the New Deal functionalist pattern.[132] The most recent, *Whitman v. American Trucking Association*,[133] confirms that *Mistretta* is still the dominant nondelegation case of the last twenty years.[134]

The Rehnquist Court has decided other separation of powers cases that do not directly relate to the Progressive theory of apolitical administration. In *Clinton v. New York*,[135] the Court invalidated provisions of the Line Item Veto Act giving the President the power to use his judgment to cancel enacted spending appropriations. *Clinton* is a hard case to classify, because it forced Justices to decide between two competing attachments. The Court majority probably decided the case in the same vein as *Panama Oil*, *Schechter Poultry*,[136] and *Youngstown Sheet & Tube Co. v. Sawyer*.[137] As those cases used originalist non-delegation law to stop the President from exercising untrammeled power over the entire U.S. economy, perhaps *Clinton v. New York* used them to stop the President from exercising untrammeled power over the entire U.S. federal budget. Justices Scalia, O'Connor, and Breyer dissented in *Clinton*, on the ground that the Court's holding threatened to resuscitate the non-delegation doctrine.[138] Breyer and O'Connor probably voted

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U. L. REV. 369, 381 (2004).

132. *See* Loving v. United States, 517 U.S. 748 (1996); Touby v. United States, 500 U.S. 160 (1991); Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989).

133. 531 U.S. 457 (2001). Justice Thomas concurred in *Whitman* to signal his interest in reconsidering whether the Court's nondelegation doctrine is correct, but no one else joined this original-intent concurrence.

134. Consider Gary Lawson's interpretation of the case, *supra* note 68, at 328-29.

135. 524 U.S. 417 (1998).

136. *See supra* notes 66-67 and accompanying text.

137. 343 U.S. 579 (1952).

138. **Cite Clinton** Steven Calabresi and Michael Rappaport agree with Breyer,

as they did because they support wide delegations on Progressive and functionalist grounds; Scalia voted with them because he opposes judge-made all-the-circumstances tests and the non-delegation doctrine requires such a test.[139]

Separately, in *Plaut v. Spendthrift Farm*, a six-vote majority of the Rehnquist Court struck down a federal securities law that required the federal courts to reopen final judgments entered before the law's enactment and to apply new and retroactive rules to the reopened cases.[140] *Plaut* falls in the same line as the reasoning of the *Northern Pipeline* plurality: Both used formalism to stop Congress from threatening what every Justice except Justice Stevens agreed was a threat to the autonomy and long-range interests of the Article III courts.

The Rehnquist Court has handed down several opinions in appointments clause cases. One is clearly formalist,[141] while three opinions are hard to classify as formalist or functionalist.[142] These decisions, however, are all rather peripheral in relation to the themes considered in this article. None challenged the constitutional status of an administrative law judge who has not been appointed directly by the President, an agency head, or a court. When such a challenge arises, the judge in question may lose his job under *Buckley*. If *Buckley* controls, that unlucky administrative job will lose his job.[143] But then again, if the Court follows its track record over the last 30 years, surely it will limit *Buckley* as *Thomas* limited *Northern Pipeline*, non-delegation cases have limited *Chadha*, and *Morrison* limited *Bowsher*.[144]

O'Connor, and Scalia that *Clinton* raises important non-delegation questions—they are enthusiastic about the decision for that reason. *See* Steven G. Calabresi, *Separation of Powers and the Centrality of* Clinton v. City of New York, 99 NW. U. L. REV. 77 (2004), and Michael Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265 (2001).

139. *See supra* note 113.

140. 514 U.S. 211 (1995).

141. *See* Edmond v. United States, 520 U.S. 651 (1997) (using a bright-line formalist test to hold military judges on the Coast Guard Court of Criminal Appeals to be inferior officers within the meaning of the Appointments Clause).

142. *See* Weiss v. United States, 510 U.S. 163 (1994) (holding that commissioned military officers do not need to be re-appointed consistent with the Appointments Clause to serve as military trial judges); Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) (holding the Chief Judge of the Tax Court to be a "Court of Law" competent to appoint inferior officers under the Appointments Clause); Morrison v. Olson, 487 U.S. 654 (1988) (holding the independent counsel to be an inferior officer and not a principal officer within the meaning of the Appointments Clause).

143. *See supra* part II.B.

144. The D.C. Circuit anticipated the suggestion in text in Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000), when it upheld the constitutionality of an FDIC ALJ appointment

The last Rehnquist Court separation of powers case, however, confirms that a broad bloc on the Rehnquist Court continues to rely on Progressive theory to decide the separation of powers cases that directly threaten administrative agencies.[145] In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, Congress established a review board, composed of members of Congress, to oversee the commission that supervised Dulles and National Airports near Washington, D.C. This commission was composed of federal, state, and District of Columbia officials, but the Court likened it to an ordinary federal agency. In his opinion for the Court, Justice Stevens called it a "non-political, independent authority."[146] The enabling statute allowed Congressmen sit in review and management of the airport commission's functions.[147]

Stevens relied on Progressive administrative theory more explicitly than any other case considered thus far. Stevens chose to apply original-intent formalism precisely because the MWAA scheme threatened to compromise agency autonomy. He offered an example: If the act under challenge were not invalidated, he worried, it would "enable [Congress] or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy."[148] To prevent this possibility, Stevens applied *Chadha* and *Bowsher* in the alternative. If the review board's functions were legislative, its structure violated *Chadha* because the board did not follow bicameralism and presentment; if those functions were executive, the board's structure violated *Bowsher* because members of Congress could not perform executive functions. Justice Stevens thus used original-intent formalism to stop an act from "provid[ing] a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role."[149]

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by construing *Buckley*'s test for distinguishing between "officers" and "employees" so narrowly that the ALJ was a mere employee, outside the coverage of the appointments clause.

145. 501 U.S. 252, 257, 260-61 (1991).

146. *See id.* at 274-76.

147. Id. at 275.

148. *Id.* at 277.

149. *Id.* Justice Stevens wrote the Court opinion for himself and Justices Blackmun, O'Connor, Scalia, Kennedy, and Souter. Justice White, Chief Justice Rehnquist, and Justice Marshall dissented on New Deal functionalist grounds.

III. ALTERNATE EXPLANATIONS OF SEPARATION OF POWERS LAW ON THE BURGER AND REHNQUIST COURTS

This account may not explain the specific beliefs and behavior of every Justice on the Court, and it may not explain stray cases like *Clinton v. City of New York* or *Plaut v. Spendthrift Farm*. All the same, it does explain how the late Burger Court and the Rehnquist Court have behaved as groups. In addition, different Justices could have seen the issues differently and still contributed to the same overarching pattern. If one judges Chief Justice Burger by his opinions in *Chadha* and *Bowsher*, he seemed to believe there was no contradiction whatsoever between the Court's New Deal functionalist and its original-intent formalist cases.[150] If one parses Justice Stevens' Court opinion in *Washington Airports*, he seems quite aware he is using original-intent formalism to dispose of the law while he is using Progressive ideas about administration to settle the merits. At the other extreme, it is reported that then-Justice Rehnquist authored the separation of powers sections of the Court's *per curiam* opinion in *Buckley*.[151] While an Associate Justice, Rehnquist wrote other opinions unusually sympathetic to original-intent formalism.[152] Perhaps Rehnquist did not take Progressive ideas about apolitical administration as seriously as his colleagues. Perhaps he used them in *Buckley* to convince his colleagues to join an otherwise strikingly formalist and novel opinion, and bowed to the inevitable later as Chief Justice, when it became clear that no one except Justice Scalia was interested in applying original-intent formalism on a consistent basis. Yet even if different Justices took different views about the Progressive theory of apolitical administration, all behaved as if this theory commanded the respect of most of the Justices on the Court.

When it applies, this indirect Progressive connection may provide the most accurate description and predictor of the Supreme Court's separation of powers decisions to date. One al-

150. Justice Kennedy's Court opinion in *Loving v. United States* suggests he may view separation of powers as harmoniously as Chief Justice Burger did. *See* 517 U.S. 748, 757-58 (1996) (declaring, in a nondelegation case doing nothing to reconsider the deference in the Court's nondelegation law, "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.").

151. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 396 (1979)

152. For example, Rehnquist proposed to revitalize the nondelegation doctrine in a concurring opinion in Indus. Union Dep't, AFL-CIO v. Amer. Petroleum Inst., 448 U.S. 607 (1980).

ternative, suggested most prominently by Thomas Merrill, holds that the Court has pursued a program of judicial restraint. While Merrill proposed this thesis as an inductive, *post hoc* rationalization of the Court's work and disclaimed any intention to propose it as a positive explanation, it still deserves consideration as a positive explanation.[153] According to this explanation, moderate or conservative Justices may feel a tension between originalism and judicial restraint. While they may be sympathetic to originalism generally, they prefer not to use originalism to invalidate acts of Congress unless the constitutional provisions at issue are unmistakably clear.[154] This explanation certainly comports with what we know about many of the Justices in the controlling bloc—at a minimum, Stewart, Burger, Blackmun, Powell, Rehnquist, Stevens, O'Connor, and Kennedy. During the relevant time frame, these Justices tended to be soft originalists, comfortable conducting aggressive judicial review only when constitutional text gave them a bright-line constitutional test.[155]

At the same time, this originalist/judicial-restraint explanation cannot explain all of the features of the controlling bloc's behavior. When laws threatened the idea of apolitical administration, these Justices were much more activist than the judicial-restraint hypothesis suggests. In particular, these Justices were willing to enforce in quite activist fashion Article I, II, and III's vesting clauses, which are quite open-ended and indeterminate as constitutional clauses go[156]—even if they would have shied away from enforcing the same language in nondelegation cases and other cases reinforcing the apolitical administrative model. *Chadha* illustrates. The majority decided the case under the rather specific bicameralism and presentment clauses. To do so, however, the Court first needed to find that the legislative veto was an exercise of legislative power. Chief Justice Burger shoehorned the power to suspend the deportation of aliens into the

153. *See* Merrill, *supra* note 71, at 228.

154. *See id.* at 250. I am grateful to Joel Goldstein for persuading me to consider this possibility.

155. *See* Young, *supra* note 2 at 625-42.

156. For example, Adrian Vermeule and Eric Posner have made a not-implausible argument that the term "legislative power" in Article I's vesting clause sanctions any grant of statutory authority from Congress to the President. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). Original-meaning scholars have contested this view. *See* Lawson, *supra* note 68; Larry Alexander & Saikrishna Prakash, *Reports of the Non-delegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003). Even so, Vermeule and Posner's interpretation is hard to refute if one starts with a presumption against constraining constitutional clauses broadly absent clear proof to the contrary.

"legislative Power" when exercised by Congress—even though he called the same power "executive" when exercised by the Attorney General.[157] (For good measure, Justice Powell concurred separately to shoehorn the veto into the open-ended judiciary vesting clause, on the ground that the reversal of the Attorney General's suspension was inherently "judicial."[158]) In short, Progressive ideas about apolitical administration seem to have encouraged Justices to be confident enough to be activist when constitutional text could not.

Another alternative explanation holds that the Court shifts between methodologies to divide government and protect individual freedom. Thomas Merrill and Elizabeth Magill have considered this possibility (although, as with the previous possibility, both raise it conceptually and normatively but not descriptively).[159] In a recent article, Magill argues that "differing approaches" to separation of powers law all "serve the same overarching goal: cabining the exercise of state power by fragmenting that power among three distinct and potent branches of government."[160] It would not be surprising if the Justices in the controlling bloc cite diffusion-of-powers concerns, but these concerns cannot justify the Court's track record by themselves. The Justices in this bloc worry about diffusion of power when Congress threatens to exercise several powers at once, but not when bureaucrats pose a similar threat. This insight also explains why the Court tries to reconcile New Deal functionalism and original-intent formalism on the ground that the latter applies only when Congress "usurps" or "aggrandizes" the prerogatives of the agencies and the other branches of the government.[161] Congressional aggrandizement is especially dangerous because, from the Progressives' point of view, it is the "political" branch *par excellence.*

Others might question whether Progressive ideas are too far out of vogue for judges and lawyers to take them seriously 80 years later. Elizabeth Magill has criticized this article's interpretation on that ground. The "serious skepticism of agency decisionmaking that is now reflected in administrative law doc-

157. INS v. Chadha, 462 U.S. 919, 952, 953 n.16 (1989).

158. *See id.* at 964 (Powell, J., concurring in the judgment).

159. *See* Merrill, *supra* note 71, at 228, 251.

160. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PENN. L. REV. 603, 607-08 (2001).

161. *See, e.g.*, United States v. Morrison, 487 U.S. 654 (1988); CFTC v. Schor, 478 U.S. 833 (1986).

trines," she argues, makes it implausible to think that courts subscribe to Progressive ideas about administration in their constitutional docket.[162] Magill refers here to the requirements of notice-and-comment rulemaking, which force regulators to be transparent about the choices they make when they promulgate legislative rules,[163] and the "hard look" doctrine, which forces agencies to identify sensitive legislative policy judgments they make.[164] These doctrines arose in the 1970s, during an era in which conservative public-choice economists and liberal federal judges both suspected that agencies were captured by the interests they were supposed to be regulating.[165] One might also raise similar objections regarding the *Chevron* doctrine, which instructs courts to defer to agencies' reasonable interpretations of their organic statutes except when the statutory language clearly requires a different result.[166] The *Chevron* doctrine, one might argue, shows that conservatives want to transfer the power to construe broad delegations from independent agencies to the President.[167] In each of these subconstitutional administrative-law doctrines, the broad coalitions in the constitutional separation of powers cases dissolve and more familiar conservative-liberal divisions resurface. The conservatives support executive and agency powers, while the liberals remain skeptical of agencies and prefer vigorous judicial review.

These objections fairly describe the surface of administrative law now, but it is crucial to put the relevant doctrines in their proper, subconstitutional perspective. These specific disagreements play out within the context of a broader institutionalist agreement about the Progressive theory of apolitical administration. Contemporary judicial conservatives and liberals may harbor doubts about Progressive administrative theory, but they agree with it and with each other far more than they agree

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162. Magill, *supra* note 10, at 71 n.101 (2004). I am grateful not only to Professor Magill but also to John Griesbach and Sai Prakash for encouraging me to address the objections presented in this paragraph.

163. *See* Conn. Light & Power Co. v. NRC, 673 F.2d 525 (D.C. Cir. 1982). Gary Lawson identifies the connection between notice-and-comment requirements and the skepticism of which Professor Magill speaks in GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 254-65 (3rd ed. 2004).

164. *See* Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1982); *see also* LAWSON, *supra* note 163, at 536-43.

165. *See, e.g.*, LAWSON, *supra* note 163, at 9; *see also id.* at 257 (section on rise of notice-and-comment rulemaking procedures in chapter 3).

166. *See* Chevron v. NRDC, 467 U.S. 837 (1984).

167. The idea behind this criticism is laid out well in Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

with the political theory that informs the original and formalist Constitution. With the possible exception of Justice Thomas, all the Justices accept that the agencies should or inevitably will get broad delegations from Congress.[168] With the possible exceptions of Thomas and Scalia, all accept that agencies should or inevitably will get the power to prosecute and adjudicate along with those rulemaking powers.[169] With the same possible exceptions, all accept that agencies are generally better off when not directly supervised by members of Congress, who are more parochial and political and less cognizant of the national interest than the President. To be sure, all of these Justices are somewhat skeptical about the Progressive blueprint. They all worry that capture problems corrupt the Progressive ideal of apolitical administration, and then fall out disagreeing about whether the President or the courts can better mitigate the capture problem. Even so, it is also telling that these normative debates are waged in the trenches of administrative law's subconstitutional doctrines, not constitutional separation of powers. With the possible exceptions of Justices Scalia and Thomas, everyone on the Burger and Rehnquist Courts has agreed that the Progressive approach was more or less inevitable. They disagree about how to fix some of that approach's side effects.

Finally, it is worth noting that this Article's thesis can explain some otherwise strange puzzles about the Court's behavior. For instance, it explains why the Court sanctioned giveaways of Article III powers in *Thomas v. Union Carbide* and *CFTC v. Schor*. The Court prevented similar giveways in *Northern Pipeline* and *Plaut* but in *Thomas* and *Schor*, as Steven Calabresi has observed, "[b]y claiming power to set up non-life tenured, non-Article III tribunals to hear core federal cases, Congress directly diminishe[d] the power of the Article III courts to perform their core function."[170] Calabresi has identified a strange puzzle, which is explained by "institutionalist" ideas about judicial power: The control group on the Burger Court did not understand the Article III courts' institutional interests as Calabresi does (or as the framers probably did), but rather as the Progressives did. Under the Progressive theory of apolitical administration, better not to distract federal judges with questions of pesticide or futures law; far more preferable for courts to leave such technical questions to administrative experts, and focus their attention elsewhere.

168. *See supra* notes 133-134 and accompanying text.
169. *See supra* notes 89-90, 117 and accompanying text.
170. Calabresi, *supra* notes 138, at 81.

IV. SEPARATION OF POWERS LAW AND THE LEGACY OF THE REHNQUIST COURT

Let us conclude by considering how this interpretation affects our perceptions of the Rehnquist Court. Of course, the conclusions in this Part are provisional because of the "blind men and the elephant" problem: What passes as an accurate explanation of separation of powers law may seem a gross overgeneralization as applied to free speech, privacy, or federalism. Nevertheless, it is striking that, in a first-rank area of constitutional law, everyone on the Court except Justice Thomas and sometimes Justice Scalia used two sharply different methodologies to reinforce a Progressive/New Deal understanding of government structure. This pattern may call into question many portraits of the Rehnquist Court.

One dominant theme in the retrospectives written thus far holds that the Rehnquist Court has been a strongly conservative Court. The more hostile reviews suggest that that the Rehnquist Court has been "conservative, not in the sense that it is following conservative judicial principles, but rather . . . in the sense that it is animated by the right-wing political agenda."[171] More sympathetic interpretations cast doubt on whether its conservative developments are illegitimate. For example, John McGinnis has suggested that the Rehnquist Court has drawn on broad ideas shared by conservative elites during the 1970s and 1980s in the same indirect manner in which the late Warren Court and Justice Brennan's wing on the Burger Court drew on New Deal and Great Society trends among liberal elites.[172]

The Rehnquist Court's track record in separation of powers cases belies both of these interpretations. It does not by itself refute either interpretation, but it does identify strong limits on the extent to which the Rehnquist Court has been politically conservative. The Progressive theory of apolitical administration has

171. Erwin Chemerinsky, *The Rehnquist Court & Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 37 (1999); *see also* Lawrence M. Friedman, *The Rehnquist Court: Some More or Less Historical Comments*, *in* THE REHNQUIST COURT: A RETROSPECTIVE 143, 151-52 (Martin H. Belsky ed., 2002) (assuming that the Court is in some respects an "obviously a conservative Court," and rejecting as "surely a mirage" the suggestion that the Rehnquist Court's decisions are politically neutral); Richard H. Fallon, Jr., *The "Conservative Paths" of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002). *See generally* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992); STANLEY H. FRIEDELBAUM, THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATISM (1994).

172. *See* McGinnis, *supra* note 5, at 498-507. *See generally* KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE (2002).

been conventional wisdom among legal elites in this country since at least the middle of the twentieth century. During the 1980s and 1990s, Justices Scalia and Thomas and many younger conservative constitutional-law academics developed a comprehensive original-meaning critique of separation of powers, encouraged in large part by precedents like *Buckley* and *Chadha*.[173] That critique, however, seems to have had little influence on otherwise-conservative Justices like Kennedy, O'Connor, and to an extent Rehnquist.

To be sure, the Rehnquist Court has reached more conservative results in other areas, and an encompassing retrospective would need to reconcile separation of powers with such areas. But the case study presented here suggests it is important to examine whether and to what extent changes elsewhere were limited by elite conventional wisdoms on a par with the Progressive theory of apolitical administration. For instance, as I have shown elsewhere, academic property theory, land-use law, and land-use scholarship stopped the Rehnquist Court from laying down anything more than extreme-case limitations on contemporary land-use regulations.[174] And as Michael Rappaport has suggested, most of the Rehnquist Court's federalism decisions are "mainly of symbolic importance."[175] As I hope to explain in subsequent scholarship,[176] Progressive-New Deal attitudes toward federalism and centralized government still command enough respect across the Rehnquist Court to have limited the scope of its federalism project.

Another common theme holds that the Rehnquist Court has been an "activist" court.[177] Of course this theme can be hard to engage, because the term "activist" is slippery and begs basic questions about what counts as "sound" or "activist" interpretation. Even so, the Court's track record in separation of powers defies the most common characterization. The Court intervened only when Congress tried to exercise direct control over an

173. *See, e.g.*, Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575 (1987).

174. *See* Claeys, *supra* note 113, at 199-216.

175. *See* Rappaport, *supra* note 131, at 372.

176. See Eric R. Claeys, "*Sabri*, *Lane*, and *Hood*: The Progressive Limits on the Rehnquist Court's Federalism Decisions" (manuscript on file with author).

177. *See, e.g.*, THOMAS KECK, THE MOST ACTIVIST COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004);THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002); *see also* LARRY KRAMER, THE PEOPLE THEMSELVES (2004); Larry Kramer, Foreword, *We the Court*, 115 HARV. L. REV. 4 (2001).

agency (*Washington Airports*) or Article III courts (*Plaut*), or to give extremely broad powers to the President (*Clinton v. City of New York*). In the independent-counsel provisions in *Morrison* and the Sentencing Guideline provisions in *Mistretta*, the Court let pass federal laws that could plausibly have been considered drastic changes from the *status quo*. In short, the Court was not activist very often in the sense that it defied Congress's will; only once, in *Clinton*, could it be said that the Court was activist in the sense that it defied the expectations of knowledgeable legal observers.

Indeed, separation of powers is especially telling because it teaches as much about the Court's critics as it does about the Court. Separation of powers provides a nice contrast to federalism, takings, and other fertile fields on the Rehnquist Court, because it blossomed, peaked, and faded about a decade before these other fields. *Buckley* reenergized separation of powers law as *United States v. Lopez*[178] did the Commerce Clause and *Lucas v. South Carolina Coastal Council*[179] did the Takings Clause two decades later. Some academics immediately reacted hostilely, charging that the Burger Court was making "drastic changes" in separation of powers law.[180] The academic commentary became less critical and more accommodating in the late 1980s, as the late Burger and early Rehnquist Court confined the originalist revival. Some articles chided the Court for its incoherence,[181] while others benignly recast the cases to conform to Progressive-New Deal administrative theory.[182] In the 1990s, after it became clear that separation of powers was no longer a growth area, the field ceased to interest most constitutional scholars who are not originalists. The commentary on the Rehnquist Court's federalism project, if more heated, still seems to be following the same trend: The Rehnquist Court's early forays into federalism provoked voluminous scholarship,[183] but recent decisions favoring Congress[184] have attracted much less attention. In short, Progres-

178. 514 U.S. 549 (1995).

179. 505 U.S. 1003 (1992).

180. John M. Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of* Buckley v. Valeo, 22 WAYNE L. REV. 1335, 1336 (1976).

181. Elliott, *supra* note 12; Chemerinsky, *supra* note 12.

182. *See, e.g.*, Strauss, *supra* note 12.

183. *See, e.g.*, Fallon, *supra* note 1; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052-53 (2001); Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367 (1996).

184. *See, e.g.*, Sabri v. United States, 541 U.S. 600 (2004); Nevada Dept. of Human

sive-New Deal expectations may go a long way in shaping constitutional scholars' expectations about what counts as "proper" adjudication and what counts as "activism" in structural constitutional law.

The separation of powers cases also correct another account of the Rehnquist Court—the "leadership" explanation. Mark Tushnet has suggested that one of the "largely unremarked" features of the Rehnquist Court has been that the liberal Justices have presented a unified front on many issues.[185] He attributes this fact to several factors—especially partisan divisions between the traditional and movement Republicans on the Court,[186] and Justice Stevens' "leadership" skills,[187] which he contends have been superior to the Chief Justice's or Justice Scalia's.[188]

To appreciate the more insightful aspects of Tushnet's interpretation, it helps to consider how the liberals, Tushnet's "traditional" Republicans, and his "movement" all stand jurisprudentially in relation to each other. On large issues of constitutional structure, it does not take much leadership to convince the liberals to hang together. In separation of powers and probably elsewhere, they have stayed within the conventional wisdom about separation of powers. Similarly, Justices Kennedy and O'Connor are all much more inclined to be "led" toward the liberals than toward the diehard conservatives. Like the liberals, Kennedy and O'Connor assume that the country's political and constitutional developments through the 1970s are basically legitimate and have been salutary for the country. That is why they have voted in lockstep with the liberals in separation of powers cases. By contrast, because Justices Scalia and Thomas are originalists, their methodology raises unsettling questions about the New Deal transformation in separation of powers.[189]

Res. v. Hibbs, 538 U.S. 721 (2003).

185. Mark Tushnet, *Pragmatism and Judgment: A Comment on Lund*, 99 NW. U. L. REV. 289, 290 (2004).

186. MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 69-70 (2005).

187. Tushnet, *supra* note 185, at 289. That said, Tushnet does not make this leadership claim as assertively in his book as he does in the articles that led to the book. In the book, Tushnet does not treat Stevens at length, suggesting only that Justice Stevens was more strategic than the Chief Justice at assigning opinions to keep the moderates on board liberal positions. *See* TUSHNET, *supra* note 186, at 86; *see also id.* at 112-13 (Stevens' background).

188. *See* TUSHNET, *supra* note 186, at 86 (Rehnquist's refusal to assign opinion strategically); *id.* at 263 (Rehnquist's unimaginative opinion writing); *id.* at 147-41 (Scalia's intemperateness toward his colleagues and injudiciousness in print).

189. Again, with the exception that Scalia refuses to adopt what he understands to be the original meaning of the non-delegation doctrine as a rule for judicial decision. *See*

Finally, then, separation of powers cases confirm the last broad portrait of the Rehnquist Court—that it is in fact an "O'Kennedy Court." While earlier retrospectives tended to portray the struggle between the liberal and conservatives on the Court,[190] a consensus is now emerging that Justices O'Connor and Kennedy are key to understanding the behavior of the Rehnquist Court. Separation of powers cases confirm this later consensus, supplementing it mainly to underscore how important it is to appreciate O'Connor and Kennedy's basic jurisprudential commitments. Some accounts suggest that O'Connor and Kennedy vote primarily in response to trends in elections or in Congress.[191] Tushnet attributes their voting behavior to the fact that they are Rockefeller Republicans, not Goldwater Republicans.[192] Nelson Lund attributes O'Connor's behavior to a pragmatic jurisprudential streak.[193] Thomas Keck suggests that O'Connor and Kennedy are trying to reconcile a tension between judicial conservatives' commitment to "restraint and [a] New Right commitment to limited government."[194] While all of these accounts are largely accurate, none gives enough due to the fact that O'Connor and Kennedy subscribe to many principles of political theory and jurisprudence that lie well within the mainstream of legal thought as marked off by the U.S. Reports and scholarship from the legal academy.

CONCLUSION

Over the last 30 years, the Progressive theory of apolitical administration seem to have permeated the "fundamental law" that informs the Supreme Court's separation of powers cases. When it applies, this theory predicts how the Court will decide separation of powers challenges. It predicts how the Court will decide the merits of such cases. It predicts whether the Court will apply original-intent formalism or New Deal functionalism. When the Court applies original-intent formalism, Progressive

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supra notes 113, 138-139 and accompanying text.

190. *See, e.g.*, THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT, *supra* note 177; FRIEDELBAUM, *supra* note 171; Richard J. Lazarus, Rehnquist's *Court*, 47 ST. LOUIS U. L.J. 861 (2003).

191. *See, e.g.*, Merrill, *supra* note 71, at 628-38; Rappaport, *supra* note 131, at 370 (2004) (describing the O'Connor Court as "politically moderate and sensitive to its public reputation," and "especially concerned about its political capital")

192. *See* TUSHNET, *supra* note 186, at 32, 48-49.

193. *See* Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249, 250 (2004).

194. KECK, *supra* note 177, at 203.

principles explain how the Court manages to limit its originalist holdings so as not to undermine the administrative state. Finally, when the Court balances interests using New Deal functionalism, the same principles determine how heavily competing policy interests hang in the functionalist balance.

This connection to Progressive political theory explains an important puzzle in separation of powers law over the last thirty years, but it also has important ramifications for studying the Supreme Court generally. The separation of powers case study presented here helps put the late Burger Court and the Rehnquist Court in a sensible historical perspective in relation to previous Courts. The same case study also offers useful warnings for ongoing efforts to develop retrospectives of the Rehnquist Court. The Rehnquist Court has been activist or conservative in important respects. Even so, we must not forget that the Rehnquist Court is also limited in important respects by Progressive and New Deal ideas, which continue to influence academics and lawyers' expectations about good government and good constitutional interpretation.