

Altered States: A Comparison of Separation of Powers in the United States and in the United Kingdom

By JAMES G. WILSON*

Introduction

The United States Supreme Court has never adequately explained why it fluctuates between “formalistic”¹ and “balancing”² resolutions of

* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University; B.A., Princeton University, 1969; J.D., University of Chicago, 1974. The author thanks Steve Steinglass, Marjorie Kornhauser, and Mimi Lord. The Cleveland Marshall fund provided some assistance.

1. The Court has employed formalistic approaches to strike down the legislative veto, *INS v. Chadha*, 462 U.S. 919 (1983), to limit the grounds Congress can invoke for excluding a newly elected Congressman, *Powell v. McCormack*, 395 U.S. 486 (1969), to prevent Congress from appointing principal executive officers, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Comptroller General administering budget deficit reduction plan), *Buckley v. Valeo*, 424 U.S. 1 (1976), and to hold that the legislative privilege does not apply to statements made in press releases and newsletters, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). A congressional statute will prevail, undisturbed by any balancing test, against challenges based upon the Tenth Amendment. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976).

Note that one can advocate formal doctrine or balancing tests without being wedded to any particular interpretive vision. For instance, this Article examines a foreign constitution to help justify formal rules.

The Court recently rejected a delegation claim in *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. 1726 (1989) (upholding statute authorizing Secretary of Transportation to create system of user fees). The delegation doctrine, however, is not completely dead. The Court has never overruled the cases establishing the doctrine. *See, e.g., Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Wayman v. Southard*, 23 U.S. (19 Wheat.) 1 (1825). Professor Schoenbrod has proposed that the Court prevent Congress from delegating any of its “legislative powers.” Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1251 (1985). Professor Currie has put the issue less abstractly: “Congress may not leave the fundamental policy decisions to others.” Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 28.

2. The Court engages in balancing tests to assess congressional power to make appointments of inferior officers, *Morrison v. Olson*, 487 U.S. 654 (1988), to allow administrative agencies to decide Article III cases, *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986), to determine the extent of executive privilege, *United States v. Nixon*, 418 U.S. 683 (1974), to decide if a federal law has preempted a state law, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), and to determine the scope of executive power, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the *Steel Seizure*

structural constitutional cases. For example, the Court has never stated why it strictly construed both the Presentment Clause,³ which requires Congress to present all legislation to the President so he or she can decide whether or not to use the veto,⁴ and the Bicameralism Clause, which mandates that all legislation must be passed by both the House of Representatives and the Senate to prohibit legislative vetoes,⁵ but subsequently allowed an administrative agency to decide Article III cases in *Commodity Futures Trading Commission v. Schor*⁶ on a balancing theory because “this inquiry in turn, is guided by the principle that practical attentions to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”⁷ The short answer is that the Court fluctuates because different clauses and different situations warrant different interpretive techniques.⁸ That answer, however, leaves unresolved the question of how to interpret each clause.

Three recent separation-of-powers cases, *Young v. United States ex*

Case). I assume that Justice Jackson’s concurrence in the Steel Seizure Case, which sets up a three-stage balancing test that shifts the presumptions against presidential power, best expresses the current Supreme Court’s perspective on foreign affairs. The balance is struck strongly in favor of the executive, particularly when the armed forces are involved. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (executive agreement concerning Iranian hostages and distribution of Iranian assets); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (presidential arms embargo). In other words, not all balancing tests are equally indeterminate; sometimes the scales are tilted heavily toward one side.

Justice White has been the most consistent advocate of balancing: “But the history of separation of powers doctrine is also a history of accommodation and practicality. Apprehensions of an overly powerful branch have not led to undue prophylactic measures that handicap the effective working of the National Government as a whole.” *Chadha*, 462 U.S. at 999 (White, J., dissenting).

3. *Chadha*, 462 U.S. at 946-48.

4. “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it . . .” U.S. CONST. art. I, § 7, cl. 2.

5. *Chadha*, 462 U.S. 919; Chief Justice Burger exalted text and history over expediency: “In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear . . . that the Framers ranked other values higher than efficiency.” *Id.* at 958-59.

6. 478 U.S. 833 (1986).

7. *Id.* at 847-48. Of course, Chief Justice Marshall was hardly deferential to Congress when he interpreted Article III in *Marbury v. Madison*, 5 U.S. 137 (1803).

8. The Court has frequently tolerated dramatic redistributions in governmental power: most notably, in accepting the growth of the party system and the administrative state. Administrative agencies adjudicate claims, propose and draft regulations that have the force of law, and execute the laws. They can enter the original jurisdiction of Article III courts, promulgate regulations that dramatically alter private rights and responsibilities, and exercise enormous prosecutorial discretion. In such cases, the Court usually has been deferential. See e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 654 (1988); *Heckler v. Chaney*, 470 U.S. 821 (1985).

rel. Vuitton et Fils,⁹ *Morrison v. Olson*,¹⁰ and *Mistretta v. United States*,¹¹ demonstrate this tension between rules and standards. Three solitary opinions by Justice Scalia are lonely calls for increased formalism. Justice Scalia filed a sole concurrence in *Young*. He agreed with the Supreme Court's holdings that a federal trial judge could neither appoint an interested party as special counsel to prosecute another party for alleged criminal contempt of an injunction,¹² nor assign any lawyer to prosecute such a case without first requesting assistance from the United States Attorney General's office.¹³ Scalia disagreed with the Court's conclusion that the federal judge had the power to appoint a special prosecutor after the executive refused to provide assistance. Scalia's dissent in *Morrison* virulently attacked the majority's validation of a congressional statute creating special prosecutors who can investigate and prosecute high ranking executive officials for suspected criminal behavior. In his *Mistretta* dissent, Scalia concluded that Congress could not create a Sentencing Commission, partially consisting of article III judges, that would set limits on trial judges' discretion in sentencing criminals.¹⁴

Scalia's criticisms of the majority's flexible conception of separated powers extended far beyond his concerns that the three decisions would have adverse effects. In an era wary of formal doctrine and formal categories, he developed a far-reaching, "formalistic" jurisprudence of separation of powers.¹⁵ Scalia defined certain powers as "judicial," "executive," or "legislative," ignoring the *Morrison* majority's warning about "the difficulty of defining such categories of 'executive' or 'quasi-legislative' officials"¹⁶ Scalia began his concurrence in *Young* with a deceptively simple definition: "The judicial power is the power to decide, in accordance with the law, who should prevail in a case or controversy."¹⁷ According to Scalia, *Morrison* stripped the executive of one of its basic powers: to investigate and prosecute crimes.¹⁸ Scalia concluded that the majority wrongly decided *Mistretta* because it permitted Congress to delegate its "power to make law" to a commission that had no

9. 481 U.S. 787 (1987).

10. 487 U.S. 654 (1988).

11. 488 U.S. 361 (1989).

12. *Young*, 481 U.S. at 815 (Scalia, J. concurring).

13. *Id.* at 800-02.

14. Scalia's formalism extends beyond separation-of-power issues to such problems as the meaning of the First Amendment. See Kannar, *Comment: The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1324-38 (1990).

15. *Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting).

16. *Morrison v. Olson*, 487 U.S. 654, 689 (1988).

17. *Young*, 481 U.S. at 816 (Scalia, J., concurring).

18. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

other responsibilities.¹⁹

Having partially defined the three basic governmental functions, Justice Scalia sought to isolate or compartmentalize those functions as much as possible: "It is not for us to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are."²⁰ He assailed the Court's "balancing" tests: "[*Mistretta*] follows the regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court."²¹

This Article initially will compare the United States Constitution and the British constitution²² both to evaluate *Young*, *Morrison*, and *Mistretta*, and to develop a sounder approach to all structural issues. Comparative constitutional law provides some of the "experience" needed to decide abstract structural cases.²³ Predicting the reverberations of a proposed change within a system will be easier if one has studied how similar alterations have affected similar organizations. The British constitution is particularly germane because it was a model for the American Constitution. The two countries have a shared legal tradition²⁴ and frequently generate similar positive law. The British constitution presents, however, a radically different commitment to separation-

19. *Mistretta*, 488 U.S. at 417, 427 (Scalia, J., dissenting).

20. *Morrison*, 487 U.S. at 709 (emphasis in original) (Scalia, J., dissenting).

21. *Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting).

22. Although Justice Scalia has expressed doubts about the relevance of foreign law to constitutional adjudication, comparative constitutional law has a venerable history. Madison and Hamilton frequently analyzed other countries' forms of government in *The Federalist Papers* to support their defense of the proposed Constitution. Comparative law is particularly pertinent in separation-of-powers cases, helping us determine which characteristics of government structure are important and why they are important. One excellent way to gain the "experience" in law that Justice Holmes exalted over "logic," O.W. HOLMES, *THE COMMON LAW* 1 (M. Howe ed. 1963), is to study how other countries have balanced freedom and authority.

23. Separation-of-powers issues are harder to compare than individual rights cases. For example, if one wants to use comparative law to help determine whether executing juveniles is unconstitutional, one need only examine several British statutes. Structural powers are more subtly interrelated.

24. Professor Damaska contrasted the Anglo-American legal systems with the continental systems. The Anglo-American systems were more interested in dispute resolution, while the continental systems were more policy oriented. These underlying differences reflect the Continent's greater willingness to use the state as manager in contrast to the Anglo-American conception of an umpire. M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 8-15 (1986).

of-powers. My analysis of and reaction to the British constitution helped formulate the following interrelated propositions: (1) the Supreme Court should never be distracted by various interpretive strategies from fulfilling its primary constitutional obligation to combat tyranny; (2) the Supreme Court should be wary of undermining the strong American constitutional tradition of separated powers carefully developed by James Madison to prevent tyranny; (3) because the powers to hire and fire largely determine constitutional structures, the Supreme Court should be extremely reluctant to allow members of any branch to have any extraconstitutional means of hiring or firing "principal officials" within the other two branches, particularly when those means involve the criminal law;²⁵ (4) the Court should change its doctrine if one branch gains supremacy over another branch or terrorizes individual citizens. Analysis of the British constitution supports the thesis that the United States Supreme Court should be more formalistic in appointments and removals cases, particularly in cases in which one branch of government removes officers of another through criminal proceedings.

These four propositions support a quasi-formalistic doctrine that reaches the same results as Justice Scalia's three opinions in *Young*,²⁶ *Morrison*,²⁷ and *Mistretta*,²⁸ but is less threatening to existing administrative agencies, which usually combine executive, legislative, and judicial functions. Instead of trying to isolate all governmental powers depending upon their classification as "legislative," "executive," or "judicial," as Scalia has proposed, the Court should create a strong presumption against giving principals in one branch any additional powers, particularly criminal law powers to hire, fire, reward, or punish principals in another branch. This presumption could be rebutted if the branch seeking the additional power could prove "necessity." If personnel having important governmental responsibilities are significantly segregated, one branch is not likely to dominate another, even if substantive powers, such as control over foreign affairs and the budget, remain shared or if other powers are combined at the agency level.²⁹

25. There is a due process component to this presumption that this Article will not discuss. Meticulous due process is crucial in criminal cases, particularly those cases with political overtones.

26. *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987).

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

28. *Mistretta v. United States*, 488 U.S. 361 (1989).

29. This proposal emphasizes separating powers by personnel as much, if not more, than by separating functions. Professor Munro concluded that Montesquieu "advocates, at the minimum, that one agency of government should not be performing the function appropriate to another. But whether [Montesquieu] would insist on a complete separation of personnel in

The proposed presumption would not radically disturb existing administrative agencies because most of their powers are based upon civil law.³⁰ Furthermore, the existing administrative agencies already significantly segregate personnel. Administrative adjudication is normally performed by administrative law judges, who are largely isolated from principal officers.³¹ Independent regulatory agencies are partially insulated from all three branches; their combined powers have not been concentrated in any one branch. In addition, civil administrative agencies remain somewhat accountable to all three branches. The President appoints the officials and oversees many operations, Congress can pass legislation to overrule administrative regulations, and the courts normally can review agency decisions.

Justice Scalia's formalistic approach is potentially more disruptive. For example, he argued in *Morrison* that *all* executive power remains with the President.³² This contention threatens the independence of the Federal Reserve Board. His conclusion in *Mistretta* that Congress cannot delegate its power to make law³³ threatens the constitutionality of all administrative rule making.

This Article's suggested presumption would change the results of *Young*,³⁴ *Morrison*,³⁵ and *Mistretta*,³⁶ all of which affect the rights of criminal defendants. Accordingly, the Court should have held in *Morrison* that Congress could not create special criminal prosecutors because Congress obtained an unnecessary, extraconstitutional tool to eliminate and intimidate principal executive officials, and because criminal prosecutors are principal officers that only the President can appoint. In *Young*, the Court should have concluded that courts do not have the

the different agencies is less obvious." C. MUNRO, *STUDIES IN CONSTITUTIONAL LAW* 191 (1987).

30. This Article does not resolve how much the presumption should affect civil administrative agencies, partially because there are so many complex variations. It is possible, for instance, that the presumption should be applied against executive review of civil adjudications that are not subject to judicial review. Nor will this Article try to predict how the presumption might apply to other civil law questions or to novel alterations in civil administrative law. At the least, this Article suggests that the Court should not be completely deferential. Finally, doctrinal formalists should be wary of proposing doctrine that extends far beyond the facts in any particular case or cases. One does not want the doctrine to become either too inflexible or too mechanical. Indeed, one reason for preferring Justice Powell's concurrence in *INS v. Chadha* over the majority opinion is its narrower scope. See *INS v. Chadha*, 462 U.S. 919 (1983).

31. *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980).

32. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J. dissenting).

33. *Mistretta v. United States*, 488 U.S. 361, 417, 427 (1989) (Scalia, J. dissenting).

34. *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987).

35. *Morrison*, 487 U.S. 654.

36. *Mistretta*, 488 U.S. 361.

power to hire and fire criminal prosecutors to prosecute criminal contempts outside the courtroom because criminal prosecutors are principal executive officers exercising a core executive function. The Court should have decided in *Mistretta* that Congress cannot put article III judges on a substantive criminal law commission, particularly when they can be fired by the President.³⁷

Part I presents an overview of the British constitutional structure, focusing on who can appoint or elect whom. The description will not "prove" that *Morrison*, *Young*, and *Mistretta* were wrongly decided, nor will it automatically generate the proposed presumption, which is fairly narrow. In fact, the comparison will in some respects make the inquiry into constitutional structure more indeterminate; the British constitution demonstrates that tyranny will not necessarily arise within a system that contains far less separation of powers than the American structure.³⁸

Any lawyer knows that a presentation of positive law generates normative reactions. It is my hope that the reader's reactions will be similar to mine: before studying the British constitution, I thought that such cases as *INS v. Chadha*,³⁹ which prohibited the legislative veto, and *Bowsher v. Synar*,⁴⁰ which prevented Congress from appointing the Comptroller General to oversee the Gramm-Rudman deficit reduction system, were unrealistically technical and rigid. Analysis of the British constitution convinced me that too much fluidity is inappropriate for the American legal and political culture. The American Constitution's separation

37. Many additional controversial categories need to be utilized to make even this relatively narrow presumption work. The presumption needs underlying definitions of the three forms of power, "legislative," "executive," and "judicial." Additionally, the Court must define, somewhat arbitrarily, such fluid terms as "substantive," "criminal," "principal," and "core function."

38. Former Judge Robert Bork summarizes the American perspective:

The foundation of American freedoms is in the structure of our Republic. The major features of that structure are the separation of the powers of the national government and the limitation of national power to preserve a large degree of autonomy with the states. Both are mandated by the Constitution. These dispersions of power, viewed historically, have guaranteed our liberties as much as, perhaps more than, the Bill of Rights itself.

R. BORK, *THE TEMPTING OF AMERICA* 4 (1990)

Some British lawyers are becoming increasingly worried that their country is becoming less free. See K. EWING & C. GEARTY, *FREEDOM UNDER THATCHER* (1990). Ewing and Gearty locate the threat to civil liberties in England's constitutional structure:

The major source of the problem in our view is a political system that has allowed the concentration of power in the hands of the executive (and the Prime Minister in particular) and the absence of any effective checks and balances.

Id. at 255. The authors, however, do not recommend a Bill of Rights. *Id.* at 262-74.

39. 462 U.S. 919 (1983).

40. 478 U.S. 714 (1986).

of powers should not be balanced into a facsimile of the British constitution's far more casual conception of separation of powers. Nor should the United States quickly discard its tradition of separated powers, because Britain's system has become dangerously over-centralized, placing an excessive amount of power in the hands of one person, the Prime Minister.⁴¹ Although many readers may disagree about the conclusions deduced from the following description of the British constitution, most readers nonetheless will learn more about the perpetually changing British constitution. This satisfies a subsidiary purpose of the Article, which sometimes extends beyond patronage issues to provide an overall view of the British constitution.

The rather lengthy description of the British constitution also serves as a metaphor for the two years I lived in England and taught English constitutional law. Personal experience can and should change constitutional jurisprudence. Thus, the structure of this Article reflects traditional British views to which I was exposed during those two years.

Part II compares the American and British systems, exploring some of the relationships between culture, politics, structural law, and positive law.⁴² In Part III, this Article will apply the understanding gained by that comparison to *Young*,⁴³ *Morrison*,⁴⁴ and *Mistretta*.⁴⁵

Part IV will take an abrupt turn, asserting that a deeper lesson of the British constitution is that the United States Supreme Court should not be overly wedded to stare decisis in structural cases. The Court should take a contextual approach both when initially formulating doctrine and when reconsidering decisions over time.

In Part V, this Article thus proposes a separation-of-powers methodology that oscillates between "balancing" and more "formalistic"

41. Margaret Thatcher's confrontational style of politics and her dominance of the Cabinet increased many observers' concerns about the British constitution. H. YOUNG, ONE OF US 538-46 (1989). The resignation of Prime Minister Thatcher, which occurred late in the creation of this Article, demonstrates that the Prime Minister's powers are finite. Whitney, *Thatcher Says She'll Quit, Bowing to Tory Challenge After 11 1/2 Years as Leader*, N.Y. Times, Nov. 23, 1990, at A8.

42. The crucial relationship between law and culture remains elusive, as seen in Professor Finer's conclusion to his wide-ranging survey of political systems: "Social structure generates the substantive issues of politics and colours the style in which these are disputed. It does not seem to me to impose any of the main forms of government I have catalogued and described." S. FINER, COMPARATIVE GOVERNMENT 589 (1970) (emphasis in original). For a thoughtful comparison of the British and American cultures, see R. CHESHRYE, THE RETURN OF A NATIVE REPORTER (1987).

43. *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987).

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

45. *Mistretta v. United States*, 488 U.S. 361 (1989).

techniques.⁴⁶ The Justices should initially weigh all available arguments and data, including comparative law. That threshold balancing inquiry can appropriately lead the Court either to adopt a formal, textual solution or to apply a balancing test. Neither solution is per se invalid. Any formal doctrine or superficial balancing test may be undermined, however, by the balancing test proposed in Part V: a perpetual skepticism toward stare decisis. The Court should not become so bound by its previous decisions that it loses sight of its primary responsibility of maintaining an effective balance of power within the government⁴⁷ while simultaneously preventing tyranny. Admittedly, this Article's two doctrinal recommendations—increased formalism in appointments decisions and decreased deference to precedent—operate at cross-purposes. Such tensions reflect the fact that the two concepts are only tools in the battle against tyranny, not ultimate ends.

I. The British Constitution

The British constitution can bewilder American constitutional lawyers. The two well-known characteristics of the British constitution—that it is unwritten and that Parliament (consisting of the House of Commons, the House of Lords, and the Queen) is supreme—obfuscate as well as explain. First, the British constitution is largely textual. It is found in statutes, legal opinions, and scholarly works.⁴⁸ Moreover, “unwritten” constitutional conventions, such as the Prime Minister's duty to resign or to hold a general election if he or she cannot command a Parliamentary majority, are continually written about.⁴⁹

Second, Parliament is “supreme” and “sovereign,” in that its law cannot be overturned by the courts, but it cannot bind future Parliaments.⁵⁰ Parliament also remains accountable to the voters, who thus retain political sovereignty. Finally, the doctrine of parliamentary sov-

46. See Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985). Utilizing “formal” doctrinal solutions implies neither acceptance nor rejection of the broader claims that some “legal formalists” make. “In relating law to the most abstract forms of interaction, formalism presents an uncompromising version of law's internal coherence and of the consequent possibility of distinguishing the juridical from the political.” Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1013 (1988). This author is wary of the quests for uncompromising coherence and clear separation of law from politics.

47. This Article is neither devising a grand balancing test that will decide how all structural cases should be resolved, nor creating a subsequent, detailed balancing test that will determine which cases should be overruled if and when there is a dangerous shift in power.

48. See, e.g., A. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1960).

49. See, e.g., R. BRAZIER, CONSTITUTIONAL PRACTICE 173-77(1988).

50. See C. MUNRO, *supra* note 29, at 86-87; see generally *id.* at 79-108.

ereignty has common law origins.⁵¹ In an extreme situation, courageous judges could possibly alter that doctrine.⁵²

The British constitution also forces an American constitutional lawyer to reevaluate basic premises, ask disturbing questions, and struggle with seemingly paradoxical issues. For instance, is the American concern over separation of powers excessive since two radically different structures frequently generate similar laws? Or is it possible that America's more theoretical, principled approach to law and rights poses a greater long-term threat to civil liberties than Britain's flexible approach? Why do the British have a wider and livelier range of public debate even though they have no textually protected constitutional right to free speech?

Analysis of the British constitution reveals the narrowness of much American constitutional law thinking. Because the British constitution is "unwritten," the British perceive that their "constitution" extends far beyond cases, encompassing all distributions of governmental power. British constitutional law students study internal party structures, internal parliamentary procedures, and the structure of the executive, unlike their American counterparts who study a few sections of the United States Constitution and some of the myriad cases interpreting those sections.

Three concepts make the British constitution more comprehensible. First, H.L.A. Hart's "rule of recognition" explains how a largely "unwritten" constitutional structure generates binding laws.⁵³ A second is to determine the process by which a tyrant might legally seize control of the British government. That inquiry helps reveal the extent of checks and balances and separation of powers. The third tool, our primary device, is to determine who can hire and fire whom.⁵⁴

51. *Id.* at 103.

52. The judicial rule of parliamentary sovereignty is unique: "it lies in the keeping of the Courts, and no act of Parliament can take it from them." H. WADE, *THE BASIS OF LEGAL SOVEREIGNTY* 187 (1955). If the courts keep the rule, perhaps they alone can change it.

53. See H. HART, *THE CONCEPT OF LAW* (1961). For example, in *Stockdale v. Hansard* the Law Lords held that a House of Commons resolution was not law because it had not been passed by all three parts of "Queen in Parliament": the House of Commons, the House of Lords, and the Queen. The judges would recognize, as law, only those bills that the Speaker of the House had certified as passed by the Queen in Parliament. *Stockdale v. Hansard*, 112 Eng. Rep. 1112 (Q.B. 1839).

A.V. Dicey made a similar argument in 1885. "The important thing is to make clear that the doctrine of Parliamentary sovereignty is both on its positive side and on its negative side, fully recognized by the law of England." A. DICEY, *supra* note 48, at 41.

54. Professor Marshall made a similar observation about the American system: "Though the physical separation of the American President and his Cabinet from Congress is the feature which superficially attracts attention, it is clearly less significant than the fact that the execu-

A. The Electoral Structure

Just over a century ago, English law professor A.V. Dicey, who almost single-handedly organized the British constitution into a coherent, accessible whole, distinguished “legal sovereignty” from “political sovereignty” to explain the nature of parliamentary sovereignty. Only Parliament had the legal powers, or legal sovereignty, to pass laws, including laws by which Parliament could reconstitute itself. The people, however, retained political sovereignty. Because they elect the members of the House of Commons and retain the right to disobey or resist Parliament’s laws,⁵⁵ “their will is under the present constitution sure to obtain ultimate obedience.”⁵⁶ Consequently, this Article’s description of the British constitution shall begin with a review of the role elections play in the selection and replacement of political leadership. Representative government must include the people’s ability to change its leadership through elections.

By far the most important election is that of the House of Commons, which dominates the Crown, the House of Lords, and the judiciary. This domination by the only elected branch over the rival branches insures a significant degree of accountability and legitimacy.⁵⁷ For example, if the Crown exercised its prerogative to veto a bill, a measure it has not taken since 1707,⁵⁸ the electorate would probably consider the refusal to grant the royal assent a virtually revolutionary breach of constitutional convention.⁵⁹ The government would probably make dissolution of the Crown the central issue in the next general election.⁶⁰

The House of Lords, which is also unelected, retained coordinate

tive branch can neither be removed by, nor dissolve, the legislature.” G. MARSHALL, *CONSTITUTIONAL THEORY* 99 (1971).

55. *Id.* at 76-77.

56. A. DICEY, *supra* note 48, at 76.

57. Some British scholars have argued that the British constitution is not as “legitimate” as its defenders maintain. See McAuslan & McEldowney, *Legitimacy and the Constitution: The Dissonance Between Theory and Practice*, in *LAW, LEGITIMACY AND THE CONSTITUTION* 1-38 (1985).

58. Queen Anne did not give her royal assent to a Militia Bill passed by Parliament. G. MARSHALL, *CONSTITUTIONAL CONVENTIONS* 22 (1986).

59. “Conventions” are constitutional norms or rules that the courts cannot enforce. See R. BRAZIER, *supra* note 49.

60. By refusing to grant her assent to a particularly tyrannical statute, the Queen could at least force another election or an armed confrontation between the government and the military, which has made an oath to obey the Crown. Thus the royal assent remains a possible check on extremely evil behavior. Such a denial is unlikely, however. The Queen’s review is usually perfunctory. The Queen sees only the short title of the bill, not the full text, when she signifies her assent. Bennion, *Modern Royal Assent Procedure at Westminster*, 1981 *ST. L. REV.* 139.

legislative power over all issues aside from money matters until 1911.⁶¹ The Lords were forced to pass the Parliament Bill of 1911, which stripped them of most of their power. Angered at a prior rejection of a money bill in 1909 and vindicated by an election on that issue in 1910, the Liberals threatened to pack the Lords with new Liberal peers if they failed to pass the 1911 Bill.⁶² Under the Bill (as amended in 1949), the Speaker of the House can present any money bill for royal assent one month after placing it before the Lords. Almost all other bills can be presented to the Crown after one year. One crucial exception to the Lord's plenary legislative power remains: the Lords must concur whenever the House of Commons seeks to extend a Parliamentary session beyond five years. The system therefore guarantees elections every five years unless all three branches agree. Led by the Prime Minister, the Commons would need the Crown's assent to pack the Lords if they resisted such an extension.

This brief description of the British government's electoral structure dramatically demonstrates the crucial significance of appointments. The House of Lords became subservient to the House of Commons because the Prime Minister could appoint any number of new Lords.⁶³ On the other hand, the House of Commons legally can do anything else without serious resistance by the House of Lords, the Crown, or the Courts, which must defer to any bill that the Speaker of the House has certified as having progressed through the Queen in Parliament.⁶⁴

The electorate's political will is the major constraint on the House of Commons and the government it creates. That will, of course, is expressed unevenly. As is usually the case, powerful interest groups fare best.⁶⁵

61. The balance of power shifted to the House of Commons via the Parliament Act of 1911 (1 & 2 Geo. 5, ch. 13).

62. W. JENNINGS, *THE BRITISH CONSTITUTION* 104 (1971).

63. The statutory requirement that elections must be held every five years (a requirement that could be set aside by another statute) forces an aspiring dictator to make public his or her anti-democratic intentions.

64. "The plain truth is that our tribunals uniformly act on the principle that a law alleged to be a bad law is *ex hypothesis* a law, and therefore entitled to obedience by the courts." A. DICEY, *supra* note 48, at 63. The House of Lords reaffirmed the doctrine of parliamentary sovereignty in *Pickin v. British Railways Board*, 1974 A.C. 765.

65. For example, brewers were able to limit the government's attempts to eliminate their control of the pubs, but barristers have struggled in their attempts to prevent solicitors from being able to try more cases. *The Economist* explained that the brewers prevailed because they faced no organized opposition, but the Bar appears to be losing because the legal profession is internally divided between solicitors and barristers. Bagehot, *Mackay's Triumph*, *THE ECONOMIST*, July 22, 1989, at 54.

The vote, the formal tool through which the people's will largely is expressed, remains legally vulnerable because it receives no special constitutional protection. Elections, for example, were delayed during World Wars I and II.⁶⁶ Parliament could pass a bill eliminating elections without holding another election to "legitimate" such an authoritarian decision. The vote can also be "diluted."⁶⁷ Parliament has established a Boundary Commission⁶⁸ that proposes electoral districts containing significantly different numbers of voters. One constituency in London, for example, had 84,401 voters, while its neighbor had 56,121.⁶⁹ In response to a lawsuit brought by the Labour Party challenging such uneven districting, the House of Lords held that the Commission is not obligated to make numerical equality its first priority.⁷⁰ The Commission can give more weight to geographical or historical boundaries. British citizens have the right to vote, but the size of the voting district gives individual votes varying degrees of strength.⁷¹

The electorate can also express itself by electing local authorities.⁷² Historically, the local authorities, funded primarily by property taxes, have provided such governmental services as education, welfare, public housing, roads, planning, and public transportation.⁷³ The Thatcher administration engaged in a protracted conflict with many local authorities run by left-wing Labour leaders.⁷⁴ Former Prime Minister Thatcher attempted to reduce the power of local authorities by centralizing the edu-

66. W. JENNINGS, *supra* note 62, at 12.

67. Britain's radically uneven distribution of parliamentary seats was once the central focus of political and constitutional controversy. The English distorted boroughs in Ireland in the early 1600s to allow Protestants to control the local Parliament. R. FOSTER, *MODERN IRELAND 1600-1972* (1988).

68. The Commission consists of the Speaker of the House of Commons, a High Court judge, and two majority party members (these last two selections are made with the agreement of the other political parties). C. TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES AND MATERIALS* 408-09 (1985). The Commission's report is submitted to the Home Secretary, who then must offer it to Parliament for final approval. *Id.* at 414-15.

69. *Id.* at 414.

70. *Regina v. Boundary Commission*, 1983 Q.B. 600 (C.A.).

71. The United States Supreme Court, however, has constitutionalized the "one person/one vote" standard for most state and federal elections. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

72. Sidney and Beatrice Webb, the famous Socialist historians, described the evolution of local governments in S. WEBB & B. WEBB, *ENGLISH LOCAL GOVERNMENT* (1963).

73. C. TURPIN, *supra* note 68, at 208-09.

74. *See Grant, Central-Local Relations: The Balance of Power*, in *THE CHANGING CONSTITUTION* 229-49 (1985).

This struggle has frequently reached the courts. One of the best examples is *Regina v. Secretary of the State for the Environment*, 1986 A.C. 240. The Lords rejected claims by local authorities that the Secretary of State had either misinterpreted the relevant statute or acted unreasonably when he set standards for expenditures by local authorities. The statute, inciden-

cation curriculum, allowing parents to opt out of specific public schools, selling public housing to those who live in the units, and substituting a poll tax based on family size for a rate tax based on property values.⁷⁵

B. Parliamentary Structure

The concentration of the United Kingdom's governmental powers extends far beyond the doctrine of parliamentary sovereignty. Parliament is controlled by the majority party in the House of Commons, which in turn is dominated by the Prime Minister.⁷⁶ By convention, the Crown must appoint as Prime Minister the person best able to form and maintain a majority in the House of Commons.⁷⁷ The Prime Minister then chooses Cabinet members and inferior governmental officials from his or her own party within the House of Commons and, to a lesser degree, within the House of Lords. The members of government retain their seats in Parliament and must publicly maintain complete loyalty to the government's policies under the convention of "collective responsibility." Governmental decisions, however, may be contested in private.⁷⁸ Government officials' power to retain their seats in Parliament while performing their Cabinet duties is the most dramatic example of the lack of separation of powers in Britain in comparison to the United States. The United States Constitution explicitly prohibits such a structure.⁷⁹

The government's dominance is enhanced by the convention that requires the rest of the majority party Ministers of Parliament (MPs), called "backbenchers," to comply with their leaders' wishes on specific votes. Except in rare cases,⁸⁰ the MPs do not have discretion to vote in

tally, had the equivalent of a legislative veto; the Secretary was required to submit any variations from uniformity to the House of Commons for approval.

75. H. YOUNG, *supra* note 41, at 538.

76. "Patronage in relation to Ministers is the most political power enjoyed by a Prime Minister, for it establishes his supreme place in the eyes of his government and parliamentary party." R. BRAZIER, *supra* note 49, at 66.

77. In theory, the majority party could purge the opposition. The House of Commons maintains complete control over its membership.

78. That convention is frequently breached by Ministers who "leak" information to the press. The Labour Party also suspended the convention to allow its Ministers to express their personal views to the English voters before they voted on a referendum over whether or not to join the Common Market. C. TURPIN, *supra* note 68, at 147. Conventions vary dramatically in their importance and in their capacity to constrain politicians.

79. "No Person holding Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

80. Sometimes the government allows its MPs to vote their own consciences, such as on the decision to abolish capital punishment. In addition to such "free votes," backbenchers can revolt and vote against the government. For instance, Thatcher's government in 1986 could not gather enough support to pass the Shops Bill, which would have allowed more stores to stay open on Sunday. H. YOUNG, *supra* note 41, at 482.

the way they think best represents their constituency and their nation. The backbenchers, however, retain power to criticize their leaders,⁸¹ replace the Prime Minister in annual elections,⁸² and force a new election by joining the opposition for a vote of no confidence. Upon a vote of no confidence, the backbenchers can force the Prime Minister to resign or dissolve Parliament.⁸³ Consequently, one must study both Parliament's internal structure and that of the major political parties to comprehend the British constitution.

Packed⁸⁴ into a small replica of the original House of Commons built after the original was bombed in World War II, Members of Parliament jeer and snarl at each other under a system politely named "adversary politics." The British parliamentary culture has the classic vices and virtues of any well-organized adversarial system: clear winners and losers, probing debate, competitive pressure, a propensity for generating alternative perspectives, polarization, excessive rhetoric, and a limited ability to reach compromise and accommodation.

Within this system, the opposition parties only have the right to criticize and ask questions of the government. By convention, they have several "supply days" that they can use to cross-examine the government. They have numerous other opportunities to ask questions and debate the government, with the most heated exchanges usually occurring between Ministers and their "shadows" who are part of the opposition. The opposition, however, is at a serious disadvantage in performing these functions. Parliamentarians have very few resources,⁸⁵ while the government has the assistance of permanent civil servants who by convention impartially serve whichever party is in power.⁸⁶ Backbenchers from

81. For a sardonic description of life as a Conservative backbencher during the Thatcher era, see J. CRITCHLEY, *WESTMINSTER BLUES* (1985).

82. *See supra* note 41.

83. R. BRAZIER, *supra* note 49, at 173-77.

84. There are only 427 seats for 650 members of Parliament. P. SILK, *HOW PARLIAMENT WORKS* 5-6 (2d ed. 1989).

85. The following table demonstrates the average MP's woeful lack of resources, particularly in contrast to the gigantic American congressional staffs:

	Number of MPs employing			
	<u>none</u>	<u>one</u>	<u>two</u>	<u>more than two</u>
Rsch Ass.	310	235	65	40
Secretaries	185	337	41	37

Id. at 35.

86. W. JENNINGS, *supra* note 62, at 147. This convention, like so many others, has taken a beating in the last decade. Civil servants frequently are called to testify before select committees. Many Labour politicians have accused the civil service of having an underlying conservative bias. Civil service loyalty to the party in power can include supplying parliamentary

both parties have complained about their inability to fulfill their constitutional obligation to criticize and confront the government.

Effecting a major change, the Thatcher government passed a bill authorizing dramatic expansion of "Select Committees" in 1980. Select Committees provide permanent oversight of selected governmental functions. As of November 1, 1988, thirteen committees of backbenchers are in operation,⁸⁷ reviewing overseeing departments ranging from Agriculture to Welsh Affairs.⁸⁸ The committees generally are nonpartisan and their membership is relatively permanent (at least in comparison to Standing Committees, which are temporary committees set up to evaluate specific legislation). The Select Committees can require regular citizens to attend meetings, but not other MPs or members of the House of Lords. They also cannot force departments to produce internal documents or compel civil servants to testify.⁸⁹ Because the government controls the House of Commons and its contempt powers, which enables the committees to compel testimony, it can refuse to answer questions whenever it wishes.⁹⁰

1. *The Legislative Process*

The majority party, through the government, completely controls the legislative process. Almost all important bills⁹¹ are proposed by the Prime Minister in the Queen's Speech, which inaugurates every session of Parliament. These bills are created by a combination of government offi-

questions to disrupt Opposition inquiry. G. MARSHALL, *supra* note 58, at 76. The Labour Party politician Denis Healey disagreed with claims that civil servants are politically biased: "Throughout my career in politics I found civil servants, if anything, overscrupulous to avoid party prejudice." D. HEALEY, *THE TIME OF MY LIFE* 107 (1989).

87. The Scottish committee was not functioning because there was an insufficient number of interested Conservatives to fill the committee due to the lack of Conservative MPs elected in Scotland. P. SILK, *supra* note 84, at 220.

88. *Id.* at 220-21.

89. *Id.* at 223.

90. The government may face political pressure if it does not cooperate. For instance, the Thatcher government had to release more information than it wished to a committee investigation of the Westland affair. *Id.*

91. Some important acts begin as "private members bills." At every session the government permits ten of its backbenchers to introduce their own legislation. During one brief period, 1964 to 1970, the Labour government supported several important private members bills, such as the Abortion Act of 1967, and the Sexual Offenses Act of 1967, which decriminalized homosexual behavior between consenting adults. Normally, private members bills are narrow in scope. M. ZANDER, *THE LAW MAKING PROCESS* 67 (1989).

On rare occasions, important legislation is implemented through the "private bill" process. Such legislation covers such topics as nationalized industries, local authorities, universities, and commercial ventures. *Id.* at 68. By far the most significant recent example has been the "private bill" to authorize private parties to buy land to build the tunnel under the English Channel.

cials, permanent civil servants, interest groups, and a small group of lawyers skilled in statutory drafting.⁹² Most major bills are presented for three "readings" before the House of Commons, although a few begin in the House of Lords. A proposed bill is presented for a first reading in a summary proceeding. The bill is then debated during a second reading, but no amendments are allowed at that time.⁹³ After the second reading, the proposed bill is referred to a Standing Committee controlled by the ruling majority party. These temporary committees, consisting of between sixteen and fifty members, can make amendments. Successful amendments almost always are technical in nature and almost always government sponsored.⁹⁴ The bills are returned to the full House for the third reading. After that formality, bills are sent to the House of Lords. The Lords both substantively criticize and technically edit bills, thereby providing another forum for debate and reconsideration.

Occasionally a bill dies in the House of Lords. For example, the House of Lords blocked an effort by the Labour Party to weaken the power of the Boundary Commission.⁹⁵ Such rare defeats should never obscure the overwhelming power of the government. For example, former Prime Minister Thatcher's plan to change the tax base for local authorities from property values to a poll tax ran into severe resistance from within and without her own party.⁹⁶ The proposal nevertheless has become law.⁹⁷

2. *The MPs and the Prime Minister*

Rebellious majority party members face a variety of sanctions from the Prime Minister. Aside from the classic forms of power—making policy, allocating resources,⁹⁸ declaring war, having virtually unlimited ac-

92. S. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 286-87 (1985).

93. *Id.* at 288-89.

94. The statistics tell the story. Professor Griffith studied three parliamentary sessions; during that time period the Ministers successfully introduced 906 out of 907 amendments, while the opposition only implemented 29 out of 599 proposals and government backbenchers saw Committees adopt only 10 of their 89 proposals. J. GRIFFITH, *PARLIAMENTARY SCRUTINY OF GOVERNMENT BILLS* 159 (1974), cited in M. ZANDER, *supra* note 91, at 71. For a recent series of essays discussing Parliament, see M. RYLE & P. RICHARDS, *THE COMMONS UNDER SCRUTINY* (3d ed. 1988).

95. C. TURPIN, *supra* note 68, at 426.

96. H. YOUNG, *supra* note 41, at 522. The tax has not garnered much popular support. *Id.* at 529.

97. *Id.* at 522.

98. Elliott, *The Control of Public Expenditure*, in J. JOWELL & D. OLIVER, *THE CHANGING CONSTITUTION* 149-73 (1985).

cess to the media,⁹⁹ and controlling information—the Prime Minister has enormous powers of patronage: she or he appoints the Cabinet, the committees within the Cabinet, any ad hoc groups within the Cabinet to conduct specific policies (such as overseeing the Falklands War), members of the House of the Lords, the Lord Chancellor (who is the equivalent of the Chief Justice of the Supreme Court but who remains a member of Cabinet dismissible at will), members of the judiciary (through the Lord Chancellor), top civil servants (who in turn make the careers of lower civil servants), and the party Whips.¹⁰⁰ The Whips assign MPs for the temporary Standing Committees.¹⁰¹ They also appoint and influence the backbench MPs who will sit on the Committee of Selection that assigns MPs to the Select Committees.¹⁰² The Whips advise the Liaison Committee, which coordinates committee work.¹⁰³ The Prime Minister appoints the Speaker of the House, who by convention must impartially conduct Parliament's sessions.¹⁰⁴ The Prime Minister influences or designates the chairs of all nationalized industries, Royal Commissions, ambassadors, chiefs of staff, the heads of national security services, as well as members of a variety of public boards.¹⁰⁵ The Prime Minister distributes a variety of honors, such as turning former President Ronald Reagan into Sir Ronald Reagan.¹⁰⁶ After consulting with the Cabinet, the Prime Minister has the power to request the Crown to dissolve Parliament any time before the statutory five year requirement is met.¹⁰⁷

99. See, e.g., M. COKERELL, P. HENNESSY & D. WALKER, *SOURCES CLOSE TO THE PRIME MINISTER* (1984).

100. Whips are considered part of the government. R. BRAZIER, *supra* note 49, at 120.

101. S. DE SMITH, *supra* note 92, at 290.

102. P. SILK, *supra* note 84, at 227.

103. The Liaison Committee consists of the fourteen select committee chairmen. R. BRAZIER, *supra* note 49, at 188 n.163. These chairmen were elected by the members of each committee. *Id.* at 188. Thus there is some autonomy from Whip pressure.

104. The parliamentary counsel, who draft most legislation, are formally responsible to the Prime Minister. Professor Zander concluded, however, that "in practice they are effectively not accountable to anyone." M. ZANDER, *supra* note 91, at 49-50.

105. R. BRAZIER, *supra* note 49, at 81-82.

106. The Queen retains a few honors that she alone can distribute.

107. Parliamentary dissolution resembles a mass lay-off, putting all the MPs' jobs at risk. See G. MARSHALL, *supra* note 58, at 45-53. It is conceivable, however, that the Crown might refuse a Prime Minister's request to dissolve Parliament. The Prime Minister may no longer be able to command a majority, but some other leader or coalition of leaders might be able to provide a stable government. The Crown might also deny the Prime Minister's request if the Prime Minister already has made several such dissolutions within a short period of time, and seems only to be trying to increase the majority party's strength. See R. BRAZIER, *supra* note 49, at 6-62. Professor Marshall argues that the Prime Minister may actually have to consult with the Cabinet before seeking a dissolution and that total resistance by the Cabinet might prevent a dissolution. G. MARSHALL, *supra* note 58, at 51-53. See *THE BRITISH PRIME MINISTER* (A. King ed. 1985) for a series of essays on the Prime Minister.

Tony Benn, a left-wing leader in the Labour Party and staunch critic of the existing constitution, particularly criticized the Prime Minister's vast powers to hire and fire. Benn contended that this power, "without any constitutional need for approval by Parliament or the Party[,] is the most decisive for it is by its use, or threat of use, that all the other powers . . . fall into the hands of the Prime Minister alone."¹⁰⁸ Benn has argued for reforms within the party structures, not the formal parliamentary structure.¹⁰⁹ His most important recommendation has been that whenever all the Labour Party MPs regain power, they should be able to elect all Cabinet officials except for the new Prime Minister.¹¹⁰ Under this scheme, both the Cabinet and the backbenchers would have more influence because Cabinet members could not be fired or shuffled at the will of the Prime Minister. This scheme would help restore the Cabinet's power which has dwindled over the past decades.¹¹¹

The Prime Minister does not have complete discretion, however, over the composition of the Cabinet. Bound by the convention of individual responsibility, some Cabinet Ministers are forced to resign. Under that doctrine, each Cabinet member is responsible to Parliament (and thus to the people) for any errors committed by his or her department or for any personal failings.¹¹² This convention is notoriously unpredictable in its application.¹¹³ In addition, Ministers can resign voluntarily and backbenchers can withdraw support.¹¹⁴ Thus, the Prime Minister's

108. P. NORTON, *THE CONSTITUTION IN FLUX*, 44 (1982). (This source was unavailable for verification due to delays in intercontinental shipping. Ed.)

109. *Id.*

110. *Id.* at 45.

111. Both Labour and Conservative Prime Ministers have made many major decisions, particularly concerning nuclear weapons policy, without Cabinet participation or even knowledge. With stunning regularity, Margaret Thatcher summarily transferred major Cabinet leaders to less prestigious positions or fired them. See P. HENNESSY, *CABINET* 123-62 (1986).

112. See, e.g., G. MARSHALL, *supra* note 58, at 61-66, 222-24.

113. For example, Lord Carrington stepped down from being Foreign Secretary after Argentina successfully invaded the Falkland Islands. R. BRAZIER, *supra* note 49, at 137. On the other hand, James Prior remained in charge of Northern Ireland after several Irish prisoners escaped from prison. The convention nevertheless retains some weight. Margaret Thatcher had to dismiss Cecil Parkinson, one of her closest allies, after it was discovered that his mistress was going to have a baby. H. YOUNG, *supra* note 41, at 342-44. She also had to sacrifice another favorite, Leon Brittan, who leaked confidential information during the Westland Affair.

114. The 1987 resignation of Nigel Lawson, Chancellor of the Exchequer, over Britain's monetary policy and Britain's relation with Europe, weakened Thatcher enough to trigger a half-hearted formal challenge to her leadership. Bagehot, *Skullduggery and Mayhem, cont.*, *THE ECONOMIST*, Nov. 11, 1989, at 75, col. 1. Bagehot also described how the voting system might be used to challenge Prime Minister Thatcher inside the Tory Party. Bagehot, *Brain Teaser*, *THE ECONOMIST*, Nov. 11, 1989, at 75, col. 3.

power varies from month to month, year to year.¹¹⁵

Theoretically, the Prime Minister has limited control of prosecutorial discretion of criminal cases. That control raises issues directly analogous to those addressed in *Morrison v. Olson*¹¹⁶ and *Young v. United States ex rel. Vuitton et Fils*.¹¹⁷ The Prime Minister appoints to the Cabinet the two officials, the Attorney General and the Solicitor General, who by convention should not institute prosecutions for party advantage.¹¹⁸ Several major statutes, such as the Official Secrets Act¹¹⁹ and the Prevention of Terrorism (Temporary Provisions) Act 1984,¹²⁰ however, give these officials exclusive discretion to bring prosecutions. Nevertheless, prosecutorial discretion is not as controlled by the government in Britain as it is controlled by the executive in the United States. Under English common law, any citizen can trigger a criminal prosecution by filing a complaint,¹²¹ unless a statute explicitly limits that decision to the government. The Attorney General, however, can quash any private prosecution by entering a *nolle prosequi*.¹²² Courts cannot review the Attorney General's decisions to commence or to terminate both criminal proceedings and civil proceedings designed to prevent criminal activities.¹²³ Prosecutorial discretion falls outside the Prime Minister's domain only in theory. A Law Officer "is not subject to direction by his ministerial colleagues or to control and supervision by the courts."¹²⁴ Such dicta contain more fiction than law.¹²⁵ Thus, a power that Justice

115. As this Article was going to press, Margaret Thatcher resigned. See *supra* note 41. A Conservative defender of the constitution might argue that recent history has vindicated the constitution. It permitted a strong-willed leader to gain enough power to weaken the unions, but eventually developed sufficient constraints to keep her from gaining too much power. Time may tell.

116. 487 U.S. 654 (1988).

117. 481 U.S. 787 (1987).

118. G. MARSHALL, *supra* note 58, at 113.

119. Official Secrets Act 1911 (1 & 2 Geo. 5, ch. 20).

120. Prevention of Terrorism (Temporary provisions) Act 1984 (1984, ch. 8).

121. In one outrageous case, the *Sun* newspaper funded the prosecution of a doctor for the alleged rape of a young girl. The paper was ultimately found in contempt of court for publishing a series of articles during the trial that threatened the doctor's chance of a fair trial. The paper was fined £75,000 for writing such headlines as "Rape Case Doc Groped." *Attorney-General v. News Groups Newspapers Ltd.*, *The Times* (London), Feb. 20, 1988, at 34, col. 2, quoted in O. HOOD PHILLIPS, *LEADING CASES IN CONSTITUTIONAL AND ADMINISTRATIVE LAW* 181-82 (6th ed. 1988).

122. *Gouriet v. Union of Post Office Workers*, 1978 A.C. 435, quoted in O. HOOD PHILLIPS, *supra* note 121, at 194.

123. O. HOOD PHILLIPS, *supra* note 121, at 194.

124. *Id.*

125. It is inconceivable that Thatcher did not oversee the prosecution of Peter Wright for the publication of *Spycatcher*. See *infra* note 207 and accompanying text.

Scalia considers a "pure executive function"¹²⁶ has been distributed by Parliament between the people and the government, with the executive retaining the last word.

C. The Party Structures¹²⁷

Although the British electorate retains the power of the ballot, the highly centralized government structure recurs inside the two major parties. This study of party structure confirms this Article's proposition that the appointment and removal powers largely define any constitution.

1. *The Conservative Party*

Both in structure and in ethos, the Conservative Party has always been more centralized than the Labour Party. A group of Conservative party leaders used to recommend a Prime Minister to the Crown, occasionally embroiling the Crown in political controversy. For instance, in 1963 the Queen helped select the Earl of Home from the House of Lords to succeed Harold Macmillan.¹²⁸ After suffering defeat twice in selecting a Prime Minister under the leadership of Edward Heath, the Conservative Party established annual elections of the party leader by the Conservative MPs in the House of Commons in 1975.¹²⁹ Margaret Thatcher won the first such election, remembering ever since to be sensitive to the backbench.¹³⁰ Consequently, the Crown no longer retains a meaningful role in the selection of the Conservative Prime Minister.

The Conservative leader appoints all significant officers to the Conservative Central Office, which coordinates the Conservative Party's election efforts.¹³¹ The Central Office screens people aspiring to run for office, creating a large "central list" from which the local constituencies can choose their candidates.¹³² The Office also provides most campaign

126. *Morrison v. United States*, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

127. Because their rivals have recently lost electoral power, we shall limit our inquiry to the Conservative and Labour Parties. Several other political parties exist in the United Kingdom, but they presently have few seats inside the House of Commons. The two major parties provide enough examples of the crucial relationship between party organization and the formal constitutional structure, a relationship ordinarily underemphasized in American constitutional analysis.

128. M. BELOFF & G. PEELE, *THE GOVERNMENT OF THE U.K.: POLITICAL AUTHORITY IN A CHANGING SOCIETY* 218 (2d ed. 1985). By appointing a peer, the Queen violated the convention that the Prime Minister should be a member of the House of Commons. *Id.*

129. The party leadership election rules for all major parties are set forth in R. BRAZIER, *supra* note 49, at 260-66.

130. M. BELOFF & G. PEELE, *supra* note 128, at 219.

131. *Id.* at 227.

132. *Id.*

finances¹³³ and supplies background material to the MPs.¹³⁴

The Central Office's control over the selection of candidates is not absolute; the local constituency party, run by local party activists within each parliamentary district, retains significant discretion in choosing a candidate from the central list offered by the Central Office.¹³⁵ Local constituencies meet together, as the National Union of Conservative and Unionist Associations.¹³⁶ Although they remain independent from the Central Office, the constituencies do not challenge their leaders' policy decisions.¹³⁷

Because the major allocation of power occurs through the annual election of the leader by the Conservative MPs, the annual party conference traditionally consists of a celebration of that leader and of the party. "[T]he major function[s] conferences fulfill relate to propaganda, publicity[,] and the general integration of the various groups within the party into a corporate whole."¹³⁸

Aside from the annual election of the leader, backbenchers maintain access to the leadership through the 1922 Committee, named in memory of the year in which a group of Conservative MPs destroyed the Lloyd George coalition by walking out of it.¹³⁹ When the Conservatives are out of power, all MPs are members of the Committee; when the Conservatives control the House of Commons, only backbenchers sit on the Committee.¹⁴⁰ At any moment the leader, as Prime Minister, can place backbenchers into government when the party is in power.¹⁴¹ He or she can also place them on the "Shadow Cabinet," a group of opposition leaders who are assigned to cover each governmental department, should

133. *Id.* at 256.

134. *Id.* at 220.

135. This process explains one of Britain's peculiarities. The two major parties tend to coalesce around a leader, and the electorate bases its vote in large part upon an assessment of that leader, but the leader only runs for office in one district, which is so safe that there is little chance for defeat.

136. M. BELOFF & G. PEELE, *supra* note 128, at 228.

137. The primary conflict between the constituency wing of the party and the Central Office has been over the assignment of "agents," professional campaign managers who assist local MPs in their election efforts. So far the local constituencies have been able to retain popular, effective agents whom the Central Office wanted to relocate to more contested districts. *Id.* at 227-28.

138. *Id.* at 226.

139. *Id.* at 224-25. Lloyd George, a Liberal, led a coalition government of Liberals and Conservatives during World War I. Partisan politics resumed soon after the war, leading to a Conservative MP revolt that destroyed the coalition in 1922.

140. *Id.* at 225.

141. R. BRAZIER, *supra* note 49, at 66.

the Conservatives fall out of power.¹⁴²

2. *The Labour Party*

The Labour Party is somewhat less centralized than the Conservative Party.¹⁴³ The Labour leader has far less power, particularly in opposition, because the Shadow Cabinet is elected by the Parliamentary Labour Party (PLP), which consists of all the Labour Party MPs, instead of being selected by the opposition leader.¹⁴⁴ Consequently, powerful opponents of the leader can maintain significant power within the party if they are popular with enough of their colleagues. The Labour leader, however, has the power to appoint all government officials whenever Labour becomes the ruling party, a power condemned by some of Labour's more left-wing members.¹⁴⁵

The PLP in turn has less strength than the Conservative MPs. In 1980 Labour decided that the party leader must win an election at the annual party conference in which the Parliamentarians would have thirty percent of the vote, the unions forty percent, and the constituency parties thirty percent of the vote.¹⁴⁶ This voting breakdown creates factions within the party, robbing it of internal strength. The Labour MPs also have less authority to make policy than their Conservative rivals. The Labour party considers its annual conference to be the ultimate source of sovereignty.¹⁴⁷ The conference consists of representatives from the unions, local constituency parties, the MPs, and small socialist societies.¹⁴⁸ The conference determines policies by two-thirds votes, conducts the leadership elections, selects the National Executive Committee (NEC),

142. For a description of the politics behind Margaret Thatcher's appointments to her shadow cabinet and her selection of trusted advisors when she was in opposition, see H. YOUNG, *supra* note 41, at 104-18.

143. Labour has never consulted the Crown when presenting a triumphant leader to be Prime Minister; they have already elected their leader. G. MARSHALL, *supra* note 58, at 29.

144. M. BELOFF & G. PEELE, *supra* note 128, at 228-29.

145. "This practice has been attacked, notably by [the left winger] Tony Benn. So far the Labour Party leader has retained the prerogative: [appealing] to the conventions of the constitution against the practices and expectations of the Labour Party." M. BELOFF & G. PEELE, *supra* note 128, at 229.

146. R. BRAZIER, *supra* note 49, at 18.

147. The Labour Party Conference's power is somewhat limited in practice. To have any effect, conference policy resolutions must be implemented by the parliamentary leaders through the party election manifesto: "The Labour Party's election manifesto is . . . drafted by the National Executive Committee in conjunction with the Labour [c]abinet or shadow cabinet, and until 1979 it was tacitly accepted that the leader had a veto over any item he considered objectionable—a privilege strongly resented by the left." M. BELOFF & G. PEELE, *supra* note 128, at 231.

148. *Id.* at 232.

and chooses the party's principal officers.¹⁴⁹ The NEC controls the party between conferences. The unions can dominate any conference vote; each union representative has as many votes as he or she has members.¹⁵⁰ Union votes must be cast as a block. Leaders of the five largest unions, with approximately two and a half million members, must be courted by everyone else in the party.

Labour's overall structure has not been as "democratic" as it could be. Until recent conservative labour legislation, union leaders were elected by open ballots, some for life. The unions also heavily influence the NEC. They directly elect twelve of the twenty-nine members and control six other seats through general conference elections.¹⁵¹ The unions' power undercuts Labour's argument that it is more "democratic" and "open" than the Conservative Party.¹⁵² It is not self-evident that a process where union leaders play a large role in making the crucial choice of the leader is more "democratic" than the Conservatives' system of making the leader accountable to elected officials within the party.

D. The Role of the Courts

The British courts are not as insulated from other branches of government as the American federal courts. The Law Lords are members of the House of Lords, a legislative branch, and their leader, the Lord Chancellor, is a Cabinet member.¹⁵³ The Lord Chancellor also serves as Speaker of the House of the Lords.¹⁵⁴ Such commingling of functions probably led Professor Marshall, one of England's foremost constitutional scholars, to deflate the doctrine of separation of powers: "In short, the principle [of separation of powers] is infected with so much impreci-

149. *Id.* at 231.

150. The numbers tell the tale. "[T]he [Labour Party] membership had slumped in 1982 to 273,803 individual members with 57,131 from the socialist societies compared with 6,185,063 from the affiliated trade unions." *Id.* at 233.

151. *Id.* at 235. Some party leaders and union officials have recently made proposals to reduce the unions' influence inside the party so that the party can attract more voters who are wary of the Unions. Bagehot, *Dumping Albatrosses*, *THE ECONOMIST*, July 29, 1989, at 49, col. 1.

152. The Labour Party has become more polarized and more ideological during the past fifteen years. Neil Kinnock, the "soft left" party leader, has gained more power over local constituency parties in an effort to purge the party of members of the Militant Tendency, a Trotskyite faction. The overall result has been a party torn by shifting factions. "[D]ivisions within the Labour Party can occasion a variety of alliances involving the PLP, the trade union movement, and the constituency parties in different combinations at different times." M. BEL-OFF & G. PEELE, *supra* note 128, at 245. The Labour Party, however, showed more cohesiveness during the 1989 Conference than they have for years. Bagehot, *Not Like the Old Days*, *THE ECONOMIST*, Oct. 7, 1989, at 77, col. 1.

153. R. BRAZIER, *supra* note 49, at 119.

154. P. SILK, *supra* note 84, at 4.

sion and inconsistency that it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds."¹⁵⁵

The Law Lords do not accept Professor Marshall's conclusion. They claim that "[a]lthough the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature."¹⁵⁶ Certainly the Law Lords are largely immune from direct political pressure. In his empirical study of the Law Lords, Alan Paterson concluded that Law Lords are threatened by only a few, rarely used sanctions. The Lord Chancellor, for example, can alter their case assignments if he disapproves of them¹⁵⁷ and can decide whether they can sit either on the Privy Council or the House of Lords.¹⁵⁸

Although impeachment remains a theoretical constraint, Paterson was unable to find any efforts within the last one hundred years to remove a Law Lord for "deviance."¹⁵⁹ That time period may not be coincidental; the Law Lords unambiguously adopted Dicey's doctrine of parliamentary sovereignty in the late nineteenth century.¹⁶⁰

One might conclude that the courts have not played a major role in formulating the constitution or protecting individual rights. Yet the courts helped design Britain's basic constitutional structure in the *Case of Proclamations*, in which Lord Justice Coke held that the King did not have the power to create new crimes or new criminal penalties, to define new royal prerogatives, or to create new crimes via the Star Chamber.¹⁶¹ These basic limitations of royal power were central issues of the Glorious Revolution of 1688. They were also incorporated into the Bill of Rights of 1689,¹⁶² which is Britain's closest equivalent to a written

155. G. MARSHALL, *supra* note 54, at 124.

156. *Regina v. H.M. Treasury ex parte Smedley*, [1985] 1 Q.B. 657 (C.A.). We should never forget that Congress and the President can always use the appointment process to pack the Supreme Court. They are restrained by convention, not fundamental law. One may not like that fact, but it is a congressional power which is far less controversial constitutionally and far more powerful than periodic proposals to allow Congress to alter constitutional decisions through manipulation of federal court jurisdiction.

157. A. PATERSON, *THE LAW LORDS* 11 (1982).

158. *Id.*

159. *Id.* Paterson did not define "deviance," except to provide the example of Lord Halisham's curtailing Lord Atkin for being too much of a reformer. *Id.*

160. *British Railways Board v. Pichin*, 1974 A.C. 765.

161. 12 Co. Rep. 74, 77 Eng. Rep. 1352 (K.B. 1611); *see also* *Darcy v. Allein*, 11 Co. Rep. 84, 72 Eng. Rep. 830 (K.B. 1602); *Prohibitions Del Roy (Case of Prohibitions)*, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (K.B. 1607).

162. 1 W. & M. Sess. 2, ch. 2.

constitution.¹⁶³

The judiciary has an imperfect tradition of protecting individual liberties through the common law.¹⁶⁴ A British court outlawed slavery under English common law.¹⁶⁵ In a classic government seizure case, *Entick v. Carrington*, the Court of Common Pleas held that the executive could not seize books and papers unless they had clear statutory authority: "If it is law, it will be found on our books. If it is not to be found there, it is not law."¹⁶⁶ Unfortunately, Parliament subsequently gave the government broad seizure powers in such statutes as the Official Secrets Act.¹⁶⁷ The judiciary has increasingly deferred to the executive, particularly whenever the executive argues national security. In *Liversidge v. Anderson*, the House of Lords upheld oppressive detention orders based on conclusory affidavits on a national security rationale during World War II.¹⁶⁸ The judiciary still retains enormous power arising from its essential obligation to interpret Parliament's statutes. The courts frequently find that the government (not Parliament) has acted *ultra vires*.¹⁶⁹ The courts can stop governmental actions which are (1) outside the scope of the minister's statutory authority, (2) contrary to the purpose of the statute, (3) misinterpretations of the statute, (4) violations of "natural justice," or (5) irrational. These doctrines can be used very aggressively.

Professor Griffith triggered a bitter controversy when he concluded that the British courts have used these powers to protect conservative interests.¹⁷⁰ Griffith noted that the courts were far more willing to find a

163. One should remember that the Bill of Rights is not a "constitution" because it is not "entrenched." A bare majority of Parliament can pass a statute to amend or to eliminate the Bill of Rights.

164. The British courts recently have become very active in defining and enforcing "natural justice," the British variant of procedural due process. British courts have prevented the government and various associations from injuring a person because of bias, a denial of hearing, or inadequate hearing procedures. See S. DE SMITH, *supra* note 92, at 569-82. Such decisions can be overruled by statute, but they have generated an independent source of procedural fairness.

165. *Somerset v. Stewart*, (1772) Lofft 1, 98 E.R. 499, 45 Digest 389 (Rep). See A. DENNING, *LANDMARKS IN THE LAW* 214-27 (1984).

166. 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (1765) (Lord Camden, C.J.), *quoted in* C. TURPIN, *supra* note 68, at 48.

Governmental claims of necessity failed: "[W]ith respect to the argument of state necessity, or a distinction that has been aimed at between state offenses and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions . . ." C. TURPIN, *supra* note 68, at 48.

167. Official Secrets Act 1911 (1 & 2 Geo. 5, ch. 20).

168. 1942 A.C. 206.

169. See, e.g., S. DE SMITH, *supra* note 92, at 560-66.

170. J. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (3d ed. 1985). Many lawyers were angry because Griffith undermined the distinction between politics and law. The English bar is

breach of natural justice when a police officer was fired than when students, prisoners, or trade union members faced sanctions.¹⁷¹ Griffith's most telling example was *Bromley v. Greater London Council*.¹⁷² The Court of Appeal and the House of Lords held that the Greater London Council (GLC), controlled by Labour, acted ultra vires when it cut public transportation rates by twenty-five percent. The GLC, however, had statutory authority to "[s]ubmit proposals for an alteration in the Executive's fare arrangements to achieve any object of general policy"¹⁷³ The Courts concluded that the GLC had a "fiduciary duty," which it breached, to make public transport economically efficient.¹⁷⁴

Griffith did not find such decisions surprising, partially because the Lord Chancellor only appoints successful barristers. Most barristers must come from moderately wealthy families because they received, until recently, no income during their tutelage and little income during their first years of practice.¹⁷⁵ "Oxbridge" emerges triumphant: "[F]our out of five full-time professional judges are products of public schools, and Oxford or Cambridge."¹⁷⁶ One should not, however, be too reductionist; the Lords do not always favor the government or the Conservatives.¹⁷⁷

II. A Comparison with the United States

A. Relative Strengths of the British System

Constitutional lawyers have compared the British and American constitutions ever since the Constitutional Convention of 1787. The General Index of James Madison's *Notes of Debates in the Federal Convention of 1787* contains sixty-one references to Great Britain.¹⁷⁸ A.V. Dicey frequently referred to the American Constitution in the course of describing and evaluating the British Constitution.¹⁷⁹ Numerous law reviews have evaluated the two systems, comparing issues ranging from

remarkably steadfast in making the law/politics distinction, perhaps because their constitution is so overtly political.

171. *Id.* at 163-78.

172. 2 W.L.R. 62.

173. J. GRIFFITH, *supra* note 94, at 208-13.

174. *Id.*

175. *Id.* at 28-29.

176. *Id.* at 28.

177. For example, the House of Lords held that private steel companies could not enjoin their workers from going on strike to support a strike against British Steel Corporation, which was publicly owned. *Duport Steels Ltd. v. Sirs*, [1980] 1 W.L.R. 142.

178. J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* REPORTED BY JAMES MADISON 666 (A. Koch ed. 1966).

179. There are 13 references listed in the index to the 10th edition of A. DICEY, *supra* note 48, at 534.

the development of alternative dispute mechanism in divorce¹⁸⁰ to judicial selection.¹⁸¹

The British frequently lose their customary reserve to praise their constitution with a smugness that approaches arrogance.¹⁸² Even Charles Dickens' Mr. Podsnap could not top the conclusion of an MP that "our constitution is the envy of the world."¹⁸³ Much of that self-confidence has diminished along with the Empire and with Britain's economic and political preeminence. Some critics believe that the British constitution is a cause of Britain's decline. They accordingly advocate radical reforms to increase prosperity.¹⁸⁴ The sad truth may be that Britain's deterioration was inevitable, irrespective of its constitutional structure. Britain's relatively small land mass and population, class rigidity,¹⁸⁵ and lack of natural resources may have doomed it to political and economic mediocrity. Britain's slide gloomily rebuts the argument that political and economic liberties must coexist (at least over the short run) for nations to thrive. Countries such as India and Britain have liberal politics but struggling economies, while South Africa and South Korea have gained economic strength amidst political oppression. Communist China's economy may grow after the slaughter at Tiananmen Square.

Whatever its ultimate relationship to the country's economic and political power, the British constitution has some obvious strengths. Its longevity is a virtue, creating a blend of stability and change that has

180. See, e.g., Miller, *British Development in Alternative Dispute Resolution in Divorce*, 2 B.Y.U. J. PUBL. L. 49 (1988). For a wider survey of governmental systems, see S. FINER, *supra* note 42.

181. See, e.g., Atkins, *Judicial Selection in Context: The American and English Experience*, 77 KY. L.J. 577 (1988-89).

182. Written constitutions are no guarantee of protection from tyranny, much less of a better organized, fairer society. Dicey explained how the British constitution protects civil liberties better than many formal constitutions: "But any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced." A. DICEY, *supra* note 48, at 198. Dicey did not disparage all written constitutions; he praised the American "statesmen" who gave constitutional rights their "legal security." *Id.* at 200. But he warned that "general rights guaranteed by the constitution may be, and in foreign countries constantly are, suspended." *Id.*

183. Mr. Podsnap explained: "We Englishmen are Very Proud of our Constitution, Sir. . . . It was Bestowed Upon Us by Providence. No Other Country is so Favoured as This Country." C. DICKENS, *OUR MUTUAL FRIEND* (1865), *quoted in* P. NORTON, *supra* note 108, at 23.

184. "When things go as badly as that, blame is not confined to those who work the system, it implicates the system itself." T. Hickey, *Constitution Under Mounting Attack*, *The Times* (London) (Jubilee Britain Supplement), Jan. 5, 1977, at 1, *quoted in* P. NORTON, *supra* note 108, at 28.

185. See I. REID, *SOCIAL CLASS DIFFERENCES IN BRITAIN* (1989).

formed a relatively free and tolerant culture with significant degrees of individual liberty. The constitution is both adaptable to changing circumstances and responsive to the will of the electorate.¹⁸⁶ Parliament can radically change the constitution without wading through a lengthy, supermajoritarian process.¹⁸⁷ Parliament essentially “balances” every detail of the British constitution. Politicizing all constitutional issues keeps the citizenry more intimately involved with constitutional questions. Yet the citizenry does not see their constitution as a sacred text created by extraordinary Framers and interpreted by exceptional Justices; the constitution is the political battleground.

Although the Prime Minister retains most governmental power over the short run, he or she still must contend with many alternative sources of power within and outside of this highly centralized government. Other Cabinet members, often potential rivals, have a forum both to express their views and to demonstrate their executive expertise. Even purged rivals who have returned to the back bench remain potential leaders.¹⁸⁸ In addition, the government must constantly explain itself in Parliament. The leader cannot hide from critics, appearing only at occasional press conferences. The other ministers are constantly forced to defend themselves on the media and against questions from their “shadows.” The Prime Minister is also checked by interest groups, the electorate, the media, the markets, and other countries.

Britain’s structure consists of limited checks and balances and a partial separation of powers. The Prime Minister cannot lead alone, but must always retain a majority in the House of Commons. After all, the Prime Minister was only elected by a majority within one constituency; he or she has no direct mandate from the entire country. Voters throughout the country are indirectly but significantly influenced by the leaders of the different parties. Both the Prime Minister and the House of Commons have the power to force elections: the Prime Minister through dissolution, the House of Commons with a vote of no confidence. Judges are appointed for life. They are willing to strike down

186. English judges need not worry as much about “legitimacy” since any of their decisions can be reversed by Parliament.

187. The Labour government authorized a referendum on its decision to have Britain join the Common Market when Parliament passed a law requiring a referendum before devolving certain of its powers to Scotland and Wales. The voters did not support the change in sufficient numbers. See C. TURPIN, *supra* note 68, at 196-206. Although it could be argued that referenda are now needed before any radical constitutional changes, the use of referenda is, at best, an emerging convention.

188. Michael Heseltine, one such “purged rival,” still gets cheers at the Tory Party Conferences. Bagehot, *Planning for Posterity*, THE ECONOMIST, Oct. 13, 1990, at 66, col. 3; see also *Thinking the Unthinkable*, THE ECONOMIST, Mar. 10, 1990, at 63-64.

governmental actions that they perceive to be ultra vires.¹⁸⁹ Even the House of Lords and the Queen provide some checks on abusive legislation or policies.

Because so much of the constitution is governed by convention, all participants must be careful to observe the values contained within the conventions underlying the basic structure. Otherwise, a majority in the Commons might convert a convention into law. For instance, if the Commons became sufficiently dissatisfied with the existing distribution of power, it could pass a statute requiring elections for all Cabinet members rather than selection by the Prime Minister.

The British pass statutes banning symbols and institute actions banning books, yet a climate of open, harsh debate still exists. Banning books is rarely acceptable, and the British probably need the equivalent of a First Amendment. Yet the American system may not prove superior over time. The English muddle may provide more freedom over the next fifty years than American constitutional law. It is not clear who should be trusted the most—the judges, the politicians, or the populace. The British have gambled on majoritarianism, the Americans on a blend of powers. Either approach may fail.

The United States Supreme Court's overt shift to conservative interpretation should make American liberals a bit more sympathetic to the widespread opposition to a Bill of Rights in Britain.¹⁹⁰ The Supreme Court's history of judicial activism by voiding the actions of other branches of government has not always been inspiring, either in terms of results or of consistency. *Dred Scott*,¹⁹¹ *The Civil Rights Cases*,¹⁹² *Lochner*,¹⁹³ Commerce Clause doctrine prior to 1937,¹⁹⁴ *National League of*

189. See, e.g., S. DE SMITH, *supra* note 92, at 560-66.

190. The British left has been wary of constitutional judicial review because it probably would protect the existing distribution of property. Socialism would be far easier to implement in the United Kingdom than in the United States because Parliament would not have to contend with the "takings" and "just compensation" requirements of the Fifth Amendment. U.S. CONST. amend. V. For example, Parliament passed a bill explicitly overturning a House of Lords decision that had required the government to reimburse an oil company for damages incurred during World War II. Assuming that the United States Supreme Court would have found the legislature's initial action to be a taking warranting compensation, it would probably find any such "overturning" statute to be another taking, an ex post facto law, and an invasion of the Court's power to enforce the Bill of Rights.

191. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (Congress could not prevent slavery in the Territories).

192. 109 U.S. 3 (1883) (Congress could not pass a statute prohibiting racial discrimination by private railroads, inns, or other places of public amusement).

193. *Lochner v. New York*, 198 U.S. 45 (1905) (states could not regulate the number of hours that bakers could work).

194. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (Congress could not regulate child labor).

Cities v. Usery,¹⁹⁵ *Buckley v. Valeo*,¹⁹⁶ busing,¹⁹⁷ affirmative action,¹⁹⁸ and the privacy cases (protecting abortion,¹⁹⁹ but not homosexuality)²⁰⁰ demonstrate a lack of consistency and poor results. For instance, British legislators, immune from judicial review under the doctrine of parliamentary sovereignty, could quickly formulate and change affirmative action plans.²⁰¹ Their counterparts in the United States, however, must satisfy numerous criteria that have been created by the Supreme Court's interpretation of the Equal Protection Clause.²⁰² Parliament can and does severely regulate campaign expenditures,²⁰³ while American campaign finance law is created by a bizarre mixture of statutes and constitutional doctrine.²⁰⁴

B. Relative Weaknesses of the British Constitution

This Article is based on optimistic assumptions that some may dispute. Those assumptions are that the United States and Britain are not and have not been tyrannical, and that both countries have offered valuable lessons to each other and to the rest of the world.²⁰⁵ Both countries have created and expanded many individual rights and formulated civilizing structures.

Continuing an ancient tradition of secrecy, the British government willingly exercises its formidable powers to regulate speech. In 1987, the police entered the studios of the British Broadcasting Agency and seized several defense and espionage programs.²⁰⁶ The Thatcher administration engaged in an extensive but futile attempt to block the publication of

195. 426 U.S. 833 (1976) (states not required to comply with minimum wage and hour requirements).

196. 424 U.S. 1 (1976) (Congress had limited powers to regulate financial contributions in federal elections).

197. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30-31 (1971).

198. See *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990).

199. *Roe v. Wade*, 410 U.S. 113 (1973).

200. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

201. So far, affirmative action proposals have been very limited. See S. BAILEY, D. HARRIS & B. JONES, *CIVIL LIBERTIES: CASES AND MATERIALS* 434-35 (2d ed. 1985).

202. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

203. See O. HOOD PHILLIPS & P. JACKSON, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 193-95 (6th ed. 1978).

204. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1129-53 (1988).

205. N. SHEEHAN, *A BRIGHT SHINING LIE* (1988). Many Vietnamese and Irish Catholics have had different perceptions. The two countries' internal politics have not been immune from barbarism either; one need only mention slavery. See R. FOSTER, *supra* note 67.

206. R. BRAZIER, *supra* note 49, at 98.

Peter Wright's *Spycatcher*.²⁰⁷ The British courts, initially deferring to the government, finally concluded that the government's efforts had become futile: "Any adverse effect which publication would be likely to have on the readiness of the intelligence services to impart confidential information to the British services had by now largely been suffered."²⁰⁸

The ruling parties' willingness to invade liberties in response to the continual violence caused by Northern Ireland has been equally disturbing. The most chilling example occurred when the Republic of Ireland successfully challenged Britain's use of "techniques" to extract information from Irish Republican Army suspects: forcing suspects to rely mainly on their fingers to support themselves against a wall; placing a hood on suspects except during interrogation; making loud and continuous noises; depriving suspects of sleep, food, and drink.²⁰⁹ The European Court concluded that the techniques were "inhuman and degrading treatment" and a violation of article three of the European Convention on Human Rights.²¹⁰

Following recommendations by a Commission headed by a Law Lord, Lord Diplock, the government passed a bill denying alleged terrorists the right to a jury trial.²¹¹ Lord Diplock's participation on the Commission that studied the Northern Ireland dilemma sheds light on *Young v. United States ex rel. Vuitton et Fils*,²¹² reinforcing the argument that judges should not participate on such committees. First of all, there is something incongruous in having the judiciary ratify the suspension of such a basic right. Second, conflicts of interest inevitably will arise. For example, Lord Diplock also wrote an important decision upholding a trial court's decision that a soldier who killed an unarmed man in Northern Ireland did not commit murder.²¹³ Such commingling of functions only enhances any impartiality claims that terrorists might make in

207. The government attempted to prevent the publication of the memoirs of Peter Wright, a secret agent. Wright both described his career and made some controversial allegations including the charge that the security agency he worked for had undermined the Labour government of Harold Wilson. See K. EWING & C. GEARTY, *supra* note 38, at 152-69.

For several months newspapers could not publish excerpts from the book, but one could order the book by telephone from American bookstores.

208. *Attorney General v. The Observer Ltd.*, *The Times* (London), Feb. 11, 1988, at 21, col. 6, *quoted in* O. HOOD PHILLIPS, *supra* note 121, at 283.

209. K. EWING & C. GEARTY, *supra* note 38, at 211.

210. *Ireland v. United Kingdom*, Eur. Ct. H.R. Ser. A. 1978, *reprinted in* S. BAILEY, D. HARRIS & B. JONES, *supra* note 201, at 213.

211. S. BAILEY, D. HARRIS & B. JONES, *supra* note 201, at 199.

212. 481 U.S. 787 (1987).

213. Diplock upheld the lower court's finding that the defendant had an honest and reasonable, though mistaken, belief that the victim was a terrorist. *Attorney General for Northern Ireland's Reference* (No. 1 of 1975), 1977 A.C. 105, [1976] 2 All E.R. 937, [1976] 3 W.L.R.

Northern Ireland, thereby undercutting any potential triumph of the "rule of law."²¹⁴

The benefit of flexibility can also be the cost of unchecked discretion. On a day to day level, the Prime Minister has incredible power. On a legal level, Parliament remains all powerful. The judicial power may be partially separated, but ultimately is subservient to Parliament. This centralization has several costs aside from the increased risk of tyranny. Commentators such as Philip Norton have complained about the dramatic, destabilizing swings in policy which occur whenever a new party gains power. The majority party never needs the opposition party's cooperation or votes.²¹⁵ Norton argues that simply liberating the MPs from the whips would force the leaders of both parties to be more accommodating.²¹⁶ In addition, the opposition has less of a role to play because it cannot control any branch and because the party system virtually eliminates the need for substantive compromise. The opposition thus has the luxury of being shrill, adding to and reflecting the polarization that permeates Britain's class conscious society. Defenders of the adversary system might reply that the institutional polarization is a worthwhile reflection of society and that party discipline is necessary to implement any meaningful changes.²¹⁷ America's two party system, dominated by lobbyists and campaign specialists, offers no real alternatives.

Neither legal system should be too smug. The British have not adequately protected civil rights, but they have created statutory rights to shelter and to health care.²¹⁸ At the same time, the United States Supreme Court has become increasingly enamored with two doctrines that have Anglican implications: "balancing," which signifies flexibility, and "deference," which strengthens majoritarian power. If the British continue to be more influenced by their European neighbors, and the Supreme Court continues its march to the right, the two constitutions may become more similar.

235, cited in S. BAILEY, D. HARRIS & B. JONES, *supra* note 201, at 215-16. Diplock stated that such factual findings are for the trial court judge or jury. *Id.*

214. The Catholic distrust of the English legal system is nothing new: the Northern Irish Catholics lack "the necessary confidence in the judicial system as a means of securing justice." K. BOYLE, T. HADDEN & P. HILLYARD, *LAW AND STATE II* (1975), *quoted in* S. BAILEY, D. HARRIS & B. JONES, *supra* note 201, at 192.

215. P. NORTON, *supra* note 108, at 110-13.

216. *Id.*

217. *See id.* at 266.

218. National health insurance began with the National Insurance Act 1911 (1 & 2 Geo. 5, ch. 8). In 1977 an Act was passed to protect the homeless. Housing (Homeless Persons) Act 1977 (ch. 38).

C. Reflections on Cultures, Structures, and Rights

Two English traits—a wariness of ideology and a self-conscious culture—permeate British law. These characteristics even appear in the debate over the quality of statutory language. As noted above, most British statutes are drafted by a special group of lawyers, the Parliamentary Counsel, under the direction of the relevant Minister and civil servants.²¹⁹ Such centrality has not prevented criticisms familiar to American lawyers.²²⁰ British statutes have been assailed for being excessively technical, complex, uncoordinated, and long. Critics contrast them with continental systems that favor statutes which establish general principles and use straightforward language.²²¹

Such criticisms trigger counter-attacks, even from critics of British statutory language. Francis Bennion lambasted British statutes, but still favored the British approach. His defense was based upon a mix of culture and anti-ideology: “[T]he pragmatic British are chary of statements of principle. They mistrust them because they invariably have to be qualified by exceptions and conditions before being fitted for real life.”²²² Bennion also observed that statutes drafted in general terms transfer more power to the judiciary: “We do not need, nor do most of us desire, to be saved by our judges from the intentions of our Parliament.”²²³

Such pleas to culture (as well as to its close relative, tradition) and to anti-theory do not fit easily with the dominant forms of American egalitarianism. Probably responding to the need to integrate many different cultures, Americans have tried to believe that culture does not matter and that no real differences exist between ethnic groups or nations. Americans prefer to rely upon principles that apparently transcend culture and history. The American left finds direction in economic and social equality, while the right locates it in the equality of the market place. There is an excessive confidence in “reason.” Consequently, Americans of varying political persuasions are easily appalled at the sloppiness of the British constitution: the continuing relevance of the hereditary mon-

219. See, e.g., M. ZANDER, *supra* note 91, at 11-17.

220. See Dickerson, *Legislative Drafting in London and Washington*, 1959 CAMBRIDGE L.J. 49.

221. “The basic difference between the drafting of the [Continental] Code and that of the [British] Act is that the draftsman of the Code clearly appears to attach paramount importance to making himself readily intelligible to the citizen whereas the British legislator is at best heedless of the user and at times even seems deliberately obscure . . .” Millett, *A Comparison of British and French Legislative Drafting (with Particular Reference to their respective Nationality Laws)*, Autumn 1986 ST. L. REV. 130, 160; see also M. ZANDER, *supra* note 91, at 22-42.

222. *Id.* at 43 (quoting Francis Bennion).

223. *Id.*

arch (who must state under oath that he or she is not a Papist),²²⁴ the widespread commingling of functions and personnel, the lack of effective legislative oversight, the centralization of power, and so on. When one compares the two constitutions, line by line (even if some of the British lines are unwritten), the American Constitution seems more effective, fair, and coherent. I believe the American Constitution better balances the rights and powers of the majority against the rights of the minority. But there are few grounds for complacency. Nobody can answer the most important question: which country will best protect their citizens from internal and external tyranny over the next fifty years? Although the American Constitution has a theoretically superior mode of government, America's future will depend far more on its cultural evolution than its legal constitution.²²⁵ Drug addiction, illiteracy, and greed are greater threats to a free civilization than most commingling of powers.

One constitutional system may be more theoretically elegant but socially inappropriate than another. Diverse, unrooted Americans need a secular element, with sacred overtones, to bind them. They need an aristocratic, antimajoritarian judiciary to keep their more primitive instincts under control. Lacking common history, tradition, or even language, Americans rely upon abstract standards and the rule of law to bind them. By creating a life-tenured judiciary, the American Constitution institutionalized an aristocratic element to counter the society's underlying democratic, egalitarian ethos. Deference to the British aristocracy may be so imbued in British culture that British judges do not need as much power as their American counterparts. Both systems have worked moderately well. Both societies, however, have an increasing need for humane judicial review. As American culture becomes increasingly savage,²²⁶ it has an even more desperate need for nine verbal shamans who create incantations out of the Sacred Text, the written Constitution. At the same time, Britain is becoming both more culturally diverse, which is a new source of strengths and weaknesses,²²⁷ and more primi-

224. The Bill of Rights (1688) (1 W. & M. Sess. 2, ch. 2).

225. Constitutional structure may be swamped by historical waves of evil. Margaret Atwood describes in agonizing detail how armed force could sweep the American Constitution away in *The Handmaid's Tale*. M. ATWOOD, *THE HANDMAID'S TALE* (1987). Shooting all the politicians and judges trivializes anxieties over separation of powers.

226. The most obvious manifestation of the country's increased savagery is the steadily escalating violence and poverty among the "underclass." See, e.g., W. WILSON, *THE TRULY DISADVANTAGED* (1987). For a more general indictment of the media's and the culture's complicity in allowing brutal American aggression abroad, see E. HERMAN & N. CHOMSKY, *MANUFACTURING CONSENT* (1988).

227. Britain has had many immigrants since World War II. They have helped rejuvenate both the economy and the culture. Nevertheless, the country has lost some of the homogeneity

tive, as reflected in persistent football hooliganism. These cultural ruminations reveal another difficulty the United States Supreme Court faces when it tries to decide separation-of-powers cases. Not only should it make a political assessment of the current balance of power, it should also be aware of the culture's overall vitality. All of the above generalities about Britain and America are open to debate and qualification, but they nevertheless provoke difficult and disturbing questions. How stable and unified is a country? How healthy is its culture? Who is being oppressed? How are they being oppressed? Judicial activism may be warranted in one era or situation, but counterproductive in another, undercutting the responsibilities of the politicians and the electorate. With such difficult questions echoing in the background, it is now time to reconsider the role of the Supreme Court in *Young*,²²⁸ *Morrison*,²²⁹ and *Mistretta*.²³⁰

III. *Young, Morrison, and Mistretta* Reconsidered in Light of the British Constitution

Most of us have a sense of how to evaluate such individual rights issues as racism, free speech, or abortion. We have less intuitive access, however, to complex structural problems. An indication of the subtlety of structural cases is the unpredictability of justices' decisions.²³¹ Indeed, the three cases being evaluated in this Article place Chief Justice Rehnquist and Justice Scalia, two leading judicial conservatives, on opposite sides.²³² Positions on separation-of-powers and federalism questions cannot be reduced to contemporary versions of liberalism or conservatism.

The interpretive problems are difficult. How much weight should be given to text, history, flexibility, and efficiency? The solutions are equally difficult. Should a case be "balanced" or should a "bright line" be drawn? One cannot begin to answer these questions without determining

that enabled it to flourish under such an informal constitution. The British constitution, dominated by conventions, resembles a Victorian men's club almost as much as the actual layout of the Houses of Parliament. It is far from obvious that such an ethos makes sense at the end of this virulent century. Perhaps, however, such an ethic is what is desperately needed.

228. *Young v. United States ex rel Vuitton et Fils*, 481 U.S. 787 (1987).

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

230. *Mistretta v. United States*, 488 U.S. 361 (1989).

231. For example, Justice Douglas, this century's most liberal justice, wrote a dissenting opinion in *Maryland v. Wirtz*, 392 U.S. 183 (1986) (Douglas, J., dissenting), that provided the basis for Justice Rehnquist's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Usery* held that the Tenth Amendment prevented Congress from requiring the states to comply with minimum wage and hour requirements.

232. Rehnquist joined the majority in all these cases, while Scalia dissented in two and concurred and dissented in the other.

the Court's primary responsibilities in fulfilling the Constitution's purposes.

The principal purpose of the constitutional framework is far easier to state than to implement: power must be sufficiently diffused to prevent tyranny, yet adequately organized to allow its fair and effective use.²³³ As James Madison explained, separation of powers is a crucial device to prevent oppression.²³⁴ "The accumulation of all powers legislative, executive, and judiciary in the same hands, whether few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."²³⁵ Tyranny can appear in forms other than concentration of power. One branch of government may persecute individuals or other branches, or the government can become collectively impotent, unable to resist external threats.

The Supreme Court faces myriad problems in trying to prevent despotism. The most self-evident difficulty is that the Court is one of the three federal branches; it must interpret its own constitutional powers to avoid self-aggrandizement. The inevitable risk of self-aggrandizement is dwarfed by some extraordinarily difficult assessments and predictions that the Court must make to prevent excessive concentration of power in either of the other two branches: which branch appears to dominate at a given time; which branch is likely to become too powerful in the future; what reverberations, such as loss of power, may result from any given opinion; and what cumulative effect will a series of opinions have on the balance of power over a period of years, even decades. The complexity of the doctrine and the technicality of most of its issues make separation-of-powers cases relatively inaccessible to the public. The Court, therefore, can create virtually permanent changes in government organization because such alterations usually will not generate much controversy. Relatively few people will know or care if the Court errs on many of these issues. Finally, as analysis of the British constitution demonstrated, the

233. Justice Jackson expressed virtually identical sentiments in the *Steel Seizure Case*: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Indeed, Jackson's concurrence provides a perfect example of the contextual analysis that this Article endorses.

234. Oppression can take many forms. Professor Henkin described the Framers' fears about excessive executive power in foreign affairs: "the Framers were hardly ready to replace the representative inefficiency of the many with an efficient monarch, and unhappy memories of royal prerogative, fear of tyranny, and distrust of any one man, kept the Framers from giving the new President too much head" L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 33 (1972).

235. *THE FEDERALIST* NO. 47 (J. Madison) (Hallowell ed. 1842). The British constitution somewhat undermines Madison's definition of tyranny because profound commingling of power has not yet produced tyranny.

Court needs to be aware of the historical and cultural climate of which it is a part and that it perpetually helps re-create.

The concept of "necessity" largely explains the Court's choices between formalistic and balancing solutions. *Anderson v. Dunn*²³⁶ serves as a venerable reminder that "necessity" remains a vague and dangerous concept:

If this power . . . is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; . . . the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.²³⁷

Any commitment to radical isolation of the three forms of governmental power, however, must be sacrificed to the need for modern administrative agencies. Congress cannot possibly define and enforce its numerous regulatory statutes. For instance, it would be absurd to require Congress to determine the precise water pollution technologies that are appropriate for every industry, requirements which change as technology improves. Agencies are needed to legislate. Formalistic theories could force the federal courts to decide all social security claims, which number in the hundreds of thousands. Agencies must adjudicate. The United States Attorney is unable to enforce all the regulatory laws through prosecution, inspection, and negotiation; agencies are indispensable for civil law enforcement. After all, the doctrine of separation of powers coexists with the doctrine of checks and balances; the latter's name implies a flexible sharing of power. The issues in *Young*,²³⁸ *Morrison*,²³⁹ and *Mistretta*²⁴⁰ can be reduced to the degree of deference that the Court should give the other two branches (mainly Congress) when they reallocate appointment and removal powers, particularly criminal law powers. To put it in legal terms: What burden of proof ought a branch seeking reallocation have in such cases, and how should that burden be met? The British "experience" reinforces the formalistic argument that the Court should not be deferential to novel congressional allocations of appointment and removal powers. The United States takes unknown risks when it severs itself from its legal tradition of significantly separating powers. Segregation of personnel is a good prophylactic device to prevent dangerous concentrations of substantive power. Commingling personnel be-

236. 19 U.S. (6 Wheat.) 204 (1821).

237. *Id.* at 228.

238. *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987).

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

240. *Mistretta v. United States*, 488 U.S. 361 (1989).

yond the modern administrative agency should be tolerated only when absolutely necessary. So long as the principal members of each branch are sufficiently segregated, tyranny is unlikely to occur even though such substantive powers as the control of foreign affairs and the budget are shared.²⁴¹ Consequently, the Court should require Congress to satisfy a heavy burden of proof in such cases, affirmatively demonstrating "necessity." That burden should be far greater whenever one of the branches attempts to commingle personnel who create and/or enforce the criminal law.²⁴² That burden should be even more severe in cases such as *Morrison*, in which one or more branches gain nontextual means to threaten or remove principal members of other branches.

A. *Young v. United States ex rel. Vuitton et Fils*

In *Young v. United States ex rel. Vuitton et Fils*²⁴³ the Supreme Court concluded that federal courts could assign disinterested, private attorneys to investigate and prosecute criminal contempt allegations, but only after requesting prosecutorial assistance from the United States Attorney.²⁴⁴ The Supreme Court also asserted that federal courts could not appoint interested parties as special prosecutors because such assignments would create, at the very least, an appearance of impropriety.²⁴⁵

In his concurrence, Justice Scalia argued that federal courts could not appoint private prosecutors to initiate criminal contempt proceedings to enforce injunctive decrees because the courts only had "judicial pow-

241. Professor Feld rejects formalistic conceptions of separation of powers largely because Congress and the President share the crucial powers of foreign affairs, the budget, and taxation. Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171 (1986). Feld argues that the Court should intervene "only to prevent one political branch from upsetting the balance and excluding the other from the decisionmaking process." *Id.* at 172. So long as the two branches "consent," no separation of powers problems arise. *Id.* at 171.

242. The proposed standard is similar to the burden proposed by Maryland in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), but it also can be made consistent with Marshall's grand synthesis: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, *but consistent with the letter and spirit of the constitution*, are constitutional." *Id.* at 421 (emphasis added). My emphasis indicates my argument; unwarranted commingling of personnel is inconsistent with both the letter and spirit of the Constitution.

243. 481 U.S. 787 (1987).

244. *Id.* at 800-02.

245. *Id.* at 811. Consequently, a federal district court judge erred in appointing the lawyer who had previously represented the plaintiffs in a successful trademark infringement suit as a special prosecutor to investigate and perhaps to prosecute the original defendant for alleged contemptuous violations of the injunctive decree.

ers.”²⁴⁶ Scalia harkened back to anti-union cases, such as *In re Debs*,²⁴⁷ and warned of judicial tyranny.²⁴⁸ He conceded, as a “necessity,” that courts must have the power to appoint attorneys to prosecute allegedly contemptuous behavior within the courtroom. Judicial proceedings could otherwise be impossible to conduct. Even for Scalia, the “core function” of criminal prosecution cannot remain completely in the executive’s hands. Exceptions to rules, nevertheless, do not defeat the need for rules.

By undermining the proposition that prosecutorial discretion in criminal cases is a core executive function, *Young* eviscerated separation of powers beyond its holding. Chief Justice Rehnquist subsequently relied on *Young* in *Morrison*. Scalia later found guilt by association in *Mistretta*:

Today’s decision follows the regrettable tendency of our recent separation-of-powers jurisprudence, See *Morrison . . . Young . . .*, to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court.²⁴⁹

The *Young* decision should remind us that tyranny can occur when government officials dominate private individuals, as well as when one branch intimidates members of another governmental branch. Because federal judges can pick private prosecutors to investigate and enforce their decrees whenever the Department of Justice refuses assistance, the courts and their private prosecutors have unchecked use of the incredibly powerful and discretionary weapon of criminal contempt.²⁵⁰ Giving the courts this appointment power violates Scalia’s formal doctrine because it allows the courts to engage in an executive function. Moreover, it violates this Article’s formal doctrine of segregating personnel in criminal cases because it gives the courts the power to appoint a principal of-

246. *Id.* at 819 (Scalia, J., concurring). Once again we see the disruptive breadth of Scalia’s reasoning. It is a bit of a fiction to claim that the judiciary has only “judicial powers.” Courts legislate to some degree when they interpret laws and the Constitution. They also perform executive functions when they enforce injunctions. Such commingling of power is inevitable.

247. 158 U.S. 564 (1895), cited in *Young*, 481 U.S. at 819 (Scalia, J., concurring).

248. Scalia also expressed concern about the extent of the holding. He saw no reason, aside from judicial “self-love,” why Congress could not now claim the same powers as the courts to enforce its contempt. *Young*, 481 U.S. at 821-22.

249. *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting).

250. Because criminal contempt proceedings can be initiated against civil defendants, *Young* almost gives the federal judiciary the impermissible power to create and enforce common law crimes.

ficer,²⁵¹ a criminal prosecutor, in a criminal case. Allocation of this appointment power does not present a clear cut issue. Imagine the disaster if the federal courts had no access to special prosecutors during the civil rights movement and President Eisenhower had been unwilling to send troops to insure integration in Little Rock?²⁵² On the other hand, we now risk possible judicial crusades against any group the judiciary finds undesirable, as occurred against the labor union movement around the turn of the century.²⁵³

The quest to make each branch efficient and independent can be carried too far, aggravating tensions between the three branches. The Court's emerging jurisprudence might enable each of the branches to operate independently. Each branch could have sufficient personnel under its control to intimidate either the citizenry or the other branches. This development may generate a new form of checks and balances, but at a higher level of conflict, as each branch brings its enhanced powers into the fray against the others. Each branch would have less need for the other branch's cooperation. One should not be too apocalyptic, however. The British courts have similar powers to initiate contempt proceedings, although virtually every contempt proceeding is handled by the government.²⁵⁴ British judges may be conservative, but they have hardly become tyrants.

B. *Morrison v. Olson*

*Morrison v. Olson*²⁵⁵ may prove to have the greatest precedential impact of the three cases examined in this Article.²⁵⁶ Not only did it validate the important, controversial position of the special prosecutor,

251. Many, including the majority in *Morrison*, would disagree with the conclusion that criminal prosecutors are "principal officers." It may not seem essential to require compliance with the Appointments Clause, which mandates that all principal officers be nominated by the Senate. U.S. CONST. art. II, § 2, cl. 2. Yet they should be "principal officers" in the sense that criminal prosecutorial discretion is a core executive function that should be under the control of principal officers who are accountable to the President. Thus, their superiors should be "principal officers," not judges.

252. See T. BRANCH, PARTING THE WATERS 222-24 (1988).

253. *In re Debs*, 158 U.S. 564 (1895).

254. Lord Denning describes the basic judicial contempt powers in A. DENNING, DUE PROCESS OF LAW (1983). Only the Attorney General or the affected court can initiate under the Contempt of Court Act 1981. See, e.g., S. BAILEY, D. HARRIS & B. JONES, *supra* note 201, at 265-311.

255. 487 U.S. 654 (1988).

256. We cannot predict how these three cases will influence the distribution of power. It may turn out that the courts' power to appoint special prosecutors to investigate and enforce contempt decrees will generate more injustice than all the special prosecutors. Certainly the labor movement at the turn of the century, battered by cases such as *In re Debs*, 158 U.S. 564 (1895), would be more wary of *Young* than of *Morrison*.

but it also virtually reaffirmed the constitutionality of independent regulatory agencies.

In *Morrison* the Supreme Court upheld the Ethics in Government Act (the Act),²⁵⁷ repudiating a biting dissent by Justice Scalia. That Act created an elaborate system to appoint special prosecutors who investigate and prosecute federal executive officials suspected of violating federal criminal laws. Under the Act, the Attorney General must investigate certain high-ranking government officials whenever he or she receives information of alleged criminal conduct that is “sufficient to constitute grounds to investigate.”²⁵⁸ If that initial inquiry generates “reasonable grounds to believe that further investigation or prosecution is warranted,”²⁵⁹ the Attorney General must “apply to the division of the court for the appointment of an independent counsel.”²⁶⁰ The chief justice then selects three federal appellate judges to sit on that Special Division, appoint a special prosecutor, and establish the scope of that prosecutor’s jurisdiction.²⁶¹ The judges can only terminate the prosecutor’s appointment after the case is completed.²⁶² The Attorney General can, however, fire the prosecutor for “good cause.”²⁶³

Chief Justice Rehnquist rejected the textual arguments that the Act violated the Appointments Clause of Articles II and III²⁶⁴ of the Constitution. Rehnquist concluded that the Act satisfied a constitutional “balancing test”: “[W]e do not think that the Act ‘impermissibly undermine[s]’ the powers of the Executive Branch”²⁶⁵ The Chief Justice, however, never set forth what powers are part of the executive branch, nor what constitutes an “impermissible undermining” of those powers. The Chief Justice failed to articulate, much less apply, any burden of proof that Congress had to satisfy before creating this novel office.

In his *Morrison* dissent, Scalia employed the major forms of constitutional argument—text, history, precedent, policy, fairness, accountability, tradition, and the difficulties of applying “balancing” doctrines—to support his position that the President must “have plenary power to re-

257. 28 U.S.C.A. §§ 591-99 (West Supp. 1990).

258. *Id.* § 591(c)(1).⁷

259. *Id.* § 592(a)(1).

260. *Id.* § 592(c).

261. *Id.* § 49 (West Supp. 1988).

262. *Id.* § 593(b) (West Supp. 1990).

263. *Id.* § 596(a)(1).

264. U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III.

265. *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (emphasis added) (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986)).

move principal officers such as the independent counsel . . .”²⁶⁶ whenever those officers engage in “purely executive” functions.²⁶⁷ Scalia argued that the creation of the special prosecutor violated the basic doctrine of separation of powers, as expressed in the Constitution: “The executive Power shall be vested in a President of the United States of America.”²⁶⁸ Prosecutorial discretion, exercised by a special prosecutor in criminal cases, is a quintessentially executive function.²⁶⁹ The Act, according to Scalia, also clashed with the Appointments Clause²⁷⁰ because the special prosecutor was a “principal officer” who should have been appointed by the President with the advice and consent of the Senate.²⁷¹ Scalia then attacked the majority for distorting precedent.²⁷² Scalia cited Alexander Hamilton to support his historical argument that the decision undermined the Framers’ concept of separation of powers.²⁷³

Scalia also made several policy arguments. The special prosecutor system could become unfair, dominated by partisan judges and special prosecutors hostile to executive officers.²⁷⁴ Such excesses would remain unchecked because “there would be no one accountable to the public to whom the blame could be assigned.”²⁷⁵ Indeed, the system was inherently unfair, even if partisan politics were absent: “How frightening it

266. *Id.* at 724 n.4 (Scalia, J., dissenting). Scalia maintained that the majority misunderstood his opinion. His dissent does not require anyone who exercises any executive power to be removable at the President’s will. *Id.* Scalia’s opinion, however, was not crystal clear. His main thesis, which this author endorses, was that the President must retain power over “purely executive” functions. In the same footnote, however, Scalia argued that “the President must have control over all exercises of the executive power.” *Id.* That sentence, taken literally, might make all independent regulatory agencies unconstitutional because they exercise executive as well as adjudicatory and legislative power. In the text of his opinion, Scalia asserted that his thesis did not threaten those agencies that find their constitutional pedigree in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). But Scalia’s endorsement of *Humphrey’s Executor* was hardly enthusiastic: “One can hardly grieve for the shoddy treatment given today to *Humphrey’s Executor*, which, after all, accorded the same indignity (with much less justification) to . . . *Myers v. United States*” *Morrison*, 487 U.S. at 725-26 (Scalia, J., dissenting).

267. *Morrison*, 487 U.S. at 723 (Scalia, J., dissenting).

268. U.S. CONST. art. II, § 1, cl. 1.

269. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

270. U.S. CONST. art. III, § 2, cl. 2.

271. *Morrison*, 487 U.S. at 715 (Scalia, J., dissenting).

272. *Id.* at 723-27; see *infra* notes 293-97 and accompanying text.

273. Scalia cited Madison’s famous passage in *The Federalist* stating that each branch must have “an equal power of self defense.” *Id.* at 698 (quoting THE FEDERALIST NO. 51, at 322-23 (J. Madison) (Hallowell ed. 1842)). Scalia noted that the main power was the veto, but also cited *Records of the Federal Convention* to show that the Framers never intended to divide executive power. *Id.* at 699 (citing M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1966)).

274. *Morrison*, 487 U.S. at 729-31 (Scalia, J. dissenting).

275. *Id.* at 731.

must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge upon, competing responsibilities.”²⁷⁶

Scalia also attacked the majority’s balancing test that upheld the Act because it did not “impermissibly undermine[] the powers of the Executive Branch.”²⁷⁷ That vague standard substituted the Justices’ beliefs for the text of the Constitution: “Once we depart from the text of the Constitution, just where short of that do we stop?”²⁷⁸ Once again we see Scalia’s excessive devotion to formalism. Balancing is sometimes inevitable and desirable. Scalia himself used a balancing test that was not part of the text when he concluded that “necessity” permitted courts to appoint prosecutors to enforce internal proceedings.

The Ethics in Government Act²⁷⁹ violates this Article’s suggested presumption against commingling personnel in criminal cases. The presumption can be partially grounded in constitutional text. First, the Act takes a “core executive function,” the prosecution of criminal cases, and distributes that function among all three branches: Congress can request a prosecutorial investigation; the executive has very limited power to block that prosecution; and the judiciary will oversee the prosecution. Consequently, the statute violates Article II of the Constitution because Congress partially removed a central executive power, prosecutorial discretion over criminal cases, from presidential control. The Act also subverted Article III because it embroils the judiciary in evaluating exercise of prosecutorial discretion. Judges should not be allowed to supervise prosecutors in criminal cases. The Act also conflicts with the Appointments Clause because it prevents the President from appointing, with advice and consent of the Senate, a “principal officer,” or an inferior officer who must be accountable to a principal officer.²⁸⁰

The Act also violates the presumption against giving one or more branches novel, extraconstitutional means to remove members of another branch. The Constitution limits Congress’ removal powers over the executive to impeachment. Under the Act, Congress now has a quicker, more effective weapon. There is no better way to remove someone from government office than to convict them of a crime. Because the statute has such a low triggering standard, the Attorney General has little power

276. *Id.* at 732.

277. *Id.* at 695.

278. *Id.* at 711.

279. 28 U.S.C.A. §§ 591-99 (West Supp. 1990).

280. U.S. CONST. art. II, § 2, cl. 2.

to prevent special prosecutors from being appointed. If the standard were much higher, there would be little reason for the Act; Congress could attack the Attorney General for failing to exercise properly his or her prosecutorial discretion despite the existence of powerful evidence of wrongdoing. The Attorney General's capacity to remove a special prosecutor "for cause"²⁸¹ is more illusory than real. The courts should and probably will interpret "cause" very narrowly; otherwise, the Act has little meaning. The Act's primary purpose is to insulate prosecutors from executive control.

It is irrelevant that Congress does not select the specific prosecutor when requesting investigations. Congress has narrowly satisfied the holdings in *Bowsher v. Synar* and *Buckley v. Valeo*,²⁸² which prohibit Congress from directly appointing principal executive officials. The special prosecutor is not under immediate congressional control, but he or she knows that Congress started the process that created this prestigious, high visibility job. Congressional critics of the government or of some of its officials need not care who the special prosecutor is, so long as he or she is sufficiently competent to pursue the named executive official. The assignment is of limited duration and scope and demands limited skills (primarily litigation). Congress can easily and quickly put any executive officer's career and job at risk, knowing that a large number of competent lawyers will be eager to become special prosecutors.²⁸³ This particular congressional power comes not from having a chosen minion, but from establishing a dangerous, extraconstitutional threat.

Morrison has created several new opportunities for Congress to intimidate the executive branch. As noted above, Congress has augmented its ability to remove executive officials. Short of removal, Congress can threaten executive officers with an independent prosecution.²⁸⁴ In addition, Congress may now be able to place any executive power inside an independent regulatory agency. In his powerful critique of *Morrison*,

281. 28 U.S.C.A. § 596(a)(1) (West Supp. 1990).

282. The special prosecutor system also demonstrates that *Bowsher v. Synar*, 478 U.S. 714 (1986) and *Buckley v. Valeo*, 424 U.S. 1 (1976), do not, by themselves, sufficiently protect the separation of powers.

283. Many competent lawyers exist, and the courts will have no trouble finding many able volunteers who know the appointment will, at the least, enhance their careers.

284. One need only consider how Senator Joseph McCarthy might have used this tool. I first learned that I had no rigid test of how to solve separation-of-powers issues after watching *Point of Order* (Norton 1964), the documentary about the McCarthy hearings, during the Watergate crisis. Senator McCarthy and Senator Ervin made the same arguments; attorneys James Sinclair and Joseph Welch asserted similar forms of executive privilege. I know which side was "right" in both situations, but I remain unsure as to which set of arguments, if either, should be constitutionalized. That ambivalence, of course, permeates this Article, leading to the Article's eventual devaluation of precedent.

Professor Carter fantasized about a congressional conversion of the State Department into the "Foreign Policy Agency," followed later by transformation of the Department of Defense into an independent regulatory agency.²⁸⁵ Once the laughter subsides, the joke also disappears.²⁸⁶ Now that Congress can partially remove the coercive power of prosecutorial discretion from the executive, perhaps it also can isolate the coercive power of the military.

The executive, of course, has not become helpless. The President has removal powers that can be exercised against Congress: the Justice Department can prosecute members of Congress for crimes.²⁸⁷ The President can pardon executive officers at any stage of a special prosecution. This pardon power,²⁸⁸ which one hopes will remain completely unreviewable by either Congress or the courts, remains a significant check. But as Professor Carter observed, governmental officials cannot count on being pardoned; nor will a pardon compensate for the stress and distraction of a criminal prosecution.²⁸⁹ The pardon power reconfirms the lack of "necessity" for the special prosecutor. Since the President can pardon anyone under criminal investigation or prosecution, the final constraints remain political opinion and impeachment. Congress has not solved the problem of executive corruption; it has relocated it in the Oval Office. If the President is honorable, he or she will prosecute suspected criminals within the executive; if not, he or she can still invoke the pardon power.

We already have seen that tyranny can occur through direct threats to individual liberty, in addition to excessive concentrations of power. *Morrison v. Olson*²⁹⁰ not only created unnecessary opportunities for congressional and judicial domination of the executive, it also authorized serious threats to the individual liberties of executive officials. This Article shall supplement Justice Scalia's powerful description of the unfair-

285. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 134 (1988).

286. Congress has already isolated the Federal Reserve Board, which exercises enormous powers over the economy, from direct presidential control. See D. KETTL, *LEADERSHIP AT THE FED* (1986).

287. The Constitution's Speech or Debate Clause is as important for what it doesn't cover as for what it does cover; it is an implied authorization for prosecution as well as an immunization. U.S. CONST. art. I, § 6. The clause creates two limited legislative immunities; during congressional sessions legislators may only be arrested for certain crimes *and* they cannot be arrested for anything they say in Congress. By implication, they may be arrested for specified crimes at any time, and may be arrested for all other crimes when Congress is not in session. The clause was based upon the English Bill of Rights: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." Bill of Rights (1688) (1 W. & M. Sess. 2, ch. 2).

288. U.S. CONST. art. II, § 2, cl. 1.

289. Carter, *supra* note 285, at 112 n.26.

290. 487 U.S. 654 (1988).

ness of the system by noting other costs of commingling personnel and functions. The Court was satisfied with the appointment process because any judge who participated in the selection of the special prosecutor could not preside over that prosecutor's case.²⁹¹ But eliminating the most egregious violation of due process alone does not satisfy due process. Several lesser conflicts of interest (or at least appearances of impropriety) remain.

Members of the Special Division, all of whom must be appellate judges,²⁹² will be among the leaders of the federal judiciary. Judges hearing specific cases may be somewhat deferential to special prosecutors (perhaps only on an unconscious level) lest they offend their influential colleagues who made the appointments. Those judges who appoint special prosecutors may have a unique regard for other special prosecutors who subsequently appear before them. Judges who desire promotion (perhaps even to the Supreme Court) will be aware that their performance on the Special Division will be studied closely during any subsequent confirmation hearing, even though there are no conventional judicial criteria to evaluate the performance. Finally, criminal defendants must feel particularly vulnerable when they are being pursued in court by judicially appointed and controlled prosecutors. The costs of the increased politicization of the judiciary outweigh the benefits.

As Scalia bitterly observed, the *Morrison* Court's analysis of precedent also revealed its preference for balancing doctrine.²⁹³ In his discussion of the two most relevant cases, *Humphrey's Executor v. United States*²⁹⁴ and *Myers v. United States*,²⁹⁵ Chief Justice Rehnquist ignored *Humphrey's Executor's* actual distinction of *Myers*, and concluded that *Humphrey's Executor* allowed widespread commingling of powers and personnel.²⁹⁶ *Humphrey's Executor* was in fact far narrower. It distinguished *Myers* only on the ground that Myers, a postmaster, engaged in executive functions while Humphrey, a Federal Trade Commission official, also participated in "quasi-legislative" and "quasi-adjudicative"

291. *Id.* at 683.

292. The Special Division is a "division of the United States Court of Appeals for the District of Columbia." 28 U.S.C.A. § 49 (West Supp. 1988).

293. *Morrison*, 487 U.S. at 726-27.

294. 295 U.S. 602 (1935) (President could not summarily remove member of the Federal Trade Commission after Congress had held that President could dismiss a commissioner for "inefficiency, neglect of duty, or malfeasance in office").

295. 272 U.S. 52 (1926) (President could fire postmaster because President has exclusive power of removal of executive officers whom he has appointed by and with advice and consent of Senate).

296. *Morrison*, 487 U.S. at 685-93.

functions.²⁹⁷ Consequently, the *Humphrey's Executor* distinction actually threatens the special prosecutor, who is engaging in a purely executive function. *Myers* admittedly suffers from having used the vacuous, limiting adjective "quasi." But the solution is to eliminate the adjective, not the decision. If separation of powers is to have any meaning, the Court must define "executive," "legislative," and "judicial." It also must determine what parts of those defined powers are "core powers" or "core functions," warranting heightened scrutiny and intensified defense whenever another branch seeks to use those powers or dominate the officials administering those powers. The Court must create a doctrine to protect those concepts. The part of that doctrine that covers appointments and removals in criminal law areas should be presumptively formalistic at this particular time in history.

It is easy to attack such malleable, conclusory concepts and categories as "executive" or "core function." We need words, nevertheless, to capture the underlying tensions that permeate constitutional law. Once again *Morrison* is instructive. One can legitimately argue about the definition of "executive powers" and what comprises its "core functions." But until *Morrison*, prosecutorial discretion in criminal cases traditionally was at the heart of executive power.

The special prosecutor decision minimized a value that the British weigh far more heavily than Americans: "tradition." One need only consider the royal family to see the British adoration of tradition over democratic theory or common sense.²⁹⁸ The tradition argument contains several subsidiary arguments. Tradition is a more sophisticated version of the quip, "If it works, don't fix it." Tradition is an acknowledgment of our ignorance. Because we do not completely understand the past, the present, or the future, we should be wary of discarding existing governmental structures and solutions. Tradition weighs experience at least as heavily as theory or consistency. It is *stare decisis writ large*. Although the *Morrison* majority could construe *Humphrey's Executor* as a partial precedent, *Morrison* ignored the two-hundred-year American tradition of prosecutorial discretion in criminal cases. The constitutional system had already developed adequate ways to prosecute powerful criminals within

297. *Humphrey's Executor*, 295 U.S. at 626.

298. For example, the Bill of Rights requires that the King or Queen be a Protestant, Bill of Rights (1688) (1 W. & M. Sess. 2, ch. 2), and that only Protestants have a right to bear arms. *Id.* Thomas Paine rhetorically asked and answered: "But, after all, what is this metaphor called a crown, or rather what is monarchy? Is it a thing, or is it a name, or is it a fraud? . . . It appears to be something going much out of fashion, falling into ridicule, and rejected in some countries both as unnecessary and expensive." T. PAINE, RIGHTS OF MAN 146-47 (1791).

the executive, as seen during the Watergate affair. President Nixon retained the power to terminate the special prosecutors who were chasing him and his associates. His final constraints were (and should have been) public opinion and congressional impeachment power.²⁹⁹

Morrison also reconfirmed the slippery nature of balancing tests. Balancing tests vary depending upon the factors the court chooses to include, the weight given to those factors, the allocation of burdens of proof for each of those factors, the precise definitions of those burdens of proof, the precise evidence needed to satisfy those burdens and, above all, the final results of the decisions. Since a balancing test never automatically determines the results, one can never know a test's true meaning until it has been applied in several cases.³⁰⁰ *Morrison* was particularly disturbing because Chief Justice Rehnquist never made an independent assessment of the "necessity" for special prosecutors. In fact, Rehnquist never considered necessity to be a relevant, much less essential, factor. Congress did not have to meet any articulated burden of proof before removing significant amounts of prosecutorial discretion from the executive. Thus, the decision has provided no guidance on how the Court should decide future appointments cases.

The doctrine of separation of powers serves major objectives other than preventing tyranny.³⁰¹ A presumptively formalistic approach to

299. This example demonstrates the subtle mix of doctrines. I have assumed that the President can be impeached for refusing to cooperate in an investigation of the executive. Thus, Congress could properly impeach President Nixon for failure to comply with a subpoena. See Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974). For a contrary view, see Van Alstyne, *The Third Impeachment Article: Congressional Bootstrapping*, 60 A.B.A. J. 1199 (1974).

This tangent reinforces a basic theme in the Article. I could have a different view of the constitutionality of the special prosecutor if the Supreme Court had or would limit congressional impeachment power. One should not evaluate structural doctrine in isolation.

300. For instance, all the justices agree that they should use intermediate scrutiny, a pure balancing test, in sex discrimination cases. They radically disagree on how that test is to be applied. Thus, the application of the doctrine has become as important as the doctrine itself. Compare *Califano v. Westcott*, 443 U.S. 76 (1979) (Congress cannot provide benefits to children of unemployed fathers while denying such benefits to children of unemployed mothers) with *Rostker v. Goldberg*, 453 U.S. 57 (1981) (Congress can exclude women from pre-draft registration).

301. Separation of powers allows more individuals and more factions to participate in governance. Our system virtually institutionalizes the three basic factions that exist in any society: the courts are the bastion of the aristocracy; Congress is the forum of democracy; and the presidency is the expression of monarchy. Separation of powers also delays the implementation of policy, thereby formalizing reconsideration. To put it more darkly, separation of powers makes government less efficient, which is a good in itself, given human nature.

Another virtue of separation of powers is that it frequently allows rival parties to share power, as has frequently been the case since World War II. The Republicans have controlled the Presidency and the Democrats have dominated Congress. Thus both parties learn the

separation-of-powers cases involving appointments and removals enhances political accountability by reducing confusion and, in the principal cases, by keeping much of the power over criminal law in the hands of elected officials instead of partially with the judiciary.³⁰² Political accountability, in turn, reduces the likelihood of tyranny, implies consent between the governors and the governed, and is consistent with democratic principles. In his *Morrison* dissent, Scalia pointed out that the special prosecutor was politically unaccountable; once he is appointed, his primary employer is a group of unelected judges.³⁰³ The special prosecutor's unaccountability is increased by the extraordinary complexity of the process. For example, few citizens will ever know how the government processed the Oliver North trial.³⁰⁴ Who made the crucial decisions when the Justice Department, the State Department, the special prosecutor's office, the defense counsel, and the trial judge met in their many in camera sessions? Normally such questions are somewhat unnecessary since there would be only one prosecutor, representing the entire executive branch. The citizenry previously could make some overall assessment of the handling of the trial, including any plea bargains, even if they did not know the details. Now we will be uncertain as to who made what deals with whom.

A confused public also will be less able to determine how different parts of the constitutional structure influence each other. The average person can more easily grasp formalistic approaches and determine causation and responsibility. If the system becomes unstable or weak, the body politic can conceptualize appropriate amendments to the Constitution. But if the Supreme Court uses more and more balancing tests, the public will have less understanding of how powers are allocated. In addition, they will face the problem that any proposed amendment, no matter

constraints of power and gain needed experience. Under the British system, the losing party has virtually no responsibilities except to criticize the government. Consequently, when a party is out of power for a protracted period of time, as is presently the case with the Labour Party, its leaders may not be gaining any practical experience in administering power, nor are they able to demonstrate to the electorate that they are capable of running the government. The American Constitution's federalist structure also serves this function of providing a meaningful forum for the opposition. Some defenders of the British constitution might reply that this commingling of responsibilities explains why the two major American parties so closely resemble each other, thereby offering the electorate no meaningful choice.

302. In all three cases the unelected judiciary gained power. The courts can now appoint special prosecutors who will investigate and prosecute alleged criminal contempts outside the courtroom, appoint and oversee special prosecutors who will investigate and prosecute executive officials, and sit on commissions that significantly determine the substantive content of criminal law.

303. *Morrison v. Olson*, 487 U.S. 654, 730 (1988) (Scalia, J., dissenting).

304. *See, e.g.*, H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 22-37 (1990).

how carefully drafted, may be whittled away by subsequent judicial balancing.

I shall conclude this section by more directly comparing practices in the United States with those in Britain. First, it is inconceivable that the Thatcher government would ever have drafted and passed a bill creating special prosecutors. Immersed in the English tradition of secrecy, Thatcherites opposed minimally intrusive checks on executive power, such as a Freedom of Information Act.³⁰⁵ If a Parliament were to pass such a bill, however, it would promptly be upheld by the Law Lords under the doctrine of parliamentary sovereignty. Recall that the executive does not completely control prosecutorial discretion. Private citizens have the common law right to initiate criminal prosecutions, even though the Attorney General can terminate any prosecution.³⁰⁶ This common law right can be eliminated by statute. Many statutes, such as the Official Secrets Act,³⁰⁷ and the Prevention of Terrorism Act of 1984,³⁰⁸ give the government sole authority to commence criminal proceedings.

These details cut both ways. *Morrison* supporters can argue that the ad hoc system of criminal prosecution that exists in Britain demonstrates that prosecutorial discretion is not a "core executive function." Nor is it "necessary" to give the executive complete control over all criminal prosecutions. Critics can reply that such British informality typifies that country's insufficient separation of powers, a tradition that may have worked for that country but which could be catastrophic in the United States. They also can point out that the executive retains prosecutorial discretion over most important crimes (particularly "political" crimes), can exercise its power to dismiss any prosecution, and can pass legislation reallocating prosecutorial discretion whenever it wishes. The solution to excessive executive discretion in Britain is to enhance the investigatory power of Parliament, particularly the backbenchers, not to dilute the traditional executive control over prosecutorial discretion.

C. *Mistretta v. United States*

The majority in *Mistretta v. United States*³⁰⁹ held that Congress could create a Sentencing Commission, which promulgates guidelines that determine the amount of discretion a federal judge has in sentencing

305. G. MARSHALL, *supra* note 58, at 113.

306. See, e.g., P. BIRKINSHAW, FREEDOM OF INFORMATION (1988); see also *supra* notes 116-126 and accompanying text.

307. Official Secrets Act 1911 (1 & 2 Geo. 5, ch. 20).

308. Prevention of Terrorism (Temporary Provisions) Act 1984 (1984, ch. 8).

309. 488 U.S. 361 (1989).

criminals. Two members of the Sentencing Commission, however, were article III federal judges.³¹⁰ The Court rejected arguments that Congress had improperly delegated its legislative power and that article III judges could not sit on such a commission.³¹¹ Justice Scalia's *Mistretta* dissent maintained that the Sentencing Commission was unconstitutional because Congress had delegated its "lawmaking powers" to an agency located partially in the judiciary, which had no functions other than lawmaking.³¹²

The attack on the federal sentencing board does not generate dazzlingly high stakes. If the Court had drawn a bright line prohibiting federal judges from sitting on any commissions making substantive law,³¹³ judges could still formulate the Federal Rules of Civil Procedure and the Federal Rules of Evidence and supervise their internal proceedings through the Judicial Conference. Legislative or executive usurpation of judicial regulation of the courtroom's internal workings raises another set of separation-of-powers issues. Under such a bright-line rule, judges would only be prevented from participating in such groups as the Sentencing Commission, investigatory commissions, or substantive law commissions. Certainly the losses of judicial experience and of the judicial aura of political impartiality would be real, but hardly catastrophic. The costs of participation are higher. When judges are allowed to sit on substantive or investigatory commissions, they may be tempted to make political decisions to increase their chances for promotion or for additional assignments to such prestigious and highly visible committees. They may in addition get embroiled in partisan politics. The *Mistretta* majority dismissed such concerns: "We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission."³¹⁴

Even if one concludes that *Mistretta* did little damage, there is no need to commingle personnel by offering discretionary awards and punishments. Indeed, some significant risks have been created. J. A. Clar-

310. *Id.* at 361.

311. *Id.* at 371-79, 405-08.

312. Scalia turned to James Madison to reinforce his consternation over the Court's continued creation of dangerously fluid constitutional doctrine. *Id.* at 426 (Scalia, J., dissenting).

313. Once again I have applied a distinction that often has been criticized: the distinction between substance and process. Admittedly the distinction is unclear. Procedural and evidentiary rules obviously have substantive overtones. Nevertheless, judicial control of internal process, of how a decision is reached, seems to be an essential part of judicial independence. Scalia adds in his dissent that *Mistretta* may threaten that aspect of judicial autonomy by permitting Congress to create mixed agencies to formulate such rules. *Id.* at 425-26.

314. *Id.* at 410.

ence Smith concluded that the French judiciary never developed as strong a tradition of autonomy as the Anglo-American judiciary, which has been far more willing to intervene on behalf of the individual against the government, because the French judges were so dependent upon the other branches for promotion.³¹⁵ Finally, placing judges on substantive law commissions undercuts their image of neutrality. Lord Diplock, for example, served on the Commission that studied Northern Ireland and eliminated the right to jury. He subsequently decided cases where the litigants lost their right to a jury.³¹⁶

Justice Scalia never made “temptation” or “conflict of interest” arguments. He dissented from *Mistretta* on the ground that Congress improperly delegated its powers because the Sentencing Commission engaged in purely “legislative” functions, unguided by “intelligible” standards from Congress.³¹⁷ He drew a constitutional distinction between agencies that make law in the course of executing laws or adjudicating laws, as opposed to those that only make laws.³¹⁸ Scalia also was disturbed because the “independent” agency was apparently located within the judiciary, taking away powers that should remain in the hands of the judges: “[U]nlike executive power, judicial and legislative powers have never been thought delegable.”³¹⁹ That broad statement is wrong; witness the power of administrative law judges. *Mistretta* reconfirms the radical nature of Scalia’s separation-of-powers jurisprudence; he aggressively seeks to define, expand, and isolate the three functions whenever possible. Scalia does not fully explain why delegating legislative powers to a group that only legislates violates the separation of powers, but delegating similar power to an agency that also exercises executive and legislative powers is constitutional. One might think the opposite made more sense. If Congress cannot delegate legislative powers, virtually all administrative agencies that issue voluminous rules are at risk. Furthermore, any attempt to force all adjudications into the federal courts would swamp those courts with millions of claims.

This Article’s approach, when tempered by precedent and tradition, does not reach as far as Scalia’s vision. The Sentencing Commission would be unconstitutional because article III judges were appointed by the President to affect substantive criminal law, not because the commis-

315. Smith, *Legislative Drafting English and Continental*, 1980 ST. L. REV. 14-22, quoted in ZANDER, *supra* note 91, at 28-35.

316. The Diplock Commission’s work is described in S. BAILEY, D. HARRIS & B. JONES, *supra* note 201, at 199-200.

317. *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

318. *Id.*

319. *Id.* at 425.

sion only legislated. Much of Scalia's reasoning remains essential, however, for this narrower presumption to work. The Court must make initial definitions of the governmental functions, particularly at their "core." Preliminary definitions can be combined with the presumption against commingling of personnel to coherently resolve contemporary separation-of-powers cases. Courts must be able to control their own courtrooms.³²⁰ Executives must be able to exercise prosecutorial discretion in criminal cases. Congress must retain the power to alter delegated legislation. Administrative agencies are part of the constitutional fabric, even if they undermine pure conceptions of separation of powers. We should be wary, however, of letting the doctrinal informality that incorporated those agencies seep into all other separation-of-powers issues.

This Article has proposed and defended a narrow presumption, limited to criminal law, that fits the facts of *Young v. United States ex rel. Vuitton et Fils*,³²¹ *Morrison v. Olson*,³²² and *Mistretta v. United States*.³²³ Formalists should be reluctant to propose doctrine that automatically extends far beyond the specific issues; aggressive judicial formalism undercuts future judicial discretion needed to respond to unforeseeable issues.

The Supreme Court should have a broader goal of preventing the leaders of any branch from obtaining new means to punish or to reward members of the other branches. When we consider that broader objective, we can see that the proposed presumption obscures some crucial differences between the three cases that it covers. *Young* removes a part of a core function and gives that function to another branch. Even though it involves an appointment, such sharing of powers is disturbing but does not constitute the greatest threat to separation of powers. It would be difficult for one branch to strip another branch of most of its powers so long as the aggressive branch could not also remove the other branch's members. *Mistretta* is more worrisome because it permits members of one branch to hire and to fire, to reward and to punish, members of another branch, but only for "extracurricular activities." Thus *Morrison* turns out to be the most dangerous case because it violates all of the values this Article is defending: it both removes a traditional core function from the executive branch and creates a novel weapon that Congress can use to terminate and to intimidate members of the executive, threatening not just their jobs, but also their personal liberty.

320. This proposition threatens those statutes that preclude judicial review.

321. 481 U.S. 787 (1987).

322. 487 U.S. 654 (1988).

323. 488 U.S. 361 (1989).

IV. Stare Decisis Reconsidered

The reader may still be uncomfortable with the proposed resolution of the three principal cases. The British constitution, after all, demonstrates the value of flexibility. Rigid doctrinal formalism, which usually has influence beyond the facts of the case, arguably is the worst solution to separation-of-powers problems.

Once again the British constitution enlightens. We have already considered one important lesson of the British constitution: concentration of appointment powers can easily lead to concentration of other powers. At one time the Prime Minister was "first among equals." Thanks to the power to hire and fire, he or she still dominates party and nation.³²⁴ Such concentrations of power reinforce this Article's primary argument that the Supreme Court should presumptively separate hiring and firing within the three branches, especially in criminal cases. The British constitution also proves, however, that flexibility is necessary for longevity. None of us can predict how or where the next wave of tyranny will surge. The aspiring tyrant might be a McCarthyite member of Congress, a Nixonian President, a religious fanatic, a group of military officers, an angry mob, or a foreign dictator. The next crisis may be economic, cultural, educational, environmental, or military.

We can begin to solve these dilemmas at two levels of abstraction. First, the Court never should forget that its primary obligation is to prevent tyranny. Second, the Court can best fulfill this admittedly abstract goal by giving less weight to its prior decisions in structural cases than elsewhere, given the inherent limitations of judicial review. In short, the Court should not let adjudicatory aesthetics prevail, particularly if its prior structural decisions have helped create a grievous political imbalance of power. The Supreme Court's structural decisions should be considered experiments, not immutable canon. The British constitution demonstrates that the relationship between structure and freedom is extremely ambiguous. Indeed, one of the "problems" all theorists face in this area is that the American system has been able to weather prior Supreme Court structural decisions, whatever their specific resolutions. Formalists such as Justice Scalia may end up crying wolf too often if they see tyranny and the destruction of separation of powers in every commingling or balancing decision. Nor should the balancers expect to see the government strangled by a series of formal decisions. We must never forget that the constitutional text assures far more separation of powers than has ever existed in Britain, establishing three powerful institutions

324. See, e.g., H. YOUNG, *supra* note 41.

that are unlikely to lose most of their power. Additionally, public opinion must remain the last, most important defense against excessive concentration of power.

The debate over the role of precedent in constitutional adjudication has already taken on renewed energy due to shifts in the makeup of the Supreme Court.³²⁵ Conservative commentators such as Richard Posner, irritated by remaining liberal decisions, have minimized the weight of constitutional precedent.³²⁶

The legal academy has continued its task of systematically separating and evaluating the different forms of acceptable legal argument, including precedent.³²⁷ Devaluing precedent conflicts with Professor Monaghan's recent suggestion that the Court should give *stare decisis* more weight in constitutional adjudication.³²⁸ Monaghan describes some of the values that *stare decisis* fosters: efficiency, equal treatment of parties over time, consistency, predictability, stability, tradition, impersonality, conservatism, legitimation, and idealism. Monaghan, who is trying to preserve a form of originalism that honors the public understanding of the Constitution's language when it was created,³²⁹ concedes that many major court decisions conflicted with original understanding: the increase in federal power at the expense of the states,³³⁰ the expansion of civil liberties,³³¹ the growth of the administrative state,³³² and the extension of presidential power.³³³ Monaghan's solution is to stop additional non-originalist adjudication, while preserving those parts which are "too central" to be altered.³³⁴ Monaghan acknowledges that the doctrine of *stare decisis* can always be characterized as a rhetorical facade because there is no theory of how much weight it should be given in different cases.³³⁵ The doctrine is particularly suspect in constitutional cases because most "wrong" constitutional decisions can be changed only by the cumbersome amendment process or by judicial reversal.³³⁶ Nev-

325. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

326. R. POSNER, *THE FEDERAL COURTS* 213 (1985).

327. Schauer, *Precedent*, 39 *STAN. L. REV.* 571 (1987).

328. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *COLUM. L. REV.* 723 (1988).

329. *Id.* at 725.

330. *Id.* at 730-34.

331. *Id.* at 727-29.

332. *Id.* at 735.

333. *Id.* at 736-39.

334. *Id.* at 750.

335. *Id.* at 743. That critique can be made against every form of legal argument.

336. In *United States v. Scott* the Court stated that

in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The

ertheless, he believes that non-originalist decisions must be accepted before any form of originalism can successfully be implemented in the future.³³⁷

On first impression, there seems to be little common ground for this Article and Monaghan's proposals. Monaghan relies upon a particular blend of constitutional reasoning—originalism and *stare decisis*—to best fulfill the Framers' purposes. As was the case with "political accountability," I remain wary of any theory or interpretive technique that distracts the Court from its primary duty to battle tyranny. For instance, Monaghan seems to accept *Roe v. Wade*³³⁸ reluctantly, even though it was wrongly decided by originalist standards, in part because *Roe* has been so hotly contested.³³⁹ But Monaghan then states that the Court properly refused to extend the privacy protections given to women seeking abortions in *Roe* to homosexuals in *Bowers v. Hardwick*.³⁴⁰ I believe the continued legal oppression of homosexuals is a blatant form of tyranny. Monaghan might reply that my observation proves his argument that such standards as "opposition to tyranny" operate at such a high level of generality that they fail to generate meaningful constraints, even while claiming to have an originalist pedigree.³⁴¹ Nevertheless, we first must determine if Monaghan and I have the following basic premise in common: the Court's primary responsibility is to combat tyranny.

Another look at Monaghan's thesis reveals many similarities to this Article's analysis. First, this Article proposes how the Court should weigh constitutional precedent: the Court should give less weight to structural decisions than to individual rights cases. Thus the Article is expanding upon Monaghan's goal of developing a theory of precedent. Second, this Article largely bases its jurisprudence upon its author's perceptions of the Framers' dread of tyranny; history still matters. But even on more specific issues our thinking tends to converge. For instance, Monaghan concedes, during his discussion of *Brown v. Board of Education*,³⁴² that the need to combat oppression can override precedent:

Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

United States v. Scott, 437 U.S. 82, 101 (1978) (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting)).

337. Monaghan, *supra* note 328, at 723-24.

338. 410 U.S. 113 (1973).

339. Most prior decisions will last under one of Monaghan's tests, because they will be "central," inconsequential, or bitterly contested.

340. 478 U.S. 186 (1986).

341. Monaghan, *supra* note 328, at 739.

342. 347 U.S. 483 (1954).

“Moreover, it seems doubtful that stare decisis is ever properly invoked to bar the claims of any group prevented from constructing the political and social rules of which they complain.”³⁴³ Although I will concede that homosexuals have not suffered from as much systematic, overt oppression or exclusion as have blacks (if only because their trait is not readily observable), I still see more than enough suppression to warrant judicial intervention. Fourth, I agree with Monaghan that the country is probably better off if the Court primarily relies on a mix of stare decisis and originalism. My reason, alas, is primarily premised upon “cynicism.”³⁴⁴ As the Court grows increasingly conservative, I find judicial restraint increasingly attractive.³⁴⁵ Finally, Monaghan periodically engages in the sort of reasoning that this Article endorses. Monaghan concedes that precedent and original intent are only factors to be weighed; prior decisions should be overruled if they would generate sufficiently adverse consequences.³⁴⁶

Professor Schauer begins his defense of precedent by demonstrating its “fairness” in treating equally different claimants at different times.³⁴⁷ Yet this “golden rule” of temporal equality should not carry as much weight for government branches. They are not human beings, but servants of human beings. Governmental structures have no innate dignity that is insulted by knowing that someone else, or even they, were treated differently at a different time. Admittedly some within a given bureaucracy may be angered, but that outrage is not the same as stripping an individual of a right. Government branches have less need for predict-

343. Monaghan, *supra* note 328, at 761.

344. Carter, *supra* note 285, at 120.

345. One of the dilemmas modern liberals face when they critique the Court is between suggesting “ideal” doctrine and acknowledging the increasingly hostile power of the Court. Any “ideal” doctrine, which will probably contain a significant degree of judicial activism, may be counterproductive in a conservative era. Nevertheless, I believe liberals should continue to propose counterdoctrine. Thus, this piece is a bit schizophrenic. It recommends a constitutional methodology that might theoretically be better but might practically be worse, given the current makeup of the Court. Context may be all, but liberals still need to suggest alternative conceptions of the Constitution.

346. Monaghan, *supra* note 328, at 760. Monaghan offers a fascinating example: “Even if one assumes [the War Powers Resolution] is unconstitutional as a matter of original intent, the Presidency’s accumulation of power and the consequent deterioration of Congress’ ability to check the President’s warmaking powers may suggest that the resolution should now be upheld by the Supreme Court.” *Id.* at 739 n.100. Even originalism, unencumbered by stare decisis, would not prevail over Monaghan’s judgment that the President currently has too much power. But sometime during the next fifty years, Congress might have too much power. Consequently, the Court should never consider as inviolate any decision that it someday may make about the War Powers Act, no matter what interpretive arguments were or were not employed in the initial decision.

347. Schauer, *supra* note 327, at 595-97.

ability than individuals because they have no personal reliance interest or expectations that will be shocked by an alteration in law. The distinction between structural issues, the "rights" of government branches, and individual rights³⁴⁸ is also influenced by that ultimately elusive concept, "natural law." The distinction is based upon the assumption that some human rights are immutable, resistant to cries of necessity or changed circumstances.³⁴⁹ The temporal aspect of *stare decisis* supports not just the equal treatment of different parties over time, but also the consistent treatment of a single individual over time.³⁵⁰

Formulating separation-of-powers doctrine and weighing prior decisions in the light of political realities has a respectable Supreme Court pedigree. In the *Steel Seizure Case*,³⁵¹ Justice Jackson openly engaged in the type of analysis this Article recommends:

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. . . . Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. . . . No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. . . . Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power.³⁵²

In other cases, the Court's debate over the Tenth Amendment also contains candid assessments of current balances of power. Justice O'Connor's dissent in *Garcia v. San Antonio Metropolitan Transit Authority*³⁵³ is peppered with political assessments: "The expansion and integration of the national economy brought with it a coordinate expansion in the scope of national problems. . . . The last two decades have seen an unprecedented growth of federal regulatory activity, as the majority itself

348. Professor Carter uses the same distinction when recommending how the Court ought to interpret structural cases. He argues that the Court ought to use an "originalist" jurisprudence, highly deferential to history and to text, for structural cases, but should use a more evolutionary "natural law" approach to human rights issues. Carter, *supra* note 285, at 118.

349. This doctrine may generate a "paradoxical" result. Although the Court should theoretically give less weight to precedent in structural cases, structural cases probably will rarely be reversed because they are infrequent, relatively uncontroversial, and difficult to assess in terms of their tyrannical impact. Furthermore, one hopes the basic constitutional structure and the institutions it has created will prevent any crisis that would justify the sort of judicial counterattack I envision.

350. If, for instance, *Roe v. Wade*, 410 U.S. 113 (1973), were overruled, many women might wonder why some have a "fundamental right" to an abortion while others do not, as well as why they personally once had that right but now have lost it.

351. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

352. *Youngstown Sheet & Tube Co.*, 343 U.S. at 653-54 (Jackson, J., concurring).

353. 469 U.S. 528 (1985).

acknowledges."³⁵⁴

The Court has a history of altering its structural decisions. One should not be too disturbed, therefore, by the Supreme Court's vacillation over the Tenth Amendment. Justice Blackmun, who held the swing vote in *Garcia*, properly downgraded precedent, including his own earlier opinion in *National League of Cities v. Usery*,³⁵⁵ which advocated a balancing test. Blackmun's switch typifies the decision this Article recommends, yet Blackmun never really answered O'Connor's claim that the states were in fact becoming political cripples. His reasoning was too legalistic, too abstract. He concluded that the Court could not create coherent judicial standards to defend the states and that the states had sufficient protection through the Constitution's basic structure: "state sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."³⁵⁶ Such process arguments are powerful, but they should never remain immune from re-examination if the federal government were ever to engage in substantive abuse.³⁵⁷

Candid judicial assessments of the current allocation of judicial power serve collateral purposes. Political appraisals inevitably color judicial doctrine, consciously and unconsciously. The citizenry needs to know what judgments have been made so that we can make a more informed evaluation of an opinion's premises and of the fit between its premises and the judge's conclusions.³⁵⁸ For example, one might disagree with Justice O'Connor's conclusions in *Garcia* that the states have become politically feeble, that they have become so weak they need judicial assistance, and/or that they need judicial protection in the particular case. In any event, the debate should significantly address the relationship of law to actual political realities, not solely a set of abstractions.

354. *Id.* at 583-87 (O'Connor, J., dissenting).

355. 426 U.S. 833 (1976).

356. *Garcia*, 469 U.S. at 552.

357. Quoting Frankfurter, Blackmun left an opening for continued review if Congress began to abuse the states:

The process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court.

Id. at 556 (quoting *New York v. United States*, 326 U.S. 572, 583 (1946)).

358. Professor Monaghan also argues that the Court needs to preserve its "legitimacy," particularly with the "reasoning classes." The reasoning class may be more reassured if they know that the Court will maintain its commitment to separation of powers by making periodic assessments of the actual balances of power instead of being overly bound either by prior decisions or elaborate theories. Monaghan, *supra* note 328.

V. Conclusion

Analysis of the British constitution supports this Article's claim that the processes of elections, appointments, and removals significantly define a constitutional structure. That conclusion reinforces the Article's proposed presumption against commingling principal officials in criminal law matters.

The lessons of the British constitution extend far beyond the precise issues raised in *Young, Morrison, and Mistretta*. Broadly, examining another country's constitutional structure demonstrates the roles of tradition, history, and culture in constitutional law. A constitutional lawyer can better see how and why every constitution is organic; alterations in one part will influence other parts. For instance, if Congress has the unreviewable power to impeach the President for failure to prosecute, it has less need for a special prosecutor. Similarly, Britain probably should not adopt a Bill of Rights giving more power to the judiciary as long as only the Prime Minister and the Lord Chancellor make judicial appointments. Parliamentary review of appointments would remain inadequate if the Whips continue to control the majority and if backbenchers know that their primary route to power and glory is through loyalty to the government.

The history of the British constitution undercuts the apocalyptic formalists' warnings of disaster in every balancing test and commingling of powers.³⁵⁹ The casual British system has lasted for centuries without becoming tyrannical; the drift toward a fluid "Anglican" constitution need not be catastrophic. Powers can be radically redistributed and concentrated without inevitably producing authoritarianism. Certainly the American system continues to survive numerous judicial balancing tests, as well as a few formal requirements. The constitutional text will probably prevent complete concentration of powers. The three recent Supreme Court appointments decisions can be partially defended by the argument that as long as *Bowsher v. Synar*³⁶⁰ and *Buckley v. Valeo*³⁶¹ prevent Congress from placing its own people in positions of executive or judicial power, Congress can never gain the type of power that the British Prime Minister has obtained, much less that of a true tyrant. The *Bow-*

359. Neither tyranny nor anarchy will arise solely because five formalistic justices err in considering a governmental power "legislative" instead of "judicial." See Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Case*, 1983 DUKE L.J. 798, 798-801. Strauss distinguishes legislative vetoes over governmental issues from legislative vetoes over the rights of private individuals, finding the former constitutional. *Id.* at 819.

360. 478 U.S. 714 (1986).

361. 424 U.S. 1 (1976).

sher/Buckley restriction arguably provides sufficient protection against legislative tyranny. Third, flexibility and adaptability are essential constitutional traits, as the British constitution so powerfully proves.

This Article has never claimed to completely “defeat” such counter-arguments. Rather, it has conveyed the author’s increasing uneasiness about recent separation-of-powers decisions, a discomfort that was intensified by studying and teaching the British constitution while in England. The Article has simultaneously expressed wariness over Justice Scalia’s ambitious attempts to substitute an expansive formal theory of separation of powers.

Like the Supreme Court, this Article alternates between formal and fluid solutions. Legal formalism provides direction and clarity in this country’s diverse culture. This is an opportune point in constitutional history to create a presumption toward text with respect to appointments of principals with criminal law responsibilities. There remains anxiety, however, about making the Constitution too rigid; the Court must be willing to change its mind if its earlier decisions lead to dangerous concentrations of power. Most justices may not be as willing as Justice Blackmun was in *Garcia*³⁶² to change their positions explicitly, much less to ground the shift on changes in the balance of power. Yet the gradual alteration of doctrine in response to shifts in power and ever-changing needs best describes how the Court has decided cases over time, even if such fluidity does not describe the thinking of most justices, who are wedded to internal consistency. The wisdom of the institution may be far greater than the wisdom of any of the justices or their critics.

Constitutional law entails a great deal of mystery and guesswork. The Supreme Court’s increasingly casual approach to separation-of-powers cases may not prove to be seriously detrimental to freedom. It is impossible to prove the following two negatives: that American people would have been tyrannized³⁶³ or that they will be tyrannized without a

362. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

363. This Article has focused on tyranny because many academic pieces appear to offer complete solutions at a lower level of abstraction, whether it be textualism, originalism, political accountability, process, positivism, deference, consent, efficiency, or legitimacy. Those lower levels may be more practical devices for organizing and evaluating cases, but they should not be conceived as ultimate “ends.” They are only means to the Framers’ primary end of creating and maintaining a free country. By now, the reader may have noticed that this Article is not grounded on any intermediate theory, which partially explains the author’s fascination with the ad hoc, experiential British constitution. The appointments and removals issues present unique considerations; I feel free to apply a different blend of arguments and techniques to other situations, even within the separation-of-powers context. After all, one cannot be sure which technique is appropriate until one assesses the overall balance of power, an assessment that will change as the Court hands down new decisions and as the political climate

significant degree of separation of powers. But those two negatives are not worth testing.

evolves. Perhaps Holmes' "experience" is the closest I can come to offering a standard: "The life of the law has not been logic: it has been experience." O.W. HOLMES, *supra* note 22, at 1. Experience is located at a very high level of abstraction. It prevails over the doctrine of separation of powers; powers must be blended and co-coordinated as well as separated. Admittedly, the term "experience" is vague, perhaps even more so than "tyranny." Nevertheless, citing Holmes is never a bad way to end an article.

